

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**

BETWEEN:

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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*

**RESPONDING MOTION RECORD**  
**(returnable on February 15, 2019)**

Date: January 31, 2019

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**COURT OF APPEAL FOR ONTARIO**

BETWEEN:

BUSINESS DEVELOPMENT BANK OF CANADA

Applicant

-and-

ASTORIA ORGANIC MATTERS LTD. and ASTORIA ORGANIC MATTERS CANADA LP

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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)

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# TAB 1

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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

BUSINESS DEVELOPMENT BANK OF CANADA

Applicant

- and -

ASTORIA ORGANIC MATTERS LTD. and  
ASTORIA ORGANIC MATTERS CANADA LP

Respondents

IN THE MATTER OF AN APPLICATION PURSUANT TO SUBSECTION 243(1) OF THE  
*BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3, AS AMENDED; AND  
SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43 AS AMENDED

SIXTH SUPPLEMENT TO THE FOURTH REPORT  
SUBMITTED BY BDO CANADA LIMITED  
IN ITS CAPACITY AS RECEIVER OF ASTORIA ORGANIC MATTERS LTD. and  
ASTORIA ORGANIC MATTERS CANADA LP

December 3, 2018

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Appendix A - Letter from K. Plunkett to M. Solmon dated June 19, 2018

## SIXTH SUPPLEMENT TO THE FOURTH REPORT

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### 1.0 Introduction

- 1.0.1 The Receiver filed its Fourth Report dated December 8, 2017 (the “**Fourth Report**”), and the four prior supplements thereto, in response to a motion brought by SusGlobal Energy Belleville Ltd. (“**SusGlobal Belleville**”) for leave to sue the Receiver for gross negligence, among other related relief (the “**Original Motion**”). The Honourable Justice McEwen heard the Motion on February 21 and 27, and March 5, 2018, and dismissed it by way of reasons for decision issued May 17, 2018 (the “**Reasons for Decision**”). His Honour ordered that SusGlobal Belleville pay the Receiver’s costs of the Motion in the total sum of \$117,938.25 by way of an endorsement issued July 3, 2018 (the “**Costs Endorsement**”).
- 1.0.2 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 Ontario Ministry of Environment and Climate Change (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. The Receiver filed its fifth supplement to the Fourth Report in response to the Fresh Evidence Motion.
- 1.0.3 Justice McEwen dismissed the Fresh Evidence Motion, with full indemnity costs in the amount of \$30,156.54 payable to the Receiver, by way of reasons for decision issued November 8, 2018. Justice McEwen found that (1) the underlying documentation relied on as fresh evidence was available to SusGlobal Belleville prior to the hearing of the Original Motion; and (2) the purported fresh evidence would not have changed the result in the Original Motion.

### 1.1 Purpose of this Report

- 1.1.1 SusGlobal Belleville purported to initiate an appeal of the Reasons for Decision, by filing a Notice of Appeal and a Certificate Respecting Evidence on June 15, 2018. On June 18, 2018, SusGlobal Belleville filed a Fresh As Amended Notice of Appeal (the “**Notice of Appeal**”).
- 1.1.2 By letter dated June 19, 2018, counsel for the Receiver wrote to counsel for SusGlobal Belleville to advise that the appeal was improperly constituted and out of time. A copy of this letter is attached hereto as **Appendix “A”**.
- 1.1.3 As a result, SusGlobal Belleville agreed to initiate a motion to seek the Court’s direction with regard to the issues raised in the June 19 letter, following the disposition of the Fresh Evidence Motion. SusGlobal Belleville did so by way of a notice of motion dated November 22, 2018, returnable before a single judge of the Court of Appeal on December 7, 2018.
- 1.1.4 This sixth supplement to the Fourth Report is filed in response to SusGlobal Belleville’s motion returnable December 7, 2018.



## 1.2 No Intention to Appeal

1.2.1 Between the issuance of the reasons for decision on May 17, 2018, and the service of the original notice of appeal on June 15, 2018, neither the Receiver nor its counsel heard anything from SusGlobal Belleville or its counsel regarding a proposed appeal. To the extent that SusGlobal Belleville asserts by way of the affidavit of Marc M. Hazout affirmed November 14, 2018, that Mr. Hazout formed an intention to appeal the Reasons for Decision immediately upon receipt, no such intention was communicated to the Receiver.

## 1.3 Prejudice to the Receiver

1.3.1 The final disposition of SusGlobal Belleville's effort to seek leave to sue the Receiver is the last remaining step that must be completed before the Receiver can make its final distribution to the applicant senior secured creditor, Business Development Bank of Canada ("BDC"), conclude its mandate, and seek its discharge, subject to the Receiver realizing on the shares of SusGlobal Energy Corp. in the over the counter market that it acquired as part of the purchase price. All other steps relating to the administration of the receivership have otherwise been completed.

1.3.2 The Receiver also continues to await payment of the costs awards made on each of the Original Motion and the Fresh Evidence Motion.

All of which is respectfully submitted this 3<sup>rd</sup> day of December, 2018.

**BDO CANADA LIMITED,**  
in its capacity as **COURT-APPOINTED RECEIVER OF**  
**ASTORIA ORGANIC MATTERS LTD. and**  
**ASTORIA ORGANIC MATTERS CANADA LP,**  
and without personal or corporate liability

  
Per: Christopher J. Mazur CIRP LIT  
*Senior Vice President*

# APPENDIX A

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**AIRD BERLIS**

Kyle Plunkett  
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June 19, 2018

**VIA EMAIL**

**SOLMON ROTHBART GOODMAN LLP**  
375 University Avenue  
Suite 701  
Toronto, ON M5G 2J5

**Attention: Melvyn L. Solmon**

Dear Sir:

**Re: Business Development Bank of Canada vs Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP (together, "Astoria" or the "Debtors")**  
**Court File No. CV-17-11760-00CL**

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We are in receipt of the Notice of Appeal and Appellant's Certificate Respecting Evidence each dated June 15, 2018, and the Fresh As Amended Notice of Appeal dated June 18, 2018 (collectively, the "**SusGlobal Appeal**"), pursuant to which your client, SusGlobal Energy Belleville Ltd. ("**SusGlobal**") purports to appeal the decision of The Honourable Mr. Justice McEwen dated May 17, 2018 (the "**McEwen Decision**").

We acknowledge service of the SusGlobal Appeal by email. Our acceptance of service is without prejudice to our position, set out below, that the SusGlobal Appeal is improperly constituted and out of time.

As you ought to be aware, appeals brought in Court proceedings in which a receiver has been appointed pursuant to s. 243 of the *Bankruptcy and Insolvency Act (Canada)* (the "**BIA**") are subject to the appeal provisions set out in s. 193 of the BIA and Rules 31 and 32 of the Bankruptcy and Insolvency General Rules (the "**BIA General Rules**"). The SusGlobal Appeal is no different.

The applicability of s. 193 of the BIA is particularly relevant in this case, given that your client's underlying motion against BDO in its capacity as the Court-appointed receiver of Astoria (in such capacity, the "**Receiver**"), relied upon certain provisions of the BIA and the BIA General Rules. You cannot rely upon the BIA to seek relief against the Receiver, and then seek to avoid its application in order to gain the benefit of a longer appeal period, and an appeal as of right.

Further, although we disagree with the position set out in the SusGlobal Appeal that s. 215 of the BIA does not apply, the application of s. 215 is not the determining factor as to

June 19, 2018

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whether the appeal route is by way of s. 193 of the BIA. Section 193 of the BIA applies conclusively, as a result of the nature of this proceeding (i.e. a receivership proceeding initiated under s. 243 of the BIA).

In light of the foregoing, the SusGlobal Appeal is out of time, having been initiated 29 days after the issuance of the McEwen Decision – well beyond the ten-day appeal period prescribed by Rule 31 of the BIA General Rules.

In addition, you require leave to initiate the SusGlobal Appeal. Contrary to the position asserted in the SusGlobal Appeal, s. 193(e) of the BIA does not apply. The only appeal route available to your client is by way of leave pursuant to s. 193(e) of the BIA; and the deadline to seek such leave passed well before the SusGlobal Appeal was served.

To date, you have not initiated either a motion for leave, or a motion to extend the time to appeal. As presently constituted, the SusGlobal Appeal is not properly before the Court of Appeal. Accordingly, we hereby demand that you immediately, and in any event by no later than June 22, 2018, withdraw the SusGlobal Appeal.

If we do not receive confirmation that the SusGlobal Appeal has been withdrawn by the close of business on June 22, 2018, we will take such steps as the Receiver deems necessary or appropriate in the circumstances, including, without limitation, initiating a motion before a single judge of the Court of Appeal.

As you are aware, the Receiver and the Debtors' estate have already borne significant unnecessary costs relating to the frivolous and unmeritorious claims advanced by SusGlobal. Accordingly, if we are required to bring a motion to address the SusGlobal Appeal, we will be seeking ours and the Receiver's costs on a full indemnity basis, against each of SusGlobal and we reserve the right to also ask for costs against your firm personally in advancing this proceeding as you have. It is difficult to see it as anything other than an abuse of process.

AIRD & BERLIS LLP



Kyle Plunkett

KP/ph

Encls.

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AIRD BERLIS

AIRD & BERLIS LLP

Barristers and Solicitors



**BUSINESS DEVELOPMENT BANK OF CANADA**  
Applicant

AND

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

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**COURT OF APPEAL FOR ONTARIO**  
PROCEEDING COMMENCED AT TORONTO

**RESPONDING MOTION RECORD**  
(Motion returnable February 15, 2019)

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