

**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

AMENDED NOTICE OF MOTION

BDO CANADA LIMITED (“**BDO**”), in its capacity as the Court- appointed receiver (in such capacity, the “**Receiver**”) of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP (together, the “**Debtors**”), will make an urgent motion to a judge presiding over the Commercial List, on Wednesday, the 11th day of September, 2019, at 10:00 a.m., or as soon after that time as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

- (a) an Order staying the charges (the “**Charges**”) brought against BDO Canada LLP (sic), and referred to in the Summons dated July 9, 2019, issued by the Ontario Court of Justice East Region (the “**Summons**”),
- (b) an Order quashing the Summons;
- (c) in the alternative, an Order dismissing the Charges and quashing the Summons;
- (d) costs of this motion against SusGlobal Energy Belleville Ltd. (“**SusGlobal Belleville**”) and Donnelly Law, Barrister & Solicitor, jointly and severally;

- (e) costs of its efforts to enforce previous costs Orders made against SusGlobal Belleville in favour of the Receiver in this proceeding; and
- (f) such further relief as is just.

THE GROUNDS FOR THE MOTION ARE:

1. BDO was appointed as the Receiver pursuant to an Order of the Ontario Superior Court (Commercial List) (the “**Court**”) issued on April 13, 2017 (the “**Appointment Order**”), on the application of Business Development Bank of Canada (the “**Applicant**”);
2. The Appointment Order contains the standard prohibition on initiating proceedings against the Receiver, without leave, as follows (the “**Stay of Proceedings**”):
 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;
3. SusGlobal Belleville purchased certain of the Debtors’ assets from the Receiver as part of a sale process conducted by the Receiver, pursuant to an asset purchase agreement dated July 27, 2017 (the “**APA**”);
4. Following the closing of the sale, SusGlobal Belleville initiated a motion for leave to sue the Receiver for damages for gross negligence, or in the alternative, wilful misconduct and breach of the APA, and breach of the Appointment Order (the “**Leave Motion**”);
5. The basis for SusGlobal Belleville’s asserted claim against the Receiver was, among other things, that the Receiver had operated the Debtors’ business, which consisted of an organic waste recycling facility, in breach of the applicable regulations maintained by the Ontario Ministry of Environment and Climate Change (the “**MOECC**”);
6. The Leave Motion was heard by the Honourable Justice McEwen on February 21, 2018, February 27, 2018, and March 5, 2018. It was dismissed by way of reasons issued May 17, 2018 (the “**First Dismissal Order**”);

7. SusGlobal Belleville thereafter brought a motion to reopen the Leave Motion for the purpose of filing fresh evidence (the “**Fresh Evidence Motion**”). That motion was heard by Justice McEwen on September 21, 2018, and dismissed on November 8, 2018 (the “**Second Dismissal Order**” and, together with the First Dismissal Order, the “**Dismissal Orders**”). Justice McEwen ordered that SusGlobal Belleville pay the Receiver’s costs of the Fresh Evidence Motion on a full indemnity scale, as it had no prospect of success;

8. SusGlobal Belleville sought to appeal both Dismissal Orders. The Receiver objected that SusGlobal Belleville’s appeal of the First Dismissal Order was out of time, and that there was no appeal as of right from either Dismissal Order;

9. SusGlobal Belleville brought motions before a single judge of the Court of Appeal seeking declarations that its appeals from each of the Dismissal Orders were governed by s. 6 of the *Courts of Justice Act* (the “**CJA**”), or alternatively, orders that would permit the appeals to proceed by way of the appeal procedures established by the *Bankruptcy and Insolvency Act* (the “**BIA**”);

10. The motions came before the Honourable Justice Watt on December 10, 2018. Justice Watt issued endorsements dismissing both motions, with costs payable to the Receiver (the “**Watt Orders**”);

11. SusGlobal Belleville brought motions asking that a panel of the Court of Appeal set aside the Watt Orders;

12. The motions to set aside the Watt Orders were heard on February 15, 2019 before the Honourable Justice Feldman, the Honourable Justice Paciocco and the Honourable Justice Zarnett, and were dismissed by way of reasons issued April 8, 2019 (the “**CA Dismissal Order**”);

13. SusGlobal Belleville did not seek to further appeal the CA Dismissal Order;

14. On July 23, 2019, counsel for SusGlobal Belleville advised the Receiver of the Charges, stating that he had obtained an Information charging BDO with committing the offence of storage of more than 150 tonnes of biosolids in the Tipping Building, in contravention of s.

186(3) of the *Environmental Protection Act*. These are the same facts that were asserted in the Leave Motion;

15. Counsel for SusGlobal Belleville further advised the Receiver that:

- (a) the Summons was issued requiring the Receiver's attendance on September 3, 2019 at 9:00 am, at 235 Pinnacle Street, City of Belleville; and
- (b) it was SusGlobal Belleville's intent to recover the full cost of remediation at the site, totalling approximately \$600,000.

16. SusGlobal Belleville has not sought the Receiver's consent or leave of this Court to initiate the Charges;

17. The Charges constitute a proceeding commenced in a court or tribunal against the Receiver, and are therefore stayed by operation of the Stay of Proceedings;

18. SusGlobal Belleville's attempt to recover costs from the Receiver by way of the Charges, in breach of the Court-ordered Stay of Proceedings, and after its Leave Motion and subsequent appeals had been dismissed by this Court and the Court of Appeal, constitutes an abuse of process;

19. The Receiver has outstanding costs awards against SusGlobal Belleville totalling over \$180,000 (the "Costs Orders"), which SusGlobal Belleville has made no effort to pay;

20. The Receiver and its counsel have incurred costs associated with enforcing the Costs Orders, for which SusGlobal Belleville is liable pursuant to Rule 60.19 of the *Rules of Civil Procedure*;

21. The other grounds set out in the Receiver's Response to Summons dated July 30, 2019 (the "**Receiver's Report**");

22. The inherent jurisdiction of the Court;

23. In the alternative, s. 106 of the *Courts of Justice Act*;

24. In the alternative, Rule 2.1.01 of the *Rules of Civil Procedure*; and

25. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) the Receiver's Report;
- (b) the pleadings and proceedings herein;
- (c) the Receiver's costs outline; and
- (d) such further and other material as counsel may advise and this Honourable Court may permit.

Date: July 30, 2019
September 9, 2019

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BUSINESS DEVELOPMENT BANK OF CANADA

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)
Proceedings commenced at TORONTO

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