

**COURT OF APPEAL FOR ONTARIO**

BETWEEN:

BUSINESS DEVELOPMENT BANK OF CANADA

Applicant

and

ASTORIA ORGANIC MATTERS LTD. and ASTORIA ORGANIC MATTERS  
CANADA LP

Respondents

IN THE MATTER OF the Receivership of Astoria Organic Matters Ltd. and Astoria Organic  
Matters Canada LP

AND IN THE MATTER OF an Application pursuant to Rules 14.05(2), 14.05(3)(d), 14.05(3)(g)  
and 14.05(3)(h) of the *Rules of Civil Procedure*

**MOTION RECORD  
VOLUME 2**

January 28, 2019

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appointed receiver of Astoria Organic Matters and Ltd. and Astoria Organic Matters  
Canada LP

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**TAB 14**

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

**COURT OF APPEAL FOR ONTARIO**

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and 14.05(3)(h) of the *Rules of Civil Procedure*

**NOTICE OF MOTION**

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

**PROPOSED METHOD OF HEARING:** The Motion is to be heard

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

**THE MOTION IS FOR**

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

**THE GROUNDS FOR THE MOTION ARE**

- (a) The Judge erred in law in failing to find that the authority to make an order requiring leave to sue a Court Appointed Receiver was under Section 101 of the *Courts of Justice Act*;
- (b) The Learned Judge erred in failing to find that, in that the authority to make an order requiring leave to sue a Court Appointed Receiver comes from the *Courts of Justice Act*, the right of appeal is found in the *Courts of Justice Act* and not the BIA;
- (c) The Learned Judge erred in law in failing to find that the requirement of leave to sue a Court Appointed Receiver is not found in Section 215 of the BIA as this section does not apply to a Court Appointed Receiver;

- (d) The Learned Judge erred in law in failing to find that the requirement of leave to sue a Court Appointed Officer directly effects a substantive right, being the right to sue a Court Appointed Officer;
- (e) The Learned Judge erred in law in failing to find that, as the authority granted under Section 101 of the *Courts of Justice Act* is separate from the authority under Section 215 of the *BIA* and in that Section 6 of the *Courts of Justice Act* does not conflict with Section 193 of the *BIA*, these provisions are not in conflict;
- (f) The Learned Judge erred in law in failing to apply the legal principles set out by the Supreme Court of Canada in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53;
- (g) The Learned Judge erred in law in failing to find that the grounds of the appeal from the Order of the Honourable Mr. Justice McEwen deal directly with the refusal to grant leave to sue, pursuant to paragraph 8 of the Receivership Order, and that the Honourable Mr. Justice McEwen treated the motion for leave to sue as a motion for summary judgment, making findings of credibility, contrary to the principles set out in *GMAC Commercial Credit Corp. – Canada v. TCT Logistics Inc.*, 2006 SCC 35 in the Supreme Court of Canada;
- (h) Section 7(5) of the *Courts of Justice Act*; and,
- (i) Such further and other grounds as the lawyers may advise.

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

- (a) The Motion Record, the Exhibit Books and the Report of the Receiver BDO;

- (b) The Reasons for Decision of the Honourable Mr. Justice McEwen; and,
- (c) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

December 14, 2018

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BUSINESS DEVELOPMENT BANK OF CANADA  
Applicant

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

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

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**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT  
TORONTO

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**NOTICE OF MOTION**

---

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Lawyers for the appellant,  
SusGlobal Energy Belleville Ltd.

**File Number: 17987**

RCP-E 4C (May 1, 2016)

**TAB 15**

ISSUED AND ENTERED ORDER

TO BE INSERTED

(3 pages)

## COURT OF APPEAL FOR ONTARIO

DATE: 20190102  
DOCKET: M49873 (C66166)

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 and released orally: December 10, 2018

## ENDORSEMENT

[1] Before the motion judge the moving party sought to reopen a previous motion in which SusGlobal sought leave to sue the Receiver BDO for damages. The motion to reopen was so that the moving party could file fresh evidence in support of its motion for leave to sue the receiver.

[2] The motion judge was satisfied that SusGlobal had not met the test to introduce further evidence. Nothing in the reasons reveals any misapprehension

Page: 2

on the part of the motion judge about the test that an applicant must meet to introduce such evidence.

[3] It was not disputed that the core information contained in the report SusGlobal sought to introduce as fresh evidence was available prior to the original hearing. Its availability to and accessibility by SusGlobal is relevant to the due diligence criterion in the fresh evidence analysis.

[4] The motion judge then turned to the question of whether the proposed fresh evidence was such that, if adduced on the motion, it would probably have changed the result. The motion judge was satisfied for several reasons that the proposed fresh evidence would not have done so.

[5] At bottom, a determination whether to admit fresh or further evidence, whether on a motion to reopen at trial or on application or on appeal, is an exercise of judicial discretion. Absent an error of law or principle or a misapprehension of the evidence, the decision of the court of first instance is entitled to deference. This is not an issue that ascends the idiosyncratic facts of this case which would warrant leave to appeal under s. 193(e) of the *Bankruptcy and Insolvency Act*.

[6] The motion is dismissed. Costs on both motions of \$10,000 inclusive of disbursements and all applicable taxes payable by the moving parties to the receiver.

*David West J.*

**TAB 16**

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

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

BUSINESS DEVELOPMENT BANK OF CANADA

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MATTERS CANADA LP

Respondents

IN THE MATTER OF the Receivership of Astoria Organic Matters Ltd. and Astoria  
Organic Matters Canada LP

AND IN THE MATTER OF an Application pursuant to Rules 14.05(2), 14.05(3)(d),  
14.05(3)(g) and 14.05(3)(h) of the *Rules of Civil Procedure*

**NOTICE OF MOTION**

The Appellant (applicant), SusGlobal Energy Belleville Ltd., will make a Motion to a Judge on Friday, December 7<sup>th</sup>, 2018 at 10:00 a.m., or as soon after that time as the Motion can be heard at the court house, 130 Queens Street West, Toronto, Ontario, M5H 2N5.

**PROPOSED METHOD OF HEARING:** The Motion is to be heard

- in writing under subrule 37.12.1(1) because it is;
- in writing as an opposed motion under subrule 37.12.1(4);
- orally. The estimated length of time for the oral argument of the motion is 2hrs

**THE MOTION IS FOR:**

- (a) An Order, if required, declaring that the appeal from the Decision of the Honourable Justice McEwen dated November 8, 2018 denying SusGlobal leave to introduce fresh evidence (the “Fresh Evidence Decision”) is brought pursuant to s.193 (c) of the *Bankruptcy and Insolvency Act* (“*BIA*”), or in the alternative s.6 of the *Courts of Justice Act* (“*CJA*”) and no leave to appeal is not required;
- (b) In the alternative, if this Court determines that the Fresh Evidence Decision required an order granting leave to appeal pursuant to s.193(e) of the *BIA*, an Order granting the Appellant leave to appeal the Fresh Evidence Decision;
- (c) Costs of this motion reserved to the Panel hearing the Appeal; and,
- (d) For such further and other relief as to this Honourable Court may seem just.

**THE GROUNDS FOR THE MOTION ARE:****Overview****The Motion By SusGlobal for Leave to Commence an Action against the Receiver**

1. BDO Canada Limited (“Receiver”) was made Court Appointed Receiver of the debtors Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP (“Debtors”) pursuant to the Order of the Honourable Justice Hailey on April 13, 2017(the “Appointment Order”).
2. The Debtors carried on the business of taking delivery of biosolid waste and processing organic compost for sale. The business was required to comply with the *Environmental Protection Act* (“EPA”) and *Amended Environmental Compliance Approval* (“ECA”).



3. SusGlobal was the Purchaser of the Debtors' assets from the Receiver pursuant to an Asset Purchase Agreement ("APA") dated July 27, 2017 (the "Property"). On September 15, 2017 the transaction closed and SusGlobal took possession of the Property and paid the Receiver the purchase price of \$7,782,752.08 .

4. After taking possession of the Site, SusGlobal learned that there was far in excess of 150 metric tonnes ("MT") of biosolid waste inside the Tipping Building as of the closing date of September 15, 2017. The amount was approximately 9-10 times the permissible amount under the ECA/EPA.

5. As a result of the Receiver's failures to comply with the Order, the EPA, the ECA and the APA requirements, SusGlobal incurred significant expense to process and remove the excessive biosolid waste in the Tipping Building, so that SusGlobal would be in compliance with the EPA/ECA

6. Thereafter, SusGlobal sought leave to commence an action against the Receiver (the "Action" and the "Motion for Leave").

7. The Action sought damages caused by the gross negligence or wilful misconduct of the Receiver. The Receiver breached the Appointment Order, EPA, ECA and APA. SusGlobal alleges that the Receiver's failure to comply with the Appointment Order, the EPA and the ECA requirements caused SusGlobal to incur a significant loss.

8. The Motion for Leave was heard on February 21, 27 and March 5 of 2018 before the Honourable Justice McEwen ("Judge").

9. Reasons for Decision were released on May 17, 2018 and the Motion for Leave was dismissed, with costs.

10. After the Motion for Leave was heard and the Reasons for Decision issued, but before an Order was issued and entered, the 2017 Annual Environmental Report (“2017 Annual Report”) that SusGlobal was required to file with the Ministry of the Environment and Climate Change (the “MOECC”) was confirmed received as required by the MOECC on June 25, 2018 only after the Motion for Leave was argued.

11. The 2017 Annual Report is reliable. It contain relevant evidence that was not available to SusGlobal prior to the argument on the Motion for Leave to support its position on the Motion for Leave.

12. As such, SusGlobal delivered the Fresh Evidence Motion. It was argued before the Judge on September 21, 2018; it was also dismissed.

13. SusGlobal has delivered a Notice of Appeal from the order dismissing the Motion for Leave.

**The Appeal from the Dismissal of the Fresh Evidience Motion is pursuant to s.193 (c) of the BIA**

14. If the appeal is governed by s.6 of the CJA or in the alternative s.193(c) of the BIA then no leave to appeal is required.

15. The Order appointing the Receiver was pursuant to section 243 of the BIA and section 101 of the CJA.<sup>1</sup> Accordingly, SusGlobal takes the position that the procedure and time limits related to civil orders apply and the appeal time period is 30 days pursuant to s.6 of the CJA. The fact that the Order was also made under s.243 of the BIA does not prevent or trump the jurisdiction under the CJA applying to this appeal.

16. SusGlobal relies upon section 6 (1) (b) of the CJA as the Decision of the Judge is final and leave to appeal is not required. Furthermore, the Notice of Appeal was served on November 19<sup>th</sup>, 2018 within the applicable 30 day appeal period under the CJA.

17. In the alternative, if this governed by appeal s. 193 (c) the issues raised on the appeal exceed the \$10,000 threshold as:

- (a) The Motion for Leave was for damages claimed by a stranger to the Receivership, being the purchaser of assets. The damages claimed are \$755,400.00 (inclusive of HST) caused by the willful or reckless or gross negligent, conduct of the Receiver during the Receivership Period. The dismissal of the Fresh Evidence Motion results in the same economic loss to SusGlobal. Therefore, the amount in issue on this appeal far exceeds the \$10,000.00 required under s.193(c) of the BIA such that no leave to appeal is required.
- (b) SusGlobal, not being a party ie. a creditor or a debtor in the Receivership, is entitled to appeal as of right as it is asserted that the assets purchased were not in accordance with the APA, the Appointment Order, the EPA/ECA which controlled

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<sup>1</sup> Motion Record of Appellant, Affidavit of Marc. M. Hazout para 6

the activities of the Receiver. As a court officer that chose to operate the business, the Receiver was required to abide by the Order, the EPA/ECA and APA.

18. The Fresh Evidence Decision was final as SusGlobal is a stranger to the Receivership Application.

**In the Alternative, if 193(e) of the BIA Applies, then Leave to Appeal Should be Granted from the Dismissal of the Fresh Evidence Motion**

19. In the alternative if s. 193(e) of the *Bankruptcy and Insolvency Act* applies, then SusGlobal seeks leave to appeal.

20. The factors required for leave to appeal based on the jurisprudence are satisfied in this appeal.

21. The issues raised are a matter of public importance in that:

- (a) the obligations and liability of a receiver that breaches the court order appointing the receiver and violates the EPA and ECA are matters of public importance;
- (b) the effect of an "As is, Where is" clause on a sale by a receiver and whether this clause can provide immunity to court appointed Receivers who contravene the EPA and ECA is a matter of public importance;
- (c) The 2017 Annual Report clearly indicated that the material evidence of Mr. Hamilton, the witness of the Receiver was *prima facie*, could not be relied upon and raised genuine issues of fact and law. The evidence placed before the Court by

a Receiver is a matter of public importance and is of significance to bankruptcy and commercial practice including receivers and their conduct.

22. If leave to appeal is not granted it will prejudice the rights of SusGlobal on its appeal from the Motion for Leave, as the Panel hearing that appeal will not have all evidence before it that is probative and relevant.

23. It would be a miscarriage of justice if leave to appeal is not granted. The 2017 Annual Report was not tested and considered by the Court so that the Court could properly exercise its discretion on the Fresh Evidence Motion.

24. The appeal from the Fresh Evidence Motion is *prima facie* meritorious.

25. The Judge erred in law in applying the legal test to reopen a trial or motion on the basis of fresh evidence and in particular, the application of the third element. The test being:

1.) Would the evidence, if presented at trial, probably have changed the results;

2.) Could the evidence have been obtained before the trial by the exercise of reasonable diligence? And,

3.) Whether the fresh evidence demonstrates that there was a miscarriage of justice?

26. In the Fresh Evidence Motion, the Judge erred in law in failing to properly apply the third aspect of the test, as the Judge:

(i) Erred by failing to find that there was a miscarriage of justice as a material witness, Mr. Hamilton the former CEO of the Debtors, materially changed his 'evidence' (in fact, three times) and as a result, the Judge erred in failing to find that there was at, the very least, conflicting evidence that supported a *prima facie* case against the Receiver;

- (ii) Erred in failing to find that Mr. Hamilton deliberately did not provide this information to the Receiver. Mr. Hamilton's contradictory evidence was not explained. Mr. Hamilton knew the actual data as he completed the 2016 Annual Report;
  - (iii) Erred by relying on Mr. Hamilton's hypothetical calculations that were not based on actual numbers on site, and the Receiver relied upon this information and provided the same to the Court; the 2017 Annual Report demonstrated this information to be materially incorrect.
- (b) Erred in law by characterizing the 2017 Annual Report as the "*same type*" of evidence when in fact it provides the most accurate and reliable weight, percentages and calculations, for conversion of wet weight to dry weight, for the whole year of 2017.
  - (c) Failed to take into account that neither the Receiver nor Mr. Hamilton provided any evidence on the Fresh Evidence Motion to dispute the 2017 Annual Report or the 2017 Calculations, or the 2016 Annual Report.
  - (d) Failed to consider the factors in the jurisprudence that the primary objective on a motion for re-opening on fresh evidence is to avoid a miscarriage of justice.
  - (e) Failed to consider the jurisprudence that the reasonable diligence requirement of the two-prong test can be relaxed in exceptional circumstance to avoid a miscarriage of justice.
  - (f) The Order appealed from is final.

- (g) Leave to appeal is not required.
- (h) Section 101 of the *Courts of Justice Act* and Section 243 *Bankruptcy and Insolvency Act*.
- (i) Section 6 of the *Courts of Justice Act* or in the alternative, Section 193(c) of the *Bankruptcy and Insolvency Act* or in the alternative, if section 193(e) of the *Bankruptcy and Insolvency Act* applies, then the Appellant seeks leave to appeal.
- (j) Such further and other grounds as the lawyers may advise.

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

- (a) Appellant's Motion Record (complete record before the Honourable Mr. Justice McEwen on the Motion for Fresh Evidence);
- (b) The Reasons for Decision dated November 8, 2018;
- (c) Exhibit Book volumes 1-3 (in the companion appeal);
- (d) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

November 27, 2018

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



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Applicant

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

Court File No. CV-17-11760-00CL

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**NOTICE OF MOTION**

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File Number: 17987

RCP-E 4C (May 1, 2016)

**TAB 17**

**COURT OF APPEAL FOR ONTARIO**

BETWEEN:

BUSINESS DEVELOPMENT BANK OF CANADA

Applicant

and

ASTORIA ORGANIC MATTERS LTD. and ASTORIA ORGANIC MATTERS  
CANADA LP

Respondents

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

THE Appellant SusGlobal Energy Belleville Ltd. (the "Purchaser" or "SusGlobal")  
APPEALS to the Court of Appeal from the Order of the Honourable Mr. Justice McEwen heard  
September 21, 2018 and Reasons for Decision released on November 8, 2018 made at Toronto.

THE APPELLANT ASKS that

- a) The Order be set aside and an order be made to permit SusGlobal to file fresh evidence, being the 2017 Annual Environmental Report<sup>1</sup> ("2017 Annual Report") that was submitted to the Ministry of the Environment and Climate Change (the "MOECC") on March 29, 2018 as well as the material evidence related thereto.

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<sup>1</sup> The 2017 Annual Report is required by the regulations under the provincial *Environmental Protection Act*.

- b) An Order be made granting the Appellant leave to sue the Respondent for damages for gross negligence or in the alternative wilful misconduct for breach of the *Environmental Protection Act ("EPA")* and the Environmental Compliance Approval #0031-7UTRSS (the "ECA") and the April 13, 2017 Order appointing the receiver, paragraphs 10(i) and 16.
- c) An Order granting leave to appeal, if required.
- d) The costs of the motion to file fresh evidence before Justice McEwen and this Appeal.
- e) For such further and other relief as to this Honourable Court may seem just.

### Context

SusGlobal brought the original Motion<sup>2</sup> before the Honourable Justice Mr. McEwen to commence an action against the Court Appointed Receiver, BDO Canada Limited ("Receiver") of the debtors Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP ("Debtors").

- i. The material evidence on that original Motion for leave was the amount of biosolid waste that was continually increasingly stored in the Tipping Building during the receivership carriage of 23 weeks (April 13, 2017 to September 15, 2017) and in particular, whether the amount stored in the Tipping Building exceeded 150 metric tonnes MT (wet weight) on a continual basis during the receivership.
- ii. On March 29, 2018 SusGlobal submitted the 2017 Annual Report.

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<sup>2</sup> The original Motion for leave to sue was heard February 21, 27 and March 5 of 2018. The Decision was reserved and written reasons were released on May 17, 2018.

- iii. On June 28, 2018, the MOECC confirmed the 2017 Annual Report, including all metrics and calculations, and that the business of SusGlobal complied with the ECA.
- iv. The 2017 Annual Report included calculations that provided the actual annual figures of how much biosolid waste was processed in 2017 (the "2017 Calculations"). The 2017 Calculations clearly indicated that, based on the most conservative view of the conduct of the Receiver, that by September 15, 2017, the amount of biosolids in the Tipping Building was at least 1,492 MT (wet weight) which far exceeded the licensed approval maximum limit of 150 MT (wet weight) pursuant to the terms and conditions of the ECA and s.20.2 and s.20.3 of the EPA.
- v. The information in the 2017 Annual Report was reliable and based upon the same percentage of water figures, used for the calculation of the amounts set out in the 2016 Annual Environmental Report ("2016 Annual Report"), submitted by Mr. Hamilton the former CEO of the Debtors.

THE GROUNDS OF APPEAL are as follows:

1. The legal test to reopen a trial or motion on the basis of fresh evidence is whether 1.) First, would the evidence, if presented at trial, probably have changed the results; 2.) Second, could the evidence have been obtained before the trial by the exercise of reasonable diligence? and 3.) Whether the fresh evidence demonstrates that there was a miscarriage of justice?

2. In dismissing SusGlobal's motion to file fresh evidence of the 2017 Annual Report, the Learned Motion Judge ("Judge") erred in law, in failing to properly apply the third aspect of the test, as the Judge:
  - a. Erred by failing to find that there was a miscarriage of justice as a material witness, Mr. Hamilton the former CEO of the Debtors, materially changed his 'evidence' (in fact, three times) and as a result, the Judge erred in failing to find that there was at, the very least, conflicting evidence that supported a prima facie case against the Receiver.
    - i. Erred in not considering the fresh evidence contained in the 2017 Annual Report, that the evidence of Mr. Hamilton was not true and that he did not provide the Court, and its officer, the Receiver with the actual conversion percentages for the wet weight to dry weight conversion, that he was fully aware, of having compiled and used the numbers in early 2017 to complete the 2016 Annual Report for the MOECC.
    - ii. Erred in not finding that Mr. Hamilton deliberately did not provide this information to the Receiver. Mr. Hamilton's changed evidence was without any explanation. His 'wet to dry weight' conversions were deliberate, confusing and based on incorrect percentages of dry weight, percentages he knew they were wrong and that the correct percentages were available from the 2016 Annual Report.
    - iii. Erred by relying on Mr. Hamilton's hypothetical calculations that were not based on actual numbers on site, and the Receiver relied upon this

information and provided the same to the Court; the 2017 Annual Report demonstrated this information to be materially incorrect.

- b. Erred by failing to find that the 2017 Annual Report used accurate percentage by dry weight (of biosolids in the Grade A compost mixture) to calculate the amount of biosolids that were actually processed in Windrows during that year. Based on the calculations the information showed that 373 metric tonnes were never processed (by dry weight) which equals 1,492 metric tonnes by wet weight as of the closing date September 15, 2017. This far exceeded the maximum of 150 MT (wet weight) permissible under EPA/ECA. This evidence further demonstrated and confirmed that the amount in the Tipping Building continually increased over the receivership and therefore the amount stored was far in excess of the maximum amount permitted by regulation under the EPA and ECA
- c. Erred by discrediting the 2017 Annual Report which demonstrated a *prima facie* case of breach of the Court Order (appointing the Receiver) at paragraph 10 (i) and paragraph 16 and breach of the EPA/ECA by storing on a continually basis in excess of 150 MT (wet weight) in the Tipping Building throughout the Receivership, which had to be cleaned up by SusGlobal (which in turn lost contracts and incurred increased costs for a number of months until the site was within the regulation requirements).
  - i. Erred by failing to take into consideration that SusGlobal agreed to pay almost \$8 million for a business that was Court Ordered to be compliant with the EPA, if the Receiver chose to operate the business. The Receiver

did chose to operate the business and as a result of the 2017 Annual Report, it was clear that the business was not run by the Receiver in a manner that was compliant with the EPA (when in fact, the Receiver advised the Court that it operated the business in compliance with the MOECC requirements, which was not correct) and therefore contrary to the Agreement of Purchase and Sale that resulted in the purchase by SusGlobal.

- d. Erred in law by relying on section 3.03 (the "As is, Where is") clause of the Agreement of Purchase and Sale to absolve BDO of any liability.
  - i. Erred in law by not taking into account that the Court Appointed Receiver was required to comply with the Order appointing that Receiver and comply with the applicable environmental legislation (for the business that the Receiver chose to operate), and in particular with the EPA and ECA and the Order para 10 (i) and para 16. . The interpretation and reliance of the Judge for the 'as is, where is' clause would be commercially absurd, as it would permit any Receiver, during the receivership, (ie prior to the closing) to breach the Order and breach the EPA legislation and regulations, and then require the purchaser to pay for cleanup of the excess waste, and suffer losses, as a result of the Receiver's misconduct.
- e. Erred in law by characterizing the 2017 Annual Report as the "*same type*" of evidence when in fact it provides the most accurate and reliable percentages and calculations, for conversion of wet weight to dry weight for the whole year of 2017;



- f. Failed to take into account that neither the Receiver nor Mr. Hamilton provided any evidence on the motion to reopen to dispute the 2017 Annual Report or the 2017 Calculations.
  - g. Failed to consider the factors in the jurisprudence that the primary objective on a motion for re-opening on fresh evidence is to avoid a miscarriage of justice.
  - h. Failed to consider the jurisprudence that the reasonable diligence requirement of the two-prong test can be relaxed in exceptional circumstance to avoid a miscarriage of justice.
  - i. Erred in dismissing the motion and the exclusion of the fresh evidence being the 2017 Annual Report which resulted in the miscarriage of justice.
3. In the alternative if s 193 of the *Bankruptcy and Insolvency Act* applies, then
- a. The appeal is governed by s 193(c),
  - b. In the alternative s 193(e) applies and this is a matter of public importance as the obligations and liability of a receiver that breaches a court order appointing the receiver and that acts in violation of the EPA and ECA are directly in issue in this appeal. and the effect of an "As is Where is" clause on a sale by a receiver in such circumstances and the principles involved require a review by the Court of Appeal.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

- (a) Section 101 of the *Courts of Justice Act* and Section 243 *Bankruptcy and Insolvency Act*.

- (b) The Order appealed from is final.
- (c) Leave to appeal is not required.
- (d) Section 6 of the *Courts of Justice Act* or in the alternative, Section 193(c) of the *Bankruptcy and Insolvency Act* or in the alternative, if section 193(e) of the *Bankruptcy and Insolvency Act* applies, then the Appellant seeks leave to appeal.

November 19, 2018

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

BUSINESS DEVELOPMENT BANK OF CANADA  
Applicant

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

Court File No. CV-17-11760-00CL

**COURT OF APPEAL**  
PROCEEDING COMMENCED AT  
TORONTO

**NOTICE OF APPEAL**

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Lawyers for the

File Number: 17987

RCP-E 4C (May 1, 2016)

**TAB 18**

**CITATION:** Business Development Bank of Canada v. Astoria Organic Matters Ltd. and  
Astoria Organic Matters Canada LP, 2018 ONSC 6062  
**COURT FILE NO.:** CV-17-11760-00CL  
**DATE:** 20181108

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
BUSINESS DEVELOPMENT BANK OF CANADA	)	<i>Miranda Spence and Kyle Plunkett</i> , for the
	)	Applicants Business Development Bank of
	)	Canada
Applicants	)	
	)	
- and -	)	
	)	
ASTORIA ORGANIC MATTERS LTD. and ASTORIA ORGANIC MATTERS CANADA LP	)	<i>Melvyn L. Solomon</i> , for the Respondents for
	)	SusGlobal Energy Belleville Ltd.
	)	
Respondents	)	
	)	
	)	<b>HEARD:</b> September 21, 2018

**REASONS FOR DECISION**

**MCEWEN J.**

[1] SusGlobal Energy Belleville Ltd. ("SusGlobal") brings this motion to reopen a prior motion heard by me in which SusGlobal sought leave to sue the receiver ("BDO") for damages. SusGlobal now seeks to file fresh evidence, being the 2017 Annual Environmental Report ("2017 Annual Report") that it submitted to the Ministry of the Environment and Climate Change (the "MOECC") on March 29, 2018 as well as the material evidence related thereto.

[2] For the reasons that follow I dismiss this motion.

[3] First, SusGlobal has not met the test to introduce fresh evidence. The purported fresh evidence that it relies upon consists of the 2017 Annual Report and appendices. SusGlobal concedes that it had all of the underlying documentation that it now relies upon as fresh evidence available at the hearing of the original motion. SusGlobal simply submits, in this regard, that the

CEO of SusGlobal, Gerald Hamaliuk, did not turn his mind to it since he was busy with other tasks.

[4] Second, SusGlobal's reliance on any MOECC correspondence is misguided and provides no assistance to SusGlobal. The MOECC correspondence simply confirms receipt of the 2017 Annual Report without substantive comment. As before (see paragraph 23 of my Reasons for Decision), the MOECC took no investigative steps.

[5] Third, the purported fresh evidence upon which SusGlobal seeks to rely would not have changed the result in the original motion for the following reasons:

- The purported fresh evidence does not remedy one of the primary criticisms I had, as set out in paragraph 19 of my Reasons for Decision, concerning the lack of any eye-witness evidence from SusGlobal's own employees or from any other sources who attended at this site before and after closing, including personnel from the MOECC and Mr. Ben Hamilton, the former operations manager of Astoria.
- The purported fresh evidence is also of the same type that I also rejected in paragraph 20 of my Reasons for Decision. It is another effort by Mr. Hamaliuk to calculate a number based on a convoluted document review, in an attempt to establish a *prima facie* case of willful misconduct and/or gross negligence. As I noted in paragraph 20, SusGlobal's case is not helped by the fact that in these proceedings it has provided various estimates of the organic waste. The newest number of 1,492 MT is the fourth such estimate.
- As I pointed out in paragraph 70 of my Reasons for Decision, even if I accepted SusGlobal's evidence, the amount of excess organic waste would have been in plain view of SusGlobal. BDO made the facility available to SusGlobal and its representatives toured the facility on numerous occasions. There is no evidence that there were any hidden or latent defects or any credible or reliable evidence that BDO knowingly concealed information. As a result, section 3.03 of the APA (the "As Is, Where Is" clause) absolves BDO of any liability.
- Last, as I set out in paragraph 75 of my Reasons for Decision, even in the absence of the provisions of the APA, and if I were to conclude that there was 1,300 - 2,100 MT of organic waste, I still do not accept this constitutes *prima facie* evidence of willful misconduct/gross negligence.

[6] One submission of SusGlobal's that I wish to highlight is that it seeks to excuse the fact that it had all of the relevant evidence in its possession prior to the hearing of the original motion on the basis that it would constitute a miscarriage of justice if I were not to allow the evidence to be introduced at this time. In this regard SusGlobal relies upon the decision of the Ontario Court of Appeal in *Degroote v. Canadian Imperial Bank of Commerce* (1999), 121 O.A.C. 327.

[7] Based on the above reasoning, I do not believe I should exercise my discretion to relax the reasonable diligence rule in this case. I do not agree with SusGlobal that the failure to do so would result in a miscarriage of justice where, even if I had admitted the new evidence, I would still have dismissed SusGlobal's motion for the reasons as indicated above.

[8] I should also note that I do not accept SusGlobal's submission that the purported new evidence establishes that Mr. Alan Hamilton misled SusGlobal, BDO, and the court. Again, for the reasons above, the evidence that SusGlobal now purports to rely upon does not lead to that conclusion given SusGlobal's multiple estimates of excess organic waste and its failure to obtain firsthand evidence.

[9] As such, SusGlobal has not met the test established in the case law to adduce further evidence after a motion for summary judgment is determined: see *R & G Draper Farms (Keswick) Ltd. v. Nature's Finest*, 2015 ONSC 7035. In my view, this is simply a situation where SusGlobal was unsuccessful in the original motion and thereafter has performed additional calculations to see if it could come up with a better theory of a case based on the information already known to it. In all of these circumstances it would be inappropriate to allow the motion.

#### Disposition

[10] For the reasons above the motion is dismissed.

[11] With respect to the issue of costs BDO seeks full indemnity costs on the basis that the motion had no reasonable prospect of success and it is essentially a delaying tactic.

[12] I am of the view that this is one of those rare cases in which costs above a partial indemnity scale ought to be awarded. In light of SusGlobal's own admission that it had all of the available information to make the calculations it now relies upon, in advance of the original motion and my Reasons for Decision, there was not a reasonable prospect of this motion succeeding.

[13] I would therefore award costs on a full indemnity basis in the amount of \$30,156.54 as claimed. The amount sought is reasonable. Having previously awarded costs to BDO on a partial indemnity basis in the original motion I see no reason why it should not receive full indemnity and not have to bear any of the ongoing costs of this second motion.

  
\_\_\_\_\_  
McEwen J.

**CITATION:** Business Development Bank of Canada v. Astoria Organic Matters Ltd. and  
Astoria Organic Matters Canada LP, 2018 ONSC 6062  
**COURT FILE NO.:** CV-17-11760-00CL  
**DATE:** 20181108

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

BUSINESS DEVELOPMENT BANK OF CANADA

Applicants

– and –

ASTORIA ORGANIC MATTERS LTD. and  
ASTORIA ORGANIC MATTERS CANADA LP

Respondents

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**REASONS FOR DECISION**

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**McEwen J.**

**Released:** November 8, 2018



BUSINESS DEVELOPMENT BANK OF CANADA  
Applicant

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

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

**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT  
TORONTO

**MOTION RECORD  
VOLUME 2**

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File Number: 17987

RCP-E 4C (May 1, 2016)