

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

MARSHALLZEHR GROUP INC.

Applicant
(Respondent in Appeal)

and

LA PUE INTERNATIONAL 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 MOVING PARTY, KSV RESTRUCTURING INC.

February 3, 2025

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TO: SERVICE LIST

TABLE OF CONTENTS

	Page No.
PART I - OVERVIEW.....	1
PART II - SUMMARY OF FACTS.....	2
PART III - ISSUES.....	7
PART IV - LAW AND ARGUMENT	7
PART V - RELIEF REQUESTED.....	17

PART I - OVERVIEW

1. KSV Restructuring Inc., in its capacity as receiver (the “**Receiver**”) of the assets, undertakings, and property of La Pue International Inc. (the “**Debtor**”) acquired for or used in relation to a business carried on by the Debtor, brings this motion for directions in respect of the Debtor’s purported appeal of a sale approval and vesting order made by the Honourable Madam Justice Dietrich of the Ontario Superior Court of Justice (Commercial List) on January 7, 2025 (the “**AVO**”). The Debtor does not have an appeal as of right from the AVO purportedly under appeal, and leave to appeal has not been sought or granted. In any event, leave to appeal should be denied.

2. The AVO approves the sale transaction (the “**Transaction**”) contemplated by an asset purchase agreement dated April 4, 2024, as amended by the First Reinstatement and Amending Agreement dated July 12, 2024, the Second Reinstatement and Amending Agreement dated October 8, 2024 and the Third Reinstatement and Amending Agreement dated November 18, 2024 (collectively, the “**Sale Agreement**”), between the Receiver and Lakeshore Luxe Design & Build Group (“**Lakeshore**”), and vesting in 1000835091 Ontario Inc. (the “**Purchaser**”), as assignee of Lakeshore, the Debtor’s right, title and interest in and to the Purchased Assets (as defined in the Sale Agreement), including the lands and premises located at the real property municipally known as 5528 Ferry Street, Niagara Falls, Ontario (the “**Real Property**”).¹

3. The AVO was granted in the receivership proceedings commenced pursuant to s. 243 of the *Bankruptcy and Insolvency Act* (the “**BIA**”), such that the appeal provisions set out in s. 193 of the BIA govern the present appeal.

¹ Endorsement of Justice Dietrich dated January 6, 2025 at para 2 [the “**Endorsement**”].

4. The law relating to appeals of approval and vesting orders is clear. There is no appeal as of right from such an order pursuant to ss. 193(b) and (c)—on which the Debtor relies for its purported appeal—such that an intended appellant must seek leave pursuant to s. 193(e) of the BIA. Here, the Debtor has not sought leave to appeal. Even if the Debtor had sought leave to appeal, the Debtor does not meet the well-established test for granting leave to appeal, such that leave ought to be denied.

5. The Transaction represents the culmination of a lengthy sale process. The Receiver is unable to close the Transaction while the Debtor's ill-constituted appeal remains outstanding. The Receiver therefore seeks the Court's direction on an urgent basis, and asks that the Court find that (a) the Debtor requires leave to appeal to the AVO, and (b) if the appeal is amended to seek leave, leave should be denied, so that the Receiver may close the Transaction as scheduled.

PART II - SUMMARY OF FACTS

6. The Receiver was appointed on the application of the Debtor's senior secured creditor, MarshallZehr Group Inc. ("**MarshallZehr**"), for the principal purpose of marketing the Debtor's principal asset, the Real Property, for sale in a court supervised sale process.²

7. On December 20, 2023, the Court granted an Order approving a process for the marketing and sale of the Real Property (the "**Sale Process**"). The Sale Process resulted in two offers—one from Lakeshore and another one that was substantially inferior to Lakeshore's offer.³

8. The Receiver entered into an Asset Purchase Agreement with Lakeshore on April 4, 2024 (the "**Original Agreement**"), which was subsequently assigned to the Purchaser.⁴ The

² Endorsement at para 9.

³ Endorsement at para 11.

⁴ Endorsement at para 10.

transaction contemplated by the Original Agreement was the culmination of the Receiver's extensive marketing and negotiation efforts to sell the Real Property.

9. On June 21, 2024, Justice Penny granted an approval and vesting order in respect of the transaction contemplated by the Original Agreement. That transaction did not close because the Purchaser failed to pay to the Receiver the second deposit contemplated under the Original Agreement (the "**Second Deposit**") and the remaining amount of the purchase price. Consequently, the Receiver terminated the Original Agreement.⁵

10. On July 12, 2024, the Receiver and the Purchaser entered into a Reinstatement Agreement (the "**First Reinstatement**"), pursuant to which the Purchaser agreed to, *inter alia*, increase the purchase price by \$50,000 and provide two more deposits in addition to the Second Deposit.⁶ The Purchaser paid the Second Deposit but failed to pay the two additional deposits and, consequently, the Receiver terminated the First Reinstatement.⁷

11. On October 8, 2024, the Receiver and the Purchaser entered into a Second Reinstatement and Amending Agreement (the "**Second Reinstatement**"), pursuant to which the Purchaser agreed to pay a further deposit and assume—subject to the Purchaser obtaining a vendor and builder license from the Home Construction Regulatory Authority (the "**HCRA**")—the pre-construction sale agreements previously entered into by the Debtor with purchasers for 359 units at the Real Property (the "**Pre-Construction Agreements**").⁸ After the Purchaser failed to pay the further deposit, the Receiver terminated the Second Reinstatement and re-listed the Real Property and other assets for sale.⁹

⁵ Endorsement at para 11.

⁶ Endorsement at para 11.

⁷ Endorsement at para 11.

⁸ Endorsement at paras 12-13.

⁹ Endorsement at para 13.

12. In November 2024, the Purchaser advised the Receiver that it had access to another additional deposit, and MarshallZehr advised that it was prepared to finance the balance of the purchase price. At the Receiver's request, on November 18, 2024, the Purchaser delivered the entirety of the additional deposit to be held in trust by its counsel, and the Receiver entered into the Third Reinstatement and Amending Agreement (the "**Third Reinstatement**").¹⁰

13. As a result of the Receiver's negotiations with the Purchaser, the Transaction contemplated by the Sale Agreement was substantially similar to that approved by Justice Penny on June 21, 2024, with the following exceptions: (a) the purchase price was increased by \$50,000; (b) a deposit in the aggregate amount of 18% of the purchase price was paid by the Purchaser; and (c) the Purchaser would only assume the Pre-Construction Agreements if it obtained the HRCA license(s) within 90 days of closing the Transaction.¹¹

14. The Receiver's motion for the AVO was supported by MarshallZehr.¹² None of the purchasers under the Pre-Construction Agreements—who stood to have their deposits returned to them in the event that the Pre-Construction Agreements were not assumed by the Purchaser—opposed the Receiver's motion.¹³

15. During the course of the receivership proceedings, the Receiver also engaged with the Debtor regarding the Debtor's proposals to purchase the Real Property or redeem the MarshallZehr loan.¹⁴

16. On September 20, 2024, the principal of the Debtor, Pawel Fugiel, submitted an offer to the Receiver, in trust for a corporation to be incorporated, for the purchase of the Real Property

¹⁰ Endorsement at para 14.

¹¹ Endorsement at para 15.

¹² Endorsement at para 5.

¹³ Endorsement at para 17.

¹⁴ Endorsement at para 18.

(the “**First Fugiel Offer**”). The Receiver advised Mr. Fugiel and his counsel that it required evidence of Mr. Fugiel’s financial ability to close the transaction before any offer submitted by him would be considered. No evidence of financing was provided by Mr. Fugiel in support of the First Fugiel Offer.¹⁵

17. On November 2, 2024, Mr. Fugiel submitted another offer to the Receiver, in trust for a corporation to be incorporated (the “**Second Fugiel Offer**”).¹⁶

18. On November 3, 2024, Mr. Fugiel, through counsel, provided the Receiver with a copy of a conditional term sheet from an international lender as evidence that he had the financial ability to close the transaction contemplated by the Second Fugiel Offer.¹⁷

19. On November 15, 2024, Mr. Fugiel provided a different financing commitment letter from a different lender. This commitment letter was also highly conditional.¹⁸ Based on the Receiver’s review, it did not appear that the conditions could be met by Mr. Fugiel.¹⁹

20. By the time that Mr. Fugiel delivered an updated commitment letter on November 21, 2024 that purported to waive certain conditions, the Receiver had already entered into the Third Reinstatement with the Purchaser (as of November 18, 2024).²⁰

21. On January 6, 2025, Justice Dietrich exercised her discretion and granted the AVO. In approving the Transaction, Her Honour found:

¹⁵ Endorsement at para 18 and Fifth Report of KSV Restructuring Inc. dated January 20, 2025 at s. 6.0(3). [the “**Fifth Report**”].

¹⁶ Fifth Report at s. 6.0(4).

¹⁷ Fifth Report at s. 6.0(5).

¹⁸ Endorsement at para 19 and Fifth Report at s. 6.0(8).

¹⁹ Fifth Report at s. 6.0(8).

²⁰ Endorsement at para 20.

[...] what 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.²¹

[...] the receivership proceeding has been ongoing for over fourteen months, the Company is not coming with a cheque in hand to pay out all creditors. Rather, Mr. Fugiel has been attempting to participate as a bidder for the Real Property and is only raising the possibility of redemption (and requesting more time to put together the necessary funds) as an alternative option to delay sale approval.²²

[emphasis added in underline]

22. On January 16, 2025, the Debtor served a notice of appeal (the “**Notice of Appeal**”) seeking, among other things, an order setting aside the AVO. The Debtor has also brought another motion for an order authorizing it to redeem MarshallZehr’s mortgage.

23. The Notice of Appeal purports to commence an appeal as of right pursuant to ss. 193(b) and (c) of the BIA. It does not rely upon s. 193(e) of the BIA, pursuant to which a judge of the Court of Appeal may grant leave to appeal, nor does it include an application for leave to appeal pursuant to Rule 31(2) of the Bankruptcy and Insolvency Act General Rules (the “**BIA General Rules**”).²³

24. The Receiver cannot close the Transaction in the face the uncertainty created by the Debtor serving the Notice of Appeal. Any delay in closing the Transaction will prejudice the Debtor’s creditors and other stakeholders:

- (a) **Interest Accrual:** As at December 11, 2024, the Debtor owed MarshallZehr approximately \$20.9 million, and interest continues to accrue at a rate of \$14,181.37 per day. Prolonged delays in the closing process will increase the debt burden, eroding the eventual recovery for the Company’s creditors;

²¹ Endorsement at para 29.

²² Endorsement at para 35.

²³ *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368, [r. 31\(2\)](#) [“**BIA Rules**”].

- (b) **Impact on Homebuyers:** Prolonged delays risk further frustrating these homebuyers, eroding confidence in the Project, and increasing the likelihood of claims or disputes;
- (c) **Deterioration of the Real Property:** the Real Property, which is the primary asset of the receivership estate, remains in an incomplete state. Any further delays may result in physical deterioration of the site, which could reduce the value of the Real Property. To date, the Receiver has incurred costs in excess of \$500,000 in connection with maintenance of the Real Property; and
- (d) **Rising Costs and Professional Fees:** The ongoing receivership incurs significant professional costs, including legal and administrative fees, which are paid from the estate. Delaying the closing of the Transaction will further reduce the net recovery for stakeholders.²⁴

PART III - ISSUES

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

- (a) whether the AVO falls within the scope of s. 193(b) and/or s. 193(c) of the BIA, and is automatically stayed pursuant to s. 195 of the BIA;
- (b) whether leave to appeal is required, or should even be granted in the context of the underlying facts, pursuant to s. 193(e) of the BIA; and
- (c) whether the confidential appendices should be sealed.

PART IV - LAW AND ARGUMENT

A. The Debtor does not have an appeal as of right:

²⁴ Fifth Report at s. 7.2.

26. The Debtor has purported to commence this appeal as of right, citing ss. 193(b) and (c) of the BIA.

27. Section 193 of the BIA comprehensively provides as follows in respect of potential rights of appeal from orders made pursuant to the BIA:

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.²⁵

28. Subsections 193(a)-(d) of the BIA enumerate the circumstances in which an appeal from an order lies to an appellate court as of right. Each of these provisions is to be construed narrowly.²⁶ Where ss. 193(a)-(d) of the BIA are inapplicable, s. 193(e) requires an appellant to seek leave to appeal the impugned order.

AVO does not fall within s. 193(b) of BIA:

29. The jurisprudence under s. 193(b) of the BIA has consistently interpreted the section as meaning that a right of appeal will lie where “the decision in question will likely affect another case raising the same or similar issues in the same bankruptcy proceedings.”²⁷ Section 193(b) must concern “real disputes” likely to affect other cases raising the same or similar issues in the same

²⁵ BIA, [s. 193](#) [emphasis added].

²⁶ *Hillmount Capital Inc. v. Pizale*, [2021 ONCA 364](#) at para [28](#); *Enroute Imports Inc. (Re)*, [2016 ONCA 247](#) at para [5](#).

²⁷ *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, [2016 ONCA 225](#) at para [32](#).

bankruptcy or receivership proceedings.²⁸ The mere possibility of the impugned order affecting the same bankruptcy or receivership proceedings is insufficient.²⁹

30. Here, no basis capable of engaging subsection 193(b) of the BIA has been asserted nor could exist. The Debtor has not identified any other cases in the receivership proceedings that could be affected by the Order of Justice Dietrich. The AVO disposed of substantially all of the Property of the Debtor, including the Real Property. Consequently, there will not be any other case dealing with the disposition of the Debtor's property in this receivership.

AVO does not fall within s. 193(c) of BIA:

31. Subsection 193(c) of the BIA is similarly inapplicable. In *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, with respect to the application of s. 193(c), the Court of Appeal emphasized the need for an approach which is alive to and satisfies the needs of modern, "real-time" insolvency litigation.³⁰ Accordingly, the Court articulated three principles to be applied when employing such approach to the interpretation of s. 193(c): it 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.³¹

32. With respect to the first principle, the caselaw holds that s. 193(c) of the BIA does not apply to decisions or orders that are procedural in nature, including orders concerning the methods by which receivers or trustees realize an estate's assets.

²⁸ *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, [2016 ONCA 225](#) at para [32](#).

²⁹ *Buduchnist Credit Union Limited v. 2321197 Ontario Inc.*, [2019 ONCA 588](#) at para [13](#); *B&M Handelman Investments Limited v. Drotos*, [2018 ONCA 581](#) at paras [27-29](#).

³⁰ *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, [2016 ONCA 225](#) at para [53](#).

³¹ *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, [2016 ONCA 225](#) at para [53](#).

33. In *Continental Forwarding Limited v. Canadian Credit Men's Association Limited*,³² the Manitoba Court of Appeal held that although the sale of assets by a trustee in bankruptcy involved assets whose value exceeded the statutory threshold, an order concerning the method by which the trustee disposed of assets did not fall within s. 193(c) (then s. 150(c)).³³

34. In *Alternative Fuel Systems Inc. v. EDO (Canada) Limited*,³⁴ the Alberta Court of Appeal held that a bankruptcy judge's order—which directed the trustee to accept Bidder B's second, substantially higher tender rather than Bidder A's first tender (which had been higher than Bidder B's first tender)—was essentially a procedural direction of the trustee in the face of Bidder A's challenge to the method by which the equipment was sold, by-passing the tender process.³⁵

35. In *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, the Court of Appeal held that grounds of appeal involving, *inter alia*, the receiver's negotiation process, and treatment of persons affected by the sale agreement that was the subject of the impugned approval and vesting order were procedural in nature and do not fall within s. 193(c).³⁶

36. Accordingly, an approval and vesting order forms part of the methods a receiver employs to dispose of a debtor's assets and, as such, is a matter of procedure that does not fall within s. 193(c).³⁷

37. Here, the Debtor seeks to challenge the AVO on appeal by calling into question the methods employed by the Receiver to dispose of the assets of the Debtor, including the Receiver's dealings with the Purchaser and the Debtor, the Receiver's treatment of deposits, and

³² *Continental Forwarding Limited v. Canadian Credit Men's Association Limited* (1965), [\[1965\] M.J. No. 49](#) (MBCA).

³³ *Continental Forwarding Limited v. Canadian Credit Men's Association Limited* (1965), [\[1965\] M.J. No. 49](#) at para 18 (MBCA).

³⁴ *Alternative Fuel Systems Inc. v. EDO (Canada) Limited*, [1997 ABCA 273](#).

³⁵ *Alternative Fuel Systems Inc. v. EDO (Canada) Limited*, [1997 ABCA 273](#) at para 11.

³⁶ *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, [2016 ONCA 225](#) at para 58.

³⁷ *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, [2016 ONCA 225](#) at para 45.

the Receiver's assessment of financial ability to complete the sale transaction, all of which involve procedural matters that do not fall within s. 193(c) of the BIA.

38. The second principle emerging from the caselaw is that s. 193(c) is not engaged where the decision or order does not call into play the value of the debtor's property.³⁸

39. In *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, the Court of Appeal held that the approval and vesting order marked the final step in the Receiver's monetization of the Debtor's assets. The ground of appeal advanced by the appellant to the effect that the sale process should be postponed to let shareholders re-finance the company was found not to bring into play the value of the appellant's property, so s. 193(c) was held not to apply.³⁹

40. Similarly, in this case, where the Debtor seeks an order directing the receiver not to close the sale transaction with the Purchaser and permitting the Debtor to "exercise its right of redemption and payout the indebtedness owed to" MarshallZehr, the Debtor's grounds of appeal do not bring into play the value of the Debtor's property, so s. 193(c) does not apply.

41. Third, for s. 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.⁴⁰ The amount or value of the matter in controversy is the loss which the granting or refusal of that right would entail.⁴¹

42. The determination of whether "the property involved in the appeal exceeds ten thousand dollars" is a fact-specific one. The Debtor must demonstrate some basis in the evidentiary record considered by the motion judge that the property involved in the appeal would exceed in value \$10,000, in the sense that the granting of the Approval and Vesting Order resulted in a loss of

³⁸ *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, [2016 ONCA 225](#) at para [59](#).

³⁹ *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, [2016 ONCA 225](#) at para [60](#).

⁴⁰ *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, [2016 ONCA 225](#) at para [61](#).

⁴¹ *Trimor Mortgage Investment Corporation v. Fox*, [2015 ABCA 44](#) at para [8](#).

more than \$10,000 because the Receiver could have obtained a higher sales price for the Debtor's property. Bald assertion is not sufficient. Otherwise, a mere bald allegation of improvident sale in a notice of appeal could result in an automatic stay of a sale approval order under BIA s. 195 as the appellant pursues its appeal.⁴²

43. This evidentiary threshold is particularly important in real-time insolvency litigation in which delays in the proceeding can prejudice the amounts fetched by a receiver on the realization process.

44. In this case, the Receiver has serious concerns about the deleterious effect of a delay in the closing of the Transaction would have on the available recovery for stakeholders. 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. The Real Property, being the main asset of the Debtor, stands to physically deteriorate because it is incomplete. To date, the Receiver has already incurred maintenance costs of \$500,000 relating to the Real Property and any further deterioration will only increase those costs.

45. An order premised on the rejection of an argument that a sale should be postponed is not one that brings into play the value of the debtor's property.⁴³ More specifically, an approval and vesting order does not determine the entitlement of any party with an economic interest in the sale proceeds. No interested party has gained or lost as a result of the order.⁴⁴

46. Accordingly, the Receiver submits that the Debtor's appeal from the AVO does not engage ss. 193(b) or (c) of the BIA.

⁴² *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, [2016 ONCA 225](#) at para 64.

⁴³ *AFC Mortgage Administration Inc. v. Sunrise Acquisitions (Elmvale) Inc.*, [2024 ONCA 764](#) at para 21.

⁴⁴ *Athabasca Workforce Solutions Inc. v. Greenfire Oil & Gas Ltd.*, [2021 ABCA 66](#) at para 15.

B. Leave to appeal should not be granted:

47. Without an appeal as of right pursuant to any of subsections 193(a)-(d) of the BIA, the Debtor is required to seek leave to appeal pursuant to subsection 193(e).

48. The availability under s. 193(e) of a right to seek leave to appeal in circumstances falling outside those captured by automatic rights of appeal in ss. 193(a) to (d) signals the need for appeal courts to control bankruptcy proceedings in order to promote the efficient and expeditious resolution of the bankruptcy, one of the principal objectives of bankruptcy legislation.⁴⁵

49. The test for leave to appeal under BIA subsection 193(e) is well-established:

(a) Does the proposed appeal raise an issue of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole and therefore is one that an appellate court should consider and address?

(b) Is the proposed appeal *prima facie* meritorious and does it involve a point that is of significance to the proceeding? and

(c) Would the proposed appeal unduly hinder the progress of the bankruptcy/insolvency proceedings?⁴⁶

50. In addition, leave should only be granted if the judgment appears to be contrary to law, amounts to an abuse of judicial power or involves an obvious error, causing prejudice for which there is no remedy.⁴⁷

⁴⁵ *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, [2016 ONCA 225](#) at para [47](#).

⁴⁶ *KingSett Mortgage Corporation v. 30 Roe Investments Corp.*, [2022 ONCA 479](#) at para [26](#).

⁴⁷ *Athabasca Workforce Solutions Inc. v. Greenfire Oil & Gas Ltd.*, [2021 ABCA 66](#) at para [18](#).

51. The Debtor has not sought leave to appeal as part of its notice of appeal, as required by subsection 193(e) of the BIA and Rule 31(2) of the BIA General Rules. In any event, the Debtor does not meet the test for leave to appeal.

52. The proposed appeal does not raise an issue of general importance to insolvency practice or to the administration of justice as a whole. The appeal is rooted in the specifics of the dealings between the Receiver, the Debtor and the Purchaser. It is also grounded in the fact-specific, discretionary decision of Justice Dietrich to grant the relief sought by the Receiver in the face of opposition by the Debtor. The reasons of Justice Dietrich demonstrate a balancing of interests of all stakeholders. Having regard to the lack of other viable alternative proposals, the support of the Applicant lender, and the lack of prejudice to the condominium unit purchasers, there is no basis to suggest the appeal will have any broad significance to the practice or the administration of justice as a whole.

53. The notice of appeal does not disclose a *prima facie* meritorious appeal. There is no arguable error in the decision of Justice Dietrich to grant the AVO and reject the request to remarket the Property or, alternatively, permit the Debtor to redeem the mortgage of MarshallZehr. Her Honour specifically found:

[...] Mr. Fugiel has been attempting to participate as a bidder for the Real Property and is only raising the possibility of redemption (and requesting more time to put together the necessary funds) as an alternative option to delay sale approval.⁴⁸

54. The receivership order clothed the Receiver with the ability to make determinations with respect to the sale process and the Transaction so as to maximize recovery. Whether to approve that exercise of the Receiver's business judgment was within Justice Dietrich's discretion. Discretionary decisions of judges supervising insolvency proceedings are entitled to a high degree

⁴⁸ Endorsement at para 35.

of deference.⁴⁹ The Appellant is essentially seeking to usurp the Sale Process undertaken by the Receiver.

55. Finally, granting leave to the Debtor to pursue the proposed appeal would also risk unduly hindering the insolvency proceeding, which is by its nature time sensitive, as it might delay the pending sale transaction. Granting leave would trigger the automatic stay contained in s. 195 of the BIA, thereby preventing the receiver from exercising its power under the Receivership Order to sell the Real Property. No purpose would be served by such a delay.

56. Accordingly, leave to appeal should not be granted.

C. The confidential appendices should be sealed:

57. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order.⁵⁰ The test for a sealing order was established by the Supreme Court in *Sierra Club of Canada v. Canada (Minister of Finance)*,⁵¹ and subsequently recast in *Sherman Estate v Donovan*.⁵² The test requires the court to consider whether:

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonable alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.⁵³

⁴⁹ *AFC Mortgage Administration Inc. v. Sunrise Acquisitions (Elmvale) Inc.*, [2024 ONCA 764](#) at para [35](#); *Re Harmon International Industries Inc.*, [2020 SKCA 95](#) at paras [40-41](#).

⁵⁰ *Courts of Justice Act*, [R.S.O. 1990, c. C.43, s. 137\(2\)](#).

⁵¹ *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#).

⁵² *Sherman Estate v. Donovan*, [2021 SCC 25](#).

⁵³ *Sherman Estate v. Donovan*, [2021 SCC 25](#) at para [38](#).

58. All three elements are prerequisites for a sealing order to be granted.⁵⁴

59. At the second step of the test, courts must consider whether any alternative measures, short of a sealing order, can reasonably protect the interest at stake and, if not, how the court may limit the scope of the sealing order to only the specific information that is necessary to be sealed.⁵⁵

60. At the third step of the test, the impact on public interest in the open court system and public confidence in the administration of justice must be weighed against the commercial benefits of sealing the information.⁵⁶ Where the sealing order is restricted to a small number of technical documents that the public is unlikely to be interested in, the negative effects regarding the open court system will be reduced.⁵⁷

61. The Receiver seeks a sealing order in respect of Confidential Appendices “1” to “6” of its Fifth Report to Court dated January 20, 2025, which comprise the Original Agreement, the First Reinstatement, the Second Reinstatement, the Third Reinstatement (all of which collectively comprise the Sale Agreement), the Fugiel Offer and the Second Fugiel Offer.

62. The Confidential Appendices contain commercially sensitive information that, if revealed to the public, could have a material and negative impact on any future efforts to market and sell the Real Property in a manner that maximizes realization for stakeholders, if the Transaction does not close. In the context of insolvency proceedings, it is common to seal commercially sensitive materials in circumstances where the subject assets are expected to be marketed.

⁵⁴ *Sherman Estate v. Donovan*, [2021 SCC 25](#) at para [38](#).

⁵⁵ *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#) at para [62](#).

⁵⁶ *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#) at paras [74-76](#).

⁵⁷ *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#) at para [78](#).

63. The proposed sealing order is the least restrictive and prejudicial alternative to prevent the dissemination of commercially sensitive information. There is no reasonable alternative to the sealing order that would adequately protect the confidentiality of the information that is sought to be kept confidential. For that reason, the salutary effects of the sealing order outweigh any deleterious effects of the public not knowing the purchase price, and their respective opinion of value until further order of the Court.

C. RELIEF REQUESTED

64. The Receiver respectfully requests that this Court grant its motion and order that the Debtor requires leave to appeal from the AVO.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of January, 2025.

PURSUANT TO RULE 4.06.01(2.1), THE UNDERSIGNED certify that they are satisfied as to the authenticity of every authority cited in this factum.



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Inc.*

SCHEDULE "A"

LIST OF AUTHORITIES

1. *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, [2016 ONCA 225](#);
2. *AFC Mortgage Administration Inc. v. Sunrise Acquisitions (Elmvale) Inc.*, [2024 ONCA 764](#);
3. *Alternative Fuel Systems Inc. v. EDO (Canada) Limited*, [1997 ABCA 273](#);
4. *Athabasca Workforce Solutions Inc. v. Greenfire Oil & Gas Ltd.*, [2021 ABCA 66](#);
5. *Buduchnist Credit Union Limited v. 2321197 Ontario Inc.*, [2019 ONCA 588](#);
6. *B&M Handelman Investments Limited v. Drotos*, [2018 ONCA 581](#);
7. *Continental Forwarding Limited v. Canadian Credit Men's Association Limited (1965)*, [\[1965\] M.J. No. 49](#) (MBCA);
8. *Enroute Imports Inc. (Re)*, [2016 ONCA 247](#);
9. *First National Financial GP Corporation v. Golden Dragon HO 10 Inc.*, 2019 ONCA 873;
10. *Hillmount Capital Inc. v. Pizale*, [2021 ONCA 364](#);
11. *Trimor Mortgage Investment Corporation v. Fox*, [2015 ABCA 44](#);
12. *KingSett Mortgage Corporation v. 30 Roe Investments Corp.*, [2022 ONCA 479](#) aff'ing [2022 ONSC 2777](#);
13. *Re Harmon International Industries Inc.*, [2020 SKCA 95](#).

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.

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 134

Powers on appeal

(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. R.S.O. 1990, c. C.43, s. 134 (1).

Interim orders

(2) On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal. 1999, c. 12, Sched. B, s. 4 (3).

Power to quash

(3) On motion, a court to which an appeal is taken may, in a proper case, quash the appeal.

Determination of fact

(4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,
(a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;
(b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and
(c) direct a reference or the trial of an issue,
to enable the court to determine the appeal.

Scope of decisions

(5) The powers conferred by this section may be exercised even if the appeal is as to part only of an order or decision, and may be exercised in favour of a party even though the party did not appeal. R.S.O. 1990, c. C.43, s. 134 (3-5).

New trial

(6) A court to which an appeal is taken shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred. R.S.O. 1990, c. C.43, s. 134 (6); 1994, c. 12, s. 46 (1).

Same

(7) Where some substantial wrong or miscarriage of justice has occurred but it affects only part of an order or decision or some of the parties, a new trial may be ordered in respect of only that part or those parties. R.S.O. 1990, c. C.43, s. 134 (7); 1994, c. 12, s. 46 (2).

MARSHALLZEHR GROUP INC.
Applicant (Respondent in Appeal)

- and - **LA PUE INTERNATIONAL INC.**

Respondent (Appellant)

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

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF THE MOVING PARTY, KSV
RESTRUCTURING INC.**

(Motion for Advice and Directions)

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