

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BUSINESS DEVELOPMENT BANK OF CANADA

Applicant

-and-

ASTORIA ORGANIC MATTERS LTD. and ASTORIA ORGANIC MATTERS CANADA LP

Respondents

**FACTUM OF THE COURT APPOINTED RECEIVER
(returnable on August 24, 2017)**

Date: August 21, 2017

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capacity as Court appointed receiver of
Astoria Organic Matters and Ltd. and Astoria
Organic Matters Canada LP***

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BETWEEN:

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FACTUM OF THE COURT-APPOINTED RECEIVER

PART I: OVERVIEW

1. Pursuant to the Order of the Honourable Justice Hailey dated April 13, 2017 (the “**Appointment Order**”), BDO Canada Limited was appointed as receiver (in such capacities, the “**Receiver**”), without security, of all of the assets, undertakings and property (collectively, the “**Property**”) of each of the Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP (“**Astoria Canada**”), which Appointment Order was obtained on the application of the Applicant, the Respondents’ largest secured creditor.
2. Under the terms of the Appointment Order, the Receiver was empowered and authorized to, *inter alia*, market any or all of the Property, including developing a formal sale process to advertise and solicit offers in respect of the Property and negotiate such terms

and conditions of sale as the Receiver, in its sole discretion, deems appropriate (the “**Sale Process**”).

3. The Sale Process conducted by the Receiver has been Court approved and the Receiver conducted the Sale Process in accordance with the Appointment Order. The Sale Process garnered interest from several parties and resulted in three (3) Qualified Bids for the Property. The Sale Process was conducted in a fair, transparent and robust manner, and was geared towards maximizing the realization of the Respondents’ assets. Most importantly, the resulting Sale Transaction is on fair, commercially reasonable terms and represents the best offer for the Property subject to the Asset Purchase Agreement.
4. The Sale Process has culminated in the Asset Purchase Agreement, which the Receiver has accepted, subject to approval by this Honourable Court and satisfaction of the terms and conditions contained therein.
5. A critical term of the Asset Purchase Agreement, is the Receiver obtaining the Approval and Vesting Order in substantially the form attached at Tab 3 of the Motion Record of the Receiver, by no later than August 31, 2017.
6. This factum, filed by the Receiver, is in support of a Court order approving:
 - (a) the Sale Transaction as contemplated by the Asset Purchase Agreement, as amended, and the issuance of the Approval and Vesting Order in the form attached Tab 3 to the Motion Record of the Receiver vesting the Purchased Assets to the Purchaser free and clear of any and all encumbrances;

- (b) the First Report, the Second Supplement and the Confidential Supplement (each as defined below) and the activities of the Receiver described therein;
 - (c) a sealing order with respect to the contents of the Confidential Supplement and the Confidential Appendix to the Second Supplement.
7. Three (3) trade suppliers (collectively, the “**Construction Lien Claimants**”), comprising of Fitzgibbon Construction Limited (“**Fitzgibbon**”), Ken Tulloch Construction Ltd. (“**Ken Tulloch**”) and Van Soelen Landscaping Ltd. (“**Van Soelen**”), have registered construction liens against Astoria Canada’s leasehold interest (collectively, the “**Construction Liens**”) in the premises municipally known as 704 Phillipston Road, Belleville, Ontario (the “**Premises**”). The Construction Lien Claimants have also registered their Construction Liens against the freehold interest of 1684567 Ontario Inc. (the “**Landlord**”) in the Premises.
 8. Fitzgibbon and VanSoelen have advised the Receiver that they oppose the current form Approval and Vesting Order as it relates to the vesting-off of the Construction Liens as against the Landlord on the basis that the Respondents and the Receiver do not have a legal interest in the freehold interest of the Premises and that the Landlord is a purported “Owner” under the *Construction Liens Act* (Ontario) (the “**CLA**”) such that the Landlord is jointly liable for unpaid trade services rendered by the Construction Lien Claimants to the Respondents.
 9. The Receiver is of the view the Construction Liens do not attach to, and thus were improperly registered against, the Landlord’s freehold interest in the Premises on account of the Construction Lien Claimants’ failure to deliver to the Landlord the prior written

notices of their improvements to the Premises as required pursuant to section 19 of the CLA.

10. As the activities of the Receiver to date have been largely directed towards the Sale Process, The Receiver is seeking an order approving the First Report, the Second Supplement and the Confidential Supplement and the activities of the Receiver described in each of the foregoing reports, all of which were served and filed in support of this motion.
11. The Receiver is also seeking a sealing order in respect of the commercially sensitive information contained in the Confidential Supplement and the Confidential Appendix to the Second Supplement, which contain, among other things, a summary of the various offers obtained during the Sale Process and the commercial terms of the Asset Purchase Agreement. Not only is such an order often sought and granted in receivership proceedings, but this order is necessary to preserve the Respondents' negotiating position should the Sale Transaction not close for any reason.
12. Capitalized terms used herein which are not otherwise defined herein shall have meanings ascribed to them in the First Report and Second Supplement.
13. The Receiver seeks the advice and direction from this Honourable Court with respect to the objections of Fitzgibbon and VanSoelen and its request that the vesting off of the Construction Liens as against the Landlord be carved out of and/or excluded from the Approval and Vesting Order.

14. If the Approval and Vesting Order is amended to accommodate the aforementioned carve out, the Sale Transaction will not proceed and the Asset Purchase Agreement will be terminated.

PART II: FACTS

15. The facts relating to this motion are more fully set out in the First Report, the Confidential Supplement and the Second Supplement.

First report of the Receiver dated August 16, 2017 [First Report].

Confidential supplement to the First Report dated August 16, 2017 [Confidential Supplement].

Second Supplement to the First Report dated August 21, 2017 [Second Supplement].

Background

16. The Respondents operate an organic recycling facility and waste transfer station from the Premises. The Respondents processes organic waste into compost for the agricultural and landscaping markets. The Respondents utilize the Gore ® Cover System, an environmentally friendly composting process that transforms a wide range of organic waste into compost within eight (8) weeks.

First Report at para. 1.1.3.

17. Astoria Canada and the Landlord entered into a 20 year lease dated June 24, 2013, plus tenant options to extend the lease in five (5) year increments for a total possible term of up to 30 years less a day (the “**Land Lease**”).

First Report at para. 1.1.4.

Confidential Appendix to the First Report.

18. The Respondents have continued to operate the business in the normal course during the pendency of these receivership proceedings under the supervision of the Receiver while the Receiver carried out the Sale Process. The Respondents currently has 8 employees.

First Report at para. 2.1.1.

19. Prior to the receivership proceedings, the Respondents had engaged a thirty party advisory in November 2016 to assist it will

First Report at para. 1.1.11.

Primary Indebtedness

20. The Respondents' are primarily indebted to Business Development Bank of Canada pursuant to the terms and conditions of a Letter of Offer dated November 16, 2015, as amended by letter agreement dated October 14, 2016 (the "**Offer Letter**"). The Respondents and BDC subsequently entered into a Forbearance and Standstill Agreement dated March 10, 2017 (together with the Offer Letter, the "**BDC Loan Agreement**"). Pursuant to the BDC Loan Agreement, BDC advanced to the Respondents a loan in the total principal sum of \$7.1 million. The obligations under the BDC Loan Agreement are guaranteed by and secured by substantially all of the assets of the Respondents.

First Report at paras. 1.1.7 and 1.1.10.

21. As set out in the First Report and the Confidential Supplement, it is clear from the offers received under the Sale Process and the Sale Transaction contemplated by the Asset Purchase Agreement that the overall realisations will be insufficient to repay the indebtedness to BDC, and the other secured creditors for that matter, and that it is not expected that there will be any distribution to Respondents' unsecured creditors.

Receivership Proceedings and Sale Process

22. Following various defaults by the Respondents under the BDC Loan Agreement, and on application by BDC returnable April 13, 2017, the Receiver was appointed by the Court as receiver of the Respondents.
23. As at the date of the Appointment Order, two of the Construction Liens were registered against the Respondents and the Landlord totaling approximately \$750,000. Following the Appointment Order, the third Construction Lien was registered bring the total to approximately \$1.05 million.

First Report, *supra*, at para. 1.1.11.

24. In granting the Appointment Order, the Court authorized the Receiver to carry out the Sale Process in accordance with the terms set out in Schedule B to the Appointment Order.

The Order of the Honourable of Justice Hainey dated April 13, 2017 [Appointment Order] at paras. 3 and 25, and Schedule B.

25. Following its appointment under the Appointment Order, the Receiver developed a formal marketing and sale process in accordance with the Court-approved Marketing Process set out in Schedule B to the Appointment Order.

First Report at para. 3.1.

26. From the date of the Receiver was appointed and delivered the teaser letters to prospective purchasers, the Receiver facilitated diligence requests by various interested parties who expressed an interest in the Property and the Respondents' business. In line with the Appointment Order, the steps and timelines taken by the Receiver were subsequently formalized in the Sale Process which was distributed to prospective purchasers that expressed an interest in the Property.

First Report at para. 3.1.3.

27. Under the terms of the Sale Process, the Receiver provided a deadline of June 9, 2017 for interested parties to submit binding offers (the “**Bid Deadline**”). Prior to the Bid Deadline, various interested parties who executed and delivered NDAs to the Receiver made various additional due diligence requests regarding additional information in respect of operations, compliance with the MOE ECAs, and the Land Lease. As a result, the Receiver agreed to extend the Bid Deadline to June 15, 2017, and notified the interested parties of same, in order to facilitate and respond to such requests.

First Report, *supra*, at paras. 3.1.3 and 3.1.4.

Asset Purchase Agreement

28. The Asset Purchase Agreement was entered into between the Receiver, the Purchaser and, for the purposes of section 8.18 therein, SusGlobal Energy Canada Corp., which Asset Purchase Agreement was subsequently amended by the parties thereto pursuant to an amendment to the Asset Purchase Agreement dated August 1, 2017.

First Report at para. 3.2.

29. An unredacted copy of the Asset Purchase Agreement is attached to the Confidential Supplement. A redacted copy of the Asset Purchase Agreement is attached as Appendix H to the First Report. A summary of the key terms is as follows:

- (a) The Sale Transaction is for substantially all of the Property of the Respondents, including the Respondents’ interest in the Land Lease and the MOE ECAs but excluding the Excluded Assets, including capital leases;
- (b) A portion of the Purchaser Price contemplates, in addition to an upfront cash payment, (i) the issuance of common stock in SusGlobal Energy Corp. in favour

the Receiver to be held for the benefit of the Respondents' creditors with provable claims, and (ii) the purchase of the Respondents' accounts receivable as at the Time of Closing for an amount equal to 70% of the value of such accounts receivable;

- (c) The Purchaser has paid a substantial deposit towards the Purchase Price set out in the Asset Purchase Agreement. The deposit is only refundable if the Sale Transaction does not close because the conditions to closing are not satisfied on or before August 31, 2017, including obtaining the Approval and Vesting Order;
- (d) The proposed closing date of the Sale Transaction is September 5, 2017, provided that all conditions precedent are satisfied on or before August 31, 2017;
- (e) BDC has consented to the Sale Transaction;
- (f) No other stakeholder opposes the Sale Transaction, other than in respect to certain of the relief sought by the Receiver in respect of the Approval and Vesting Order; and
- (g) The Purchased Assets are being sold on an "as is, where is" basis.

Appendix H to the First Report.

Confidential Supplement.

- 30. The Receiver understands that the Purchaser will continue to operate certain elements of the Respondents' business from the Premises, which will preserve the employment of those employees who accept offers of the employment from the Purchaser.

Land Lease

31. Astoria Canada and the Landlord entered into the Land Lease, the terms of the which are subject to a confidentiality provision, pursuant to which the Landlord agreed to lease a portion of the Premises to Astoria Canada.

Second Supplement at para. 2.1.3.

32. A review of the terms of the Land Lease do not suggest the relationship between the parties thereto is anything more than a tenant-landlord relationship.

Second Supplement at paras. 2.2.1 – 2.1.3 and the Confidential Appendix B to the Second Supplement.

Construction Liens

33. As previously mentioned, the Construction Lien Claimants registered the Construction Liens against the Respondents' leasehold interest and the Landlord on account of services rendered to the Respondents pursuant to service agreements entered into between one or both of the Respondents.

Second Supplement at para. 1.0.2 and para. 2.2.3.

34. The Receiver is not aware or in possession of any contracts, for service or otherwise, between the Landlord and any of the Construction Lien Claimants that relate to the services which are the subject of the Construction Liens. To the best of the Receiver's knowledge all services were made at the sole request of the Respondents and all related contracts and/or invoices were solely as between the Respondents and the applicable Construction Lien Claimants, copies of which are attached at Appendices C, D and E to the Second Supplement.

Second Supplement at paras. 2.2.7 – 2.2.8 and Appendices C, D and E.

35. As of the date hereof, the Receiver has been advised by the Landlord that, to the best its knowledge, it did not receive the required prior written notice from the Construction Lien Claimants in order to enforce a lien against a landlord, which notice is required under section 19(1) of the CLA (the “**Section 19 Notice**”).

Second Supplement at paras. 2.2.4 - 2.2.5.

Receiver’s Recommendations

36. The Receiver is of the view that there is no basis whatsoever to support that the Construction Liens were properly registered as against the Landlord such that vesting off of the Construction Liens as against the freehold interest in the Premises should be carved out of the relief sought by the Receiver in this motion.
37. For the following reasons, the Receiver recommends that the court issue an order approving the Sale Transaction and vesting in the Purchaser all of the rights, title and interests in and to the Purchased Assets:
- (a) The Purchased Assets were actively marketed for sale by the Receiver and the offer from the Purchaser is the best offer received in the Sale Process;
 - (b) The Sale Process was approved by the Court and it was carried out by the Receiver in accordance with its terms as approved by the Court;
 - (c) The Purchaser intends to continue to operate from the Premises as a going concern, which will preserve employment for certain of the Respondents’

employees, as well as provide the Landlord with a continued source of revenue under the Lease;

- (d) The principal economic stakeholders in the receivership proceeds have either provided to the Receiver their consent to or confirmation that they do not oppose the Sale Transaction; and
- (e) The Construction Lien Claimants failed to deliver the prescribed Section 19 Notice to the Landlord in accordance with CLA and there is no contractual relationship as between any of the Construction Lien Claimants and the Landlord that would suggest that the Landlord requested an improvement be made to the Premises in respect of the services rendered by the Construction Lien Claimants.

Confidential Information

- 38. The Receiver is of the view that the information contained in the Confidential Supplement and the Confidential Appendix to the Second Supplement should be filed with the Court on a confidential basis, until further order of the Court, so that the value of the offers is not made publicly available should the Sale Transaction not close for any reason. In addition, and in light of the terms of the Land Lease, the Receiver is also of the view that the Land Lease should be filed with Court on a confidential in order to comply with contractual terms contained therein. As summary of the offers received is provided for in the Confidential Supplement.
- 39. In addition, the Asset Purchase Agreement has been redacted to exclude the purchase price and the amount of the deposit paid. The Receiver respectfully requests that this documents be filed with the Court on a confidential basis until the Sale Transaction

closes or further order of this Court, as it is the Receiver's view that the availability of this information may negatively impact future realizations on the sale of the Purchased Assets in the event that the Sale Transaction does not close for any reason. A copy of the unredacted Asset Purchase Agreement is provided in Confidential Supplement.

40. The Receiver believes that no stakeholder will be prejudiced if the information is sealed until the Sale Transaction has closed.

PART III: THE ISSUES

41. The issues to be resolved on this motion are as follows:

- (a) *Should the Court approve the Sale Transaction contemplated by the Asset Purchase Agreement?*
- (b) *Should this Court authorize and approve the execution by the Receiver of the Asset Purchase Agreement?*
- (c) *Should the Court grant the Approval and Vesting Order in the form attached at Tab 3 to the Motion Record, which includes a vesting off of the Construction Liens as against the freehold interest?*
- (d) *Should this Court approve the First Report, the Second Supplement and the Second Supplement and the activities of the Receiver described in the the First Report, the Second Supplement and the Confidential Report?*

- (e) *Should grant an order sealing the Confidential Supplement and the Confidential Appendix to the Second Supplement in light of the commercially sensitive nature of the information contained therein?*

PART IV: THE LAW AND ARGUMENT

This Sale Transaction should be approved

42. The Receiver respectfully submits that the Property was marketed and the Asset Purchase Agreement was negotiated in a fair, transparent and commercially reasonable manner, consistent with the Appointment Order issued by the Court. The Sale Transaction is commercially reasonable and is the best result of the robust, fair and transparent Sale Process. The Receiver respectfully submits that the legal and commercial requirements for this Court to approve the Sale Transaction have been met.
43. In *Royal Bank v. Soundair Corp.*, the Ontario Court of Appeal summarized the factors a court should consider when assessing whether to approve a transaction to sell assets:
- (a) It should consider whether court appointed officer has made sufficient effort to get the best price and has not acted improvidently;
 - (b) It should consider the interests of all parties;
 - (c) It should consider the efficacy and integrity of the process by which offers are obtained; and
 - (d) It should consider whether there has been unfairness in the working out of the process.

Royal Bank of Canada v. Soundair Corp., 1991 CarswellOnt 205 ["Soundair"] at para. 16, and see also: *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611 (CanLII) at para. 40; *BDC v. Marlwood Golf & Country Club*, 2015 ONSC 3909 (CanLII) ["Marlwood"] at para. 12; and *GE Canada Real Estate*

Financing Business Property Company v. 1262354 Ontario Inc., 2014 ONSC 1173 (CanLII) at paras. 38-41.

44. As observed by the Manitoba Court in *Shape Foods Inc.*, the *Soundair* case outlined two basic principles for the Court to consider in reviewing the sale of assets: (i) a court should place a good deal of confidence in the actions taken and the opinions formed by the Receiver; (ii) a court should be reluctant to second-guess, with the benefit of hind-sight, the considered business decisions of the Receiver. Unless the contrary is clearly shown, the Court should assume the Receiver is acting in good faith and properly.

Shape Foods Inc. (Receiver of), Re, 2009 MBQB 171, 2009 CarswellMan 312 at para. 21.

45. Furthermore, in reviewing a receiver's decision to accept an offer, the courts exercise considerable caution and grant considerable deference to the receiver's decision. As the Court of Appeal for Ontario in *Regal Constellation Hotel Limited* stated:

"Although the Courts will carefully scrutinize the procedure followed by a receiver, they rely upon the exercise of their appointed receivers, and are reluctant to second guess the considered business decisions made by the receiver in arriving at its recommendations. The Court will assume that the receiver is acting properly unless the contrary is clearly shown."

Regal Constellation Hotel Ltd., Re, 2004 CarswellOnt 2653 at para. 23

(a) Effort to Obtain the Best Price

46. In its effort to obtain the best price, the Receiver acted at all times in accordance with the Appointment Order issued by the Court. In the Receiver's view, the market for the Purchased Assets was sufficiently canvassed and parties who may have an interest were given a reasonable opportunity to review the opportunity and make an offer.

47. Offers received after the Bid Deadline has passed or after an agreement of purchase and sale has been signed are relevant to consider on an approval motion only to the extent that they show improvidence. If the offer does not show improvidence, the offer should not be considered on the approval motion
48. The Receiver respectfully submits that it has taken all reasonable steps in attempting to obtain the best price, has followed orders issued by the Court and has not acted improvidently. The Receiver believes the Purchase Price is reasonable in the circumstances.

(b) Interests of the Parties

49. The primary interest in a receivership is that of the creditors of the debtor. The examination of the Sale Process, through the lens of the *Soundair* test, is to primarily be conducted from the perspective of those for whose benefit the Sale Process has been conducted. In *Soundair*, Justice Galligan referred to creditors, the debtor and the successful purchaser, who has negotiated an agreement with a court appointed officer, as parties whose interests ought to be considered when assessing a sale process.

Soundair at paras. 39 & 41.

50. As stated above, the Sale Transaction represents the best offer for the Purchased Assets attainable after the Court approved sales process has been conducted. Further, BDC, one of the primary economic stakeholders in the receivership proceedings, has consented to the Sale Transaction. Lastly, all stakeholders were provided with notice of the Sale Process and this motion to approve the Sale Transaction, and save and except for the limited objection raised by Fitzgibbon and Van Soelen with respect to the form of the Approval and Vesting Order, none have objected.

(c) Efficacy and Integrity of the Sale Process

51. The Receiver marketed the Property and business of the Respondents and sought bids from interested parties fairly and in accordance with the procedures and process approved by the Appointment Order. All interest parties were given ample opportunity to participate in the Sale Process.
52. The Sale Process was a fair and effective process for maximizing realization of the Purchased Assets. The Purchased Assets have been appropriately marketed in accordance with the Appointment Order and the terms of the court-approved Sale Process, and the terms of the Asset Purchase Agreement are fair and commercially reasonable; the integrity of the Sale Process has been maintained throughout.

(d) No Unfairness in working out the Sale Process

53. It is critical that prospective purchasers know that if they acted in good faith, bargain seriously with a receiver and enter into an agreement with the receiver, the Court will not lightly interfere with the commercial judgment of that receiver. Parties who enter into agreements with receivers, following appropriate court-approved sale process, should expect that their bargain will be confirmed by the Court.

Soundair, at paras. 46 &49.

54. The Sale Process adopted by the Receiver in coming to the Sale Transaction was a just and fair one. The Receiver made proper and sufficient efforts to get the best offer that it could for the Purchased Assets. The Receiver followed a Court-approved sale process which was not opposed by any party when approvals thereof were sought, and was fair to all persons who had indicated an interest in bidding on the Purchased Assets. The Receiver had properly carried out the mandate it was given.

55. For the foregoing reasons, the Receiver respectfully submits that the Sale Transaction is consistent with the *Soundair* principles and respectfully requests that it be approved by this Court.

The Asset Purchase Agreement should be approved

56. The Asset Purchase Agreement is the result of the Court-approved Sale Process and represents a fair, commercially reasonable transaction. For these reasons expressed above with respect to the Sale Transaction, the Receiver respectfully submits that the Asset Purchase Agreement is fair and reasonable. Accordingly, the Receiver respectfully requests this Court approve the Asset Purchase Agreement.

The Approval and Vesting Order should be granted

57. The Asset Purchase Agreement includes an order vesting the Purchased Assets in the Purchaser as a closing deliverable, and the Receiver therefore seeks the Approval and Vesting Order from this Court to facilitate the closing of the Sale Transaction.

58. All parties with known interest in the Purchased Assets whose interests would be affected by the Approval and Vesting Order sought have been served with notice of this motion. Moreover, the terms of the Approval and Vesting Order sought provide that only the Respondents' and the Receiver's interest in and to the Purchased Assets will be transferred; accordingly, any proprietary interest of another party in any of the Purchased Assets would not be transferred to the Purchaser, or be vested out, should that proprietary interest ultimately be determined to be valid.

59. As mentioned above, the Receiver is of the view that the vesting off of the Construction Liens from the both the leasehold and freehold interests is reasonable in the circumstances; given that the Construction Lien Claimants appear to have improperly registered against the freehold interest with any legal entitlement to do so.

60. The Receiver respectfully submits that the Approval and Vesting Order in the form attached at Tab 3 to the Motion Record should be granted.

The Court should vest off the Construction Liens improperly registered against the Landlord in respect of the freehold interest

61. Where the owner in an owner-contractor relationship is the tenant to the premises improved by the contractors supply or services, subsection 19(1) of the CLA requires the contractor to give the landlord of such premises prior written notice of such supply or services in order for any lien arising therefrom to attach to the landlord's interest in the premises:

“Where owner's interest leasehold

19. (1) Where the interest of the owner to which the lien attaches is leasehold, the interest of the landlord shall also be subject to the lien to the same extent as the interest of the owner if the contractor gives the landlord written notice of the improvement to be made, unless the landlord, within fifteen days of receiving the notice from the contractor, gives the contractor written notice that the landlord assumes no responsibility for the improvement to be made.”

62. In *1276761 Ontario Ltd. v. 2748355 Canada Inc.* (“**GRM Contracting**”), the Ontario Divisional Court (the “**ODC**”) held that written notice is mandatory for purposes of CLA subsection 19(1). Although the case law had previously been split on whether “notice events” could substitute for actual written notice, the ODC held that only written notice could give rise to a lien on a landlord's interest in a property:

“26 . . . Further, we conclude that the interpretation in the case law that the notice requirement contemplated in the statute may be fulfilled by “notice events” alone, without a document providing notice in writing, does not conform with the statute. Notice events may only supplement the notice provided.”

1276761 Ontario Ltd. v. 2748355 Canada Inc., 2006 Carswell 5392, [2006] O.J. No. 4740 (Ont. S.C.J. (Div. Ct)).

63. GRM Contracting has been followed by the Ontario Superior Court of Justice (the “Ontario SCJ”) in *Flexible Contractors Inc. v. 1408023 Ontario Inc.* (“*Flexible Contractors*”) and also noted (in *obiter*) as authority by the Ontario SCJ in *Industrial Refrigerated Systems Inc. v. Quality Meat Packers Ltd.*

Flexible Contractors Inc. v. 1408023 Ontario Inc., 2012 CarswellOnt 12912, 2012 ONSC 5837 (Ont. S.C.J.) [*Flexible Contractors*], at paras. 11 to 16.

Industrial Refrigerated Systems Inc. v. Quality Meat Packers Ltd., 2015 CarswellOnt 10645, 2015 ONSC 4545 (Ont. S.C.J.), at paras. 27 and 28.

64. If a landlord is also an owner for purposes of the CLA, notice under subsection 19(1) would not be required. The definition of “owner” in the CLA reads:

““owner” means any person, including the Crown, having an interest in a premises at whose request and,

- (a) upon whose credit, or
- (b) on whose behalf, or
- (c) with whose privity or consent, or
- (d) for whose direct benefit,

an improvement is made to the premises but does not include a home buyer;”

65. The threshold question is whether the improvements made by the Construction Lien Claimants were made “at the request of” the landlord of the Premises. The landlord was not a party to any contract for the service and/or supply resulting in such improvements, and the lease to the Premises did not contemplate such improvements, let alone require

that they be done. We are not aware of any case where a landlord has been found to be an owner under such circumstances.

66. There are a number of cases where landlords were found not to be owners even though the lease in question contemplated that the tenant would make improvements and there was a significant degree of awareness on the landlord's part as to the details of the improvements being effected by the tenant.

Pinehurst Woodworking Co. v. Rocco, 1986 CarswellOnt 669 ["*Pinehurst*"], at paras. 11 to 16.

Veneri Engineering Ltd. v. Zonenward Leasex Management Inc., 1994 CarswellOnt 943, [1994] O.J. No. 1649 (Ont. C.J. [Gen. Div.]), at paras. 41 to 43.

Southern Plumbing Ltd. v. Quality Craft Interiors Ltd., 1994 CarswellOnt 951, [1994] O.J. No. 2109 (Ont. C.J. [Gen. Div.]).

Sloot Construction-Design Ltd. v. North Maple Mail Ltd., 1999 CarswellOnt 4174, [1999] O.J. No. 4927 (Ont. S.C.J.) ["*Sloot Construction*"], at paras. 17 to 28.

Winnen Construction Group Conditioning Ltd. v. Oxford MRC Inc., 2002 CarswellOnt 3593, 118 A.C.W.S. (3d) 11 (Ont. S.C.J.) ["*Winnen Construction*"], at paras. 40 to 45.

Lincoln Mechanical Contractors v. Cardillo, 2011 ONSC 664, 2011 CarswellOnt 493 (Ont. S.C.J.) ["*Lincoln Mechanical*"], at paras 16 to 26.

67. In *Regional Plumbing & Heating Ltd. v. Ann-Rob Properties Ltd.* ("**Regional Plumbing**"), the Ontario Supreme Court of Justice, High Court of Justice found an landlord to be a statutory owner. It should be noted, however, that the court in *Regional Plumbing* did not consider the ODC's decision in *Pinehurst* from earlier the same year. It should also be noted that the Ontario SCJ considered *Regional Plumbing* when reaching the opposite conclusion (and following *Pinehurst*) in *Winnen Construction*.

Regional Plumbing & Heating Ltd. v. Ann-Rob Properties Ltd., 1986 CarswellOnt 786, [1986] O.J. No. 1460 (Ont. S.C.J. [H.C.J.]).

Winnen Construction, at para. 42.

68. In *Muskoka Minerals & Mining Inc. v. Gorge Holdings Inc.*, the Ontario SCJ found a landlord to be a statutory owner under the CLA, but only because the landlord was a

party to and personally liable under the contract for supply from which the lienable debt arose.

Muskoka Minerals & Mining Inc. v. Gorge Holdings Inc., 2016 CarswellOnt 8596, 2016 ONSC 3320 (Ont. S.C.J.), at paras. 23 to 26.

69. The Receiver submits that, based on the above cases, the landlord of the Premises is not an owner for purposes of the CLA, and thus a notice pursuant to subsection 19(1) of the CLA was required. Since no such notice was sent by any of the Construction Lien Claimants, the Construction Liens Claimants' registrations on title to the Premises against the landlord's interest therein should be discharged.
70. If the Construction Lien Claimants' registrations on title to the Premises are not discharged in their entirety, the Sale Transaction will not close to the detriment of many stakeholders.
71. The Court power to order the discharge of a lien and that any registration in respect thereof be vacated is found in subsection 47(1) of the CLA.
72. In each of *Flexible Contractors*, *Sloot Construction* and *Lincoln Mechanical*, the issue of whether a lien attached to a landlord's interest was decided in a landlord's favour explicitly on a summary basis.

Flexible Contractors, at paras. 1 to 5 and 34.

Sloot Construction, at paras. 7 to 9.

Lincoln Mechanical, at paras. 26 and 32 to 34.

The Court should approve the First Report, the Second Supplement and the Confidential Supplement and the activities of the Receiver described therein

73. The primary purpose of this receivership has been to facilitate the orderly sale of the Respondents' business and assets. With closing of the Sale Transaction, should this Court see fit to approve it, a substantial step towards that primary purpose will be satisfied. The activities of the Receiver since its appointment, as set out in detail in the First Report and the Second Supplement, were all necessary and undertaken in good faith in furtherance of the Receiver's duties and powers pursuant to the Appointment Order and the Sale Process. The Receiver therefore respectfully submits that such activities should be approved.

The Court should order the sealing of the Confidential Supplement and the Confidential Appendix to the Second Supplement

74. The Supreme Court of Canada enunciated the test to be considered when determining whether to grant a sealing order in *Sierra Club of Canada v. Canada (Minister of Finance)*. A sealing order should be granted where: (i) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order outweigh its deleterious effects.

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41, at para. 53.

75. Sealing orders with respect to offers to purchase assets and resulting sale agreements have been granted in receivership proceedings pending the closing of the transaction.

Marlwood, at para 10.

76. As stated more fully above, the Receiver is of the view that the summary of offers and the unredacted Asset Purchase Agreement, included in the Confidential Supplement, should be filed with the Court on a confidential basis until the Sale Transaction has closed or further order of this Court, so that the information contained therein is not made publicly

available should the Sale Transaction not close for any reason. The Receiver is also of the view that the Confidential Appendix to the Second Supplement, which contains the Land Lease, should be filed with the Court on a confidential basis until further order of this Court, so as to not breach the terms of the confidentiality provisions contained in the Land Lease. The Receiver believes that no stakeholder will be prejudiced if the information is sealed until the Sale Transaction has closed and further order of the Court is made, as the case may be.

77. The Receiver respectfully submits that the request for this order is in accord with the principles enunciated in *Sierra Club of Canada* and humbly requests the court to grant the sealing of the Confidential Supplement and the Confidential Appendix to the Second Supplement.

PART V: RELIEF REQUESTED

78. For the foregoing reasons, the Receiver respectfully requests that this Court grant an order:
- (a) approving the Sale Transaction contemplated by the Asset Purchase Agreement;
 - (b) authorizing and approving the execution by the Receiver of the Asset Purchase Agreement;
 - (c) authorizing and directing the Receiver to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Sale Transaction and for the conveyance of the Purchased Assets to the Purchaser;
 - (d) vesting in the Purchaser the Receiver's, if any, and the Debtors' right, title and interest in and to the Purchased Assets;

- (e) approving the First Report, the Second Supplement and the Supplement Confidential and the activities of the Receiver described in each of the First Report, the Second Supplement and the Supplement Confidential; and
- (f) sealing (i) the Confidential Supplement pending closing of the Sale Transaction or further order of the Court, and (ii) the Confidential Appendix to the Second Supplement pending further order of the Court.

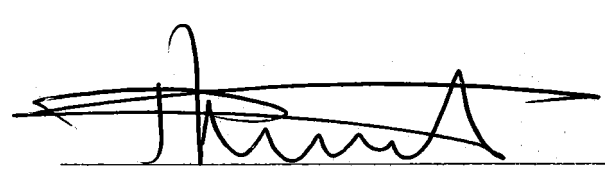
79. Such further and other relief as this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

August 21, 2017



Sam Babe (LSUC No. 49498B)



Kyle B. Plunkett (LSUC No. 61044N)

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

SCHEDULE A**Case Law:**

1. *Royal Bank of Canada v. Soundair Corp.*, 1991 CarswellOnt 205.
2. *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611 (CanLII).
3. *BDC v. Marlwood Golf & Country Club*, 2015 ONSC 3909 (CanLII).
4. *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, 2014 ONSC 1173 (CanLII).
5. *Shape Foods Inc. (Receiver of), Re*, 2009 MBQB 171, 2009 CarswellMan 312.
6. *Regal Constellation Hotel Ltd., Re*, 2004 CarswellOnt 2653.
7. *1276761 Ontario Ltd. v. 2748355 Canada Inc.*, 2006 Carswell 5392, [2006] O.J. No. 4740 (Ont. S.C.J. (Div. Ct)).
8. *Flexible Contractors Inc. v. 1408023 Ontario Inc.*, 2012 CarswellOnt 12912, 2012 ONSC 5837 (Ont. S.C.J.).
9. *Industrial Refrigerated Systems Inc. v. Quality Meat Packers Ltd.*, 2015 CarswellOnt 10645, 2015 ONSC 4545 (Ont. S.C.J.).
10. *Pinehurst Woodworking Co. v. Rocco*, 1986 CarswellOnt 669.
11. *Venneri Engineering Ltd. v. Zonenward Lease Management Inc.*, 1994 CarswellOnt 943, [1994] O.J. No. 1649 (Ont. C.J. [Gen. Div.]).
12. *Southern Plumbing Ltd. v. Quality Craft Interiors Ltd.*, 1994 CarswellOnt 951, [1994] O.J. No. 2109 (Ont. C.J. [Gen. Div.]).
13. *Sloot Construction-Design Ltd. v. North Maple Mall Ltd.*, 1999 CarswellOnt 4174, [1999] O.J. No. 4927 (Ont. S.C.J.).
14. *Winnen Construction Group Conditioning Ltd. v. Oxford MRC Inc.*, 2002 CarswellOnt 3593, 118 A.C.W.S. (3d) 11 (Ont. S.C.J.).
15. *Lincoln Mechanical Contractors v. Cardillo*, 2011 ONSC 664, 2011 CarswellOnt 493 (Ont. S.C.J.).
16. *Regional Plumbing & Heating Ltd. v. Ann-Rob Properties Ltd.*, 1986 CarswellOnt 786, [1986] O.J. No. 1460 (Ont. S.C.J. [H.C.J.])A.

17. *Muskoka Minerals & Mining Inc. v. Gorge Holdings Inc.*, 2016 CarswellOnt 8596, 2016 ONSC 3320 (Ont. S.C.J.).
18. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41.

Relevant Statute

1. Construction Lien Act, RSO 1990, c C.30

Definitions

1. (1) In this Act,

...

“owner” means any person, including the Crown, having an interest in a premises at whose request and,

- (a) upon whose credit, or
- (b) on whose behalf, or
- (c) with whose privity or consent, or
- (d) for whose direct benefit,

an improvement is made to the premises but does not include a home buyer;

Where owner’s interest leasehold

19. (1) Where the interest of the owner to which the lien attaches is leasehold, the interest of the landlord shall also be subject to the lien to the same extent as the interest of the owner if the contractor gives the landlord written notice of the improvement to be made, unless the landlord, within fifteen days of receiving the notice from the contractor, gives the contractor written notice that the landlord assumes no responsibility for the improvement to be made. R.S.O. 1990, c. C.30, s. 19 (1).

2. Courts of Justice Act, RSO 1990, c C.43

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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BUSINESS DEVELOPMENT BANK OF CANADA
Applicant

AND

**ASTORIA ORGANIC MATTERS LTD. and ASTORIA
ORGANIC MATTERS CANADA LP**
Respondents

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
PROCEEDING COMMENCED AT TORONTO**

**FACTUM
OF THE COURT APPOINTED RECEIVER
(Motion returnable August 24 2017)**

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Matters and Ltd. and Astoria Organic Matters
Canada LP*