

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

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*

REPLY MOTION RECORD

August 16, 2018

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TAB 1

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

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14.05(3)(h) of the *Rules of Civil Procedure*

AFFIDAVIT OF GERALD HAMALIUK

I, Gerald Hamaliuk, of the City of Oakville, in the Province of Ontario, MAKE OATH
AND SAY:

1. I am still the Chief Executive Officer of SusGlobal Belleville and Sus Global, and, as such, have knowledge, information and belief of the matters contained in this affidavit. Where I have relied on the information of others, I have set out the source of that information and I verily believe that it is true.
2. I am the only engineer employed by SusGlobal Belleville and qualified to compile and submit the 2017 Report to the MOECC.

3. This affidavit is in response to the respondent's Responding Motion Record and Fifth Supplemental Report of BDO Canada Limited ("BDO" or "Receiver") dated August 3, 2018 ("Fifth Report").

4. In the Fifth Report, BDO attaches email communications between me and representatives of BDO:

- (i) for the time period January 9, 2018 to February 23, 2018 wherein I was requesting information from BDO to complete certain parts of the 2017 Report; and,
- (ii) March 21, 2018 to March 26, 2018 where I was asking BDO for their input relating to the wording of the 2017 Report.

5. During that time period, I was requesting information that was required to complete a number of aspects to the 2017 Report, but not the calculation and the determination of the percentage of biosolids used, on a dry weight basis, in the preparation of Grade A Compost.

6. In the Fifth Report, I believe BDO is suggesting that I was able to do this calculation before March 20th when I completed my initial work. However, I was not able to do so until I was in a position to complete this aspect of the 2017 Report, ie, after I received all information from BDO to be able to complete the other aspects of the 2017 Report by the end of March deadline.

7. I commenced preparation of the 2017 Report in January 2018, when I started gathering analytical information as set out in the emails in the Fifth Report, which information I did not have, but which information BDO should have had. In order to complete those aspects of the 2017 Report, I required this information which SusGlobal Belleville did not have.

8. As such, from January 9 to February 23, 2018, I contacted Angelo Consoli a number of times to obtain the analytical information from BDO that was required for compliance with the ECAs for the site for the March 31, 2018 deadline. However, I was provided with limited information from BDO as is evident from the email chains in the Respondent's Motion Record at tab A. As a result, I also had to go through all site files during February and March of 2018 and asked BDO for the analysis and details for agreements for treating and disposal of leachate for the site. I also sought clarification on many issues from the 2017 operation before September 15, 2017 when SusGlobal Belleville took over.

9. The only compliance analyses BDO supplied were for eight compost samples, and none of the water or biofilter media results were sent for the first three-quarters of 2017, that were required. Given the lack of data and information from BDO, after February 23, 2018, I focused on compiling the information on hand and preparing explanations of why no compliance analysis could be fully presented. This took a considerable amount of time.

10. As that aspect took more time than expected, along with other obligations I had, including the motion for leave to sue BDO, and in that I did not realize the importance of the 2016 Annual report calculations, I did not turn my mind to the calculations of the dry weight percentages until the latter part of March.

11. In March, I commenced my review of the hardcopy of the 2016 Annual Report that had been submitted to the MOECC that referred to dry weight information.

12. I used the 2016 Annual Report figures to calculate the percentages used by Astoria to calculate the dry weight of biosolids and the dry weight of leaf and yard waste and woodchips used

to manufacture Grade A compost (see paragraph 7 of my affidavit sworn July 13, 2018 and footnote 1).

13. On March 21st, 2018 the incoming and outgoing data was collated and summarized. It was at this point in time that I realized the site operated during 2017 at 18.8% dry weight of biosolids on an annual percentage, instead of the 25% as declared by BDO in their Fourth Report Supplement at section 2.1.3(2)..

14. As I was the only person employed by SusGlobal Belleville who was able to do this analysis and complete the whole 2017 Report by the deadline, it took a significant amount of time in order to get to the point where I could do these calculations.

15. I believe that Mr. Hamilton was aware of the percentages of dry weight from his preparation of the 2016 Annual Report. The references to his changes in evidence, the use of Schedule C to the BDO Factum on the motion for leave to sue, and his changing explanations of the percentages of wet and dry weight were all confusing and, in my view, were camouflage, as he had the actual percentages, all along, in the 2016 Annual Report that he prepared. He could have properly calculated that the actual percentages for the year were 18.8% and not 25% of biosolids during the Receivership based on the annual figures. In fact however, the accurate number for the 23-week period, based on the fact that the Receiver was blending less material, was 17.2%, in that Susglobal Bellville blended 25% on average by dry weight over the last quarter of 2017 [25% - 18.8% divided by 4 equals 1.6%] . As a result, the amount that was continually built up over the 23 week period in the Tipping Building was far in excess of 1500 metric tonnes.

16. The significance and impact of the wet versus dry weight could not have been established until the calculations based on the 2016 Annual Report figures was carried out by me for the 2017

Report and it could not be finalized until the 2017 Report was accepted by the MOECC in June of this year.

Summary

17. Initially the calculations provided by BDO were based on wet weight. The weight records accurately reflected that. The Pinchin Report showing 1,312 metric tonnes on or about July 10th to 12th, 2017 was consistent with that information from BDO's initial evidence on the motion for leave to sue. That is, there were in excess of 2,000 metric tonnes of biosolid waste that were built up in the Tipping Building by the closing date of September 15, 2017.

18. Mr. Hamilton then said that this amount that he gave to Pinchin was an error by him with no explanation of how that occurred.

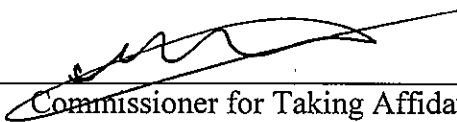
19. It was not until January 19, 2018, when the respondents served the Supplement to the Fourth Report that for the first time BDO distinguished mixing on a dry weight versus wet weight basis. However I did not understand this new approach taken by the Receiver until I was told about the oral argument of the Receiver, which referred to Schedule C to the Receiver's factum. I then understood that the Receiver was doing a hypothetical calculation based on figures that did not exist. These calculations were not based on what actually occurred at the site during the 23 week period. Based on this new methodology submitted by BDO in its factum, for calculation of the dry weight, as pointed out in my calculations provided to the court at the beginning of the last day of the motion, a copy of which is now shown to me and marked as Exhibit A to this affidavit, the amount of biosolid waste that would have been required to be delivered during the 23 week

period for BDO's figures to make sense, would have been approximately 800¹ metric tonnes more than the amount actually delivered to the site during that 23-week period. However, the Judge did not accept this analysis by SusGlobal Belleville. I believe this was due to the confusing information provided by BDO during the motion for leave to sue.

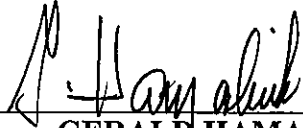
20. Now that we do know the correct percentage on an annual basis, and the correct wet weight to dry weight calculations, the Court now has the accurate evidence which demonstrates that there is a *prima facie* case that BDO failed to comply with the *Environmental Protection Act* regulations and the license condition related to the maximum amount of biosolid waste (150 metric tonnes by wet weight) that could be stored in the Tipping Building during the Receivership.

21. This affidavit is sworn in reply to the Fifth Report and for no improper purpose.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on August 16th, 2018



Commissioner for Taking Affidavits
(or as may be)

} 

GERALD HAMALIUK

Rajiv Joshi
LSO # 71326R

RCP-E 4D (July 1, 2007)

¹ Based on a windrow of 500 metric tonnes by wet weight

This is Exhibit "A" referred to in the Affidavit of Gerald Hamaliuk
sworn August 16, 2018



Commissioner for Taking Affidavits (or as may be)

Rajiv Joshi

LSO # 71326B

**1. Amount of Organic Waste Processed during the Receivership Period using
BDO's 1:1 "weight" Ratio**

At section 2.0.5 of BDO's Supplement to Fourth Report, BDO states "Grade A compost is comprised of 25% or less bio-solids on a "dry weight" basis. To achieve this, Astoria used a Carbon : Nitrogen ratio that is 3:1 by volume and which equates to approximately 1:1 by weight."

**A. Total Amount of Biosolids Processed During the Receivership Period
Using BDO's 1:1 "weight" Ratio (Maximum Windrow)**

Total Biosolids Received during the Receivership Period	=	4,951.77 MT
Total Windrows Constructed during the Receivership Period	=	23 Windrows
Maximum Windrow	=	500 MT
BDO Ratio	=	1 (Biosolids) : 1 (Leaf/Yard)
Amount of Biosolids per Maximum Windrow	=	500 MT x 50%
	=	250 MT
Total Amount of Biosolids Processed During Receivership Period	=	250 MT x 23 Windrows
	=	5,750 MT
Total Remaining Biosolids in the Tipping Building As of September 15, 2017	=	4,951.77 MT – 5,750 MT
	=	<u>- 798.23 MT</u>

*As of the Closing Date, the Tipping Building should have a **ZERO** amount of Biosolids in it.

*Biosolids include: (1) biosolids; (2) paper sludge; and (3) manure.

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PROCEEDING COMMENCED AT
TORONTO

**AFFIDAVIT OF GERALD HAMALIUK
SWORN AUGUST 16, 2018**

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File Number: 17987

RCP-E 4C (May 1, 2016)

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RCP-E 4C (May 1, 2016)