

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

**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***

**FACTUM OF THE APPELLANT,
SUSGLOBAL ENERGY BELLEVILLE LTD.**

**(for the motion related to the appeal from the Order dated November 8, 2018
dismissing the motion to reopen the motion for leave to sue the Receiver)**

re: fresh evidence.

November 30, 2018

SOLMON ROTHBART GOODMAN LLP
Barristers
375 University Avenue
Suite 701
Toronto, Ontario
M5G 2J5

Melvyn L. Solmon (LSUC# 16156J)
msolmon@srglegal.com
Tel: 416-947-1093 (Ext. 333)
Fax: 416-947-0079

Lawyers for SusGlobal Energy Belleville Ltd

TO:

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
181 Bay Street, Suite 1800
P.O. Box 754
Toronto, Ontario
M5J 2T9

Steven L. Graff (LSUC# 31781V)

Tel: 416-863-1500

Fax: 416-863-1515

Kyle B. Plunkett

Tel: 416-863-1500

Fax: 416-863-1515

kplunkett@airdberlis.com

Lawyers for BDO Canada Limited, in its capacity as Court appointed receiver of
Astoria Organic Matters and Ltd. and Astoria Organic Matters Canada LP

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FACTUM OF THE APPELLANT

PART I - IDENTITY OF APPELLANT, PRIOR COURT & RESULT

1. The Appellant, SusGlobal Energy Belleville Ltd. (“SusGlobal” or “Appellant”), brings this motion for an order that the Notice of Appeal served on Monday, November 19, 2018 is either:

- (a) An appeal properly brought pursuant to section 193(c) of the *Bankruptcy and Insolvency Act* (“*BIA*”) or in the alternative pursuant to section 6 of the *Courts of Justice Act* (“*CJA*”) and no leave to appeal is required; or,
- (b) In the alternative, an Order granting leave to appeal pursuant to section 193(e) of the *BIA*.

2. The appeal is from the Decision of the Honourable Mr. Justice McEwen (“Judge”) dated November 8, 2018 wherein the Judge refused to grant leave to admit material fresh evidence and to reopen and rehear the motion for leave to sue the Court appointed Receiver.

PART II - OVERVIEW - NATURE OF CASE AND ISSUES

3. The Appellant relies on the facts and the defined terms as set out in the factum on the motion in appeal file no. C65512 being heard on the same day as this motion.

4. The material fact that was learned from the fresh evidence, that was only available after the motion for leave to sue was fully argued, was that the actual percentage of Biosolid Waste that was used in the Compost Mixture, on average, for the year 2017 was 18.8%, not 25%.¹

5. This has a material effect on the calculation of the actual amount of Biosolid Waste that built up in, and was stored (in increasing amounts) in, the Tipping Building over the Receivership Period. By September 15, 2017, the amount of Biosolid Waste that was unused and stored in the Tipping Building was 373 MT by dry weight.² That is 1,492 MT by wet weight. This is almost ten times the EPA regulated maximum amount of 150 MT (by wet weight).

6. This was a clear breach of the ECA and section 186(3) of the *EPA*.

7. Mr. Hamilton knew the correct figures and knew how to calculate them. He had completed the 2016 Annual Report which set out the percentage of water in various organic waste material. These figures were known to him and could have been used to calculate the correct percentage of

¹ See Motion Record (“MR”) Affidavit of Gerry Hamaliuk dated August 16, 2018, pg332 para 13

² (Assuming the maximum amount of 500 metric tonnes of compost mixture were used in every one of the 23 windrows).

Biosolid Waste used in the Compost Mixture (on average) for each Windrow (rather than use 25% in his calculations and estimates).

8. It is submitted that the Judge erred in law in the applying the third governing factor with respect to the test for fresh evidence in determining whether to admit the 2017 Annual Report and the 2016 Annual Report figures, as fresh evidence, to reopen and rehear the motion to avoid a miscarriage of justice. It is submitted that the Court was misled by Mr. Hamilton. Whether this was intentional or not (it is submitted that Mr. Hamilton having run the business for over 10 years prior to the Receivership knew the correct numbers as he had completed the 2016 Annual Report had the correct numbers), the Court should prevent a decision being made on evidence that was clearly not accurate.

9. The appeal also raises the issue of when the Court should apply the overarching principle of avoiding a miscarriage of justice, which is of general importance to the practice. It is respectfully submitted that the Court of Appeal should address on this issue.

10. Furthermore, the conduct of the Receiver and the use of the "As is, Where is" clause found in the APA by the Receiver to deny responsibility and liability is a matter of importance that ought to be reviewed by this Court to ensure that the standard of conduct expected of receivers running environmentally sensitive businesses is clear and is followed. Unknown to SusGlobal, it bought a business for almost \$8 million that was not compliant with the *EPA/ECA* and the Order.

11. The excess Biosolid Waste had to be cleaned up and properly used to bring SusGlobal into compliance. The cleanup costs and the loss of business and profit related thereto was in excess of \$650,000.00.

PART III - SUMMARY OF FACTS

12. After the Motion for Leave (also used interchangeably as the “Original Motion”) was heard and before the Reasons for Decision issued, SusGlobal (on March 29, 2018), submitted the 2017 Annual Environmental Report (“2017 Annual Report”), it was required to be filed with the MOECC.

13. This 2017 Annual Report addressed all of the activities at the site during the 2017 calendar year. In particular, “Appendix B” of the 2017 Annual Report is a detailed accounting of annual tonnage received and shipped dated per day and sorted by class or item and totaled accordingly. This information is extracted from the weigh scale computer.³

14. The 2017 Annual Report is required by law.⁴

15. Mr. Hamaliuk is the Chief Executive Officer of SusGlobal. He is the only engineer employed by SusGlobal who is qualified to compile and submit the 2017 Annual Report to the MOECC.⁵

16. The 2017 Annual Report allows for accurate and reliable calculations for the whole year to be made of the amount of total biomass and subcategory of biosolids, delivered to the site.⁶ On the Original Motion the Parties conceded that the most reliable way to determine the amount of

³ MR Affidavit of Gerald Hamaliuk, dated July 13, 2018 pg 38, para 3 and Exhibit “A” pg 45

⁴ MR Affidavit of Gerald Hamaliuk, dated July 13, 2018 pg 38, para 3 and see pg 45 “This Annual Report is required under ECA Number 0031-7UTRSS, but includes information as required under all ECA’s for this Property”.

⁵ MR Affidavit of Gerald Hamaliuk, dated August 16, 2018 pg 329, para 1-2

⁶ MR Affidavit of Gerald Hamaliuk, dated July 13, 2018 pg 39, para 5

biosolids on the site at any time was to review the weigh scale tickets for materials arriving at the site.⁷

17. The 2017 Annual Report requires assembling data from multiple sources during the reporting year. This process was complicated by the fact that SusGlobal only assumed control of the subject site as of September 15, 2017 (the "Closing Date"). Therefore, many records were not directly available. Much of the underlying information to complete the 2017 Annual Report⁸ was not available until just before the March 29, 2018 submission date.⁹

18. From the time period January 9, 2018 to February 23, 2018, Mr. Hamaliuk contacted Angelo Consoli (VP of BDO) a number of times to obtain the required analytical information from the Receiver in order to complete certain aspects of the 2017 Annual Report to be in compliance with the ECA. However, he was provided with limited information. As a result, Mr. Hamaliuk went through all site files during February and March of 2018 and asked the Receiver for the analysis and details for agreements for treating and disposal of leachate for the site. He also sought clarification on a number of other issues related to the time period before September 15, 2017, for the 2017 operation.¹⁰

19. Given the lack of data and information from the Receiver, after February 23, 2018, Mr. Hamaliuk then focused on compiling the information that was on hand and preparing explanations of why no compliance analysis could be fully presented for certain aspects of the report.¹¹ This process took Mr. Hamaliuk longer than he expected and he overlooked the importance of the 2016

⁷ MR Affidavit of Gerald Hamaliuk, dated July 13, 2018 pg 39 para 6

⁸ But not the calculation of the conversion from wet weight to dry weight.

⁹ MR Affidavit of Gerald Hamaliuk, dated July 13, 2018 pg 38-39 para 4; The deadline for submission was March 31, 2018.

¹⁰ MR Affidavit of Gerald Hamaliuk, dated August 16, 2018 pg 330-331, para 4 and 8

¹¹ MR Affidavit of Gerald Hamaliuk, dated August 16, 2018 pg 331, para 9

Annual Report calculations.¹² As result, he did not turn his mind to the calculations of the conversion of the 'wet weight to dry weight', until the latter part of March 2018.¹³

20. In March of 2018, Mr. Hamaliuk commenced a review of the hard copy of the 2016 Annual Report that had been submitted to the MOECC, which referred to wet weight and dry weight conversion.¹⁴

21. On March 21st, 2018, the incoming and outgoing data was collected and summarized for the 2017 Annual Report. Shortly thereafter, Mr. Hamaliuk did the calculations and it was then that Mr. Hamaliuk realized that the site operated during 2017 at 18.8%¹⁵ dry weight of Biosolid Waste in the Compost Mixture on the average on an annual basis, and not at the maximum of 25% used by the Receiver in their Fourth Report Supplement at section 2.1.3(2).¹⁶ Throughout the reports the Receiver stated that the Biosolid Waste being used was a maximum of 25% or less of the Compost Mixture in each Windrow. However, the Receiver made all calculations on the basis of 25%. Mr. Hamilton, (and therefore the Receiver) knew the on the average that percentage of Biosolid Waste in the Compost Mixture was much less than the maximum admitted percentage of 25% (of Biosolid Waste in the Compost Mixture by dry weight)¹⁷.

¹² Mr. Hamilton completed the 2016 Annual Report

¹³ MR Affidavit of Gerald Hamaliuk, dated August 16, 2018 pg 331, para 10

¹⁴ MR Affidavit of Gerald Hamaliuk, dated August 16, 2018 pg 331, para 11

¹⁵ The calculation of the 18.8% is as follows: [The calculation is from the annual figures set out in the 2017 Annual Report, namely: $2785 / (2785 + 12,017) \times 100 = 18.81\%$. In other words, total biosolids dry weight divided by total biosolids plus organic material in the mix, times 100 = 18.81%. (see SusGlobal Motion Record, Tab 2, Exhibit "A", pg. 18)]

¹⁶ MR Affidavit of Gerald Hamaliuk, dated August 16, 2018 pg 332, para 13

¹⁷ It should be noted that the only reason for calculating the dry weight is to ensure that the facility complies with the regulation that requires a maximum of 25% of Biosolid Waste by dry weight to be used in the Compost Mixture in order to satisfy the requirements and be categorized as Compost A. The Annual Report includes the requirement of reporting to the MOECC that the Compost A is being manufactured within that dry weight percentage requirement by regulation.

22. In doing his calculation, Mr. Hamaliuk used the percentage of water from the 2016 Annual Report. Mr. Hamaliuk used those percentages to calculate the dry weight of Biosolid Waste and Leaf/Yard Content compared to the biosolids that were used by Mr. Hamilton to do his calculations set out to manufacture Compost A during 2017.¹⁸

23. The significance and impact of this information on the conversion from wet weight to dry weight, could not have been established until the calculations based on the 2016 Annual Report figures were carried out by Mr. Hamaliuk for the 2017 Annual Report.¹⁹

24. The 2017 Annual Report had to be accepted as being in compliance with the ECA/EPA by the MOECC before SusGlobal could rely on it.²⁰ The MOECC confirmed receipt and compliance²¹ on June 25, 2018. On the same date it was provided to the Receiver.

25. SusGlobal relies on the facts set out in the Factum in appeal file no. C65512 including at para 53 and 55:

- (a) All materials that came on Site whether Biosolid Waste or Leaf/Yard Content were weighed, and recorded (weigh scale tickets were produced);²²
- (b) All Biosolid Waste that was received on Site and put into the Tipping Building was never dried out: all Biosolid Waste was wet;²³
- (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;²⁴
- (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.²⁵ Dry weight is never used on Site when processing;²⁶

¹⁸ MR Affidavit of Gerald Hamaliuk, dated August 16, 2018 pg 331, para 12

¹⁹ MR Affidavit of Gerald Hamaliuk, dated August 16, 2018 pg 332-333 para 16

²⁰ MR Affidavit of Gerald Hamaliuk, dated July 13, 2018 pg 38-39 para 4

²¹ See MR Affidavit of Gerald Hamaliuk, dated July 13, 2018 pg. 38 to 39, para 3 and 4

²² ExB.vol.1, pg 214 see example of a weight scale ticket; Reasons for Decision, para 47

²³ ExB.vol.3, pg 770 para 7-8

²⁴ ExB.vol.3, pg 770 para 7-8

²⁵ ExB.vol.2, pg 329-330, Section 2.1.3

²⁶ ExB.vol.3, pg 770 para 7-8; Reasons for Decision, para 57

- (e) The total amount of Biosolid Waste received during the Receivership Period was in excess of 4,952²⁷ 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 23×500 MT = 11,500 MT of Compost Mixture (wet weight);²⁸
- (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%);²⁹
- (h) The maximum amount of Biosolid Waste permitted in the Compost Mixture by regulation, by dry weight, is 25%³⁰ of the Compost Mixture and the other 75% is Leaf/Yard Content;³¹ and,
- (i) The water content of the Biosolid Waste is 75%.³²

26. Based on the actual figure of 18.8%³³ of Biosolid Waste being used in the Compost Mixture the following calculations can be performed:

- (a) 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%³⁴ 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 11,500³⁵ MT = 4,600 MT.
- (d) This 4,600 MT Compost Mixture by dry weight would have been composed of Biosolid Waste and Leaf/Yard Content. If 18.8% is the actual percentage of the

²⁷ ExB.vol.2, pg 624 -629 (Exhibit 8) and BDO claimed it was 5206²⁷ MT (wet weight). Reasons for Decision, para 47 (G. Hamaliuk Affidavit, para 25)

²⁸ ExB.vol.2, pg 330, section 2.1.3(3); Reasons for Decision para 49-50

²⁹ ExB.vol.2, pg 330 – *“The blending process consisted of spraying water on the mixture to obtain a 60% moisture level.”*

³⁰ 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).”

³¹ ExB.vol.2, pg 329, Section 2.1.3; Reasons for Decision, para 55

³² 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.

³³ MR pg 47 2017 Annual Report – calculation for 18.8% is as follows: $2785 / (2785 + 12,017) \times 100 = 18.81\%$.

³⁴ ExB.vol.2, pg 329-330 section 2.1.3

³⁵ $500 \text{ MT} \times 23 \text{ Windrows (during receivership period)} = 11,500 \text{ MT}$

Biosolid that was used on average in the Compost Mixture to create Compost A in each Windrow, then $(4,600 \times 18.8\%) = 864.8$ MT, would be the dry weight of the maximum amount of Biosolid Waste that could have been used during the 23 week period.³⁶

- (e) The 864.8 MT is the dry weight of the Biosolid Waste that was used in the Compost Mixture but dry weight only represents 25% of the wet weight of the Biosolid Waste. Therefore, the 864.8 has to be multiplied by 4 to obtain the wet weight of the Biosolid Waste that was used in the Compost Mixture ($864.8 \times 4 = 3,459.2$).
- (f) The 4,952 wet weight of Biosolid Waste that was delivered minus the 3,459.2 Biosolid Waste by wet weight that was actually used in the Compost Mixture during the Receivership Period provides the amount of Biosolid Waste by wet weight that was built up and stored in the Tipping Building. The amount is $4,952 - 3,459.2 = 1,492.8$ MT.

Calculations based on the actual 18.8% of Biosolids being used in the Compost Mixture

27. Based on the above, 4,952 MT of Biosolid Waste (wet weight) arrived during the Receivership Period. A maximum of 3,459.2 MT of Biosolid Waste (wet weight) was used in the Compost Mixture to manufacture Compost A. This leaves a minimum of 1,492.8 MT³⁷ by wet weight of Biosolid Waste that would have built up and stored in the Tipping Building as of September 15, 2017.³⁸

28. The ECA limit of 150 MT in the Tipping Building is for wet weight. Based on these amounts, the Receiver permitted the ECA limit of 150 MT of waste (by wet weight) to be violated by more than 1,300 excess MT of Biosolid Waste, far above the ECA limit (by wet weight of waste) as of September 15, 2017.³⁹

³⁶ 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.

³⁷ The dry weight of this 1,492.8 MT would be approximately 373 MT

³⁸ MR Affidavit of Gerald Hamaliuk, dated July 13, 2018 pg 41, para 12

³⁹ MR Affidavit of Gerald Hamaliuk, dated July 13, 2018 pg 42, para 14

29. The information in the 2017 Annual Report was reliable and based upon the same percentage of water figures, used for the calculation of the amounts set out in the 2016 Annual Report, submitted by Mr. Hamilton. Mr. Hamilton knew about these figures but instead in his estimates used the maximum amount of 25%. It is submitted that this was deliberate and misleading. The effect of using the maximum percentage dramatically and artificially lowered the total amount of Biosolid Waste that was actually stored in the Tipping Building and built up during the Receivership Period.

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

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

31. Mr. Hamilton was aware of the percentages of dry weight from his preparation of the 2016 Annual Report. Mr. Hamilton could have properly calculated that the actual average annual percentages for the 2017 year was 18.8% Biosolid Waste as a percentage of the Compost Mixture for Compost A and not 25% Biosolid Waste (being a hypothetical percentage) (and being the maximum amount allowable under the regulation), during the Receivership Period.

32. It would be a miscarriage of justice if Mr. Hamilton's estimate, calculations and allegations⁴⁰ submitted based on the 25% figure were allowed to govern the factual foundation for the Original Motion and were allowed to be used to determine the Fresh Evidence Motion.

PART IV - STATEMENT OF ISSUES, LAW & AUTHORITIES

33. The issues on the motion are the following:

- (1) Whether the appeal falls under section 6 of the CJA or in the alternative, section 193(1) (c) and no leave to appeal is required.
- (2) If it does not, whether leave should be granted pursuant to section 193(e) of the *BIA*, in that:
 - a.) SusGlobal satisfied the legal principles to reopen motion based on fresh evidence.
 - b.) 2017 Annual Report would have changed the results on the Original Motion.
 - c.) Whether the legal factors are satisfied for leave to appeal under s.193 (e).

Issue 1 – Appeal falls under section 6 of CJA or in the alternative, section 193 (c) of BIA and no is leave required.

34. SusGlobal submits that the appeal is governed by s.6 of the CJA or in the alternative s.193(c) of the BIA such that no leave to appeal is required.

35. The Order appointing the Receiver was pursuant to section 243 of the BIA and section 101 of the CJA. 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

⁴⁰ With regard to estimates and calculations, Vol.2, pg. 330, section 2.1.3 3), Vol.2, pg. 332, 2.3.4. pg. 333, section 2.3.7, Appendix I, pg. 472 to 474 (appendix I is not referred to in the Receiver's Report), Vol. 3, pg. 792 to 795, Vol. 3, pg. 814 to 815, and pg. 886 to 888. With regard to the allegations related to the Pinchin Report, Vol. 2, pg. 340, section 3.1.6, BDO letter, pg. 452, ExB and pg. 500, Email of BDO dated November 8, 2017, allegation re: half a Windrow on September 15, 2017, pg. 339, section 3.0.4 and Vol.2, pg. 474. Allegation related to the chart (never produced), Vol.2, pg. 500, BDO Email of November 8, 2017.

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.

36. 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 November 19th, 2018 within the applicable 30 day appeal period under the CJA.

37. In the alternative, if the appeal is governed by s.193(c), SusGlobal submits that the Original Motion was for damages claimed by it as a stranger to the Receivership, being the Purchaser of assets. The damages claimed are \$755,400.00 (inclusive of HST) caused by the willful or reckless or gross negligent, conduct of the Receiver during the Receivership Period. The dismissal of the Fresh Evidence Motion resulted in the same economic loss to SusGlobal. Therefore, the amount in issue on this appeal far exceeds the \$10,000.00 required under s.193(c) of the BIA such that no leave to appeal is required.

38. The Purchaser, not being a creditor or a debtor in the receivership, is entitled to a right of appeal if the assets purchased were not in accordance with the APA, the Order and ECA/EPA. As the central issue on the leave to appeal and Fresh Evidence Motion was the issue of Receiver's liability as a result of its conduct and economic loss sustained by SusGlobal was in excess of \$10,000.00 the threshold amount pursuant s.193 (c).

***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**

Issue 2 – In the alternative, Leave to Appeal should be granted

39. In the alternative, it is submitted that this is an appropriate case for leave to appeal should be granted.

40. The evidence demonstrates that it would be a miscarriage of justice if this matter was decided based on the incorrect estimates and calculations (and in fact, it is submitted intentionally) false evidence of Mr. Hamilton which was referred to by the Receiver in its Fourth Report and the Supplements.⁴¹

41. Mr. Hamilton's estimate and calculations were unnecessary and unreliable. He knew the exact figures from the 2016 Report and had knowledge that on average was much less than 2% (in the range of 18.8% over the one year period) with regard to the percentage of Biosolid Waste that was being used in the Compost Mixture for each Windrow.

42. Furthermore, it is submitted that the principle that the Court should avoid a miscarriage of justice should have been the governing factor on the Fresh Evidence Motion and the Judge failed to apply this principle as set out in the case law.

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

a) First, would the evidence, if presented at trial, probably have changed the results?

⁴¹ 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

- b) Second, could the evidence have been obtained before the trial by the exercise of reasonable diligence?

671112 Ontario Ltd. v. Sagaz Industries Canada Inc., (2001) SCC 59 para 20, 59-65

44. This test was first enunciated in *Scott v Cook, (1970)*, and in that case at para 13 Justice Grant stated:

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

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

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

[emphasis added]

Scott v Cook, (1970) CarswellOnt 253 para 13

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

Castlerigg Investments Inc. v. Lam 2 O.R. (3d) 216

Clayton v. British American Securities Ltd., (1934), 49 B.C.R. 28

46. The courts have also reiterated that the reasonable diligence requirement of the two-prong test will be relaxed in exceptional circumstances to avoid a miscarriage of justice.

Degroote v. Canadian Imperial Bank of Commerce, [1999] O.J. No. 2313 (Ont. C.A.).

a.) The 2017 Annual Report would have changed the result on the Original Motion

47. Justice McEwen in his Reasons for Decision on the Original Motion noted that overall, SusGlobal's motion failed due to its inability to produce credible and reliable evidence to support its claim of excess organic waste in the Tipping Building.⁴² However, this Court now has the 2017 Annual Report that includes the actual percentages (for various materials), to convert wet weight to dry weight, correctly is now available.

48. The 2017 Annual Report provides the accurate annual percentage on average by dry weight of 18.8% of Biosolid Waste used in the Compost Mixture to manufacture Compost A, that was actually processed during the Receivership Period. As a result, this Court now has the accurate and reliable information instead of hypothetical estimates. The correct information shows that 373 MT was never processed (by dry weight) which equals 1,492 MT by wet weight. This far exceeds the maximum of 150 MT (wet weight).⁴³

49. The Judge on the Original Motion relied upon the evidence of Mr. Hamilton, his estimates and calculations to discredit and disregard the Pinchin Report and SusGlobal calculations to find that there was no excess organic waste stored in the Tipping Building.

⁴² Reasons for Decision dated May 17, 2018 para 19

⁴³ As a result, the calculations performed by BDO cannot be accepted because they are inconsistent with the results accurate percentage as set out in the 2017 Annual Report see para 52-61 of the Reasons.

50. Furthermore, the 2017 Annual Report supports the analysis and is within range of the estimate provided by the Pinchin Report⁴⁴ that was alleged by the Receiver to have contained errors based on the alleged mistakes alleged by Mr. Hamilton.

51. Neither the Receiver nor Mr. Hamilton provided any evidence on the Fresh Evidence Motion to dispute the 2017 Annual Report and the mathematics that follow from that correct annual average percentage of Biosolid Waste used in the Compost Mixture for each Windrow, during the Receivership Period.

52. The evidence from the 2017 Annual Report leaves no doubt that the Receiver permitted the limit of 150 MT (by wet weight of waste) to be violated by more than 1,300 excess MT of Biosolid Waste (wet weight) above the ECA limit throughout the Receivership Period and as of September 15, 2017.⁴⁵

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

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

⁴⁴ It is submitted that it is with the fresh evidence and the Court can now place weight on the 1312 metric tonnes on the organic weight see para 37 and 46 of the Reasons. See ExB.vol.1, pg 265 – see Table 3.3.3-Pile Age and Volume Summary “*Tipping Building – 1312.5 MT*”

⁴⁵ The Original Motion Judge Mr. Justice McEwen found at para 23 as follows: “ I accept, however, that at some level, excess storage of organic waste could arguably establish a *prima facie* case of gross negligence or willful misconduct but that was not the case here.”

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

55. From January 9, 2018 to February 23, 2018 Mr. Hamaliuk requested analytical and other information from BDO in order to complete a number of aspects of the 2017 Report.

56. It was not until March of 2018, that Mr. Hamaliuk reviewed the 2016 Annual Report figures and turned his mind to calculate the percentages used by Astoria to calculate the dry weight of Biosolid Waste and the dry weight of Leaf and Yard Content used in the Compost Mixture to manufacture Compost A.

57. In addition, it was not until March 21, 2018 when the incoming and outgoing data was collated and summarized and shortly thereafter, when Mr. Hamaliuk did the calculations, that he realized the site was operating during 2017 at 18.8% (on an annual average percentage), by dry weight of Biosolid Waste in the Compost Mixture, and not the alleged 25% maximum.

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

c) The legal factors in determining Leave to Appeal under s.193 (e) are satisfied.

59. SusGlobal relies upon the legal submissions made in the factum on the motion in appeal no. C65512. This includes section 193(e) (see Issue 2(b) commencing at paragraph 108).

60. The legal factors required for leave to appeal are satisfied in this appeal. As this is a matter of public importance as the obligations and liability of a receiver that breaches the APA, the ECA/EPA and the Order appointing it as the receiver directly are in issue in this appeal.

61. The appeal also raises an issue with respect to the effect of an "As is, Where is" clause on a sale by a Receiver and whether this clause can provide a blanket immunity to Court Appointed Receivers who contravene the APA, the Order, and the EPA/ECA. The issue on appeal is also of significance to bankruptcy and commercial practice including receivers and their conduct.

62. The material evidence submitted by SusGlobal on the Original Motion for leave to sue the Receiver had already satisfied the evidentiary requirement of a *prima facie* case, for granting leave to sue the Receiver. The 2017 Annual Report on the fresh-evidence motion clearly indicated that the material evidence of Mr. Hamilton could not be relied upon and raised genuine issues of fact and law.

63. The Fresh Evidence Decision is final and the Receiver's failure to comply with the Order, EPA/ECA and the APA, caused SusGlobal significant expense to clean up the excess Biosolid Waste in the Tipping Building and in order for SusGlobal to be in compliance with the EPA/ECA. SusGlobal could not manufacture Compost A for a number of months. As a result, SusGlobal sustained damages.

64. 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 APA, the Order and the ECA/EPA once the Receiver decided to operate the business.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.* 2016 ONCA 225
2. *Crate Marine Sales Ltd., Re*, 2016 ONCA 140
3. *Trimor Mortgage Investment Corp. v. Fox* (2015) ABCA 44
4. *671112 Ontario Ltd. v. Sagaz Industries Canada Inc.*, (2001) SCC 59
5. *Scott v Cook*, (1970) CarswellOnt 253
6. *Castlerigg Investments Inc. v. Lam* 2 O.R. (3d) 216
7. *Clayton v. British American Securities Ltd.*, (1934), 49 B.C.R. 28
8. *Degroote v. Canadian Imperial Bank of Commerce*, [1999] O.J. No. 2313 (Ont. C.A.).
9. *Power consolidated (China) Pulp Inc. v. British Columbia Resources Investment* 1988, 19 C.P.C. (3d)
10. *Med Finance Co.S.A v. Bank of Montreal* (1993), 22 C.B.R (3d) 279
11. *Farm Credit Canada v. Gidda* 2015 CarswellBC 1414

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.
-

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).

BUSINESS DEVELOPMENT BANK OF CANADA
Applicant

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

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

**COURT OF APPEAL FOR
ONTARIO**

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE APPELLANT

SOLMON ROTHBART GOODMAN LLP

Barristers
375 University Avenue
Suite 701
Toronto, Ontario
M5G 2J5

Melvyn L. Solmon (LSUC# 16156J)

msolmon@srglegal.com

Tel: 416-947-1093 (Ext. 333)

Fax: 416-947-0079

Lawyers for the appellant, SusGlobal Energy Belleville Ltd.

File Number: 17987

RCP-E 4C (May 1, 2016)