CITATION: Business Development Bank of Canada v. Astoria Organic Matters Ltd., 2019 ONSC 6557
COURT FILE NO.: CV-11760-CL
DATE: 20191113

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BUSINESS DEVELOPMENT BANK OF CANADA, Applicant

AND:

ASTORIA ORGANIC MATTERS LTD. and ASTORIA ORGANIC MATTERS CANADA LP, Respondents

BEFORE: PENNY J.

COUNSEL: *Scott C. Hutchison and Peter S. Grbac* for SusGlobal Energy Belleville Ltd. and Gerald Hamaliuk, Moving Parties

Steven Graff and Miranda Spence for BDO Canada Limited, Receiver of Astoria, Responding Party

HEARD: November 4, 2019

ENDORSEMENT

Overview and Issues

[1] There are two motions before the court dealing with different aspects of the same basic issue.

[2] Gerald Hamaliuk, the chief executive officer of SusGlobal Energy, laid an information against BDO Canada Limited, the court-appointed receiver of Astoria, alleging that BDO committed the offence of storing, at a waste facility, more than 150 tonnes of biosolids in excess of the allowed amount, contrary to s. 186(3) of the *Environmental Protection Act.* On the basis of this information, a justice of the peace issued a summons to BDO to appear before the Belleville Provincial Court.

[3] BDO brought a motion to stay the private prosecution on the basis that:

(a) Mr. Hamaliuk did not obtain leave of the Superior Court of Justice (as required by the order of Mr. Justice Hainey dated April 13, 2017 (the Order)); and

(b) commencing the private prosecution was, in any event, an abuse of process.

[4] An interim stay was granted in August to enable the matter to be properly briefed and brought before this Court.

[5] Hamaliuk and his company, SusGlobal, have brought a cross motion seeking, among other things, an order granting leave if necessary and an order, *nunc pro tunc*, authorizing the private prosecution or, in the alternative, granting leave to lay a new information on substantially the same terms as the private prosecution.

[6] It was agreed between counsel that Hamaliuk would be the "applicant" and BDO the "respondent" for purposes of argument but that all issues raised by each side would be dealt with in the course of one hearing.

[7] The issues are:

(1) did the order of Hainey J. require Hamaliuk to obtain leave of the Superior Court of Justice to commence the private prosecution?

(2) if the answer to question #1 is Yes, should leave be granted and the private prosecution be authorized? and

(3) even if the answer to question #1 is No, should the private prosecution be stayed as an abuse of process?

[8] Hamaliuk argues leave is not required but, if it is, leave should be granted.

[9] BDO argues that leave is required and should not be granted. BDO argues, in any event, that the private prosecution should be stayed as an abuse of process.

Background

[10] BDO was appointed as receiver of Astoria under s. 243 of the *Bankruptcy and Insolvency Act* in April 2017 by order of Mr. Justice Hainey. Astoria owned and operated a biosolids waste treatment facility. Para 8 of the Order (which is in the form of the Commercial List Model Order) provides that no proceeding or enforcement process in any court or tribunal shall be commenced or continued against BDO except with the written consent of BDO or with leave of the Court.

[11] Para 10 of the Order, which stays all rights and remedies against BDO, does not exempt BDO from compliance with statutory or regulatory provisions relating to health, safety or the environment.

[12] Para 16 of the Order does not require BDO to occupy or take control of any property that may be environmentally contaminated, but nothing exempts BDO from any duty to report or make disclosure imposed by any applicable environmental legislation.

[13] Para 17 of the Order provides that BDO shall incur no liability as a result of its appointment or the carrying out of the order save and except for any "gross negligence or willful misconduct." Nothing in the Order derogates from the protections afforded BDO by s. 14.06 of the BIA. Section 14.06 of the BIA provides, notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred, if the condition arose after the trustee's appointment, unless it is established

that the condition arose or the damage occurred as a result of the trustee's gross negligence or willful misconduct.

[14] There is no dispute, in this case, that BDO occupied and took control of the biosolids waste treatment facility.

[15] In the course of the receivership proceedings, BDO sold the biosolids waste facility to SusGlobal. This transaction closed in September 2017.

[16] Several months after closing, SusGlobal sought leave to sue BDO for damages for gross negligence or wilful misconduct. SusGlobal alleged that BDO had, at the time of the sale, allowed the volume of raw organic waste stored at the facility to exceed the permitted amount prescribed by an Environmental Compliance Approval (ECA) issued by the Ontario Ministry of the Environment and Climate Change (MOECC), contrary to s. 186(3) of the *Environmental Protection Act* (EPA). SusGlobal sought damages of over $600,000 arising out of its direct and indirect costs of disposing of the excess raw organic waste.

[17] SusGlobal's motion was heard by Mr. Justice McEwen of the Ontario Superior Court of Justice over three days in February and March 2018. Justice McEwen's decision dismissing SusGlobal's motion for leave was released in May 2018. McEwen J. found, among other things, that:

(a) SusGlobal had failed to produce any credible or reliable evidence to support its claim of excess organic waste storage;

(b) the 150 tonne limit on raw organic waste only applied to storage, not the temporary presence of raw organic waste for purposes of blending with other categories of organic waste in ongoing waste treatment processes;

(c) MOE's officials were provided with information that the facility may have contained up to 1300 tonnes of raw organic waste. They took no steps to investigate, nor was any charge or sanction contemplated or levelled against BDO during the time it was operating the facility; and

(d) the asset sale to SusGlobal was on an "as is where is" basis. There were no representations or warranties. Even if SusGlobal's evidence were to be accepted, the amount of organic waste was in plain view. BDO made the facility available to SusGlobal, whose representatives toured the facility on numerous occasions. They also had full access to, and reviewed, the relevant data. There was no hidden or latent defect nor was there any evidence that BDO knowingly concealed information.

[18] After McEwen J. released his reasons, SusGlobal brought a motion to file new evidence. This motion was dismissed in November 2018.

[19] SusGlobal then sought leave to appeal to the Court of Appeal for Ontario. That motion was dismissed by a single judge, Watt J.A. Justice Watt found that no appeal lay without leave, and that no grounds for granting leave existed. SusGlobal appealed the decision of Watt J.A. to a

full panel of the Court of Appeal. That appeal was dismissed in April 2019 with detailed reasons given by Zarnett J.A.

[20] Over the course of these proceedings, BDO was awarded over $180,000 in costs payable by SusGlobal. BDO has also incurred enforcement costs to date of an additional $12,000. None of these costs have been paid.

[21] In July 2019, Hamaliuk swore an information before a justice of the peace in Belleville alleging that BDO had committed the offence of storing raw organic waste at the facility in excess of the permitted amount prescribed by the ECA issued by the MOECC, contrary to s. 186(3) of the EPA – in other words, Hamaliuk, the CEO of SusGlobal, made exactly the same allegation as SusGlobal made in the motion for leave to sue BDO that was dismissed by McEwen J., after a three day hearing and appeals to four judges of Court of Appeal for Ontario. The material put before the justice of the peace in support of issuing a summons was essentially taken from the evidence filed in the proceedings before the Superior Court of Justice. The decisions of McEwen J. and the Court of Appeal, however, were not disclosed to or otherwise brought to the attention of the justice of the peace.

[22] The justice of the peace issued a summons to BDO. Counsel for SusGlobal then advised BDO that the summons, returnable September 3, 2019 in Belleville, had been issued and that SusGlobal intended, in the course of its private prosecution, to seek to recover the full cost of its remediation of the facility (in other words, the very amounts SusGlobal sought to claim in its leave proceedings before McEwen J.).

[23] Section 190.1 of the EPA permits the court that convicts a person of an offence to make an order for restitution against the person convicted, requiring the person to pay another person for reasonable expenses actually incurred on account of damage to property that results from or is in any way connected to the commission of the offence.

Analysis

1. ***Is the initiating of a private prosecution under the EPA a "proceeding" within the meaning of para 8 of the Order?***

[24] Para 8 of the Order provides that no proceeding or enforcement process in any court or tribunal shall be commenced or continued against BDO except with written consent or with leave of the Court.

[25] Counsel for Hamaliuk and SusGlobal advances two arguments. First, he argues that a private prosecution under the EPA is not caught by the term "proceeding" in the Order. Although the courts have interpreted the term "proceeding" broadly to cover both judicial and extra-judicial proceedings, Mr. Hutchison argues that the interpretation is not so broad as to capture the prosecution of a criminal or quasi-criminal offence. He relies for this proposition on *Milner Greenhouses v. Saskatchewan*, 2004 SKQB 160, a decision of the Saskatchewan Queen's Bench, and *R. v. Fitzgibbon*, [1990] 1 SCR 1005.

[26] In *Milner*, one of the greenhouse employees was injured in the course of her employment. Milner Greenhouses was charged with offences under the Saskatchewan *Occupation Health and*

Safety Act. Prior to the Crown laying these charges, Milner sought the protection of a stay under s. 11 of the *Companies' Creditors Arrangement Act*. Para 3 of the initial order granting a stay provided that "no suit, action, enforcement process, extra-judicial proceeding or other proceeding shall be processed or with or commenced against" Milner. Ryan-Froslie J. held that the order did not bar the prosecution of charges laid under the health and safety regulations. He concluded that the prosecution of a quasi-criminal regulatory offence is not captured by the term "proceeding." His Honour held that the purpose of the CCAA is to facilitate compromises and arrangements between an insolvent company and its creditors. In this case, the Crown was not a creditor and did not seek payment of any debts or enforcement of any contractual right. Its relationship to Milner Greenhouses was not a commercial one. The Crown, representing the people of Saskatchewan, sought only to prosecute Milner for alleged wrongdoings relating to the safety and well-being of employees. If the Crown is not a creditor and its relationship to the debtor is not a commercial one, it is unlikely, he reasoned, that Parliament contemplated the Crown's exercise of prosecutorial discretion when enacting s. 11 of the CCAA. Ryan-Froslie J. referred, in reaching these conclusions, to the decision of the SCC in *R. v. Fitzgibbon.*

[27] *Fitzgibbon* concerned a lawyer who pleaded guilty to fraud and breach of trust. Part of his sentence involved a restitution order payable to the law society. At the time this order was imposed, the lawyer was an undischarged bankrupt. What is now s. 69(1) of the *Bankruptcy and Insolvency Act* provides that no remedy or action may be taken against a bankrupt without leave of the court in bankruptcy. The Supreme Court held that a compensation order made under the *Criminal Code* could be made without obtaining prior leave from the bankruptcy court.

[28] Cory J. expressed the aim of s. 69: to provide a means of maintaining control over the distribution of the assets and property of the bankrupt in order to provide for the orderly and fair distribution of the bankrupt's property among his or her creditors, to avoid a multiplicity of proceedings and to prevent any single creditor from obtaining an effective priority over others. Cory J. distinguished between the initial restitution order made by the criminal court, which affected the undischarged bankrupt only in a personal manner, and a subsequently filed order for enforcement purposes, which affected his property and could not be executed upon in light of the bankruptcy, except to the extent of a *pari passu* claim. Requiring leave of the bankruptcy court before making a compensation order in criminal sentencing would severely limit the role of the sentencing judge which is vital to the administration of criminal law. Central to the reasoning of Cory J. in this case was the importance of maintaining the distinction between civil and criminal procedure. The prior consent requirement under s. 69 of the BIA, he concluded, could not apply to penal or criminal proceedings involving the imposition of a fine or imprisonment. As a matter of principle, criminal courts should not be subjected to the control of civil courts.

[29] Mr. Hutchison, while conceding these cases are not directly on point (there are, apparently, no cases directly on point), argues that the considerations underpinning the conclusion in *Milner* and *Fitzgibbon* should apply to the circumstances of this case. He argues:

(1) Hamaliuk is not a creditor of Astoria and the relationship between Hamaliuk and Astoria is not commercial in nature;

(2) Hamaliuk does not seek the payment of any debts or the enforcement of any contractual rights but has brought a private prosecution against BDO for alleged wrongdoings to the environment; and

(3) Hamaliuk's decision to commence a private prosecution is compatible with the terms of the Order. This is because para 10 of the Order provides that BDO is not exempt from compliance with statutory or regulatory provisions relating to health, safety or the environment.

[30] In essence, SusGlobal and Hamaliuk argue that interpreting the word "proceeding" in para 8 of the Order to include a private prosecution under the EPA would be an unwarranted and improper interference with the prosecution of wrongdoers in the public interest. It would, they argue, frustrate the purposes and processes of penal offences and environmental protection.

[31] The applicants' second argument is that the Order does not immunize BDO from prosecutions properly brought to enforce applicable environmental laws. The stay provisions in the BIA are, like those in the CCAA, designed to ensure that the bankruptcy process is not made unworkable and that legitimate claims can be advanced. The leave mechanism should not be converted into a blanket immunity for court-appointed officers. The purpose of designating BDO as an officer of the court was not to shield it from liability but to impose upon it obligations for which it will be held accountable. BDO's duties involved acting in accordance with a certain standard of care in the running of the business. Such an approach is equally applicable, if not more so, to liability for breach of statutory obligations, *Standard Trust Co. (In Liquidation) v. Lindsay Holdings Ltd.* [1994] BCJ No 2638.

[32] I agree with counsel for BDO, Ms. Spence, that *Milner* and *Fitzgibbon* are distinguishable on two important grounds. First, both those cases dealt with claims sought to be made against the debtor/bankrupt, not a court appointed receiver. Para 8 of the Order, by contrast, deals specifically with claims against the receiver. Paragraph 17 of the Order establishes a specific threshold for such claims - "gross negligence or willful misconduct."

[33] Both the reason for and provenance of provisions like para 8 of the Order (the "leave to sue" provision) were comprehensively addressed in the reasons of Zarnett J.A. in the Court of Appeal's decision, referred to in para 19 above, *Business Development Bank of Canada v. Astoria Organic Matters Ltd*, 2019 ONCA 269. Zarnett J.A. concluded that a leave to sue provision is essential to a receivership; it is required to preserve the integrity of the court's role as supervisor of the receivership. He wrote, at para 46:

> Parliament enacted s. 243(1) in the context of the legal landscape set out above. It is unlikely that Parliament would have authorized the court to appoint a receiver and at the same time excluded the power to do so with provisions considered to be essential to the court's role in a receivership. Further, Parliament legislated that a receiver should be appointed when just or convenient, using language also found, for example, in the *CJA*. The terms essential to a receiver's appointment and to the court's role in a receivership inevitably inform the court's assessment of whether it may be just or convenient to appoint a receiver. It is therefore also unlikely that Parliament intended the court to appoint a receiver when just and convenient while

> depriving the court of the power to include an essential term in the appointment. A leave to sue provision is essential to a receivership; it is required to preserve the integrity of the court's role as supervisor of the receivership.

[34] The Court of Appeal also considered the breadth of what a receiver may be empowered by the court to do, such as the taking, management and eventual disposition of the debtor's property. A receiver directed by the court to take possession and control of property and to sell it, for example, may be subject to claims by those with whom the court has directed or authorized the receiver to deal. This is a central reason for the necessity of the leave to sue provision.

[35] The Court was also careful to point out, however, that finding that s. 243(1) of the BIA includes the power to authorize a leave to sue provision by necessary implication does not confer an open-ended power on the court. Though a leave to sue provision affects *when* third parties may sue the receiver, it does not eliminate the *right* to sue or involve making unilateral declarations about the rights of third parties affected by other statutory schemes, paras 54 and 55. See also *GMAC Commercial Credit Corp. Canada v. TCT Logistics Inc.* 2006 SCC 35 at paras 45 and 59.

[36] While the stay of claims against the *debtor* (in cases like *Milner* and *Fitzgibbon*) concern the maintenance of the status quo to enable the debtor to negotiate a compromise with its creditors or the orderly and fair distribution of the debtor's property among its creditors, the leave to sue provision is, in addition to these others reasons, concerned with *the preservation of the integrity of the court's role as supervisor of the receivership.*

[37] Second, in *Milner*, the court relied upon the fact that the Crown was not in a commercial relationship with the debtor but was merely seeking to prosecute the debtor for alleged violations of statutory obligations under the *Occupational Health and Safety Act.* I am unable to agree with SusGlobal's argument that, like the Crown in *Milner*, its CEO, Hamaliuk, was also not a creditor, did not seek payment of a debt and was merely acting out of a sense of public duty to right wrongs done to the environment.

[38] No reasonable assessment of what went on here could result in the conclusion that Hamaliuk was not acting in his capacity as CEO of SusGlobal or that, when he laid the information, was not seeking a means to recover SusGlobal's alleged costs of "remediation." First, SusGlobal's counsel, and therefore SusGlobal's authorized agent (not, I should point out, counsel on the proceedings before McEwen J. or counsel before me on these motions) specifically advised BDO, when bringing the summons to BDO's attention, that SusGlobal's intent, in bringing the private prosecution, was "to recover the full cost of remediation at the site, totaling approximately $600,000." Second, s. 190.1 of the EPA permits the provincial court, following a successful prosecution, to order that compensation for the cost of remediation be paid by the convicted person to any person who reasonably incurred expenses in the remediation of problems connected to the offence. So, not only was the intent of Hamaliuk and SusGlobal in bringing the private prosecution unequivocally stated, but the legislation provides the specific means for the realization of that intent.

[39] I am also unable to agree with SusGlobal's second argument; that to interpret the leave to sue requirement as applying to Hamaliuk's private prosecution would "immunize" BDO from enforcement of its statutory obligations. The leave to sue requirement does not immunize BDO

from anything. The leave requirement is just that, a requirement for leave. SusGlobal's argument that the test applied by the justice of the peace – reasonable and probable grounds to believe an offence had been committed – is sufficient protection for BDO's concerns, misses the point. If the Superior Court of Justice has imposed a leave to sue requirement, then the Superior Court of Justice must grant that leave.

[40] This approach necessarily follows from the analysis of Zarnett J.A. in *Business Development Bank of Canada v. Astoria, supra.* The Superior Court of Justice appointed BDO as receiver of the property and undertaking of Astoria. The Superior Court of Justice has the jurisdiction and responsibility to supervise the conduct of that receivership. The justice of the peace who received the information had no connection to or responsibility for the receivership whatsoever.

[41] As stated in *GMAC Commercial Credit Corp. – Canada v. TCT Logistics Inc., supra,* para 58, the gatekeeping purpose of the leave requirement is to prevent the trustee or receiver "from having to respond to actions which are frivolous or vexatious or from claims which do not disclose a cause of action" so that the bankruptcy process is not made unworkable. On the other hand, it ensures that legitimate claims can be advanced. Thus, interpreting the leave to sue provision as capturing Hamaliuk's private prosecution does not result in BDO being immunized from the enforcement of Ontario's environmental protection laws.

[42] For these reasons, I conclude that the institution of a private prosecution, by Hamaliuk laying an information against to BDO, is a "proceeding" within the meaning of the leave to sue requirement under para 8 of the Order. Leave was required; leave was not obtained.

2. *If leave is required, should leave be granted to commence or continue the private prosecution?*

[43] If leave was required, the applicants argue they should be granted leave, either *nunc pro tunc* or upon laying a new information before a justice of the peace. The applicants argue that the private prosecution is not frivolous or vexatious. They also argue, in this context as well, that it has already been determined by a justice of the peace that there were reasonable and probable grounds to believe that BDO committed an offence contrary to the EPA. Thus, the applicants argue, Hamaliuk has already established the factual basis necessary to support the bringing of this private prosecution. And, to the extent that there is any issue about whether the proceeding has sufficient merit or is in any way abusive, the court hearing the prosecution can address the full panoply of remedies and defences available to BDO.

[44] I am unable to agree. Leave should not be grant because Hamaliuk's private prosecution is an abuse of process.

[45] Judges of the Superior Court have an inherent and residual discretion to prevent abuse of the court's process. The doctrine of abuse of process engages the inherent power of the court to prevent misuse of its procedure in any way that would bring the administration of justice into disrepute. Canadian courts have routinely applied the doctrine of abuse of process to attempts to relitigate in circumstances where the strict requirements of issue estoppel or *res judicata* are not met but where allowing the litigation to proceed would nonetheless violate such principles as

judicial economy, consistency, finality and the integrity of the administration of justice, *Toronto (City) v. C.U.P.E., Local 79,* 2003 SCC 63.

[46] Violation of principles of judicial economy, consistency, finality and the integrity of the administration of justice is exactly what would happen if the applicants were granted leave to continue with or commence a new private prosecution.

[47] The threshold for leave in this context is not a high one. It is designed to protect the receiver against frivolous or vexatious actions or actions without basis in fact. The party seeking leave must only show a reasonable cause of action with some evidentiary, basis, or, in other words, the evidence must disclose a *prima facie* case, *GMAC Commercial Credit Corp. – Canada v. TCT Logistics Inc., supra,* at para 59.

[48] The applicants sought to meet that test in a comprehensive three day hearing before McEwen J. Following the dismissal of their motion for leave to sue, they submitted a further motion to admit new evidence. This motion was also dismissed. The applicants appealed. Their appeal was dismissed by Watt J.A., who found the applicants had failed to establish grounds upon which leave to appeal could be granted. The applicants appealed that decision to a full panel of the Court of Appeal for Ontario. The full panel dismissed the applicants' appeal. The factual matrix set out in the applicants' information laid before the justice of the peace was essentially the same factual matrix which McEwen J. found did not meet the test for leave to sue. Neither the decisions of McEwen J. nor the decisions of the Court of Appeal for Ontario were put before or brought to the attention of the justice of the peace. The applicants have introduced no evidence on these motions to address the test for leave. They rely only on the brief of documents put before the justice of the peace in support of Hamaliuk's sworn information, i.e., effectively the same evidence that was put before and rejected by McEwen J.

[49] This behaviour constitutes a clear case of abuse of process. It flies in the face of judicial economy. It effectively seeks the same relief in a different court and could lead to inconsistent results. It makes a mockery of the principle of finality. And, particularly in light of the failure to disclose the decisions of the Superior Court and the Court of Appeal to the justice of peace who received Hamaliuk's sworn information, it is a serious attack on the integrity of the administration of justice.

[50] In *Audziss v. Santa*, there were proceedings before the Superior Court to determine whether Audziss had standing to sue for a compliance audit of Santa's municipal campaign spending. Smith J. decided he did not and stayed Audziss' application for that relief. Audziss went before a justice of the peace and swore an information, making the same allegations as he had in the Superior Court application. The decision of Smith J. was not brought to the attention of the justice of the peace and a summons was issued. Pierce J. granted Santa's application to quash the summons. Justice Pierce's analysis is not expressly based on abuse of process but engages essentially the same considerations. Pierce J. held:

> Mr. Audziss elected to commence a proceeding in the Superior Court to challenge the applicant's election spending. The allegations made are the same as those in the private information laid. When the decision in the Superior Court is adverse, he cannot choose another forum to litigate the same issues in hope of a better result.

> It is telling that he did not reveal the fact of Mr. Justice Smith's decision to the justice of the peace. The *ex parte* proceeding was conducted in the absence of Mr. Santa. Even if the justice of the peace had jurisdiction to hear the matter, he would have been entitled to consider whether the decision of Mr. Justice Smith was binding on him. Mr. Audziss had a duty to bring the decision to the attention of the justice of the peace.
>
> Our law functions under the ancient principle of *stare decisis*: the notion that the superior courts' decisions are binding on the courts below. This is law's discipline. It provides certainty to litigants and citizens alike. It avoids the problems of inconsistent judgements. It allows the law to develop in an orderly way. It preserves respect for the authority of the courts. It allows the law to be known.
>
> The laying of an information by Mr. Audziss against the applicant was a collateral attack on the judgement of Smith J.....

2002 CarswellOnt 2027 at paras 29 to 31; aff'd 2003 CarswellOnt 19 (C.A.). The reasoning of Pierce J. in *Audziss* applies with equal force in the circumstances of this case.

[51] For example, Hamaliuk's documents filed in support of his sworn information include a statement of "Sentencing Considerations". In this statement, Hamaliuk refers to an "adverse effect" on SusGlobal being $500,000 (this is elsewhere referred to as $600,000) of remediation costs. He goes on blithely to state that BDO "failed to compensate SusGlobal for the loss or damage" without disclosing that, following a three day hearing, McEwen J. found that no *prima facie* case of BDO causing "loss or damage" had been proved.

[52] Mr. Hutchison points out that *Audziss* was brought by way of prerogative relief to quash the summons. He argues that this is the correct procedure and should have been followed here, rather than by motion on the Commercial List for a stay of the proceedings.

[53] Section 140 of the *Provincial Offences Act* provides that the Superior Court of Justice may by order grant "any relief" in respect of matters arising under the POA that the applicant "would be entitled to in an application for an order in the nature of mandamus, prohibition or certiorari." Notice of the application must be served on the person "whose act or omission gives rise to" the application, any person "who is a party to a proceeding" that gives rise to the application and the provincial Attorney General.

[54] Section 140 does not require an applicant, as I read that section, to apply *for* mandamus, prohibition or certiorari. It is sufficient that the applicant would be entitled to relief *in the nature of* mandamus, prohibition or certiorari. The act or omission giving rise to BDO's motion is not the act of the justice of the peace issuing the summons. The act or omission giving rise to this motion is the act of the CEO of SusGlobal laying an information based on the same allegations that had just been dismissed by the Superior Court and the Court of Appeal, choosing another forum in which to litigate the same issues, and then failing to disclose the fact that the Superior Court/Court of Appeal has already disposed of the substance of SusGlobal's allegations. The remedy sought by BDO, a stay, is *in the nature of* an order of prohibition. The Attorney General was served with BDO's motion and has not appeared.

[55] In these circumstances it would be pure formalism and contrary to the intent of Rule 1.04(1) of the Rules of Civil Procedure, to say now, having fully briefed the issue and argued it fully before this Court, that BDO must return to the drafting table and issue a new application in the nature of the prerogative writs, only to advance exactly the same argument as it is doing now.

3. Even if leave is not required, should the private prosecution be stayed in any event?

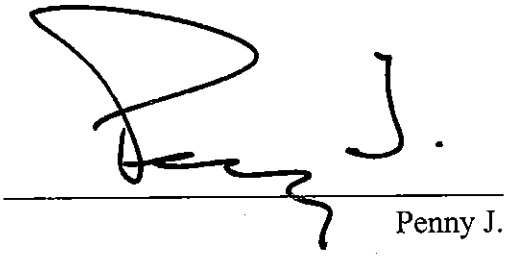
[56] In light of my disposition of the first and second issues, it is not necessary to deal separately with the third issue. Leave is required. Leave is, in any event, not granted because the private prosecution is an abuse of process. Even if leave was not required, the private prosecution would nevertheless have been stayed as an abuse of process.

Conclusion

[57] For the foregoing reasons, the motion of Hamaliuk and SusGlobal is dismissed. The motion of BDO is granted. The private prosecution is stayed.

Costs

[58] It was agreed among counsel and the Court at the conclusion of the hearing that costs would be dealt with following the release of these Reasons. I would normally require cost submissions to be made by way of brief written submissions supported by the cost summaries of both sides. If counsel wish to make submissions about the process, this might be best dealt with at a 9:30 AM chambers appointment. Otherwise, if counsel can agree on the format for the written submissions outlined above, I will accept their submissions in writing, not to exceed three typed, double-spaced pages and a bill of costs.



Penny J.

Date: November 13, 2019