

COURT OF APPEAL FOR ONTARIO

BUSINESS DEVELOPMENT BANK OF CANADA

Applicant

and

ASTORIA ORGANIC MATTERS LTD. and ASTORIA ORGANIC MATTERS
CANADA LP

Respondents

IN THE MATTER OF the Receivership of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP
AND IN THE MATTER OF an Application pursuant to Rules 14.05(2), 14.05(3)(d), 14.05(3)(g) and 14.05(3)(h) of the *Rules of Civil Procedure*

AFFIDAVIT OF CRISTINA GARISTO

I, Cristina Garisto, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a legal assistant with the law firm of Solmon Rothbart Goodman LLP, the lawyers for the applicant (appellant), SusGlobal Energy Belleville, Ltd., and, as such, have knowledge of the matters contained in this affidavit.
2. On Monday, December 10, 2018 we brought a motion in the Court of Appeal that was heard by the Honourable Mr. Justice Watt (the "Judge"). The Judge dismissed the motion ("Order").

3. On Friday, December 14, 2018, Melvyn Solmon, a Partner at Solmon Rothbart Goodman LLP, was instructed to bring a motion to set aside the Order. Annexed hereto and marked as **Exhibit "A"** to this my affidavit is a true copy of the email serving the Notice of Motion, along with the attachments.

4. The motion which was served on December 14, 2018 was for an order to set aside the Order of the Judge on December 10, 2018 that dismissed the appeal and held that the appeal was not governed by Section 6 of the *Courts of Justice Act* but rather was governed by Section 193 of the *Bankruptcy and Insolvency Act* ("*BIA*") and for an Order reinstating the appeal and ordering a timetable for perfecting the appeal.

5. I was instructed by Mr. Solmon to provide our process servers with the Notice of Motion and to instruct them to file the Notice of Motion the following Monday, December 17, 2018.

6. Friday, December 14, 2018 was also the date of our office Holiday Party.

7. When our process server attended at the Court of Appeal to file the Notice of Motion, the Court advised that the material was late and was required to have been filed on Friday, December 14, 2018 pursuant to Rule 61.16(6) of the *Rules of Civil Procedure*.

8. I am advised by Mr. Solmon and do verily believe that he was unaware of the rule change made in July of 2017 that required pursuant to Rule 61.16(6) of the *Rules of Civil Procedure* the motion to be filed as well as served within four days of the decision of the Judge.

9. Furthermore, we have yet to receive the written endorsement of the Judge from the December 10, 2018 attendance.

10. I am advised by Mr. Solmon and do verily believe that he advised opposing counsel when he discovered the Notice of Motion was rejected and requested their client's consent to an order to extend the time for filing the Notice of Motion. Annexed hereto and marked as **Exhibit "B"** to this my affidavit is a true copy of the email from Mr. Solmon to the lawyers for the respondent. I am advised by Mr. Solmon and verily believe that he has also called both Mr. Steven Graff and Ms. Miranda Spence. We have yet to receive a response.

11. I swear this affidavit in support of a motion to extend the time to file the Notice of Motion and for no improper purpose.

SWORN BEFORE ME at the City of
Toronto, in the Province of Ontario on
December 18, 2018



Commissioner for Taking Affidavits
(or as may be)

}



CRISTINA GARISTO

This is Exhibit "A" referred to in the Affidavit of Cristina Garisto
sworn December 18, 2018



Commissioner for Taking Affidavits (or as may be)

Cristina Garisto

From: Mel Solmon
Sent: December 14, 2018 4:49 PM
To: Miranda Spence
Cc: Steve Graff; Kyle Plunkett; Cristina Garisto; Rajiv Joshi; Mel Solmon
Subject: RE: Court of Appeal - SusGlobal Motions to set aside
Attachments: Notice of Motion to set aside C65512.pdf; Notice of Motion to set aside C66166 (002).pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Attached and served upon you are the notices of motion to set aside the orders of Justice Watt made December 10, 2018.

Melvyn L. Solmon
Solmon Rothbart Goodman LLP
375 University Avenue, Ste. 701
Toronto, Ontario M5G 2J5
Tel: (416) 947-1093
Fax: (416) 947-0079

This electronic message is directed in confidence to the person named above, and may not otherwise be distributed, copied or disclosed. The contents of this electronic message may also be subject to solicitor-client privilege and all rights to that privilege are expressly claimed and not waived. If you have received this electronic mail message in error, please notify me immediately by telephone at 416-947-1093, ext. 333 and destroy this electronic mail message, without making a copy. Thank you for your assistance. **WARNING:** From time to time, our spam scanners eliminate legitimate email from clients. If your email contains important instructions, please ensure that we acknowledge receipt of those instructions.

must not be disclosed to anyone.

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

BUSINESS DEVELOPMENT BANK OF CANADA

Applicant

and

ASTORIA ORGANIC MATTERS LTD. and ASTORIA ORGANIC MATTERS
CANADA LP

Respondents

AND BETWEEN:

SUSGLOBAL ENERGY BELLEVILLE LTD.

Applicant/Moving Party
(Appellant)

and

BDO CANADA LTD., Court Appointed Receiver of Astoria Organic
Matters Ltd. and Astoria Organic Matters Canada LP

Respondent
(Responding Party)

IN THE MATTER OF the Receivership of Astoria Organic Matters Ltd. and Astoria Organic
Matters Canada LP
AND IN THE MATTER OF an Application pursuant to Rules 14.05(2), 14.05(3)(d), 14.05(3)(g)
and 14.05(3)(h) of the *Rules of Civil Procedure*

NOTICE OF MOTION

The Appellant, SusGlobal Energy Belleville Ltd., will make a Motion to the Panel on a
date fixed by the Court at 10:00 a.m., or as soon after that time as the Motion can be heard at the
court house, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

PROPOSED METHOD OF HEARING: The Motion is to be heard

- in writing under subrule 37.12.1(1) because;
- in writing as an opposed motion under subrule 37.12.1(4);
- orally. The estimated length of time for the oral argument of the motion is 60 minutes.

THE MOTION IS FOR

- (a) An order setting aside the Order of the Honourable Mr. Justice Watt (“Judge”) dated December 10, 2018, that dismissed the appeal and held that the appeal was not governed by Section 6 of the *Courts of Justice Act* but rather was under Section 193 of the *Bankruptcy and Insolvency Act* (“BIA”);
- (b) Reinstating the appeal and ordering a timetable for perfecting the appeal;
- (c) For costs of this motion and the motion before the Judge; and
- (d) Such further and other Relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE

- (a) The Judge erred in law in failing to find that the authority to make an order requiring leave to sue a Court Appointed Receiver was under Section 101 of the *Courts of Justice Act*;

- (b) The Learned Judge erred in failing to find that, in that the authority to make an order requiring leave to sue a Court Appointed Receiver comes from the *Courts of Justice Act*, the right of appeal is found in the *Courts of Justice Act* and not the *BIA*;
- (c) The Learned Judge erred in law in failing to find that the requirement of leave to sue a Court Appointed Receiver is not found in Section 215 of the *BIA* as this section does not apply to a Court Appointed Receiver;
- (d) The Learned Judge erred in law in failing to find that the requirement of leave to sue a Court Appointed Officer directly effects a substantive right, being the right to sue a Court Appointed Officer;
- (e) The Learned Judge erred in law in failing to find that, as the authority granted under Section 101 of the *Courts of Justice Act* is separate from the authority under Section 215 of the *BIA* and in that Section 6 of the *Courts of Justice Act* does not conflict with Section 193 of the *BIA*, these provisions are not in conflict;
- (f) The Learned Judge erred in law in failing to apply the legal principles set out by the Supreme Court of Canada in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53;
- (g) The Learned Judge erred in law in failing to find that the grounds of the appeal from the Order of the Honourable Mr. Justice McEwen deal directly with the refusal to grant leave to sue, pursuant to paragraph 8 of the Receivership Order, and that the Honourable Mr. Justice McEwen treated the motion for leave to sue as a motion for summary judgment, making findings of credibility, contrary to the principles

set out in *GMAC Commercial Credit Corp. – Canada v. TCT Logistics Inc.*, 2006 SCC 35 in the Supreme Court of Canada;

- (h) Section 7(5) of the *Courts of Justice Act*; and,
- (i) Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- (a) The Motion Record, the Exhibit Books and the Report of the Receiver BDO;
- (b) The Reasons for Decision of the Honourable Mr. Justice McEwen; and,
- (c) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

December 14, 2018

SOLMON ROTHBART GOODMAN LLP
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Kyle Plunkett
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Fax: 416-863-1515
kplunkett@airdberlis.com

Lawyers for the respondent (responding party),
BDO Canada Limited

BUSINESS DEVELOPMENT BANK OF CANADA et al.
Applicants

-and- ASTORIA ORGANIC MATTERS LTD. et al.
Respondents
(Respondents in Appeal)

Court of Appeal File No. C65512
Court File No. CV-17-11760-00CL

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

SOLMON ROTHBART GOODMAN LLP

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Melvyn L. Solmon (LSUC# 16156J)

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Fax: 416-947-0079

Lawyers for the appellant,
SusGlobal Energy Belleville Ltd.

File Number: 17987

RCP-E 4C (May 1, 2016)

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

BUSINESS DEVELOPMENT BANK OF CANADA

Applicant

and

ASTORIA ORGANIC MATTERS LTD. and ASTORIA ORGANIC MATTERS
CANADA LP

Respondents

IN THE MATTER OF the Receivership of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP
AND IN THE MATTER OF an Application pursuant to Rules 14.05(2), 14.05(3)(d), 14.05(3)(g) and 14.05(3)(h) of the *Rules of Civil Procedure*

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- (c) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

December 14, 2018

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Lawyers for the respondent, BDO Canada Limited, in its capacity as Court appointed receiver of Astoria Organic Matters and Ltd. and Astoria Organic Matters Canada LP

BUSINESS DEVELOPMENT BANK OF CANADA
Applicant

-and- ASTORIA ORGANIC MATTERS LTD. et al.
Respondents

Court of Appeal File No. 66166
Court File No. CV-17-11760-00CL

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

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Lawyers for the appellant,
SusGlobal Energy Belleville Ltd.

File Number: 17987

RCP-E 4C (May 1, 2016)

This is Exhibit "B" referred to in the Affidavit of Cristina Garisto
sworn December 18, 2018

A handwritten signature in cursive script, appearing to read "Melvin Solomon".

Commissioner for Taking Affidavits (or as may be)

Cristina Garisto

From: Mel Solmon
Sent: December 17, 2018 4:34 PM
To: Miranda Spence (mspence@airdberlis.com)
Cc: Steve Graff; Kyle Plunkett; Mel Solmon
Subject: re the filing of the motions to set aside the orders of Watt, j

Filing had to be on Friday as well . The court of appeal advised they could not accept it and we would have to bring a motion to extend time to file by one day.

As a result we need an extension of time to file .

Will you consent to the extension of time to file the motions?

Melvyn L. Solmon

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BUSINESS DEVELOPMENT BANK OF CANADA
Applicant

-and- ASTORIA ORGANIC MATTERS LTD. et al.
Respondents

Court of Appeal File No. 66166
Court File No. CV-17-11760-00CL

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

**AFFIDAVIT OF CRISTINA GARISTO SWORN
DECEMBER 18, 2018**

SOLMON ROTHBART GOODMAN LLP

Barristers
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Lawyers for the appellant
SusGlobal Energy Belleville, Ltd.

File Number: 17987

RCP-E 4C (May 1, 2016)