

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

BUSINESS DEVELOPMENT BANK OF CANADA

Applicant

-and-

ASTORIA ORGANIC MATTERS LTD. AND ASTORIA ORGANIC MATTERS CANADA LP

Respondents

**IN THE MATTER OF the Receivership of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP**

**AND IN THE MATTER OF an Application pursuant to Rule 14.05(2), 14.05(3)(d), 14.05(3)(g), 14.05(3)(h) of the *Rules of Civil Procedure***

**FACTUM OF SUSGLOBAL ENERGY BELLEVILLE LTD.**

February 13, 2018

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# TABLE OF CONTENTS

<b>PART I – OVERVIEW .....</b>	<b>1</b>
<b>PART II – FACTS .....</b>	<b>3</b>
<b>PART III – ISSUES .....</b>	<b>15</b>
<b>PART IV – THE LAW .....</b>	<b>16</b>
<b>A. ISSUE 1 – SHOULD LEAVE BE GRANTED TO PERMIT SUSGLOBAL BELLEVILLE         TO BRING ITS CLAIM AGAINST BDO? .....</b>	<b>16</b>
<b>B. ISSUE 2 – DOES BDO’S CONDUCT AMOUNT TO GROSS NEGLIGENCE OR, IN THE         ALTERNATIVE WILFUL MISCONDUCT, OR BREACH OF THE ORDER.....</b>	<b>19</b>
<b>C. ISSUE 3 – DOES THE “AS IS, WHERE IS” CLAUSE AT SECTION 3.03 OF THE APA         NEGATE BDO’S LIABILITY? .....</b>	<b>24</b>
<b>SCHEDULE “A” .....</b>	<b>27</b>
<b>SCHEDULE “B” .....</b>	<b>28</b>

## **PART I – OVERVIEW**

1. On September 15, 2017, SusGlobal Energy Belleville Ltd. closed an Asset Purchase Agreement with the Receiver, BDO, for assets of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP (the “Debtors”), who previously carried on a Category A organic composting and recycling business in Belleville, Ontario.
2. SusGlobal Belleville’s position is that there was in excess of 1,500 metric tonnes (“MT”) of Organic Waste in the Tipping Building on September 15, 2017. BDO’s position is that there was far less than that. BDO bases this on the evidence of Mr. Allan Hamilton, the Debtor’s President and Chief Executive Officer during the Receivership Period. He falsely stated that the Debtors “processed on average 1 to 1.5 Windrows per week” from April to September 15, 2017. He falsely stated this to try and account for the actual amount of Organic Waste received by the Debtors during this time period. Furthermore, he alleged he made a mathematical error in BDO’s Fourth Report when it is submitted by SusGlobal Belleville that he did not make a mathematical error. Furthermore, his calculations based on the BDO Pictures taken on September 12, 2017, is mathematically incorrect.
3. The math that flows from the uncontradicted facts demonstrates there was in excess of 1,500 MT in the Tipping Building on September 15, 2017. Those facts are as follows:
4. During the 23-week Receivership Period, BDO accepted a total of approximately 4,952 MT of Biosolid Content from various vendors. This amount does not include the material that was in the Tipping Building at the start of the receivership. This figure comes from the Debtors Material Report from January 1, 2017 to November 22, 2017, which is accurate.
5. During the 23-week Receivership Period, BDO constructed 23 Windrows. Each Windrow can hold between 450 to 500 MT of Compost Mixture. These figures are accurate.
6. There is no dispute that to produce Category A compost, BDO mixed 25% Biosolid Content with 75% other organic waste, including, but not limited to, Leaf and Yard waste, into a Compost Mixture.



7. As a result, BDO could have processed a maximum Compost Mixture of 11,500 MT (500MT x 23 weeks) during the Receivership Period (assuming each Windrow was filled to 500 MT).
8. BDO accepted approximately 4,952 MT of Biosolid Content during the Receivership Period (as set out in the Debtors Material Report). As a result, to produce Category A Compost, BDO would have required at least 14,856 MT of Leaf/Yard Content, and would have had to process a total Compost Mixture amount of at least 19,808 MT during the Receivership Period.
9. To process the 19,808 MT Compost Mixture, BDO was required to process an average of at least 1.73 Windrows per week (assuming 500 MT per Windrow) or 1.92 Windrows per week (assuming 450 MT per Windrow) [which could not have occurred as the average was only 1 Windrow per week].
10. Therefore, it was impossible for BDO to process the 4,952 MT of Biosolid Content it received during the Receivership Period, as it only processed on average 1 Windrow per week during the Receivership Period. Mr. Hamilton's evidence attempts to hide this fact.
11. The Pictures taken by both BDO and SusGlobal Belleville further confirm there was in excess of 1,500 MT of Organic Waste in the Tipping Building on September 12, 2017.
12. BDO is grossly negligent in not being able to determine this math and in relying on a witness that BDO should have known was not telling the truth. BDO's due diligence as a Receiver once they decided to take possession and run the Business was gross negligence at least. Their breach of the ECA was wilful disobedience. The "mathematical error", as alleged by Mr. Hamilton, was not an error.<sup>1</sup>
13. BDO is not entitled to rely on the "As Is, Where Is" clause in the APA when it operated the Business contrary to the environmental laws and the ECA issued by the province of Ontario. "As Is, Where Is" cannot mean operating the Business contrary to the environmental laws and the ECA: doing so would constitute a fundamental breach of the APA.

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<sup>1</sup> See Affidavit of Gerald Hamaliuk affirmed November 29, 2017, Exhibit "P" – Pinchin Report at page 13 [Hamaliuk Affidavit] (sets out between July 10 and July 13, 2017, there was 1,312.5 MT of Organic Waste in the Tipping Building).

14. At the very least there is a strong *prima facie* case of gross negligence or in the alternative a *prima facie* case and leave should be granted to SusGlobal Belleville to sue the Receiver. The Receiver can claim over against the incompetent Mr. Hamilton that the Receiver relied on without bothering to do the math. Not granting leave to sue would, in substance, give a licence to a receiver to be incompetent and to not properly check the information they are receiving, at the risk of the environment.

## **PART II – FACTS**

### **A. THE PARTIES & THE BDO RECEIVERSHIP PERIOD**

15. SusGlobal Energy Canada Corp. (“SusGlobal Canada”), is a federally incorporated corporation in Canada that carries on the business of operating renewable energy facilities throughout the Province of Ontario.<sup>2</sup> SusGlobal Canada is the parent company of SusGlobal Energy Belleville Ltd. (“SusGlobal Belleville”).<sup>3</sup>

16. SusGlobal Belleville is a provincially incorporated corporation in Ontario that carries on the business of operating an organic composting and recycling facility at 704 Phillipston Rd., Belleville, Ontario (the “Site”). Part of the Site includes the Tipping Building (where organic waste was stored prior to it being processed into compost).<sup>4</sup>

17. The Debtors previously carried on the business of operating an organic composting and recycling facility at the Site (the “Business”).<sup>5</sup>

18. The Debtors produced Category A Compost<sup>6</sup> by processing organic waste which included, but is not limited to: leaf and yard waste; biosolids; and wastewater treatment effluent which contained coliform bacteria and metal contaminants, among other things (collectively, the “Organic Waste”).<sup>7</sup>

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<sup>2</sup> Hamaliuk Affidavit, at para 3.

<sup>3</sup> Hamaliuk Affidavit at para 4.

<sup>4</sup> Hamaliuk Affidavit at para 5.

<sup>5</sup> Hamaliuk Affidavit at para 9.

<sup>6</sup> Supplementary Affidavit of Gerald Hamaliuk Affirmed on December 17, 2017 at para 10 [Supplementary Hamaliuk Affidavit] (Category A Compost is produced pursuant to O Reg 267/03: GENERAL, under *Nutrient Management Act, 2002*, SO 2002, c 4).

<sup>7</sup> Hamaliuk Affidavit at para 9; Supplementary Hamaliuk Affidavit at para 10.

19. By the Order of the Honourable Mr. Justice Hainey dated April 13, 2017, BDO Canada Limited (“BDO” or the “Receiver”) was appointed the Receiver of the assets, undertakings and properties of each of the Debtors acquired for, or used in relation to the Business, including all proceeds thereof (the “Property”) (collectively, the “Order”).<sup>8</sup>

20. Pursuant to the Amended Environmental Compliance Approval Number 0031-7UTRSS (the “ECA”), which was issued to the Debtors on August 7, 2015, BDO was obligated to ensure that no more than 150 tonnes (“MT”) of Organic Waste was stored inside the Tipping Building.<sup>9</sup>

21. Paragraph 16 of the Order addresses the limitation on environmental liability of BDO.<sup>10</sup>

22. If BDO chose to take possession of the Property and operate the Business, then the Order required BDO to operate the Site legally and in compliance with all laws, including, but not limited to, all environmental laws and ECAs.<sup>11</sup>

23. BDO occupied the Site and took control, care, charge, possession, and management of the Debtors’ Property and the Site. BDO was required to comply with the conditions of the ECA, pursuant to s. 186(3) of the *Environmental Protection Act* (Ontario) (the “EPA”) and paragraph 16 of the Order.<sup>12</sup>

## **B. THE NEGOTIATIONS**

24. In or around May 2017, SusGlobal Belleville initiated conversations with BDO for the purchase of some of the Property. An Asset Purchase Agreement (the “APA”) for specific assets of the Debtors was discussed (the “Purchased Assets”).<sup>13</sup>

25. Between May and September 2017, SusGlobal Canada conducted its due diligence of the Business. It conducted three Site visits and inspected the Tipping Building twice. There were no visible issues of Site non-compliance on any Site visit. SusGlobal Canada also conducted its own due diligence

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<sup>8</sup> Hamaliuk Affidavit at para 6.

<sup>9</sup> Hamaliuk Affidavit at para 20, Exhibit “D” – Amended Environmental Compliance Approval Number 0031-7UTRSS.

<sup>10</sup> See Schedule “B”.

<sup>11</sup> Hamaliuk Affidavit at para 60.

<sup>12</sup> Hamaliuk Affidavit at para 60.

<sup>13</sup> Hamaliuk Affidavit at para 27.

where it thoroughly examined all of the Debtors' documents in the online data room. Nothing indicated that BDO was not operating the Site in compliance with all environmental laws and ECAs.<sup>14</sup>

26. On September 12, 2017, SusGlobal Belleville attempted to execute the APA for the Purchased Assets (collectively, the "Original Closing Date").<sup>15</sup>

27. SusGlobal Belleville was not able to execute the APA on the Original Closing Date, because it was not able to arrange the fund transfer to BDO from its lender, PACE Credit Union ("PACE").<sup>16</sup>

28. On September 14, 2017, SusGlobal Belleville and BDO executed the Third Amendment to the APA which extended the closing date to September 15, 2017 (the "Closing Date") on the condition that SusGlobal Belleville provided BDO with additional consideration in the amount of \$100,000 (the "Penalty Consideration").<sup>17</sup>

29. On the Closing Date, SusGlobal Belleville and BDO executed the APA for \$7,782,752.08 (the "Purchase Price").<sup>18</sup>

30. Section 2.08(1) of the APA provides:

(1) At the Time of Closing, [SusGlobal Belleville] will assume and thereafter fulfil, perform and discharge when due the following Liabilities of Astoria outstanding as at the Closing Date (collectively, the "Assumed Liabilities"):

(c) all Liabilities relating to or arising from the Purchased Assets under Environmental Laws from and after the Closing Date including, without limitation, any costs and expenses associated with any ongoing work in process from and after the Time of Closing required to be carried out in order to comply with any Environmental Laws provided that it is agreed by the parties hereto that such ongoing work shall not include the work described in Section 4.02(9) below. [emphasis added]<sup>19</sup>

31. Section 3.03 of the APA provides the "As Is, Where Is" clause.<sup>20</sup>

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<sup>14</sup> Hamaliuk Affidavit at paras 12-19, 26-44.

<sup>15</sup> Supplementary Motion Record, Tab 1 – Amended Notice of Motion dated January 18, 2018, at para 21 [Amended Notice of Motion].

<sup>16</sup> Amended Notice of Motion at para 22.

<sup>17</sup> Amended Notice of Motion at para 24.

<sup>18</sup> Amended Notice of Motion at para 25.

<sup>19</sup> Hamaliuk Affidavit at para 62.

<sup>20</sup> Hamaliuk Affidavit at para 8, Exhibit "C"- Executed APA; See Schedule "B".

### **C. BDO'S ILLEGAL CONDUCT DURING THE RECEIVERSHIP PERIOD**

32. After taking possession of the Site on the Closing Date, SusGlobal Belleville entered into the Tipping Building and found approximately 1,500 MT of Organic Waste stored inside. This was approximately ten times the amount permitted under the ECA.<sup>21</sup>

33. As a result, SusGlobal Belleville notified the Ministry of the Environment and Climate Change (the "MOECC") of the excessive inventory in the Tipping Building. The MOECC required SusGlobal Belleville to implement a management plan to process the excessive inventory in the Tipping Building to ECA compliance.<sup>22</sup>

34. SusGlobal Belleville carried out this management plan. It was required to: (i) turn away lucrative composting contracts from various vendors; and (ii) convert its operations from a Class A Compost facility to a Class B Compost facility. Class B Compost cannot be sold to the general public. SusGlobal Belleville was not able to generate any revenue from its compost.<sup>23</sup>

35. Between April 13, 2017, and September 15, 2017 (the "Receivership Period"), BDO must have had full knowledge of the excessive inventory and the odour problem in the Tipping Building.<sup>24</sup>

36. In or around July 2017, BDO had retained both Pinchin Ltd. ("Pinchin") (prior to July 10, 2017) and Stantec Consulting Ltd. ("Stantec") (prior to July 19, 2017) to conduct odour sampling tests on the Site. BDO did not mention this to SusGlobal Canada or SusGlobal Belleville prior to either the Original Closing Date or the Closing Date.<sup>25</sup> As a result, BDO knew there was 1,312.5 MT of Organic Waste in the Tipping Building, contrary to the ECA requirement. BDO did not notify SusGlobal Canada or SusGlobal Belleville.

37. On July 19, 2017, Stantec provided its odour report to Angelo Consoli, Vice President of BDO (the "Stantec Report"). It clearly indicated excessive odour readings. The Stantec Report indicated this

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<sup>21</sup> Hamaliuk Affidavit at para 45.

<sup>22</sup> Hamaliuk Affidavit at paras 69-70.

<sup>23</sup> Hamaliuk Affidavit at paras 72-74, 76-81.

<sup>24</sup> Hamaliuk Affidavit at para 60.

<sup>25</sup> Hamaliuk Affidavit at paras 50-58.

odour issue “warrant[ed] investigation.” BDO did not undertake any reasonable investigation. BDO neither reasonably dealt with the odour issue nor the presence of excess of 150 MT of Organic Waste in the Tipping Building. BDO did not notify SusGlobal Canada or SusGlobal Belleville about the Stantec Report findings nor of the odour issue in the Tipping Building before either the Original Closing Date or the Closing Date.<sup>26</sup> This conduct of BDO was commercially unreasonable considering SusGlobal Belleville was paying almost \$8 million for the Debtors’ Property.

38. The August 2017 dockets of Mr. Consoli clearly demonstrate that BDO had knowledge of the odour testing report from Pinchin and Stantec prior to September 2017.<sup>27</sup>

**D. THE BUSINESS OF THE DEBTORS**

39. As part of the Business, the Debtors entered into agreements to receive and process Organic Wastes with various commercial and municipal vendors, among others.<sup>28</sup>

40. Each vendor, along with delivery of the Organic Waste, would also pay an amount of money required to pay for the processing of organic waste into compost. The payment by a vendor to the Debtors was not conditional upon the Debtors processing the Organic Waste into compost, but was a prepayment for the work to be done to process the Organic Waste into compost.<sup>29</sup>

41. The Debtors would usually receive approximately 50 to 80 MT of Organic Waste per day; and along with that the prepaid processing fee of approximately \$50 to \$60 per MT of Organic Waste to be processed. To ensure the inventory of Organic Waste in the Tipping Building did not exceed 150 MT pursuant to the ECA, the Debtors were required to process the Organic Waste approximately every three days (applying a conservative estimate of the Debtors receiving 50 MT of Organic Waste per day from

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<sup>26</sup> Hamaliuk Affidavit at paras 50-58.

<sup>27</sup> Motion Record of BDO returnable on November 15, 2017, Tab 2, Appendix “E” – Fee Affidavit of Chris Mazur, Exhibit “A”, pages 2, 4, 8 [Mazur Affidavit].

<sup>28</sup> Hamaliuk Affidavit at para 21 (Vendors include, but are not limited to: (1) Sunoco; (2) Northumberland County; and (3) Third High Farms), Exhibit “E”- Debtors Material Report from January 1, 2017 to November 22, 2017; Exhibit “F”- Contract between Astoria Organic Matters Canada LP and Waste Management; Exhibit “G”- Contract between Astoria Organic Matters Canada LP and Third High Farms; Exhibit “H”- Sample weigh ticket.

<sup>29</sup> Hamaliuk Affidavit at para 22.

the vendors). BDO knew this, as its agents, including, but not limited to, Mr. Hamilton, who were running the Business, knew this.<sup>30</sup>

42. The Debtor's cost to process the Organic Waste was approximately \$40 per MT of Organic Waste (the "Processing Cost"). The Debtors charged its vendors approximately \$50 to \$60 per MT of Organic Waste to accept and process the Organic Waste. The Debtors' profit margin was approximately \$10 per MT of Organic Waste.<sup>31</sup>

43. The Debtors did not necessarily incur any Processing Cost. The Debtors could simply accept payment from their vendors and store the Organic Waste in the Tipping Building, among other buildings on the Site, and not incur any Processing Cost. However, the Debtors could only accept and store up to 150 MT of Organic Waste in the Tipping Building, until they had to process it to ensure ECA compliance.<sup>32</sup>

**E. THE COMPOSTING PROCESS DURING THE RECEIVERSHIP PERIOD**

44. To produce Category A Compost, BDO mixed 25% biosolid content, which included the following Organic Wastes: (1) biosolids; (2) paper sludge; and (3) manure (collectively, the "Biosolid Content"). The Biosolid Content was stored in the Tipping Building. The Biosolid Content was then mixed with 75% other organic waste, which included, but was not limited to, leaf and yard waste ("Leaf/Yard Content") inside the Tipping Building (collectively, the "Compost Mixture" or the "Ratio").<sup>33</sup>

45. The Compost Mixture would then be moved from the Tipping Building to a separate structure called a windrow, where the Compost Mixture would be exposed to different temperature and air

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<sup>30</sup> Hamaliuk Affidavit at para 23, Exhibit "E"- Debtors Material Report from January 1, 2017 to November 22, 2017, and para 24.

<sup>31</sup> Hamaliuk Affidavit at para 24.

<sup>32</sup> Hamaliuk Affidavit at paras 23, 25.

<sup>33</sup> Supplementary Hamaliuk Affidavit at paras 13, 14.

concentration treatments, among other treatments, to eventually produce Category A Compost (a “Windrow”).<sup>34</sup>

46. Each Windrow holds approximately 450 MT (“Conservative Windrow”) to 500 MT (“Full Windrow”) of Compost Mixture.<sup>35</sup>

47. In BDO’s Fourth Report, BDO stated that it was advised by Mr. Hamilton that BDO processed “on average 1 to 1.5 Windrows per week” during the Receivership Period.<sup>36</sup>

48. However, in BDO’s Fourth Report, BDO stated that only 23 Windrows were constructed during the 23 weeks of the Receivership Period. Therefore, BDO processed on average a maximum of one (1) Windrow per week (the “Process Rate During the Receivership”).<sup>37</sup>

49. Therefore, Mr. Hamilton must have provided false information to BDO.<sup>38</sup>

50. Based on the Process Rate During the Receivership, BDO could have only processed a maximum Compost Mixture amount of 11,500 MT during the Receivership Period (assuming a Full Windrow of 500 MT for each of the 23 Windrows) (the “Maximum BDO Compost Mixture Process Amount”).<sup>39</sup>

51. To produce Category A Compost at the Process Rate During the Receivership and Ratio using a Full Windrow per week, BDO would have been required to process (25% of 500 MT) 125 MT of Biosolid Content (per week) and (75% of 500 MT) 375 MT of Leaf /Yard Content (per week), to a total Compost Mixture amount of 500 MT.<sup>40</sup>

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<sup>34</sup> Supplementary Hamaliuk Affidavit at para 16.

<sup>35</sup> Supplementary Hamaliuk Affidavit at para 17; See Section 2.1.3(3) of BDO’s Fourth Report.

<sup>36</sup> Supplementary Hamaliuk Affidavit at para 18; See Section 2.1.3(3) of BDO’s Fourth Report.

<sup>37</sup> Supplementary Hamaliuk Affidavit at para 19 (These values are based on the Gore Cover Windrow system production report, referred to as the “Windrow Production Report”).

<sup>38</sup> Supplementary Hamaliuk Affidavit at para 20.

<sup>39</sup> Supplementary Hamaliuk Affidavit at para 21, Exhibit “4” – Assuming Maximum Compost Mixture Processed Calculation, Full Windrow.

<sup>40</sup> Supplementary Hamaliuk Affidavit at para 22, Exhibit “5” – Category A Compost Calculation, Full Windrow.



52. In the alternative, assuming BDO always filled a Conservative Windrow with 450 MT of Compost Mixture, BDO could only have processed a maximum Compost Mixture amount of 10,350 MT (“Conservative BDO Compost Process Amount”).<sup>41</sup>

53. To produce Category A Compost at the Process Rate During the Receivership and Ratio using a Conservative Windrow per week, BDO would have been required to process 112.5 MT of Biosolid Content (per week) and 337.5 MT of Leaf/Yard Content (per week), to a total Compost Mixture amount of 450 MT.<sup>42</sup>

54. Comparing these calculations with the record of the actual amounts in the Material Report<sup>43</sup> dated November 23, 2017, indicates that during the Receivership Period, BDO accepted a total of approximately 4,952 MT of Biosolid Content (the “Reported Total Biosolid Content”). Based on the figures in the Material Report and taking the average over 23 weeks of the Receivership Period, BDO accepted approximately 215 MT of Biosolid Content<sup>44</sup> on average per week from various vendors (the “Reported Weekly Biosolid Content”) (collectively, the “Receivership Material Report”).<sup>45</sup>

55. The amount available for the 25% Biosolid Content component of the Compost Mixture, pursuant to the Ratio, during the Receivership Period was 4,952 MT, plus whatever amount was already in the Tipping Building on April 13, 2017. Therefore, for BDO to produce Category A Compost during the Receivership Period, BDO would have required at least 14,856 MT of Leaf/Yard Content, and would have had to process a total Compost Mixture amount of at least 19,808 MT (the “Total Reported Compost Mixture”).<sup>46</sup>

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<sup>41</sup> Supplementary Hamaliuk Affidavit at para 23, Exhibit “6” – Maximum Compost Mixture Processed Calculation, Conservative Windrow.

<sup>42</sup> Supplementary Hamaliuk Affidavit at para 24, Exhibit “7” – Category A Compost Calculation, Conservative Windrow.

<sup>43</sup> Supplementary Hamaliuk Affidavit, Exhibit “8” – Material Report during Receivership Period (A record is kept daily of the materials received and this report summarizes those daily records).

<sup>44</sup> These amounts were calculated using the following Organic Waste categories: (1) biosolids; (2) paper sludge; and (3) manure.

<sup>45</sup> Supplementary Hamaliuk Affidavit at para 25, Exhibit “8” – Excel Spreadsheet, Material Report data during Receivership Period; See Hamaliuk Affidavit, Exhibit “E” – Debtor’s Material Report from January 1, 2017, to November 22, 2017; See Expert Report of Nick Pora at pages 1, 2.

<sup>46</sup> Supplementary Hamaliuk Affidavit at para 26, Exhibit “9” – Reported Total Biosolid Content Calculation, Full Windrow.

56. To process the Reported Total Biosolid Content to Category A Compost, BDO was therefore (assuming 500 MT for Full Windrow) required to process 39.62 Full Windrows during the Receivership Period. Therefore, to process the Reported Biosolid Content to Category A Compost during the Receivership Period, BDO was required to process an average of at least 1.73 Windrows per week.<sup>47</sup>

57. In the alternative, assuming BDO used a Conservative Windrow, BDO was required to process an average of at least 1.92 Conservative Windrows per week.<sup>48</sup>

58. Using either the Conservative Windrow or the Full Windrow to compare the calculations with the actual amounts set out in the Material Report, the “evidence” of BDO relying on Mr. Hamilton is impossible. BDO clearly states at Section 2.2.2 that BDO only processed the Compost Mixture at the Process Rate During the Receivership of an average of one Windrow per week. Therefore, it was impossible for BDO to process the Reported Total Biosolid Content. Mr. Hamilton’s evidence attempts to hide this fact.<sup>49</sup>

59. Assuming BDO processed the Maximum BDO Compost Mixture Process Amount of 11,500 MT during the Receivership Period, using a Full Windrow, BDO had in excess of 8,308 MT of Compost Mixture in the Tipping Building (the “Full Excess”).<sup>50</sup>

60. In the alternative, assuming BDO used a Conservative Windrow, BDO had in excess of 9,458 MT of Compost Mixture in the Tipping Building (the “Conservative BDO Compost Mixture Process Amount”).<sup>51</sup>

61. Based on the fact that 4,952 MT of Biosolid Content was stored in the Tipping Building during the Receivership Period and there were only 23 Windrows processed during that period, and assuming the maximum amount of 500 MT per Windrow (giving BDO the benefit of the doubt), the total amount

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<sup>47</sup> Supplementary Hamaliuk Affidavit at para 27, Exhibit “9” – Reported Total Biosolid Content Calculation, Full Windrow.

<sup>48</sup> Supplementary Hamaliuk Affidavit at para 28, Exhibit “10” – Reported Total Biosolid Content Calculation, Conservative Windrow.

<sup>49</sup> Supplementary Hamaliuk Affidavit at para 29.

<sup>50</sup> Supplementary Hamaliuk Affidavit at para 30, Exhibit “11” – Excess Compost Mixture Calculation, Full Windrow.

<sup>51</sup> Supplementary Hamaliuk Affidavit at para 31, Exhibit “12” – Excess Compost Mixture Calculation, Conservative Windrow.

of Biosolid Content that could be processed during the Receivership Period was 2,875 MT. As a result, on September 15, 2017, the Closing Date, there was at least 2,077 MT of Biosolid Content in the Tipping Building, plus whatever amount was already in the Tipping Building as of April 13, 2017. It is clear based on the mathematics and numerical values provided by BDO that BDO was in breach of the ECA and EPA throughout the Receivership Period. Furthermore, this is confirmed by an analysis of the pictures made available, as referred to below.<sup>52</sup>

62. BDO took pictures of the Tipping Building dated September 12, 2017, and provided them in BDO's Fourth Report (the "BDO Pictures"). The BDO Pictures clearly illustrate that approximately 2,108.2 MT of Organic Waste was in the Tipping Building as of September 12, 2017.<sup>53</sup>

63. Based on the BDO Pictures, Mr. Hamilton calculated that a maximum of 741 MT of Organic Waste should have been in the Tipping Building as of September 15, 2017.<sup>54</sup>

64. The Hamilton Calculations are inaccurate.<sup>55</sup> The BDO Pictures show the Tipping Building to be full of Organic Waste from the front, stretching all the way to the back of the Tipping Building, minus the 10 metres of empty space at the beginning of the Tipping Building.<sup>56</sup>

65. In BDO's Fourth Report, Mr. Hamilton states that (1) one Windrow was processed on Thursday, September 14, 2017, and an additional half Windrow was processed on September 15, 2017.<sup>57</sup>

66. Stage One is the first step in the process to produce Category A Compost. There are only (4) four Stage One Windrows on the Site. The Compost Mixture must remain in the Stage One Windrow for 28 days. Therefore, a Stage One Windrow is only available once every seven days. It is impossible to have (2) two Stage One Windrows open on consecutive days. This is confirmed by the Windrow Production

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<sup>52</sup> Supplementary Hamaliuk Affidavit at para 32, Exhibit "13" – Calculation of the 2,077 MT figure (This also gives the benefit of the doubt to BDO that they did not store any Leaf/Yard waste in the Tipping Building on or before September 15, 2017. If BDO did also store Leaf/Yard waste in the Tipping Building during the Receivership Period, the excess would have been significantly greater than 2,077 MT, based on the 3 to 1 Compost Mixture Ratio); See Expert Report of Nick Pora.

<sup>53</sup> Supplementary Hamaliuk Affidavit at paras 33, 49, Exhibit "14" – BDO Pictures Calculation; Expert Report of Nick Pora at page 2.

<sup>54</sup> Supplementary Hamaliuk Affidavit at para 34, BDO's Fourth Report – Appendix "I" at page 2.

<sup>55</sup> See Expert Report of Nick Pora.

<sup>56</sup> Supplementary Hamaliuk Affidavit at para 47, BDO's Fourth Report – Appendix "H", Appendix "I".

<sup>57</sup> Supplementary Hamaliuk Affidavit at para 50, BDO's Fourth Report – Appendix "I" at page 3.

Report provided by BDO at Appendix “G” of BDO’s Fourth Report and the SusGlobal Belleville Windrow Production Report to be provided by SusGlobal Belleville.<sup>58</sup>

67. The Windrow Production Report at Appendix “G” of BDO’s Fourth Report indicates that (1) one Windrow was constructed on September 14, 2017.<sup>59</sup>

68. However, the Windrow Production Report does not indicate any Windrow being processed on September 15, 2017. The Windrow Production Report indicates the next Windrow construction date was September 21, 2017.<sup>60</sup>

69. Therefore, on September 14, 2017, BDO either filled one full Windrow, by removing 495 MT from the Tipping Building, or one-half Windrow, by removing 62 MT from the Tipping Building, according to Mr. Hamilton’s calculations.<sup>61</sup>

70. If BDO removed one full Windrow by removing 495 MT from the Tipping Building, there would still be approximately 1,613.2 MT of Organic Waste remaining in the Tipping Building.<sup>62</sup>

71. In the alternative that BDO only removed one half Windrow by removing 62 MT from the Tipping Building, there would still be approximately 2,046.2 MT of Organic Waste remaining in the Tipping Building.<sup>63</sup>

72. Moreover, at section 2.3.8(9) of BDO’s Fourth Report, BDO states that 1,000 MT of Organic Waste were moved into the Tipping Building by Monday, October 16, 2017.<sup>64</sup>

73. The MOECC required SusGlobal Belleville to move the two Windrows totalling approximately 1,000 MT back into the Tipping Building. On October 14 and 15, 2017, SusGlobal Belleville moved the 1,000 MT from the outside two Windrows into the Tipping Building. Pursuant to conversations with the

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<sup>58</sup> Supplementary Hamaliuk Affidavit at para 51, BDO’s Fourth Report – Appendix “G”, Exhibit “15” – SusGlobal Belleville Windrow Production Report.

<sup>59</sup> Supplementary Hamaliuk Affidavit at para 52, BDO’s Fourth Report – Appendix “G”.

<sup>60</sup> Supplementary Hamaliuk Affidavit at para 53.

<sup>61</sup> Supplementary Hamaliuk Affidavit at para 54, BDO’s Fourth Report – Appendix “I” at page 3.

<sup>62</sup> Supplementary Hamaliuk Affidavit at para 55, Exhibit “16” – Remaining Calculation, Full Windrow.

<sup>63</sup> Supplementary Hamaliuk Affidavit at para 56, Exhibit “17” – Remaining Calculation, Half Windrow.

<sup>64</sup> Supplementary Hamaliuk Affidavit at para 57.

MOECC, SusGlobal Belleville took pictures of the 1,000 MT in the Tipping Building and the zero volumes in the outside two Windrows (the “SusGlobal Belleville Tipping Building Picture”).<sup>65</sup>

74. In that the SusGlobal Belleville Tipping Building Picture clearly indicates what 1,000 MT of Organic Waste looks like in the Tipping Building, a comparison of the SusGlobal Belleville Tipping Building Picture with the BDO Pictures is possible to do a proper analysis of how much Organic Waste was actually in the Tipping Building as of September 12, 2017.<sup>66</sup>

75. Based on the space difference of seventeen meters between the BDO Pictures and the SusGlobal Belleville Tipping Building Picture, approximately 637.6 MT of Organic Waste can fit in the BDO Picture. Because the SusGlobal Belleville Tipping Building already has 1,000 MT in it, the BDO Picture has approximately 1,637.6 MT in it. However, because a conservative height estimate of 1.95 meters of Organic Waste was used, the actual discrepancy of the Organic Waste amount in the BDO Pictures as compared to the SusGlobal Belleville Tipping Building Picture is likely much higher, and closer to 1,000 MT.<sup>67</sup>

## **F. DAMAGES**

76. SusGlobal Belleville suffered damages in the amount of \$755,400 (inclusive of HST) in processing the 1,500 tonnes of organic waste in the Tipping Building, loss of business, loss of compost sales, and incurred costs to process the Class B Compost, plus the Penalty Consideration (collectively, the “Claim Amount”).<sup>68</sup>

77. By letter dated October 30, 2017, SusGlobal Belleville wrote to BDO seeking reimbursement for damages for \$655,400. On November 13, 2017, BDO denied responsibility.<sup>69</sup>

78. On November 15, 2017, SusGlobal Belleville achieved ECA compliance.<sup>70</sup>

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<sup>65</sup> Supplementary Hamaliuk Affidavit at para 58, Exhibit “18” – E-mail from Gerald Hamaliuk to MOECC Officer, Katy Potter, dated October 23, 2017, Exhibit “19” – SusGlobal Tipping Building Picture, Exhibit “20” – SusGlobal Belleville Pictures of the empty Windrows.

<sup>66</sup> Supplementary Hamaliuk Affidavit at para 60.

<sup>67</sup> Supplementary Hamaliuk Affidavit at para 62.

<sup>68</sup> Hamaliuk Affidavit at para 75-82; Amended Notice of Motion at para 24.

<sup>69</sup> Hamaliuk Affidavit at para 75, 83.

79. SusGlobal Belleville now brings this application for leave to sue BDO as a result of its gross negligence, or in the alternative wilful misconduct, including breach of the Order and, further, or in the alternative, breach of the APA by failing to operate the Site legally, and in compliance with all environmental laws and ECAs.<sup>71</sup>

80. SusGlobal Belleville was entitled to rely on the fact that BDO, as a court officer, would operate the Site in compliance with all environmental laws.

81. BDO was operating the Site illegally and in non-compliance with the ECA prior to both the Original Closing Date and the Closing Date. BDO was in breach of its closing obligations pursuant to the APA. BDO was not ready, willing, and able to close the APA on the Original Closing Date. Therefore, SusGlobal Belleville also claims reimbursement for the Penalty Consideration of \$100,000.<sup>72</sup>

### **PART III – ISSUES**

82. Should leave be granted to permit SusGlobal Belleville to bring its claim against BDO for damages for gross negligence or in the alternative, wilful misconduct, and breach of the APA in conjunction with a breach of the Order (collectively, the “Allegations”)?

83. Does the conduct of BDO, in its capacity as court-appointed Receiver in this proceeding, amount to a strong *prima facie* case or in the alternative a *prima facie* case of gross negligence, or in the alternative, wilful misconduct, and a breach of the APA in conjunction with a breach of the Order, the EPA, and the ECA, sufficient that SusGlobal Belleville should receive compensation from BDO?

84. Is BDO, as a court officer, entitled to avoid liability by relying on the “As Is, Where Is” clause at Section 3.03 of the APA when it failed to comply with environmental legislation and the Order?

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<sup>70</sup> Hamaliuk Affidavit at para 73.

<sup>71</sup> Amended Notice of Motion at para 1.

<sup>72</sup> Amended Notice of Motion at para 87.

## PART IV – THE LAW

### A. ISSUE 1 – SHOULD LEAVE BE GRANTED TO PERMIT SUSGLOBAL BELLEVILLE TO BRING ITS CLAIM AGAINST BDO?

85. Paragraph 8 of the Order states that leave of this Court is required to permit SusGlobal Belleville to bring its claim against BDO.<sup>73</sup> Section 215 of the *Bankruptcy and Insolvency Act* (“BIA”) provides that leave of this Court is required for SusGlobal Belleville to bring its claim against BDO.<sup>74</sup>

86. The law provides that leave of this Court may be granted to SusGlobal Belleville for it to bring its claim against BDO for the Allegations, unless this Court finds that SusGlobal Belleville has not established a *prima facie* claim against BDO. This Court may find that a *prima facie* claim does not exist, if SusGlobal Belleville’s claim is either: (1) frivolous or vexatious; or (2) if the evidence filed in support of its application does not disclose a cause of action against BDO.

87. This Court should grant leave to SusGlobal Belleville to bring its claim against BDO for the Allegations.

88. SusGlobal Belleville’s claim against BDO is not frivolous or vexatious: The evidence filed in support of its application against BDO, including, but not limited to, the Affidavit of Gerald Hamaliuk affirmed on November 29, 2017, [the “Hamaliuk Affidavit”] clearly discloses a cause of action against BDO for damages for gross negligence, or in the alternative, wilful misconduct, or breach of the Order. SusGlobal Belleville’s claim against BDO is sufficient to establish a *prima facie* case.

89. The law provides that this Court may apply a stricter test of a “strong *prima facie* case” where either: (1) the Allegations raised could have been raised in an earlier proceeding; or (2) the Court has already approved the conduct complained of in the Allegations.

90. In the alternative, SusGlobal Belleville’s claim against BDO is sufficient to also satisfy a “strong *prima facie* case” against BDO. The Hamaliuk Affidavit clearly evidences that BDO had knowledge the

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<sup>73</sup> Schedule “B”, Order at para 8.

<sup>74</sup> Schedule “B”, *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 215.

Site was operating illegally and in contravention of the ECA. BDO continued to operate the Site illegally during the Receivership Period in breach of paragraph 10 of the Order: it had knowledge of the odour issue concerning the Odour Measurement, the Stantec Report, and preliminary draft of the Pinchin Report regarding the metric tonnage in the Tipping Building being 1,312.5 MT.

I. LEGAL TEST - IF RECEIVER'S CONDUCT IS NOT APPROVED BY THE COURT

91. The Supreme Court of Canada ("SCC") in *GMAC Commercial Credit Corp – Canada v TCT Logistics Inc*<sup>75</sup> ("GMAC") stated the threshold is low on an application for leave to commence an action against a receiver or trustee:

...the threshold for granting leave to commence an action against a receiver or trustee is not a high one...(1) Leave to sue a trustee should not be granted if the action is frivolous or vexatious...(2) An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee...(3) The Court is not required to make a final assessment of the merits of the claim before granting leave...<sup>76</sup> [emphasis added]

92. The evidence filed by SusGlobal Belleville in support of its application, including, but not limited to, the Hamaliuk Affidavit, against BDO discloses a clear cause of action against BDO for gross negligence, or in the alternative, wilful misconduct, and breach of the APA in conjunction with a breach of the Order and environmental legislation. In any event, SusGlobal Belleville's claim against BDO is not frivolous or vexatious.

93. The Ontario Court of Appeal (the "OCA") in *Canadian National Railway Co v Holmes*<sup>77</sup> ("CNR") stated: "the party seeking leave must only show a reasonable cause of action with some evidentiary basis, or in other words, 'the evidence must disclose a *prima facie* case.'"<sup>78</sup>

94. SusGlobal Belleville's claim against BDO establishes a *prima facie* case for the Allegations: leave should be granted by this Court to allow SusGlobal Belleville to pursue its claim against BDO.

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<sup>75</sup> *GMAC Commercial Credit Corp – Canada v TCT Logistics Inc*, [2006] 2 SCR 123 (SCC) [GMAC] (TAB 1).

<sup>76</sup> *GMAC*, *supra* note 75 at para 55, 57, citing *Mancini (Trustee of) v Falconi*, [1993] OJ No 146 at p 2 (Ont CA) (TAB 2).

<sup>77</sup> *Canadian National Railway Co v Holmes (appeals by Schonfeld Inc and Bossy Nagy Geoffrey)*, [2016] OJ No 946 (Ont CA) [CNR] (TAB 3).

<sup>78</sup> *CNR*, *supra* note 77 at para 29; See *GMAC*, *supra* note 75 at para 59.



## II. LEGAL TEST - IF RECEIVER'S CONDUCT HAS BEEN APPROVED BY THE COURT

95. BDO's conduct could not have been approved by the Court, as it was not disclosed to the Court. However, if the Court should find that the conduct was approved, then the following legal analysis applies.

96. The OCA in *CNR* stated "a more stringent standard for the granting of leave – a strong *prima facie* case – may be appropriate in cases where the issues raised in the action could have been raised in the discharge proceedings."<sup>79</sup>

97. The OCA in *Gallo v Beber*<sup>80</sup> stated the stricter test is to be applied where the same issues raised in the action had been raised or could have been raised in the discharge proceeding.<sup>81</sup>

98. In *Toronto Dominion Bank v Preston Springs Gardens Inc*<sup>82</sup>, the court stated the more stringent "strong *prima facie* cast" test would have to be met by any party seeking leave to sue the receiver, where there have been numerous orders approving the conduct and activities of the receiver.<sup>83</sup>

99. In *80 Aberdeen Street Ltd v Surgeon Carson Associates Inc* ("Aberdeen"), the Court stated the more stringent "strong *prima facie* case" test applies to determine leave "where the allegations raised in the action could have been raised in earlier proceedings or where the conduct subject to the proposed attack is in substance the same as conduct approved earlier by the Court."<sup>84</sup>

100. In the alternative, SusGlobal Belleville is also able to demonstrate a "strong *prima facie* case" against BDO for the Allegations. The Hamaliuk Affidavit demonstrates a strong *prima facie* case that BDO breached the APA, the Order, and environmental legislation in its failure to operate the Site legally and in compliance with the EPA: such conduct amounts to gross negligence, or in the alternative, wilful

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<sup>79</sup> *CNR*, *supra* note 77 at para 35.

<sup>80</sup> *Gallo v Beber*, [1998] OJ No 5357 (Ont CA) [*Gallo*] (**TAB 4**).

<sup>81</sup> *Gallo*, *supra* note 80 at para 7; affirmed in *80 Aberdeen Street Ltd v Surgeon Carson Associates Inc*, [2008] OJ No 269 at paras 50-51 (Ont SCJ) [*Aberdeen*] (**TAB 5**).

<sup>82</sup> *Toronto Dominion Bank v Preston Springs Gardens Inc*, [2006] OJ No 1834 (Ont SCJ) [*TDB*] (**TAB 6**).

<sup>83</sup> *TDB*, *supra* note 82 at para 36.

<sup>84</sup> *Aberdeen*, *supra* note 81 at para 49.

misconduct. The Consoli Dockets evidence that BDO had clear knowledge of the odour issue regarding the Odour Measurement in the Tipping Building from both the Stantec Report and a preliminary draft of the Pinchin Report and BDO had knowledge of the excess metric tonnage in the Tipping Building.

**B. ISSUE 2 – DOES BDO’S CONDUCT AMOUNT TO GROSS NEGLIGENCE OR, IN THE ALTERNATIVE WILFUL MISCONDUCT, OR BREACH OF THE ORDER**

**I. BREACH OF THE ORDER**

101. Paragraph 10 of the Order states that BDO is not empowered to carry on the Debtors’ Business in an illegal manner or exempt BDO from compliance with statutory or regulatory provisions relating to the environment, among other things.<sup>85</sup>

102. BDO is in breach of paragraph 10 of the Order by its failure to ensure the Site was operating in compliance with the ECA: BDO was operating the Site illegally.

103. BDO represented that during the Receivership Period, BDO operated the Site in compliance with the MOECC requirements and in the normal course of business.<sup>86</sup>

With respect to the operations and associated costs prior to Closing, the Receiver and Astoria operated the business in compliance with the MOECC requirements. During the Receivership period, the Receiver continued to operate the site in the normal course and funded all payroll and operating costs associated with the site including shipments of product from Peterborough up to the Closing Date. [emphasis added]

104. BDO did not do so. BDO acted in breach of the Order, in a grossly negligent manner, in breach of the APA as referred to herein, and in breach of the ECA and the EPA.

105. The Consoli Dockets clearly evidence that BDO had full knowledge of the odour issue regarding the Tipping Building and the excess metric tonnage in the Tipping Building.

**II. BREACH OF GROSS NEGLIGENCE OR, IN THE ALTERNATIVE, WILFUL MISCONDUCT**

106. Paragraph 17 of the Order states that BDO can be held liable for any gross negligence or wilful misconduct on its part, among other things.<sup>87</sup>

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<sup>85</sup> Schedule “B”, Order at para 10.

<sup>86</sup> Hamaliuk Affidavit at para 7, Exhibit “B”- Letter from BDO to SusGlobal Belleville dated November 13, 2017.

<sup>87</sup> Schedule “B”, Order at para 17.

(1) LEGAL TEST – “GROSS NEGLIGENCE” AND “WILFUL MISCONDUCT”

107. The test for whether BDO’s conduct amounts to “gross negligence” or “wilful misconduct” is whether its misconduct in operating the Site illegally and in contravention of the ECA amounts to a marked departure from the standards by which a responsible and competent receiver, in such circumstances as being in charge of the Debtors’ Property, would have acted or conducted themselves; or where BDO knew what it was doing was wrong or was recklessly indifferent to its conduct.

108. In *CNR*, the OCA qualified “gross negligence” and “wilful misconduct” by a receiver:

The liability of the Monitor and Receiver in this case was limited by the various orders to gross negligence or wilful misconduct. Accordingly, the analysis as to whether there is a factual foundation for a claim does not relate to mere negligence. In such circumstances, the test is whether the Receiver “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...[emphasis added]<sup>88</sup>

109. The SCC in *Peracomo Inc v Telus Communications Co*<sup>89</sup> qualified “wilful misconduct:”

In other contexts, “wilful misconduct” has been defined as “doing something which is wrong knowing it to be wrong or with reckless indifference”; “recklessness” in this context means “an awareness of the duty to act or a subjective recklessness as to the existence of the duty”... These formulations capture the essence of wilful misconduct as including not only intentional wrongdoing but also conduct exhibiting reckless indifference in the face of a duty to know...[emphasis added]<sup>90</sup>

110. Once BDO had knowledge of the odour issue and the ECA non-compliance and took no further steps to ameliorate the non-compliance, its conduct amounted to reckless disregard that amounts to gross negligence, or in the alternative, wilful misconduct.

111. BDO’s illegal conduct was a very marked departure from the standard by which a responsible and competent receiver in the similar circumstance of being in charge of the Debtors’ Property would have acted or conducted themselves.

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<sup>88</sup> *CNR*, *supra* note 77 at para 31, citing *Alberta Treasury Branches v Elaborate Homes Ltd*, [2014] AJ No 597 at para 39 (Alb QB) [*Alberta Treasury*] (TAB 7); See *Peracomo Inc v Telus Communications Co*, 2014 SCC 29, [2014] SCJ No 29 at para 56 (SCC) [*Peracomo*] (TAB 8); See also *Alberta Treasury* at paras 35-36.

<sup>89</sup> *Peracomo*, *supra* note 88.

<sup>90</sup> *Peracomo*, *supra* note 88 at paras 57-58.

112. Moreover, the Consoli Dockets evidence that BDO knew about the odour issue in the Tipping Building from the Stantec Report and drafts of the Pinchin Report prior to the Original Closing Date and the Closing Date and knew that what it was doing was wrong.

113. In the alternative, BDO was recklessly indifferent to its illegal conduct, as it did not mention the ECA non-compliance in any of the BDO Reports to this Court, at any time, or with SusGlobal Canada or SusGlobal Belleville prior to either the Original Closing Date or the Closing Date.

114. BDO's omission to comply with the ECA was in reckless disregard of the legal duties of BDO under the EPA, the BIA, and the Order and in reckless disregard of the consequences to SusGlobal Belleville. In so conducting itself, BDO acted dishonestly and unfairly to SusGlobal Belleville.

115. BDO also did not make candid and full-disclosure to this Court of all material facts respecting a pending application, whether favourable or unfavourable to it. At section 2.11.1 of BDO's Third Report to this Court, BDO stated<sup>91</sup>:

On October 30, 2017, SusGlobal Belleville sent a letter to the Receiver claiming \$580,000 plus HST in charges against the Receiver in respect of the site condition of the Astoria property at the time of Closing in relation to the quantum of raw material bio-solids in the building at the Leased Premises that receives the bio-solids (the "Tipping Building"). The Receiver has reviewed the contents of the claim and is currently in the process of preparing its responses to SusGlobal Belleville but believes the claim to be unfounded and, in any event, the APA provides that the Purchased Assets were sold on "as is, where is". To the extent necessary, the Receiver will submit a supplemental report in respect of same.

116. While SusGlobal Belleville did not have a pending application against BDO at the time of BDO's Third Report, BDO never mentioned in any of BDO's Reports to this Court of the ECA non-compliance at the Site, the odour issues regarding the Odour Measurement from the Pinchin Report, or the findings of the Stantec Report.

117. However, BDO did ask this Court to approve the Consoli Dockets at the same motion to approve its Third Report returnable on November 15, 2017.<sup>92</sup> While BDO did not find it necessary to apprise this

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<sup>91</sup> Motion Record of BDO returnable on November 15, 2017, Tab 2, Third Report of the Receiver dated November 7, 2017, page 8 (BDO sought approval of the Third Report pursuant to its Notice of Motion returnable on November 15, 2017).

<sup>92</sup> Mazur Affidavit, supra note 27, Exhibit "A".

Court of its non-compliance, it did, however, find it necessary to ask this Court for a distribution approval to be remunerated for its illegal conduct. BDO's conduct amounts to gross negligence, or in the alternative, wilful misconduct.

118. Neither Mr. Consoli, nor any other BDO agent mentioned any of the odour issues or excess metric tonnage in the Tipping Building, the consultations with Pinchin, or the Stantec Report to SusGlobal Belleville or SusGlobal Canada prior to both the Original Closing Date or the Closing Date.

119. SusGlobal Belleville is entitled to damages as a result of the conduct of BDO.

(2) LEGAL TEST – STANDARD OF CARE OF A COURT-APPOINTED RECEIVER

120. The law holds BDO, as court-appointed Receiver for the Debtors' Property, to a standard of reasonable care, supervision and control as an ordinary man would give to the business were it his own: the Receiver must act with meticulous correctness, but not to a standard of perfection.

121. The SCC in *Plisson v Duncan and Diemert*<sup>93</sup> ("*Plisson*") stated:

Creditors of an estate, the running business of which is placed by a court in the hands of a receiver and manager, are entitled to exact from him such reasonable care, supervision and control as an ordinary man would give to the business were it his own [Emphasis added.]<sup>94</sup>

122. In *Regal Constellation Hotel Ltd*<sup>95</sup> ("*Regal*"), the Ontario Court of Appeal held:

It has been said with respect to a court-appointed receiver's standard of care that the receiver "must act with meticulous correctness, but not to a standard of perfection"...<sup>96</sup>

123. BDO breached the standard of care of that of a reasonable receiver in its failure to operate the Site legally and in compliance with all laws, including, but not limited to, the ECA. If an ordinary man were placed in BDO's position to operate the Site and manage the Debtors' Property, as if it were his own business, he would--at least and at a minimum--ensure his business was operating legally and in full compliance with all applicable laws, including, but not limited to, all environmental laws and ECAs.

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<sup>93</sup> *Plisson v Duncan and Diemert* (1905), 36 SCR 647 (SCC) [*Plisson*] (TAB 9).

<sup>94</sup> *Plisson*, supra note 93 at p 3 (Davies J).

<sup>95</sup> *Regal Constellation Hotel Ltd (Re)*, [2004] OJ No 2744 (Ont CA) [*Regal*] (TAB 10).

<sup>96</sup> *Regal*, supra note 95 at para 26.

124. The term “meticulous” implies conduct that is “thorough”, “careful”, “painstaking”, and “scrupulous.” Any conduct that amounts to wilfully ignoring warning signs of legal non-compliance, such as Mr. Consoli’ and Mr. Hamilton’s failures to ameliorate the odour issue clearly stated in the Stantec Report, and drafts of the Pinchin Report, or notify SusGlobal Belleville of the odour issue cannot be considered “meticulous.”

125. BDO’s failure to ensure it was operating the Site legally and in compliance of the ECA and all other applicable laws, including but not limited to, all environmental laws, amounts to a clear breach of the standard of meticulous correctness and is 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 that BDO knew what it was doing was wrong or BDO was recklessly indifferent in its conduct.

(3) LEGAL TEST – FIDUCIARY DUTY OF A RECEIVER TO THE COURT

126. Section 247 of the BIA provides:

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. [emphasis added]

127. BDO is an officer of the court and has a fiduciary duty to all interested in the Debtors’ Property. BDO must make candid disclosure to the court of all material facts respecting pending applications, whether they are favourable or unfavourable.

128. In *Regal*, the Ontario Court of Appeal held:

A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor’s property, including the debtor (and, where the debtor is a corporation, its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or unfavourable...<sup>97</sup>

129. BDO breached its fiduciary duty to this Court and all creditors interested in the Debtors’ Property, as it failed to act honestly, in good faith, in compliance with the Order, in compliance with the

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<sup>97</sup> *Regal*, *supra* note 95 at para 26.

APA, and in compliance with the ECA. SusGlobal Belleville is entitled to rely on BDO's fiduciary obligations to the Court, as well as its duties under the BIA, the Order, and the EPA.

130. BDO is responsible for damages suffered by SusGlobal Belleville resulting from BDO's conduct. SusGlobal Canada and SusGlobal Belleville was entitled to rely on the fact that the conduct of a court-appointed officer would be in compliance with the environmental laws of Ontario. SusGlobal Canada and SusGlobal Belleville had a reasonable expectation that BDO would not allow its agents to commit illegal acts for an extended period of time. SusGlobal Canada and SusGlobal Belleville did not anticipate that BDO would engage in such reckless conduct, as it is not characteristic behaviour of a court-appointed Receiver. BDO knew it was required to comply with the ECA, but chose to breach it.

**C. ISSUE 3 – DOES THE “AS IS, WHERE IS” CLAUSE AT SECTION 3.03 OF THE APA NEGATE BDO’S LIABILITY?**

131. Section 2.08(1) of the APA provides:

(2) At the Time of Closing, [SusGlobal Belleville] will assume and thereafter fulfil, perform and discharge when due the following Liabilities of Astoria outstanding as at the Closing Date (collectively, the “Assumed Liabilities”):

(c) all Liabilities relating to or arising from the Purchased Assets under Environmental Laws from and after the Closing Date including, without limitation, any costs and expenses associated with any ongoing work in process from and after the Time of Closing required to be carried out in order to comply with any Environmental Laws provided that it is agreed by the parties hereto that such ongoing work shall not include the work described in Section 4.02(9) below. [emphasis added]<sup>98</sup>

132. While SusGlobal Belleville assumed the liabilities pursuant to section 2.08(1) of the APA, SusGlobal Belleville did not assume any liabilities that arose from BDO's own failure to comply with the requisite environmental laws of Ontario and misused the funds received, that were earmarked to be used to comply with the ECA conditions.<sup>99</sup>

133. Section 3.03 of the APA provides the “As Is, Where Is” clause.<sup>100</sup>

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<sup>98</sup> Hamaliuk Affidavit at para 62.

<sup>99</sup> Hamaliuk Affidavit at para 63.

<sup>100</sup> Schedule “B”, Section 3.03 of the APA, “As Is, Where Is”; Hamaliuk Affidavit at para 8, Exhibit “C”- Executed APA.

134. Paragraph 16 of the Order required BDO to comply with environmental laws, including the ECA conditions. An “As Is, Where Is” clause cannot licence a breach of a court order.

135. At section 2.11 of BDO’s Third Report, BDO stated it believed SusGlobal Belleville’s claim against BDO “to be unfounded and, in any event, the APA provides that the Purchased Assets were sold on ‘as is, where is.’”<sup>101</sup>

136. There was no implied term in the APA, or anywhere else, that BDO could take possession of the Business and operate the Business and ignore the obligations under the BIA, the EPA, the ECA, and the Order.

137. BDO cannot rely on the “As Is, Where Is” clause when it breached its duty of honesty and good faith and breached the EPA as a court officer. SusGlobal Belleville was entitled to rely on the expectation that BDO, as a court officer, would comply with section 247 of the BIA, the Order, and the EPA. The “As Is, Where Is” clause in the APA is subject to BDO obeying all laws, including, but not limited to, the environmental laws of Ontario.

138. The Assumed Liabilities did not include liabilities that were created after the APA was signed, as a result of BDO’s activities that were contrary to the ECA and the Order.

139. The “As Is, Where Is” clause does not contemplate illegal conduct: BDO cannot rely on it as a shield to excuse it from having to comply with the law. BDO was grossly negligent in operating the Site illegally and relying on the “As Is, Where Is” clause as a shield from liability. BDO is liable to pay SusGlobal Belleville for damages. Leave to sue BDO should be granted to SusGlobal Belleville.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13th DAY OF FEBRUARY, 2018



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Melvyn L. Solmon, Eric K. Gillespie, Andrew T.R. Chachula  
Of counsel for SusGlobal Energy Belleville Ltd.

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<sup>101</sup> Motion Record of BDO returnable on November 15, 2017, Tab 2, Third Report of the Receiver dated November 7, 2017, s 2.11.1.



February 13, 2018

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## SCHEDULE “A”

1. *GMAC Commercial Credit Corp – Canada v TCT Logistics Inc*, [2006] 2 SCR 123 (SCC).
2. *Mancini (Trustee of) v Falconi*, [1993] OJ No 146 (Ont CA).
3. *Canadian National Railway Co v Holmes (appeals by Schonfeld Inc and Bossy Nagy Geoffrey)*, [2016] OJ No 946 (Ont CA).
4. *Gallo v Beber*, [1998] OJ No 5357 (Ont CA).
5. *80 Aberdeen Street Ltd v Surgeson Carson Associates Inc*, [2008] OJ No 269 (Ont SCJ).
6. *Toronto Dominion Bank v Preston Springs Gardens Inc*, [2006] OJ No 1834 (Ont SCJ).
7. *Alberta Treasury Branches v Elaborate Homes Ltd*, [2014] AJ No 597 (Alb QB).
8. *Peracomo Inc v Telus Communications Co*, 2014 SCC 29, [2014] SCJ No 29 (SCC).
9. *Plisson v Duncan and Diemert* (1905), 36 SCR 647 (SCC).
10. *Regal Constellation Hotel Ltd (Re)*, [2004] OJ No 2744 (Ont CA).

## SCHEDULE “B”

### ORDER AT PARA 16

16. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, “Possession”) of any of the Property that might be environmental contaminated<sup>102</sup>...nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver’s duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession. [emphasis added]

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<sup>102</sup> As required by the environmental legislation, including, *the Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder.

### SECTION 3.03 OF THE APA, “AS IS, WHERE IS”

(1) The Purchaser acknowledges and agrees that it is purchasing the Purchased Assets on an “as is, where is” basis and on the basis that the Purchaser has conducted to its satisfaction an independent inspection, investigation and verification of the Purchased Assets (including a review of title), Assumed Liabilities and all other relevant matters and has determined to proceed with the transaction contemplated herein and will accept the same at the Time of Closing in their then current state, condition, location, and amounts, subject to all Permitted Encumbrances.

(2) Except as otherwise expressly provided in Section 3.01, no representation, warranty or condition whether statutory (including under the Sale of Goods Act (Ontario), the International Sale of Goods Contracts Convention Act (Canada) and the International Sale of Goods Act (Ontario) or any international equivalent act which may be applicable to the subject matter pursuant to the provisions of this Agreement, including but not limited to the United Nations Convention on Contracts for the International Sale of Goods), or express or implied, oral or written, legal, equitable, conventional, collateral, arising by custom or usage of trade, or otherwise is or will be given including as to title, outstanding liens or encumbrances, description, fitness for purpose, merchantability, merchantable quality, quantity, condition (including physical and environmental condition), suitability, durability, assignability, or marketability thereof or any other matter or thing whatsoever, and all of the same are expressly excluded and disclaimed and any rights pursuant to such statutes have been waived by the Purchaser. The Purchaser acknowledges and agrees that it has relied entirely and solely on its own investigations as to the matters set out above and in determining to purchase the Purchased Assets and assume the Assumed Liabilities pursuant to this Agreement. [emphasis added]

(3) The description of the Purchased Assets and Assumed Liabilities contained herein is for the purpose of identification only and the inclusion of any item in such description does not confirm the existence of any such items or that any such item is owned by Astoria. Except as otherwise explicitly set forth in Section 3.01, no representation, warranty or condition has been given by the Receiver concerning the completeness or accuracy of such descriptions and the Purchaser acknowledges and agrees that any other representation, warranty, statements of any kind or nature, express or implied, (including any relating to the future or historical financial condition, results of operations, prospects, assets or liabilities of Astoria or the quality, quantity or condition of the Purchased Assets) are specifically disclaimed by the Receiver.

(4) Any documents, materials and information provided by or on behalf of the Receiver to the Purchaser with respect to the Purchased

Assets or Assumed Liabilities (including any confidential information memorandums, management presentations, or material made available in the electronic data room) have been provided to the Purchaser solely to assist the Purchaser in undertaking its own due diligence, and the Receiver has not made and is not making any representations or warranties, implied or otherwise, to or for the benefit of the Purchaser as to the accuracy and completeness of any such documents, materials or information or the achievability of any valuations, estimates or projections. The Purchaser acknowledges that it has not and will not rely upon any such documents, materials or information in any manner, whether as a substitute for or supplementary to its own due diligence, searches, inspections and evaluations. The Receiver and their respective affiliates, directors, officers, employees, agents and advisors shall not be liable for any inaccuracy, incompleteness or subsequent changes to any such documents, materials or information.

## **ORDER AT PARA 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.

***BANKRUPTCY AND INSOLVENCY ACT, S 215***

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.

## ORDER AT PARA 10

10. THIS COURT ORDERS that all rights and remedies against the Debtors, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any “eligible financial contract” as defined in the BIA, and further provided that nothing in this paragraph shall: (i) empower the Receiver or the Debtors to carry on any business which the Debtors is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, (iv) prevent the registration of a claim for lien, or (v) prevent the registration and perfection of the claim for lien of Ken Tulloch Construction Ltd., but for greater certainty, no further steps or proceeding shall be taken in the context of any such claim.



## ORDER AT PARA 17

17. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation. [emphasis added]

BUSINESS DEVELOPMENT  
BANK OF CANADA

- and -

ASTORIA ORGANIC MATTERS LTD.  
and ASTORIA ORGANIC MATTERS  
CANADA LP

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

Applicant

Respondents

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

Proceeding Commenced at Toronto

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**FACTUM OF SUSGLOBAL ENERGY  
BELLEVILLE LTD.**

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