

COURT OF APPEAL FOR ONTARIO

DATE: 20190107
DOCKET: M49872 (C65512)

Watt J.A. (In Chambers)

BETWEEN

Business Development Bank of Canada

Applicants

and

Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP

Respondents

Melvyn L. Solmon and Rajiv Joshi, for the moving party Susglobal Energy
Belleville Ltd.

Miranda Spence and Kyle Plunkett, for the responding party BDO Canada Ltd.
(the Receiver)

Heard: December 10, 2018

ENDORSEMENT

[1] On December 10, 2018, I dismissed a motion brought by Susglobal Energy Belleville Ltd. (“Susglobal”) for various alternative remedies in connection with a Fresh as Amended Notice of Appeal it served and filed from an order refusing it leave to commence a claim against Business Development Bank of Canada (“BDO Canada”) in its capacity as Court-appointed Receiver of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada L.P. (“Astoria”).

[2] At that time, I promised the parties that I would provide reasons for the conclusions I had reached. Those reasons follow.

The Background Facts

[3] A bit of background to begin.

The Business of Astoria

[4] Astoria operated an organic recycling facility and a waste transfer station. The company mixed and processed various organic wastes with leaf and yard waste to form clear compost for agricultural and landscape markets.

The Receivership

[5] On April 13, 2017 BDO Canada was appointed as the Receiver of Astoria. The formal order, consistent with the model template Receivership order established by the *Commercial List Users' Committee*, refers not only to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), but also to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c C.43 ("*CJA*").

[6] Following its appointment as Receiver, BDO Canada continued the business of Astoria in the ordinary course with Astoria staff.

The Asset Purchase Agreement

[7] On July 27, 2017, the Receiver entered into an Asset Purchase Agreement (“APA”) with, among others, Susglobal. Under the APA, Susglobal agreed to acquire some of Astoria’s assets. The deal closed on September 15, 2017.

The Letter

[8] About six weeks after the deal closed, on October 30, 2017, Susglobal wrote to the Receiver. Susglobal alleged that prior to closing, the Receiver was grossly negligent in its operation of Astoria. According to Susglobal, BDO Canada:

- i. allowed the volume of raw organic waste to exceed the allowances prescribed by the environmental compliance approvals maintained by the Ontario Ministry of Environment and Climate Change (“OECC”); and
- ii. withheld information from Susglobal relating to the results of an annual odour sampling program conducted in a building at the Astoria facility.

The Investigation

[9] BDO Canada investigated Susglobal’s allegations and found them to be without merit. The Receiver communicated these findings to Susglobal by letter two weeks later.

The Original Motion

[10] Susglobal sought leave from a judge of the Superior Court of Justice to permit it to commence a claim against BDO Canada in its capacity as Court-appointed Receiver of Astoria, for damages for gross negligence, or in the alternative, for wilful misconduct and breach of the APA and the order appointing the Receiver.

The Decision of the Motion Judge

[11] At the conclusion of a three-day hearing, the presiding judge (“the motion judge”) reserved his decision. In his reasons, the motion judge found:

- i. that Susglobal failed to produce any credible and reliable evidence to support its claim of excess organic waste in a building at the facility;
- ii. that, in any event, s. 3.03 of the APA, the “As is, Where is” clause, absolved the Receiver of any liability; and
- iii. that, even if Susglobal had been able to establish the excess organic waste it alleged was in a building at the Astoria facility, this would not constitute *prima facie* evidence of wilful misconduct or gross negligence on the part of the Receiver.

The reasons were released on May 17, 2018.

The Appeal

[12] On June 15, 2018, Susglobal initiated its appeal from the decision of the motion judge. It did so by filing a Notice of Appeal and a Certificate Respecting Evidence. Three days later, on June 18, 2018, Susglobal filed a Fresh as Amended Notice of Appeal. In neither notice did Susglobal seek leave to appeal.

The Motion to Re-Open

[13] About three weeks after initiating its appeal, Susglobal sought to re-open its original motion and file fresh evidence. The proposed fresh evidence included:

- i. an undated report that Susglobal said it had filed with the OECC on March 29, 2018; and
- ii. a confirmatory email from an OECC representative on June 25, 2018 acknowledging receipt of the Susglobal report.

The Decision on Re-opening

[14] On November 8, 2018, the motion judge dismissed the motion to re-open the original motion. Among other things, the motion judge concluded:

- i. that the underlying information advanced as fresh evidence was available to Susglobal prior to the hearing of the original motion, but not tendered there; and

- ii. that, even if received, the proposed fresh evidence would not have changed the result on the original motion.

This Motion

[15] On this motion, Susglobal seeks several alternative forms of relief:

- i. an order that the Fresh as Amended Notice of Appeal was properly served and filed under s. 6 *CJA*;
- ii. in the alternative, if the appeal is governed by s. 193(c) of the *BIA*, an order *nunc pro tunc* extending the time for serving and filing the notice of appeal from 10 to 29 days; and
- iii. in the further alternative, if the appeal is governed by s. 193(e) of the *BIA*, an order granting leave to appeal and an order *nunc pro tunc* extending the time for filing the Fresh as Amended Notice of Appeal from 10 days to 29 days.

Analysis

[16] To resolve the issues put in play by this motion, it is helpful to begin with the threshold issue of which statutory regime governs this appeal. The *BIA*? Or the *CJA*?

Issue #1: The Governing Statute

[17] As I will explain, I am satisfied that it is the *BIA* and not the *CJA* that governs this appeal.

[18] The judgment under appeal was rendered on a motion brought by Susglobal seeking leave to commence a claim against the Court-appointed Receiver of Astoria for damages for gross negligence, alternatively for wilful misconduct and breach of the APA and the order of the judge who appointed the Receiver. The root authority invoked to appoint the Receiver was s. 243(1) of the *BIA*.

[19] As part of its exclusive authority over bankruptcy and insolvency, Parliament has jurisdiction over procedural law in bankruptcy matters. As a result, Parliament has the authority to authorize, as well as to limit or prohibit, appeals as it deems appropriate: *Re Solloway Mills & Co.*, [1935] O.R. 37 (C.A.), at p. 43.

[20] Appeals from decisions or orders made in proceedings instituted under the *BIA*, it follows, are governed by the *BIA* and the *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368 ("*BIA Rules*"), not by the *CJA* or the Rules of Civil Procedure, R.R.O., 1990, Reg. 194: *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Co.*, 2012 ONCA 569, at para. 19. See also, *Dabbs v. Sunlife Assurance Co. of Canada* (1998), 41 O.R. (3d) 97 (C.A.), at para. 13.

[21] The reference in the formal order to s. 101 of the *CJA* does not have the effect of ousting the operation of the *BIA* as the source of appellate authority. The

order is in standard form and to hold that its reference to the *CJA* trumps the application of the *BIA* would be to turn the doctrine of federal paramountcy applicable in cases of incompatibility between provincial and federal legislation on a subject-matter of exclusive federal authority on its head. See, *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at paras. 14-19.

[22] In the result, I am satisfied that this appeal is governed by the provisions of the *BIA*, in particular, s. 193 of that Act and the *BIA* rules.

Issue #2: Appeals as of Right under the *BIA*

[23] Section 193 of the *BIA* authorizes appeals to this court from orders and decisions of judges in proceedings under the Act. The section is in these terms:

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.

[24] An appeal lies to this court as of right in the circumstances described in ss. 193(a) to (d). In all other circumstances, leave to appeal must be sought from a single judge under s. 193(e). Under r. 31(2) of the *BIA* rules, the notice of appeal in cases in which reliance is placed on s. 193(e) must include the application for leave: *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500 (Ch'rs), at paras. 38-39.

[25] As its primary source of appellate jurisdiction under the *BIA*, Susglobal invoked s. 193(c). Recent jurisprudence has rejected an expansive application of the automatic right of appeal contained in this provision and held it inapplicable to orders that:

- i. are procedural in nature;
- ii. do not bring into play the value of the debtor's property; or
- iii. do not result in a loss.

See, *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225 (Ch'rs), at paras. 49, 50, 53; *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611 (Ch'rs), at para. 22.

[26] Recall what Susglobal sought before the original motion judge: leave to sue the Court-appointed Receiver to recover damages for alleged gross negligence, wilful misconduct, breach of the APA and of the order appointing the Receiver. In

its essence, the order sought was procedural in nature – the right to sue, to pursue a remedy in damages.

[27] Further, the order under appeal did not contain any element of a final determination of the economic interests of the claimant. Nor is there any basis in the evidentiary record to support the assertion that the decision resulted in an economic loss. Susglobal did not seek to have the motion judge determine its actual alleged losses. What it sought was the right to pursue the Receiver for its alleged losses. What it lost was a chance to sue.

[28] Success on appeal will put no money in Susglobal's treasury. Its gain is one of chance – the right to sue to prove its case on liability and in damages. Thus its appeal falls outside the entry portal of s. 193(c) since it does not directly involve property exceeding \$10,000 in value.

Issue #3: Leave to Appeal under Section 193(e)

[29] In the further alternative, Susglobal invokes s. 193(e) of the *BIA* and seeks leave to appeal from the decision of the motion judge. I would not grant leave to appeal in the circumstances of this case.

[30] Leave to appeal under s. 193(e) is discretionary. Although the provision itself is unrevealing of the factors that may or must be considered in determining whether leave may be granted, prior decisions have identified as relevant factors:

- i. whether the appeal raises issues of general importance to the practice in bankruptcy or insolvency matters, or to the administration of justice as a whole, and thus is one that this court should consider and address;
- ii. whether the appeal is *prima facie* meritorious; and
- iii. whether the appeal would unduly hinder the progress of the bankruptcy or insolvency proceedings.

See, *Business Development Bank of Canada v. Pine Tree Resort Inc.*, 2013 ONCA 282 (Ch'rs), at para. 29.

[31] A review of the motion judge's reasons as a whole betrays Susglobal's claim that issues of general importance to the practice in bankruptcy or insolvency matters or to the administration of justice as a whole are involved and ripe for appellate decision in this case.

[32] The motion judge was well aware of and devoted his reasons to his assigned task. And that was to determine whether Susglobal could establish a *prima facie* case that the Receiver had engaged in gross negligence or wilful misconduct in the manner Susglobal alleged. After a careful, unerring and clear-eyed assessment of the evidence adduced on the motion, the judge, in richly detailed and well-documented reasons, concluded that Susglobal had failed to meet its burden. No more. No less.

[33] Susglobal's assertion that the motion judge's assessment of the "As is, Where is" clause in s. 303 of the APA represents a comment on such clauses generally, thus is a matter of general importance to the bankruptcy or insolvency Bar, falls on barren ground. Absolution under the clause was fact-specific. The alleged excess of which Susglobal complains was in plain view. The Receiver made the facility available to Susglobal staff who toured frequently. Susglobal had full access to and reviewed relevant data.

[34] Nor am I persuaded that Susglobal's appeal is meritorious.

[35] A proposed appeal is *prima facie* meritorious where the decision:

- i. is contrary to law;
- ii. amounts to an abuse of judicial power; or
- iii. involves an obvious error causing prejudice for which there is no remedy.

See, *Pine Tree*, at para. 31.

[36] In its original motion, Susglobal sought leave to sue the Court-appointed Receiver. Susglobal was required to adduce evidence, if it could, to establish a *prima facie* case that the Receiver demonstrated a marked departure from the standards by which responsible and competent people in equivalent circumstances would have acted or conducted themselves or was recklessly indifferent in its conduct.

[37] The motion judge concluded that Susglobal had failed to meet its burden. His conclusion, supported by several findings of fact grounded on uncontroverted evidence, are uncontaminated by errors of law or principle or any misapprehensions of substance. They are entitled to deference in this court.

[38] A final factor worthy of consideration is prejudice. By this I mean the prejudice suffered by the Receiver and the Debtors' estate in responding to Susglobal's claims rather than in pursuing an efficient and expeditious administration of the Debtors' estate, as is its task under the *BIA*.

Issue #4: The Extension of Time

[39] It follows from what I have said that Susglobal's notice of appeal was not filed within the time required by the *BIA* rules. Were this a case within s. 193(c) where no leave is required, or one meriting leave under s. 193(e), it would be necessary to determine whether an extension of time should be granted. In the absence of an automatic right of appeal under s. 193(c) and leave under s. 193(e), the motion for an extension of time also fails.

