Court of Appeal File No. C65512 and C66166
Court File No. CV-17-11760-00CL

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*

FACTUM OF THE MOVING PARTY, SUSGLOBAL ENERGY BELLEVILLE LTD. (APPELLANT ON APPEALS)

February 6, 2019

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FACTUM OF THE MOVING PARTY, SUSGLOBAL ENERGY BELLEVILLE LTD. (APPELLANT ON APPEALS)

PART I - IDENTITY OF THE MOVING PARTY (APPELLANT), PRIOR COURT & RESULT

1. The moving party, SusGlobal Energy Belleville Ltd. ("SusGlobal" or the "Purchaser"), brings this motion to the Panel pursuant to Section 7(5) of the *Courts of Justice Act* ("*CJA*") for an order to set aside and vary the two Orders of the Honourable Mr. Justice Watt dated December 10, 2018. The Honourable Mr. Justice Watt held that the appeals in issue were not governed by Section 6 of the *CJA* but rather by Section 193 of the *Bankruptcy and Insolvency Act* ("*BIA*").

2. As a result, His Honour held that the Purchaser had no automatic right of appeal under Section 6 of the *CJA.*

3. The moving party seeks an order that Section 6 of the *CJA* is the jurisdictional basis for the substantive right to appeal both of the Orders ("Orders") of the Honourable Mr. Justice McEwen ("Motion Judge") dated May 17, 2018 and November 8, 2018, under the Commercial Court. Therefore, the Purchaser has a right to appeal and that each of the Notices of Appeal were properly served within 30 days of the Orders and filed as required with the Court of Appeal.[1]

4. The Purchaser asks that the appeals be reinstated, that a reasonable schedule be ordered for perfection of the appeals, and that the appeals be heard one after the other by the same Panel, with one common set of materials (but with a separate exhibit book and a separate appeal book and compendium for the appeal of the order refusing leave to file fresh evidence and reopen the motion for leave to sue the receiver), facta, and that the costs throughout be reserved to the Panel hearing the appeals.

[1] The issues related to s 193 *BIA* are not before this Panel. The only basis that the Purchaser has to appeal these Orders is if the Purchaser has a right to appeal under the *CJA.*

PART II - OVERVIEW

5. This motion will decide the jurisdictional issue of the correct route of appeal from a provincial order (which appoints a receiver pursuant to the authority of Section 101 of the *CJA*) that restricts the substantive right to sue, of a purchaser of assets from a receiver, by requiring leave of the Commercial Court, to be obtained before any lawsuit can be brought.

6. The factual foundation for this motion is the following:

(a) the jurisdiction of the Superior Court (Commercial Court) to make an order that a purchaser needs leave of the Commercial Court before the purchaser can sue a receiver is found in Section 101 of the *CJA* and the inherent jurisdiction of the Commercial Court related thereto;

(b) the moving party submits that to make the determination of whether the right to appeal is under the *CJA* depends upon whether that part of the Receivership Order[2] that is the subject matter of the appeal, was granted in reliance upon the jurisdiction provided under the *CJA*. As the appeal is based on paragraph 8 of the Receivership Order, which requires leave of the Commercial Court to sue the Receiver[3], the appeal right is governed by Section 6 the *CJA*; and,

(c) as the jurisdiction of the Commercial Court to restrict the power to sue a receiver is not found in the *BIA*, the substantive right to appeal is therefore not found in the *BIA*.

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[2] This is the Receivership Order referred to as defined in paragraph [14] of the Factum.
[3] Defined in paragraph 12

7. The factual context demonstrates that there is also merit to the appeal, even though the merits of the appeal are not in issue before the Panel on these motions. It will be submitted on the appeals that the Motion Judge erred in law in making findings of credibility on a motion seeking leave to sue the Receiver. The Supreme Court of Canada ("SCC") has held that the proper test is whether or not the moving party has demonstrated a *prima facie* case.

8. The Motion Judge was not entitled to make findings of credibility favourable to Mr. Al Hamilton[4], the prior CEO who ran the business into insolvency before the Receivership Order and before the assets were purchased by SusGlobal, as Mr. Al Hamilton did not file any affidavit upon which the Court could make such a finding.[5]

9. Without those findings of credibility, the evidence demonstrated that there was a *prima facie* case for liability, either for gross negligence, wilful misconduct, or breach of the APA (as defined in paragraph 20) against the Receiver and that the Purchaser is entitled to have those issues dealt with as a result of its right to appeal under Section 6 of the *CJA*.

10. Furthermore, the motion for leave to file fresh evidence and reopen the motion for leave to sue the Receiver was based on the fresh evidence of the actual figures of biosolid waste and organic waste calculated as a result of the 2017 Annual Report[6] filed with the Ministry of the Environment and Climate Chance (the "MOECC")[7]. Those actual figures demonstrated that the amount of

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[4] See Decision, paragraphs 35, 37, 43, 44, 52, 56, 57, 59, 60 to 62 and 64

[5] Mr. Hamilton did not swear any affidavits. Mr. Al Hamilton provided information to the Receiver that the Receiver included in its reports. Mr. Hamilton changed the information he provided to the Receiver on three occasions and his credibility is in issue.

[6] Defined in paragraph 27-29

[7] Defined in paragraph 28

biosolid waste that built up and was stored in the Tipping Building[8], was far in excess of the limited amount permitted by the environmental legislation [s. 186(3) *EPA*] and licence for the Site.

11. Mr. Al Hamilton's credibility was further impugned on the motion for leave to admit fresh evidence and reopen the motion for leave to sue. This fresh evidence demonstrated that the credibility of Mr. Al Hamilton was seriously in doubt and that it would be a miscarriage of justice not to allow this fresh evidence to be admitted so that the Commercial Court could decide the issue based on the accurate weights, and the accurate percentage of biosolid waste by dry weight used in the Compost Mixture.[9]

PART III - SUMMARY OF FACTS

12. The Purchaser is provincially incorporated in Ontario and a wholly owned subsidiary of SusGlobal Energy Canada Corp. It carries on the business of operating an organic composting and recycling facility at 704 Phillipston Rd., Belleville, Ontario (the "Site"). SusGlobal purchased the assets of the business from the court appointed receiver, BDO Canada Limited ("BDO" or "Receiver" as referred to herein).

13. Part of the Site includes the Tipping Building (where waste was placed and mixed prior to being moved into consecutive windrows, to be processed into compost.)[10]

14. On April 13, 2018, BDO was appointed the Receiver by order of the Honourable Mr. Justice Hainey ("Receivership Order") of the assets, undertakings and properties of each of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP (collectively the "Debtors")

[8] Defined in paragraph 13 and 30
[9] Defined in paragraph 17
[10] SusGlobal's Motion Record ("MR") Vol.1, Tab 5, Affidavit of Marc M. Hazout Page 46, para 3

acquired for, or used in relation to the business carried on by the Debtors, including all proceeds thereof (collectively, the "Property").[11]

15. The preamble of the Receivership Order appointing the Receiver provides that the jurisdiction for making the Receivership Order was pursuant to Section 101 of the *CJA* and Section 243 of the *BIA*.[12] This double barrelled jurisdiction has a substantive effect on the jurisdiction of the Commercial Court to order certain paragraphs of the Receivership Order.

16. The Receivership Order gave the power to the Receiver to market and sell the Property. The Receiver was not required to occupy or take control of the Property, nor operate the business. However, the Receiver chose to do so, so that it could maximize the return on the assets. However, having chosen to do so, the Receivership Order provided that the Receiver would have to comply with the *Environmental Protection Act ("EPA")* and regulations, including the ECA[13] which would increase the risk of liability of the Receiver under the Receivership Order.[14]

17. The business operated by the Debtors before the Receivership Order was an organic composting and recycling facility. It produced Grade A Compost ("Compost A"). There were two categories of waste that were used in the process to make Compost A. The first was biosolid waste (which includes biosolids, paper sludge and manure) and the second was organic waste (which includes wood chips and leaf and yard waste). The biosolid waste and organic waste are mixed in the Tipping Building ("Compost Mixture") briefly and then moved through windrows, and put through a process (the Gore Cover System) that takes approximately eight weeks to process into Compost A.

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[11] Ibid, para 4
[12] MR Vol.1, Tab 9, Page 136; see Preamble of the Receivership Order
[13] Defined in paragraph 22
[14] Paragraph 10(ii) and 16 of the Receivership Order

18. As stated, as the Receiver chose to carry on the business, the Receiver was required to comply with the regulations under the *EPA* and in particular, the limitation of the amount of waste (150 Metric Tonnes) that could be stored in the Tipping Building.

19. SusGlobal's position on the motion for leave to sue the Receiver before the Motion Judge was that if the Tipping Building continually held an increasing amount of waste, far in excess of 150 metric tonnes ("MT") of waste (by wet weight), then the waste was **"stored"** in the Tipping Building. This waste built up and increased during the receivership period between April 13 and September 15, 2017 ("Receivership Period").

The Purchase

20. Between May 2017 and July 2017, SusGlobal discussed, carried out due diligence and negotiated an agreement to purchase the Property (the Asset Purchase Agreement) (the "APA"). The APA was closed on September 15, 2017. The Purchaser took possession and paid the Receiver the purchase price of $7,782,750.08 (both cash and the transfer of shares of a public company) for the Property.[15]

21. Based on the Receivership Order, the Purchaser was entitled to rely on the fact that the Receiver, a Court officer, would comply with the Receivership Order appointing the Receiver including all environmental laws under the ECA and *EPA*[16].

Excess Waste is Stored in the Tipping Building

[15] MR, Vol. 1, Tab 10, Page. 154-233, see Executed Asset Purchase Agreement
[16] Paragraph 10(ii) and 16 of the Receivership Order, s. 186(3) *EPA*

22. After taking possession of the Site, the Purchaser learned that there was far in excess of 150 MT of waste inside the Tipping Building. As a result, the Purchaser notified[17] the MOECC of the excess inventory in the Tipping Building. The MOECC required the Purchaser to implement a management plan[18] to process the excess inventory in the Tipping Building pursuant to the Amended Environmental Compliance Approval Number 0031-7UTRSS[19] ("ECA").

23. By October 30, 2017, the Purchaser had incurred significant expenses to process and remove the excess biosolid waste from the Tipping Building. The Purchaser sent a demand letter setting out the losses incurred as a result of the Receiver's conduct, claiming $655,400.00 on October 30, 2017[20]. After a demand was made by the Purchaser on October 30, 2017, Mr. Al Hamilton changed his "evidence" from the initial information he provided to the Pinchin representatives in mid July 2017 found in the Pinchin Report (dated October 2017). He also changed his calculations referred to in the initial Receiver's reports filed on the Motion For Leave To Sue the Receiver. The change in evidence is found at the references in this footnote[21].

24. The Receiver responded on November 13, 2017[22] denying responsibility and asserting that it had complied with the Receivership Order, the *EPA*, the ECA and the APA during the Receivership Period. The Receiver also relied on the "As is, Where is" clause in the APA. The

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[17] Compendium, Tab 8, Page 40-42
[18] Compendium, Tab 7, Page. 39, Email dated October 5, 2017 from Katy Potter (MOECC) to Gerald Hamaliuk
[19] Compendium, Tab 1, Page 3, Section titled "Waste Storage" *(a) 150 tonnes of waste inside the Tipping Building including, but not limited to, any Compost blended with pulp and paper biosolids or other waste.*
[20] Compendium, Tab 9. Page 43
[21] Compendium Tab 12, Page 48 Letter from Angelo Consoli to Gerald Hamaliuk; and Tab 14 Receivers Fourth Report dated December 8, 2017 Sections 2.3.4 Page 59, Section 2.3.6 Page 60, Section 3.1.6 Page 62; and Tab 16 Supplement to the Fourth Report dated January 19, 2018 Section 2.0.2 Page 74 and Tab 18 Page 79-82 - Al Hamilton's Appendix "I" to the Fourth Report of the Receiver and Fourth Supplement to the Receivers Fourth Report at Tab 19, Page 84 Section 1.3.1 and Tab 23, Page 119-120 Schedule C to the Factum of the Receiver on the Motion For Leave to Sue
[22] Compendium, Tab 12, Page 48

Receiver also mentioned[23] one of the "errors" of Mr. Al Hamilton related to the amount of waste observed in the Tipping Building in mid July 2017, recorded in the Pinchin Report[24] that was delivered to the MOECC.[25]

25. In December of 2017, the Purchaser brought a motion for leave to sue the Receiver ("Motion For Leave To Sue" or "Original Motion") for damages for gross negligence or wilful misconduct based on the breaches (as a Court officer) of the Receivership Order and for the Receiver's breaches of the *EPA*, ECA and APA.[26]

26. The Motion For Leave To Sue the Receiver was heard on February 21, 27 and March 5, 2018 before the Motion Judge. The decision was reserved and written reasons were released on May 17, 2018 ("Decision").[27] His Honour dismissed the Purchaser's motion.

27. On June 15, 2018, the Purchaser's counsel served a Notice of Appeal and served a Fresh as Amended Notice of Appeal on June 18, 2018.[28]

Motion for Fresh Evidence

28. After the Motion For Leave To Sue the Receiver was heard but not yet decided, on March 29, 2018, the Purchaser submitted the 2017 Annual Environmental Report ("2017 Annual Report") that is required by law to be filed with the MOECC.[29]

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[23] Compendium, Tab 11, Page 46-47; The Receivers email to the MOECC dated November 8, 2017, not copied to the Purchaser.
[24] Compendium, Tab 4, Pages 23-33 and in particular page 32 Table 3.3.3 – Pile Age and Volume Summary
[25] Compendium, Tab 6, Page 37, Email dated October 5, 2017 from Gerald Hamaliuk to Katy Potter
[26] MR Vol 1, Tab 7, Page 100 - Reasons for Decision, para 7; see also Tab 9 Page 114 Receivership Order section 8 as SusGlobal required leave to sue the Receiver.
[27] MR Vol 1, Tab 7, Page 99-115
[28] MR Vol 1, Tab 6, Page 89-98
[29] MR Vol 2, Tab 18, Page 272 para 1 Decision of the Motion Judge

29. On June 28, 2018, the MOECC confirmed the 2017 Annual Report, including all metrics and calculations, and that the business of the Purchaser complied with the ECA.

30. The 2017 Annual Report addressed all of the activities at the Site during the 2017 calendar year. In particular, "Appendix A and B" of the 2017 Annual Report included a detailed accounting of annual tonnage received and shipped daily, sorted by category of waste and totalled accordingly. This information was obtained from the weigh scale computer which weighs the truckloads as they enter the Site. Using the Annual Report, the MOECC annually monitors the dry weight calculations to ensure the percentage of biosolid waste by dry weight is less than 25%[30] of the Compost Mixture to meet the standards required to classify the product as Compost A that allows it to be sold.

31. Once the Purchaser had the actual annual figures of how much biosolid waste was processed in 2017, the Purchaser was able to demonstrate that continually the amount of biosolid waste in the Tipping Building had increased to at least 1,492 MT of biosolid waste (by wet weight)[31]. This amount far exceeded the licensed approved maximum limit of 150 MT by wet weight pursuant to the terms and conditions of the ECA and section 20.2 and 20.3 of the *EPA*[32]. This is the biosolid waste that the Purchaser had to clean up at great expense and loss of sales, after the Purchaser took possession of the Site.

[30] Compendium Tab 1A, Page 13
[31] The only place on Site that biosolid waste can be stored, is in the Tipping Building to a maximum of 150 MT before mixing to start the process Gore Cover System process. This calculation gives the Receiver the benefit of a calculation based on the maximum amounts of biosolid waste that could have been processed during the Receivership Period.
[32] Compendium Tab 1, Page 1

32. What also came to light was that Mr. Al Hamilton had done the 2016 Annual Environmental Report[33] and knew the percentage of water with regard to the various types of waste. He knew the correct calculation to determine the percentage by dry weight of the biosolid waste used in making Compost A during the Receivership Period. However he did not tell the Receiver nor did he provide that information to the Commercial Court (but he provided other "corrections" that were inconsistent with the actual weight figures) and, after the fresh evidence, with the actual percentages of water in various categories of waste.

33. Based on this new information, the Purchaser brought a motion for fresh evidence on July 13, 2018 which was scheduled and was heard on September 21, 2018 by the Motion Judge.

34. On November 8, 2018, the Motion Judge released written reasons, refused to grant leave to admit the fresh evidence and to reopen the Motion For Leave To Sue the Receiver, finding that there was no miscarriage of justice, as the Motion Judge believed Mr. Al Hamilton.[34]

35. On November 17, 2018, the Purchaser filed its Notice of Appeal from that order.

36. Both Orders of the Motion Judge, which prevented the Purchaser from suing the Receiver, were made as a result of paragraph 8 of the Receivership Order which required leave of the Commercial Court to sue the Receiver. Paragraph 8 provides:

> **No Proceedings Against The Receiver**
>
> 8. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

[33] This information was not disclosed by Mr. Al Hamilton in his "evidence", i.e. the information that he told the Receiver and which the Receiver put into its reports.
[34] MR Vol. 2, Tab 18, Page 274 – Decision paragraphs 7 and 8

The Motions before Mr. Justice Watt

37. The Notices of Appeal were served and filed, and the Receiver took issue with the Purchaser's position that it was entitled to the right to appeal under the *CJA*.

38. The parties agreed to bring the two motions that were heard by Justice Watt, to decide the issues.

39. The motions were for:

(a) an order that Section 6 of the *CJA* was the jurisdictional basis of these appeals and that the Purchaser had a right to appeal and did not need to comply with the *BIA*; or,

(b) in the alternative, that the Purchaser needed an extension of time of 19 days in order to serve an appeal under Section 193(c) of the *BIA*; or,

(c) in the further alternative, that the Purchaser needed an extension of time to seek leave to appeal and also needed an order granting leave to appeal pursuant to Section 193(e) of the *BIA*.

40. Mr. Justice Watt dismissed both motions and in substance, thereby dismissed all appeals.

41. With regard to the issue of jurisdiction and whether Section 6 of the *CJA* applied, written reasons were released on January 7, 2019.[35]

[35] MR, Vol. 1 , Tab 3, Page 13-25

42. As the motion to set aside and vary the orders of Mr. Justice Watt were filed one day late (but served on time), a motion was brought before the Honourable Madam Justice Fairburn to extend the time to file these Notices of Motion now before the Panel. That extension was granted by the Honourable Madam Justice Fairburn on January 24, 2019.[36]

43. It is submitted that the orders of the Honourable Mr. Justice Watt should be set aside and varied as the jurisdiction to make the Receivership Order requiring leave to sue the Receiver came from Section 101 of the *CJA* and the inherent jurisdiction of the Court related thereto. Therefore, the jurisdiction to appeal was based on that part of the Receivership Order (paragraph 8) and was from the *CJA.* Further, the right to sue is not a procedural right, it is a substantive right. As a result of those two errors, it is submitted that the orders of the Honourable Mr. Justice Watt should be set aside and varied to permit these appeals from the Orders to proceed.

PART IV - STATEMENT OF ISSUES, LAW & AUTHORITIES

ISSUE #1

(a) Whether the jurisdiction to make an order restricting the substantive right to sue a receiver, is based on provincial jurisdiction and not federal jurisdiction; and,

(b) Whether the legislative history of s. 243 *BIA* supports the analysis, that the jurisdiction to make an order restricting the substantive right to sue a receiver is based on provincial jurisdiction and not federal jurisdiction?

[36] Compendium Tab 124, Page 120-121

ISSUE #2

(c) Whether the right to appeal and procedures related thereto, are based on provincial jurisdiction, if the jurisdiction to make that part of the Receivership Order (paragraph 8) upon which the order appeal from is based, is made under the provincial jurisdiction?

ISSUE #3

(d) Whether the right to sue is a substantive right or a procedural right?

ISSUE #1

The Legislative History of Section 243 of the *BIA* and the Procedural Gap

44. The appointment of a receiver was a remedy under provincial jurisdiction, not federal. The receivership remedy was available originally from the Court of Equity, not law. A receiver could be appointed to preserve and manage property pending the outcome of litigation. Also, a receiver could be appointed to enforce rights over property and to preserve it pending realization.[37]

45. With respect to the federal legislation, in 1992, Parliament amended the *BIA* to include "Part XI – Secured Creditors and Receivers" was added to the *BIA*. This brought, under federal law, various aspects of receivership law that had previously been governed by provincial legislation and common law.[38] In order for Part XI to apply, the debtor had to be insolvent and had to charge all or substantially all of its assets to a secured creditor.

[37] Brief of Authorities ("BoA") Tab 2, Railside Development, Justice Moore, para 29
[38] BoA, Tab 2, Railside, para 39-40; and see Tab 5, Lemare, para 51-68

46. As part of the 1992 amendments, Section 243 *BIA* was included in Part XI. However, it did not give the Bankruptcy Court jurisdiction to appoint a receiver. It was passed on the basis that the provincial jurisdiction would be used to appoint a receiver and, if there were insolvency circumstances, the *BIA* applied and it placed certain obligations on and gave certain rights to a provincially appointed receiver.

47. As well in 1992, Section 244(1) of the *BIA* was introduced. This section added a minimum 10 day notice period before secured creditors could seek to realize on their security in respect of all or substantially all of the assets of a defaulting debtor.

48. Interim receivers were part of the Bankruptcy Act and the *BIA* s. 46. The *BIA* continued and expanded the right to appoint an interim receiver. In order to protect the secured creditor from having the assets of the debtor dissipated during the notice period, Section 47 was added to give creditors the right to appoint an "interim receiver" over the assets of the debtor during this ten day period.

49. At the same time, Section 47.1 was added to allow the appointment of an interim receiver over the assets of a debtor who had filed a notice of intention to file a proposal or a proposal.

50. Initially, the Bankruptcy Courts took the view that Sections 47 and 47.1 interim receivers were intended to be used in the same relatively narrow "watchdog" role that the traditional Section 46 interim receivers had played in the past. This was to prevent possible abuse by fraudulent debtors. However, instead of mirroring the language of Section 46, Parliament chose to include broad discretionary language that opened the door to appointments that, in the end, went well beyond the scope of Section 46 interim receivers. This eventually led to the criticism that the interim receiver was no longer "interim".

51. The issue of these expanded powers was first addressed in 1994 in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc., ("Curragh")*.[39] In Curragh, Farley J. distinguished between a section 46 interim receiver and a section 47 interim receiver, noting that section 47 confers broader powers to deal with the debtor's property and that those powers go far beyond a section 46 interim receiver's role in preserving property, thereby allowing a section 47 interim receiver to function as a quasi-receiver and manager/trustee in bankruptcy. Commenting that the interim receivership had continued for a much longer period of time than the ten days as set out in section 244 of the *BIA*.[40]

52. Farley J., in noting that the power in the basket clause of section 47(2)(c), unlike the bulk of the *BIA*, is not a detailed code, wrote the often-quoted statement that "*the Court could enlist the services of an interim receiver to do not only what 'justice dictates' but also what 'practicality demands*"".[41]

53. The issue of expanded powers and the subsequent criticism was summarized by Justice Moir in *Railside* at para 50-51:

> 50 The development of a broad approach to s. 47 led to numerous orders, especially out of the Toronto Commercial List, that appointed interim receivers with nation-wide powers that often seemed to override local legislation, that were often ex parte but with a comeback clause, and that often extended to the complete and final liquidation of the debtor's assets.
>
> 51 The decision in Curragh, the decisions that followed it, and the practice of creating ex parte nation-wide, broadly empowered, full receiverships out of s. 47 were open to the criticism that they failed to give meaning to the word "interim" and the phrase "notice under subsection 244(1)" in s. 47(1) and the conservatory focus of the only specified powers in s. 47(2), that is, paragraphs (a) and (b). Issues remained about whether s. 47 could be used as a basis for a full receivership (interim to what?),

[39] (1994), 27 C.B.R. (3d) 148 (Ont. Gen. Div.), BoA, Tab 3, Curragh
[40] Ibid, para 7
[41] Ibid, para 22

> whether it could be used as a basis for disposing of property other than for preservation, whether it could be used to override substantive provincial law, especially in other jurisdictions, and whether restrictions on persons who receive no notice are adequately protected by a comeback clause.

BIA 2004 Model Template Order

54. In Ontario, since 2004, the Commercial List User's Committee of the Ontario Superior Court of Justice developed what is described as the model template receivership order that incorporates both s.101 of the *CJA* and s.47 of the *BIA*, (and now with extended jurisdiction, s.243 of the Act).[42] In 2004, there was no power to appoint a receiver under s 243 BIA. The basis of the jurisdiction to appoint a receiver and make orders such as restricting the right to sue a receiver by requiring leave of the court, was s. 101 of the *CJA* and the inherent jurisdiction of the court related thereto.

BIA 2009 Amendments to Section 243 – National Receivership Regime

55. As stated, prior to 2009, Part XI of the *BIA* did not give the court jurisdiction to appoint a receiver. It relied on the provincial authority to appoint a receiver and the *BIA* applied to place certain obligations on and gave certain rights to a provincially appointed receiver in insolvency circumstances.

56. Over time, however, a practice developed in some jurisdictions of appointing interim receivers and giving them broad powers (as outlined above) to take possession of the debtor's assets, manage the debtor's business, and ultimately sell that business as a going concern and distribute the proceeds to creditors. [43]

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[42] BoA, Tab 11, Bennett, Frank. Bennet on Bankruptcy. 2018. 20th Ed, Carswell Page 741
[43] BoA, Tab 2, Railside, see para 28-66 and in particular, para 50-51, 55

57. This all changed in 2009.[44] At that time, Section 47 of the *BIA* was amended in order to make it clear that an interim receiver may be appointed for only a relatively brief period of time. Having made interim receiverships clearly interim, Parliament overhauled Part XI of the *BIA* to introduce a national receivership regime.[45] Section 243 now provided that a secured creditor may apply to a Bankruptcy Court exercising its jurisdiction under the *BIA* for an order appointing a receiver over all or substantially all of the assets used in the business of an insolvent debtor. Unlike the results achieved by the diverging interpretations of Section 47 of the *BIA* (where an expansive interim receivership remedy was available in some provinces, but not others) the Section 243 *BIA* receivership remedy gave the Courts the authority to appoint a receiver with the power to act nationally thereby eliminating the need to apply to Courts in multiple jurisdictions for the appointment of a receiver, where a corporation carries on business in more than one province. However, this did not affect the Court's jurisdiction to appoint receivers pursuant to Section 101 of the *CJA* and the inherent jurisdiction related thereto.[46] In fact, if the receiver was not national, the power to appoint would only come from the provincial statute such as Section 101 of the *CJA*. This was decided by the SCC as set out in paragraph 68 of Lemare Lake Logging Limited herein.[47]

58. Furthermore, a receiver is defined in Part XI under subsection 243(2). It does not include an "interim" receiver, but does include a receiver appointed under other federal and provincial legislation. It would also include a receiver appointed under a security instrument, commonly referred to as a privately appointed receiver.[48]

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[44] SC 2005, c. 47 and SC 2007, c. 37, both proclaimed in force as of September 18, 2009.
[45] BoA, Tab 2, Railside, para 60-62
[46] BoA Tab 2, Railside para 62-65 and Tab 5, Lemara para 48 and 68
[47] BoA, Tab 5, paragraph 68
[48] BoA, Tab 11, Bennett, Frank. Bennet on Bankruptcy. 2018. 20th Ed, Carswell Page 749

The Protection of Receivers

59. Section 215 of the *BIA* was in place when the original amendments were made in 1992. As there was no authority to appoint a receiver under the *BIA*, there was no need to include a "receiver" under Section 215 *BIA* to have the protection that the receiver could not be sued without leave. Section 215 *BIA* only protected those persons listed in that section. Parliament did not include a receiver. The jurisdiction of a provincially appointed receiver was already part of the provincial power (for example, in Ontario, Section 101 of the *CJA* and the inherent jurisdiction related thereto).

60. When the template order was drafted in 2004, the explanatory note that was issued on September 14, 2004 explained the reasoning behind having an order under both Section 101 of the *CJA* and Section 243 of the *BIA*. It also noted that "the Office of the Superintendent of Bankruptcy noting that because an interim receiver is not a "receiver" for the purposes of Part XIV of the *BIA*, there is no mandatory notice to creditors, reporting to the Superintendent or other statistics gathering function for interim receiverships in Canada". The fact that a receiver was not an "interim" receiver and therefore was not included in Section 215 of the *BIA* was clearly the interpretation of the Office of the Superintendent and the committee that drafted the template order. This is also supported by the drafting of section 14.06(1.1) and 14.06(2). If Parliament intended to include a receiver in s 215 *BIA* it could have done so but chose not to. The provincial law governs, and is the source of the jurisdiction to make orders protecting receivers from suit, unless leave of the Commercial Court is first obtained.

61. In 2009 when the national receivership regime legislated by parliament, again Section 215 was not amended. This is again due to the fact that the power to appoint the receiver was a provincial appointment unless a receiver was appointed under Section 243 alone.

62. Section 215 was not amended to include a receiver. It is submitted that the only jurisdiction of a Commercial Court to make such an order requiring leave to sue and therefore limiting the substantive right of a person to sue to receiver, such as a purchaser of the assets, could only come from the provincial power.

The Determination of the SCC of the Purpose of Section 243 *BIA*

63. In 2015, the SCC had to deal directly with the purpose of Section 243 of the *BIA*. In this case, there was a potential conflict between the *BIA* and a Saskatchewan statute that protected farmers and required a longer notice period, before enforcement proceedings could be taken by a secured creditor against a farmer.

64. The SCC held that the purpose of Section 243 was to establish a national receivership regime for the appointment of a national receiver. This did not conflict with the provincial jurisdiction to appoint a receiver and the provincial legislation that governed.

> 67 The preceding review confirms that s. 243's purpose is simply the establishment of a regime allowing for the appointment of a national receiver, thereby eliminating the need to apply for the appointment of a receiver in multiple jurisdictions: see Wood, pp. 466-67. The 2005 and 2007 amendments to the *BIA* made clear that interim receivers were to be temporary in nature and have more limited powers, as originally intended, but gave courts the power to appoint a receiver with authority to act nationally, thereby increasing efficiency and removing the need to seek the appointment of a receiver in each jurisdiction where the debtor has assets. Sarra, Morawetz and Houlden have explained:
>
> > Section 243 grants authority to the court, defined in s. 2 to include a judge exercising jurisdiction under the *BIA*, to appoint a receiver with the power

> to act nationally, thereby eliminating the need to apply to the courts in multiple jurisdictions for the appointment of a receiver. The national receiver under the *BIA* is entitled to act across the country, increasing efficiency by removing the need to have a receiver appointed in each jurisdiction in which the debtor's assets are located. [Emphasis added; p. 1037.]
>
> 68 Section 243 was thus aimed at the establishment of a national receivership regime. Its purpose was to avoid a multiplicity of proceedings and the inefficiency resulting from them. **There is no evidentiary basis for concluding that it was meant to circumvent the procedural and substantive requirements of the provincial laws where the appointment is sought.** General considerations of promptness and timeliness, no doubt a valid concern in any bankruptcy or receivership process, cannot be used to trump the specific purpose of s. 243 and to artificially extend the provision's purpose to create a conflict with provincial legislation. Construing s. 243's purpose more broadly in the absence of clear evidence that Parliament intended a broader statutory purpose, is inconsistent with the requisite restrained approach to paramountcy and with the fundamental rule of constitutional interpretation referred to earlier in our reasons (paras. 20-21). Vague and imprecise notions like timeliness or effectiveness cannot amount to an overarching federal purpose that would prevent coexistence with provincial laws like the *SFSA*. [49] [emphasis added]

65. As the purpose of Section 243 was for a national receiver, on the facts before the case at bar, there was no need for nor was a national receiver appointed. The Property that SusGlobal purchased and the business related thereto was only carried on in Ontario.

66. As a result, Section 101 of the *CJA* and Section 243 of the *BIA* are not in conflict and can both coexist without encroaching on exclusive jurisdiction or raising the issue of paramountcy either as “operational conflict” or “frustration of purpose”.

[49] BoA Tab 3, Lemare, para 68

67. The SCC most recently dealt with a similar "untidy intersection" of provincial environmental legislation and federal insolvency legislation in the decision of *Ophan Wells Association v. Grant Thornton Ltd.*,[50] and concisely dealt with the issue of paramountcy:

> [65] Over time, two distinct forms of conflict have been recognized. The first is *operational conflict*, which arises where compliance with both a valid federal law and a valid provincial law is impossible. Operational conflict arises "where one enactment says 'yes' and the other says 'no', such that 'compliance with one is defiance of the other'" (*Saskatchewan* (*Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 18, quoting *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191). The second is *frustration of purpose*, which occurs where the operation of a valid provincial law is incompatible with a federal legislative purpose. The effect of a provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions" (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 73). The party relying on frustration of purpose "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose" (*Lemare*, at para. 26, quoting *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536, at para. 66).
>
> [66] Under both branches of paramountcy, the burden of proof rests on the party alleging the conflict. This burden is not an easy one to satisfy, as the doctrine of paramountcy is to be applied with restraint. Conflict must be defined narrowly so that each level of government may act as freely as possible within its respective sphere of constitutional authority. "[H]armonious interpretations of federal and provincial legislation should be favoured over an interpretation that results in incompatibility . . . in the absence of 'very clear' statutory language to the contrary" (*Lemare*, at paras. 21 and 27). "It is presumed that Parliament intends its laws to co-exist with provincial laws" (*Moloney*, at para. 27). As this Court found in *Lemare*, at paras. 22-23, the application of the doctrine of paramountcy should also give due weight to the principle of co-operative federalism. This principle allows for interplay and overlap between federal and provincial legislation. While co-operative federalism does not impose limits on the otherwise valid exercise of legislative power, it does mean that courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation. [emphasis added]

68. There is no operational conflict or frustration of purpose between Section101 of *CJA* and Section 243 of *BIA* as both have separate purposes. The enactment of Section 243 was to grant

[50] 2019 SCC 5, BoA Tab 4, para 65-66

the Courts the power to appoint a receiver with authority to act nationally. This would increase the efficiency and remove the need to seek the appointment of a receiver in each jurisdiction where the debtor has assets. However, it does not in any way limit or prevent the provincial jurisdiction to appoint a receiver and the inherent jurisdiction related thereto.

69. As a result, it is submitted that the power to order paragraph 8 and limit or restrict the substantive right to sue, comes from Section 101 of the *CJA* and the related inherent jurisdiction of the Court.

ISSUE #2

70. As the jurisdiction to make the Receivership Order is under Section 101 of the *CJA*, then the right to appeal a decision based on that part of the Receivership Order, must be granted in reliance on such jurisdiction and therefore the appeal provisions of that statute in the *CJA* applies.

> **Industrial Alliance Insurance and Financial Services Inc. vs. Wedgemount Power Limited Partnership [2018] BCJ No. 1341 (BCCA) (in Chambers) at paragraphs 21 and 24**

71. As a result, the right of appeal is found in Section 6 of the *CJA* related to any order made that flows from the jurisdiction that granted paragraph 8 of the Receivership Order.

72. It is submitted that the *Third Eye Capital*[51] case of the Court of Appeal is persuasive if not binding on this Court. In that case the receiver was appointed under both Section 101 of the *CJA* and Section 243 of the *BIA*.

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[51] BoA, Tab 6, paragraph 1, 103 and 108

73. An appeal was brought from a vesting order made under Section 100 *CJA*, The jurisdiction to appoint the receiver and make the vesting order was provincial.

74. The appeal was a direct appeal to the Court of Appeal under s. 6 of the *CJA* and it was not under the jurisdiction of the *BIA*.

75. Furthermore, the jurisdictional issue has been the subject of comment by Frank Bennett, one of the leading writers in the field of bankruptcy.

76. There is no authority directly on point dealing with which appeal period is applicable when orders are made under both the *CJA* and the *BIA*. Mr. Bennett in his text states that this is a "procedural gap" and the matter has not been decided. [52]

> "In Ontario, there is a **procedural gap** in the appeal period from an order made under section 101 of the Courts of Justice Act and sections 47 and 243 of the *BIA*. Under the former, the appeal period is 30 days [Rule 61.04 of the Rules of Civil Procedure] from the date of the order, while under the latter, it is 10 days [Rule 31(1) of the Bankruptcy Rules]." [emphasis added]
>
> **Bennett, Frank. *Bennett on Bankruptcy*. 2018. 20th Ed, Carswell pg 741 footnote 26**

The Jurisdiction to Order Paragraph 8 of the Receivership Order is Not Under the *BIA*

77. The jurisdiction to make an order that leave is required to sue a receiver is not found in the *BIA*.

78. Parliament has passed legislation being Section 215 of the *BIA* and Section 251 of the *BIA* where the legislature has determined that it would provide protection to certain officials appointed

under the *BIA*. This includes the Superintendent of Bankruptcy, interim receivers, official receivers and trustees in bankruptcy.

79. Under Section 251, parliament has also provided protection for receivers where it states at Section 251:

> "Protection of receivers
>
> 251 No action lies against a receiver for loss or damage arising from the sending or providing by the receiver of a notice pursuant to section 245 or a statement or report pursuant to section 246, if done in good faith in compliance or intended compliance with those sections."

80. Section 215 of the *BIA* therefore does not apply to receivers. Section 215 does not include receivers.[53][54]

81. The *BIA* is a statutory Court. Section 215 provides for protection of officials appointed under the *BIA*. As the protection of those officials has been dealt with in the bankruptcy legislation, then the bankruptcy Court has no inherent jurisdiction to add powers in an area already determined and legislated by parliament. The Bankruptcy Court has no inherent jurisdiction to order that the substantive right to sue a receiver be restricted by requiring leave first be obtained.

82. The protection to limit the ability to sue receivers is found in the provincial legislation and the inherent jurisdiction of the Court related thereto.[55]

ISSUE #3

[53] See also sections 14.06(1.1) and 14.06(2.2) of the *BIA*.
[54] See also sections 81.4(5) and 81.6(3) of the *BIA*.
[55] BoA, Tab 6 see *Third Eye Capital Corporation v. Resources Dianor Inc.*, [2018] ONCA 252 para 103 and 108; Tab 7 see *Endean v. British Columbia* [2016] 2 S.C.R para 60 and 62

The Right to Sue is a Substantive Right Not a Procedural Right

83. It is submitted that the right to sue is a substantive right not a procedural right.[56]

84. As a result, this appeal deals directly with the substantive right of SusGlobal to sue the Receiver and limitations on that right as a result of the provincial legislation.

85. The Purchaser is entitled to a direct right of appeal to the Court of Appeal pursuant to section 6 of the *CJA.*

The Merits of the Appeal

86. Although the merits of the appeal are not in issue on this motion, it is submitted that the Court should be made aware of the fact the Motion Judge did not follow the legal test set by the SCC in deciding the issue and in failing to allow the motion for fresh evidence and reopen the Motion For Leave To Sue the Receiver.

Motion for Leave to Sue the Receiver – "*Prima facie*" against Receiver/BDO

87. The appeal is meritorious because the Motion Judge erred in law in treating the Motion For Leave To Sue as if it were a motion for summary judgment. He did so by making findings of credibility, rather than determining whether there was a *prima facie* case based on the conflicting evidence adduced on the motion, and thereby exceeding His jurisdiction.

88. The evidence of the weigh bills of the waste delivered to the Site during the Receivership Period (compared to the amount used) and the measurements of the amount of waste in the Tipping Building observed by Mr. Al Hamilton in mid July 2017, in the Tipping Building, set out in the

[56] BoA, Tab 9, *Alberta (AG) v. Atlas Lumber co*. [1941] S.C.R 87

Pinchin Report supported that the amount of biosolid waste stored continually over the Receivership Period in the Tipping Building was far in excess of 150 MT by wet weight.

89. This was also confirmed by the MOECC (Ms. Potter) in its email communications with Mr. Hamaliuk, the engineer in charge at the Site who works for the Purchaser.[57] There is a *prima facie* case of excess biosolid waste built up and stored in the Tipping Building during the Receivership Period, based on the evidence of actual weights delivered , and observations of the MOECC and Mr. Al Hamilton, (until he changed his story after the demand in October 2017 by the Purchaser).[58]

90. A material witness, Mr. Al Hamilton the former CEO of the Debtors, gave information to the Receiver that was included in the Reports filed and that information was not under oath. He made three material changes to his "evidence".[59] The Motion Judge failed to find that there was conflicting evidence. Once the judge found that Mr. Al Hamilton had changed the information he

[57] Compendium Tab 6 Page 36 Email dated October 5, 2017 from Katy Potter to Gerald Hamaliuk

[58] The calculations of the Receiver on the Original Motion depended upon the information from Mr. Hamilton. The position of Mr. Al Hamilton and the receiver was that the 23 windrows processed 500MT each of the Compost Mixture and that the ratio of biosolid waste to organic waste was 1:1. Therefore approximately 250MT of biosolid waste was used in every windrow or 5750 MT of biosolid waste over the Receivership Period. But this evidence is impossible. The total amount of biosolid waste delivered to the Site during the Receivership was only 4,952 MT. This one to one ratio cannot be correct. This supports a *prima facie* case. Furthermore, the evidence from the emails of the MOECC representative, Ms. Potter, was that she saw a significant amount of waste in the Tipping Building (so there was no explanation based on the Receiver's calculations for having any biosolid waste left in the Tipping Building on September 15, 2017). See Compendium, Tab 15, Page 69, para 25 and Compendium, Tab 16, page 74 to 75, Compendium, Tab 14, Pages 57 to 58, Compendium, Tab 21, Pages 117 and Compendium, Tab 23, Pages 119 to 120.

[59] Compendium Tab 12, Page 48 Letter from Angelo Consoli to Gerald Hamaliuk; and Tab 14 Receivers Fourth Report dated December 8, 2017 Sections 2.3.4 Page 59, Section 2.3.6 Page 60, Section 3.1.6 Page 62; and Tab 16 Supplement to the Fourth Report dated January 19, 2018 Section 2.0.2 Page 74 and Tab 18 Page 79-82 - Al Hamilton's Appendix "I" to the Fourth Report of the Receiver and Fourth Supplement to the Receivers Fourth Report at Tab 19, Page 84 Section 1.3.1 and Tab 23, Page 119-120 Schedule C to the Factum of the Receiver on the Motion For Leave to Sue

gave to the Receiver on a Motion for Leave to sue, the Motion Judge was not entitled to accept one version over another[60].

91. In doing so the Motion Judge discounted that part of the Pinchin Report that dealt specifically with the Tipping Building. That part of the Report was not subject to criticism. That part of the Report as well, as the weigh ticket demonstrated a *prima facie* case of continual build-up of waste in the Tipping Building.

92. Therefore, the Receiver acted contrary to the *EPA*/ECA and consequently, contrary to the paragraph 10 (ii) of the Receivership Order and the terms of the APA. Furthermore, the reliance by the Receiver on the "As is, Where is" clause in the APA to negate any liability, is simply untenable on the facts and in law. It cannot be that a court officer can breach the Receivership Order (appointing that officer), as well as the *EPA* and ECA, and when those breaches directly affect the value of the assets purchased under that Receivership Order, take the position that "As is Where is" means the purchaser has to take financial responsibility for the receiver's contemptuous conduct of a court Receivership Order and disregard of environmental legislation. This would also be contrary to the legislative intent under the *EPA*/ECA. As a result, the Receiver breached the 'As is, Where is' provision as it did not operate the Tipping Building in compliance with the EPA/ECA and Receivership Order[61]. At the very least this raises a *prima facie* case.

[60] MR Vol. 1 Reasons at Tab 7, pg 106 para 37, 57-65

[61] The Receiver represented to the Court that it was operating in compliance with the conditions of the ECA. Compendium Tab 14 Fourth Report of the Receiver at Page 56 Section 1.2.2 and 3.4.3 and Tab 12 Page 49-50 BDO Letter of November 13, 2017

93. The SCC in *GMAC Commercial Credit Corp – Canada v TCT Logistics Inc.* ("GMAC") stated the threshold is low on an application for leave to commence an action against a receiver or trustee:

> "…the threshold for granting leave to commence an action against a receiver or trustee is not a high one…(1) Leave to sue a trustee should not be granted if the action is frivolous or vexatious…(2) An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee…(3) The Court is not required to make a final assessment of the merits of the claim before granting leave…"[62]
> [emphasis added]

94. If the evidence of the Purchaser is accepted it supported a *prima facie* case against the Receiver.

Fresh Evidence Motion

95. The issue is whether or not the Motion Judge erred in failing to find that there was a miscarriage of justice when Mr. Hamilton misled the court in failing to disclose the exact percentage of water in the waste used at the Site and what the dry weight was, as a result of the 2016 analysis Mr. Hamilton had done for the 2016 Report. This evidence demonstrates that Mr. Hamilton's change in evidence was knowingly false as he knew the correct numbers and he did not have to speculate or estimate as he did in the Receiver's reports.

96. Furthermore, the material fact that emerged on the Fresh Evidence Motion, that was only available after the Motion For Leave To Sue was fully argued, was that the actual percentage of biosolid waste that was used in the compost mixture, on average, for the year 2017 that was 18.8%,

[62] GMAC, supra note 75 at para 55, 57-59 citing Manici (Trustee of) v Falconi, [1993] OJ No 146 at Page2 (Ont CA)

not the 25% that was used in the Receiver's calculations to try and account for the excess weight from the weigh bills.[63]

97. This had a material effect on the calculation of the actual amount of biosolid waste that built up in, and was stored (in increasing amounts) in the Tipping Building over the Receivership Period. By September 15, 2017, the amount of biosolid waste that was unused and stored in the Tipping Building was 1,492 MT by wet weight. This is almost ten times the *EPA* regulated maximum amount of 150 MT (by wet weight).

PART V - ORDER REQUESTED

98. That the Order of the Honourable Justice Watt be set aside and varied and for an Order declaring that section 6 of *CJA* applies and that the appeals be reinstated.

99. As set out in paragraph 4 of the Factum herein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of February 2019.

Melvyn L. Solmon / Rajiv Joshi
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[63] See Compendium Tab 21, Page 113 Affidavit of Gerry Hamaliuk dated August 16, 2018, para 13

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership*, [2018] B.C.J 1349 BCCA

2. *Railside Developments Ltd*., Re, 2010 NSSC 13

3. *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*, (1994), 27 C.B.R. (3d) 148 (Ont. Gen. Div.)

4. *Ophan Wells Association v. Grant Thornton Ltd*., 2019 SCC 5

5. *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd*., 2015 SCC 53

6. *Third Eye Capital Corporation v. Resources Dianor Inc*., 2018 ONCA 253

7. *Endean v. British Columbia*, (2016) 2 S.C.R

8. *GMAC Commercial Credit Corp. – Canada v. TCT Logistics Inc*. [2006] 2 S.C.R. 123

9. *Alberta (Attorney-General) v. Atlas Lumber co.* [1941] S.C.R. 87

10. *In the Matter of the Consumer Proposal of Sally Teresa Wiggins*, 2003. 67 O.R. (3d) 133

11. Bennett, Frank. *Bennett on Bankruptcy*. 2018. 20th Ed, Carswell

12. Houlden, L.W, Morawetz, G.B. *Bankruptcy and Insolvency Law of Canada*, 2009, 4th Edition, Electronic excerpts Part VII (ss. 183-186) *"Statutory Interpretation, Gap-Filling and Inherent Jurisdiction of the Court"*.

13. Commercial List Users' Committee of the Ontario Superior Court of Justice. The New Standard Form Template Receivership Order. Explanatory Notes for Version No.1, September 14, 2014.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

BIA – Section 46
46(1) Appointment of interim receiver
The court may, if it is shown to be necessary for the protection of the estate of a debtor, at any time after the filing of an application for a bankruptcy order and before a bankruptcy order is made, appoint a licensed trustee as interim receiver of the property or any part of the property of the debtor and direct the interim receiver to take immediate possession of the property or any part of it on an undertaking being given by the applicant that the court may impose with respect to interference with the debtor's legal rights and with respect to damages in the event of the application being dismissed.

46(2) Powers of interim receiver
The interim receiver appointed under subsection (1) may, under the direction of the court, take conservatory measures and summarily dispose of property that is perishable or likely to depreciate rapidly in value and exercise such control over the business of the debtor as the court deems advisable, but the interim receiver shall not unduly interfere with the debtor in the carrying on of his business except as may be necessary for the conservatory purposes or to comply with the order of the court.

46(3) Place of filing
An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Amendment History
2004, c. 25, s. 29; 2007, c. 36, s. 13

BIA – Section 47.
47(1) Appointment of interim receiver
If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates until the earliest of

(a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,

(b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and

(c) the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.

47(2) Directions to interim receiver
The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

(a) take possession of all or part of the debtor's property mentioned in the appointment;

(b) exercise such control over that property, and over the debtor's business, as the court considers advisable;

(c) take conservatory measures; and

(d) summarily dispose of property that is perishable or likely to depreciate rapidly in value.

47(3) When appointment may be made
An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

(a) the debtor's estate; or

(b) the interests of the creditor who sent the notice under subsection 244(1).

47(4) Place of filing
An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Amendment History
1992, c. 27, s. 16(1); 2005, c. 47, s. 30(1); 2007, c. 36, s. 14

BIA – Section 47.1
47.1(1) Appointment of interim receiver
If a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1), the court may at any time after the filing, subject to subsection (3), appoint as interim receiver of all or any part of the debtor's property,

(a) the trustee under the notice of intention or proposal;

(b) another trustee; or
(c) the trustee under the notice of intention or proposal and another trustee jointly.

47.1(1.1) Duration of appointment
The appointment expires on the earliest of

(a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,

(b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and

(c) court approval of the proposal.

47.1(2) Directions to interim receiver
The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

(a) carry out the duties set out in subsection 50(10) or 50.4(7), in substitution for the trustee referred to in that subsection or jointly with that trustee;

(b) take possession of all or part of the debtor's property mentioned in the order of the court;

(c) exercise such control over that property, and over the debtor's business, as the court considers advisable;

(d) take conservatory measures; and

(e) summarily dispose of property that is perishable or likely to depreciate rapidly in value.

47.1(3) When appointment may be made
An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

(a) the debtor's estate; or

(b) the interests of one or more creditors, or of the creditors generally.

47.1(4) Place of filing
An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Amendment History
1992, c. 27, s. 16(1); 2005, c. 47, s. 31(1), (2); 2007, c. 36, s. 15

BIA – Section 193

193. Court of Appeal
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.

Amendment History
1992, c. 27, s. 68

BIA – Section 215

215. No action against Superintendent, etc., without leave of court
Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

Amendment History
1992, c. 27, s. 80

BIA – Section 243.
243(1) Court may appoint receiver
Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and

over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

243(1.1) Restriction on appointment of receiver
In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

243(2) Definition of "receiver"
Subject to subsections (3) and (4), in this Part, **"receiver"** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt
that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver- manager.

243(3) Definition of "receiver" — subsection 248(2)
For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

243(4) Trustee to be appointed
Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

243(5) Place of filing
The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

243(6) Orders respecting fees and disbursements
If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

243(7) Meaning of "disbursements"
In subsection (6), **"disbursements"** does not include payments made in the operation of a business of the insolvent person or bankrupt.

Amendment History
1992, c. 27, s. 89(1); 2005, c. 47, s. 115; 2007, c. 36, s. 58

BIA – Section 251

251. Protection of receivers
No action lies against a receiver for loss or damage arising from the sending or providing by the receiver of a notice pursuant to section 245 or a statement or report pursuant to section 246, if done in good faith in compliance or intended compliance with those sections.

Amendment History
1992, c. 27, s. 89(1)

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

FACTUM OF THE MOVING PARTY, SUSGLOBAL ENERGY BELLEVILLE LTD. (APPELLANT ON APPEALS)

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