

**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

**RESPONDING FACTUM
SUBMITTED BY BDO CANADA LIMITED**

RESPONDING MOTION RECORD

(returnable on February 21, 2017)

Date: February 16, 2017

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SERVICE LIST

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FACTUM OF THE COURT-APPOINTED RECEIVER

PART I: OVERVIEW

1. SusGlobal Energy Belleville Ltd. ("**SusGlobal Belleville**") brings this motion for leave to initiate a claim against BDO Canada Limited ("**BDO**"), in its capacity as Court-appointed receiver (in such capacity, the "**Receiver**") of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada (together, "**Astoria**"), for damages for gross negligence, willful misconduct or, in the alternative, breach of contract.
2. SusGlobal Belleville's purported claim arises out of its purchase from the Receiver of, among other things, Astoria's organic waste processing facility on September 15, 2017 (the "**Closing Date**"). SusGlobal Belleville alleges that, prior to the sale, the Receiver was grossly negligent in its operation of the business in that (a) the Receiver allowed the volume of raw organic waste stored in the enclosed building located at Astoria's premises, which is used to receive bio-solids (the "**Tipping Building**"), to exceed the permitted allowances prescribed by the environmental compliance approvals ("**ECAs**")

maintained by the Ministry of the Environment and Climate Change (the “MOECC”) (the “**Alleged Excess Volume**”); and (b) the Receiver withheld information from it relating to the results of an annual odour sampling program conducted in the Tipping Building (the “**Odour Sampling**” and, together with the Alleged Excess Volume, the “**SusGlobal Claim**”). However, the evidence that SusGlobal Belleville relies upon in support of these claims is entirely deficient, and without credibility.

3. SusGlobal Belleville has no direct evidence of the volume of organic waste in the Tipping Building on the relevant date, being the Closing Date. Rather, it relies upon after-the fact-calculations performed by its own employees, based upon visual observation by their so-called “expert” of a photograph taken three days before Closing, to conclude that the Tipping Building contained ten times the prescribed maximum amount of organic waste on the Closing Date (i.e. 1,500 metric tonnes (“MT”)). Aside from being based on erroneous foundations, this conclusion is also inconsistent with the documentary evidence showing that (a) on September 26, 2017, less than two weeks later, the volume of organic waste in the Tipping Building was only 400 MT, despite SusGlobal Belleville having limited processing capability during the intervening period, and (b) SusGlobal Belleville did not raise the issue of excess volume until October 30, 2017 – more than six weeks after it allegedly discovered ten times the maximum amount of organic waste it expected to find. In addition, the MOECC has not, at any point, raised any concern with the quantum of organic waste permitted by the Receiver to accumulate in the Tipping Building.

Fourth Report of the Receiver dated December 8, 2017 [Fourth Report]

4. In support of its Odour Sampling allegation, SusGlobal Belleville relies upon two reports completed in July 2017 (i.e. months before the Closing Date), which were originally commissioned by the Receiver as part of Astoria’s annual reporting obligations to the MOECC. The Receiver acknowledges that, on their face, these reports show an excess of odour in the Tipping Building. However, the MOECC ultimately discounted these reports on the basis that the underlying source testing had been performed incorrectly. As a result, the MOECC deemed the reports unreliable, and did not require the Receiver to

take any steps in response. At the same time, the MOECC was sufficiently satisfied with the level of odour in the Tipping Building that it advised the Receiver that no further odour reporting would be required until the following year.

Fourth Report at Section 2.4

5. In light of this evidence (or lack thereof), the Receiver requests that the within motion be dismissed in its entirety. There is absolutely no evidence to support that the Receiver was in any way negligent, let alone grossly negligent. The SusGlobal Claim is frivolous and vexatious, and this motion should be dismissed, with costs on a substantial indemnity basis.

6. Capitalized terms used herein which are not otherwise defined shall have the meanings ascribed to them in the Fourth Report of the Receiver (the “**Fourth Report**”) and the Supplement to the Fourth Report of the Receiver (the “**Supplemental Fourth Report**”), as the case may be.

PART II: FACTS

The Appointment Order and APA

7. BDO was appointed as the Receiver pursuant to the Order of the Honourable Justice Hainey dated April 13, 2017 (the “**Appointment Order**”), on the application of Business Development Bank of Canada (“**BDC**”), Astoria’s largest secured creditor. At the time of the Appointment Order, BDC was owed approximately \$6.4 million.

8. Under the terms of the Appointment Order, the Receiver was empowered and authorized to, *inter alia*, market any or all of Astoria’s assets, undertakings and property (collectively, 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, deemed appropriate.

9. On July 27, 2017, the Receiver entered into an Asset Purchase Agreement (the “**APA**”) with, *inter alios*, SusGlobal Belleville, pursuant to which SusGlobal Belleville agreed to acquire certain of

Astoria's assets (the "Sale Transaction"). The APA was subsequently amended on August 1, 2017, August 29, 2017, and September 14, 2017.

10. On August 30, 2017, The Honourable Justice Myers granted an order approving, among other things, the Sale Transaction contemplated by the APA and the activities of the Receiver described in the reports filed with the Court up to such date.

Overview of Operations

11. Prior to the issuance of the Appointment Order, Astoria operated an organic recycling facility and waste transfer station from 704 Phillipston Rd., Belleville, Ontario (the "Leased Premises" or the "Site"). The Astoria operations involved the mixing and processing of various organic waste (e.g. food, paper sludge, biosolids, manure and liquid organic) with leaf and yard waste that was received at the Site by third parties, into clear compost for the agricultural and landscape markets. Following its appointment, the Receiver continued Astoria's business activities in the ordinary course, with the same staff in place.

Fourth Report at para. 1.1.1

12. Astoria used a Gore® Cover System, which is an environmentally friendly composting process which transforms a wide range of organic waste into high quality compost and fertilizer within an eight (8) week period. Astoria used the following volume ratio in mixing in the Tipping Building to produce Category A Compost: three (3) parts leaf and waste together with one (1) part organic waste inside, which ratio equates to a maximum of 25% organic waste, on a dry weight basis, and 75% leaf and waste, on a dry weight basis, as prescribed under the Ontario Compost Quality Standards.

Fourth Report at para. 2.1.3

Schedule C to this Factum

13. In its materials, SusGlobal Belleville correctly sets out the prescribed ratio mixture to generate Category A Compost pursuant to the Ontario Compost Quality Standards. However, it miscalculates the

ratio in its materials. As set out in the attached Schedule “C” to this Factum, and by way of examples, leaf and yard waste has a typical moisture content of 25%, whereas organic waste (bio solids) has a typical moisture content of 75%. Removing the moisture content therefore has a significant impact of the relative weight of these substances. One MT of leaf and yard waste, at an assumed moisture content of 25%, would have a dry weight of 750 kg (i.e. 1000 kg x 75%). One MT of organic waste, at an assumed moisture content of 75%, would similarly have a dry weight of 250 kg (i.e. 1000 kg x 25%). The Ontario Compost Quality Standards specify a maximum of 25% of organic waste in the production of Category A Compost calculated on a dry weight basis. This would be achieved by maintaining a ratio of 3 parts leaf and yard waste to 1 part organic waste, on a dry weight basis.

14. As a result, using a 3:1 ratio calculated on a dry weight basis, is equivalent to a 1:1 ratio calculated on a wet waste basis. Given that Astoria processed its organic waste using “wet” materials (i.e. materials that retained their original moisture content), a 500 MT windrow would typically contain 250 MT of leaf and yard waste and 250 MT of organic waste. By carrying on its production in this manner, Astoria’s operations stayed within the maximum 25% organic waste component, when assessed on the equivalent dry weight basis, as permitted under the Ontario Compost Quality Standards to generate Category A Compost.

Supplementary Affidavit of Gerry Hamaliuk dated December 17, 2017 at para. 12

Schedule C to this Factum

15. A more substantive overview and background of Astoria is set out in the First Report to the Court of the Receiver dated August 16, 2017 (the “**First Report**”), a copy of which is attached at Appendix A to the Fourth Report.

16. A more fulsome description of Astoria’s actual day-to-day operations, including the process of converting waste into fertilizer and compost, is described in the Fourth Report and the Supplemental

Fourth Report, which clearly evidences that Astoria operated at all times in compliance with the Ontario Compost Quality Standards and the Regulations.

Fourth Report at section 2.1.

Supplemental Fourth Report at paras. 2.0.1 to 2.0.8

Delay to closing of the Sale Transaction

17. The Sale Transaction was originally scheduled to close on September 12, 2017 in accordance with terms of the APA, but was ultimately completed on September 15, 2017. This delay arose from SusGlobal Belleville's inability to pay the balance of the purchase price due on September 12, 2017.

Fourth Report at paras. 2.0.3, 2.0.5

18. At SusGlobal Belleville's request, the Receiver agreed to amend the APA to permit the sale to close on September 15, 2017. In exchange, the Receiver requested, and received, an extension fee of \$100,000.

Fourth Report at paras. 2.0.4, Appendix B

SusGlobal Belleville Raises the SusGlobal Claim

19. By letter dated October 30, 2017 (the "**October 30 Letter**"), SusGlobal Belleville wrote to the Receiver to raise the two issues that make up the SusGlobal Claim. Despite having been in ownership and control of the Site for six weeks following closing of the Sale Transaction, and despite numerous communications between the parties, the October 30 Letter was the first time SusGlobal Belleville raised any of these concerns.

Fourth Report at paras. 1.2.5, 3.0.1

20. In response to the October 30 Letter, the Receiver, in consultation with Al Hamilton, Astoria's former president, CEO and operational manager, immediately contacted Pinchin Ltd. ("**Pinchin**"), an environmental engineering consulting firm engaged by the Receiver following its appointment and the

author of one of the two odour reports, and the MOECC, to investigate the facts surrounding these allegations.

21. After reviewing the SusGlobal Claim and discussing the allegations contained therein with each of Mr. Hamilton, the MOECC, and Pinchin, the Receiver determined that, at all times during the course of its mandate, it had operated the Site: (i) in the normal course; and (ii) in compliance with the applicable ECAs, which regulate emissions from the Site and the way in which waste and other materials are handled.

Fourth Report at paras. 1.2.2, 1.2.3

22. Following its investigations, by letter dated November 13, 2017 (the “**November 13 Letter**”), the Receiver advised SusGlobal Belleville that it disputed the allegations made in the October 30 Letter. The Receiver highlighted, among other things, the facts that SusGlobal Belleville had relied upon its own due diligence under the APA, and that the allegation of excess volume of materials and non-compliance with the applicable ECA in the Tipping Building had no merit, and, more importantly, was unsupported.

Fourth Report at paras. 3.0.2 and 3.0.3

Supplement Fourth Report at para. 2.1.1

23. The Receiver brought a motion returnable November 15, 2017, and filed its Third Report to the Court in support thereof, to seek, *inter alia*, approval of an interim distribution of the sale proceeds (the “**Interim Distribution Motion**”).

Fourth Report at para. 1.2.1

24. SusGlobal Belleville sought an adjournment of the Interim Distribution Motion so that it could advance the SusGlobal Claim against the Receiver. After several adjournments and other court attendances relating to SusGlobal Belleville’s delays in advancing its motion, the within motion was eventually set down for hearing on February 21, 2017. In the interim, the Court granted an order

approving the proposed interim distribution subject to the Receiver entering into a reimbursement arrangement with BDC.

Fourth Report at paras. 1.2.6, 1.2.7, 1.2.8

Volume of Material in the Tipping Building

25. SusGlobal Belleville asserts that, upon taking possession of the Site on the Closing Date, it entered into the Tipping Building and found approximately 1,500 MT of organic waste stored inside. This amount is approximately ten times the ECA-mandated limit of 150 MT of organic waste.

SusGlobal Belleville factum at para. 32

26. SusGlobal Belleville's assessment in this regard is simply wrong. There is no empirical evidence at all for such statement. It is incorrect and unsupported.

27. The 1,500 MT figure is cited at paragraphs 45 and 53 of the affidavit of Gerald Hamaliuk, the CEO of SusGlobal Belleville, sworn in support of this motion (the "**Hamaliuk Affidavit**"). Mr. Hamaliuk states that he applied "general engineering principles" to the estimate contained within the Pinchin Report, which reported that the Tipping Building contained 1,312 MT of organic waste as at July 10-12, 2017.

Hamaliuk Affidavit at paras. 45, 53; Exhibit P (Pinchin Report) at para 1.1, Table

3.3.3

28. Leaving aside Mr. Hamaliuk's lack of qualifications to make this assessment, and the fact that the figure he depends upon was reported months before the Closing Date, Pinchin has advised the Receiver that the 1,312 MT identified in Table 3.3.3 of its report was not independently verified. Rather, Pinchin advises that this figure was based upon reporting data provided to it by Mr. Hamilton. Mr. Hamilton advises that he initially measured the quantum of organic waste in cubic feet, and then inadvertently

converted this figure into cubic metres, before finally converting it into metric tonnes. Accordingly, any calculation that Mr. Hamaliuk allegedly performed based on the 1,312 MT figure is unreliable.

Fourth Report at paras. 3.1.3-3.1.6, Appendix D

29. In his email to the Receiver dated November 4, 2017, Mr. Hamaliuk asserts that “the MOECC was onsite the first week after we took over and estimated the inventory at more than 1500 tonnes”. However, when the Receiver wrote to the MOECC to confirm what had occurred during its site visit, the MOECC’s representative advised, “During the Ministry’s site visit on September 26, 2017, an outside operator/consultant, who was brought in by SusGlobal Belleville, provided an estimate of 400 tonnes of waste material being in the Tipping Building...”. Mr. Hamaliuk’s misstatements in this regard further demonstrate the unreliability of his evidence. There is no evidence of any other Ministry attendances at the Site between Closing and September 26, 2017.

Fourth Report at Appendices M, O

30. SusGlobal Belleville has also produced a letter dated January 26, 2018 from Nick Pora, a consultant that it hired, which it purports to rely upon as an expert’s report. Mr. Pora concludes that the Tipping Building contained approximately 2,000 MT of organic waste, presumably as of the Closing Date (the effective date of the analysis is not set out in the letter). Mr. Pora’s conclusions in this regard are based upon his visual review of photographs of the Tipping Building, as well as his analysis of the total organic waste received during the period April 13, 2017, to September 14, 2017, combined with his own assessment of how many tonnes of organic waste Astoria could process in a given week.

Nick Pora “Export Report” dated January 26, 2018

31. Again leaving aside Mr. Pora’s lack of qualifications, his assessment contains blatant inaccuracies which can be identified by a layperson. For example, he states that, based on Astoria’s stated processing mix ratio of three (3) parts leaf and yard waste to one (1) part organic waste, 375 tonnes of leaf and yard

waste would be required to process 125 tonnes of organic waste. However, Mr. Hamilton, who has direct experience with Astoria's operations, and as set out in more detail in Schedule "C" to this Factum, has advised that Astoria's mix ratio of leaf and yard waste to organic waste, when calculated by wet weight as opposed to volume or dry weight, is 1:1, rather than 3:1. Mr. Pora accordingly used the wrong mix ratio in making his calculation, rendering his conclusions inaccurate. Clearly, Mr. Pora has no business being characterized or presented as an expert considering this error in calculation. Notably, this error is repeated at paragraphs 44 to 51 of SusGlobal Belleville's factum, and is the basis upon which SusGlobal Belleville alleges, incorrectly, that Mr. Hamilton provided "false" information to BDO.

Nick Pora "Export Report" dated January 26, 2018

Fourth Report, Appendix I

32. The MOECC's representative, Katy Potter, has advised that "the only unequivocal way of confirming how much waste is stored in the Tipping Building at any given time, is by reviewing how much waste was received through the weigh scale tickets/records, and comparing this to the waste processing activities on-site for the same time (i.e. formation of windrows). You could then calculate the remaining balance of waste in the Tipping Building."

Fourth Report at Appendix O

33. Using this type of analysis, Mr. Hamilton concludes that as at September 15, 2017, the Tipping Building contained only 185 MT of organic waste. Although this was slightly higher than the ECA-mandated maximum of 150 MT, Mr. Hamilton advises that such slight overages are common in the operation of the facility, and would have been resolved within one business day of normal operations had the Closing of the Sale Transaction not occurred.

Fourth Report at para. 2.2.6, Appendix I; Fourth Report at para. 3.0.4

34. Regrettably, SusGlobal Belleville was unable to resume normal operations upon the Closing Date, because it had not purchased the required equipment from the Receiver/Astoria, and had not yet sourced its own equipment, as described in greater detail at paragraphs 48-52 below. Accordingly, the volume of organic waste in the Tipping Building most likely increased, as opposed to decreased, following the Closing.

35. The Receiver submits that, to the extent that the operations were non-compliant with the ECAs, this shift from the pre-Closing operations is what rendered the operations non-compliant and only occurred post-Closing.

Fourth Report at para. 3.0.4

36. As set out above, SusGlobal Belleville's consultant estimates that, as of September 26, 2017, there were approximately 400 MT of organic waste in the Tipping Building. SusGlobal Belleville's own evidence is that it takes approximately three days to process 150 tonnes of organic waste. In light of the reduced operations carried on by SusGlobal Belleville between September 15 and 26, and having regard for the fact that SusGlobal Belleville accepted 220 metric tonnes in new organic waste during that period (September 18-25), it is exceedingly unlikely that SusGlobal Belleville was able to reduce the volume of organic waste in the Tipping Building from 1,500 MT (or ~2,000 MT) to 400 MT – even if it was producing Class B compost using a lower leaf and yard waste to organic waste ratio. In that regard, SusGlobal Belleville only produced 1 to 2 Windrows within that period and, as such, it is impossible that SusGlobal Belleville would have reduced the volume of materials in the Tipping Building to 400MT if you were to start with 1,500 MT (or ~2,000 MT) as at the Closing Date. It would have required SusGlobal Belleville to produce at least 5 windrows (if you start with 1,500 MT) or 7.5 windrows (if you start with 2,000 MT), if SusGlobal Belleville continued operations in same manner as Astoria.

Hamaliuk Affidavit at para. 59, Exhibit E; Fourth Report at para. 2.3.4; Affidavit of Sarah Quildon affirmed February 15, 2018 (“Quildon Affidavit”), Exhibit B

37. The Receiver received an email from Mr. Hamaliuk on September 20, 2017 regarding the results of the odour testing in the Draft Pinchin Report (defined below). Notably, the issue of volume of materials in the Tipping Building was not raised in this correspondence or at any time prior to October 30, 2017. If the volume of material in the Tipping Building had been a concern at Closing, as SusGlobal Belleville is now alleging, it is reasonable to expect that SusGlobal Belleville would have immediately raised the issue rather than remaining silent for six weeks.

Fourth Report at para. 3.0.5

38. As set out above, during the MOECC's site visit on September 26, 2017, the volume of materials in the Tipping Building was estimated by the SusGlobal Consultant to exceed the ECA limit by 250 MT. Even at this level, the MOECC officer, Ms. Potter, merely requested that SusGlobal Belleville undertake voluntary steps to come into compliance. No such requests were made of Astoria or the Receiver by the MOECC prior to Closing.

Fourth Report at para. 3.0.6

39. Finally, at no time has the MOECC expressed to Astoria or the Receiver that the Receiver was not operating Astoria in compliance with the ECA and/or the applicable environmental laws of Ontario.

40. In light of the foregoing, the Receiver submits that SusGlobal Belleville's claim relating to the Alleged Excess Volume is without evidentiary foundation or merit.

Odour Sampling Program

41. SusGlobal Belleville alleges that it was not made aware that the Receiver retained Stantec Consulting Ltd. ("**Stantec**") to carry out the Odour Sampling program and provide an odour report (the "**Stantec Report**"), based upon odour estimates set out in the draft report prepared by Pinchin (the "**Draft Pinchin Report**" and, together with the Stantec Report, the "**Odour Reports**"). This allegation does not

give rise to any damages in favour of SusGlobal Belleville, and is irrelevant to the claim it seeks to advance against the Receiver.

Hamaliuk Affidavit, para. 57

42. The Odour Reports were prepared as part of the Receiver's compliance with the MOECC's reporting requirements. Following its review of the Odour Reports, the MOECC determined that "there was an error in how the source testing was completed". Specifically, the source testing was completed with fully uncovered windrows (i.e. the Gore® Covers, whose function, in part, is to control odour, were removed during the source testing). This is not a normal or approved operating practice. The MOECC agreed that source testing could be redone in the spring/summer of 2018, and that this second test would also count for the second annual source testing requirement. During the receivership period, non-compliance regarding odour was not an issue.

Fourth Report at paras. 3.1.1 and 3.1.2; Appendix L

43. The MOECC later attended at the Site on August 10, 2107 to investigate an odour complaint and toured the Tipping Building at that time. The MOECC determined that the odour was not being generated from the Tipping Building. An off-site odour that was identified was agriculture-based. There were no further steps required by the MOECC to be taken following this attendance, nor were there any other odour complaints after that date and up to Closing.

Fourth Report at para. 3.1.7; Appendix J

44. SusGlobal Belleville's allegation that it did not review the Odour Reports has no bearing on its claim, as no damages flow from it. In the alternative, it does not demonstrate that the Receiver acted with gross negligence in obtaining and not expressly sharing these reports, as the issues identified therein were ultimately determined by the MOECC to be resolved.

"As is, where is" Provision

45. As is customary for sale transactions effected in the context of an insolvency proceeding, a critical term of the APA is that the Purchased Assets were purchased on an “as is, where is” basis.

46. The Receiver maintains that SusGlobal Belleville executed the APA subject to an “as is, where is” provision in the representations and warranties section of the APA. The “as is, where is” provision is as follows:

3.03 “As Is, Where Is”

(1) The Purchaser acknowledges and agrees that it is purchasing the Purchased Assets on an “as is, where is” basis and on the basis that the Purchaser has conducted to its satisfaction an independent inspection, investigation and verification of the Purchased Assets (including a review of title), Assumed Liabilities and all other relevant matters and has determined to proceed with the transaction contemplated herein and will accept the same at the Time of Closing in their then current state, condition, location, and amounts, subject to all Permitted Encumbrances.

...

(4) Any documents, materials and information provided by or on behalf of the Receiver to the Purchaser with respect to the Purchased Assets or Assumed Liabilities (including any confidential information memorandums, management presentations, or material made available in the electronic data room) have been provided to the Purchaser solely to assist the Purchaser in undertaking its own due diligence, and the Receiver has not made and is not making any representations or warranties, implied or otherwise, to or for the benefit of the Purchaser as to the accuracy and completeness of any such documents, materials or information or the achievability of any valuations, estimates or projections. The Purchaser acknowledges that it has not and will not rely upon any such documents, materials or information in any manner, whether as a substitute for or supplementary to its own due diligence, searches, inspections and evaluations. The Receiver and their respective affiliates, directors, officers, employees, agents and advisors shall not be liable for any inaccuracy, incompleteness or subsequent changes to any such documents, materials or information. [Emphasis added]

Fourth Report, Appendix B

47. Section 3.03 of the APA clearly states that the Receiver shall not be liable to SusGlobal Belleville for the accuracy and completeness of any such documents, materials or information or the achievability of any valuations, estimates or projections relied upon by SusGlobal Belleville.

Fourth Report, Appendix B

Post-Closing Operating Conditions

48. As described in the First Report, various key equipment, that was financed and used in the day-to-day operations by Astoria, was excluded from the Sale Transaction (the “**Astoria Financed**

Equipment”). The Astoria Financed Equipment was critical to carry on the day-to-day operations at the Site to stay within compliance of the ECAs. The Astoria Financed Equipment was excluded from the Sale Transaction at the request of SusGlobal Belleville, who ultimately decided to source its own equipment to continue post- Closing operations.

Fourth Report at para. 2.0.6

49. Mr. Ben Hamilton, the former operations manager of Astoria, who was retained by SusGlobal Belleville post-closing as the Site superintendent on the Closing Date, advises the Receiver that operations immediately following Closing and beyond the first MOECC post-Closing site visit on September 26, 2017 (the “MOECC Site Visit”) were not maintained at the same level of operations as they were up to and prior to Closing.

Fourth Report at para. 2.3.1

50. The decline in the volume of processing has been in part due to SusGlobal Belleville having inadequate, or no equipment suitable for moving bio-solids. Despite this, SusGlobal Belleville did not in a timely manner adjust its operational practices (or volumes of incoming organic waste).

Fourth Report at para. 2.3.2

51. The reduced operations by SusGlobal Belleville post-Closing led to a decrease in processing materials but not a corresponding decrease in the acceptance of waste materials from third parties, resulting in a buildup of waste materials in the Tipping Building.

52. As a result, any excess raw bio-solid materials in the Tipping Building was a direct result of SusGlobal Belleville’s inadequate equipment and operations post-Closing.

Fourth Report at para. 2.3.8

PART III: THE ISSUES

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

- (a) *Should leave of this Court being granted to permit SusGlobal Belleville to bring a claim against the Receiver for damages for gross negligence?*
- (b) *In reaching said decision, should the Court give any weight to the “expert” report delivered by SusGlobal Belleville in connection the SusGlobal Motion?*

PART IV: THE LAW AND ARGUMENT

A. Leave Should Not Be Granted

The Test for Leave in the Context of a Claim for Gross Negligence

54. In *Mancini (Trustee of) v. Falconi*, the Court of Appeal summarized principles from various cases with regard to actions taken against a trustee under section 186 of the *Bankruptcy Act* (now section 215 of the BIA), which applies to both trustees and receivers. The principles outlined in *Mancini* are:

- (a) leave to sue a trustee should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed;
- (b) an action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. The evidence typically will be presented by way of affidavit and must supply facts to support the claim sought to be asserted; and

- (c) the court is not required to make a final assessment of the merits of the claim before granting leave.

Mancini (Trustee of) v. Falconi, 1993 CarswellOnt 1861, [1993] O.J. No. 146 ["Mancini"] at para. 7, Receiver's Brief of Authorities ["RBOA"] at Tab 1; cited in *1416088 Ontario Ltd. v. Deloitte & Touche*, 2010 ONSC 1011 at para. 2, RBOA at Tab 2

55. In *GMAC Commercial Credit Corp. – Canada v. TCT Logistics Inc.*, the Supreme Court of Canada confirmed that the requirement that leave be granted in order to bring a claim against a receiver is to protect the receiver against frivolous or vexatious claims, as well as claims which do not disclose a cause of action. The gatekeeping function of leave ensures that only legitimate claims against receivers can be advanced.

GMAC Commercial Credit Corp. – Canada v. TCT Logistics Inc., 2006 SCC 35, 2006 CarswellOnt 4621 ["GMAC"] at para. 58, RBOA at Tab 2, citing *Mancini* at para. 17, RBOA at Tab 1

56. A court appointment is not an absolute bar to suit against a court-appointed receiver; however, obtaining an order for leave to sue should not be a perfunctory process. The foundation of the alleged claim should be examined with care.

Royal Bank v. Vista Homes Ltd. 1985 CarswellBC 475, [1985] B.C.W.L.D. 2108 ["Royal Bank"] at para 19, RBOA at Tab 4

57. Gross negligence is a question of fact.

Gordon v. Nutbean, 1969 CarswellOnt 178, [1969] 2 O.R. 420 at para. 3, RBOA at Tab 6

58. In *Alberta Treasury Branches v. Elaborate Homes Ltd.*, Justice Nielsen discusses the analysis that needs to be applied when applying for leave to bring a claim for gross negligence. The test that needs to be applied is whether the Receiver has demonstrated a very marked departure from the standards by which responsible and competent people in such circumstances would have acted or conducted themselves, or in a manner such that it knew what it was doing was wrong or was recklessly indifferent in its conduct.

Alberta Treasury Branches v. Elaborate Homes Ltd., 2014 ABQB 350, [2014] A.W.L.D. 3322 [“Elaborate”] at para. 39, RBOA at Tab 7

59. While the issue before this Honourable Court is whether there is any factual foundation to grant leave for SusGlobal Belleville to bring its claim, this Honourable Court may weigh the evidence accordingly in coming to its conclusion.

National Carpet Mills Ltd., Re, 2015 ONSC 4890, 257 A.C.W.S. (3d) 26 at para. 36, RBOA at Tab 8

60. Taken together, these cases establish that, in order for SusGlobal Belleville to be successful on this motion, it must adduce evidence that establishes a *prima facie* case that the Receiver has demonstrated a very marked departure from the standards by which responsible and competent people in such circumstances would have acted or conducted themselves, or in a manner such that it knew what it was doing was wrong or was recklessly indifferent in its conduct. SusGlobal Belleville has not met this burden.

GMAC at para. 59, RBOA at Tab 2, citing *Nicholas v. Anderson*, 1996 CarswellOnt 1196, [1996] O.J. No. 1068 at para. 16, RBOA at Tab 3

The Receiver Was Not Grossly Negligent

61. SusGlobal Belleville puts forward unreliable, incorrect, confusing and self-serving evidence, which it asserts establishes that the Receiver operated the Tipping Building in breach of the ECAs. However, SusGlobal Belleville cannot point to any independent evidence – and in particular, any evidence from the MOECC or an expert who examined the Site at Closing – to show that its claims have any merit.

62. Further, SusGlobal Belleville blatantly ignores the impact its flawed operation of the Site post-Closing has had on non-compliance with the ECA in the Tipping Building. The immediate reduction in processing post-Closing was purely of SusGlobal Belleville’s own doing, in not securing appropriate equipment to continue processing at the Site at the pre-Closing rate.

63. The MOECC's approach to compliance and enforcement is to safeguard the public interest, ensuring that the response by the MOECC to any non-compliance is proportionate to its severity.

Superior Fine Papers Inc. v. Ontario (Ministry of the Environment), [2011]
O.E.R.T.D. No.22 at para. 108, RBOA at Tab 9

64. SusGlobal Belleville fails to recognize that the Receiver's/Astoria's operations through to Closing, despite active involvement and communication with MOECC representatives did not produce: (i) any remediation orders or requests from the MOECC to halt operations, (ii) any requirement or request to alter the normal operations in any way; or (iii) any complaint regarding odour from the Site, and specifically in the Tipping Building. The fact that the MOECC has not taken any steps at all to sanction the Receiver, suggests that there is no conduct to sanction.

Fourth Report at para 2.3.7

65. Additionally, SusGlobal Belleville has not brought forward any evidence to demonstrate that the Receiver acted in a manner that was different than the manner in which Astoria operated the business prior to the Receivership so as to demonstrate a marked departure from the standards applicable to a receiver.

66. In this regard, the Receiver has acknowledged that, based on its calculations (and not the grossly overinflated calculations introduced by SusGlobal Belleville), there was a slight overage in organic waste volume in the Tipping Building as at the Closing Date. However, Mr. Hamilton has confirmed that such temporary changes in volume in the Tipping Building occur in the normal course of operations. As the materials are mixed together prior to being moved to a Windrow, there may be a brief exceedance of the volume storage restriction at a moment in time. After processing, the volume of materials would have been brought back in compliance with the MOECC, if it did in fact exceed the permitted volume, which is not unusual and taken into account by the MOECC. The varying volumes are a function of the normal course of business and are accounted for when considering compliance with MOECC standards.

Accordingly, any such slight overages are consistent with the manner in which Astoria operated the business, and do not represent a marked departure from the standards applicable to a receiver.

Fourth Report at paras. 2.2.5, 2.2.6 and 2.2.7

67. The Receiver respectfully submits that it acted in accordance with best practices of a receiver and officer of the Court in all respects. At all times, the Receiver operated the Astoria business in the normal course and in compliance with the ECAs and applicable laws, and as such, was not grossly negligent.

In any event, the “as-is, where-is” clause is a bar to the claim against the Receiver

68. As set out above, the APA contained an “as-is, where-is” clause, consistent with standard practice for sales carried out by receivers. In accordance with this clause, SusGlobal Belleville is required to rely on its own due diligence with regard to the condition of the Property that it purchased. SusGlobal Belleville and is not entitled to claim damages from the Receiver arising from the condition of the Property upon the Closing.

69. In bringing this motion, SusGlobal Belleville is attempting to rely on its own lack of diligence to place responsibility upon, and seek damages from, the Receiver. The “as-is, where-is” clause specifically prevents SusGlobal Belleville from doing so.

***Antorisa Investments Ltd. v. 172965 Canada Ltd. et al. 82 O.R. (3d) 437 at para. 77,
RBOA at Tab 11***

70. SusGlobal Energy Canada Corp. (“Parentco”), the parent company of SusGlobal Belleville, conducted its own due diligence prior to submitting its original bid to BDO on June 15, 2017. As set out in the Fourth Report, the due diligence included, *inter alia*, numerous visits to the Site and a review of the documents in the data room. Both Parentco and SusGlobal Belleville and their representatives had unlimited opportunity to access the data room and make enquiries necessary prior to completing the Sale Transaction.

Notice of Motion, returnable December 20, 2017, at para. 37; Fourth Report at section 3.2

71. Caveat emptor does not apply in cases of fraud, mistake and negligent misrepresentation, or if there is a latent defect with the property. None of these exceptions apply in this case.

Antorisa Investments Ltd. v. 172965 Canada Ltd. et al. 82 O.R. (3d) 437 at para. 78, RBOA at Tab 11

72. SusGlobal Belleville asserts that its claim stems from the Receiver's failure to comply with environmental laws of Ontario, but there has been no evidence to support that the Receiver did not comply with the laws of Ontario. As set out above, the only time that the MOECC expressed any concern with compliance with the ECAs was during the MOECC Site Visit with SusGlobal Belleville eleven (11) days after Closing.

73. If the MOECC did not have or express any concerns about the Receiver's compliance with the MOECC requirements, then it is unfathomable how SusGlobal Belleville can assert that the Receiver operated the business "illegally". Their assertions remain completely unfounded and unsupported.

Should the Court give any weight to the "expert" report delivered by SusGlobal Belleville in connection with its motion?

74. SusGlobal Belleville introduces a letter from Mr. Pora a consultant that it hired as an "operations consultant", which it purports to rely upon as an expert's report (the "**Pora Letter**").

75. In order to be qualified to give expert evidence, the witness must be shown to have acquired "special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify." The Pora Letter is entirely silent on this point.

R. v. Mohan, 1994 CarswellOnt 66 (S.C.C.) at para. 31, RBOA at Tab 12

76. Additionally, experts must be neutral and objective. To the extent that they are not, they are not properly qualified to give expert opinions. On its face, Mr. Pora's retainer by SusGlobal Belleville as an "operations consultant" renders him objectively

Bank of Montreal v. Citak, 2001 CarswellOnt 944 (Ont. S.C.J. – Commercial List) at para. 5, RBOA at Tab 13

77. Accordingly, the Receiver requests that the Court refrain from relying on the Pora Letter as an expert report.

PART V: RELIEF REQUESTED

78. For the foregoing reasons, the Receiver respectfully requests that this Court dismiss this motion with costs on a substantial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

February 16, 2018



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SCHEDULE "A"

1. *1416088 Ontario Ltd. v. Deloitte & Touche*, 2010 ONSC 1011
2. *638733 Ontario Inc. v. Ward*, [1990] O.J. No. 10
3. *Alberta Treasury Branches v. Elaborate Homes Ltd.*, 2014 ABQB 350, [2014] A.W.L.D. 3322
4. *Antorisa Investments Ltd. v. 172965 Canada Ltd. et al.* 82 O.R. (3d) 437
5. *Bank of Montreal v. Citak*, 2001 CarswellOnt
6. *GMAC Commercial Credit Corp. – Canada v. TCT Logistics Inc.*, 2006 SCC 35, 2006 CarswellOnt 4621
7. *Gordon v. Nutbean*, 1969 CarswellOnt 178, [1969] 2 O.R. 420
8. *Mancini (Trustee of) v. Falconi*, 1993 CarswellOnt 1861, [1993] O.J. No. 146
9. *National Carpet Mills Ltd., Re*, 2015 ONSC 4890, 257 A.C.W.S. (3d) 26
10. *Nicholas v. Anderson*, 1996 CarswellOnt 1196, [1996] O.J. No. 1068
11. *R. v. Mohan*, 1994 CarswellOnt 66 (S.C.C.)
12. *Royal Bank v. Vista Homes Ltd.* 1985 CarswellBC 475, [1985] B.C.W.L.D. 2108
13. *Superior Fine Papers Inc. v. Ontario (Ministry of the Environment)*, [2011] O.E.R.T.D. No.22

SCHEDULE "B"

Bankruptcy and Insolvency Act, RSC 1985, c B-3

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.

SCHEDULE "C"

Construction of Category A Compost Process:

Windrow Production	Volume		Estimated Weight - Low		Estimated Weight - High	
	(buckets)	%	Tonnes	%	Tonnes	%
Carbon / Leaf & Yard	3	75%	225	50%	250	50%
Nitrogen / Bio-Solids	1	25%	225	50%	250	50%
Total	4	100%	450	100%	500	100%

Conversion of a Wet Weight Constructed Windrow to Dry Weight Guidelines

	Leaf & Yard	BioSolids	Total
Wet Weight (MT)	250	250	500 (1)
Moisture % / Content	25% (63)	75% (188)	(250) (2)
Dry Weight (MT)	188	63	250 (3)
Ratio of Dry Weight	75%	25%	(4)

Notes:

- (1) Wet Weight of 500 MT Windrow is split 1:1 on a weight basis.
- (2) Moisture % / Content is 25% for Leaf & Yard and 75% for BioSolids, therefore these percentages are to be applied to determine the Dry Weight basis.
- (3) The Dry Weight is calculated by extracting the moisture content.
- (4) The ratio of Leaf & Yard and Biosolids is based on the Dry Weight measurement and is estimated to be 75%:25% or 3:1 as per the Ontario Compost Quality Standards.

* To calculate the % moisture for each of the materials you plan to compost.

- a) Weigh a small container.
- b) Weigh 10 g of the material into the container.
- c) Dry the sample for 24 hours in a 105-110 degree C oven.

d) Reweigh the sample, subtract the weight of the container, and determine the moisture content using the following equation:

$$M_n = ((W_w - W_d) / W_w) \times 100$$

in which:

M_n = moisture content (%) of material n

W_w = wet weight of the sample, and

W_d = weight of the sample after drying.

Reference: http://compost.css.cornell.edu/calc/moisture_content.html

**when converting to dry weight from wet weight re Category A Compost

187.5 dry weight metric tonnes of Leaf and Yard Waste at a calculated 25% moisture and 62.5 dry weight metric tonnes of biosolids at a calculated 75% moisture. 187.5:62.5 is the 3:1 ratio by volume.

$$3 \times 62.5 = 187.5 \text{ (leaf and Yard waste)}$$

$$1 \times 62.5 = 62.5 \text{ (biosolids)}$$

3:1 ratio by volume (dry weight) making Category A Compost.

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
(Motion returnable February 21, 2018)

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