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# Clarity in Appeal Procedures: The BIA Prevails

Jan 23, 2019

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A recent decision of Justice Watt of the Ontario Court of Appeal definitively answers the question of which appeal procedure must be followed in appeals of Orders made in proceedings constituted under both the *Bankruptcy and Insolvency Act* (the "***BIA***")[1] and the *Courts of Justice Act* (the "***CJA***").[2] Justice Watt's decision in *Business Development Bank of Canada v. Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP*[3] concludes that, even where the initial Order references both statutes, any appeal must follow the appeal procedures prescribed by s. 193 of the *BIA* and the *Bankruptcy and Insolvency Act General Rules* (the "***BIA Rules***") due to Parliament's exclusive jurisdiction over bankruptcy matters.

The decision arose in the context of a receivership proceeding initiated in the Ontario Superior Court of Justice (Commercial List) (the "**Court**"). By way of an Order of Justice Hainey dated April 13, 2017 (the "**Receivership Order**"), BDO Canada Ltd. ("**BDO**") was appointed as the receiver (in such capacity, the "**Receiver**") of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP ("**Astoria**"), which companies carried on business as the operators of an organic waste processing facility (the "**Facility**"). Consistent with the model receivership order, the Receivership Order was made pursuant to both s. 101 of the *CJA* and s. 243 of the *BIA*.

Following a sale process, the Receiver entered into an asset purchase agreement with SusGlobal Energy Belleville Ltd. ("**SusGlobal**") for the sale of the Facility. After the closing of the sale, SusGlobal alleged that the Facility had contained an excess of organic waste as at the closing date, and that the Receiver had therefore been grossly negligent in its operation of the Facility after its appointment.

SusGlobal brought a motion seeking leave of the Court to commence a claim against the Receiver arising from its allegations (the "**Original Motion**"). Justice McEwen dismissed the Original Motion by way of reasons for decision issued May 17, 2018 (the "**Decision**"), citing a lack of credible and reliable evidence to support any wilful misconduct or gross negligence on the part of the Receiver, among other reasons.[4] [5]

On June 15, 2018, nearly a month after Justice McEwen released the Decision, SusGlobal initiated an appeal (the "**Appeal**"). The Receiver objected that the Appeal was out of time, as it had been initiated outside of the ten-day time period prescribed by the *BIA Rules* for appeals made pursuant to s. 193 of the *BIA*.

SusGlobal thereafter brought a motion before a single judge of the Court of Appeal, seeking an Order that the Appeal was governed by s. 6 of the *CJA* and the *Rules of Civil Procedure* (the "***Rules***"), which prescribe a 30-day appeal period. In the alternative, SusGlobal sought Orders extending the time to serve and file the Appeal from 10 days to 29 days, and that the Appeal was made as of right pursuant to s. 193(c) of the *BIA*, or alternatively, that leave to appeal pursuant to s. 193(e) of the *BIA* was warranted.

On the threshold issue, Justice Watt held that, as Parliament has exclusive authority over bankruptcy and insolvency, it has jurisdiction over procedural law in bankruptcy matters. Accordingly, the Appeal was governed by the *BIA* and the *BIA Rules*, and not the *CJA* and the *Rules*. In so holding, His Honour wrote as follows:

[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.

Justice Watt further held that there was no automatic right of appeal pursuant to s. 193(c) of the *BIA*, and refused to grant leave to appeal pursuant to s. 193(e) of the *BIA*. Having so determined, His Honour also held that no extension of time to file the Appeal should be granted.

This decision provides certainty with regard to appellate procedure for proceedings initiated pursuant to the *BIA*, whether or not the initial Order makes reference to the *CJA* or other provincial statutes. Court-appointed receivers can rest assured that the protections afforded under the *BIA* to ensure the efficient administration of debtors' estates by preventing frivolous appeals remain in place.

The Financial Services Group at Aird & Berlis can advise on proceedings initiated pursuant to the *Bankruptcy and Insolvency Act*. Details can be found on our **Financial Services web page**.

*Aird & Berlis LLP partners Miranda Spence and Kyle Plunkett acted for the Receiver on the motion before Justice Watt.*

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[1] RSC, 1985, c B-3.

[2] RSO 1990, c C43.

[3] (January 7, 2019), Toronto, M49872 (C65512) (Ont CA).

[4] *Business Development Bank of Canada v. Astoria Organic Matters Ltd. and Astoria Organic Matters LP*, 2018 ONSC 2850 (Ont SCJ – Comm List).

[5] Following the release of the Decision, SusGlobal brought a motion seeking to reopen the Original Motion for the purpose of introducing fresh evidence. Justice McEwen dismissed that motion pursuant to reasons for decision issued November 8, 2018: *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2018 ONSC 6062 (Ont SCJ).

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