

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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 SUBMITTED BY BDO CANADA LIMITED,
in its capacity as Court-appointed receiver of Astoria Organic Matters Ltd.
and Astoria Organic Matters Canada LP**

(motion returnable on December 7, 2018)

Date: December 5, 2018

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**BRIEF OF AUTHORITIES OF BDO CANADA LIMITED,
in its capacity as Court-appointed receiver of Astoria Organic Matters Ltd.
and Astoria Organic Matters Canada LP
(motion returnable on December 7, 2018)**

PART I - OVERVIEW

1. On May 17, 2018, following a three-day hearing, the Honourable Justice McEwen released reasons for decision (the “**Reasons for Decision**”) dismissing a motion brought by the Appellant, SusGlobal Energy Belleville Ltd. (“**SusGlobal Belleville**”), for leave to file a claim against BDO Canada Limited (“**BDO**”), in its capacity as Court-appointed receiver (in such capacity, the “**Receiver**”) of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP (together, “**Astoria**” or the “**Debtors**”), for damages for alleged gross negligence on the part of the Receiver (the “**Original Motion**”). His Honour concluded that the evidence did not disclose a *prima facie* case that the Receiver’s conduct demonstrated a marked departure from the standards to which reasonable and competent people in such circumstances would have acted or conducted themselves.

2. The Reasons for Decision are now the subject of the Notice of Appeal dated June 15, 2018, as amended on June 18, 2018, filed with this Court by SusGlobal Belleville.

3. The Receiver submits that the Notice of Appeal is out of time, having been initiated 29 days after the issuance of the Reasons for Decision. This was well beyond the ten-day appeal period prescribed by Rule 31 of the *Bankruptcy and Insolvency General Rules* (the “**BIA General Rules**”). The Receiver submits that any appeal from the Reasons for Decision must follow the procedure prescribed by the *Bankruptcy and Insolvency Act* (“**BIA**”) and the BIA General Rules, and not the procedure established pursuant to s. 6(1) of the *Courts of Justice Act* (“**CJA**”), as alleged by SusGlobal Belleville.

4. As an alternative position, SusGlobal Belleville argues that it is entitled to an extension of time for its appeal, and relies on subsection 193(c) of the BIA as the basis for asserting that it may

appeal the Reasons for Decision as a matter of right. The Receiver submits that any appeal of the Reasons for Decision falls outside the scope of subsection 193(c) of the BIA, and that SusGlobal Belleville has no automatic right to appeal. Accordingly, SusGlobal Belleville is required to obtain leave pursuant to subsection 193(e) of the BIA in order to pursue its appeal. The Receiver opposes SusGlobal Belleville's request for an extension of time, and submits that this is not a case in which leave to appeal ought to be granted.

PART I - FACTS

Procedural History

5. BDO was appointed as the Receiver pursuant to the Order of the Honourable Justice Hainey dated April 13, 2017 (the "**Appointment Order**"), pursuant to s. 243 of the BIA and s. 101 of the CJA. Prior to the issuance of the Appointment Order, Astoria operated an organic recycling facility and waste transfer station. The Astoria operations involved the mixing and processing of various organic waste (e.g. food, paper sludge, bio solids, manure and liquid organic) with leaf and yard waste that was received at the site by third parties, into clear compost for the agricultural and landscape markets. Following its appointment, the Receiver continued Astoria's business activities in the ordinary course, with the same staff in place.

Fourth Report of the Receiver dated December 8, 2017 [Fourth Report] at para 1.1.1; Exhibit A to Affidavit of Gerald Hamaliuk sworn November 29, 2017 ("Hamaliuk Affidavit"), Exhibit Book [EB] Vol 1 of 3 at Tab 1A at 17-34.

***Bankruptcy and Insolvency Act*, RSC, 1985, c B-3, s 243; *Courts of Justice Act*, RSO 1990, c C43, s 101.**

6. On July 27, 2017, the Receiver entered into an Asset Purchase Agreement (the "**APA**") with *inter alios*, SusGlobal Belleville, pursuant to which SusGlobal Belleville agreed to acquire certain of Astoria's assets (the "**Sales Transaction**"). The Sales Transaction closed on September 15, 2017 (the "**Closing**").

Fourth Report at para 1.1.5-1.1.6, Appendix B; Exhibit C to Hamaliuk Affidavit, EB Vol 1 of 3 at Tab 1B at 40-119.

7. In a letter to the Receiver dated October 30, 2017 (the “**October 30 Letter**”), SusGlobal Belleville alleged that, prior to the Closing, the Receiver was grossly negligent in its operation of Astoria in that (a) the Receiver allowed the volume of raw organic waste stored in the Tipping Building, the enclosed building located at Astoria’s premises, which is used to receive bio-solids, to exceed the permitted allowances prescribed by the environmental compliance approvals (“**ECAs**”) maintained by the Ontario Ministry of Environment and Climate Change (the “**MOECC**”) (the “**Alleged Excess Volume**”); and (b) the Receiver withheld information from it relating to the results of an annual odour sampling program conducted in the Tipping Building (the “**Odour Sampling**” and, together with the Alleged Excess Volume, the “**SusGlobal Claim**”).

Fourth Report at paras 1.2.5, 3.0.1, Appendix C; Exhibit U to Hamaliuk Affidavit, EB Vol 1 of 3 at Tab 1U at 310-311.

8. The Receiver investigated the SusGlobal Claim and reached the conclusion that the allegations had no merit. In a letter dated November 13, 2017, the Receiver advised SusGlobal Belleville that it disputed the allegations made in the October 30 Letter.

Fourth Report at paras 3.0.2 and 3.0.3, Appendix D; Exhibit B to Hamaliuk Affidavit, EB Vol 1 of 3 at Tab 1B at 36-38.

9. SusGlobal Belleville initiated the Original Motion in which it formally asserted the SusGlobal Claim by way of a notice of motion dated December 1, 2017. Each of SusGlobal Belleville and the Receiver filed numerous affidavits in support of their respective positions, including evidence filed mid-hearing, all of which was considered by the Court.

10. The Original Motion was heard on February 21, 27, and March 5, 2018 (the “**Hearing**”). The decision was reserved and the written reasons were released on May 17, 2018. Justice McEwen found that:

- (a) SusGlobal Belleville failed to produce credible and reliable evidence to support its claim of excess organic waste in the Tipping Building. In this regard:
 - (i) SusGlobal Belleville failed to produce any eye-witness evidence from its own employees, notwithstanding it had ample access to the facility, including the Tipping Building, prior to the Closing;
 - (ii) SusGlobal Belleville failed to provide any credible and reliable evidence from other sources who attended at the site before and after the Closing, including personnel from the MOECC, the former operations manager of Astoria, and other employees, operators or consultants;
 - (iii) when MOECC officials were provided with information that the Tipping Building *may* contain approximately 1,300 MT of organic waste, they took no steps to investigate; and
 - (iv) no type of charges or sanctions were contemplated or leveled against the Receiver during the time it was operating the facility, or thereafter;
- (b) section 3.03 of the APA (i.e. the “As Is, Where Is” clause) absolved the Receiver of any liability in any event; and

- (c) even if SusGlobal Belleville had been able to establish that the amount of organic waste in the Tipping Building was in the range of 1,300 to 2,100 metric tonnes, this would not be sufficient to constitute *prima facie* evidence of willful misconduct or, alternatively, gross negligence, on the part of the Receiver.

Reasons for Decision at paras 19, 23, 71, 75, Receiver’s Brief of Authorities [“RBOA”] at Tab 1.

11. Accordingly, Justice McEwen dismissed the Original Motion, with costs payable to the Receiver. The Reasons for Decision were issued on May 17, 2018.

Reasons for Decision, RBOA at Tab 1.

12. On June 15, 2018, SusGlobal Belleville initiated its appeal of the Reasons for Decision by filing the Notice of Appeal and a Certificate Respecting Evidence. On June 18, 2018, SusGlobal Belleville filed a Fresh As Amended Notice of Appeal (as amended, the “**Notice of Appeal**”).

Sixth Supplement to the Fourth Report of the Receiver dated December 3, 2018 [Sixth Supplement] at para 1.1.1, Responding Motion Record [“RMR”] at Tab 1 at 2.

13. On July 5, 2018, SusGlobal Belleville initiated a motion to reopen the Original Motion and file fresh evidence (the “**Fresh Evidence Motion**”). The purported fresh evidence upon which SusGlobal Belleville relied consisted of an undated report prepared by SusGlobal Belleville (the “**2017 Report**”), which SusGlobal Belleville asserts it filed with the MOECC on March 29, 2018. The purported fresh evidence also included an email from a representative of the MOECC dated June 25, 2018, acknowledging receipt of the 2017 Report.

Sixth Supplement at para 1.0.2, RMR at Tab 1 at 2.

14. Justice McEwen dismissed the Fresh Evidence Motion, with costs payable to the Receiver. The reasons for the dismissal of the Fresh Evidence Motion were issued November 8, 2018. Justice McEwen found that (1) the underlying documentation relied on as fresh evidence was available to SusGlobal Belleville prior to the hearing of the Original Motion; and (2) the purported fresh evidence would not have changed the result in the Original Motion.

Sixth Supplement at para 1.0.3, RMR at Tab 1 at 2.

The Hazout Affidavit

15. On this motion, SusGlobal Belleville has filed the affidavit of Marc M. Hazout affirmed November 14, 2018 (the “**Hazout Affidavit**”). Mr. Hazout affirms that he is the director, chairman and president of SusGlobal Belleville. He did not affirm or swear an affidavit in support of the Original Motion or the Fresh Evidence Motion.

Hazout Affidavit at para 1, Appellant’s Motion Record [AMR] at Tab 2 at 20-21.

16. Paragraphs 3 through 23 of the Hazout Affidavit purport to re-introduce or re-characterize evidence that was previously adduced by other affiants on the Original Motion. The Receiver submits that any such evidence is inadmissible on this motion, and ought not be considered by the Court. Only paragraphs 24 through 37 of the Hazout Affidavit, which speak to SusGlobal Belleville’s delay in initiating its appeal, are relevant for the purpose of this motion.

Hazout Affidavit, at paras 3-23, AMR at Tab 2 at 21-25.

PART III — ISSUES

17. The following issues are raised on this motion:

- (a) whether the appeal is required to proceed by way of the procedure established by section 193 of the BIA and the BIA General Rules;

- (b) if so, whether an extension of time to serve the Notice of Appeal should be granted;
- (c) if an extension of time is warranted, if the appeal may proceed as of right pursuant to subsection 193(c) of the BIA;
- (d) if the appeal may not proceed as of right pursuant to subsection 193(c) of the BIA, whether leave ought to be granted pursuant to subsection 193(e) of the BIA.

PART IV — LAW AND ARGUMENT

A. The Appeal Must Proceed Pursuant to s. 193 of the BIA

18. Where federal legislation occupies the field by providing a procedure for an appeal, those provisions prevail over any provincial legislation that provides for an appeal. Accordingly, an appeal from a decision or order made in proceedings instituted under the BIA is governed by the BIA and the BIA General Rules, and not by the provincial Rules of Practice.

Donald JM Brown, QC, Civil Appeals, loose-leaf (April 2014) (Toronto: Carswell, 2017) vol 1 at para. 2:1120, RBOA at Tab 2; LW Houlden, GB Morawetz and Janis Sarra, Bankruptcy and Insolvency Law of Canada, loose-leaf (2009 - Rel. 11), 4th ed (Toronto: Carswell, 2017) vol 3 at 7-106, RBOA at Tab 3; Ontario Wealth Management Corp v Sica Masonry and General Contracting Ltd., 2014 ONCA 500 (Ont CA) at para 36 [Sica], RBOA at Tab 4; Canada (Superintendent of Bankruptcy) v 407 ETR Concession Co, 2012 ONCA 569 (Ont CA) at paras 19-20, RBOA at Tab 5.

19. SusGlobal Belleville argues that, because the Receiver was appointed by way of an application brought pursuant to both section 243 of the BIA, and section 101 of the CJA¹, it is entitled to choose whether to initiate its appeal either under the appeal route prescribed by section 193 of the BIA and Rule 31 of the BIA General Rules, or by way of section 6 of the CJA. SusGlobal Belleville argues that the fact that the Appointment Order was also made pursuant to

¹ The model template receivership order established by the Commercial List Users' Committee incorporates both section 101 of the CJA and section 243 of the BIA. Bennett, Frank, Bennett on Bankruptcy, 2018, 20th Ed, Carswell p. 741, Appellants Brief of Authorities ("ABA") at Tab 9.

section 243 of the BIA does not “trump” the jurisdiction of the CJA applying to SusGlobal Belleville’s appeal. SusGlobal Belleville cites no authority in support of this position.

SusGlobal Belleville Factum at para 77.

20. The Supreme Court of Canada outlined the doctrine of federal paramountcy in the context of discrepancies between the BIA and provincial laws in *Alberta (Attorney General) v Moloney*. The trend in the jurisprudence is to allow overlaps between federal and provincial powers as long as each level of government properly pursues objectives that are within its jurisdiction. However, where a provincial law and a federal law come into conflict, the federal law will prevail.

Alberta (Attorney General) v Moloney, 2015 SCC 51 (SCC) at paras 15 and 16 [*Moloney*], RBOA at Tab 6.

21. A conflict arises where:

- (a) there is an operational conflict because it is impossible to comply with both laws;
or
- (b) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment.

Moloney at paras 17 and 18, RBOA at Tab 6.

22. Express conflict will exist unless both laws “*can operate side by side without conflict*”, or if both laws “*can apply concurrently, and citizens can comply with either of them without violating the other.*”

Moloney at para 19, RBOA at Tab 6.

23. Overlapping legislation does not necessarily lead to a conflict. For example, a more restrictive provincial law will not be deemed to conflict with a less restrictive federal law. A more restrictive federal law will conflict with a less restrictive provincial law, however, because the federal law must prevail.

Moloney at para 26, RBOA at Tab 6.

24. Section 193 of the BIA provides:

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.

RSC, 1985, c B-3, s 193.

25. Pursuant to Rule 31 of the BIA General Rules, an appeal pursuant to section 193 of the BIA must be initiated within ten days of the decision appealed from.

Bankruptcy and Insolvency General Rules, CRC, c 368

26. Subsection 6(1)(b) of the CJA provides :

An appeal lies to the Court of Appeal from,

- (b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;

RSO 1990, c C43, s 6(1)(b).

27. Pursuant to Rule 61.04(1) of the *Rules of Civil Procedure* (the “*Rules*”), an appeal of a final order must be initiated within 30 days after the making of the order appealed from.

RRO 1990, Reg 194, s 61.04(1).

28. The less restrictive regime established by the CJA and the Rules will necessarily lead to results where an appeal that is properly constituted thereunder, would be improperly constituted under the BIA and the BIA General Rules. The two regimes accordingly have an operational conflict. In accordance with the doctrine of paramountcy, the federal legislation must prevail to the extent of the conflict.

29. The Receiver accordingly submits that SusGlobal Belleville's appeal must proceed by way of the procedure established pursuant to section 193 of the BIA and Rule 31(1) of the BIA General Rules.

B. No Extension of Time Should Be Granted

30. SusGlobal Belleville's appeal was initiated 29 days after the issuance of the Reasons for Decision, well beyond the ten-day appeal period prescribed by Rule 31(1) of the BIA General Rules.

31. In determining whether to grant an order extending the time to serve a notice of appeal, this Court must be informed by four factors:

- (a) whether the applicant had a *bona fide* intention to appeal before the expiration of the appeal period;
- (b) any explanation for the delay in filing;
- (c) any prejudice to the responding party; and
- (d) the merits of the proposed appeal.

32. This Court has also noted that,

While appellate courts have considered a number of different factors in determining whether to grant leave to extend the time for appealing, the governing principle is simply whether the “justice of the case” requires that an extension be given.

Carter v Ontario (Minister of Revenue), 2010 ONCA 566 (Ont CA) at para 5 [*Carter*], RBOA at Tab 7.

33. Mr. Hazout affirms that SusGlobal Belleville intended to appeal the Reasons for Decision, but was unable to initiate its appeal in time due to internal delays in obtaining approval from its board of directors to do so.

Hazout Affidavit at paras 27-35, AMR at Tab 2 at 25-27.

34. By Mr. Hazout’s own admission, he alone was unable to instruct counsel to pursue an appeal; he required the approval of SusGlobal Belleville’s board of directors. Accordingly, his personal intention to appeal is not the relevant consideration; rather, the person or persons who are empowered to decide whether or not to appeal must have formed the requisite intent. Notably, Mr. Hazout’s email to the board of directors dated June 5, 2018, does not recommend proceeding with an appeal, but simply advises that the board’s consent would be required should they wish to proceed with an appeal. Mr. Hazout affirms that the board of directors did not sign a resolution approving the appeal until June 12, 2018.

Hazout Affidavit at paras 27, 35, Exhibits B, E, AMR at Tab 2 at 25, 27, Tabs 2B, 2E; Carter at para 10, RBOA at Tab 7.

35. In addition, SusGlobal Belleville’s failure to advise the Receiver of its purported intention to appeal militates against this Court finding that SusGlobal Belleville displayed an intention to appeal before the expiration of the appeal period.

Sixth Supplement to the Fourth Report para 1.2.1, RMR at Tab 1 at 3.

36. Further, this Court has confirmed that although bureaucratic or procedural factors may be the cause of a delay in initiating an appeal, such factors may not constitute a satisfactory reason for extending the time period. This analysis ought to apply in this case.

Carter at para 14, RBOA at Tab 7.

37. The Receiver has confirmed that the final disposition of SusGlobal Belleville's effort to sue the Receiver is the last remaining step before it may complete its mandate. Accordingly, the longer the disposition of this issue is delayed, the longer the Receiver must remain involved in this proceeding.

Sixth Supplement to the Fourth Report at para 1.3.1, RMR at Tab 1 at 3.

38. Finally, as discussed in paragraphs 58 to 62 below, the underlying appeal has no merit. The Receiver accordingly requests that this Court deny SusGlobal Belleville's request for an extension of time.

C. There is No Right of Appeal under Section 193(c) of the BIA

39. An automatic right of appeal is available in the limited circumstances prescribed in subsections 193(a) through (d) of the BIA. These categories have been narrowly interpreted. In all other circumstances, leave to appeal is required pursuant to subsection 193(e).

RSC, 1985, c B-3, s 193.

40. The narrow interpretation of the right of appeal under section 193 of the BIA is intended to ensure efficient and expeditious administration in bankruptcy proceedings, which is a primary objective of bankruptcy legislation. The narrow construal of section 193 is necessary to achieve regulatory harmony with section 13 of the *Companies Creditors Arrangement Act*, which imposes a leave requirement for all appeals from orders made thereunder.

Downing Street Financial Inc. v. Harmony Village-Sheppard Inc., 2017 ONCA 611 (Ont CA) at para 20 [*Downing*], RBOA at Tab 8; 2403177 *Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225 (Ont CA) at paras 47 and 50 [*Bending Lake*], RBOA at Tab 9.

41. As noted by Brown J.A. in *Bending Lake*, the inclusion of the leave to appeal right under subsection 193(e) in 1949, removed the need for a broad interpretive approach to the enumerated rights of appeal under section 193.

Bending Lake at para 49, RBOA at Tab 9.

42. SusGlobal Belleville asserts that if the BIA appeal route is applicable, then it relies on subsection 193(c) in asserting that it has an automatic right of appeal. That section provides that the appeal may proceed if the property involved in the appeal exceeds ten thousand dollars in value.

Notice of Appeal, Hazout Affidavit at Exhibit F, AMR at Tab 2F at 60-69.

43. In *Bending Lake*, Brown J.A. summarized the jurisprudence relating to subsection 193(c) and identified three orders or decisions from which subsection 193(c) would not grant a right of appeal: (i) orders or decisions that are procedural in nature; (ii) orders or decisions that do not bring into play the value of the debtor's property; and (iii) orders or decisions that do not result in a loss.

Downing at para 22, RBOA at Tab 8, citing *Bending Lake* at para 53, RBOA at Tab 9.

44. In *Crate Marine Sales*, decided a few weeks before *Bending Lake*, Hourigan J.A. noted the following additional principles for the interpretation of subsection 193(c):

- (a) the subsection must be clearly applicable; i.e., it must be narrowly construed; and

- (b) the appeal must *directly* involve property exceeding \$10,000 in value (emphasis in original).

***Crate Marine Sales Ltd., Re.*, 2016 ONCA 140 [*Crate Marine Sales*], at para 9, Appellant's Brief of Authorities ("ABA") at Tab 11.**

45. The Reasons for Decision are procedural in nature, as they refused to grant SusGlobal Belleville leave to sue for damages. Justice McEwen also did not make any determination as to the value of the Debtors' property.

46. SusGlobal Belleville argues that it is a stranger to the receivership which has suffered a loss greater than \$10,000 as a result of the Reasons for Decision. Having regard for the above principles, the inquiry must therefore focus on whether the outcome of the Original Motion itself resulted in a loss.

SusGlobal Belleville Factum at para 84.

47. For a decision under appeal to result in a loss, "*the order in question must contain some element of a final determination of the economic interests of a claimant in the debtor*", and the Court must be satisfied that there is "*some basis in the evidentiary record*" to support the assertion that the decision resulted in a loss. On the Original Motion, SusGlobal Belleville was not seeking to have the Court determine its actual alleged losses, but rather was simply seeking the right to pursue the Receiver for such alleged losses.

***Downing* at paras 23, 26, 27, RBOA at Tab 8, citing *Bending Lake* at para 6 and 64, RBOA at Tab 9.**

48. In *Crate Marine Sales Ltd.*, this Court made the following comments in addressing whether the property involved in the appeal exceeded \$10,000 in value: "*if the appeal is successful and the receiver is liable for occupation rent, then the amount in question is final without further recourse*

to court action.” Having so concluded, the Court permitted the appeal to proceed as of right pursuant to subsection 193(c)

Crate Marine Sales at para 9, ABA at Tab 11.

49. This situation may be contrasted with the present appeal. Should SusGlobal Belleville be successful on its appeal, such that the Reasons for Decision are reversed, all it will have gained is the right to sue the Receiver for damages in the amount of \$755,400. Further recourse to the Court will be required to determine whether the Receiver is in fact liable to SusGlobal Belleville, and in what amount. Accordingly, SusGlobal Belleville’s appeal does not directly involve property exceeding \$10,000 in value.

50. For the foregoing reasons, the Reasons for Decision do not fall within subsection 193(c), and leave to appeal is required under subsection 193(e).

D. Leave Should Not be Granted under Subsection 193(e)

51. The relevant considerations on an application for leave to appeal under subsection 193(e) were outlined by Blair J.A. in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, as follows:

Beginning with the overriding proposition that the exercise of granting leave to appeal under Section 193(e) is discretionary and must be exercised in a flexible and contextual way, the following are the prevailing considerations in my view. The court will look to whether the proposed appeal,

- (a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;
- (b) is *prima facie* meritorious, and

(c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.

Business Development Bank of Canada v Pine Tree, 2013 ONCA 282 (Ont CA) at para 29 [*Pine Tree*], RBOA at Tab 10.

52. Blair J.A. also noted that appellate judges owe substantial deference to the discretionary decisions made by commercial court judges who are attuned to the to the dynamics of insolvency and restructuring proceedings.

Pine Tree at para 33, RBOA at Tab 10.

(a) No Issues of General Importance

53. The Reasons for Decision do not concern matters of general importance to the practice in bankruptcy or insolvency matters or to the administration of justice as a whole. Rather, the Reasons for Decision represent a fact-specific analysis of whether or not SusGlobal Belleville could establish a *prima facie* case that the Receiver had engaged in gross negligence or willful misconduct. The Reasons for Decision make very clear that the McEwen J.'s conclusions were based on SusGlobal Belleville's "*failure to produce credible and reliable evidence to support its claim of excess organic waste in the tipping building.*"

Reasons for Decision at para 19, RBOA at Tab 1.

54. SusGlobal Belleville suggests that the proposed appeal raises an important jurisdictional question as to what appeal period is applicable when Orders of the Court are made jointly under both the BIA and the CJA. That question will be addressed on this motion, with no need for any further appeal, and is therefore not a factor in favour of granting leave.

SusGlobal Belleville Factum at para 112.

55. SusGlobal Belleville also suggests that the interpretation of the “As Is, Where Is” clause in the Reasons for Decision is a matter of significance to the practice of law relating to receiverships.

SusGlobal Belleville Factum at para 111.

56. The Reasons for Decision cannot to be taken as a comment on “As Is, Where Is” clauses generally. McEwen J. specifically noted that section 3.03 of the APA (i.e. the “As Is, Where Is” clause) absolved the Receiver of any liability because of the specific facts of the case, namely: that the amount of alleged excess waste complained of was in plain view; the Receiver made the facility available to SusGlobal Belleville, whose representatives toured the facility on numerous occasions; and SusGlobal Belleville had full access to, and did review, relevant data. In these circumstances, McEwen J. found it appropriate to rely on the “As Is, Where Is” clause.²

Reasons for Decision at paras 70, 71, RBOA at Tab 1; Fourth Report at Appendix B, EB at Vol. 2 of 3, Tab 2B, pp. 386-387.

57. There is therefore no issue of general importance engaged on this appeal.

(b) *The Proposed Appeal is Not Meritorious*

58. A proposed appeal will be *prima facie* meritorious where the decision is contrary to law, amounts to an abuse of judicial power, or involves an obvious error causing prejudice for which there is no remedy. SusGlobal Belleville’s proposed appeal does not satisfy any of these criteria.

***Pine Tree* at para 31, RBOA at Tab 10.**

59. The issue before the Court on the Original Motion was whether SusGlobal Belleville ought to be granted leave to sue the Receiver for gross negligence and willful misconduct. SusGlobal Belleville asserted that, through the course of managing Astoria’s operations between the date of

² The “As Is, Where Is” clause is reproduced in full at Schedule C to this factum.

its appointment and the closing of the sale to SusGlobal Belleville, the Receiver had let excess organic waste build up in the Tipping Building, in breach of the applicable regulations. SusGlobal Belleville asserted that such alleged conduct by the Receiver amounted to operating the site “illegally”, and therefore constituted gross negligence and/or willful misconduct.

60. On a motion for leave to sue a Receiver, the applicable test requires the moving party adduce evidence that establishes a *prima facie* case that the Receiver has demonstrated a very marked departure from the standards by which responsible and competent people in such circumstances would have acted or conducted themselves, or in a manner such that it knew what it was doing was wrong or was recklessly indifferent in its conduct

GMAC Commercial Credit Corp – Canada v TCT Logistics Inc, 2006 SCC 35 (SCC) [GMAC] at para. 59, RBOA at Tab 11.

61. Justice McEwen concluded that SusGlobal Belleville had not met its burden as set out above. This conclusion was eminently reasonable, having regard for the following facts which are established by the record, and are not in dispute:

- (a) the applicable regulations provide that no more than 150 metric tonnes (“MT”) of organic waste may be stored in the Tipping Building at any given time. However, SusGlobal Belleville conceded in argument that it was acceptable to have amounts in excess of 150 MT, and up to 500 MT, of organic waste in the Tipping Building at one time;

Reasons for Decision at para 21, RBOA at Tab 1.

- (b) SusGlobal Belleville did not adduce any direct evidence of the volume of organic waste in the Tipping Building as at the closing;

- (c) SusGlobal Belleville's efforts to indirectly estimate the volume of organic waste in the Tipping Building as at the closing date (i.e. by looking at photographs, and by making calculations by applying the facility's estimated processing power to records showing the amount of unprocessed organic waste received at the facility), resulted in SusGlobal Belleville asserting three very different possibilities: it was either 1,300 MT, 1,500 MT, or 2,100 MT. Unsurprisingly, McEwen J. determined that this evidence was unreliable;

Hamaliuk Affidavit at paras 53, 84, EB Vol 1 of 3 at Tab 1, at 10, 15 Supplementary Affidavit of Gerald Hamaliuk affirmed December 17, 2017, at paras 32, 49, EB Vol 2 of 3 at Tab 3, 508, 512.

- (d) SusGlobal Belleville was provided with regular access to the Tipping Building in the period leading up to the closing;

Hamaliuk Affidavit at paras 13-19, 34-37, EB Vol 1 of 3 at Tab 1, at 3-4,6-7; Fourth Report at paras 3.2.1-3.2.4, EB at Vol 2 of 3, Tab 2 at 341-342.

- (e) the MOECC took no regulatory action against the Receiver during the time that it was operating the facility, or thereafter;

Fourth Report at paras 3.0.6, 3.1.7, Appendix J, EB at Vol 2 of 3, Tab 2 at 339-341, Tab 2J at 483

- (f) the MOECC was aware that at a certain point, the volume of organic waste in the Tipping Building *may* have reached 1,300 MT. The MOECC took no steps in response to this information; and

Hamaliuk Affidavit at Exhibit S, EB Vol 1 of 3 at Tab 1S, at 319-320.

- (g) a representative of the MOECC confirmed to the Receiver that she did a site visit with an "outside operator/consultant" of SusGlobal Belleville on September 26,

2017. This representative of SusGlobal Belleville estimated that the volume of organic waste in the Tipping Building was 400 MT (i.e. within the acknowledged acceptable range).

Fourth Report at Appendix O, EB at Vol 2 of 3, Tab 2O, at 499.

62. SusGlobal Belleville has repeatedly attempted to complicate matters by engaging in convoluted explanations of how it arrived its calculations, and why such calculations ought to be accepted over those introduced by the Receiver. These explanations cannot change the foregoing uncontroverted facts, all of which support McEwen J.'s conclusion that SusGlobal Belleville failed to satisfy its evidentiary burden on the Original Motion.

63. The Receiver accordingly submits that the proposed appeal is not *prima facie* meritorious.

(c) *Undue Delay and Prejudice*


64. The Receiver and the Debtors' estate have borne significant unnecessary costs relating to the frivolous and unmeritorious claims advanced by SusGlobal Belleville. The undue delay in filing this appeal has only added to the prejudice suffered by the Receiver and the Debtors' estate by hindering the efficient and expeditious administration of the Debtors' estate.

PART V — RELIEF REQUESTED

65. The Receiver respectfully requests an Order quashing the appeal on the grounds that it is out of time, or alternatively, that leave to appeal is denied. The Receiver further requests its costs of this motion on a scale that is just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of December, 2018

Date: December 5, 2018



AIRD & BERLIS LLP
Miranda Spence - LSO No. 60621M
Counsel for the Respondent

SCHEDULE A

LIST OF AUTHORITIES

1. *Business Development Bank of Canada v Astoria Organic Matters Ltd and Astoria Organic Matters Canada LP*, 2018 ONSC 2850 (Ont SCJ – Comm. List)
2. Donald J.M. Brown, QC, *Civil Appeals*, loose-leaf (April 2014) (Toronto: Carswell, 2017)
3. LW Houlden, GB Morawetz and Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, loose-leaf (2009 - Rel. 11), 4th ed (Toronto: Carswell, 2017)
4. *Ontario Wealth Management Corp v Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500 (Ont CA)
5. *Canada (Superintendent of Bankruptcy) v 407 ETR Concession Co*, 2012 ONCA 569 (Ont CA)
6. *Alberta (Attorney General) v Moloney*, 2015 SCC 51 (SCC)
7. *Carter v Ontario (Minister of Revenue)*, 2010 ONCA 566 (Ont CA)
8. *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611 (Ont CA)
9. *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225 (Ont CA)
10. *Business Development Bank of Canada v Pine Tree*, 2013 ONCA 282 (Ont CA)
11. *GMAC Commercial Credit Corp – Canada v TCT Logistics Inc*, 2006 SCC 35 (SCC).

SCHEDULE B
TEXT OF STATUTES & REGULATIONS

Bankruptcy and Insolvency Act, RSC, 1985, c B-3

Court of Appeal

193 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:

- (i) if the point at issue involves future rights;
- (ii) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (iii) if the property involved in the appeal exceeds in value ten thousand dollars;
- (iv) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- (v) in any other case by leave of a judge of the Court of Appeal.

Bankruptcy and Insolvency General Rules, CRC, c 368

Appeal to Court of Appeal

31 (1) An appeal to a court of appeal referred to in subsection 183(2) of the Act must be made by filing a notice of appeal at the office of the registrar of the court appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.

(2) If an appeal is brought under paragraph 193(e) of the Act, the notice of appeal must include the application for leave to appeal.

Courts of Justice Act, RSO 1990, c C43

Court of Appeal jurisdiction

6 (1) An appeal lies to the Court of Appeal from,

- (a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;
- (b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;
- (c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court;
- (d) an order made under section 137.1. R.S.O. 1990, c. C.43, s. 6 (1); 1994, c. 12, s. 1; 1996, c. 25, s. 9 (17); 2015, c. 23, s. 1.

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Time for Appeal and Service of Notice

61.04 (1) An appeal to an appellate court shall be commenced by serving a notice of appeal (Form 61A) together with the certificate required by subrule 61.05 (1), within 30 days after the making of the order appealed from, unless a statute or these rules provide otherwise,

- (a) on every party whose interest may be affected by the appeal, subject to subrule (1.1); and
- (b) on any person entitled by statute to be heard on the appeal. O. Reg. 14/04, s. 31.

SCHEDULE C

3.03 "As Is, Where Is"

(1) The Purchaser acknowledges and agrees that it is purchasing the Purchased Assets on an "as is, where is" basis and on the basis that the Purchaser has conducted to its satisfaction an independent inspection, investigation and verification of the Purchased Assets (including a review of title), Assumed Liabilities and all other relevant matters and has determined to proceed with the transaction contemplated herein and will accept the same at the Time of Closing in their then current state, condition, location, and amounts, subject to all Permitted Encumbrances.

(2) Except as otherwise expressly provided in Section 3.01, no representation, warranty or condition whether statutory (including under the *Sale of Goods Act* (Ontario), the *International Sale of Goods Contracts Convention Act* (Canada) and the *International Sale of Goods Act* (Ontario) or any international equivalent act which may be applicable to the subject matter pursuant to the provisions of this Agreement, including but not limited to the *United Nations Convention on Contracts for the International Sale of Goods*), or express or implied, oral or written, legal, equitable, conventional, collateral, arising by custom or usage of trade, or otherwise is or will be given including as to title, outstanding liens or encumbrances, description, fitness for purpose, merchantability, merchantable quality, quantity, condition (including physical and environmental condition), suitability, durability, assignability, or marketability thereof or any other matter or thing whatsoever, and all of the same are expressly excluded and disclaimed and any rights pursuant to such statutes have been waived by the Purchaser. The Purchaser acknowledges and agrees that it has relied entirely and solely on its own investigations as to the matters set out above and in determining to purchase the Purchased Assets and assume the Assumed Liabilities pursuant to this Agreement.

(3) The description of the Purchased Assets and Assumed Liabilities contained herein is for the purpose of identification only and the inclusion of any item in such description does not confirm the existence of any such items or that any such item is owned by Astoria. Except as otherwise explicitly set forth in Section 3.01, no representation, warranty or condition has been given by the Receiver concerning the completeness or accuracy of such descriptions and the Purchaser acknowledges and agrees that any other representation, warranty, statements of any kind or nature, express or implied, (including any relating to the future or historical financial condition, results of operations, prospects, assets or liabilities of Astoria or the quality, quantity or condition of the Purchased Assets) are specifically disclaimed by the Receiver.

(4) Any documents, materials and information provided by or on behalf of the Receiver to the Purchaser with respect to the Purchased Assets or Assumed Liabilities (including any confidential information memorandums, management presentations, or material made available

in the electronic data room) have been provided to the Purchaser solely to assist the Purchaser in undertaking its own due diligence, and the Receiver has not made and is not making any representations or warranties, implied or otherwise, to or for the benefit of the Purchaser as to the accuracy and completeness of any such documents, materials or information or the achievability of any valuations, estimates or projections. The Purchaser acknowledges that it has not and will not rely upon any such documents, materials or information in any manner, whether as a substitute for or supplementary to its own due diligence, searches, inspections and evaluations. The Receiver and their respective affiliates, directors, officers, employees, agents and advisors shall not be liable for any inaccuracy, incompleteness or subsequent changes to any such documents, materials or information.

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BUSINESS DEVELOPMENT BANK OF CANADA
Applicant

AND

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

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

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

**FACTUM SUBMITTED BY BDO CANADA
LIMITED, in its capacity as Court-appointed
receiver of Astoria Organic Matters Ltd.
and Astoria Organic Matters Canada LP**

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