

**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

**FACTUM**

October 17, 2019

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**INTRODUCTION**

1. This is the factum of SusGlobal Energy Belleville Ltd (“SusGlobal”) and Gerald Hamaliuk. SusGlobal is responding to a motion by the Receiver (BDO) and (with Hamaliuk) has a cross-motion before the Court seeking certain related relief arising from the issues presented by BDO’s motion. Both motions largely turn on the issue of whether the Order Appointing the Receiver in this matter did, or could, prevent the initiation of a prosecution of the Receiver in the Provincial Offences Court under the *Environmental Protection Act* without the prior leave of the Court.

2. SusGlobal and Hamaliuk respectfully submit that the Order does not, on its face, require leave. The terms of the Order require the Receiver to comply with environmental law which necessarily implies accepting the possibility of prosecution under such law. The relevant provisions of the *Bankruptcy and Insolvency Act* do not authorize an order insulating a receiver

from prosecution for provincial regulatory offences, and this Court does not have the authority to preclude the institution of a prosecution before the Provincial Offences Court. Any of the concerns animating the usual protective order made in favour of a receiver can be properly addressed within the provincial offences regime.

## **BACKGROUND**

3. BDO Canada Limited (“BDO” or the “Receiver”) was appointed as the Receiver of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP (“Astoria”). The Order appointing BDO included the usual term stating that proceedings or enforcement processes in any court or tribunal against BDO were prohibited except with BDO’s written consent or with leave of the Court. The terms of the Order, however, specifically carved out compliance with all environmental laws and regulations.

4. SusGlobal purchased some of Astoria’s assets, including an organic recycling facility and waste transfer station. That facility was operated by BDO for a period of time. The Receiver was obliged to maintain this facility in full compliance with the applicable environmental legislation and related regulations. Prior to the close of the transaction, however, the Receiver allowed the volume of raw organic waste to exceed the allowances established by the environmental compliance approvals as maintained by the Ontario Ministry of Environment and Climate Change.

5. As a result of BDO’s failure to comply with the applicable environmental legislation, Hamaliuk laid an Information before a Justice of the Peace, alleging that BDO committed the

offence of storing more than 150 tonnes of biosolids at the impugned facility in excess of the allowed amount, contrary to s. 186(3) of the *Environmental Protection Act*. Finding reasonable grounds to believe the offence had been committed, the Justice of the Peace issued process in the form of a summons directed to BDO to attend Court and answer the Charge. The Attorney General of Ontario has not intervened to stay or withdraw the charge.

6. Hamaliuk's decision to lay an Information against BDO without the leave of this Court was and remains entirely appropriate and valid. A private prosecution is not captured by the term "proceeding" provided for in the Order appointing BDO. Moreover, a close examination of the purpose and relevant sections of the *Bankruptcy and Insolvency Act* demonstrate that the Order appointing BDO does not immunize a receiver from prosecutions properly brought to enforce applicable environmental laws and related regulations. Subjecting a private prosecution to the leave requirement of the Order would frustrate and undermine the purposes and processes of both penal (provincial offences) and environmental legislation.

7. Consequently, Gerald Hamaliuk was not required to seek leave of this Honourable Court to lay an Information before the Provincial Offences Court against BDO to enforce the applicable environmental law. In the alternative, if leave to proceed under the *Environmental Protection Act* was required, such leave should be granted *nunc pro tunc* and the stay lifted. In the further alternative, this Honourable Court should grant leave to substitute proceedings in the Provincial Offences Court by the laying of a fresh Information in substantially the same terms as the Charge.

## PART I - SUMMARY OF FACTS

### *The Parties*

8. SusGlobal is a provincially incorporated corporation in Ontario that carries on the business of operating an organic composting and recycling facility at 704 Philipston Road, Belleville, Ontario (the "Site").

9. Gerald Hamaliuk was the Informant (the person "laying the charge") in the provincial offences prosecution brought against BDO in the Ontario Court of Justice. At the time he swore the Information, Hamaliuk was the CEO of SusGlobal.

10. Astoria operated an organic recycling facility and waste transfer station at the Site. Their operations consisted of processing organic waste and yard waste ("Organic Waste") to generate compost for the use of agricultural and landscape markets.

11. The Applicant and moving party, BDO, is the Court-appointed Receiver of Astoria.

### ***BDO was appointed the Receiver of Astoria – the Receivership Order***

12. On April 13, 2017, BDO was appointed the Receiver of Astoria by Order of Justice Hainey (the "Receivership Order").<sup>1</sup> The Receiver made its application pursuant to s. 243(1) of the

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<sup>1</sup> Appointment Order of BDO Canada Limited, dated April 13, 2017, Motion Record of SusGlobal Energy Ltd. and Gerald Hamaliuk in his capacity as Informant in the proceeding pending before the Provincial Offences Court in Belleville ("MR"), Tab 2.A.

*Bankruptcy and Insolvency Act*<sup>2</sup> (the “BIA”) and s. 101 of the *Courts of Justice Act*<sup>3</sup> (the “CJA”).

The formal order was consistent with the Commercial List model order.

13. The Receivership Order provides, in part:

**NO PROCEEDINGS AGAINST THE RECEIVER**

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.

**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 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 ...***

**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 a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the “Environmental Legislation”), provided however that ***nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. ...***

**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 and except for

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<sup>2</sup> R.S.C., 1985, c. B-3.

<sup>3</sup> R.S.O. 1990, c. C.43.

any gross negligence or wilful misconduct on its part ... Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

***Astoria's operations were required to comply with environmental legislation and regulations***

14. Pursuant to paragraph 16 of the Receivership Order, BDO elected to occupy the Site and took control, care, charge, possession, and management of Astoria's property and the Site. Importantly, pursuant to paragraph 10 of the Receivership, BDO, as Astoria's Court-appointed Receiver, was required to comply with the conditions of the Amended Environmental Compliance Approval Number 0031-7UTRSS, dated August 7, 2015 (the "ECA") issued to Astoria,<sup>4</sup> pursuant to s. 186(3) of the *Environmental Protection Act*<sup>5</sup> (the "EPA").

15. S. 186(3) of the *EPA* provides:

**Offence re approval, licence or permit, etc.**

(3) Every person who fails to comply with the terms and conditions of an environmental compliance approval, certificate of property use or renewable energy approval or of a licence or permit under this Act or who fails to comply with the terms of a report under section 29 is guilty of an offence.

16. As part of Astoria's operations, it received and processed the Organic Waste from various vendors. The vendor would pay Astoria upon delivering the Organic Waste, and prior to Astoria processing this waste into compost. The vendor's payments were not conditional upon Astoria actually processing the Organic Waste into compost; instead, the payments were prepayments for the work to be performed in order to process the Organic Waste into compost.<sup>6</sup>

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<sup>4</sup> MR, Tab 2.N at p. 211.

<sup>5</sup> R.S.O. 1990, c. E.19.

<sup>6</sup> SusGlobal Amended Notice of Motion, MR, Tab 2.B at p. 36.



17. Pursuant to s. 2(9)(a) of the *ECA*, Astoria was not permitted to store more than 150 tonnes of waste inside the Tipping Building, one of the buildings located on the Site.

18. Section 2(9)(a) of the *ECA* states:

**Waste Storage**

(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;<sup>7</sup>

19. Astoria would receive between 50 to 80 metric tonnes of Organic Waste per day at the Tipping Building located on the Site. To ensure compliance with the *ECA*, Astoria was required to process the Organic Waste approximately every three days. As Astoria's agents, BDO was aware of this as were the individuals running Astoria's daily operations.<sup>8</sup>

***Astoria's operations violated environmental legislation and regulations***

20. On July 27, 2017, the Receiver entered into an Asset Purchase Agreement with SusGlobal relating to the purchase of some of the Debtors' assets, including the Site. The transaction closed on September 15, 2017 (the "Closing Date"). On the Closing Date, SusGlobal began operating its organic and recycling business at the Site, including accepting and processing the Organic Waste, which it continues to do so to date.<sup>9</sup>

21. BDO represented that BDO operated the Site during the receivership period as follows:

With respect to the operations and associated costs prior to Closing, the Receiver and Astoria operated the business in compliance with the MOECC [Ministry of the

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<sup>7</sup> MR, Tab 2.N at p. 219.

<sup>8</sup> SusGlobal Amended Notice of Motion, MR, Tab 2.B at p. 37.

<sup>9</sup> *Ibid* at p. 38.

Environment and Climate Change] requirements. During the Receivership period, the Receiver continued to operate the site in the normal course and funded all payroll and operating costs associated with the site including shipments of product from Peterborough up to the Closing Date.<sup>10</sup>

22. On the Closing Date, SusGlobal entered the Tipping Building and found at least 2,000 tonnes of Organic Waste stored inside. This amount of stored Organic Waste constituted thirteen times the permitted amount provided for in the *ECA*.<sup>11</sup>

23. Between September 26, 2017 and October 31, 2017, SusGlobal was in direct communication with the Ontario Ministry of Environment and Climate Change (the “MOECC”) to resolve the issue of the excessive Organic Waste in the Tipping Building. Importantly, SusGlobal took concrete steps to process the Organic Waste inside the Tipping Building to bring the amount of the Organic Waste in the Tipping Building to the acceptable limit mandated by the *ECA*.<sup>12</sup>

24. On November 15, 2017, SusGlobal finally achieved compliance with the *ECA*.<sup>13</sup>

***SusGlobal instituted a civil claim for damages***

25. On October 30, 2017, SusGlobal wrote to the Receiver pointing out that prior to the Closing Date, the Receiver allowed the volume of raw Organic Waste to exceed the allowances established by the environmental compliance approvals as maintained by the MOECC.<sup>14</sup>

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<sup>10</sup> *Ibid.*

<sup>11</sup> Affidavit of Gerald Hamaliuk, dated July 9, 2019, MR, Tab 2.N at p. 204.

<sup>12</sup> SusGlobal Amended Notice of Motion, MR, Tab 2.B at p. 46.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid* at pp. 46-47.

26. Seeking leave of this Court to institute a civil claim for damages against BDO, SusGlobal brought a motion against BDO alleging BDO failed to act honestly, in good faith, and in compliance with the Receivership Order, the Asset Purchase Agreement, and the *ECA*. SusGlobal further alleged that BDO was grossly negligent in its conduct, or, in the alternative, BDO's conduct constituted wilful misconduct. SusGlobal requested BDO reimburse it for damages incurred to process the excess Organic Waste.<sup>15</sup>

27. In litigation concluding in April 2019,<sup>16</sup> SusGlobal's efforts to institute a civil claim for damages for the Receiver's actions ended with a decision of the Court of Appeal for Ontario that had the effect of making final this Honourable Court's order denying leave to institute an action for damages.

***Hamaliuk lays the Charge against BDO***

28. On July 9, 2019, Hamaliuk swore an Information before a Justice of the Peace alleging that between April 27 and September 15, 2017, BDO committed the offence of storing more than 150 tonnes of biosolids in the Tipping Building at the Site, contrary to s. 186(3) of the *EPA* (the "Charge").<sup>17</sup>

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<sup>15</sup> *Ibid* at p. 49.

<sup>16</sup> *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269, MR, Tab 2.L.

<sup>17</sup> Information of Gerald Hamaliuk, MR, Tab 2.M.

29. The Justice of the Peace received the Information and, finding reasonable grounds to believe the offence had been committed, issued process in the form of a summons directed to BDO Canada LLP to attend court and answer the Charge (the “Summons”).<sup>18</sup>

30. On July 19, 2019, a Provincial Offences Officer served the Summons<sup>19</sup> pursuant to s. 26 of the *Provincial Offences Act* (the “POA”).<sup>20</sup>

31. On August 13, 2019, Justice Penny stayed the Charge brought against BDO and referred to in the Summons until further order of the Superior Court of Justice (Commercial List).<sup>21</sup>

## **PART II - LAW AND ARGUMENT**

32. It is respectfully submitted that the Receivership Order was not intended to—and could not—exempt BDO from a prosecution for violations of federal or provincial environmental law. The Receivership Order—namely paragraphs 8, 10, and 16—and their context demonstrate the Court’s intent that leave was not required to lay an Information before the Provincial Offences Court. Specifically, the stay provision contained in paragraph 8 of the Receivership Order—and the related leave requirement—is not a bar to the prosecution of charges laid pursuant to the *EPA* and its regulations.

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<sup>18</sup> Summons, dated July 9, 2019, MR, Tab 2.O.

<sup>19</sup> Affidavit of Service of Summons, dated July 19, 2019, MR, Tab 2.P.

<sup>20</sup> R.S.O. 1990, c. P.33.

<sup>21</sup> Order of Penny J., dated August 13, 2019, MR, Tab 2.R.

***A private prosecution is not captured by the term “proceeding” provided for in the Receivership Order***

33. When interpreting an order, a Court “will use accepted principles of statutory and contractual interpretation to ascertain the intent of the ordering judge.”<sup>22</sup> This means that the words of an order are “to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the... [order], the object of the... [order], and the intention of... [the court].”<sup>23</sup>

34. A private prosecution is not captured by the term “proceeding” provided for in paragraph 8 of the Receivership Order. Paragraph 8 provides 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.”<sup>24</sup>

35. The leave requirement of paragraph 8 finds its statutory support in s. 215 of the *BIA*, despite the fact that this section makes no reference to a “proceeding.” The term “proceeding” as provided for in paragraph 8 of the Receivership Order is, however, reflected in the comparable language of s. 11 of the *Companies’ Creditors Arrangement Act* (the “*CCAA*”),<sup>25</sup> which has received significant judicial attention.

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<sup>22</sup> *Canadian National Railway Company v. Holmes*, 2015 ONSC 3038 (CanLII) at para. 18, SusGlobal and Hamaliuk Book of Authorities (“SHBOA”), Tab 1.

<sup>23</sup> *Royal Bank of Canada v. Robertson*, 2016 NSSC 176 (CanLII) at para. 20, SHBOA, Tab 2.

<sup>24</sup> MR, Tab 2.A.

<sup>25</sup> R.S.C., 1985, c. C-36.

36. The Courts have interpreted the term “proceeding” broadly to “cover both judicial and extra-judicial proceedings which could prejudice an eventual arrangement.”<sup>26</sup> Despite the expansive interpretation of the term “proceeding,” the caselaw weighs in favour of the conclusion that the interpretation is not so broad so as to capture the prosecution of a criminal or quasi-criminal offence as in this case.

37. In *Milner Greenhouses Ltd. v. Saskatchewan*, the Court held that the stay order provided by s. 11 of the CCAA does *not* stay the prosecution of a quasi-criminal regulatory offence.<sup>27</sup> The case concerned one of Milner Greenhouses Ltd.’s employees who was injured in the course of her employment duties. Milner Greenhouses Ltd. was charged with offences under the *Saskatchewan Occupational Health and Safety Act, 1993* and its regulations.

38. Prior to the Crown laying these charges, Milner Greenhouses Ltd. sought protection under the CCAA and obtained an *ex parte* order. Paragraph 3 of the order included a stay pursuant to s. 11 of the CCAA:

3(c) no suit, action, enforcement process, extra-judicial proceeding or other proceeding shall be processed with or commenced against the Petitioners or the Assets, including, without restriction, any application or proceeding pursuant to any federal, provincial or other legislation in any other jurisdiction to which the Petitioners or any of them are subject.

39. The Court there concluded that the stay ordered pursuant to this order did not bar the prosecution of charges laid pursuant to the applicable health and safety regulations.

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<sup>26</sup> *Nortel Networks Corp. (Re)*, [2010] O.J. No. 1111 at para. 36, SHBOA, Tab 3.

<sup>27</sup> 2004 SKQB 160 (CanLII) at para. 29, SHBOA, Tab 4.

Importantly, the Court concluded that the prosecution of a quasi-criminal regulatory offence is not captured by the term “proceeding.”<sup>28</sup>

40. In reaching this conclusion, Ryan-Froslic J. made the following observations:

... s. 11 of the CCAA must be construed in the context of the whole Act and with a view to its objects and purposes. The purpose of the CCAA is to facilitate compromises and arrangements between an insolvent company and their creditors. In the situation before me, the Crown is not a creditor of Milner Greenhouses. It does not seek payment of any debts nor enforcement of any contractual right. Its relationship to Milner Greenhouses is not a commercial one. The Crown in the situation before me represents the people of Saskatchewan and seeks only to prosecute Milner Greenhouses for alleged wrongdoings. Those wrongdoings relate solely to the safety and well-being of employees pursuant to *The Occupational Health and Safety Act, 1993* and its regulations. If the Crown is not a creditor (its relationship to the debtor company is not a commercial one), it is arguable Parliament did not contemplate them when it enacted the CCAA. It is significant that the legislation exempted by Parliament from the operation of a stay order is all commercial in nature. This reinforces the argument that the CCAA is directed to commercial as opposed to penal actions.<sup>29</sup>

41. Referring to the Supreme Court’s decision in *R. v. Fitzgibbon*, Ryan-Froslic J. also cautioned against “making criminal and quasi-criminal proceedings subject to civil orders.”<sup>30</sup>

*Fitzgibbon* concerned the situation of a lawyer who had misappropriated client funds. At the time he pled guilty to three counts of fraud and one count of breach of trust, he was an undischarged bankrupt. He was sentenced to a prison term and ordered to reimburse the law society for moneys paid to compensate his client.<sup>31</sup>

42. In holding that a compensation order made pursuant to the *Criminal Code* could be made *without* obtaining the consent of the bankruptcy court, the Supreme Court observed:

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<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid* at para. 24.

<sup>30</sup> *Ibid* at para. 29.

<sup>31</sup> *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005, 1990 CanLII 102 (SCC), SHBOA, Tab 5.

It is worthy of note that the importance of maintaining the distinction between civil and criminal procedures was affirmed by the Quebec Court of Appeal in *In re Lévis Automobiles Inc.: Gingras v. Cour des Sessions de la Paix*, 1973 CanLII 1273 (QC CA), [1973] C.A. 670, 12 C.C.C. (2d) 182. There Crête J.A. (as he then was) observed that the provisions of s. 40 of the *Bankruptcy Act*, R.S.C. 1952, c. 14 (later R.S.C. 1970, c. B-3, s. 49, and now R.S.C., 1985, c. B-3, s. 69) could not apply to penal or criminal proceedings involving the imposition of a fine or imprisonment. In that same case, it was noted by Turgeon J.A. that as a matter of principle criminal courts should not be subjected to the control of civil courts. This decision supports the determinations I have reached.<sup>32</sup> [emphasis added]

43. The considerations underpinning the conclusion in *Fitzgibbon* find equal application to the facts of this case.

44. **First**, Hamaliuk is not a creditor of Astoria. As a result, the relationship between Hamaliuk and Astoria is not commercial in nature.

45. **Second**, Hamaliuk did not seek the payment of any debts or the enforcement of any contractual rights. Instead, he brought a private prosecution against BDO for alleged wrongdoings to the environment.

46. **Third**, Hamaliuk's decision to lay the Information is fully compatible with the terms of the Receivership Order. Again, the Receivership Order provides that the Receiver is to abide by all applicable environmental statutory or regulatory provisions and casts those obligations as exceptions to the stay provision of the Receivership Order.

47. In particular, paragraph 10 provides that "nothing in this paragraph shall ... exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment." And, paragraph 16 provides that "nothing herein shall

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<sup>32</sup> *Ibid* at pp. 1017-18.



exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation.” To subject the bringing of a private prosecution to the leave requirement of paragraph 8 of the Receivership Order would effectively neuter the force and effectiveness of the exemptions provided for in these paragraphs.

***The Receivership Order’s leave requirement does not immunize a Receiver from prosecutions properly brought to enforce applicable environmental laws***

48. When the terms of the Receivership Order—namely paragraphs 8, 10, and 16—are assessed in their proper context, it is also clear that BDO cannot shield itself behind the Receivership Order’s leave requirement in order to avoid a private prosecution brought to enforce applicable environmental laws.

49. Like the *CCAA*, the *BIA* is designed to facilitate the distribution of the bankrupt’s assets among his or her creditors.<sup>33</sup> And, like the stay provision provided for in the *CCAA*, the stay provision of the *BIA*—s. 215—is designed to ensure that the bankruptcy process is not made unworkable and that legitimate claims can be advanced.<sup>34</sup> The leave mechanism provided for in s. 215 of the *BIA*, however, is not designed to “protect the trustee from well-founded litigation.”<sup>35</sup> The Supreme Court has also cautioned against converting the leave mechanism provided for in s. 215 “into blanket insulation for court-appointed officers.”<sup>36</sup>

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<sup>33</sup> *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 (CanLII) at para. 32, SHBOA, Tab 6.

<sup>34</sup> *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35 (CanLII) at para. 58, SHBOA, Tab 7.

<sup>35</sup> *Ibid* at para. 74.

<sup>36</sup> *Ibid* at para. 68.

50. Designating a Receiver an officer of the Court does not shield them from liability. In *Standard Trust Co. (In liquidation) v. Lindsay Holdings Ltd.*, a petitioner applied for the appointment of a Receiver and sought protections for the receiver against legislation that creates liability for the costs of environmental protection and for environmental damage.<sup>37</sup>

51. In rejecting the petitioner's request for protection for the receiver against applicable environmental legislation, Thackray J. held that the purpose of designating an individual as an officer of the court is "not to shield them from liability but to impose upon them obligations for which they will be accountable."<sup>38</sup> A receiver, according to Thackray J., while an officer of the court is still different from the court itself and therefore its potential liability is also different from that of the court.<sup>39</sup>

52. In support of this position, Thackray J. cited with approval the following passage from F. Bennett:

Notwithstanding that the receiver and manager is an officer of the court, [its] fiduciary duty to all extends to a standard of care in the running of the business comparable to the "reasonable care, supervision and control as an ordinary [person] would give to the business were it his own" ... Where [it fails to provide such a standard of care, [it] may be liable for [its] negligence.<sup>40</sup>

Importantly, Thackray J. concluded that while F. Bennett's comments related to a common law duty, they are "equally applicable, if not more so, to liability for a breach of a statutory duty."<sup>41</sup>

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<sup>37</sup> [1994] B.C.J. No. 2638 at para. 1, SHBOA, Tab 8.

<sup>38</sup> *Ibid* at para. 23.

<sup>39</sup> *Ibid* at para. 24.

<sup>40</sup> *Ibid* at para. 24 citing Frank Bennett, *Receiverships* (Toronto: Carswell, 1985) at 118.

<sup>41</sup> *Ibid* at para. 25.

***Subjecting a private prosecution to the leave requirement of the Receivership Order would frustrate and undermine the purposes and processes of penal (provincial offences) and environmental legislation***

53. Requiring Hamaliuk to seek leave of the Court in order to bring a private prosecution would frustrate and undermine the purposes underpinning both penal (provincial offences) and environmental legislation.

54. The purpose of the *EPA* is set out at s. 3 of the legislation and provides for “the protection and conservation of the natural environment.” In *R. v. Consolidated Maybrun Mines Ltd.*, the Supreme Court held that when interpreting the purpose and scheme of the *EPA*, the preventative and remedial purposes of the legislation must be considered.<sup>42</sup> Writing for the Court, Justice L’Heureux-Dubé also remarked that the legislation features penal functions, as exemplified in this case by s. 186(3) of the *EPA*.

55. The purpose of all penal law is to maintain a just, peaceful, and safe society.<sup>43</sup> This purpose is accomplished by identifying those acts that are to be prevented and setting out those punishments or sanctions that are designed to “preserve the authority of and promote the respect for the law.”<sup>44</sup> In *Cloutier v. Langlois*, the Supreme Court held that “[o]ur system of

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<sup>42</sup> [1998] 1 S.C.R. 706 at 732, 1998 CanLII 820 (SCC), SHBOA, Tab 9.

<sup>43</sup> *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at 556, 1996 CanLII 230 (SCC), SHBOA, Tab 10. Note that the purpose of the *POA* is set out at s. 2 and provides for the replacement of the “summary conviction procedure for the prosecution of provincial offences, including the provisions adopted by reference to the *Criminal Code* (Canada), with a procedure that reflects the distinction between provincial offences and criminal offences.”

<sup>44</sup> *Ibid.*

criminal justice is based on the punishment of conduct that is contrary to the fundamental values of society, as statutorily enshrined in the *Criminal Code* and similar statutes."<sup>45</sup> [emphasis added]

56. Common to both penal and environmental legislation therefore is a fundamental public need to address wrongs and to articulate appropriate punishments or sanctions for a wrong that has been committed. Subjecting a private prosecution to the leave requirement as set out in the Receivership Order carries with four principal errors.

57. **First**, it bestows upon Receivers a special and unwarranted status that they are not wholly accountable for environmental liabilities they produce when operating a business, and are therefore beyond the penal functions of the *EPA*.

58. **Second**, it allows a Receiver to perpetuate an environmental offence and profit from it, as was the case here.

59. **Third**, it does little to deter future Receivers from operating a waste management facility that is not in compliance with applicable environmental laws if profits can still be made.

60. **Fourth**, it fails to recognize that the initiation of a prosecution under the *POA* is already subject to the approval of a judicial officer, namely the Justice of the Peace, who receives the Information and determines whether or not to issue process.

61. Requiring Hamaliuk to seek leave of the Court in order to bring a private prosecution undermines the rights and processes by which a private prosecution is brought. The Crown

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<sup>45</sup> [1990] 1 S.C.R. 158 at 182, 1990 CanLII 122 (SCC), SHBOA, Tab 11.

Prosecution Manual of the Ministry of the Attorney General (Criminal Law Division) makes clear that both the statutory right of a person to lay an Information and the right and duty of the Attorney General to supervise a criminal prosecution and take over a private prosecution are “fundamental parts of the criminal justice system.”<sup>46</sup> Subjecting the private prosecution to the leave requirement of the Receivership Order frustrates and undermines both of these statutory rights and duties.

62. It also displaces the established procedural safeguards provided for in the *POA* with the ones provided for under s. 215 of the *BIA*. Under the *POA*, the following safeguards have been considered sufficient to prevent abusive prosecutions—“the requirements that an informant swear an Information based on reasonable and probable grounds together with the ability of a justice of the peace to refuse to issue process and the power of the Attorney General to intervene.”<sup>47</sup>

63. Significantly, the Attorney General has not intervened in this prosecution.

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<sup>46</sup> Ministry of the Attorney General (Criminal Law Division), Crown Prosecution Manual, Prosecution Directive, dated November 14, 2017 at p. 117, SHBOA, Tab 12.

<sup>47</sup> John Swaigen, Albert Koehl & Charles Hatt, “Private Prosecutions Revisited: The Continuing Importance of Private Prosecutions in Protecting the Environment” (Symposium on Environment in the Courtroom (II) (2013: University of Ottawa), MR, Tab 2.N at p. 323.

***If leave to proceed under the Environmental Protection Act was required, such leave should be granted nunc pro tunc and the stay lifted***

64. In *Gallo v. Beber (Trustee of)*, the Court of Appeal for Ontario set out the test to be applied when a court is to determine whether leave should be granted *nunc pro tunc*. According to the Court:

An application for leave to commence an action *nunc pro tunc* should be granted if to do so does not cause prejudice or any substantial injustice, and if leave would have been granted if it had been sought at the appropriate time. In the absence of prejudice, leave will generally be granted unless it is clear that there is no foundation for the claim or the action is frivolous or vexatious.<sup>48</sup>

65. In this case, BDO would not suffer any prejudice or substantial injustice should leave to proceed under the EPA be granted *nunc pro tunc*. First, Hamaliuk has sufficiently articulated the particulars of BDO's alleged breaches of the applicable environmental legislation.<sup>49</sup> BDO is clearly aware, and has been for some time, of the charge it is facing. There is no element of surprise in this context.<sup>50</sup> Second, the passage of time has not resulted in the loss or destruction of documents.<sup>51</sup>

66. It is also clear that the private prosecution is neither frivolous nor vexatious. Importantly, it has already been determined by the Justice of the Peace that there were reasonable and probable grounds to believe that the Receiver committed an offence contrary to the *EPA*. Hamaliuk has therefore established the factual basis to support the bringing of this private

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<sup>48</sup> 1998 CanLII 907 (ON CA) at para. 7, SHBOA, Tab 13 citing to *Roynat Inc. v. Allan*, 69 C.B.R. 245 (Alta. Q.B.), SHBOA, Tab 14.

<sup>49</sup> *Canadian National Railway Company*, *supra* note 22 at para. 21, SHBOA, Tab 1.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

prosecution. Consequently, if leave to proceed under the *EPA* was required, it should be granted *nunc pro tunc* and the stay should be lifted.

67. To the extent that there is any issue about whether the proceeding has sufficient merit or is in any way abusive, the Court hearing the prosecution will have a full panoply of remedies for BDO.

### **PART III - ORDER REQUESTED**

68. SusGlobal Energy Belleville Ltd. and Gerald Hamaliuk respectfully request:

- (a) If necessary, an order *nunc pro tunc* authorising the institution of the proceedings in respect of the Charge before the Provincial Offences Court;
- (b) If necessary, an order lifting the stay imposed by the Order of Justice Penny, dated August 13, 2019;
- (c) If necessary, an order reinstating the Prosecution brought against BDO Canada LLP, and referred to in the Summons dated July 9, 2019, issued by the Ontario Court of Justice East Region;
- (d) In the alternative, an order authorising Gerald Hamaliuk to lay a new Information before the Provincial Offences Court in substantially the same terms as the Information in the Prosecution;
- (e) The costs of this proceeding, plus all applicable taxes; and
- (f) Such further and other relief as to this Honourable Court may seem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of October 2019.

per.   
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Informant in the proceeding pending before  
the Provincial Offences Court in Belleville



## SCHEDULE "A"

### LIST OF AUTHORITIES

1. *Canadian National Railway Company v. Holmes*, 2015 ONSC 3038 (CanLII)
2. *Royal Bank of Canada v. Robertson*, 2016 NSSC 176 (CanLII)
3. *Nortel Networks Corp. (Re)*, [2010] O.J. No. 1111
4. *Milner Greenhouses Ltd. v. Saskatchewan*, 2004 SKQB 160 (CanLII)
5. *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005, 1990 CanLII 102 (SCC)
6. *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 (CanLII)
7. *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35 (CanLII)
8. *Standard Trust Co. (In liquidation) v. Lindsay Holdings Ltd.*, [1994] B.C.J. No. 2638
9. *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, 1998 CanLII 820 (SCC)
10. *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, 1996 CanLII 230 (SCC)
11. *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, 1990 CanLII 122 (SCC)
12. Ministry of the Attorney General (Criminal Law Division), Crown Prosecution Manual, Prosecution Directive, dated November 14, 2017
13. *Gallo v. Beber (Trustee of)*, 1998 CanLII 907 (ON CA)
14. *Roynat Inc. v. Allan*, 69 C.B.R. 245 (Alta. Q.B.)

## SCHEDULE "B"

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

#### ***Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3***

**14.06 (2)** Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

- (a) before the trustee's appointment; or
- (b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

**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.

**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.

#### ***Companies' Creditors Arrangement Act, RSC 1985, c C-36***

**11.02 (1)** A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

***Environmental Protection Act, R.S.O. 1990, c. E.19***

**186 (1)** Every person who contravenes this Act or the regulations is guilty of an offence.

**186 (3)** Every person who fails to comply with the terms and conditions of an environmental compliance approval, certificate of property use or renewable energy approval or of a licence or permit under this Act or who fails to comply with the terms of a report under section 29 is guilty of an offence.

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

**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.

**(2)** An order under subsection (1) may include such terms as are considered just.

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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