

Court File No. CV-17-11760-00CL  
Court File No. CV-17-0023-00  
Court File No. CV-17-0242-00  
Court File No. CV-17-0022-00

**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 AN APPLICATION PURSUANT TO SUBSECTION 243(1) OF THE  
*BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3, AS AMENDED; AND  
SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43 AS AMENDED**

**FIRST SUPPLEMENT**

**TO THE SECOND REPORT TO THE COURT  
SUBMITTED BY BDO CANADA LIMITED  
IN ITS CAPACITY AS RECEIVER OF ASTORIA ORGANIC MATTERS LTD. and  
ASTORIA ORGANIC MATTERS CANADA LP**

November 3, 2017

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- Appendix D - E-mail from Katy Potter of the MOECC to Al Hamilton dated March 16, 2017 re Air Inspection Report attaching Astoria Air Facility Inspection Report dated December 2, 2016 and Memorandum dated January 24, 2017 from the Ministry of Environment
- Appendix E - E-mails between Patrice Harnois and Al Hamilton dated March 22, 2017 re: Spring start-up

## 1.0 INTRODUCTION AND PURPOSE OF REPORT

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### 1.1 Introduction

- 1.1.1 This report is a supplement to the Receiver's Second Report dated September 27, 2017 (the "Supplement to Second Report").
- 1.1.2 Pursuant to the endorsement of Justice Myers dated August 31, 2017, the Court ordered that a timetable be set to resolve the issues arising in the various construction lien actions against, *inter alia*, Astoria and the Landlord. A date of December 12, 2017 and related timetable was set on September 19, 2017 (the "Timetable") for a motion by the Receiver to seek advice and directions with respect to the timeliness and quantum of the Lien Claims of Tulloch and Van Soelen.
- 1.1.3 The Receiver filed its Second Report to provide the Court with an outline of the Receiver's factual understanding of the timeliness and quantum of the Lien Claims in order to assist the Court in determining the validity of such Lien Claims. Subsequently the following Motion Records and materials were delivered by the Lien Claimants:
- 1) a Responding Motion Record of Ken Tulloch Construction Ltd. including therein Affidavits of Ken Tulloch and Patrice Harnois (the "Tulloch Affidavits");
  - 2) a Responding Motion Record of Van Soelen Landscaping Ltd. including therein the Affidavit of Dustin William Van Soelen (the "Van Soelen Affidavit");
  - 3) an Affidavit of Gregory Arthur Thomas DeMille sworn October 18, 2017 in relation to the issue of quantum of the Fitzgibbon Lien Claim attaching as Exhibit "Q" a letter signed by Mr. Hamilton dated October 18, 2017; and,
  - 4) an email dated October 27, 2017, from Bryan Skolnik of Gardiner Roberts, counsel acting on behalf of Van Soelen, attaching a copy of a letter from Mr. Hamilton dated October 19, 2017 (the "October 19 Letter"), a copy of which is attached hereto as Appendix A.

### 1.2 Purpose of this Report

- 1.2.1 This Supplement to Second Report is being filed to provide the Court with an update on the Receiver's consideration of the Lien Claims and to provide additional information to assist the Court in providing its advice and directions in determining the validity of the Lien Claims.

### 1.3 Scope and Terms of Reference

- 1.3.1 The Supplement to Second Report has been prepared for the use of this Court and Astoria's stakeholders as general information relating to Astoria. Accordingly, the reader is cautioned that the Supplement to Second Report may not be appropriate for any other purpose. The Receiver will not assume responsibility or liability for losses incurred by the reader as a result of the circulation, publication,

reproduction or use of the Second Report different than the provisions of this paragraph.

- 1.3.2 In preparing this Supplement to Second Report, the Receiver has relied upon Astoria's records and available unaudited financial information. While the Receiver has reviewed certain of Astoria's records, such work does not constitute an audit or verification of such information for accuracy, completeness, or compliance with Generally Accepted Accounting Principles or International Financial Reporting Standards. Accordingly, the Receiver expresses no opinion or other form of assurances with respect to such information except as expressly stated herein.
- 1.3.3 Capitalized terms used but not defined in this Supplement to Second Report shall have the meaning ascribed to them in the First Report, the Second Supplement, the Third Supplement, the Second Report or the Appointment Order, as applicable.
- 1.3.4 This Supplement to Second Report, and all court materials and orders issued and filed in these receivership proceedings are available on the Receiver's website at: <http://extranets.bdo.ca/astoriaorganicmatters> and will remain available on the website for a period of six (6) months following the Receiver's discharge.

## 2.0

## CONSTRUCTION LIEN CLAIMANTS

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### 2.1 Tulloch Lien Claim

- 2.1.1 Mr. Ken Tulloch states at paragraph 44 of the Tulloch Affidavits that 'no one has ever explained to me why the Receiver has now taken the position that the amount is not owing'.
- 2.1.2 The Receiver hereby seeks to clarify that it is not the Receiver's position that the amount of the Tulloch Lien Claim is not owing, but rather, the matter for which the Receiver seeks the Court's advice and direction relates to the timeliness of the registration of the Tulloch Lien Claim and the determination of priority of the Ken Tulloch Lien Claim.
- 2.1.3 In response to the Tulloch Affidavits, Mr. Hamilton has provided additional documentation for the Court's consideration in assessing the timeliness of the Tulloch Lien Claim. Attached hereto are the following documents provided by Mr. Hamilton:

**Appendix B** - Astoria Notification of New Waste - Sonoco (September, 2016);

**Appendix C** - emails amongst Al Hamilton, Douglas Kemp-Welch and Camilla Dumbeck dated September 21, 2016 re MOECC visit today;

**Appendix D** - e-mail from Katy Potter of the MOECC to Al Hamilton dated March 16, 2017 re Air Inspection Report attaching Astoria Air Facility Inspection Report dated December 2, 2016 and Memorandum dated January 24, 2017 from the Ministry of Environment;

**Appendix E** - emails between Patrice Harnois and Al Hamilton dated March 22, 2017 re: Spring start-up.

### 2.2 Van Soelen Lien Claim

- 2.2.1 Throughout these proceedings and prior to initiating its motions for advice and directions in relation to the Lien Claims, the Receiver has requested on several occasions that the parties provide their assistance including any information and documentation that is available in respect of the issues identified with respect to the timeliness and quantum of the Lien Claims.
- 2.2.2 Subsequent to the Receiver delivering its motion materials for advice and direction, the Lien Claimants delivered responding motion records and/or other materials as outlined in section 1.1.3 herein.
- 2.2.3 It has also come to the Receiver's attention that counsel for certain of the Lien Claimants may have reached out directly to Mr. Hamilton under unknown circumstances to the Receiver and have obtained the two signed letters from Mr. Hamilton also identified above. In the case of Van Soelen, on October 20, 2017 counsel for Van Soelen served the Van Soelen Affidavit in response to the Receiver's motion for advice and

directions. Subsequently, on October 27, 2017, counsel for Van Soelen circulated the October 19 Letter.

- 2.2.4 While these newly received letters signed by Mr. Hamilton raise some uncertainties as to the information that he had submitted previously under oath, the October 19 Letter did not provide any clarity in respect of specific timelines or details relating to the Van Soelen Lien Claim.
- 2.2.5 Further enquiries were made of Mr. Hamilton and the Receiver summarizes the information received from him as follows. Mr. Hamilton had not noticed that some of the entries in the invoices rendered by Van Soelen after October 4, 2016 included references to limestone (granular). Limestone was required for the preparation of the site for the asphalt paving performed by Fitzgibbon. Fitzgibbon came to the site during the first part of October to ensure it was ready. Fitzgibbon determined that the site was not ready due to issues with Van Soelen's work, including compaction and poor workmanship (not level or up to the required grade). The work performed by Van Soelen after October 4, 2016 involved correcting the issues identified by Fitzgibbon and then topping up the stockpiles of limestone that was required to be left on site for Fitzgibbon's use during paving. These limestone loads were delivered on December 13 and 14, 2016 and Fitzgibbon commenced its paving work on December 14, 2016. The remainder of the work in the last Van Soelen invoice for December relates to cleanup work on the south side of the property that was unrelated to the work done in relation to the composting facility project.
- 2.2.6 Based on the circumstances outlined above, the Receiver is not in a position to alter its conclusion in respect of the timeliness or quantum of the Van Soelen Lien Claim at this time. Cross examinations have been requested to take place on November 17, 2017 to clarify this matter further.


### 2.3 Fitzgibbon Lien Claim

- 2.3.1 As indicated above, Exhibit "Q" to the Affidavit of Gregory Arthur Thomas DeMille sworn October 18, 2017 is a letter signed by Mr. Hamilton dated October 18, 2017 correcting his earlier assessment of the quantum of the amount owing to Fitzgibbon. In this October 18 letter, Mr. Hamilton advises that certain areas were missed by him in his calculations and that upon further review he agrees with Fitzgibbon's invoiced values "with respect to volumes and square metres of product installed." The Receiver has confirmed with Mr. Hamilton the corrections to his earlier assessment of the quantum of Fitzgibbon's lien claim.
- 2.3.2 Mr. Hamilton has indicated, however, that invoices 4424, 4574 and 4853 are not proper amounts to be included in the Fitzgibbon lien. Invoice 4424 was not approved by Astoria and had been inadvertently paid. Fitzgibbon had agreed to return the payment but has not done so to date, accordingly the amount of that invoice is a credit to Astoria. Invoice 4574 relates to a grinding trial when Astoria was at 40 Wilson Avenue in Belleville. This work does not relate to the construction of the composting facility and is therefore not part of the improvement that is the subject of the Fitzgibbon lien. Invoice 4853 relates to a charge for allegedly damaging a level laser. However, Mr. Hamilton has advised that the laser supplied by Fitzgibbon was not functional upon receipt and Astoria is therefore not responsible for these costs.

3.0.1 The Receiver respectfully submits this Supplement to Second Report to provide an update to the Court in respect of the Lien Claims and for the purpose of providing additional information to assist the Court relating to the timeliness and quantum of the Lien Claimants and to seek the Court's advice and directions in determining the validity of the Lien Claims of the Lien Claimants.

All of which is respectfully submitted this 3<sup>rd</sup> day of November, 2017.

**BDO CANADA LIMITED,**  
in its capacity as **COURT-APPOINTED RECEIVER OF**  
**ASTORIA ORGANIC MATTERS LTD. and**  
**ASTORIA ORGANIC MATTERS CANADA LP,**  
and without personal or corporate liability

  
Per: Chris Mazur CIRP LIT  
*Senior Vice President*