Court of Appeal File No. C65512/M49948
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*

WRITTEN SUBMISSIONS OF BDO CANADA LTD.,
in its capacity as Court-appointed receiver of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP
(motion returnable January 3, 2019)

Date: January 18, 2019

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TAB 1

WRITTEN SUBMISSIONS OF BDO CANADA LTD.,
in its capacity as Court-appointed receiver of Astoria Organic Matters Ltd.
and Astoria Organic Matters Canada LP

1. The respondent, BDO Canada Ltd., in its capacity as Court-appointed receiver of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP (in such capacity, the "**Receiver**"), delivers these written submissions further to the endorsement of the Honourable Justice Fairburn dated January 3, 2019, and in response to the written submissions re: merits (the "**Merits Submissions**") delivered by the moving party, SusGlobal Energy Belleville Ltd. ("**SusGlobal**").

No Substantive Position

2. The Honourable Justice Watt released Reasons for Decision dated January 7, 2019 (the "**Reasons**"). A copy of the Reasons is attached hereto at **Tab A**.

3. As indicated at the hearing of the motion returnable January 3, 2019, the Receiver takes no position in response to SusGlobal's motions for Orders extending the time to file its Notices of Motion requesting that a panel of this Court set aside the Orders of the Honourable Justice Watt dated December 10, 2018 (the "**Panel Motion**"). Accordingly, the Receiver makes no substantive submission in response to the Merits Submissions.

4. In the Receiver's view, the Reasons are correct. If SusGlobal is successful on the within motion, such that the Panel Motion is permitted to proceed, the Receiver will be asking the panel to uphold the Reasons.

Procedural Position

5. As also indicated at the hearing of the motion returnable January 3, 2019, the Receiver submits that, should this Court grant the Orders sought by SusGlobal, the Panel Motion ought to proceed expeditiously.

6. For the reasons canvassed at the hearing January 3, 2019, the Receiver requests that, consistent with Justice Brown's decision in *2363523 Ontario Inc. v. Nowack*,[1] the Panel Motion

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[1] 2018 ONCA 286 [*Nowack*] at paras 6-9, attached hereto at **Tab B**. A copy of this case was handed up at the hearing January 3, 2019.

proceed in writing, within a one month timeframe from the release of the Court's decision on this motion.

7. In the alternative, the Receiver requests that the hearing of the Panel Motion be set for no more than one hour, and that the matter be assigned an expedited hearing date.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of January, 2019.

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Tab A

COURT OF APPEAL FOR ONTARIO

DATE: 20190107
DOCKET: M49872 (C65512)

Watt J.A. (In Chambers)

BETWEEN

Business Development Bank of Canada

Applicants

and

Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP

Respondents

Melvyn L. Solmon and Rajiv Joshi, for the moving party Susglobal Energy Belleville Ltd.

Miranda Spence and Kyle Plunkett, for the responding party BDO Canada Ltd. (the Receiver)

Heard: December 10, 2018

ENDORSEMENT

[1] On December 10, 2018, I dismissed a motion brought by Susglobal Energy Belleville Ltd. ("Susglobal") for various alternative remedies in connection with a Fresh as Amended Notice of Appeal it served and filed from an order refusing it leave to commence a claim against Business Development Bank of Canada ("BDO Canada") in its capacity as Court-appointed Receiver of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada L.P. ("Astoria").

[2] At that time, I promised the parties that I would provide reasons for the conclusions I had reached. Those reasons follow.

The Background Facts

[3] A bit of background to begin.

The Business of Astoria

[4] Astoria operated an organic recycling facility and a waste transfer station. The company mixed and processed various organic wastes with leaf and yard waste to form clear compost for agricultural and landscape markets.

The Receivership

[5] On April 13, 2017 BDO Canada was appointed as the Receiver of Astoria. The formal order, consistent with the model template Receivership order established by the *Commercial List Users' Committee*, refers not only to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), but also to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c C.43 ("*CJA*").

[6] Following its appointment as Receiver, BDO Canada continued the business of Astoria in the ordinary course with Astoria staff.

The Asset Purchase Agreement

[7] On July 27, 2017, the Receiver entered into an Asset Purchase Agreement ("APA") with, among others, Susglobal. Under the APA, Susglobal agreed to acquire some of Astoria's assets. The deal closed on September 15, 2017.

The Letter

[8] About six weeks after the deal closed, on October 30, 2017, Susglobal wrote to the Receiver. Susglobal alleged that prior to closing, the Receiver was grossly negligent in its operation of Astoria. According to Susglobal, BDO Canada:

i. allowed the volume of raw organic waste to exceed the allowances prescribed by the environmental compliance approvals maintained by the Ontario Ministry of Environment and Climate Change ("OECC"); and

ii. withheld information from Susglobal relating to the results of an annual odour sampling program conducted in a building at the Astoria facility.

The Investigation

[9] BDO Canada investigated Susglobal's allegations and found them to be without merit. The Receiver communicated these findings to Susglobal by letter two weeks later.

The Original Motion

[10] Susglobal sought leave from a judge of the Superior Court of Justice to permit it to commence a claim against BDO Canada in its capacity as Court-appointed Receiver of Astoria, for damages for gross negligence, or in the alternative, for wilful misconduct and breach of the APA and the order appointing the Receiver.

The Decision of the Motion Judge

[11] At the conclusion of a three-day hearing, the presiding judge ("the motion judge") reserved his decision. In his reasons, the motion judge found:

i. that Susglobal failed to produce any credible and reliable evidence to support its claim of excess organic waste in a building at the facility;

ii. that, in any event, s. 3.03 of the APA, the "As is, Where is" clause, absolved the Receiver of any liability; and

iii. that, even if Susglobal had been able to establish the excess organic waste it alleged was in a building at the Astoria facility, this would not constitute *prima facie* evidence of wilful misconduct or gross negligence on the part of the Receiver.

The reasons were released on May 17, 2018.

The Appeal

[12] On June 15, 2018, Susglobal initiated its appeal from the decision of the motion judge. It did so by filing a Notice of Appeal and a Certificate Respecting Evidence. Three days later, on June 18, 2018, Susglobal filed a Fresh as Amended Notice of Appeal. In neither notice did Susglobal seek leave to appeal.

The Motion to Re-Open

[13] About three weeks after initiating its appeal, Susglobal sought to re-open its original motion and file fresh evidence. The proposed fresh evidence included:

i. an undated report that Susglobal said it had filed with the OECC on March 29, 2018; and

ii. a confirmatory email from an OECC representative on June 25, 2018 acknowledging receipt of the Susglobal report.

The Decision on Re-opening

[14] On November 8, 2018, the motion judge dismissed the motion to re-open the original motion. Among other things, the motion judge concluded:

i. that the underlying information advanced as fresh evidence was available to Susglobal prior to the hearing of the original motion, but not tendered there; and

ii. that, even if received, the proposed fresh evidence would not have changed the result on the original motion.

This Motion

[15] On this motion, Susglobal seeks several alternative forms of relief:

i. an order that the Fresh as Amended Notice of Appeal was properly served and filed under s. 6 *CJA*;

ii. in the alternative, if the appeal is governed by s. 193(c) of the *BIA*, an order *nunc pro tunc* extending the time for serving and filing the notice of appeal from 10 to 29 days; and

iii. in the further alternative, if the appeal is governed by s. 193(e) of the *BIA*, an order granting leave to appeal and an order *nunc pro tunc* extending the time for filing the Fresh as Amended Notice of Appeal from 10 days to 29 days.

Analysis

[16] To resolve the issues put in play by this motion, it is helpful to begin with the threshold issue of which statutory regime governs this appeal. The *BIA*? Or the *CJA*?

Issue #1: The Governing Statute

[17] As I will explain, I am satisfied that it is the *BIA* and not the *CJA* that governs this appeal.

[18] The judgment under appeal was rendered on a motion brought by Susglobal seeking leave to commence a claim against the Court-appointed Receiver of Astoria for damages for gross negligence, alternatively for wilful misconduct and breach of the APA and the order of the judge who appointed the Receiver. The root authority invoked to appoint the Receiver was s. 243(1) of the *BIA*.

[19] As part of its exclusive authority over bankruptcy and insolvency, Parliament has jurisdiction over procedural law in bankruptcy matters. As a result, Parliament has the authority to authorize, as well as to limit or prohibit, appeals as it deems appropriate: *Re Solloway Mills & Co.*, [1935] O.R. 37 (C.A.), at p. 43.

[20] Appeals from decisions or orders made in proceedings instituted under the *BIA*, it follows, are governed by the *BIA* and the *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368 (*"BIA* Rules"), not by the *CJA* or the Rules of Civil Procedure, R.R.O., 1990, Reg. 194: *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Co.*, 2012 ONCA 569, at para. 19. See also, *Dabbs v. Sunlife Assurance Co. of Canada* (1998), 41 O.R. (3d) 97 (C.A.), at para. 13.

[21] 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. See, *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at paras. 14-19.

[22] In the result, I am satisfied that this appeal is governed by the provisions of the *BIA*, in particular, s. 193 of that Act and the *BIA* rules.

Issue #2: Appeals as of Right under the *BIA*

[23] Section 193 of the *BIA* authorizes appeals to this court from orders and decisions of judges in proceedings under the Act. The section is in these terms:

> 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.

[24] An appeal lies to this court as of right in the circumstances described in ss. 193(a) to (d). In all other circumstances, leave to appeal must be sought from a single judge under s. 193(e). Under r. 31(2) of the *BIA* rules, the notice of appeal in cases in which reliance is placed on s. 193(e) must include the application for leave: *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500 (Ch'rs), at paras. 38-39.

[25] As its primary source of appellate jurisdiction under the *BIA*, Susglobal invoked s. 193(c). Recent jurisprudence has rejected an expansive application of the automatic right of appeal contained in this provision and held it inapplicable to orders that:

i. are procedural in nature;

ii. do not bring into play the value of the debtor's property; or

iii. do not result in a loss.

See, *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225 (Ch'rs), at paras. 49, 50, 53; *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611 (Ch'rs), at para. 22.

[26] Recall what Susglobal sought before the original motion judge: leave to sue the Court-appointed Receiver to recover damages for alleged gross negligence, wilful misconduct, breach of the APA and of the order appointing the Receiver. In

its essence, the order sought was procedural in nature – the right to sue, to pursue a remedy in damages.

[27] Further, the order under appeal did not contain any element of a final determination of the economic interests of the claimant. Nor is there any basis in the evidentiary record to support the assertion that the decision resulted in an economic loss. Susglobal did not seek to have the motion judge determine its actual alleged losses. What it sought was the right to pursue the Receiver for its alleged losses. What it lost was a chance to sue.

[28] Success on appeal will put no money in Susglobal's treasury. Its gain is one of chance – the right to sue to prove its case on liability and in damages. Thus its appeal falls outside the entry portal of s. 193(c) since it does not directly involve property exceeding $10,000 in value.

Issue #3: Leave to Appeal under Section 193(e)

[29] In the further alternative, Susglobal invokes s. 193(e) of the *BIA* and seeks leave to appeal from the decision of the motion judge. I would not grant leave to appeal in the circumstances of this case.

[30] Leave to appeal under s. 193(e) is discretionary. Although the provision itself is unrevealing of the factors that may or must be considered in determining whether leave may be granted, prior decisions have identified as relevant factors:

i. whether the appeal raises issues of general importance to the practice in bankruptcy or insolvency matters, or to the administration of justice as a whole, and thus is one that this court should consider and address;

ii. whether the appeal is *prima facie* meritorious; and

iii. whether the appeal would unduly hinder the progress of the bankruptcy or insolvency proceedings.

See, *Business Development Bank of Canada v. Pine Tree Resort Inc.*, 2013 ONCA 282 (Ch'rs), at para. 29.

[31] A review of the motion judge's reasons as a whole betrays Susglobal's claim that issues of general importance to the practice in bankruptcy or insolvency matters or to the administration of justice as a whole are involved and ripe for appellate decision in this case.

[32] The motion judge was well aware of and devoted his reasons to his assigned task. And that was to determine whether Susglobal could establish a *prima facie* case that the Receiver had engaged in gross negligence or wilful misconduct in the manner Susglobal alleged. After a careful, unerring and clear-eyed assessment of the evidence adduced on the motion, the judge, in richly detailed and well-documented reasons, concluded that Susglobal had failed to meet its burden. No more. No less.

[33] Susglobal's assertion that the motion judge's assessment of the "As is, Where is" clause in s. 303 of the APA represents a comment on such clauses generally, thus is a matter of general importance to the bankruptcy or insolvency Bar, falls on barren ground. Absolution under the clause was fact-specific. The alleged excess of which Susglobal complains was in plain view. The Receiver made the facility available to Susglobal staff who toured frequently. Susglobal had full access to and reviewed relevant data.

[34] Nor am I persuaded that Susglobal's appeal is meritorious.

[35] A proposed appeal is *prima facie* meritorious where the decision:

i. is contrary to law;

ii. amounts to an abuse of judicial power; or

iii. involves an obvious error causing prejudice for which there is no remedy.

See, *Pine Tree*, at para. 31.

[36] In its original motion, Susglobal sought leave to sue the Court-appointed Receiver. Susglobal was required to adduce evidence, if it could, to establish a *prima facie* case that the Receiver demonstrated a marked departure from the standards by which responsible and competent people in equivalent circumstances would have acted or conducted themselves or was recklessly indifferent in its conduct.

[37] The motion judge concluded that Susglobal had failed to meet its burden. His conclusion, supported by several findings of fact grounded on uncontroverted evidence, are uncontaminated by errors of law or principle or any misapprehensions of substance. They are entitled to deference in this court.

[38] A final factor worthy of consideration is prejudice. By this I mean the prejudice suffered by the Receiver and the Debtors' estate in responding to Susglobal's claims rather than in pursuing an efficient and expeditious administration of the Debtors' estate, as is its task under the *BIA*.

Issue #4: The Extension of Time

[39] It follows from what I have said that Susglobal's notice of appeal was not filed within the time required by the *BIA* rules. Were this a case within s. 193(c) where no leave is required, or one meriting leave under s. 193(e), it would be necessary to determine whether an extension of time should be granted. In the absence of an automatic right of appeal under s. 193(c) and leave under s. 193(e), the motion for an extension of time also fails.

Tab B

2018 ONCA 286
Ontario Court of Appeal

2363523 Ontario Inc. v. Nowack

2018 CarswellOnt 4396, 2018 ONCA 286, 292 A.C.W.S. (3d) 468

2363523 Ontario Inc. (Plaintiff / Respondent / Responding Party) and Steven Nowack, Melissa Frishling, John Doe 1 to 10, Jane Doe 1 to 10 and Doe Corporations 1 to 10 (Defendants / Appellant / Moving Party)

David Brown J.A.

Heard: March 20, 2018
Judgment: March 21, 2018
Docket: CA M48928 (C63990)

Counsel: Paul Slansky, for Moving Party
Norman Groot, for Responding Party

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
XXIII Practice on appeal
XXIII.6 Time to appeal
XXIII.6.b Extension of time
XXIII.6.b.iii Grounds for extension

Headnote

Civil practice and procedure --- Practice on appeal — Time to appeal — Extension of time — Grounds for extension
Judge made order requiring appellant to pay security for costs of appeal from sentence for contempt — Just over one month after order was made, appellant sought extension of time to file notice of motion for panel review of order pursuant to s. 7(5) of Courts of Justice Act and R. 61.16(6) of Rules of Civil Procedure — Motion granted — Appellant formed intention to seek review of security for costs order shortly after it was made — Appellant moved with some dispatch to serve and file notice of motion, albeit outside very short four-day service window in Rules — Appeal engaged appellant's liberty and was not frivolous — Review motion to be heard by panel of Court of Appeal in writing, due to concerns about delay.

Table of Authorities

Cases considered by *David Brown J.A.*:

Paulsson v. Cooper (2010), 2010 ONCA 21, 2010 CarswellOnt 116 (Ont. C.A. [In Chambers]) — referred to

Yaiguaje v. Chevron Corporation (2017), 2017 ONCA 827, 2017 CarswellOnt 16763, 138 O.R. (3d) 1 (Ont. C.A.) — considered

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 7(5) — pursuant to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

R. 3.02(1) — considered

R. 61.16(6) — considered

MOTION by appellant for extension of time for panel review of order for security for costs.

David Brown J.A.:

1 The appellant, Steven Nowack, is appealing the order of Dunphy J. dated June 30, 2017, which imposed a further term of imprisonment of 21 days for what the parties call "Contempt No. 2". In that appeal, Hoy A.C.J.O. made an order dated December 6, 2017 requiring the appellant to post security for costs of $10,000 within 30 days (the "Order").

2 The appellant seeks an extension of time to file a notice of motion for a panel review of the Order pursuant to s. 7(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "*CJA*") and Rule 61.16(6) of the *Rules of Civil Procedure*. The respondent vigorously opposes the motion.

3 The appellant served respondent's counsel with a notice of motion on January 10, 2018. However, Rule 61.16(6) required the service and filing of the notice of motion within four days after the Order was made, that is by December 10, 2017.

4 Motions for the extension of time to file a court document require looking at several factors. Most importantly, they require looking at the justice of the case in all the circumstances: *Paulsson v. Cooper*, 2010 ONCA 21 (Ont. C.A. [In Chambers]), at para. 2.

5 In the present case, a combination of factors leads me to grant the appellant an extension of time:

(i) I accept that the appellant formed an intention to seek a review of the security for costs Order shortly after it was made. The appellant has sought to review most orders made in this lengthy proceeding, so I have no doubt he quickly formed an intention to review the Order. That would be consistent with his usual habit;

(ii) The appellant moved with some dispatch to serve and file a notice of motion to review, albeit outside the very short four-day service window in the *Rules*;

(iii) The underlying appeal engages the liberty of the subject;

(iv) Two judges of this court have described the merits of the appeal from the order of Dunphy J. as "not frivolous" and having merit: Decision of Hoy A.C.J.O., at paras. 18 and 19; and

(v) Although orders for security for costs are discretionary in nature and usually entitled to deference, a panel of this court recently reversed an order for security for costs because the chambers judge had "erred in principle in determining the justness of the order sought": *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, 138 O.R. (3d) 1 (Ont. C.A.), at para. 21. It therefore is difficult to predict the degree of deference that a panel will afford to any particular order for security for costs made by a single judge. As a result, I cannot assess the merits of the appellant's desired panel review of the Order with any degree of precision.

6 However, Rule 3.02(1) states that the court may extend any prescribed time "on such terms as are just." As a general practice, motions to a panel to review an order of a single judge of this court are heard orally. Given the history of this proceeding, I am concerned that following the general practice of an oral hearing would result in undue delay in scheduling and then hearing the motion. Consequently, I direct that the appellant's review motion be heard by a panel of this court in writing.

7 In fashioning this remedy, I am influenced by the most unfortunate, but increasing, practice of parties seeking panel reviews of single judge decisions pursuant to s. 7(5) of the *CJA*. That provision, quite unintentionally, is now fuelling the emergence of a motions culture in this court. Decisions of single judges on the simplest of procedural matters, such as the extension of time, now prompt a further motion demanding an "internal appeal" of the decision to a panel. Motion time is heaped upon motion time, which delays hearing an appeal on its merits.

8 As a result, the terms that I am imposing in granting the appellant the indulgence of an extension of time are designed to bring the issue of the finality of the Order to a conclusion by the end of next month. Directing a motion in writing will ensure that result; leaving it to the parties to schedule an oral hearing only invites further delay.

9 The appellant has had ample time to prepare his materials for a *CJA* s. 7(5) review of the Order. Accordingly, the schedule for filing materials — with sufficient copies for the panel in accordance with the *Rules* — is as follows:

(i) The appellant shall serve and file all materials for his *CJA* s. 7(5) review of the Order no later than Thursday, March 29, 2018;

(ii) The appellant may not file any further materials after March 29, 2018;

(iii) If the appellant fails to file his materials by 4:30 p.m. on Thursday, March 29, 2018, I direct the Registrar to dismiss his motion for a panel review as abandoned;

(iv) The respondent shall serve and file all responding materials no later than April 11, 2018; and

(v) The motion materials shall be placed before a civil panel for its consideration during the week of April 23, 2018.

10 The costs of this motion are reserved to the panel hearing the motion to review the Order.

Motion granted.

End of Document

BUSINESS DEVELOPMENT BANK OF CANADA
Applicant

AND

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

Court of Appeal File No. C65512/ M49948
Court File No. CV-17-11760-00CL

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

WRITTEN SUBMISSIONS OF BDO CANADA LTD., in its capacity as Court-appointed receiver of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP

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