English translation of the judgment of Beaupré, J.A.

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| Séquestre de Ariela Phase 1 | | | | | 2024 QCCA 1084 | |
| COURT OF APPEAL | | | | | | |
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| CANADA | | | | | | |
| PROVINCE OF QUEBEC | | | | | | |
| REGISTRY OF | | | QUEBEC | | | |
| No.: | 200-09-010748-249 | | | | | |
| (200-11-028626-235) | | | | | | |
|  | | | | | | |
| DATE: | August 23, 2024 | | | | | |
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| BEFORE | | THE HONOURABLE | | MICHEL BEAUPRÉ, J.A. | |
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| ***IN THE MATTER OF THE RECEIVERSHIP OF ARIELA PHASE 1 S.E.C. AND DÉVELOPPEMENT ARIELA S.E.C.:*** | | | | | | |
| RAYMOND CHABOT INC. | | | | | | |
| APPELLANT – Receiver / Trustee under the debtors’ proposal | | | | | | |
| and | | | | | | |
| ARIELA PHASE 1, S.E.C. | | | | | | |
| DÉVELOPPEMENT ARIELA S.E.C.  IMPLEADED PARTIES – Debtors  and | | | | | | |
| COMPUTERSHARE TRUST COMPANY OF CANADA | | | | | | |
| LAURENTIAN BANK OF CANADA | | | | | | |
| IMPLEADED PARTIES – Secured creditors | | | | | | |
| and | | | | | | |
| PROTECTION INCENDIE UNIK INC. | | | | | | |
| MB VENTILATION INC. | | | | | | |
| MAXI-PAYSAGE INC. | | | | | | |
| PORTES ET FENÊTRES ISOTHERMIC INC. | | | | | | |
| INTERVENORS – Objecting creditors | | | | | | |
| and | | | | | | |
| ARMOIRES ORLÉANS INC. | | | | | | |
| GRANIT PLUS INC. | | | | | | |
| LES CONSTRUCTIONS BÉ-CON INC. | | | | | | |
| PLANCHER BOIS FRANC GAGNÉ INC. | | | | | | |
| GESTION C.B.C. INC. | | | | | | |
| LES CONTRÔLES A.C. INC. | | | | | | |
| APPLICANTS FOR LEAVE TO INTERVENE | | | | | | |
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| JUDGMENT | | | | | | |
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1. This matter comes before the Court as a result of an appeal by the receiver from a judgment rendered on April 3, 2024, by the Superior Court (the Honourable Justice Jacques G. Bouchard), which refused to approve the amended proposal and the reorganization plan submitted to the Superior Court by the receiver.[[1]](#footnote-1)
2. The receiving order issued in first instance is being overseen by Justice Émond.
3. It is not disputed that the applicants, secured creditors who hold a legal construction hypothec on an immovable belonging to the debtor Ariela Phase 1 S.E.C., are not covered by the proposal process, given their refusal to approve the proposal.[[2]](#footnote-2)
4. That said, on December 14, 2023, the receiver disallowed the proof of claim of each of the applicants in their capacity as secured creditors, and on or about December 21, 2023, each of the applicants filed an application in first instance to appeal the notices of disallowance (the “Appeal Applications”). Those proceedings, however, were stayed due to the filing of the proposal.
5. This, broadly summarized, is the context in which each of the applicants filed its own application seeking leave to intervene voluntarily and for aggressive purposes in the present file (all of the applications being identical in content),[[3]](#footnote-3) with the sole aim, as they indicated, of making it possible for them to subsequently apply, in first instance, to have the stay of proceedings lifted so they can bring their Appeal Applications before the supervising judge.
6. The applications before me are based primarily on s. 195 *BIA*:

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| **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.  [Underlining added] | **195** Sauf dans la mesure où le jugement dont il est interjeté appel est sujet à exécution provisoire malgré l’appel, toutes les procédures exercées en vertu d’une ordonnance ou d’un jugement dont il est appelé sont suspendues jusqu’à ce qu’il soit disposé de l’appel; mais la Cour d’appel, ou un juge de ce tribunal, peut modifier ou annuler la suspension ou l’ordonnance d’exécution provisoire s’il apparaît que l’appel n’est pas poursuivi avec diligence, ou pour toute autre raison qui peut être jugée convenable.  [Soulignements ajoutés] |

1. The receiver is not contesting the applications. In an email sent to the Court on August 19, 2024, the receiver confirmed that if the applications are granted:

[translation]

[...], the Receiver will ask that the continuation of the applications to appeal the notices of disallowance (the “**Appeal Applications**”) filed by [the applicants] in the Quebec Superior Court (Commercial Division) be the subject of a case management conference before the Honourable Justice Émond, in his capacity as supervising judge in the present case, during which the advisability of proceeding on the Appeal Applications and, if applicable, the manner of so proceeding, shall be discussed with the supervising judge.

[Boldface in the original]

1. Notwithstanding that the applications for voluntary aggressive interventions in the Court file are not contested, I am of the view that they are not appropriate – indeed that they are unnecessary – and should be dismissed.
2. First, in light of the applicants’ theory of the case – that is, that the present appeal does not concern them given their status – there is cause to strongly doubt their interest in intervening voluntarily and for aggressive purposes in the appeal.[[4]](#footnote-4)
3. That said, even assuming that they have an indisputable interest, I am of the opinion that the Court, or one of its judges sitting alone, is not the appropriate forum for the applicants’ ultimate purpose, which they should seek before the Superior Court.
4. Insofar as the Appeal Applications are not made “under” the judgment “appealed from”, within the meaning of s. 195 *BIA*, certain principles set out by Houlden, Morawetz and Sarra in their leading text *Bankruptcy and Insolvency Law in Canada*, applied with the necessary adaptations, convince me that the applicants’ detour through the Court is not useful or, indeed, necessary:

§5:279 If a debtor is appealing a receiving order made against him or her by the bankruptcy judge, an application by a secured creditor to proceed with a civil action is made to the bankruptcy judge, not to a judge of the Court of Appeal: *Re Pesant* (1961), 4 C.B.R. (N.S.) 14, 1961 CarswellQue 46 (Que. S.C.). The power to make an order granting leave to proceed is not stayed by the filing of an appeal: *Re Pesant* (1961), 4 C.B.R. (N.S.) 14, 1961 CarswellQue 46 (Que. S.C.).

[…]

§8:96 It is only proceedings under the order or judgment appealed from that are affected by a stay. Thus, for example, in an appeal from a bankruptcy order, an application by a secured creditor to continue an action to enforce its claim is not a proceeding under the judgment or order appealed from, and therefore leave will be obtained from the bankruptcy judge, not from a judge of the court of appeal: *Re Pesant* (1961) 4 C.B.R. (N.S.) 14 (Que. S.C.).[[5]](#footnote-5)

[Underlining added]

1. The applicants’ Appeal Applications were stayed as a result of the filing of the proposal and s. 69.1 *BIA*, and the power to lift the stay is provided for in s. 69.4 *BIA*:

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| **69.4**. A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied  (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or  (b) that it is equitable on other grounds to make such a declaration.  [Underlining added] | **69.4** Tout créancier touché par l’application des articles 69 à 69.31 ou toute personne touchée par celle de l’article 69.31 peut demander au tribunal de déclarer que ces articles ne lui sont plus applicables. Le tribunal peut, avec les réserves qu’il estime indiquées, donner suite à la demande s’il est convaincu que la continuation d’application des articles en question lui causera vraisemblablement un préjudice sérieux ou encore qu’il serait, pour d’autres motifs, équitable de rendre pareille décision.  [Soulignements ajoutés] |

1. That said, in accordance with ss. 2 and 183(1.1) *BIA* and pursuant to the aforementioned comments of authors Houlden, Morawetz and Sarra and the ruling in *Re Pesant* to which they refer, the court of competent jurisdiction is the Quebec Superior Court, and I see no need for the applicants to pass through this Court, by means of a voluntary aggressive intervention, in order seize the Quebec Superior Court of an application to lift the stay of proceedings in respect of their Appeal Applications.

**FOR THESE REASONS, THE UNDERSIGNED:**

1. **DISMISSES** the applications for a voluntary aggressive intervention, without legal costs.

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|  | | MICHEL BEAUPRÉ, J.A. |
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| Mtre Guy P. Martel | | |
| STIKEMAN, ELLIOTT | | |
| For the appellant | | |
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| Mtre Frédérique Drainville | | |
| McCARTHY, TÉTRAULT | | |
| For the impleaded party Laurentian Bank of Canada | | |
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| Mtre J. Patrick Bédard | | |
| BÉDARD POULIN, AVOCATS | | |
| For the intervenors MB Ventilation inc. and Maxi-Paysage inc. | | |
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| Mtre Anne-Marie Lessard | | |
| BERNIER BEAUDRY AVOCATS | | |
| For the intervenor Portes et Fenêtres Isothermic inc. | | |
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| Mtre François Bélanger | | |
| Mtre Marianne Duboy | | |
| LAVERY, DE BILLY | | |
| For the intervenor Protection Incendie Unik inc. | | |
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| Mtre J. Patrick Bédard | | |
| Mtre Rafaël Villemure Beaudoin | | |
| BÉDARD POULIN, AVOCATS | | |
| For the applicant for leave to intervene Armoires Orléans inc. | | |
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| Mtre Yannick Richard | | |
| CAIN, LAMARRE | | |
| For the applicant for leave to intervene Granit Plus inc. | | |
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| Mtre Justin Paré | | |
| BOUCHARD + AVOCATS | | |
| For the applicants for leave to intervene Les Constructions Bé-Con inc., Plancher Bois Franc Gagné inc. and Gestion C.B.C. inc. | | |
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| Mtre Andreas Dhaene | | |
| DENTONS CANADA | | |
| For the applicant for leave to intervene Les Contrôles A.C. inc. | | |
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| Date of hearing: | August 22, 2024 | |

1. ## Séquestre d’Ariela Phase 1, 2024 QCCS 1596.

   [↑](#footnote-ref-1)
2. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“*BIA*”), s. 62(2). [↑](#footnote-ref-2)
3. Arts. 185 and 377 of the *Code of Civil Procedure*. [↑](#footnote-ref-3)
4. The submissions made at the hearing – to the effect that if I were to grant the applications, the applicants would ask me to exempt them from the requirement to file a memorandum (because, as we are to understand, such memorandum would serve no purpose) – clearly illustrate this. [↑](#footnote-ref-4)
5. Lloyd W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., vol. 3, Toronto, Thomson Reuters, 2009 (loose-leaf, updated July 2024). [↑](#footnote-ref-5)