

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

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

IN THE MATTER OF the Receivership of Astoria Organic Matters Ltd.

**MOVING PARTY'S FACTUM**

September 13<sup>th</sup>, 2018

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**PART I - INTRODUCTION**

1. SusGlobal Energy Belleville Ltd. (“SusGlobal”), brings the within motion to reopen (“Motion to Reopen”) the motion heard by the Honourable Justice McEwen, for leave to sue the Receiver (“BDO”) for damages (the “Original Motion”) and to file fresh evidence, being the 2017 Annual Environmental Report (“2017 Annual Report”) submitted to the Ministry of the Environment and Climate Change (the “MOECC”) on March 29, 2018 and the relevant excerpts from the 2016 Annual Environmental Report.

2. The material evidence on the Original Motion was the evidence that demonstrated that on a balance of probabilities the amount of biosolid waste that was stored in the Tipping Building during the receivership carriage of the 23 weeks (April 13<sup>th</sup>, 2017 to September 15, 2017, the “Receivership”) exceeded the permitted amount pursuant to the terms and conditions of the

Amended Environmental Compliance Approval dated August 7, 2015<sup>1</sup>, pursuant to s.20.2 and s.20.3 of the Environmental Protection Act (“EPA”). In particular, the amount stored on a continual increasing basis in the Tipping Building exceeded 150 MT (wet weight) during the receivership, from the last week of April (the second week of the receivership)<sup>2</sup>.

## Overview

3. During the latter part of February and March of 2018 Gerald Hamaliuk (“Mr. Hamaliuk”) on behalf of SusGlobal commenced preparation of the 2017 Annual Report to the MOECC, as required by the regulations under the provincial Environmental Protection Act (the “EPA”)<sup>3</sup>.

4. The 2017 Annual Report could not be completed prior to the hearing of the Original Motion, as the information required to complete certain aspects<sup>4</sup> of the report was being obtained from the Receiver/BDO on a continual basis during the time period from January 9, 2018 to February 23, 2018.

5. On March 29, 2018 SusGlobal submitted the 2017 Annual Report to the MOECC. On June 25, 2018 the MOECC confirmed the 2017 Annual Report, including all metrics and calculations,

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<sup>1</sup> See s.20.2 - EPA: “You have applied under section 20.2 of Part II.1 of the Environmental Protection Act, R.S.O. 1990, c. E.19 (Environmental Protection Act) for approval of: one (1) fully enclosed Tipping Building, to be used for receiving, shredding and blending of Organic Waste;  
Exhibit Book, Vol. 1, pg. 121

See s.20.3 Waste Storage – EPA: 9 (a) “150 tonnes of waste inside the Tipping Building including, but not limited to, any Compost blended with pulp and paper biosolids or other waste”.  
Exhibit Book, Vol. 1, pg. 129

<sup>2</sup> The fresh evidence now demonstrates that there were approximately 100MT (wet weight) of biosolids delivered to the site every week more than was necessary (and therefore not used) for the production of Grade A compost (ie each Windrow) that was built up and stored in the Tipping Building. By July 12, 2017, as set out in the Pinchin Report, after 13 weeks approximately the buildup was 1312.5 MT of biosolids (wet weight).

<sup>3</sup> This Annual Report is required under the Environmental Compliance Approval number 0031-7UTRSS SusGlobal Motion Record, Tab 2, pg. 16, Exhibit “A”

<sup>4</sup> (However, this did not include the information required to do the calculation comparing the wet weight to dry weight)

so that the business of SusGlobal complied with the Environmental Compliance Approval #0031-7UTRSS (the “ECA”).

6. The 2017 Annual Report included calculations that were based on the total annual figures of the amount of biosolid waste that was delivered and processed by the business in 2017 (the “2017 Calculations”). The 2017 Calculations show, based on the most conservative view of the conduct of the Receiver, that by September 15, 2017, the amount of biosolids in the Tipping Building was at least 1,492 MT (the wet weight) which far exceeded the licensed approval maximum amount that could be stored in the Tipping Building, being 150 MT (wet weight).

7. This amount accumulated as the amount delivered, on average per week, was an amount in excess of the amount used for the processing of Windrows (and the production of Class A compost).

8. The 2017 Annual Report calculations are based upon the figures for percentage of water in various materials, as set out in the 2016 Annual Environmental Report (the “2016 Annual Report”). The 2016 Annual Report was prepared by Allan Hamilton (“Mr. Hamilton”). He was the prior manager of Astoria and was hired by the Receiver to be in charge of the operation of the business during the Receivership. Mr. Hamilton was well aware of the calculations and percentages for conversion to dry weight, which he used in preparing the 2016 Annual Report. The evidence indicates that he did not provide this information to the Receiver.

9. SusGlobal takes the position that the information in the 2017 Annual Report is reliable, as it is based upon the same figures for the percentage of water in various materials, used for the calculations of the amounts set out in the 2016 Annual Report, submitted by the Debtor Astoria

Organic Matters Ltd. (“Astoria”) (Mr. Hamilton) to the MOECC in 2017 (before the Receivership Order).

10. The analysis in the 2017 Annual Report is confirmed and approved by the MOECC. This information could not have been completed prior to the completion of the argument on the Original Motion because (i) the delay in the Receiver providing other information required for the 2017 Annual Report which occupied the time available to Mr. Hamaliuk, (ii) the timing of the providing of further “evidence” delivered by the Receiver, not in the form of a report or an affidavit<sup>5</sup>, and (iii) the timing of the computation of the calculations by Mr. Hamaliuk just days before the submission of the 2017 Annual Report, at the end of March 2017. Furthermore, it could have not been completed by Mr. Hamaliuk prior to that date, as he was the only person available and qualified to do so at SusGlobal.

11. As a result of this evidence, SusGlobal has demonstrated that Mr. Hamilton misled the Receiver and this Court. His calculations as set out in the Receiver’s Fourth Report (dated December 8, 2017<sup>6</sup>) are now shown to be materially incorrect. His material change in “evidence” is now shown to be incorrect and the Pinchin report is now shown to be accurate, based on the 1,312 metric tonnes (wet weight) observation and calculation by Mr. Hamilton in mid-July 2017.

12. The use of Schedule C<sup>7</sup> to the BDO Factum on the Original Motion to justify and compare the dry weight and wet weight amount now have been shown to be of no value, as Mr. Hamilton had the exact figures for percentages of water for the different materials, as set out in the 2016

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<sup>5</sup> Provided to SusGlobal and the Court on the last hearing date of the Original Motion March 5, 2018 – Chart 1 – Astoria Organic Matters – Material Receipt Report – Summary of Appendix of E of Hamaliuk Exhibit Book, Vol. 3, pgs. 831 to 838

<sup>6</sup> Receivers Fourth Report see sections 2.2.6 (Appendix I); 2.2.7; 2.3.4 and 2.3.7 Exhibit Book, Vol. 2, pgs. 321 to 348

<sup>7</sup> For which there was no evidentiary basis whatsoever.

Annual Report. Furthermore, the fresh evidence demonstrates that Mr. Hamilton's changing explanations to calculate the conversion from wet to dry weight, were confusing and wrong, based on Mr. Hamilton's figures that he used in the 2016 Annual Report.

13. Mr. Hamilton has not provided any evidence on the Motion to Reopen, to explain his conduct.

14. As a result of the 2017 Annual Report, SusGlobal now can determine that the dry weight of biosolids used to make Grade A compost at Astoria was 18.8% of the compost mixture<sup>8</sup>, not 25% of the compost mixture, as the Receiver alleged in its chart and calculations, delivered during the Original Motion.

15. The Court now has the evidence which demonstrates that there is a *prima facie* claim against BDO for gross negligence, and or in the alternative, wilful misconduct, because of its failure to comply with the EPA regulations and the license terms and conditions, which are mandated by the EPA and which were required to be complied with by BDO, by Court Order (see paragraph 10 and 16 of the Receivership Order (used interchangeably as "Court Order")).

## **PART II - SUMMARY OF FACTS**

16. The chronology of the delivery of evidence on the Original Motion is as follows:

- I. SusGlobal served and Motion material on December 1, 2017 including the Affidavit of Mr. Hamaliuk with exhibits (affirmed November 29, 2017);
- II. Receiver served Fourth Report with appendix A-O dated December 8, 2017;

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<sup>8</sup> i.e. the mixture in each Windrow.

- III. SusGlobal served Supplementary Affidavit of Mr. Hamaliuk with exhibits (affirmed December 17, 2017;
  - IV. SusGlobal served Supplementary Motion Record (ie. Amended Notice of Motion) dated January 18, 2018;
  - V. Receiver served Supplement to Fourth Report with appendix dated January 19, 2018;
  - VI. SusGlobal served Factum dated February 13, 2018;
  - VII. SusGlobal served Second Supplementary Motion Record (containing affidavit of Sarah Quildon) dated February 15, 2018;
  - VIII. Receiver served Responding Factum dated February 16, 2018;
  - IX. Receiver served Second Supplement to the Fourth Report dated February 20, 2018;
  - X. SusGlobal served Third Supplementary Motion Record (containing affidavit of Sarah Quildon) dated February 20, 2018.
17. The Original Motion was heard on February 21, 27<sup>th</sup> and arguments continued on March 5, 2018. However, prior to commencing arguments on March 5, 2018 the Receiver provided SusGlobal and the Court additional material not in a report or affidavit form.<sup>9</sup>
18. The decision was reserved and written reasons were released on May, 17, 2018.

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<sup>9</sup> See - Chart 1– Astoria Organic Matters – Material Receipts Report – Summary of Appendix E of Hamaliuk Affidavit - purporting to be the summary of organic waste received and Windrows constructed during various time periods. Exhibit Book, Vol. 3, pg. 831 to 840



19. The Order with regard to the Original Motion has not been issued.
20. The MOECC confirmed receipt of the 2017 Annual Report on June 25, 2018 and a copy was provided to the Receiver on the same date.
21. On June 25, 2018 SusGlobal notified the Receiver of its intention to bring the Motion to Reopen based on the fresh evidence, in light of the information in the 2017 Annual Report.
22. The within motion to file fresh evidence was served on July 13, 2018.

### **New Evidence – 2017 Annual Report**

23. On March 29, 2018, the 2017 Annual Report was provided to the MOECC by SusGlobal. This report addresses all of the activities that occurred at the site during the 2017 calendar year. In particular, “Appendix B of the 2017 Annual Report is a detailed accounting of annual tonnage received and shipped dated per day and sorted by class or item and totaled accordingly. This information is extracted from the weigh scale computer.”<sup>10</sup>
24. The 2017 Annual Report is required by law.<sup>11</sup>
25. Mr. Hamaliuk is the Chief Executive Officer of SusGlobal and is the only engineer employed by SusGlobal who is qualified to compile and submit the 2017 Annual Report to the MOECC.<sup>12</sup>
26. The 2017 Annual Report allows for accurate and reliable calculations for the whole year, to be made, of the amount of total biomass and subcategory of bio solids, delivered to the site.<sup>13</sup> The

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<sup>10</sup> Affidavit of Gerald Hamaliuk, dated July 13, 2018 para 3 and SusGlobal Motion Record Tab 2, Exhibit “A”

<sup>11</sup> Affidavit of Gerald Hamaliuk, dated July 13, 2018 para 3

<sup>12</sup> Affidavit of Gerald Hamaliuk, dated August 16, 2018 para 1-2

Parties concede that the most reliable way to determine the amount of biosolids on the site at any time is to review the weigh scale tickets for materials arriving at the site.<sup>14</sup>

27. The 2017 Annual Report requires assembling data from multiple sources during the reporting year. This process was complicated by the fact that the SusGlobal only assumed control of the subject site as of September 15, 2017. Therefore, many records were not directly available. Much of the underlying information to complete the 2017 Annual Report<sup>15</sup> was not available until just before the March 29, 2018 submission date.<sup>16</sup>

28. From the time period of January 9, 2018 to February 23, 2018, Mr. Hamaliuk contacted Angelo Consoli a number of times to obtain the required analytical information from BDO in order to complete certain aspects of the 2017 Annual Report to be in compliance with the ECA. However, he was provided with limited information from BDO. As a result, Mr. Hamaliuk went 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. He also sought clarification on a number of other issues related to the time period before September 15, 2017, for the 2017 operation.<sup>17</sup>

29. Given the lack of data and information from BDO, after February 23, 2018, Mr. Hamaliuk focused on compiling the information on hand and preparing explanations of why no compliance analysis could be fully presented for certain aspects of the report.<sup>18</sup> This process took Mr. Hamaliuk longer than he expected and he overlooked the importance of the 2016 Annual Report

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<sup>13</sup> Affidavit of Gerald Hamaliuk, dated July 13, 2018 para 5

<sup>14</sup> Affidavit of Gerald Hamaliuk, dated July 13, 2018 para 6

<sup>15</sup> But not the calculation of the conversion from wet weight to dry weight.

<sup>16</sup> Affidavit of Gerald Hamaliuk, dated July 13, 2018 para 4

<sup>17</sup> Affidavit of Gerald Hamaliuk, dated August 16, 2018 para 4 and 8

<sup>18</sup> Affidavit of Gerald Hamaliuk, dated August 16, 2018 para 9

calculations. As result, he did not turn his mind to the calculations of the conversion of the wet weight to dry weight, until the latter part of March 2018.<sup>19</sup>

30. In March of 2018, Mr. Hamaliuk commenced a review of the hard copy of the 2016 Annual Report that had been submitted to the MOECC, which referred to wet weight and dry weight conversion.<sup>20</sup>

31. On March 21<sup>st</sup>, 2018 the incoming and outgoing data was collected and summarized for the 2017 Annual Report. Shortly thereafter, Mr. Hamaliuk did the calculations and it was then that Mr. Hamaliuk realized that the site operated during 2017 at 18.8%<sup>21</sup> 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).<sup>22</sup>

32. Mr. Hamaliuk used the percentage of water with regard to certain materials from the 2016 Annual Report to calculate the dry weight of biosolids and the dry weight of leaf and yard and woodchips used to manufacture Grade A compost during 2017.<sup>23</sup>

33. The significance and impact of this information on the conversion from wet weight to dry weight, could not have been established until the calculations based on the 2016 Annual Report figures were carried out by Mr. Hamaliuk for the 2017 Annual Report.<sup>24</sup>

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<sup>19</sup> Affidavit of Gerald Hamaliuk, dated August 16, 2018 para 10

<sup>20</sup> Affidavit of Gerald Hamaliuk, dated August 16, 2018 para 11

<sup>21</sup> The calculation of the 18.8% is as follows: [The calculation is from the annual figures set out in the 2017 Annual Report, namely:  $2785 / (2785 + 12,017) \times 100 = 18.81\%$ . In words, total biosolids dry weight divided by total biosolids plus organic material in the mix, times 100 = 18.81%. (see SusGlobal Motion Record, Tab 2, Exhibit "A", pg. 18)

<sup>22</sup> Affidavit of Gerald Hamaliuk, dated August 16, 2018 para 13

<sup>23</sup> Affidavit of Gerald Hamaliuk, dated August 16, 2018 para 12

<sup>24</sup> Affidavit of Gerald Hamaliuk, dated August 16, 2018 para 16

34. The 2017 Annual Report was submitted on March 29, 2018. Before the 2017 Annual Report could be relied upon by SusGlobal, the report had to be accepted as being in compliance with the ECA (EPA) by the MOECC.<sup>25</sup> The MOECC confirmed receipt and compliance on June 25, 2018. On the same date it was provided to the Receiver.

**No Disagreement on the Evidence between the Parties:**

35. There is no disagreement on the evidence, or between the Parties, on the following:

- a) that during the 23 weeks the Receiver operated the site, the weigh scale tickets (Material Report) confirmed a total of 4,951 Metric tonnes (wet weight) of biosolid waste was delivered to the site and was received by the Receiver;<sup>26</sup>
- b) that the 4,951 metric tonnes of biosolid waste would have been “wet” i.e. would have contained moisture. The 2016 Annual Report and the 2017 Annual Report make it clear that both the former operator Astoria and SusGlobal accept that 25% of this raw material was biosolids and the remaining 75% was water. The same calculation used in the 2017 Annual Report was used by Astoria when it completed the 2016 Annual Report. This calculation is also industry standard. The calculation has also been now accepted by the MOECC. As a result, it is now correct to conclude that 1,238 ( $4,951 \times 0.25 = 1238$ ) metric tonnes of actual biosolids arrived at the site during the time. This is the “dry weight” amount of biosolids (ie. without water)<sup>27</sup>;

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<sup>25</sup> Affidavit of Gerald Hamaliuk, dated July 13, 2018 para 4

<sup>26</sup> Affidavit of Gerald Hamaliuk, dated July 13, 2018 para 7

<sup>27</sup> Affidavit of Gerald Hamaliuk, dated July 13, 2018 para 7 Footnote 1 (from the 2016 Annual Report):

The conversion factors used to convert from the wet scale readings to the dry scale content are as follows:

- c) that throughout the 23 weeks the Receiver operated the site, there were 23 Windrows of compost completed at the site<sup>28</sup>;
- d) that each Windrow contained a maximum of 500 metric tonnes of compost (organic mixture). This equates to a maximum of 11,500 metric tonnes of total compost (500 metric tonnes x 23 Windrows)<sup>29</sup> (wet weight);
- e) that the 11,500 metric tonnes of Class A compost would have been “wet” i.e would have contained moisture. The Receiver (through Mr. Hamilton) and SusGlobal accept that 40% of this mixture of the material, was Class A compost, and remaining 60% was water. As a result, it is correct to conclude that 4,600 metric tonnes of Class A compost was manufactured on the site during this time period

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- a. for biosolids and paper sludge: 25% solid, 75% water
  - b. for leaf and yard waste: 75% solid, 25% water
  - c. for food waste: 40% solid, 60% water
  - d. for clean wood: 100% solid
  - e. for liquid organics: 3% solid, 97% water

These were also the percentages that were used in the calculations for the 2016 Annual Report, except for two changes. Leaf and yard waste in the 2016 Annual Report was 90% solids and 10% water. Based on the testing, this is an unrealistic ratio. As a result, a more conservative approach (which was used by SusGlobal in completing the 2017 Report) is to use 75% solid and 25% water. As leaf and yard waste is green waste, it is higher than 10% moisture which was confirmed by the MOECC compliance officer who reviewed the Sus Global 2017 Environmental Report.

If the ratio of 90% was used, (as was used by Astoria) it would result in an even lower percent of biosolid on a dry weight basis. That is, it would have resulted in a calculation of a higher amount of biosolid waste being stored in the Tipping Building as of September 15, 2017. Also, the percent of solids in paper sludge was changed by SusGlobal to 25% from 45%. This was based on an analysis sent to Caducin Laboratory in December of 2017. The other solid content ratios of 25% for biosolids, 40% for food waste, 3% for liquid organics and 100% for clean wood are the same as used for the conversion from wet to dry weight in the 2016 Environmental Report that was prepared by Astoria.

<sup>28</sup> Affidavit of Gerald Hamaliuk, dated July 13, 2018 para 8. Note that this information comes from the Fourth Report (Mr. Hamilton Record p330 par 3) and the Windrow Production Report p 808/463 ( ie 23 Windrows were processed over 23 weeks)

<sup>29</sup> Affidavit of Gerald Hamaliuk, dated July 13, 2018 para 8

(11,500 metric tonnes x 40% = 4,600 metric tonnes). This is the “dry weight” amount of Class A compost that is without water<sup>30</sup>.

### **MOECC Regulation**

36. The MOECC regulates the total amount of biosolids that can be used in various grades of compost. The dry weight calculation set out in the ECA legislation and regulations is for compost production under the Ontario Regulations.<sup>31</sup>

37. The 2017 Annual Report now establishes that 4,600 metric tonnes of Class A compost would have contained a maximum of 18.8% biosolids and the remaining compost mixture, (to make Class A Compost) was made up of other materials. This calculation is as follows:  $2785/(2785+12,017) \times 100 = 18.81\%$ . In words, total biosolids used were 2785 dry weight divided by total biosolids plus organic material in the mix, times 100 = 18.81%<sup>32</sup>.

38. This calculation has now been accepted by the MOECC. As a result, it is correct to conclude that a maximum of 865 metric tonnes of actual biosolids were used in the composted material on site during the receivership period (4,600 metric tonnes x 18.8% = 865 tonnes)<sup>33</sup>. This is the “dry weight” amount of biosolids in the composted material i.e. without water. This is less than the maximum of 25% by dry weight regulated by the government<sup>34</sup>.

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<sup>30</sup> Affidavit of Gerald Hamaliuk, dated July 13, 2018 para 9

<sup>31</sup> Affidavit of Gerald Hamaliuk, dated July 13, 2018 para 10

<sup>32</sup> SusGlobal Motion Record, Tab 2, Exhibit “A”, 2017 Annual Report, pg. 18

<sup>33</sup> Affidavit of Gerald Hamaliuk, dated July 13, 2018 para 11

<sup>34</sup> Supplementary Affidavit of Gerald Hamaliuk affirmed on December 17, 2017 Tab 1 – Exhibit A Ontario’s Compost Quality Standards – 3.3 Quality of Feedstock “Sewage biosolids, pulp and paper biosolids and domestic septage may be used as feedstock materials for the production of Category A and B compost. In the case of Category A compost production, sewage biosolids, pulp and paper biosolids and domestic septage shall be limited to a maximum of 25% of the feedstock blend (on a dry weight basis).

39. Based on the above, 1,238 metric tonnes of biosolids (dry weight) arrived during the time the Receivership operated the site. A maximum of 865 metric tonnes (dry weight) was used in the actual compost. This leaves a minimum of 373 metric tonnes (dry weight) of biosolids that were built up and stored on site as of September 15, 2017.<sup>35</sup>

40. Biosolids are essentially human waste (ie. excrements etc). They are highly regulated and controlled. They would have remained on site at all times. The only permissible storage location was the Tipping Building. The Environmental Compliance Approval (“ECA”) for this site limits the total amount of biosolids on this site to a maximum of 150 metric tonnes (wet weight). The 373 metric tonnes (dry weight of biosolids delivered to the site during this period) was present and in direct contravention of the Approval.<sup>36</sup>

41. Furthermore, the Approval limit of 150 metric tonnes is for wet weight. The 373 metric tonnes of biosolids is for dry weight. The industry standard and value accepted by the MOECC in the 2017 Report is that the dry weight of biosolids represents only 25% of the wet weight of the biosolids. Therefore, the wet weight amount of biosolids stored on site during the Receiver’s time of operation as of September 15, 2017 was 1,492 metric tonnes (373 metric tonnes x 4 = 1,492 metric tonnes). Based on these amounts, the Receiver permitted the Approval limit of 150 metric tonnes (wet weight) to be violated by more than 1,300 excess metric tonnes above the Approval limit (wet weight) as of September 15, 2017.<sup>37</sup>

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<sup>35</sup> Affidavit of Gerald Hamaliuk, dated July 13, 2018 para 12

<sup>36</sup> Affidavit of Gerald Hamaliuk, dated July 13, 2018 para 13

<sup>37</sup> Affidavit of Gerald Hamaliuk, dated July 13, 2018 para 14

**Receiver's (Mr. Hamilton's) "Evidence"**

42. The Receiver's initial evidence being Mr. Hamilton's calculations were all based on wet weight. The initial evidence was consistent with the weigh scale and the Pinchin Report which indicated 1,312 metric tonnes in the Tipping Building in mid-July, 2017.<sup>38</sup>

43. Mr. Hamilton then changed his evidence and said that this amount that he gave to Pinchin was an error by him, but he gave no explanation for how he made that error.

44. It was not until January 19, 2018, when the Receiver served the Supplement to the Fourth Report that for the first time Receiver/BDO raised and distinguished mixing on a dry weight versus wet weight basis.<sup>39</sup>

45. SusGlobal responded to the issue of wet weight vs dry weight based on the amounts delivered and Material Reports and were based on wet weight.<sup>40</sup>

46. The Receiver attempted to demonstrate what the conversion from wet weight to dry weight calculation should be on the Original Motion, by inserting a formula and calculating a hypothetical in Schedule C. This was based on a new methodology of "dry weight" based on figures that did not exist.

47. This formula and calculation was not based on what actually occurred at the site during the 23 week period. As we now have the actual correct percentages for conversion, the calculation has

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<sup>38</sup> See SusGlobal's Motion Record Tab 2 – A pg 185 Table 3.3.3 – Pile Age and Volume Summary (ie. Tipping Building 1312.5 MT page 13 of 23 of Pinchin Report)

<sup>39</sup> Affidavit of Gerald Hamaliuk, dated August 16, 2018 para 19 and see Fourth Supplement s.2.0.2 to s.2.0.4

<sup>40</sup> See Affidavit of Sarah Q dated February 20, 2018. Exhibit Book, Vol. 3, pgs. 831 to 838



been shown, based on the 2017 Annual Report, to be wrong in Schedule C and wrong in the chart delivered on the last day of the Original Motion<sup>41</sup>.

48. Furthermore, in order for this hypothetical calculation referred to in Schedule C of the BDO Factum, to be accurate, the amount of biosolids waste that would have been required to be delivered during the 23 week period for BDO's figures to reconcile, would have been approximately 800 metric tonnes<sup>42</sup> more, than the amount actually delivered on site.<sup>43</sup>

49. Mr. Hamilton did not advise the Receiver that the actual percentage of water was already calculated and determined in the 2016 Annual Report – this was a serious omission given that he was the individual who had 10 years of experience in operating this kind of business and in particular, because he had the information and knowledge as he had completed the 2016 Annual Report for MOECC.

50. Mr. Hamilton was aware of the percentages of dry weight from his preparation of the 2016 Annual Report. The reference to Mr. Hamilton's changes in evidence, the use of Schedule C to the BDO Factum on the Original Motion, and Mr. Hamilton's changing explanations of the percentages of wet and dry weight, were confusing and camouflage the fact that he had the actual percentages in the 2016 Annual Report that he prepared<sup>44</sup>. If he would have used the actual percentages, then his evidence would not have been "corrected".

51. Mr. Hamilton could have properly calculated that the actual percentages for the years were 18.8% biosolid waste as a percentage of the total mixture for Class A compost and not 25%

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<sup>41</sup> Ex. Book Vol. 3 pg 838 – Incorrect (maximum amount not correct amount)

<sup>42</sup> Based on a maximum Windrow of 500 metric tonnes by wet weight and based on the actual weigh scale data (wet weight)

<sup>43</sup> Affidavit of Gerald Hamaliuk, dated August 16, 2018 para 19

<sup>44</sup> Affidavit of Gerald Hamaliuk, dated July 13, 2018 para 15

biosolid (being a hypothetical percentage) (and being the maximum amount allowable under the regulation), during the Receivership, based on the annual figures.

52. The Receiver and this Court were all misled by Mr. Hamilton, it is submitted, with respect to the change in evidence that was referred to in the 4<sup>th</sup> Supplemental Report of the Receiver .

53. It was not until the 2017 Annual Report had been submitted and the MOECC confirmed compliance, that the significance of the “dry and wet” weight analysis could be established and confirmed to ensure the Court now has accurate information.

54. It would be a miscarriage of justice if Mr. Hamilton’s incorrect (false) “corrected evidence” was allowed to govern the factual foundation for the Original Motion.

### **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

55. There are three issues on this motion:

**Issue 1:** Whether the moving party has satisfied the legal test for leave to introduce fresh evidence to reopen the Original Motion?

**Issue 2:** Whether the fresh evidence demonstrates that there is a *prima facie* case against BDO for gross negligence, and/or in the alternative, wilful misconduct for failure to comply with the EPA, s.10 and s.16 of the Receivership Order, and the APA?

**Issue 3:** Whether the ‘as is, where is’ provision means that the Receiver must comply with s.10 and s.16 of the Court Order, and the EPA after BDO took possession and control of the business, and whether its failure to do so is a breach of the APA?

## **Issue 1 - Applicable Legal Principles**

56. Justice McEwen reserved his decision and written reasons were released on May, 17, 2018. However, the order has not been issued and entered.

57. The legal principles applicable for reopening a trial or motion on the basis of fresh evidence, before judgment is entered, is set out in *671112 Ontario Ltd. v. Sagaz Industries Canada Inc.*, (2001)<sup>45</sup>, where the Supreme Court of Canada affirmed the two-part test for motions to reopen a trial before the judgment is entered:

- a) First, would the evidence, if presented at trial, probably have changed the results?
- b) Second, could the evidence have been obtained before the trial by the exercise of reasonable diligence?<sup>46</sup>

58. This test was first enunciated in *Scott v Cook*, (1970)<sup>47</sup>, and in that case at para 13 Justice Grant stated:

“It seems, therefore, that the rule pertaining to the right of a trial Judge to open up a case and consider new or fresh evidence after the close of the trial but before judgment is entered is **less stringent than the principle governing an application to adduce new or further evidence before an appellate Court**”...

and he went on to set out a brief summary of the principles on which the rule is based:

- 1) The trial judge should have unfettered discretion in this matter so as to **ensure that a miscarriage of justice** does not occur;
- 2) Before entry of judgment, the trial Judge is in a **better position to exercise that discretion** than is an appellate Court. The trial Judge **knows the factors in the case** that influenced his decision and can more readily determine the weight that should be given to the new evidence offered;
- 3) The authorities indicate that a **trial Judge can always reconsider his decision until the judgment is drawn up and entered**;
- 4) The trial Judge is the one in the **best position to judge the bearing of the new or further evidence** upon the case in light of the evidence already heard;
- 5) Once a litigant has obtained a judgment, he is entitled not to be deprived of it without very solid grounds.

**[emphasis added]**

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<sup>45</sup> 2001 SCC

<sup>46</sup> Ibid - 59 para 20, 59-65

<sup>47</sup> CarswellOnt 253

59. In *Castlerigg Investments Inc. v. Lam*,<sup>48</sup> Justice Dennis Lane relied on *Clayton v. British American Securities Ltd.*,<sup>49</sup> for the principle that a trial judge who has not yet been rendered *functus*, has untrammelled discretion in determining whether to re-open a trial, so as to ensure that a miscarriage of justice does not occur. He also considered the factors listed in *Scott v Cook* and determined that the primary objective on a motion for re-opening on fresh evidence is to avoid a miscarriage of justice.

60. The courts have also reiterated that the reasonable diligence requirement of the two-prong test will be relaxed in exceptional circumstances to avoid a miscarriage of justice.<sup>50</sup>

**a.) 2017 Annual Report would have changed the result**

61. The material evidence with respect to the Original Motion for leave was the evidence of the amount of biosolid waste that was stored in the Tipping Building during the receivership carriage of 23 weeks and in particular, whether the amount stored in the Tipping Building exceeded 150 MT (wet weight) on a continual and increasing basis, during the receivership.

62. The 2017 Annual Report provides the accurate and reliable percentages and calculations, for conversion of wet weight to dry weight for the whole year 2017.

63. On the Original Motion, this Court relied upon the evidence of Mr. Hamilton and his corrections, and confusing ‘wet to dry weight’ conversion, to discredit and disregard the Pinchin Report, and to find that there was no excess organic waste stored in the Tipping Building.

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<sup>48</sup> 2 O.R. (3d) 216

<sup>49</sup> (1934), 49 B.C.R. 28

<sup>50</sup> See *Degroote v. Canadian Imperial Bank of Commerce*, [1999] O.J. No. 2313 (Ont. C.A.).

64. Justice McEwen in his decision noted that overall, SusGlobal's motion failed due to its inability to produce credible and reliable evidence to support its claim of excess organic waste, in the Tipping Building.<sup>51</sup> However, this Court now has the 2017 Annual Report that includes the applicable percentages (for various materials), to convert wet weight to dry weight, correctly.

65. Furthermore, the 2017 Annual Report used accurate percentage by dry weight (of biosolids in the Grade A compost mixture) to calculate the amount of biosolids that were actually processed in Windrows during the receivership. As a result, this Court now has the accurate and reliable information instead of hypothetical information. The correct information shows that 373 metric tonnes were never processed (by dry weight) which equals 1,492 metric tonnes by wet weight. This far exceeds the maximum of 150 metric tonnes (wet weight).<sup>52</sup>

66. From a cursory review of the 2017 Calculations they clearly indicate that based on the most conservative view of the conduct of the Receiver that by September 15<sup>th</sup>, 2017, the amount of biosolids in the Tipping Building had built up to 1,492 MT (wet weight) which far exceeded the licensed approval maximum limit of 150 MT.

67. Neither the Receiver nor Mr. Hamilton has provided any evidence on the Motion To Reopen to dispute the 2017 Annual Report or the 2017 Calculations.

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<sup>51</sup> Reasons for Decision dated May 17, 2018 para 19

<sup>52</sup> As a result, the calculations performed by BDO cannot be accepted because they are inconsistent with the results accurate percentage as set out in the 2017 Annual Report see para 52-61 of the Reasons.

68. Furthermore, the 2017 Annual Report supports the analysis and is within range of the estimate provided by the Pinchin Report<sup>53</sup> that was alleged by the Receiver to have contained errors based on the alleged mistakes alleged by Mr. Hamilton.

69. The evidence from the 2017 Annual Report leaves no doubt that Receiver permitted the Approval limit of 150 metric tonnes (wet weight) to be violated by more than 1,300 excess metric tonnes (wet weight) above the Approval limit as of September 15, 2017.<sup>54</sup>

70. Accordingly, there is no doubt that had the 2017 Annual Report been available and before the Court on the Original Motion that it would have changed the results or likely resulted in a different outcome on the Original Motion.

**b.) Is there a reasonable explanation why the 2017 Annual Report was not obtained prior to the Original Motion**

71. The report requires assembling data from multiple sources during the reporting year. This process was complicated by the fact that SusGlobal only assumed control of the subject site as of September 15, 2017. Therefore, many records were not directly available.

72. From January 9, 2018 to February 23, 2018 Mr. Hamaliuk requested analytical and other information from BDO in order to complete a number of aspects of the 2017 Report. However, BDO provided limited information to Mr. Hamaliuk, and as a result, he focused on compiling the information on hand and preparing explanations of why compliance analyses could not be fully presented.

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<sup>53</sup> It is submitted that it is with the fresh evidence and the Court can now place weight on the 1312 metric tonnes on the organic weight see para 37 and 46 of the Reasons.

<sup>54</sup> The Original Motion Judge Mr. Justice McEwen found at para 23 as follows: “ I accept, however, that at some level, excess storage of organic waste could arguably establish a *prima facie* case of gross negligence or willful misconduct but that was not the case here.”

73. It was not until March of 2018, that Mr. Hamaliuk reviewed 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.

74. In addition, it was not until March 21, 2018 when the incoming and outgoing data was collated and summarized and shortly thereafter, when Mr. Hamaliuk did the calculations, that he realized the site was operating during 2017 at 18.8% (on an annual percentage), by dry weight of biosolids in the compost Grade A mixture, instead of the 25% of the compost mixture as speculated by BDO. The significance and impact of the conversion of the wet to dry weight could not have been established until the calculations, based on the 2016 Annual Report figures, were carried out by Mr. Hamaliuk for the 2017 Annual Report.

75. This took Mr. Hamaliuk a considerable amount of time and this was exacerbated by the fact that he was the only engineer employed by SusGlobal and the only person qualified to compile and submit the 2017 Annual Report to the MOECC.

76. The 2017 Annual Report was not available until it was completed and submitted on March 29, 2018 and received and confirmed by the MOECC on June 25, 2018.

## **Issue 2 – Prima Facie Case and Miscarriage of Justice**

77. Given that the 2017 Annual Report is now available and that the Court now has the correct percentage of biosolids in the compost A mixture during 2017 (18.8%), and the correct wet weight to dry weight conversion calculations, the Court 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.

78. It is submitted that the overarching principle on a motion for re-opening is to ensure that a miscarriage of justice does not occur. Justice McEwen having presided over the Original Motion and is in the best position to exercise His discretion given that he knows the factors that influenced His decision and determine the weight that should be given to this fresh evidence.

79. It has now been demonstrated, based on the fresh evidence, that the evidence of Mr. Hamilton was not only not true but he did not provide the Court, and its officer, the Receiver with the actual conversion percentages for the wet weight to dry weight conversion, that he was fully familiar with, having used the numbers in 2016 for the 2016 Annual Report. If he had done so his “mistakes” would have been shown not to be mistakes. His “speculation” as to the amount stored in the Tipping Building at various times, set out in the Receiver’s reports, is now shown to be incorrect.

80. It would be a miscarriage of justice if this fresh evidence now was not considered by this Court so that the Court can properly exercise its discretion on this Motion to Re-open, and grant leave to sue the Receiver.

**Issue 2 a – Why Your Honour Should Exercise Your Discretion to Re-open the Original Motion**

81. Based on the jurisprudence this Court has ‘untrammelled discretion to prevent abuse’ and with the objective to avoid a miscarriage of justice. It would be a miscarriage of justice to accept the ‘evidence’ provided by Mr. Hamilton when he knew that the information that he provided to



the Receiver was false, because he had the correct percentage of biosolids from his preparation of the 2016 Annual Report. He deliberately did not provide this information to the Receiver. Mr. Hamilton changed evidence was without any explanation. His ‘wet to dry weight’ conversions were deliberate, confusing and materially based on incorrect figures. Instead, Mr. Hamilton provided hypothetical calculations that were not based on actual numbers on site, and the Receiver relied upon this information and provided the same to this Court. That information is now shown to be materially incorrect.<sup>55</sup> SusGlobal asserts that this Court was misled on the Original Motion and now has an opportunity to avoid a miscarriage of justice by providing leave to introduce the fresh evidence available.

### **Issue 3: Asset Purchase Agreement (“APA”) – “As Is, Where Is”) Provision**

82. The Receiver relies upon the ‘as is, where is’<sup>56</sup> provision in the Asset Purchase Agreement to negate any liability with respect to Environmental Laws and its obligation to be in compliance with the EPA.

#### **Limitation on Environmental Liabilities**

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 environmentally contaminated, might be pollutant or contaminant...”

#### **[emphasis added]**

83. The Receiver was not required to occupy or take control; instead it could have under the Court Order (ie. Receivers Powers para 3 (i)) engaged qualified or third party to undertake environmental or workers’ health and safety assessments of the Property and operations of

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<sup>55</sup> Ex. Book Vol. 2 pg 332, s.2.3.6 –pg 333, s.3.1.5 pg 340-341, pg 472 to 474 and 792 to 795

<sup>56</sup> Asset Purchase Agreement (APA) s.3.03 “As is, Where is”

Astoria. However, the Receiver did take control, care, charge, possession and management of Astoria's property and the site. As a result BDO was required to comply with the EPA (ECA) and the Court Order.

84. The 'as is where is' clause, refers to the business being operated in compliance with the EPA requirements related to the Property and s.10 and s.16 of the Court Order. As a result, the Receiver breached the 'as is where is' provision as it did not operate the Tipping Building in compliance with the EPA (ECA) and Court Order.

85. Furthermore, the APA did not provide under s.2.8 (see para 68 of the Reasons) that SusGlobal would assume liabilities created by the Receiver, as a result of the Receivers breaches of the EPA (ECA) of the Court Order. In addition, that would be inconsistent with the duties of an officer of the Court including paragraph 10 of the Court Order.

86. The Receivers failure to comply with the EPA caused SusGlobal significant expense to clean up the excess biosolid waste in the Tipping Building, in order to be in compliance with the EPA (ECA) and Court Order. This took a considerable amount of time and in doing so SusGlobal incurred damages.

#### **PART IV - ORDER REQUESTED**

87. An Order granting SusGlobal leave to reopen the Original Motion heard by the Honourable Mr. Justice McEwen, for leave to sue the Receiver for damages and to file fresh evidence.;

88. An Order granting leave to permit SusGlobal to bring its claim for damages against the Receiver and for such further and other directions as this Court may order;

89. Costs of the Motion and of the hearing before the Honourable Mr. Justice McEwen on a partial indemnity basis, or in the alternative that the costs be reserved to the Judge hearing the claim of SusGlobal as against the Receiver;

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 13th day of September, 2018.

*Melvyn L. Solmon and Rajiv Joshi*

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## **SCHEDULE “A”**

### **LIST OF AUTHORITIES**

1. 671112 Ontario Ltd. V. Sagaz Industries Canada Inc., (2001) SCC 59
2. *Scott v. Cook*, (1970) CarswellOnt 253
3. *Castlerigg Investments Inc. v. Lam*, (1991) 2 O.R. (3d) 216
4. *Degroote v. Canadian Imperial Bank of Commerce*, [1999] O.J. No. 2313 (Ont. C.A.)

**SCHEDULE "B"**

**TEXT OF STATUTES, REGULATIONS & BY - LAWS**

1. See case brief.

BUSINESS DEVELOPMENT BANK OF CANADA  
Applicant

-and- ASTORIA ORGANIC MATTERS LTD. et al.  
Respondents

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT  
TORONTO

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RCP-E 4C (May 1, 2016)