

Court of Appeal Court File No.: COA-23-CV-1357

OSJ Court File No. CV-23-00004031-0000

**ONTARIO
COURT OF APPEAL**

B E T W E E N:

PEAKHILL CAPITAL INC.

Applicant
(Respondent on Appeal)

and

1000093910 ONTARIO 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

**RESPONDING FACTUM OF THE APPELLANT
TO THE MOTION OF THE PROPOSED INTERVENER,
2557904 ONTARIO INC.**

(Appeal returnable, April 2, 2024)

March 20, 2024

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TO: SERVICE LIST

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PART I: BRIEF OVERVIEW STATEMENT

1. The proposed purchaser, 2557904 Ontario Inc. (“**255**”), seeks to intervene in the instant appeal.
2. The Appellant, 1000093910 Ontario Inc. (“**Debtor**”), objects to the proposed intervention.

PART II: STATEMENT OF FACTS

3. The facts that are presently before this Court are set out in the contents of the Appellant’s Appeal Book and Compendium and the Respondent’s Responding Appeal Book and Compendium. The Appeal record is complete, and the Debtor’s Appeal has been perfected as of February 21, 2024. This Appeal was ordered expedited by the Order of Madam Justice Simmons dated January 24, 2024.

4. The proposed intervener has had notice of the Appeal since December 29, 2023.¹

5. The proposed intervenor has filed, before this Court, an affidavit, which introduces the following facts and allegations, none of which are set out in the Appeal materials:

- a. *“As of the date that the Debtor executed acceptance of the Original APS, the Debtor was fully aware that the Receiver would take possession and control of the Property and that the Debtor potentially lacked the capacity to close the transaction.”²*
- b. *“The Debtor’s financial difficulties, and the possibility that a receiver could be appointed, was never disclosed to me at any point by the Debtor during the course of our negotiations.”³*
- c. *“I never would have purchased the Property had I known of the Debtor’s financial difficulties.”⁴*
- d. A series of e-mails passing between the lawyers for the proposed intervener and the Receiver, disclosing the negotiations and bargaining intentions of those parties.

6. In response to paragraph 28 of the Affidavit Anthony Marcucci, the lawyers for 255 (Louis Raffaghello), were served by the Debtor with the Appeal Book and Compendium, Exhibit Book, and

¹ The Notice of Appeal was served on December 29, 2023, on the interested parties, including, Concorde Law, Mr. Louis Raffaghello, at louisr@concordelaw.ca, counsel to 255.

² Motion Record of the Proposed Intervener (“**Intervener Record**”): Tab 2, Affidavit of Anthony Marcucci (“**Marcucci Affidavit**”), at para 7.

³ Intervener Record: Tab 2, Marcucci Affidavit at para 10.

⁴ *Ibid.*

Factum on *February 15, 2024*. The return date of this appeal (April 2, 2024) was fixed by Madam Justice Simmons on March 1, 2024.

PART III: LAW AND ARGUMENT

7. The well-established factors to consider whether to grant leave to intervene include, among others: (i) the nature of the case; (ii) the issues that arise; (iii) the likelihood of the proposed intervenor making a useful contribution to resolution of the issues; and finally (iv) whether the intervenor's participation would be unfair to the immediate parties.⁵

8. When considering whether the proposed intervenor will make a useful contribution, the Court focuses on: (i) the proposed intervenor and its expertise or interest in the issues at stake, and (ii) the specific contribution the intervenor proposes to make.⁶

9. The granting of leave to intervene is discretionary. This discretion must be exercised with caution, and the intervention rule should be narrowly interpreted, otherwise, the proceedings run the risk of becoming unwieldy.⁷

10. It is emphasized that this is a private dispute between two parties. Intervention in private litigation may cause injustice to the original litigants.⁸ The proposed intervenor, 255, seeks intervention in a private dispute, and in that regard, the standard to be met by the proposed intervention is more stringent and onerous.⁹

11. Injustice may result from the timing of the proposed intervention, and may ensue in those cases in which the proposed intervenor seeks to augment the record established by the parties to the Appeal, rather than accept the record as established.¹⁰

12. The Debtor relies on the Supreme Court of Canada's Notice to the Profession, November 2021, as it relates to intervenors:

⁵ *Peel (Regional Municipality) v Great Atlantic & Pacific Co. of Canada Ltd. (C.A.)*, 1990 CanLII 6886 (ON CA); see also *General Manager*, 2024 ONSC 130 (CanLII) at para 8, "The court should consider the nature of the case, the issues involved, whether the intervening party will make a useful contribution to the resolution of the dispute and whether the intervention will cause any injustice or undue delay [...]"; see *Rule 13* of the Rules of Civil Procedure.

⁶ *Registrar, Home Construction Regulatory Authority v Yarco Developments Inc.*, 2023 ONSC 4346 (CanLII), at para 7.

⁷ *Chief Building Official v Haastown Holdings*, 2022 ONSC 1963 (CanLII), at para 17.

⁸ *Jones v Tsige*, 2011 CanLII 99894 (ON CA), at para 26.

⁹ *Foxgate Developments Inc. v Jane Doe*, 2021 ONCA 745 (CanLII) para 7: "I am also mindful that where an appeal involves a private dispute rather than public law, the proposed intervenor must meet a stringent standard [...]".

¹⁰ *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 29 (CanLII), at para 16: "I am cognizant of the court's common practice to require intervenors in an appeal to accept the existing record and not seek to supplement it [...]".

- a. *The Court expects all intervener submissions to be useful to the Court and different from those of the parties.*
- b. *The purpose of an intervention is **not to support a party but to advance the intervener's own view of a legal issue before the Court.** Despite the participation of interveners, the case remains a dispute between its parties. However, the fact that an intervener's submission aligns it generally with one party over another does not, without more, make the submission inappropriate.*
- c. ***Interveners should not take a position on the outcome of an appeal, whether in written or oral argument.***
- d. ***Interveners must not challenge findings of fact, introduce new issues, or try to expand the case.***
- e. *In considering applications to intervene, the Court will be mindful of the need not to unduly imbalance the arguments before it.*
- f. *The Court always retains a discretion to take any steps it sees fit to prevent an unfairness to the parties arising from an intervener's participation in an appeal.¹¹ [emphasis added]*

13. It is respectfully submitted that the proposed intervener seeks to introduce, at this Appeal, evidence that was neither before the Motion Judge, nor set out in the appeal and responding materials presently before this Court.

14. It is respectfully submitted that the introduction of these new facts is prejudicial to the integrity of the Appeal and constitutes new evidence in respect of which no motion has been brought. It is further submitted that it is impermissible for an intervener to introduce new issues or try to expand the case. The introduction of the untested evidence will unduly imbalance the arguments to be made before this Court.

15. It is noteworthy that the Receiver's First Report states, *inter alia*, the following:

As a result of the intervening receivership proceedings (which the Company was already on notice at the time of entering into the Original APS), the Original APS could not be closed on its terms because, among other things, the closing mechanics are different in a receivership than in an ordinary course real estate transaction. Accordingly, forthwith after the commencement of the receivership proceedings, the Receiver approached 255

¹¹ <https://www.scc-csc.ca/ar-lr/notices-avis/21-11-eng.aspx>.

seeking to amend the Original APS to, among other things: (i) add a mutual condition that the Original APS was conditional on the Receiver obtaining an Approval and Vesting Order vesting title in the Real Property to 255, and (ii) contemplate the closing mechanics required in a receivership sale. However, 255 was not prepared to agree to such amendments. Accordingly, the Receiver was unable to close the transaction contemplated by the Original APS.

[...]

In light of the foregoing, and as is discussed further below, the Receiver is seeking relief from the Court: (i) terminating the Original APS and any related agreements; and (ii) directing Ren/Tex to forthwith return the Original APS Deposit to 255.

16. The additional, and untested evidence, of the proposed intervener was not included in the Receiver's First Report. Putting it another way, the Receiver, as an Officer of the Court, has already delivered to the Court what it considered to be the material facts of the matter in its First Report.

17. This Court, in *Clublink*¹² and *Huang*,¹³ suggested that a proposed intervener should file, on its motion to intervene, a draft Factum it proposes to file on the appeal, assuming leave is granted, so as to permit this Court to assess both the uniqueness of its submissions, and issues of redundancy with respect to the submissions made by other parties. The intervener, in this case, has not done so, and appears to have conflated, in its Factum, the evidence it intends to rely on, should it be granted leave, with the reasons/grounds as to why leave should be granted.

18. It is incumbent on the intervener to disclose a clear summary of the arguments on the Appeal, and how those arguments are informed by its perspective on the issues, but, the overarching principle is that no fresh evidence can be introduced and no party is to suffer prejudice.

19. The Appellant is the Debtor. The Respondent is the Receiver. The Receiver is an Officer of the Court and is duty bound to take into consideration the interests of all stakeholders. The essence of this Appeal is the decision made by the Receiver to terminate a binding Agreement of Purchase and Sale but allow the same purchaser to repurchase the subject property under a Stalking Horse arrangement. The evidence which the intervener seeks to have this Court consider adds nothing to this controversy.

¹² [*Clublink Corporation ULC v Oakville \(Town\)*](#), 2019 ONCA 358 (CanLII) at para 4.

¹³ [*Huang v Fraser Hillary's Limited*](#), 2018 ONCA 277 (CanLII) at para 15.

PART IV: ORDER REQUESTED

20. The Debtor respectfully requests that the motion of the proposed intervener be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20th day of March, 2024.



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SCHEDULE “A”

STATUTES AND RULES

1. [Rule 13](#) of the *Rules of Civil Procedure*.

JURISPRUDENCE

1. [Chief Building Official v Haastown Holdings](#), 2022 ONSC 1963 (CanLII).
2. [Clublink Corporation ULC v Oakville \(Town\)](#), 2019 ONCA 358 (CanLII).
3. [Foxgate Developments Inc. v Jane Doe](#), 2021 ONCA 745 (CanLII).
4. [General Manager](#), 2024 ONSC 130 (CanLII).
5. [Huang v Fraser Hillary’s Limited](#), 2018 ONCA 277 (CanLII).
6. [Jones v Tsige](#), 2011 CanLII 99894 (ON CA).
7. [Peel \(Regional Municipality\) v Great Atlantic & Pacific Co. of Canada Ltd. \(C.A.\)](#), 1990 CanLII 6886 (ON CA).
8. [Registrar, Home Construction Regulatory Authority v Yarco Developments Inc.](#), 2023 ONSC 4346 (CanLII).
9. [Reference re Greenhouse Gas Pollution Pricing Act](#), 2019 ONCA 29 (CanLII).

SCHEDULE “B” – N/A

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CERTIFICATE

THE APPELLANT, 1000093910 Ontario Inc., by its lawyers, certifies the following:

1. an Order pursuant to subrule 61.09(2) is not required;
2. the Appellant (Respondent on Motion) requires 25 minutes for their argument, not including reply;
3. the Factum of the Appellant (Respondent on Motion) complies with subrule 5.1;
4. the Factum of the Appellant (Respondent on Motion) contains 1,610 words between Part I – V, including footnotes; and
5. the Counsel signing the Certificate are satisfied of every authority listed in Schedule “A”.

March 20, 2024


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NEWMARKET

CERTIFICATE

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