Court of Appeal File No. M50086
Court of Appeal File No. C65512 & C66166
Court File No. CV-17-11760-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

BUSINESS DEVELOPMENT BANK OF CANADA

Applicant

-and-

ASTORIA ORGANIC MATTERS LTD. and ASTORIA ORGANIC MATTERS CANADA LP

Respondents

AND BETWEEN:

SUSGLOBAL ENERGY BELLEVILLE LTD.

Applicant/Moving Party
(Appellant)

-and-

BDO CANADA LTD., Court Appointed Receiver of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP

Respondent
(Responding Party)

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

FACTUM OF THE RESPONDENT, BDO CANADA LIMITED,
in its capacity as Court-appointed receiver of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP
(motion returnable on February 15, 2019)

Date: February 11, 2019

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PART I - OVERVIEW

1. The moving party, SusGlobal Energy Belleville Ltd. ("**SusGlobal Belleville**") asks that a panel of this Court set aside or vary the Orders of the Honourable Justice Watt dated December 10, 2018 (the "**Watt Orders**"), wherein he found, among other things, that two appeals initiated by SusGlobal Belleville are governed by s. 193 of the *Bankruptcy and Insolvency Act*, and not s. 6 of the *Courts of Justice Act*. The respondent, BDO Canada Limited, in its capacity as the Court-appointed receiver of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP (in such capacity, the "**Receiver**"), opposes the motion.

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

2. The first proposed appeal relates to a decision made by the Honourable Justice McEwen dated May 17, 2018 (the "**Original Decision**"), wherein he dismissed SusGlobal Belleville's motion for leave to sue the Receiver for gross negligence and wilful misconduct (the "**Original Motion**"). The second proposed appeal relates to a decision made by the Honourable Justice McEwen dated November 8, 2018 (the "**Fresh Evidence Decision**"), wherein he refused to reopen the Original Motion to permit SusGlobal Belleville to file fresh evidence (the "**Fresh Evidence Motion**" and, together with the Original Motion, the "**Leave Motions**").

3. The Receiver was appointed pursuant to both s. 243 of the *BIA*, and s. 101 of the *CJA*, by way of the Order of the Honourable Justice Hainey dated April 13, 2017 (the "**Appointment Order**"), which Order is consistent with the model order approved by the Ontario Superior Court of Justice (Commercial List) model order subcommittee. SusGlobal Belleville was required to bring the Leave Motions as a consequence of paragraph 8 of the Appointment Order, which prevents any party from suing the Receiver without first obtaining the leave of the Court.

4. The Honourable Justice Watt concluded that appeals from decisions or orders made in proceedings instituted under the *BIA* are governed by the *BIA* and the *Bankruptcy and Insolvency Act General Rules* (the "***BIA General Rules***"), and not by the *CJA* and the *Rules of Civil Procedure* (the "***Rules***"). In so concluding, His Honour held:

> The reference in the formal order to s. 101 of the *CJA* does not have the effect of ousting the operation of the *BIA* as the source of appellate authority. The order is in standard form and to hold that its reference to the *CJA* trumps the application of the *BIA* would be to turn the doctrine of federal paramountcy applicable in cases of incompatibility between provincial and federal legislation on a subject-matter of exclusive federal authority on its head.
>
> Endorsement of Justice Watt dated December 10, 2018, Receiver's Brief of Authorities [RBOA] at Tab 1 at para 21.

5. On this motion, SusGlobal Belleville argues that, in order to determine which appeal route is applicable, the Court must not look to the fact that the proceeding in which the Leave Motions were brought was instituted pursuant to the *BIA*. Rather, SusGlobal Belleville asks this Court to look behind the Leave Motions themselves, to identify the source of the Court's authority to order paragraph 8 of the Appointment Order, without which the Leave Motions would not have been necessary. SusGlobal Belleville argues that, because the underlying jurisdiction to include paragraph 8 in the Appointment Order is purportedly found in the *CJA*, and not the *BIA*, the appeals at issue must also be governed by the *CJA*.

6. The Receiver submits that the analysis proposed by SusGlobal Belleville represents a convoluted approach which fails to recognize the principles of paramountcy, Parliament's exclusive authority over bankruptcy and insolvency matters, and the Court's interest in promoting the efficient and expeditious resolution of bankruptcy proceedings.

7. The Receiver asks that this Court instead uphold the Watt Orders, and adopt the analysis set out in His Honour's endorsement.

PART II - THE FACTS

Procedural History

8. On the application of Business Development Bank of Canada ("**BDC**"), BDO was appointed as the Receiver pursuant to the Appointment Order on April 13, 2017. Prior to the issuance of the Appointment Order, Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP (together "**Astoria**" or the "**Debtors**") had 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 delivered to 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], Compendium at Tab 1 at para 1.1.1.
>
> *BIA* s 243; *CJA*, s 101.

9. Consistent with the model receivership order approved by the Commercial List Users' Committee, the Appointment Order contains the following paragraph (the "**Prohibition on Proceedings Against the Receiver**" or "**Paragraph 8**"):

> 8. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.
>
> Commercial List Users' Committee of the Ontario Superior Court of Justice, Standard Form Template Receivership Order as at January 21, 2014, RBOA at Tab 2.

10. 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 "**Sale Transaction**"). The Sale Transaction closed on September 15, 2017 (the "**Closing**").

> Fourth Report, Compendium at Tab 1 at para 1.1.5-1.1.6, Appendix B, Compendium at Tab 1B.

11. In a letter to the Receiver dated October 30, 2017 (the "**October 30 Letter**"), SusGlobal Belleville alleged that, prior to the Closing, the Receiver had been grossly negligent in its operation of Astoria in that (a) the Receiver allowed the volume of raw organic waste stored in the Tipping Building (i.e. 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 SusGlobal Belleville 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, Compendium at Tab 1 at paras 1.2.5, 3.0.1, Appendix C, Compendium at Tab 1C.

12. 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, Compendium at Tab 1 at paras 3.0.2 and 3.0.3, Appendix D, Compendium at Tab 1D.

13. 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, which was amended on January 18, 2018. Among other grounds, SusGlobal Belleville relied upon sections 243(1), 243(2) and 247 of the *BIA*, Rules 3, 11 and 13 of the *BIA General Rules*, and paragraphs 8, 16, 17 and 33 of the Appointment Order, in support of its motion. 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 motion judge.

Amended Notice of Motion, Compendium at Tab 3.

14. The Honourable Justice McEwen heard the Original Motion on February 21, 27, and March 5, 2018 (the "**Hearing**"), and released the Original Decision on May 17, 2018. His Honour 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, RBOA at Tab 3.

15. Accordingly, the Honourable Justice McEwen dismissed the Original Motion, with costs payable to the Receiver.

Reasons for Decision, RBOA at Tab 3.

16. On June 15, 2018, SusGlobal Belleville initiated its appeal of the Original Decision by filing a 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] Compendium at Tab 4, at para 1.1.1.

17. The Receiver immediately objected that the Notice of Appeal had been filed late, as any appeal of the Original Decision was to be governed by s. 193 of the *BIA*, which provides for a ten-day appeal period.

Sixth Supplement at Appendix A, Compendium at Tab 4A.

18. On July 5, 2018, SusGlobal Belleville initiated the Fresh Evidence Motion. The purported fresh evidence upon which SusGlobal Belleville sought to rely 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, Compendium at Tab 4 at para 1.0.2.

19. The Honourable Justice McEwen heard the Fresh Evidence Motion on September 21, 2018, and dismissed it by way of the Fresh Evidence Reasons issued November 8, 2018, with full indemnity costs payable to the Receiver. His Honour 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, Compendium at Tab 4 at para 1.0.3; Fresh Evidence Reasons at RBOA at Tab 4.

The Motions Before the Honourable Justice Watt

20. Following the issuance of the Fresh Evidence Decision, SusGlobal Belleville brought motions before a single judge of the Court of Appeal, seeking declarations that the appeals of each of the Original Decision and the Fresh Evidence Decision are governed by s. 6 of the *CJA*,

or alternatively, orders that would permit the appeals to proceed by way of the *BIA* appeal procedures. The Honourable Justice Watt dismissed both motions by way of the Watt Orders.

21. The Watt Orders have the effect of disposing of SusGlobal Belleville's appeals of each of the Original Decision and the Fresh Evidence Decision. Should this Court uphold the Watt Orders, SusGlobal Belleville's efforts to sue the Receiver will be at an end. The resolution of this issue is the last outstanding step that must be completed before the Receiver can make its final distribution to the applicant BDC, conclude its mandate, and seek its discharge (subject to realizing on the shares of SusGlobal Energy Corp that represented $3.8 million of the consideration that SusGlobal Belleville paid to the Receiver as part of the Sale Transaction). All other steps relating to the administration of the receivership have otherwise been completed.

Sixth Report, Compendium at Tab 4 at para. 1.3.1.

PART III - ISSUES

22. The only issue before this Court is whether the Honourable Justice Watt was correct in finding that SusGlobal Belleville's proposed appeals from the Original Decision and the Fresh Evidence Decision (together, the "**Proposed Appeals**") must follow the appeal procedures prescribed by s. 193 of the *BIA* and the *BIA General Rules*, as opposed to s. 6 of the *CJA* and the *Rules of Civil Procedure*.

23. This factum will address the following issues:

(a) whether the doctrine of paramountcy dictates that s. 193 of the *BIA*, and not s. 6 of the *CJA*, governs appeals of orders made in proceedings instituted pursuant to s. 243 of the *BIA*;

(b) whether SusGlobal Belleville's proposed analysis of the applicable appeal route is tenable;

(c) whether s. 243 of the *BIA* can provide the Court with the jurisdiction to include the Prohibition on Proceedings Against the Receiver in the Appointment Order; and

(d) whether Paragraph 8 of the Appointment Order was made pursuant to s. 215 of the *BIA*.

24. The within motion does not engage the merits of the Proposed Appeals, including the question of whether the Original Motion and/or the Fresh Evidence Motion were procedural or substantive. This factum will nevertheless briefly respond to SusGlobal Belleville's factum as it relates to the merits of the Proposed Appeals.

PART IV – LAW AND ARGUMENT

A. The Proposed Appeals are Governed by Section 193 of the *BIA*

(a) Section 193 of the BIA *Governs Appeals in Proceedings Instituted Pursuant to s. 243 of the* BIA

25. 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 5; 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 6; *Ontario Wealth Management Corp v Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500 (Ont CA) at para 36 [Sica], RBOA at Tab 7; *Canada (Superintendent of Bankruptcy) v 407 ETR Concession Co*, 2012 ONCA

569 (Ont CA) at paras 19-20, RBOA at Tab 8; *Dabbs v Sunlife Assurance Co of Canada* (1998), 41 OR (3e) 97 (CA) at para 13, RBOA at Tab 9.

26. 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 10.

27. 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 10.

28. 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 10.

29. 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 10.

30. 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.

BIA, s 193.

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

Bankruptcy and Insolvency General Rules, CRC, c 368, 30(2).

32. 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;

BIA, s 6(1)(b).

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

Rules, s 61.04(1).

34. 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.

35. In the alternative, an appellant may comply with both statutes by following the more restrictive regime established by the *BIA* and the *BIA General Rules*. On either analysis, the doctrine of paramountcy requires an appellant to follow the appeal route established by the *BIA*.

36. This conclusion is consistent with the principle that Parliament has jurisdiction over procedural law in bankruptcy matters, as part of its exclusive authority over bankruptcy and insolvency. As a result, Parliament has the authority to authorize, as well as to limit or prohibit, appeals in bankruptcy matters as it deems appropriate.

Re Solloway Mills, [1935] OR 37 (CA), RBOA at Tab 11 at paras 15, 34.

37. The Proposed Appeals are of orders made in a proceeding that was initiated pursuant to both s. 243 of the *BIA* and s. 6 of the *CJA*. The fact that the *CJA* is referenced in the Appointment Order does not permit the Court to ignore the fact that the proceeding was also instituted pursuant to the *BIA*, and that the *BIA* appeal procedures take precedence over those established by the *CJA*.

38. 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) The Analysis Proposed by SusGlobal Belleville is Untenable

39. SusGlobal Belleville submits that, in determining the applicable appeal route, the Court must not consider the larger proceeding in which the orders under appeal were made. Rather, SusGlobal Belleville asks the Court to examine the specific orders under appeal, and to identify the source of the Court's authority to order each paragraph of each order. Having made this determination, the Court can then consider which appeal route to follow. The convoluted analysis set out in SusGlobal Belleville's factum demonstrates the difficulties with this approach.

40. On the Original Motion, the Honourable Justice McEwen was tasked with considering whether to grant SusGlobal Belleville leave to sue the Receiver, in accordance with Paragraph 8 of the Appointment Order. SusGlobal Belleville asks this Court to look behind the Appointment Order, to determine where the Court derived its jurisdiction to order the Prohibition on Proceedings Against the Receiver in the first place, and submits that the source of this jurisdiction dictates the appropriate appeal route.

41. SusGlobal Belleville relies on two cases in support of its proposed approach. The Receiver submits that these cases either do not stand for the proposition(s) for which SusGlobal relies upon them, and/or they are distinguishable from this case.

42. SusGlobal Belleville asserts that this Court's decision in *Third Eye Capital Corporation v. Ressources Dianor Inc. / Dianor Resources Inc.* [*Dianor Resources*] supports its position. That case involved an appeal of a vesting order made pursuant to s. 100 of the *CJA,* in the context of a receivership proceeding initiated pursuant to the *BIA* and the *CJA*.

> *Dianor Resources*, 2018 ONCA 253 at SusGlobal Brief of Authorities [SBOA] at Tab 6.

43. SusGlobal Belleville asserts that the appeal in *Dianor Resources* was a direct appeal to the Court of Appeal pursuant to s. 6 of the *CJA*, and was not under the jurisdiction of the *BIA*. However, there is nothing in the *Dianor Resources* decision that suggests that either the parties or the Court accepted that the *CJA* appeal route applied.

44. The *Dianor Resources* case concludes with the Honourable Justice Lauwers ordering a second phase of the appeal. At the second hearing, which took place in September 2018, the receiver took the position that the ten-day *BIA* appeal period applied. The Court has not yet issued a decision arising from this second hearing, such that the applicable appeal period remains a live issue. Accordingly, *Dianor Resources* does not provide support for SusGlobal Belleville's position on this motion.

> SusGlobal Belleville Factum at paras 72-74; Jefferey Carhart and Margaret Sims, "Vesting Orders, Appeal Periods and the 2018 Decision of the Ontario Court of Appeal in Third Eye Capital Corporation v Ressources Dianor Inc" Annual Review of Insolvency Law (2018) at 611-612, RBOA at Tab 12.

45. In *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership* [*Industrial Alliance*], certain appeals were initiated in the context of a receivership proceeding in which the receiver was appointed pursuant to both the *BIA* and the *Law and Equity Act*, R.S.B.C. 1996, c. 253. A single judge of the B.C. Court of Appeal quashed certain appeals brought by the appellant on the grounds that they were out of time, having been filed after the ten-day period prescribed by the *BIA General Rules*. In so holding, the Honourable Justice Groberman noted that the orders under appeal were made in reliance upon certain provisions of the *BIA*, such that the appeal provisions of the *BIA* were applicable.

> SusGlobal Belleville Factum at paras 70-71; *Industrial Alliance*, 2018 BCJ 1349 (BC CA) at SBOA at Tab 1 at paras 1, 21, 24.

46. The Receiver submits that this decision is of minimal assistance to this Court. The Honourable Justice Groberman conducted no analysis beyond noting that provisions of the *BIA* were referenced in the orders under appeal. His Honour did not engage in the type of multi-step analysis proposed by SusGlobal Belleville, whereby the Court is asked to look beyond the orders under appeal, to the jurisdiction behind the underlying provisions of the receivership order. Further, as the Honourable Justice Groberman concluded that the *BIA* appeal route applies, he was not required to consider the competing interests that may be engaged where the order under appeal is made in a *BIA* proceeding, but does not reference the *BIA* directly. Finally, that decision is not binding on this Court.

47. SusGlobal Belleville asserts that, because the *BIA* purportedly does not contain any provision that expressly prohibits proceedings against receivers appointed pursuant to s. 243 of the *BIA*, then the Court's authority to include the Prohibition on Proceedings Against the Receiver in the Appointment Order must derive from the *CJA*. SusGlobal Belleville then devotes several pages of argument to explaining why s. 243 of the *BIA* cannot be the source of the Court's authority to order the Prohibition on Proceedings Against the Receiver, with reference to the history of s. 243, jurisprudence that elaborates upon the purpose of s. 243, and an examination of numerous other sections of the statute.

48. If this Court accepts SusGlobal Belleville's approach, then every party who seeks to appeal an order made in a proceeding instituted under the *BIA*, will have to perform a similar analysis in order to determine which appeal route to follow. Such an approach will cause uncertainty for the parties and, undoubtedly, a significant volume of motions. This approach also appears inconsistent with the current trend towards a more restrictive interpretation of s. 193 of the *BIA*, for the purpose of promoting the efficient and expeditious resolution of bankruptcy

proceedings, and achieving regulatory harmony with the *Companies' Creditors Arrangement Act*.

> *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225 (Ont CA), RBOA at Tab 13 at paras 47-53; *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611 (Ont CA), RBOA at Tab 14 at para 20.

49. A more sensible approach is found in the Honourable Justice Watt's conclusion that "[a]ppeals from decisions or orders made in proceedings instituted under the *BIA* are governed by the *BIA* and the [*BIA General Rules*]". Treating all appeals brought in a *BIA* proceeding equivalently will give rise to greater certainty for the parties, and will ensure consistency with the paramountcy principles cited above, in accordance with Parliament's exclusive jurisdiction over procedural law in bankruptcy and insolvency matters.

> Endorsement of Justice Watt dated December 10, 2018, RBOA at Tab 1 at para 20.

(c) Section 243 Provides Jurisdiction to Make Orders Such as Paragraph 8 of the Appointment Order

50. SusGlobal Belleville devotes considerable analysis to the legislative history of s. 243 of the *BIA*, in an attempt to establish that the Court's jurisdiction to include the Prohibition on Proceedings Against the Receiver in the Appointment Order derives from the *CJA*, and not from the *BIA*. As set out above, the Receiver submits that the Court need not undertake this analysis at all in order to conclude that s. 193 of the *BIA* governs the Proposed Appeals. In the alternative, the Receiver submits that s. 243 of the *BIA* authorizes the Court to make orders such as the Prohibition on Proceedings Against the Receiver, such that, even on SusGlobal Belleville's proposed analysis, s. 193 of the *BIA* applies to the Proposed Appeals.

51. SusGlobal Belleville traces the development of *BIA* receivership law from the 1992 amendments to the *BIA*, which added "Part XI – Secured Creditors and Receivers", through the

creation of the Toronto Commercial List's model receivership order in 2004, the enactment of the current s. 243 of the *BIA* in 2009, up to the Supreme Court of Canada's pronouncements regarding the purpose of s. 243 in *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd* [*Lemare Lake*]. In its analysis, however, SusGlobal Belleville misses several crucial points which contradict its conclusion that the jurisdiction to make orders such as the Prohibition on Proceedings Against the Receiver can only come from the *CJA*, to the exclusion of the *BIA*.

> SusGlobal Belleville at paras 44-69; *Lemare Lake*, 2015 SCC 53, SBOA at Tab 5 at paras 52-68.

52. As set out in the explanatory notes for version 1 of the standard form template receivership order developed for the Commercial List Users' Committee of the Ontario Superior Court of Justice dated September 14, 2004, the original model order styled the court officer as both an interim receiver pursuant to s. 47(1) of the *BIA*, and a receiver and manager appointed pursuant to s. 101 of the *CJA*. At the time the *BIA* only provided for the appointment of an interim receiver, as s. 243 had not yet been amended to permit the appointment of a national receiver.

53. The explanatory notes state that s. 101 of the *CJA* was included in the model order for two reasons: (a) to provide the receiver and manager with a priming charge, not otherwise available to s. 47(1) interim receivers; and (b) to ensure that receivers appointed by way of the model order were subject to the regulations imposed on "receivers" pursuant to Part XI of the BIA. As s. 47(1) interim receivers were specifically excluded from the obligations imposed on receivers in ss. 243-252 of the pre-2009 *BIA*, the reference to s. 101 of the *CJA* in the model order was in fact a roundabout way of ensuring that court officers appointed by way of the model order would be subject to the *BIA* receivership regime.

Model Receivership Order, Explanatory Notes, SBOA at Tab 13 at 3-4. Steven Weisz, Linc Rogers, "Sweeping Changes Proposed to Canadian Bankruptcy and Insolvency Legislation" 1 Pratt's J Bankr L 135 (2005) [Weisz 2005], RBOA at Tab 15 at 142. Roderick J Wood, "The Paramountcy Principle in Bankruptcy and Insolvency Law" 57 CBLJ 27 (2016) [Wood 2016], RBOA at Tab 16 at 10.

RSC, 1985, c. B-3 at 243, in force between July 2, 2003 and December 14, 2004

54. Section 243 of the *BIA* in its current form came into effect in 2009, as part of a comprehensive suite of amendments. At the time, commentators noted that the power to appoint a receiver pursuant to s. 243 of the *BIA* directly, would eliminate the need for the "dual appointment" language of the model order, as such receivers would now be automatically subject to the obligations imposed by ss. 243-252 of the *BIA*. For example, Professor Roderick Wood wrote in 2009:

> The 2005/2007 amendments to the *BIA*, in force in 2009, were designed to ensure that the appointment of an interim receiver may now only be used as a temporary measure. However, courts are given a new ability to appoint a national receiver that will be recognized across Canada. It is likely that this will result in a discontinuance of the practice of concurrent appointments, since this device was primarily designed to ensure that interim receivers were not insulated from the statutory provisions that regulated ordinary receiverships.
>
> Roderick Wood, "The Regulation of Receiverships" Annual Review of Insolvency Law (2009) at 3, RBOA at Tab 17; Weisz 2005, RBOA at Tab 15 at 142; Mary IA Buttery and H Lance Williams, "New Developments in Receivership Law: A Survey" IIC-ART 2012-2 [Buttery 2012] at RBOA at Tab 18 at 2.

55. While the dual appointment language of the model order has survived these changes, these authorities demonstrate that the primary reasons for referring to both statutes no longer exist.

56. The general consensus in both the literature and the case law is that the introduction of the s. 243 receiver in 2009 effectively brought the receivership remedy into the ambit of the BIA: "the effect of section 243 is effectively to replace the need to rely on the jurisdictions of the

provincially constituted superior courts in the appointment of the receiver, and to instead grant powers that are analogous to the bankruptcy court." Consistent with this objective, the 2009 amendments also provided that only licenced trustees could act as receivers, thereby imposing the Code of Ethics found in the *BIA General Rules* over all receivers.

> *Railside Developments Ltd, Re*, 2010 NSSC 13, SBOA at Tab 2 at paras 62-64; Buttery 2012, RBOA at Tab 18 at 3, 4, 8; Wood 2016, RBOA at Tab 16 at p. 10, 12; *Lemare Lake*, SBOA at Tab 5 at paras 68.

57. Parliament's intention in this regard is further confirmed by the text of s. 243, which provides as follows:

> 243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.
>
> *BIA*, s. 243.

58. On its face, s. 243(1)(c) provides the court with broad residual power to bestow such powers on a s. 243 receiver as it sees fit. SusGlobal Belleville's argument that any power not expressly provided for in the *BIA* must come from the *CJA* appears to ignore the wide latitude granted to the Court by way of s. 243(1)(c).

59. For the foregoing reasons, the Receiver submits that the Court had the jurisdiction pursuant to s. 243(1)(c) to include the Prohibition on Proceedings Against the Receiver in the

Appointment Order. Accordingly, even using SusGlobal Belleville's complicated analysis, the Proposed Appeals are governed by s. 193 of the *BIA*.

(d) Paragraph 8 of the Appointment Order Was Made Pursuant to s. 215 of the BIA

60. In the further alternative, the Receiver submits that s. 215 of the *BIA* applies to receivers appointed pursuant to s. 243 of the *BIA*, such that the BIA provides the express jurisdiction to order the Prohibition on Proceedings Against the Receiver.

61. Section 215 provides as follows:

> Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.
>
> *BIA*, s 215.

62. Section 215 does not specifically include "receivers" among the parties against whom no action lies without leave of the court. However, pursuant to s. 243(4) of the *BIA*, only a "trustee" (as defined in the *BIA*) may be appointed a receiver. Accordingly, as s. 215 applies to trustees, s. 215 applies by implication to receivers appointed by way of s. 243 of the *BIA*.

63. Consistent with this analysis, the courts have applied s. 215 of the *BIA* to s. 243 receivers. In this regard, the Honourable Justice Wilton-Siegel described the purpose of s. 215 as it applies to receivers as follows:

> In this regard, I note that s. 215 of the BIA balances two important objectives – the need for proper oversight of receivers, which takes the form of both court oversight and creditor rights to proceed against a receiver, and the need to prevent unmeritorious actions from proceeding against the court's agent.

Crate Marine Sales Ltd., Re., 2017 ONSC 178 (Ont SCJ – Comm List), RBOA at Tab 19 at paras 22 and 62; *Niggeh v Soberman Tessis Inc*, 2010 ONSC 3526 (Ont SCJ), RBOA at Tab 20 at paras 1, 2.

64. The Receiver accordingly submits that s. 215 of the *BIA* applies to receivers, such that the Court's authority to order the Prohibition on Proceedings Against the Receiver was derived expressly from the *BIA*. In such circumstances, there can be no doubt that the Proposed Appeals are subject to s. 193 of the *BIA*.

(B) The Proposed Appeals Are Not Meritorious

65. Although the merits of the Proposed Appeals are not before this Court, the Receiver will briefly respond to SusGlobal Belleville's arguments in this regard.

66. 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 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.

67. 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], RBOA at Tab 21 at para. 59.

68. 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, Compendium at Tab 2 at paras 53, 84; Supplementary Affidavit of Gerald Hamaliuk affirmed December 17, 2017, Compendium at Tab 5 at paras 32, 49.

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

Hamaliuk Affidavit, Compendium at Tab 2 at paras 13-19, 34-37; Fourth Report, Compendium at Tab 1 at paras 3.2.1-3.2.4.

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

Fourth Report, Compendium at Tab 1 at paras 3.0.6, 3.1.7.

(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, Compendium at Tab 2S.

(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, Compendium at Tab 1O.

69. Contrary to SusGlobal Belleville's submissions, none of these findings depended upon the Honourable Justice McEwen finding that Al Hamilton, upon whom the Receiver relied in its evidence, was more credible than SusGlobal Belleville's witnesses. Rather, His Honour simply concluded that, on the basis of the foregoing uncontroverted facts, SusGlobal Belleville failed to satisfy its evidentiary burden on the Original Motion.

70. As the "new" evidence that SusGlobal Belleville sought to introduce on the Fresh Evidence Motion did not strike at any of the above findings, the Honourable Justice McEwen

determined that the admission of that evidence would not have changed the result on the Original Motion.

71. For these reasons, the Receiver submits that the Proposed Appeals have no merit in any event. Should this Court uphold the Watt Orders, SusGlobal Belleville's efforts to sue the Receiver will be at an end, and the Receiver will be in a positon to conclude its mandate. The Receiver submits that, having regard for all of the circumstances, and the various Court Orders made to date, this result would be just.

PART V – ORDER REQUESTED

72. The Receiver requests that SusGlobal Belleville's motion be dismissed, with costs payable on a scale that is just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: February 11, 2019

AIRD & BERLIS LLP
Miranda Spence - LSO No. 60621M
Counsel for the Respondent, BDO Canada Limited, in its capacity as Court-appointed receiver of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP

SCHEDULE A

LIST OF AUTHORITIES

1. Endorsement of Justice Watt dated December 10, 2018
2. Commercial List Users' Committee of the Ontario Superior Court of Justice, The New Standard Form Template Receivership Order
3. *Business Development Bank of Canada v Astoria Organic Matters Ltd and Astoria Organic Matters Canada LP*, 2018 ONSC 2850 (Ont SCJ – Comm. List)
4. *Business Development Bank of Canada v Astoria Organic Matters Ltd,* 2018 ONSC 6062 (Ont SCJ 0 Comm. List)
5. Donald JM Brown, QC, *Civil Appeals*, loose-leaf (April 2014) (Toronto: Carswell, 2017) vol 1 at para. 2:1120
6. 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
7. *Ontario Wealth Management Corp v Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500 (Ont CA)
8. *Canada (Superintendent of Bankruptcy) v 407 ETR Concession Co*, 2012 ONCA 569 (Ont CA)
9. *Dabbs v Sunlife Assurance Co of Canada* (1998), 41 OR (3e) 97 (CA)
10. *Alberta (Attorney General) v Moloney*, 2015 SCC 51 (SCC)
11. *Re Solloway Mills*, [1935] OR 37 (CA)
12. Jefferey Carhart and Margaret Sims, "Vesting Orders, Appeal Periods and the 2018 Decision of the Ontario Court of Appeal in Third Eye Capital Corporation v Ressources Dianor Inc" Annual Review of Insolvency Law (2018)
13. *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225 (Ont CA)
14. *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611 (Ont CA)
15. Steven Weisz, Linc Rogers, "Sweeping Changes Proposed to Canadian Bankruptcy and Insolvency Legislation" 1 Pratt's J Bankr L 135 (2005)
16. Roderick J Wood, "The Paramountcy Principle in Bankruptcy and Insolvency Law" 57 CBLJ 27 (2016)

SCHEDULE B

LIST OF RULES AND STATUTES

***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:

(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.

No action against Superintendent, etc., without leave of court

215 Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

Court may appoint receiver

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

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

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

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

Bankruptcy and Insolvency General Rules (C.R.C., c. 368)

30(2) A notice of motion or a motion, as the case may be, must be filed at the office of the registrar and served on the other party within 10 days after the day of the order or decision appealed from, or within such further time as the judge stipulates.

***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).

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

61.04 (1) An appeal to an appellate court shall be commenced by serving a notice of appeal (Form 61A or 61A.1) 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; O. Reg. 536/18, s. 2 (1).

***Bankruptcy and Insolvency Act,* RSC 1985, c B-3** in force between July 2, 2003 and December 14, 2004

(i.e. as at the date that the Commercial List Users' Committee of the Ontario Superior Court of Justice issued the Explanatory Notes for Version No. 1 of the standard form template receivership order, found at Tab 13 of the SBOA)

PART XI

SECURED CREDITORS AND RECEIVERS

Definition of "court" in certain places

243. (1) In paragraphs (2)(*b*) and 250(2)(*a*) and (*b*), "court" means

(*a*) any court other than a court as defined in section 2; and

(*b*) a court as defined in section 2 when not exercising jurisdiction in bankruptcy.

Definition of "receiver"

(2) Subject to subsection (3), in this Part, "receiver" means a person who has been appointed to take, or has taken, possession or control, pursuant to

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

(*b*) an order of a court made under any law that provides for or authorizes the appointment of a receiver or receiver-manager,

of all or substantially all of

(*c*) the inventory,

(*d*) the accounts receivable, or

(*e*) the other property

of an insolvent person or a bankrupt that was acquired for, or is used in relation to, a business carried on by the insolvent person or bankrupt.

Idem

(3) For the purposes of subsection 248(2), the definition "receiver" in subsection (2) shall be read without reference to paragraph (*b*) thereof.

1992, c. 27, s. 89.

Advance notice

244. (1) A secured creditor who intends to enforce a security on all or substantially all of

(*a*) the inventory,

(*b*) the accounts receivable, or

(*c*) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(*a*) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(*b*) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

- 1992, c. 27, s. 89;
- 1994, c. 26, s. 9(E).

Receiver to give notice

245. (1) A receiver shall, as soon as possible and not later than ten days after becoming a receiver, by appointment or otherwise, in respect of property of an insolvent person or a bankrupt, send a notice of that fact, in the prescribed form and manner, to the Superintendent, accompanied by the prescribed fee, and

(*a*) in the case of a bankrupt, to the trustee; or

(*b*) in the case of an insolvent person, to the insolvent person and to all creditors of the insolvent person that the receiver, after making reasonable efforts, has ascertained.

Idem

(2) A receiver in respect of property of an insolvent person shall forthwith send notice of his becoming a receiver to any creditor whose name and address he ascertains after sending the notice referred to in subsection (1).

Names and addresses of creditors

(3) An insolvent person shall, forthwith after being notified that there is a receiver in respect of any of his property, provide the receiver with the names and addresses of all creditors.

1992, c. 27, s. 89.

Receiver's statement

246. (1) A receiver shall, forthwith after taking possession or control, whichever occurs first, of property of an insolvent person or a bankrupt, prepare a statement containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(*a*) to the insolvent person or the trustee (in the case of a bankrupt); and

(*b*) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Receiver's interim reports

(2) A receiver shall, in accordance with the General Rules, prepare further interim reports relating to the receivership, and shall provide copies thereof to the Superintendent and

(*a*) to the insolvent person or the trustee (in the case of a bankrupt); and

(*b*) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Receiver's final report and statement of accounts

(3) A receiver shall, forthwith after completion of duties as receiver, prepare a final report and a statement of accounts, in the prescribed form and containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(*a*) to the insolvent person or the trustee (in the case of a bankrupt); and

(*b*) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

1992, c. 27, s. 89.

Good faith, etc.

247. A receiver shall

(*a*) act honestly and in good faith; and

(*b*) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

- 1992, c. 27, s. 89.

Powers of court

248. (1) Where the court, on the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt), a receiver or a creditor, is satisfied that the secured creditor, the receiver or the insolvent person is failing or has failed to carry out any duty imposed by sections 244 to 247, the court may make an order, on such terms as it considers proper,

(*a*) directing the secured creditor, receiver or insolvent person, as the case may be, to carry out that duty, or

(*b*) restraining the secured creditor or receiver, as the case may be, from realizing or otherwise dealing with the property of the insolvent person or bankrupt until that duty has been carried out,

or both.

Idem

(2) On the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt) or a creditor, made within six months after the statement of accounts was provided to the Superintendent pursuant to subsection 246(3), the court may order the receiver to submit the statement of accounts to the court for review, and the court may adjust, in such manner and to such extent as it considers proper, the fees and charges of the receiver as set out in the statement of accounts.

- 1992, c. 27, s. 89.

Receiver may apply to court for directions

249. A receiver may apply to the court for directions in relation to any provision of this Part, and the court shall give, in writing, such directions, if any, as it considers proper in the circumstances.

- 1992, c. 27, s. 89.

Right to apply to court

250. (1) An application may be made under section 248 or 249 notwithstanding any order of a court as defined in subsection 243(1).

Where inconsistency

(2) Where there is any inconsistency between an order made under section 248, or a direction given under section 249, and

(*a*) the security agreement or court order under which the receiver acts or was appointed, or

(*b*) any other order of the court that appointed the receiver,

the order made under section 248 or the direction given under section 249, as the case may be, prevails to the extent of the inconsistency.

- 1992, c. 27, s. 89.

Protection of receivers

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

- 1992, c. 27, s. 89;
- 1997, c. 12, s. 117(F).

Defence available

252. In any proceeding where it is alleged that a secured creditor or a receiver contravened or failed to comply with any provision of this Part, it is a defence if the secured creditor or the receiver, as the case may be, shows that, at the time of the alleged contravention or failure to comply, he had reasonable grounds to believe that the debtor was not insolvent.

- 1992, c. 27, s. 89.

BUSINESS DEVELOPMENT BANK OF CANADA
Applicant

AND

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

Court of Appeal File No. M50086
Court File No. C65512 & C66166
Court File No. CV-17-11760-00CL

COURT OF APPEAL FOR ONTARIO
PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE RESPONDENT
(Motion returnable February 15, 2019)

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