

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

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 6, 2018

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COURT OF APPEAL FOR ONTARIO

BETWEEN:

BUSINESS DEVELOPMENT BANK OF CANADA

Applicant (Responding Party)

and

ASTORIA ORGANIC MATTERS LTD and ASTORIA ORGANIC MATTERS CANADA LP

Respondents

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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 “**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 BDO’s conduct demonstrated a marked departure from the standards 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. This Notice of Appeal is subject to a contemporaneous motion.

3. 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.

4. 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 (the “**Fresh Evidence Reasons**”). Mr. Justice McEwan 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.

5. By notice of appeal dated November 19, 2018, SusGlobal Belleville initiated an appeal of the Fresh Evidence Reasons. On this motion, SusGlobal Belleville seeks an order that the appeal may proceed pursuant to section 6 of the *Courts of Justice Act* (“**CJA**”) or alternatively leave to appeal pursuant to subsection 193(c) of the *Bankruptcy and Insolvency Act* (“**BIA**”).

PART I - FACTS

6. BDO was appointed as the Receiver pursuant to the Order of the Honourable Justice Hainey dated April 13, 2017 (the “**Appointment Order**”), pursuant to section 243 of the BIA and section 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.

7. 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.

8. In a letter dated October 30, 2017, SusGlobal Belleville alleged that, prior to the sale, 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 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.

9. 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.

10. 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.

11. 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 2.

12. 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 2.

13. Prior to the release of the Reasons for Decision on the Original Motion, SusGlobal Belleville submitted the 2017 Report to the MOECC on March 29, 2018. According to SusGlobal

Belleville, its principal, Gerald Hamaliuk, prepared the 2017 Report in February and March 2018 to comply with the regulations under the *Environmental Protection Act*.

Affidavit of Gerald Hamaliuk sworn on July 13, 2018 [July Hamaliuk Affidavit] at para 4, Appellant's Motion Record [AMR] at Tab 4 at 38; *Environmental Protection Act*, RSO 1990, c E19.

14. SusGlobal Belleville alleges that the underlying information for the 2017 Report was not available until just before the March 29, 2018 submission date. However, all of the information attached as appendices to the 2017 Report was available to SusGlobal Belleville prior to this date. It appears from Mr. Hamaliuk's affidavit sworn August 16, 2018 (the "**August Hamaliuk Affidavit**") that the portion of the 2017 Report that he drafted "*took more time than expected*", and that he "*did not turn [his] mind to the calculations of the dry weight percentages until the latter part of March.*"

August Hamaliuk Affidavit at para 10, AMR at Tab 6 at 329.

15. Between January 9, 2018, and February 23, 2018 (i.e. before the Hearing had concluded), the Receiver exchanged numerous emails with Mr. Hamaliuk regarding the information required for the 2017 Report, and provided numerous documents to complete this report. At no time during the course of the Receiver's email exchanges with Mr. Hamaliuk did Mr. Hamaliuk suggest that the contents of the 2017 Report would have any bearing on the ongoing Original Motion.

Fifth Supplemental Report of the Receiver dated August 2, 2018 [Fifth Report] at paras 1.3.3, 1.3.4, 1.3.5, AMR at Tab 5 at 273.

16. On the Fresh Evidence Motion, SusGlobal Belleville asserted that the 2017 Report constitutes evidence that the compost produced at the Astoria facility prior to September 15, 2017 contained a maximum of 18.8% biosolids calculated by dry weight, as opposed to the 25% biosolids content by dry weight adduced by the Receiver on the Original Motion. Based on this

new calculation, SusGlobal Belleville asserted that the wet weight of biosolids stored in the Tipping Building as at Closing was 1,492 metric tonnes.

July Hamaliuk Affidavit at para 14, AMR at Tab 4 at 42.

17. However, the 2017 Report does not provide any support for the 18.8% calculation, nor does it identify the source of the figures used to make this calculation. Rather, the 2017 Report states that the biosolids content was 18%, without reference to any appendix. The 18.8% figure is set out in the July Hamaliuk Affidavit and the August Hamaliuk Affidavit. It appears from the August Hamaliuk Affidavit that Mr. Hamaliuk calculated the 18.8% figure using information set out in the report that Astoria filed with the MOECC for 2016 (the “**2016 Report**”), which was available to SusGlobal Belleville in advance of the Original Motion. Mr. Hamaliuk simply “*did not realize the importance of the 2016 Annual report calculations*” prior to the Hearing. Nonetheless, SusGlobal Belleville asserted on the Fresh Evidence Motion that this new calculation ought to entitle it to reopen the Original Motion.

July Hamaliuk Affidavit, Exhibit A, AMR at Tab 4 at 44; July Hamaliuk Affidavit at para 11, AMR at Tab 4 at 41; August Hamaliuk Affidavit at paras 11-13, AMR at Tab 6 at 331-332.

18. SusGlobal Belleville provided a draft copy of the 2017 Report to the Receiver on March 21, 2018. At that time, SusGlobal Belleville did not draw to the Receiver’s attention its conclusion (without supporting documentation) that the compost produced during the Receiver’s tenure contained a maximum of 18.8% biosolids, or that, in its view, this calculation was material to the determination of the Original Motion.

Fifth Report at para 1.3.5, 1.3.6, Appendix B, AMR at Tab 5 at 282 and 320.

19. On June 25, 2018, the MOECC confirmed its receipt of the 2017 Report by email. The email does not indicate any review or acceptance of the calculations set out in the 2017 Report;

rather, it states that the 2017 Report contains the information that it is required to contain. SusGlobal Belleville has not filed any evidence to suggest that the MOECC conducted any review of the 2017 Report beyond comparing the sub sections identified in the 2017 Report with the requirements outlined in the applicable ECA.

July Hamaliuk Affidavit, Exhibit B, AMR at Tab 2B at 244; Fifth Report at para 1.3.1, AMR at Tab 5 at 281.

20. Justice McEwen issued the Fresh Evidence Reasons dismissing the Fresh Evidence Motion on November 8, 2018.

Fresh Evidence Reasons, RBOA at Tab 1.

PART III — ISSUES

21. 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 *Bankruptcy and Insolvency General Rules* (“**BIA General Rules**”);
- (b) if so, 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

22. 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 3; 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 4; *Ontario Wealth Management Corp v Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500 (Ont CA) at para 36 [Sica], RBOA at Tab 5; *Canada (Superintendent of Bankruptcy) v 407 ETR Concession Co*, 2012 ONCA 569 (Ont CA) at paras 19-20, RBOA at Tab 6.

23. 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 CJA, it is entitled to choose whether to initiate appeals of decisions made in this proceeding under either 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 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 35.

24. 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 7.

25. 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 7.

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

Moloney at para 19, RBOA at Tab 7.

27. 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 7.

28. 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.

29. 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.

30. 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).

31. 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).

32. 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.

33. 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. Leave Should Not be Granted under Subsection 193(e) of the BIA

34. 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 11.

35. 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 11.

(a) No Issues of General Importance

36. The Fresh Evidence Reasons 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 Fresh Evidence Reasons represent a fact-specific analysis of whether or not SusGlobal Belleville is entitled to re-open a hearing to introduce fresh evidence. This decision has no application outside the specific facts of this case.

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

SusGlobal Belleville Factum at para 111.

38. The Fresh Evidence Reasons cannot to be taken as a comment on “As Is, Where Is” clauses generally. McEwen J. specifically noted in the Reasons for Decision on the Original Motion that s. 3.03 of the purchase agreement (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. This finding is the basis for any comment on the “As Is, Where Is” clause in the Fresh Evidence Reasons.

Reasons for Decision at paras 70, 71, RBOA at Tab 2.

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

(b) The Proposed Appeal is Not Meritorious

40. 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 here is no remedy.

Pine Tree at para 31, RBOA at Tab 11.

The Test to Reopen a Motion and Adduce Fresh Evidence

41. On a motion to reopen a motion to adduce fresh evidence, the party seeking to adduce fresh evidence must show that:

- (a) the evidence he or she seeks to adduce is such that if it had been presented at trial, it probably would have changed the result; and,
- (b) the evidence could not have been obtained by reasonable diligence before the motion.

R & G Draper Farms (Keswick) Ltd v Nature's Finest Produce Ltd, 2015 ONSC 7035, 260 ACWS (3d) 260 (Ont SCJ) at para 20 [R & G Draper Farms], RBOA at Tab 12.

42. In *Mehedi v 2507161 Ontario Inc.*, the Ontario Court of Appeal held that the two-part test articulated above includes considerations of finality, the cogency of the new evidence, any delay in bringing the new evidence forward, any difficulty in relitigating the issues, and any prejudice to other parties who may have acted in reliance on the decision.

Mehedi v 2507161 Ontario Inc., 2015 ONCA 670 (Ont CA) at para 20 [*Mehedi*], RBOA at Tab 13.

The Purported Fresh Evidence Could Have Been Obtained By Reasonable Diligence

43. The due diligence requirement in the test to reopen a motion and admit fresh evidence ensures there is finality in the motion judge's decision. Counsel cannot treat the first motion as a "dress rehearsal".

R & G Draper Farms at para 24 (Ont SCJ), RBOA at Tab 12, citing *Lo v Ho*, 2010 ONSC 662 (Ont SCJ) at para 40, RBOA at Tab 14.

44. In argument, SusGlobal Belleville conceded that the information contained in the 2017 Report was available to it prior to the Hearing. Accordingly, there is no dispute that the purported fresh evidence was readily accessible to SusGlobal Belleville prior to the Hearing.

The Purported Fresh Evidence Would Not Have Changed The Result

45. Whether or not the purported fresh evidence would have changed the result on the Original Motion is part of the test for leave to reopen a motion. Justice McEwen concluded correctly that the purported fresh evidence would not have changed the result.

46. For SusGlobal Belleville's purposes, the key fact set out in the 2017 Report, is that the compost produced during the Receiver's tenure contained a maximum of 18% biosolids, by dry weight. In Mr. Hamaliuk's affidavits and SusGlobal Belleville's factum on the Fresh Evidence Motion, SusGlobal Belleville expands on this point to assert that the 18% figure (now 18.8%) can be used to calculate that the Tipping Building contained 1,492 metric tonnes of biosolids, by wet weight, as at the Closing. This represents a fourth calculation performed by Mr. Hamaliuk, to be added to SusGlobal Belleville's prior evidence, which purported to establish that the Tipping Building contained 1,300, or 1,500, or 2,100 metric tonnes of excess organic waste as at Closing.

Reasons for Decision at para 20, RBOA at Tab 2.

47. Justice McEwen refused to credit SusGlobal Belleville's evidence as to the quantum of biosolids in the Tipping Building, for a number of reasons. The overarching flaw identified in the Reasons for Decision, is that SusGlobal Belleville could produce no first-hand evidence, either from its own employees or from third parties, on this point. The purported fresh evidence on this motion does not remedy that deficiency.

Reasons for Decision at para 19, RBOA at Tab 2.

48. Justice McEwen also rejected Mr. Hamaliuk's calculations as to the quantum of biosolids in the Tipping Building, in favour of the Receiver's calculations. On the Fresh Evidence Motion, Mr. Hamaliuk presented a new set of calculations, which he performed on the basis of information that was available to him as of the Hearing, and which he asked the Court to accept as "*the accurate evidence*". This constituted a blatant attempt to relitigate an issue that was decided in the Receiver's favour.

August Hamaliuk Affidavit at para 20, AMR at Tab 6 at 334.

49. Justice McEwen found that the MOECC did not appear to view the alleged excess organic waste in the Tipping Building as problematic, noting that they took no steps to investigate, and that they did not contemplate or level any charges or sanctions against the Receiver during the time that it was operating the facility. The Receiver disputes SusGlobal Belleville's position that the email sent by the MOECC on June 25, 2018, acknowledging receipt of the 2017 Report, constitutes any kind of substantive comment on the content of the 2017 Report. However, if the MOECC did indeed review the 2017 Report and find it satisfactory (which is not admitted), then this constitutes additional evidence that the MOECC is not bothered by the quantum of organic waste in the Tipping Building.

Reasons for Decision at para 23, RBOA at Tab 2.

50. In any event, although he preferred the Receiver's evidence to SusGlobal Belleville's, Justice McEwen was very clear in his Reasons for Decision that better evidence on the points raised on the Fresh Evidence Motion would not have changed the outcome for SusGlobal Belleville. In this regard, the following passages from the Reasons for Decision speak for themselves:

[70] Even if SusGlobal's evidence, taken at its highest, is true, the amount of excess organic waste that they now complain of was in plain view. BDO made the facility available to SusGlobal and representatives of SusGlobal did tour the facility on numerous occasions. They also had full access to, and did review, relevant data. This is not a case of any form of hidden or latent defect. There is also no credible or reliable evidence that BDO knowingly concealed information.

[71] As a result, in my view, s. 3.03 [of the APA] absolves BDO of any liability.

...

[75] Alternatively, even in the absence of the aforementioned provisions in the APA if I were to conclude that there was somewhere in the neighbourhood of 1,300 – 2,100 MT of organic waste in the Tipping Building as initially alleged by SusGlobal I do not accept that this would constitute *prima facie* evidence of willful

misconduct or, alternatively, gross negligence. While violation of the ECA could, in some circumstances, lead to liability, I do not accept that any amount in excess of 150 MT would automatically form a cause of action. First, SusGlobal concedes that up to 500 MT of organic waste could be stored in the Tipping Building at any time. As noted, in my view, this amount could be even higher depending on the processing that was taking place. Further, it is uncertain as to how much organic waste was being “stored” as opposed to “processed” at any given time. Presumably, this is what led to the MOECC’s lack of interest when it was told that approximately 1,300 MT of organic waste could be in the Tipping Building. Based upon this lack of real concern, or any following investigation, I do not accept SusGlobal’s contention that BDO operated the business “illegally”. It certainly appears from the record placed in front of me that the MOECC obviously allowed some “given and take” with respect to the amount of organic waste contained in the Tipping Building.

Reasons for Decision at paras 70, 71, 75, RBOA at 2.

51. None of the purported fresh evidence strikes at any of these findings. Justice McEwen accordingly correctly concluded that the purported fresh evidence would have had no impact on the decision on the Original Motion, and dismissed the Fresh Evidence Motion.

(c) *Undue Delay and Prejudice*

52. The Receiver and 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.

53. For the foregoing reasons, the Receiver requests that leave to appeal the Fresh Evidence Motion be denied.

PART V — RELIEF REQUESTED

54. The Receiver respectfully requests an Order that:

- (a) any appeal of the Fresh Evidence Reasons must proceed by way of the procedure established by section 193 of the BIA and Rule 31 of the BIA General Rules;
- (b) leave to appeal the Fresh Evidence Reasons pursuant to subsection 193(e) of the BIA is denied; and
- (c) SusGlobal Belleville pay the Receiver's costs of this motion on a scale that is just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of December, 2018

Date: December 6, 2018

 per: dem

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*, 2018 ONSC 6062 (Ont SCJ)
2. *Business Development Bank of Canada v Astoria Organic Matters Ltd and Astoria Organic Matters Canada LP*, 2018 ONSC 2850 (Ont SCJ – Comm. List)
3. Donald JM Brown, QC, *Civil Appeals*, loose-leaf (April 2014) (Toronto: Carswell, 2017)
4. LW Houlden, GB Morawetz and Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, loose-leaf (2009 - Rel. 11), 4th ed (Toronto: Carswell, 2017)
5. *Ontario Wealth Management Corp v Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500 (Ont CA)
6. *Canada (Superintendent of Bankruptcy) v 407 ETR Concession Co*, 2012 ONCA 569 (Ont CA)
7. *Alberta (Attorney General) v Moloney*, 2015 SCC 51 (SCC)
8. *Carter v Ontario (Minister of Revenue)*, 2010 ONCA 566 (Ont CA)
9. *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611 (Ont CA)
10. *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225 (Ont CA)
11. *Business Development Bank of Canada v Pine Tree*, 2013 ONCA 282 (Ont CA)
12. *R & G Draper Farms (Keswick) Ltd v Nature's Finest Produce Ltd*, 2015 ONSC 7035, 260 ACWS (3d) 260 (Ont SCJ)
13. *Mehedi v 2507161 Ontario Inc*, 2015 ONCA 670 (Ont CA)
14. *Lo v Ho*, 2010 ONSC 662 (Ont SCJ)

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, RRO 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.

BUSINESS DEVELOPMENT BANK OF CANADA
Applicant

AND

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

Court of Appeal File No. C66116
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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