Court of Appeal File No. C65512
Court File No. CV-17-11760-00CL

COURT OF APPEAL FOR ONTARIO

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

AND BETWEEN:

SUSGLOBAL ENERGY BELLEVILLE LTD.

Applicant/Moving Party
(Appellant)

and

BDO CANADA LTD., Court Appointed Receiver of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP

Respondent
(Responding Party)

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 Rules 14.05(2), 14.05(3)(d), 14.05(3)(g) and 14.05(3)(h) of the *Rules of Civil Procedure*

MOVING PARTY'S FACTUM

main appeal

November 30, 2018

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MOVING PARTY'S FACTUM

PART I - IDENTITY OF MOVING PARTY, PRIOR COURT & RESULT

1. The Appellant (Appellant), SusGlobal Energy Belleville Ltd. ("SusGlobal" or "Purchaser"), brings the within motion for an Order that the Notice of Appeal served on June 15,

2018 and the Fresh as Amended Notice of Appeal served on June 18, 2018 were properly served and filed pursuant to *s.6 of the Courts of Justice Act ("CJA")* (hereinafter referred to as "Notice of Appeal").

2. In the alternative, if this Court determines that this appeal is pursuant to s.193 (c) of the *Bankruptcy and Insolvency Act* ("BIA"), then the Appellant seeks:

(a) an Order, *nunc pro tunc*, extending the time for serving and filing the Notice of Appeal from 10 day to 29 days.

3. In the further alternative, if this Court determines that this appeal requires leave to appeal pursuant to s.193 (e) of the BIA:

(a) An Order granting the Appellant leave to appeal the Decision of the Honourable Justice McEwen dated May 17, 2018 (hereinafter "Reasons for Decision" or "Decision"); and,

(b) An Order *nunc pro tunc* extending the time for serving and filing.

Factual Context

4. SusGlobal Energy Canada Corp. ("SusGlobal Canada") is a federally incorporated corporation that carries on the business of operating renewable energy facilities throughout the Province of Ontario. SusGlobal Energy Corp ("Corp") (a fully reporting US issuer) is the parent company of SusGlobal Canada.[1]

5. SusGlobal is a provincially incorporated corporation in Ontario and a wholly owned subsidiary of SusGlobal Canada. It carries on the business of operating an organic composting and

[1] Exhibit Book (hereafter "ExB").vol.2, pg 503

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 being processed into compost.)[2]

6. On April 13, 2017 BDO Canada Limited ("BDO or Receiver") was appointed the Receiver by Order of the Honourable Justice Hainey ("Order") of the assets, undertakings and properties of each of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP (collectively the "Debtors") acquired for, or used in relation to the business carried on by the Debtors, including all proceeds thereof (collectively, the "Property").[3]

7. The Order appointing the Receiver was made pursuant to s.101 of the *Courts of Justice Act* and s.243 of the *Bankruptcy Insolvency Act ("BIA")*.[4]

8. Under the terms of the Order, the Receiver was empowered and authorized to market any or all of the Property including a formal sale process to sell the Property. [5]

9. Paragraph 10 (ii)[6] and 16[7] of the Order address the limitation of the environmental liability to the Receiver. However, as the Receiver chose to carry on the Business, the Receiver was required to comply with the regulations under the *Environmental Protection Act*[8] ("EPA") and in particular, the storage limitation of 150 metric tonnes ("MT") of waste in the Tipping Building.[9]

10. In July of 2017, BDO and SusGlobal executed the Asset Purchase Agreement ("APA") and on September 15, 2017 the transaction closed. SusGlobal took possession and paid the Receiver the purchase price of $7,782,752.08 for the Property.

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[2] ExB.vol.2, pg 504
[3] ExB.vol.1, pg 2 para 6, and Exhibit A 'Order' pg 18-34; vol.2, pg 503 and see Motion Record of Appellant, Affidavit of Marc M. Hazout pg 21, para 4; Reasons for Decision para 4
[4] ExB.vol.1, pg 17 see Preamble of Order
[5] Motion Record of Appellant, Affidavit of Marc. M. Hazout para 5
[6] ExB.vol.1, pg 23
[7] ExB.vol.1, pg 25
[8] R.S.O. 1990, c.E.19, *EPA* c. 186(3) and 187(2) (penalty provision).
[9] ExB.vol.1, pg 121-154 (Amended Environmental Compliance Approval); see pg 129 Waste Storage 9 (a) 150 MT

11. After taking possession of the Site, SusGlobal learned that there was far in excess of 150 MT of biosolid waste inside the Tipping Building. As a result, SusGlobal notified the Ministry of the Environment and Climate Change (the "MOECC") of the excessive inventory in the Tipping Building. The MOECC required SusGlobal to implement a management plan to process the excessive inventory in the Tipping Building pursuant to the Amended Environmental Compliance Approval Number 0031-7UTRSS ("ECA").

12. The Receiver's failures to comply with the Order, the EPA, the ECA requirements, and the APA, caused SusGlobal to incur a significant expense to process and remove the excessive biosolid waste in the Tipping Building so that SusGlobal would be in compliance with the EPA/ECA.

13. On October 30, 2017, SusGlobal sent a demand letter setting out the losses incurred as a result of the Receiver's conduct, claiming $655,400.00.[10] The Receiver responded on November 13, 2017 – denying all responsibility, and asserted that the Receiver complied with all EPA/ECA regulations from April 13, 2017 to September 15, 2018 (the "Receivership Period") and relied on the "As is, Where is" clause in the APA.

14. In December of 2017, SusGlobal brought a motion for leave to sue the Receiver for damages for gross negligence or wilful misconduct based on the breaches (as a court officer) of the Order appointing the Receiver and for the Receiver's breaches of the EPA/ECA and APA.[11]

15. The motion for leave to sue the Receiver was heard on February 21, 27 and March 5, 2018 before the Honourable Justice McEwen. The decision was reserved and written reasons were released on May 17, 2018 ("Decision"). His Honour dismissed SusGlobal's motion.

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[10] Amended to $755,400.00 as a result of the payment of $100,000 for an extension of 3 days to close the transaction, when the Receiver, at that time, was in breach of the APA and the Order. SusGlobal did not know this at that time.
[11] Reasons for Decision, para 7; see also para 8 of the Order ExB.vol.1 pg 23 section 8 SusGlobal requires leave to sue the Receiver

16. On May 17, 2018, Marc M. Hazout ("Mr. Hazout"), the President of SusGlobal reviewed the Reasons and intended to appeal the Decision but could not do so until a Board of Directors ("Board") meeting of Corp was held and the Board's approval was obtained. On June 12, 2018 the Board of Corp unanimously provided approval to appeal the Decision by corporate resolution. On June 15, 2018, SusGlobal instructed its counsel to appeal.

17. On June 15, 2018, SusGlobal's counsel served a Notice of Appeal and served its Fresh as Amended Notice of Appeal on June 18, 2018.

PART II - SUMMARY OF FACTS

The Business of Debtors carried on by BDO the Court Appointed Receiver

18. The Debtors previously carried on the business of operating an organic composting and recycling facility at the Site (the "Business").

19. To produce Grade A Compost ("Compost A"), BDO mixed biosolid content, which included the following: (1) biosolids; (2) paper sludge; (3) manure (collectively, the "Biosolid Waste"). The Biosolid Waste was stored in the Tipping Building. The Biosolid Waste was then mixed with other organic waste, which included, but not limited to wood chips and leaf and yard waste ("Leaf/Yard Content") inside the Tipping Building (collectively, the "Compost Mixture").[12]

20. The Compost Mixture would then be moved from the Tipping Building to a separate structure called a windrow ("Windrow"), where the Compost Mixture would be exposed to different temperatures and air concentration treatments, among other treatments, to eventually, after three phases of processing, produce Compost A.[13]

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[12] ExB.vol.2, pg 504 para 13-14; (BDO alleges that food and liquid organics were also part of the Compost Mixture during the Receivership Period. That is in dispute); see Reasons for Decision para 2

[13] ExB.vol.2, pg 505 para 16

21. Each Windrow held a maximum Compost Mixture of 500 MT (wet weight).[14]

22. Pursuant to the ECA, the Receiver was not allowed to store more than 150 MT of waste (not just Biosolid Waste) inside the Tipping Building. Section 9(a) of the ECA states:

> (9) The Owner is approved to store the following amounts of waste at the Site:
> (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;[15] [emphasis added]

23. As part of the Business, the Debtors and then the Receiver, entered into agreements with various commercial and municipal customers to receive and process Biosolid Waste and Leaf/Yard Content. If the percentage of Biosolid Waste in the mixture was 25% or less, then it would comply with the regulations to enable the Receiver to make and sell Compost A.[16]

24. Each customer would deliver Biosolid Waste and would pay an amount of money required for the Receiver to process the material into Compost A.[17]

25. The Receiver received approximately 50 to 80 MT of Biosolid Waste each weekday along with the prepaid processing fee of $50 to $60 per MT of Biosolid Waste. To ensure the inventory of Biosolid Waste and Leaf/Yard Content in the Tipping Building did not exceed 150 MT pursuant to the ECA, the Receiver was required to process the Biosolid Waste and Leaf/Yard Content approximately every three days (applying a conservative estimate of the Receiver receiving 50 MT of Biosolid Waste per day from customers). BDO knew this. It hired Allan Hamilton ("Mr. Hamilton") who was the former President and CEO of Astoria Ltd. when it went into receivership. He worked for BDO during the Receivership Period.[18]

26. The Receiver's profit margin was approximately $10 per MT of Biosolid Waste.[19]

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[14] ExB.vol.2, pg 505 para 17 and See Section 2.1.3(3) of BDO's Fourth Report
[15] ExB.vol.1, pg 4, para 20 and see page 129; Reasons for Decision para 11
[16] ExB.vol.1, pg 4, para 21 (see sample contract/agreement with vendors at ExB.vol.pg 210/212)
[17] ExB.vol.1, pg 4, para 22
[18] ExB.vol.1, pg 5, para 23
[19] ExB.vol.1, pg 5, para 24

27. If the Receiver did not process all of the Biosolid Waste, it would build up in the Tipping Building and be stored there.[20] As such, the Receiver did not incur the full processing fee received.

Paragraph 10 (ii), 16 and 17 of the Order required compliance with ECA/EPA[21]

28. The relevant paragraphs of the Order are:

No Exercise of Rights or Remedies

> 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…(ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment…[22]

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…"[23]

Limitation on the Receiver's Liability

> 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 except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under section s.81.5 (5) or 81.6(3) of the BIA ...[24]
> ***[emphasis added]**

29. As the Receiver chose to carry on the Business, it was obligated to comply with paragraph 10 (ii) of the Order, and the ECA/EPA.[25]

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[20] ExB.vol.1, pg 5, para 23, 25
[21] Reasons for Decision, para 8
[22] ExB.vol.1, pg 23
[23] ExB.vol.1, pg 25
[24] ExB.vol.1, pg 26
[25] Motion Record of Appellant, Affidavit of Marc. M. Hazout para 10; See Order at ExB.Vol.1, pg 23 and pg 25-26

Asset Purchase Agreement ("APA") with BDO and Sept. 15, 2017 – ("Closing Date")

30. In May 2017 SusGlobal initiated discussions with the Receiver for the purchase of some of the Property. An APA for specific assets of the Debtors was discussed (the "Purchased Assets").[26] Subsequently, on July 27, 2017, the Receiver entered into an APA with SusGlobal, for the Purchased Assets.

31. SusGlobal was entitled to rely on the fact that the Receiver, a court officer, would comply with the Order appointing the Receiver including all environmental laws under the ECA and EPA.

32. The APA was subsequently amended on August 1, 2017, August 29, 2017 and September 14, 2017.[27]

33. Between May and September 2017, SusGlobal conducted its due diligence of the Business. It conducted three Site visits where it inspected the Tipping Building twice.[28] There were no visible issues of Site non-compliance on any Site visit. SusGlobal also conducted its own due diligence 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 under ECA and EPA.[29]

SusGlobal Discovers An Excessive Amount of Biosolid Waste in the Tipping Building

34. After closing and taking possession of the Site, SusGlobal learned that the Tipping Building had far in excess of 150 MT of Biosolid Waste inside the Tipping Building.[30] SusGlobal notified the MOECC of the excessive inventory in the Tipping Building.[31]

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[26] ExB.vol.1, pg 5, para 27

[27] SusGlobal attempted to close the APA on the original date of September 12, 2017 but was unable to obtain and arrange the fund transfer to BDO from its lenders resulting in the Third Amendment on the condition that SusGlobal provided Receiver/BDO with additional consideration in the amount of $100,000.00 (the "Penalty Consideration").

[28] The Receiver disputes this and alleges there were more inspections of the Tipping Building.

[29] ExB.vol.1, pg 3, para 12-19; pg 5 para 26-44

[30] ExB.vol.1, pg 8, para 45

[31] ExB.vol.1, pg 299, email G. Hamaliuk to K. Potter, October 5, 2017, 3:20 p.m. and reply K. Potter to G. Hamaliuk, 4:08p.m.

35. This was confirmed by the Ministry (Katy Potter, an MOECC Officer at the Belleville area office):

> "I have also addressed this issue to Michael, **as during my recent visit, it appears quite a bit of unprocessed material was left in the Tipping Building by the time SusGlobal took over**..."[32] **[emphasis added]**

36. Unknown to SusGlobal, prior to July 10, 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 and analyze odour sampling tests on the Site.[33] BDO did not mention this to SusGlobal prior the Closing Date.[34] The final Pinchin Report was not provided to SusGlobal until October 5, 2017.[35] On October 8, 2017, Pinchin forwarded the final Pinchin Report to the MOECC. The Pinchin and Stantec Reports were not included in the data room.[36]

37. The Pinchin Report[37] provided that as of July 12, 2017, there was 1,312 MT of waste in the Tipping Building, contrary to the ECA requirement.[38]

38. By email dated October 5, 2017, Katy Potter stated (after reviewing the Pinchin Report):

> "One thing that I did note in my review of the report that may have further contributed to the high OU is that <u>there appears to have been ~9 times the allowable limit of waste being held in the Tipping Building</u> at the time of the source testing. ECA 0031-7UTRSS allows for 150 tonnes of material to be stored in the Tipping Building at any one time, but in the summary table shown on page 13of the report, <u>I see that there was ~1312.5 metric tonnes being held in the building.</u> There is a strong possibility that this contributed to odours during the source testing as well, and needs to be addressed for all future operations and source testing.
> I have also addressed this issue to Michael, as during my recent visit, it appears quite a bit of unprocessed material was left in the Tipping Building by the time SusGlobal took over,

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[32] ExB.vol.1, email, October 5, 2017, 1:29pm, K. Potter to G. Hamaliuk at page 303.
[33] This was to provide a compliance sample report for an annual order sampling program at the Site to ensure compliance with Environmental Compliance Approval Number 0565-9WXGBY.
[34] ExB.vol.1, pg 9-11, para 50-58
[35] ExB.vol.1, pg 12, para 66
[36] ExB.vo2, 490 see email on September 20, 2017 at 8:02 pm from Mr. Hamaliuk to Angelo Consoli "Since this information was not in the Data Room and SusGlobal was not informed that the study was in progress, our position is that we cannot be involved in any aspect of the study other than being in the room when it is presented to the MOECC"
[37] ExB.vol.1, pg 265 – see Table 3.3.3-Pile Age and Volume Summary *"Tipping Building – 1312.5 MT" (The sampling program was conducted between July 10 and July 12, 2017)*
[38] The Pinchin Report raised concerns as a result of the high level of odour which was measured in the Tipping Building on July 10-12, 2017.

> so a management plan to get that material either offsite or to the composting process and back down to allowable levels is required." [39]

39. As a result, MOECC required SusGlobal to implement a management plan to process the excess inventory in the Tipping Building and to bring the Site back to ECA compliance.[40]

40. On October 19, 2017, Gerald Hamaliuk ("Mr. Hamaliuk") sent a letter to the MOECC setting out a plan to remove the excess waste from the Tipping Building.[41]

41. The MOECC agreed and SusGlobal carried out this management plan from October 19, 2017 to November 15, 2017. In doing so it was required to:

(a) turn away lucrative composting contracts from various customers in order to first process the excessive Biosolid Waste in the Tipping Building;[42] and,

(b) convert its operations from Compost A facility to Class B Compost facility. Class B Compost could not be sold to the general public and SusGlobal was not able to generate any revenue from its compost during this period of time.[43]

42. As a result, SusGlobal suffered a loss. It incurred significant expenses to clean up the excessive BioSolid Waste in the Tipping Building in order to be in compliance with the EPA/ECA, lost sales during that time and was unable to manufacture Compost A.[44]

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[39] ExB.vol.1, pg 302-303 see email from Katy P. to Mr. Hamaliuk at 1:29 pm. The Judge did not refer to this email. ExB.vol.1, email, October 5, 2017, 1:29pm, K. Potter to G. Hamaliuk at page 303. The Stantec Report also raised concerns regarding the odour emissions into the biofilter from the Tipping Building which were significantly higher than anticipated and recommended that the discrepancy warranted an investigation. ExB.vol.1, pg 289 (July 19, 2017)

[40] ExB.vol.1, pg 12, para 69-70; see email exchange at pg 299-303. The Judge did not refer to this email.

[41] ExB.vol.1, pg 313-315 see email and letter setting out the plan for SusGlobal. The Judge did not refer to this email.

[42] ExB, vol.2 pg 492 see email on November 4, 2017 at 11:21 pm from Mr. Hamaliuk to Angelo C "When we took over Sept.15, the inventory was even more as the tipping area was completely full and we had to turn away loads". The period of time is from October 5, 2017 to November 15, 2017.

[43] ExB.vol.1 pg 12/13, para 72-74, 76-81, pg 314-315 letter from Mr. Hamaliuk to Katy P outlining his proposal to change operations from Compost A to Class B Compost

[44] ExB.vol.1, pg 13, para 73, Motion Record of the Appellant, Affidavit of Marc. M. Hazout para 18. There was no room to put Biosolid Waste in the Tipping Building.

SusGlobal's Demand Letter for Damages and Receiver/BDO Response

43. On October 30, 2017, SusGlobal wrote to the Receiver seeking reimbursement for damages it suffered in the amount of $655,400 ($580,000 plus HST) as a result of processing approximately 1,500 MT of Biosolid Waste in the Tipping Building, loss of business, loss of compost sales and costs incurred to process and deliver the Class B Compost.[45]

44. By letter dated November 13, 2017, BDO responded to SusGlobal denying any responsibility. In this letter, BDO made reference to an *'inadvertent mathematical error'* made by Mr. Hamilton when he allegedly provided incorrect data in July, 2017 that was relied upon in the Pinchin Report. BDO and Mr. Hamilton provided no explanation for any of the calculations of the alleged *'mathematical errors'*[46] and BDO relied on the s.3.03 - 'As is, Where is' clause in the APA.

45. It was not until November 15, 2017 that SusGlobal achieved ECA compliance: at that point it had processed enough Biosolid Waste to reduce the inventory in the Tipping Building to an acceptable limit pursuant to the ECA.[47]

Motion for Leave to Sue Receiver and the Material Evidence

46. In December of 2017, SusGlobal brought the Motion for leave to sue the Receiver.[48] SusGlobal claimed that BDO's conduct throughout the Receivership Period amounted to gross negligence, or in the alternative, wilful misconduct.

The Basis of the Claim against the Receiver

47. SusGlobal raised a *prima facie* case that during the Receivership Period, the Receiver continually stored in excess of 150 MT of Biosolid Waste in the Tipping Building. By September

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[45] ExB.vol.1, pg 13, para 75-82; see letter at pg 310-311
[46] ExB.vol.1, pg, 15, para 83-84; see letter at pg 36-38
[47] ExB.vol.1, pg 13, para 73, Affidavit of G. Hamaliuk, November 29, 2017
[48] Pursuant to s.17 of the Order SusGlobal required leave to bring a claim against the Receiver.

15, 2017 the amount of Biosolid Waste was at least over twice the permitted amount and likely approximately 9-10 times the Biosolid Waste permitted under the ECA/EPA regulations.[49]

48. The issue on appeal is whether the Judge erred in law in ignoring the evidence that demonstrated a *prima facie* case and treating the Motion as a motion for summary judgment.

49. It is submitted the Judge was not entitled to make findings of credibility, as a result of 'the changed evidence' of Mr. Hamilton from July 12, 2017 and the Judge was not entitled to make findings of fact based on the "estimates" of Mr. Hamilton that are inconsistent with the actual measured weights and agreed to percentages, as set out herein.[50]

50. The calculation of the amount of the Biosolid Waste that was left stored in the Tipping Building is a logical mathematical exercise. The amount stored in the Tipping Building over the Receivership Period is equal to the amount of Biosolid Waste delivered (a known number) less the amount used (the maximum that can be used is known), during the same period, to process Compost A. This amount of Biosolid Waste increased in the Tipping Building continually over the Receivership Period.

51. The MOECC provided the correct method to make this calculation on November 8, 2017, when Katy Potter of the MOECC wrote that the 'only unequivocal' method to calculate how much waste was in the Tipping Building at any given time is as follows:

> "However, I would note that the only unequivocal way of confirming how much waste is stored in the Tipping Building at any given time, is by reviewing how much waste was received through the weigh scale tickets/records, and comparing this to the waste processing activities on-site for the same day (ie. formation of windrows). You could then calculate the remaining balance of the waste in the Tipping Building".[51]

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[49] ExB.vol, pg 299 – see email on October 5, 2018 at 3:20 pm where Mr. Hamaliuk's suggests to the MOECC that there were approx. 9x times the permitted material in the Tipping Building.

[50] See changed evidence of Mr. Hamilton at ExB.vol.1, pg 37, ExB.vol.2, pg 340 section 3.1.6, ExB.vol.3, pg 675 section 2.0.2 and 2.0.4, pg 766 Schedule C to Factum, ExB.vol.3, pg 792 and the pictures at ExB.2, pg 464-482

[51] ExB.vol.2, pg 499 see email from Katy P to Angelo C at 4:35 pm; See Reasons for Decision para 48, 52 although the Judge agreed this was a useful way to determine the amount of Biosolid Waste at the Site – he ignored the calculations conducted by Mr. Hamaliuk

52. The same exercise can be used for the Receivership Period by calculating the total amount of Biosolid Waste delivered during the Receivership Period, and subtracting from that number the total maximum amount of Biosolid Waste that could have been used, during the Receivership Period.

53. The evidence on the motion confirms that the following facts are not in dispute:

(a) All materials that came on Site whether Biosolid Waste or Leaf/Yard Content were weighed, and recorded (weigh scale tickets were produced);[52]
(b) All Biosolid Waste that was received on Site and put into the Tipping Building was never dried out: all Biosolid Waste was wet; [53]
(c) The leaf and yard waste used to create the Compost Mixture in the Tipping Building is also wet when received and there is no step in the process to dry out the Leaf/Yard Content;[54]
(d) Water is added to the Compost Mixture in the Tipping Building to bring the water-moisture content of the Compost Mixture up to 60 percent.[55] Dry weight is never used on Site when processing; [56]
(e) The total amount of Biosolid Waste received during the Receivership Period was in excess of 4952[57] MT (wet weight);
(f) That each Windrow contained a maximum of 500 MT of Biosolid Waste and Leaf/Yard Content (the Compost Mixture) and that during the receivership 23 Windrows were constructed; therefore the maximum amount of Compost Mixture that could have been created over the 23 weeks was 23x500 MT = 11,500 MT of Compost Mixture (wet weight);[58]
(g) The mixture that makes Compost A is 60% water (ie. the water content is 60% of the Compost A mixture so that the dry weight is 40%);[59]

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[52] ExB.vol.1, pg 214 see example of a weight scale ticket; Reasons for Decision, para 47
[53] ExB.vol.3, pg 770 para 7-8
[54] ExB.vol.3, pg 770 para 7-8
[55] ExB.vol.2, pg 329-330, Section 2.1.3
[56] ExB.vol.3, pg 770 para 7-8; Reasons for Decision, para 57
[57] ExB.vol.2, pg 624 -629 (Exhibit 8) and BDO claimed it was 5206[57] MT (wet weight). Reasons for Decision, para 47 (G. Hamaliuk Affidavit, para 25)
[58] ExB.vol.2, pg 330, section 2.1.3(3); Reasons for Decision para 49-50
[59] ExB.vol.2, pg 330 – *"The blending process consisted of spraying water on the mixture to obtain a 60% moisture level."*

(h) The maximum amount of Biosolid Waste permitted in the Compost Mixture by regulation, by dry weight, is 25%[60] of the Compost Mixture and the other 75% (or more) is Leaf/Yard Content;[61] and,

(i) The water content of the Biosolid Waste is 75%.[62]

54. BDO in its Fourth Report dated December 8, 2018 confirmed the same information as set out above. With this information, the least amount of Biosolid Waste that built up and was stored in the Tipping Building can be calculated for the Receivership Period.

Supplementary Affidavit of Mr. Hamaliuk

55. On December 17, 2017, in response to BDO's Fourth Report, Mr. Hamaliuk, the engineer employed by Susglobal, with 46 years of experience in the industry, swore a supplementary affidavit wherein he performed a number of calculations. He was not cross-examined. He provided calculations based on the maximum of 500 MT of Compost Mixture per Windrow. Based on his calculations he arrived at the following conclusions:

(a) He reviewed the Material Reports and calculated that during the Receivership Period BDO received a total of approximately 4,952 MT of Biosolid Waste (wet weight). This is the first part of the equation.

(b) To calculate the maximum possible amount of Biosolid Waste used during the Receivership Period the following calculation must be done to determine the amount of Biosolid Waste by (wet weight) used during the Receivership Period to make Compost A.

(c) Based on the percentage of water/moisture in that Compost Mixture being 60%[63] the dry weight of the maximum amount of the Compost Mixture that could have been used in the manufacturing of Compost A during the 23 week Receivership Period is 40% of 11,500[64] MT = 4,600 MT.

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[60] There was no evidence of the actual % amount of Biosolid Waste used in the Compost Mixture for each Windrow during the Receivership Period. However, using the maximum allowed in the calculation, which gives the Receiver the benefit of the uncertainty, the Receiver was in breach of the ECA/EPA and Order. See Ontario Compost Quality Standards section 3.3 pg 523 "In the case of Compost A 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).

[61] ExB.vol.2, pg 329, Section 2.1.3; Reasons for Decision, para 55

[62] So that if there is 100 MT by wet weight of Biosolid Waste, then 75% of that is water and therefore the dry weight of that Biosolid Waste is 25 MT.

[63] ExB.vol.2, pg 329-330 section 2.1.3

[64] 500 MT x 23 Windrows (during receivership period) = 11,500 MT

(d) This 4,600 MT Compost Mixture by dry weight would have been composed of Biosolid Waste and Leaf/Yard Content. If it is assumed that the maximum amount of Biosolid Waste that could be used by dry weight for the Compost Mixture to create Compost A is 25% then, if the Compost Mixture is 4,600 MT by dry weight (4,600 x 0.25%) = 1,150 MT would be the dry weight of the maximum amount of Biosolid Waste that could have been used during the 23 week period.[65]

Conversion of Wet Weight to Dry Weight

56. As the Biosolid Waste (wet weight) is composed of 75% moisture and 25% dry weight then the maximum possible wet weight of the 1,150 MT of Biosolid Waste would be 4,600 MT.

57. Based on SusGlobal's total Biosolid Waste delivered of 4,952 MT wet weight minus the maximum 4600 MT that could be used, the minimum amount of Biosolid Waste that would have not been used would be 254 MT (wet weight) and would have been stored in the Tipping Building. This is almost double the amount allowed (assuming the maximum amount was used in every Windrow).[66]

58. If the amount of Biosolid Waste in the Compost Mixture, on average, is less than 25% and if the total amount of the Compost Mixture, on average, in a Windrow is less than 500 MT, then the amount of Biosolid Waste that would have built up and therefore been stored in the Tipping Building over the Receivership Period, would have been much more.

59. Any other estimates, references to equipment, references to pictures and changes in the "evidence" of Mr. Hamilton and his hypothetical calculations, are all irrelevant as they are all unreliable. It is clearly difficult to estimate the amount in the Tipping Building based on just observation or estimates. However, the math, based on the actual weight figures and known

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[65] However, the maximum of 25% may not have been used. If one uses a percentage of 20% of Biosolid Waste to create the Compost Mixture, then the calculation would be as follows: the dry weight is 4,600 MT, 20% of that is 920 MT by dry weight. If 920 MT of dry weight of Biosolid Waste is used, then the wet weight would be 3,680 MT. As a result, the wet weight amount of Biosolid Waste that would have been continually built up in the Tipping Building would have been (4952-3680) or 1,272 MT by wet weight, which would be almost 9x the permissible limit under the ECA/EPA.

[66] ExB.vol.3, pg 832 see Chart 2

percentages, demonstrates that there was a considerable amount of Biosolid Waste stored in the Tipping Building over the Receivership Period. The Pinchin Report is correct, if Mr. Hamilton's data on July 12, 2017 was correct, with regard to the Tipping Building, and 1312 MT of waste was in the Tipping Building as of July 12, 2017. It is likely that based on the fact that excess Biosolid Waste was delivered over the amount used every week, that there was far in excess of two times the allowable amount and probably closer to 10 times the amount or more of Biosolid Waste that built up and was stored in the Tipping Building during the Receivership Period.

60. Furthermore, the Pinchin Report was clear with regard to the Tipping Building and there was no error related to the measurement of odour in the Tipping Building. It stated:

> *"Odour emissions from the tipping building to the biofilter inlet were considerably higher than expected. SusGlobal has stated that they will initiate a procedure to place a wood chip lawyer on top of the biosolids in the tipping building at the end of each day to reduce the exposure of the biosolids to the ambient air."*[67]

61. On the next page of the report (page (iii))[68] in the Report the Table: Odour Emissions Data Summary indicates 1,414 OU in the Tipping Building. The same information is found in the conclusion of the Report titled: 'Discussion of Results' (pg 16 of 23).[69] Stantec was of the same opinion[70]. This is in contrast to the uncovered Windrow odour measurements.

BDO's Estimations are not evidence and Mr. Hamilton cannot be relied upon

62. BDO's estimation of the amount of Biosolid Waste in the Tipping Building (being Mr. Hamilton's calculations) were all initially based on 'wet weight'. The initial evidence was also consistent with the weigh scale records and the Pinchin Report which indicated 1,312 MT wet

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[67] ExB.vol.1, pg 249
[68] ExB.vol.1, pg 250
[69] ExB.vol.1, pg 268; However, the Judge ignored this fact in the Reasons for Decision at para 37 by not placing any weight on the Pinchin Report.
[70] See footnote 59.

weight of waste in the Tipping Building in mid-July, 2017 being 9x the allowed amount of waste permitted in the Tipping Building.

63. In the Fourth Report, in order to make his estimates work, Mr. Hamilton gave 'evidence' that a half Windrow was produced on September 15, 2017 (attaching Appendix I[71] – being his final estimates for September 15, 2017 inventory analysis). That was clearly wrong. The information available from the Batch Details Report[72] shows that no Windrow was started on September 15, 2017. Again, Mr. Hamilton's "evidence" was unreliable.

64. On January 19, 2018, BDO served a Supplement to the Fourth Report and for the first time BDO raised and distinguished mixing on a "dry weight vs. wet weight basis".[73] BDO attempted to demonstrate what the conversion from 'wet weight to dry weight' should be on the Motion, by inserting a formula and calculating a hypothetical, attached as Schedule C to its Factum on the Motion, which was not evidence.[74] However, this was based on a new methodology of 'dry weight' based on figures that did not exist. In fact, the formula and calculation were not based on what actually occurred at the Site during the 23 week period nor on information in the Material Reports available to BDO and Mr. Hamilton.

65. All calculations and measurements prior to this Report were on a wet weight basis. The issue of dry weight or conversion was initially never raised by BDO.

66. SusGlobal responded to the issue of wet weight vs dry weight based on the amounts delivered set out in the Material Reports which were all based on wet weight.[75]

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[71] ExB.vol.2, pg 472-482
[72] ExB.vol.3, pg 737-741
[73] ExB.vol.3, pg 675 see section 2.0.2 and 2.0.4
[74] ExB.vol.3, pg 766
[75] ExB.vol.3 pg 769-770 para 7-8

67. SusGlobal argued on the Motion the material change in the evidence of Mr. Hamilton. There was no back up to this change and his "corrections", nor for the 'wet to dry weight' calculation conversions. They were all misleading, confusing and an attempt to discredit the Pinchin Report's findings related to the Tipping Building.[76] In any event these errors by Mr. Hamilton only raised issues (which were not genuine issues without any evidentiary basis for these alleged errors). It was an error for the Judge to make findings of fact as if Mr. Hamilton's new evidence was the correct evidence when it was contrary to the known weight figures and the maximum possible amount of Biosolid Waste that could have been used over the Receivership Period.

SusGlobal's Intention to Appeal the Decision

68. On or about May 17, 2018, Marc M. Hazout ("Marc") the Director, Chairman and President of Corp. (which is a fully reporting U.S issuer) and the President of SusGlobal (a wholly owned subsidiary of Corp.) received a copy of the Reasons for Decision.[77]

69. Having reviewed the Reasons for the Decision, Marc intended to appeal the Decision but could not make that determination alone without first holding a Board meeting of Corp. and obtaining the appropriate and necessary approval.

70. Corp. was then governed and managed by six Directors. The Directors are also situated in separate geographical locations across Ontario.[78]

71. On June 5, 2018, Marc emailed the Decision to the Board. In that email he advised the Board that in order to proceed with an appeal of the Decision, the Board's approval would be

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[76] See changed evidence of Mr. Hamilton at ExB.vol.1, pg 37, ExB.vol.2, pg 340 section 3.1.6, ExB.vol.3, pg 675 section 2.0.2 and 2.0.4, pg 766 Schedule C to Factum, ExB.vol.3, pg 792 and the pictures at ExB.2, pg 464-482. Also the Receiver referred to a chart that Mr. Hamilton prepared for Pinchin and provided to the Receiver, but never produced (see ExB. Vol 2 p 452 first full paragraph.

[77] Ibid, para 1, 26

[78] Motion Record of Appellants, Affidavit of Marc M. Hazout, para 28-29

required. This was necessary, as prior to SusGlobal exercising its right to appeal the Decision Corp. was required to hold a Board meeting and obtain the required approval.[79]

72. On June 8, 2018 the Board held a conference call to discuss the merits of proceeding with an appeal of the Decision.[80]

73. On June 11, 2018, Marc emailed the Board, a draft copy of the proposed resolution in the form of a Unanimous Written Consent ("UWC") (of the Directors in lieu of a meeting of the Board of Corp.) to approve the appeal of the Decision. In that same email he advised that the resolution must be signed unanimously by all directors as it was in lieu of a regular board. This was done given the urgency of the matter. The Board approval could not be obtained until all six (6) members had responded and approved the resolution.[81]

74. On June 12, 2018, the Board of Corp. unanimously provided approval to appeal the Decision by corporate resolution.[82]

75. On June 15, 2018, SusGlobal notified its counsel of the Board of Corp.'s decision and gave instructions to initiate the appeal process.[83]

76. SusGlobal's counsel served the Notice of Appeal on June 15, 2018 and a Fresh as Amended Notice of Appeal on June 18, 2018.[84]

PART III - LIST OF ISSUES

Issue 1: Whether Leave to Appeal and/or Extension of Time to serve the Notice of Appeal is required?
Issue 2 (a): In the alternative, if the Appeal is governed by s.193(c) of the BIA, SusGlobal seeks an order for extension of time to serve the Notice of Appeal from 10 days to 29 days.

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[79] Ibid, para 30
[80] Ibid, para 31-32
[81] Ibid, para 33-34
[82] Ibid, para 35
[83] Ibid, para 36
[84] Ibid, para 37

(b): In the further alternative, if the Appeal is governed by s.193(e) of the BIA, SusGlobal seeks an order granting leave to appeal and an extension of time to serve and file the Notice of Appeal from 10 days to 29 days.

PART IV - LAW & AUTHORITIES RELATING TO ISSUES

Issue 1: Whether SusGlobal is correct that no leave to appeal and/or extension, is required

77. The Order appointing the Receiver was pursuant to section 243 of the BIA and section 101 of the CJA.[85]Accordingly, SusGlobal takes the position that the procedure and time limits related to civil orders apply and the appeal time period is 30 days pursuant to s.6 of the CJA. The fact that the Order was also made under s.243 of the BIA does not prevent or trump the jurisdiction under the CJA applying to this appeal.

78. SusGlobal relies upon section 6 (1) (b) of the CJA as the Decision of the Judge is final and leave to appeal is not required. Furthermore, the Notice of Appeal was served on June 15, 2018, within the applicable 30 day appeal period under the CJA (i.e. 29 days).

79. SusGlobal also states that Section 215 of the BIA does not apply to receivers appointed pursuant to section 243 of the BIA and section 101 of the CJA, nor to a receiver's report made pursuant to an order of the Court, or to a receiver appointed pursuant to section 243 of the BIA and section 101 of CJA.[86]

80. In fact, Section 215 of BIA has no application to a court appointed receiver. This section applies to interim receivers under section 46, 47 and 47.1 of the BIA (and other bankruptcy representatives such as trustees in bankruptcy).[87]

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[85] Motion Record of Appellant, Affidavit of Marc. M. Hazout para 6
[86] Bennett, Frank. "*Bennett on Receiverships*". 2011. 3rd Ed., Carswell pg 904-905
[87] Ibid, pg. 904-911

Issue 2 (a): Alternative Position s.193 (c) of BIA

81. In the alternative, if this Court determines that this appeal is governed by s.193 of the BIA then SusGlobal seeks an order for the extension of time to serve the Notice of Appeal from 10 days to 29 days.

82. Section 193 (c) of the BIA provides for an automatic right of appeal from an order or decision of a judge under the BIA when:

> "s.193: Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:...
> c) if the property involved in the appeal exceeds in value ten thousand dollars;"

83. Under s.193(c) of the BIA the monetary value/loss threshold is $10,000.00.

84. The motion for leave to sue the Receiver before the Judge was for damages for a loss suffered by a stranger to the receivership, being a purchaser of assets, in the amount of $755,400.00 as amended (inclusive of HST). This was sustained by SusGlobal, as a result of the willful conduct or recklessness or gross negligence conduct, or breach of contract, of the Receiver during the Receivership Period. Given that this amount far exceeds the $10,000.00 required under s.193(c) of the BIA no leave to appeal was required.

> ***2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.* 2016 ONCA 225 para 44-49, 51-53, 59, 61**
> ***Crate Marine Sales Ltd.*, Re, 2016 ONCA 140 para 8-10**
> ***Trimor Mortgage Investment Corp. v. Fox* (2015) ABCA 44 para 8-10**

85. The Purchaser, not being a creditor or a debtor in the receivership, is entitled to a right of appeal when the court officer sold assets, in circumstances where the court officer did not comply with environmental legislation that directly affected the assets and where this was a breach of the Order appointing the court officer.

86. If s. 193 applies, SusGlobal requires an order extending the time to serve the Notice of Appeal. The factors used to determine if the court's discretion should be exercised to extend the

time for filing a notice of appeal was recently set out in *Menizes Lawyers Professional Corp. v. Morton* Justice. In that case, Lauwers, J summarized the factors as follows:

a) Is there a *bona fide* intention to appeal;
b) Is there a reasonable explanation for the delay in filing;
c) Is there any prejudice to the responding parties caused by the delay; and
d) what are the merits of the proposed appeal?

***Menizes Lawyers Professional Corp. v. Morton* 2015 CarswellOnt 12515 para 6**

87. The jurisprudence has also established a fifth factor being *'is it in the interests of justice that an extension of time be granted'*.

***Braich, Re (2007), 2007 CarswellBC 3185* (B.C. C.A) para 10-15;**
***Flair Construction Ltd., (Trustee of) v. Bank of Montreal*, 1981 CarswellBC 2349 para 3, 7-9**

88. SusGlobal had a *bona fide* intention to appeal the Decision within the 10 day appeal period.

89. Marc M. Hazout the President of SusGlobal intended, to appeal the Decision within 10 days of receiving the Reasons for Decision, but could not do so until receiving the required approval of the Board of Corp.

90. The Board approval could not be obtained until all six (6) members consented to the proposed resolution.

91. On June 12, 2018 the Board of Corp. unanimously signed a resolution approving the appeal.

92. Once SusGlobal received the approval from the Board, it promptly had the Notice of Appeal served on June 15, 2018.

93. There is no prejudice to the Receiver in granting the extension of time to serve the Notice of Appeal, as the major creditor has been paid subject to any return of funds if SusGlobal is successful in its claim.

94. The appeal is meritorious, as set out below. It is in the interests of justice that an extension of time be granted.

SusGlobal has a *Prima Facie* case against Receiver/BDO

95. The evidence filed in support of the Motion against the Receiver clearly disclosed a cause of action against the Receiver for damages for gross negligence, or in the alternative, wilful misconduct, including breach of the Order and the APA.

96. The Supreme Court of Canada ("SCC") in *GMAC Commercial Credit Corp – Canada v TCT Logistics Inc.* ("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..."[88] [emphasis added]
> ***GMAC Commercial Credit Corp – Canada v TCT Logistics Inc [2006] 2 SCR para 57***

97. SusGlobal's claim against the Receiver is not frivolous or vexatious.

98. The evidence on the Motion clearly indicated that the Receiver had knowledge or was wilfully blind that the Site was operating illegally and in contravention of the ECA/EPA. In fact, the Receiver continued to operate the Site illegally during the Receivership Period in breach of paragraph 10 (ii) of the Order. Given the least amount of Biosolid Waste stored in the Tipping Building by September 15, 2017, i.e. at least about two times the permitted amount, and that there is no evidence that the maximum amount of Compost Mixture of 500MT was always used, nor is there any evidence that the Compost Mixture always included the maximum of 25% Biosolid Waste and, in light of the independent reading by Pinchin of the odour levels,[89] the MOECC's observations and direction for the unequivocal calculation of the amount stored in the Tipping Building, and the clean-up of the excess Biosolid Waste over a 40 day period, it is submitted that

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[88] GMAC, supra note 75 at para 55, 57, citing Manici (Trustee of) v Falconi, [1993] OJ No 146 at pg 2 (Ont CA)
[89] See the Pinchin Report pg 249 and the Stantec Report pg 289

the evidence discloses a *prima facie* case of a cause of action against the Receiver for gross negligence, or in the alternative, wilful misconduct, and breach of the APA in conjunction with the breach of the Order and environmental legislation.

99. The Ontario Court of Appeal in *Canadian National Railway Co. v Holmes* ("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.*"

Canadian National Railway Co. v Holmes [2016] OJ No 946 (Ont CA)

100. BDO's conduct was a very marked departure from the standard by which a responsible and competent receiver in the similar circumstances of being in charge of the Debtor's Property would have acted or conducted itself.

101. SusGlobal did not anticipate that the Receiver would engage in such conduct, as it is not characteristic behaviour of a court-appointed Receiver to act in breach of an Order and legislation. The Receiver knew it was required to comply with the EPA/ECA and Order. It did not. It resulted in damages being suffered by the Purchaser, SusGlobal. The Receiver's conduct warrants disapproval, as anything less would be a licence for receivers to disregard court orders and environmental legislation, in the future.

BDO relies on 'As Is, Where Is' – clause to absolve all liability

102. The Receiver as discussed above relies on the "As is, Where is" clause:

> **303 "As Is, Where Is"** (1) The Purchaser acknowledges and agrees that it is purchasing the Purchased Assets on an "as is, where" 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. [90]

[90] ExB.vol.1, pg 57, see section 3.03

103. The reliance by the Receiver on the "As is, Where is" clause in the APA to negate any liability is also another issue of general importance to the practice. The interpretation taken by the Receiver that the 'As is, Where is' clause absolves all liability is simply untenable on the facts and in law. It cannot be that a court officer can breach the Order (appointing that officer), as well as the EPA and ECA, and when those breaches directly affect the value of the assets purchased under that Order, take the position that "As is Where is" means the purchaser has to take financial responsibility for the receiver's contemptuous conduct and disregard of environmental legislation. This would also be contrary to the legislative intent under the EPA/ECA. At the very least this raises a *prima facie* case. (see paragraph 10(ii) and 16 of the Order, *supra*).

104. The Receiver was not required to occupy or take control; 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 Order.

105. The 'As is, Where is' clause, must refer to the business being operated in compliance with the EPA requirements related to the Property and s.10 (ii) 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 Order[91].

106. 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 Receiver's breaches of the EPA/ECA and the Order. In addition, that would be inconsistent with the duties of an officer of the Court, including paragraph 10(ii) of the Order.

107. The Receiver's failure to comply with the EPA caused SusGlobal to incur significant expenses to clean up the excess Biosolid Waste in the Tipping Building, in order to be in

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[91] The Receiver represented to the Court that it was operating in compliance with the conditions of the ECA. ExB. Vol 2 p325 Fourth Report par 1.2.2 and p345 par 3.4.3 and p453 (BDO Letter of November 13, 2017)

compliance with the EPA/ECA and Order. This took a considerable amount of time and in doing so SusGlobal incurred loss and damages.

Issue 2 (b) – In the Further Alternative Position section 193 (e) of BIA

108. In the further alternative, if this Court determines that this appeal is governed by s.193 (e) of the BIA then SusGlobal seeks an order for leave to appeal and an extension of time to serve and file the Notice of Appeal from 10 days to 29 days. Section 193(e) provides that leave can be granted by a single judge of the Court of Appeal.

109. The factors for leave to appeal under s.193(e) as set out in the jurisprudence are:

a) Whether the point of appeal is of significance to the practice;
b) Whether the point raised is of significance to the action itself;
c) Whether the appeal is *prima facie* meritorious or, on the other hand whether it is frivolous; and
d) Whether the appeal will unduly hinder the progress of the action?

***Power consolidated (China) Pulp Inc. v. British Columbia Resources Investment* 1988, 19 C.P.C. (3d) para 3**
***Med Finance Co.S.A v. Bank of Montreal* (1993), 22 C.B.R (3d) 279 para 13-14**
***Farm Credit Canada v. Gidda* 2015 CarswellBC 1414 para 8-12**

110. SusGlobal states that the issues raised on this appeal are of general importance to the practice and significant to the obligations and duties of court appointed receivers in complying with provincial environmental laws and court orders.

111. The interpretation of the "As Is, Where Is" clause relied on by the Receiver is untenable on the facts and in law. It cannot be the intent of the legislation that an 'As is, Where is' clause provides a blanket immunity to court appointed Receivers who have breached provisions of the Order and failed to comply with environmental legislation under the EPA/ECA. This is an issue of significance to the practice under receiverships.

112. In addition, this appeal raises the jurisdictional question as to what appeal period is applicable when Orders by the Court are made jointly under both the CJA and BIA. There is no

- not relevant to the appeal itself

authority directly on point dealing with which appeal period is applicable when Orders are made under both the CJA and BIA. In fact, Bennett in his text states that there is a 'procedural gap':

> "In Ontario, there is a **procedural gap** in the appeal period from an order made under section 101 of the Courts of Justice Act and sections 47 and 243 of the BIA. Under the former, the appeal period is 30 days [Rule 61.04 of the Rules of Civil Procedure] from the date of the order, while under the latter, it is 10 days [Rule 31(1) of the Bankruptcy Rules]." [emphasis added]
> **Bennett, Frank. *Bennett on Bankruptcy*. 2018. 20th Ed, Carswell pg 741 footnote 26**

113. The material evidence submitted by SusGlobal on the motion for leave to sue the Receiver satisfied the evidentiary requirement of a *prima facie* case for granting leave to sue the Receiver. The material uncontested evidence raised genuine issues of fact and law. The points raised on this appeal are at the core of SusGlobal's claim against the Receiver. The issues on appeal are of significance to bankruptcy and commercial practice respecting receivers.

114. The Decision is final and the Receiver's failure to comply with the Order, the EPA, the ECA and the APA, caused SusGlobal significant loss.

115. If leave to appeal is not granted it will prejudice the rights of SusGlobal. SusGlobal was entitled to rely on the fact that a court appointed receiver was required to comply with the Order, paragraph 10 (ii), and was required to comply with the applicable environmental legislation including the ECA/EPA once the receiver decided to operate the business.

116. The appeal is *prima facie* meritorious as set out under Issue 2 (a). In granting leave to appeal, this court does not need to express a view as to whether the appeal would succeed; it is sufficient simply to observe that there are arguable grounds of appeal and that the issues raised are significant to the bankruptcy practice and ought to be considered and addressed.

> ***Fiber Connections Inc. v. SVCM Capital Ltd.* (2005) CarswellOnt 1834 para 15-19**

117. The reasons for an order to grant the extension of time to serve and file the Notice of Appeal are set out in above in the Section Issue 2(a).

118. There is no prejudice to the Receiver or the Estate as payment of the funds has been made to BDC, the major secured creditor, which payment was made pursuant to a Consent Order, and is subject to any repayment, if the claim of SusGlobal were to be successful.

ORDER REQUESTED

119. The Appellant, Moving Party, SusGlobal seeks:

120. An Order, that the Notice of Appeal served on June 18, 2018 was properly served and filed pursuant to *s.6 of the Courts of Justice Act ("CJA").*

121. In the alternative, if this Court determines that this appeal is pursuant to s.193 of the *Bankruptcy and Insolvency Act* ("BIA"), and if this court determines that the appeal is governed by s.193 (c), then the appellant seeks:

a. an Order nunc pro tunc, extending the time for serving and filing the Notice of Appeal from 10 day to 29 days.

122. In the further alternative, if this Court determines that this appeal requires leave to appeal pursuant to s.193 (e) of the BIA:

a. An Order granting the appellant Leave to Appeal the Decision of the Honourable Justice McEwen dated May 17, 2018 (hereinafter "Reasons for Decision" or "Decision").

b. An Order *nunc pro tunc* extending the time for serving and filing the Fresh as Amended Notice of Appeal from 10 days to 29 days.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of November, 2018.

Melvyn L. Solmon/ Rajiv Joshi

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *GMAC Commercial Credit Corp – Canada v TCT Logistics Inc* [2006] 2 SCR para 57
2. *Manici (Trustee of) v Falconi*, [1993] OJ No 146 at pg 2 (Ont CA)
3. *Canadian National Railway Co. v Holmes* [2016] OJ No 946 (Ont CA)
4. *Power consolidated (China) Pulp Inc. v. British Columbia Resources Investment* 1988, 19 C.P.C. (3d) para 3
5. *Med Finance Co.S.A v. Bank of Montreal* (1993), 22 C.B.R (3d) 279 para 13-14
6. *Farm Credit Canada v. Gidda 2015 CarswellBC* 1414 para 8-12
7. *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005) CarswellOnt 1834 para 15-1
8. Bennett, Frank. "*Bennett on Receiverships*". 2011. 3rd Ed., Carswell
9. Bennett, Frank. *Bennett on Bankruptcy*. 2018. 20th Ed, Carswell

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3)

Appeals
Court of Appeal

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- **(a)** if the point at issue involves future rights;
- **(b)** if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- **(c)** if the property involved in the appeal exceeds in value ten thousand dollars;
- **(d)** from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- **(e)** in any other case by leave of a judge of the Court of Appeal.

- R.S., 1985, c. B-3, s. 193;
- 1992, c. 27, s. 68.

No action against Superintendent, etc., without leave of court
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.

- R.S., 1985, c. B-3, s. 215;
- 1992, c. 27, s. 80.

Secured Creditors and Receivers
Court may appoint receiver

- **243 (1)** Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
    - **(a)** take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
    - **(b)** exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
    - **(c)** take any other action that the court considers advisable.

Courts of Justice Act, R.S.O. 1990, c. C.43

Court of Appeal jurisdiction

6 (1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;
(b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;
(c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court;
(d) an order made under section 137.1. R.S.O. 1990, c. C.43, s. 6 (1); 1994, c. 12, s. 1; 1996, c. 25, s. 9 (17); 2015, c. 23, s. 1.

Combining of appeals from other courts

(2) The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Court of Appeal. R.S.O. 1990, c. C.43, s. 6 (2); 1996, c. 25, s. 9 (17).

Same

(3) The Court of Appeal may, on motion, transfer an appeal that has already been commenced in the Divisional Court or the Superior Court of Justice to the Court of Appeal for the purpose of subsection (2). R.S.O. 1990, c. C.43, s. 6 (3); 1996, c. 25, s. 9 (17).

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

BUSINESS DEVELOPMENT BANK OF CANADA et al.
Applicants

-and-

ASTORIA ORGANIC MATTERS LTD. et al.
Respondents
(Respondents in Appeal)

Court of Appeal File No. C65512
Court File No. CV-17-11760-00CL

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

MOVING PARTY'S FACTUM

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