

**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

SUPPLEMENTARY MOTION RECORD

January 18, 2018

SOLMON ROTHBART GOODMAN LLP

375 University Avenue
Suite 701
Toronto, ON M5G 2J5

Melvyn L. Solmon

Tel: 416-947-1093
Fax: 416-947-0079
Email: msolmon@srglegal.com

Lawyers for SusGlobal Energy Belleville Ltd.

ERIC K. GILLESPIE PROFESSIONAL CORPORATION

10 King Street East,
Suite 600
Toronto, ON M5C 1C3

Eric K. Gillespie

Tel: 416-703-6362
Fax: 416-703-9111
Email: egillespie@gillespielaw.ca

Andrew T.R. Chachula

Tel: 416-703-3912
Fax: 416-703-9111
Email: achachula@gillespielaw.ca

Lawyers for SusGlobal Energy Belleville

TO:

STIKEMAN ELLIOTT LLP

Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Elizabeth Pillon

Tel: 416-869-5623
Fax: 416-947-0866
Email: lpillon@stikeman.com

Lawyers for the Respondents, Astoria Organic Matters Ltd.
and Astoria Organic Matters Canada LP

AND TO:

FOGLER, RUBINOFF LLP

TD Centre, North Tower
3000-77 King Street West
PO Box 95, Stn. Toronto Dom.
Toronto, ON M5K 1G8

Scott R. Venton/ Kenneth W. Movat/ W. Ross MacDougall

Tel: 416-864-9700
Fax: 416-941-8852
Email: sventon@foglers.com/ kmovat@foglers.com/ rmacdougall@foglers.com

Lawyers for the Applicant, Business Development Bank Of Canada

AND TO:

AIRD & BERLIS LLP

Barristers & Solicitors
181 Bay Street, Suite 1800
Brookfield Place, Box 754
Toronto, ON M5J 2T9

Steve Graff/ Kyle Plunkett

Tel: 416-865-3406
Fax: 416-863-1515
Email: sgraiff@airdberlis.com/ kplunkett@airdberlis.com

Lawyers for the Receiver, BDO Canada Limited

AND TO:

JUSTICE CANADA

Tax Section
130 King Street West, Suite 3400
Exchange Tower, P.O. Box 36
Toronto, ON M5K 1K6

Diane H. A. Winters

Tel: 416-973-3172
Fax: 416-973-0810
Email: diane.winters@justice.gc.ca

AND TO:

ONTARIO MINISTRY OF FINANCE

Legal Services Branch
11-777 Bay Street
Toronto, ON M5G 2C8

Kevin J. O'Hara

Tel: 416-327-8463
Fax: 416-325-1460
Email: kevin.ohara@fin.gov.on.ca

AND TO:

PLUTA RECHTSANWALTS GMBH

Niederlassung Mannheim
Harrlachweg 1
68163 Mannheim

Rainer Bachert

Insolvency Administrator

Tel: 011.49.621.4328899.0
Fax: 011.49.621.4328899.50
Email: rainer.bachert@pluta.net

AND TO: **BALDWIN LAW PROFESSIONAL CORPORATION**
Barristers & Solicitors
54 Victoria Avenue
P.O. Box 1537
Belleville, ON K8N 5J2

S. Daniel Baldwin
Tel: 613-771-9991
Fax: 613-771-9998
Email: dbaldwin@baldwinlaw.ca

Lawyers for Fitzgibbon Construction Limited

AND TO: **GARDINER ROBERTS LLP**
Bay Adelaide Centre – East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Bryan Skolnik
Tel: 416-865-6600
Fax: 416-865-6636
Email: bskolnik@grllp.com

Lawyers for Van Soelen Landscaping Ltd.

AND TO: **KENNALEY CONSTRUCTION LAW**
First Canadian Place
5700-100 King Street West
Toronto, ON M5X 1C7

Robert J. Kennaley
Tel: 416-886-7310
Fax: 416-700-8185
Email: rjk@kennaley.ca

Lawyers for Ken Tulloch Construction Ltd.

AND TO: **DENTONS CANADA LLP**
77 King Street West, Suite 400
Toronto, ON M5K 0A1

Karen Groulx
Tel: 416-863-4697

Email: karen.groulx@dentons.com

Sara-Ann Van Allen

Tel: 416-863-4402

Email: sara.vanallen@dentons.com

Lawyers for the Landlord, 1684567 Ontario Inc.

AND TO: **MINISTRY OF THE ENVIRONMENT AND CLIMATE CHANGE**
Kingston District Office
1259 Gardiners Rd
Kingston, ON K7P 3J6

Jim Mahoney

Manager (A)

Tel: 613-548-6902

Email: james.mahoney@ontario.ca

AND TO: **O'FLYNN WEESE LLP**
Barristers & Solicitors
65 Bridge Street East
Belleville, ON K8N 1L8

John Mastorakos

Tel: 613-966-5222

Fax: 613-961-7991

Email: jmastorakos@owtlaw.com

AND TO: **MCCARTHY TETRAULT LLP**
421-7th Avenue SW, Suite 4000
Calgary, AB T2P 4K9

Pantelis Kyriakakis

Tel: 403-260-3536

Cell: 403-479-5484

Email: pkyriakakis@mccarthy.ca

Lawyers for Caterpillar Financial Services Limited

AND TO: **THE TORONTO-DOMINION BANK**
143 North Front Street
Belleville, ON K8P 3B5

Nicolas O'Reilly

Branch Manager

Tel: 613-966-3347 ext. 250

Fax: 613-966-4596
Email: oreiln@tdbank.ca

AND TO: **GOWLING WLG**
77 King Street West, Suite 400
Toronto, ON M5K OA1

Neil Abbott
Tel: 416-862-3476
Email: neil.abbott@gowlingwlg.com

Lawyers for Bank of Montreal

AND TO: **ENGINEERING & DEVELOPMENT SERVICES DEPARTMENT**
City of Belleville

Spencer Hutchison
Manager of Approvals
Tel: 613-967-3234
Email: shutchison@city.belleville.on.ca

AND TO: **SIOUI MITTS LAW**
Barristers, Solicitors & Notaries
21 Quinte Street, P.O. Box 397
Trenton, ON K8V 5R6

Stephen M. Sioui
Tel: 613-965-6430
Fax: 613-965-6400
Email: smsioui@siouimittslaw.com

Lawyers for Trenval Business Development Corporation

AND TO: **GRAHAM F. SIRMAN**
Barrister & Solicitor
275 Ontario Street, Suite 102
Kingston, ON K7K 2X5

Graham F. Sirman
Tel: 613-531-4500
Email: graham@gsirmanbarrister.ca

Lawyers for Mr. Allan Hamilton

INDEX

<u>Tab</u>	<u>Document</u>	<u>Page No.</u>
1.	Amended Notice of Motion dated January 18, 2018	1

TAB 1

**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

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

AMENDED NOTICE OF MOTION

SusGlobal Energy Belleville Ltd. (“SusGlobal Belleville”) will make an application to a judge presiding on the Commercial List on Wednesday, December 20, 2017, at 10:00 a.m. at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The application is to be heard orally.

THE APPLICATION IS FOR:

1. Leave of this court to permit SusGlobal Belleville to bring a claim against BDO Canada Limited (“BDO” or the “Receiver”), the Receiver appointed in this proceeding, for damages for gross negligence or in the alternative, wilful misconduct, and breach of the “Asset Purchase Agreement” and breach of the “Court Order”, as defined herein;
2. Leave to examine a representative of Pinchin Ltd. (“Pinchin”) and a representative of Stantec Consulting Ltd. (“Stantec”) on this application, if that evidence is required;
3. The determination of rights that depend on the interpretation of a contract, the Amended Environmental Compliance Approval Number 0031-7UTRSS (the “ECA”) dated August 7, 2015 issued to 1684567 Ontario Inc. and Astoria Organic Matters Ltd. for the site location 704 Phillipston Road in Belleville, Ontario (the “Site”) and the Order of the Honourable Mr. Justice Hainey dated April 13, 2017 (the “Court Order”);
4. Judgment in favour of SusGlobal Belleville requiring BDO to pay SusGlobal Belleville the amount of \$755,400 (inclusive of HST) (the “Amended Claim Amount”);
5. In the alternative, an order for a trial of the issues and directions in that regard, pursuant to Rule 38(10) of the *Rules of Civil Procedure* in conjunction with Rule 3 of the Bankruptcy and Insolvency General Rules;
6. Costs on this application on a substantial indemnity basis, or in the alternative, on a partial indemnity basis; and
7. Such other relief as counsel may advise and this Honourable Court permit.

THE GROUNDS FOR THE APPLICATION ARE:

A. OVERVIEW

8. SusGlobal Energy Canada Corp. (“SusGlobal Canada”), is a federally incorporated corporation in Canada that carries on the business of operating renewable energy facilities throughout the Province of Ontario.

9. SusGlobal Canada is the parent company of SusGlobal Belleville.

10. SusGlobal Belleville is a provincially incorporated corporation in Ontario that carries on the business of operating an organic composting and recycling facility at 704 Phillipston Rd., Belleville, Ontario (the “Site”).

11. On April 13, 2017, BDO was appointed the Receiver by the Court Order of the assets, undertakings and properties of each of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP (collectively the “Debtors”) acquired for, or used in relation to the business carried on by the Debtors, including all proceeds thereof (collectively, the “Property”).

12. The Debtors carried on business as an organic composting and recycling facility located at the Site. The Debtors processed organic waste which included, but is not limited to: leaf and yard waste; biosolids; and wastewater treatment effluent which contained coliform bacteria and metal contaminants, among other things (collectively, “Organic Waste”).

13. Pursuant to the ECA, the Debtors were not allowed to store more than 150 tonnes of waste inside one of the buildings on site, the Tipping Building (whenever Organic Waste was dealt with by the business). Section 2(9)(a) of the ECA states:

(9) The Owner is approved to store the following amounts of waste at the Site: (a) 150 tonnes of waste inside the Tipping Building including, but not limited to, any Compost blended with pulp and paper biosolids or other waste; [emphasis added]

14. Paragraph 16 of the Court Order addresses limitation on environmental liabilities:

16. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, “Possession”) of any of the Property that might be environmental contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the “Environmental Legislation”), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver’s duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession. [emphasis added]

15. Pursuant to paragraph 16 of the Court Order, BDO occupied the Site and took control, care, charge, possession, and management of the Debtors Property and the Site. As the court-appointed Receiver for the Debtors, BDO was required to comply with the conditions of the ECA, pursuant to section 186(3) of the *Environmental Protection Act* (Ontario) (the “EPA”).

16. As part of the business of the Debtors, the Debtors entered into agreements to receive and process Organic Wastes with various vendors, including, but not limited to: (1) Sunoco; (2) Northumberland County; and (3) Third High Farms.

17. The Debtors would be paid by a vendor upon delivery of the Organic Waste, and prior to the processing of the Organic Waste into compost. The payment by a vendor to the Debtors was not conditional upon the Debtors processing the Organic Waste into compost but was a prepayment for the work to be done to process the waste into compost.

18. The Debtors would receive approximately 50 to 80 metric tonnes of Organic Waste per day. To ensure the inventory of Organic Waste in the Tipping Building did not exceed 150 metric tonnes pursuant to the ECA, the Debtors were required to process the Organic Waste approximately every three

days (applying a conservative estimate of the Debtors receiving 50 metric tonnes of Organic Waste per day from the vendors). BDO knew this as its agents, including, but not limited to, Mr. Hamilton, who were running the business, knew this.

19. The Debtor's cost to process the Organic Waste was approximately \$40 per metric tonne of Organic Waste (the "Processing Cost"). The Debtors charged its vendors approximately \$50 to \$60 per metric tonne of Organic Waste to accept and process the Organic Waste. The Debtors' profit margin was approximately \$10 per metric tonne of Organic Waste.

20. The Debtors were pre-paid by their vendors to receive and process the waste. The Debtors did not necessarily incur any Processing Cost. The Debtors could simply accept payment from their vendors and store the Organic Waste in the Tipping Building, among other buildings on the Site, and not incur any Processing Cost.

21. On September 12, 2017, SusGlobal Belleville attempted to execute an Asset Purchase Agreement (the "APA") with BDO for specified assets of the Debtors, among other things (the "Purchased Assets") (collectively, the "Original Closing Date").

22. SusGlobal Belleville was not able to execute the APA and close the transaction with BDO on the Original Closing Date, because it was not able to arrange a fund transfer to BDO from their lender, PACE Credit Union ("PACE"), pursuant to the APA.

23. On September 13, 2017, BDO's counsel wrote to SusGlobal Belleville stating that it would extend the APA closing date to September 15, 2017 (the "Closing Date"), on the condition that SusGlobal Belleville provided BDO with additional consideration to the purchase transaction in the amount of \$100,000, among other things (the "Penalty Consideration"). On September 13, 2017, BDO's counsel did not disclose to SusGlobal Belleville that BDO knew the Site was not in ECA compliance.

24. On September 14, 2017, SusGlobal Belleville and BDO executed the Third Amendment to the APA which extended the closing date to September 15, 2017, and required SusGlobal Belleville to pay the Penalty Consideration to BDO.

25. On the Closing Date, SusGlobal Belleville executed the APA with BDO for the Purchased Assets. SusGlobal Belleville purchased the Purchased Assets from BDO for \$7,782,752.08 plus the amount of the Assumed Liabilities, as defined and set out in the APA (the “Purchase Price”). The Assumed Liabilities did not include liabilities that were created after the date the APA was signed, as a result of activities by BDO, a court officer, that were contrary to conditions of the ECA, as defined herein, and contrary to the Court Order.

26. On the Closing Date, SusGlobal Belleville began operating its organic composting and recycling business at the Site and to accept and process Organic Waste: to date, it continues to do so.

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

With respect to the operations and associated costs prior to Closing, the Receiver and Astoria operated the business in compliance with the MOECC requirements. During the Receivership period, the Receiver continued to operate the site in the normal course and funded all payroll and operating costs associated with the site including shipments of product from Peterborough up to the Closing Date. [emphasis added]

28. BDO did not do so. BDO acted in breach of the Court Order, in a grossly negligent manner, in breach of the APA as referred to herein, and in breach of the ECA. SusGlobal Belleville is entitled to damages as a result of the conduct of BDO.

B. SUSGLOBAL CANADA AND SUSGLOBAL BELLEVILLE’S DUE DILIGENCE PRIOR TO THE CLOSING DATE

29. On May 7, 2017, SusGlobal Canada became aware that the Debtors business was in receivership.

30. On May 11, 2017, Gerald Hamaliuk, the Chief Executive Officer of SusGlobal Canada and SusGlobal Belleville, took a tour of the Site and discussed the Debtors’ operations with Brock Evans, the Site Supervisor at the time who was employed by the Debtors (the “First Site Visit”).

31. On the First Site Visit, Mr. Hamaliuk conducted a full process tour of the entire Site with Brock Evans. Mr. Hamaliuk inspected all buildings, including, but not limited to, the Tipping Building, where Organic Waste was received, tipped, and blended, as well as the Site equipment (the “Tipping Building”). During Mr. Hamaliuk’s inspection of the Tipping Building, he did not observe any inventory issue or any excessive accumulation of biosolids there: he only observed a small amount of inventory in the Tipping Building, which consisted of mainly biosolids and some mixed organics at the far end of the building. There was no unusual odour in the building.

32. On the First Site Visit, Mr. Hamaliuk noticed that there was a shredder (the “Shredder”) in the Tipping Building, which was used to process biosolids and woodchips in the Tipping Building.

33. On May 18, 2017, Mr. Hamaliuk and Marc M. Hazout, President of SusGlobal Belleville, visited the Site again to review the Site conditions and discuss the Debtors’ business details with Al Hamilton, the President and Chief Executive Officer of the Debtors (the “Second Site Visit”).

34. On the Second Site Visit, Mr. Hamaliuk and Mr. Hazout conducted a full process tour of the Site with Mr. Hamilton where they inspected each building, including, but not limited to, the Tipping Building.

35. On the Second Site Visit, Mr. Hamaliuk, again, did not observe any inventory issue within the Tipping Building: there was no excess biosolids being stored in the Tipping Building. Mr. Hamaliuk, again, noticed the Shredder was located in the Tipping Building.

36. On both the First Site Visit and the Second Site Visit, there was enough room in the Tipping Building to mix Organic Waste and feed the biosolid materials into the Shredder.

37. On May 18, 2017, SusGlobal Canada signed a Non-Disclosure Agreement with BDO and was granted access to the online data room (the “Data Room”) which contained background information on the Debtors business.

38. On May 22, 2017, SusGlobal Canada initiated contact with BDO to discuss the potential of purchasing specified assets of the Debtor's Property, among other things.
39. On June 15, 2017, SusGlobal Canada submitted a bid for the Debtor's Property pursuant to a draft version of the APA (the "Bid").
40. On June 22, 2017, BDO requested SusGlobal Canada to submit a revised Bid increasing the purchase price.
41. On June 28, 2017, SusGlobal Canada submitted its revised Bid to BDO.
42. On July 12, 2017, BDO accepted SusGlobal Canada's revised Bid to purchase the Debtor's Property pursuant to a draft version of the APA.
43. Prior to SusGlobal Canada submitting its original Bid to BDO on June 15, 2017, SusGlobal Canada carried out its own due diligence when it inspected the Site on the First Site Visit and Second Site Visit, as well as conducted a detailed review of the documents in the Data Room.
44. Prior to SusGlobal Canada submitting its original Bid to BDO on June 15, 2017, SusGlobal Canada developed a business case for submitting a bid to BDO and presented this to PACE Credit Union for funding to the level required to purchase the assets: this business case was based on the Site being in compliance with all legal requirements, including, but not limited to, all ECAs.
45. On July 14, 2017, Mr. Hamaliuk requested in a phone call to Mr. Hamilton to visit the Site on July 25, 2017, for a third time with Paul Mullan, the regional manager of Ecoverse Canada, a supplier of compost equipment. The purpose of this visit was for Mr. Hamaliuk to inspect the composting equipment with Mr. Mullan to determine what equipment SusGlobal Canada might need to replace upon taking possession of the Purchased Assets.
46. On July 14, 2017, Mr. Hamilton agreed to allow Mr. Hamaliuk to visit the Site with Mr. Mullan: neither Mr. Hamaliuk nor Mr. Hamilton notified BDO that Mr. Hamaliuk intended to visit the Site on July 25, 2017.

47. On July 25, 2017, Mr. Hamaliuk confirmed his Site visit for July 25, 2017, with Mr. Hamilton by way of e-mail.

48. On July 25, 2017, Mr. Hamaliuk visited the Site for a third time with Mr. Hamilton and Mr. Mullan (the “Third Site Visit”). Mr. Hamaliuk did not enter any Site buildings because the only purpose of the visit to the Site for a third time was to inspect the equipment. There was no equipment in any of the Site buildings that Mr. Hamaliuk needed to inspect.

49. On the Third Site Visit, Mr. Hamaliuk noticed that the Shredder was outside of the Tipping Building. When Mr. Hamaliuk asked Mr. Hamilton why the shredder was outside, Mr. Hamilton responded that it was being used to shred leaf and yard waste outside of the Tipping Building. Mr. Hamilton did not mention anything to Mr. Hamaliuk with respect to any biosolid inventory in the Tipping Building.

50. On July 25, 2017, Angelo Consoli, Vice President of BDO, e-mailed Mr. Hamaliuk stating that SusGlobal Canada was not allowed to visit the Site again without the Receiver’s prior written consent.

51. On August 15, 2017, Mr. Hamaliuk e-mailed Mr. Consoli to request that Greg Kozlowski, a mechanic, inspect the small tools on the Site.

52. On August 15, 2017, Mr. Consoli e-mailed Mr. Hamaliuk stating that Mr. Kozlowski could attend at the Site.

53. On August 16, 2017, Mr. Kozlowski inspected the small tools trailer at the Site.

54. After Mr. Kozlowski inspected the small tools, he advised Mr. Hamaliuk by telephone, that he saw: (1) leaf waste, yard waste, and woodchips piled high outside of the Tipping building on the Site; and (2) raw compost piled extensively outside of the compost screening area on the Site (collectively, the “Pile Ups”).

55. On or around August 16, 2017, Mr. Hamaliuk called Mr. Consoli and told him about the Pile Ups: Mr. Hamaliuk was advised by Mr. Consoli by telephone that everything was under control on the Site.

C. SUSGLOBAL BELLEVILLE'S CLAIM AGAINST BDO

56. On the Closing Date, SusGlobal Belleville entered the Tipping Building to find at least 1,500 tonnes of Organic Waste stored inside: this amount was approximately ten times the permitted amount pursuant to the ECA.

57. Between the First Site Visit and the Closing Date, BDO continued to accept and store Organic Waste from various vendors in the Tipping Building, the leaf and yard waste area, and the raw compost storage area. Between this time, BDO did not attempt to process the wastes received to be in compliance with the ECA conditions regarding the Tipping Building.

58. The Material Report dated November 23, 2017, indicates that between January 1, 2017, to approximately May 29, 2017, BDO was receiving regular biosolids deliveries of approximately 30 metric tonnes per day from various sources.

59. The Material Report dated November 23, 2017, also indicates that from approximately July 2017, to September 14, 2017, BDO was accepting less biosolids quantities: there was likely no room for biosolids inventory.

60. SusGlobal Canada and SusGlobal Belleville had every expectation that BDO would comply with the ECA and all other applicable laws. SusGlobal Canada and SusGlobal Belleville had a reasonable expectation that BDO would not allow its agents to commit illegal acts for an extended period of time. SusGlobal Canada and SusGlobal Belleville did not anticipate that BDO would engage in such reckless conduct, as it is not characteristic behaviour of a court-appointed Receiver. BDO was required to comply with the conditions of the ECA. BDO knew this.

D. KNOWLEDGE OF BDO PRIOR TO CLOSING

61. Unknown to SusGlobal Canada, prior to July 10, 2017, BDO retained Pinchin, an environmental, engineering, and health and safety consulting firm, to provide a compliance sample report for an annual odour sampling program at the Site to ensure compliance with Environmental Compliance Approval Number 0565-9WXGBY (the “Odour ECA”) (collectively, the “Pinchin Report”).

62. Pinchin conducted the odour sampling program at the Site between July 10, 2017, and July 12, 2017.

63. The Pinchin Report estimated the amount of the Organic Waste in the Tipping Building to be approximately 1,312 metric tonnes and a volume of 1,875 cubic meters (m³) (the “Pinchin Biosolid Amount”).

64. Using the Pinchin Biosolid Amount of 1,875 m³ value, and applying general engineering principles, the actual biosolid amount in the Tipping Building was approximately 1,500 tonnes. The 1,312-tonne Pinchin Biosolid Amount was determined by Pinchin using a specific gravity of 0.7, which is characteristic of mixed organic material such as biosolids mixed with wood chips. However, the Organic Waste in the Tipping Building mostly consisted of paper sludge, which has a specific gravity of 0.8 to 0.85. Using a conservative specific gravity value of 0.8, the total biosolid amount mass was approximately 1,500 tonnes (the “Total Biosolid Amount”), contrary to the conditions of the ECA.

65. Also, prior to July 19, 2017, BDO retained Stantec, an engineering and environmental sciences consulting firm, to provide a draft odour report pursuant to odour estimates that were determined by Pinchin in a preliminary draft of the Pinchin Report (the “Stantec Report”).

66. On July 19, 2017, Stantec provided the Stantec Report to BDO. The Stantec Report stated the Average Odour Analytical Result in the Tipping Building to Biofilter Inlet was 1,414 odour units (a measurement of odour concentration) (the “Odour Measurement”).

67. The Stantec Report also stated “that odour emissions into the biofilter from the Tipping Building [were] significantly higher than anticipated in [Astoria’s most recent version of the Emission Summary and Dispersion Modelling Report]. This discrepancy also warrants investigation.” [emphasis added]

68. Prior to the Closing Date, BDO never indicated to SusGlobal Canada or SusGlobal Belleville that it had retained Pinchin or Stantec to conduct odour sampling tests on the Site: further, it did not inform either SusGlobal Canada or SusGlobal Belleville that there were any inventory issues regarding the Total Biosolid Amount or Pinchin Biosolid Amount or an odour issue regarding the Odour Measurement concerning the Tipping Building, or any unlawful conduct that had occurred on a daily basis prior to the Closing Date.

69. Prior to the Closing Date, BDO did not inform SusGlobal Canada, or SusGlobal Belleville that it took any steps to investigate or ameliorate the excessive Total Biosolid Amount or Pinchin Biosolid Amount or Odour Measurement coming from the Tipping Building.

70. BDO chose to breach the ECA and environmental laws of Ontario as it knew of the excessive Organic Waste and Odour Measurement issue in the Tipping Building from the Pinchin Report and Stantec Report, it knew of the ECA conditions of the licence, and also knew that it took approximately three days to process 150 tonnes of Organic Waste to maintain the Tipping Building within ECA compliance.

71. As the court-appointed Receiver for the Debtors, BDO must have known about the excessive Organic Waste and Odour Measurement issue in the Tipping Building. BDO also knew it was receiving money to process the waste but intentionally failed to do so and kept the funds received, which are estimated in the amount of \$75,000.00.

72. After Brock Evans resigned as Site Manager for the business, Mr. Hamilton, who was hired by BDO, continued as Site Manager. He was the agent of BDO and knew about the excessive Organic Waste and Odour Measurement issue that existed in the Tipping Building and that the funds paid for

processing were being converted by BDO and used improperly, and in any event, not for processing of Organic Waste. As well, Mr. Consoli, the Vice President of BDO, was fully aware of this problem, in light of the fact that the Stantec Report was addressed and sent to him.

73. Section 2.08(1) of the APA provides:

(1) At the Time of Closing, [SusGlobal Belleville] will assume and thereafter fulfil, perform and discharge when due the following Liabilities of Astoria outstanding as at the Closing Date (collectively, the “Assumed Liabilities”):

(c) all Liabilities relating to or arising from the Purchased Assets under Environmental Laws from and after the Closing Date including, without limitation, any costs and expenses associated with any ongoing work in process from and after the Time of Closing required to be carried out in order to comply with any Environmental Laws provided that it is agreed by the parties hereto that such ongoing work shall not include the work described in Section 4.02(9) below.

74. While SusGlobal Belleville assumed the liabilities pursuant to section 2.08(1) of the APA, SusGlobal Belleville did not assume any liabilities that arose from the Receiver’s own failure to comply with the requisite environmental laws of Ontario and misused the funds received, that were earmarked to be used to comply with the ECA conditions.

75. The final Pinchin Report was not completed prior to the Closing Date. However, the draft report provided the information needed by BDO to know that BDO was carrying on the business of the Debtors in receivership, unlawfully.

76. The contents of the Pinchin Report and the Stantec Report were not known to SusGlobal Canada or SusGlobal Belleville and were not provided to SusGlobal Canada or SusGlobal Belleville prior to the Closing Date: this was intentionally done by BDO to avoid a reduction of the Purchase Price.

77. The final Pinchin Report was provided to SusGlobal Belleville on October 5, 2017.

78. After the Closing Date, both Pinchin and Stantec requested payment from SusGlobal Belleville to complete the Pinchin Report, as required by the ECA.

79. On October 8, 2017, Pinchin forwarded the final Pinchin Report to the Ontario Ministry of the Environment and Climate Change (the “MOECC”).

80. Between September 26, 2017 and October 31, 2017, SusGlobal Belleville was in direct communication with the MOECC to ameliorate the excessive inventory issue in the Tipping Building.

81. By email dated October 5, 2017, an MOECC Officer at the Belleville area office, required SusGlobal Belleville to first process the Organic Waste materials in the Tipping Building to be in compliance with the 150-tonne storage limit pursuant to the ECA. The email stated:

...it appears quite a bit of unprocessed material was left in the Tipping Building by the time [SusGlobal Belleville] took over, so a management plan to get that material either off-site or into the composting process and back down to allowable levels is required [emphasis added]

82. Between the Closing Date and November 15, 2017, the MOECC Officer inspected the status of Organic Waste in the Tipping Building and assessed odour issues to ensure ECA compliance.

83. Between the Closing Date and November 15, 2017, SusGlobal Belleville had been working to process the Organic Waste inventory in the Tipping Building down to the ECA limit.

84. On November 15, 2017, SusGlobal Belleville achieved ECA compliance: it had processed enough Organic Waste to reduce the inventory in the Tipping Building to an acceptable limit pursuant to the ECA.

85. Because SusGlobal Belleville had to first reduce the Organic Waste inventory in the Tipping Building to comply with the ECA, it suffered further financial loss as it could not receive additional Organic Wastes from various contractors, as there was no room in the Tipping Building as a result of BDO’s breach of the ECA conditions.

E. DAMAGES

86. On October 30, 2017, SusGlobal Belleville requested that BDO reimburse SusGlobal Belleville for damages in the amount of \$580,000 plus HST, which is \$655,400 (inclusive of HST) (the “Claim Amount”) (collectively, the “Letter”).

87. Pursuant to the Third Amendment to the APA, BDO required SusGlobal Belleville to pay the Penalty Consideration of \$100,000 on the basis that SusGlobal Belleville did not satisfy its closing obligations pursuant to the APA. Because BDO was operating the Site illegally and in non-compliance with the ECA prior to the Original Closing Date, BDO was also not able to satisfy its closing obligations pursuant to the APA and, therefore, BDO was not ready, willing, and able to close on the Original Closing Date: BDO could not offer the Site to SusGlobal Belleville in compliance with the ECA and all applicable environmental laws, including section 186(3) of the EPA, among others.

88. Both BDO and SusGlobal Belleville were not able to satisfy their respective closing obligations on the Closing Date. BDO should not have required SusGlobal Belleville to pay the Penalty Consideration of \$100,000 to extend the closing date to the Closing Date.

89. SusGlobal Belleville requests that BDO reimburse SusGlobal Belleville for the Penalty Consideration of \$100,000 (no HST charged).

90. SusGlobal Belleville requests that BDO reimburse SusGlobal Belleville for damages in the total amount of \$755,400 (inclusive of HST) (the “Amended Claim Amount”). The Claim Amount and the Amended Claim Amount were calculated as follows.

91. To process the 1,500 tonnes of Organic Waste stored in the Tipping Building, SusGlobal Belleville needed to add 6,000 tonnes of woodchip blend. At a processing cost of \$40 per tonne, SusGlobal processed 7,500 tonnes of Organic Waste at a total cost of \$300,000 (the “Processing Cost”).

92. Because SusGlobal Belleville was required to reduce the Tipping Building inventory to comply with the ECA, it had to turn down business from Sunoco on September 19, 20 and 21, 2017, and Northumberland for an indefinite period, at a loss of \$10,000 per month for six months. SusGlobal Belleville suffered lost revenues of \$60,000 from Northumberland (the “Lost Contract Cost”).

93. In order to bring down the Biosolid Amount in the Tipping Building to be in compliance with the ECA, SusGlobal Belleville converted its operations from a Class A Compost facility to a Class B Compost facility pursuant to section 6(8) of the ECA (“Class B Compost”).

94. Class B Compost is not safe enough to be sold to the general public and can only be disposed of pursuant to a Non-Agricultural Source Materials Plan (“NASM Plan”). SusGlobal Belleville could not sell and, therefore, earn any revenue from Class B Compost.

95. Pursuant to a NASM Plan, 5 tonnes of Class B Compost can be applied to a one-acre area of land. Each NASM Plan applies to a 50-acre area of land at a cost of approximately \$1,900 per NASM Plan. To dispose of 7,500 tonnes of Class B Compost, 1,500 acres of land is required. The actual cost to SusGlobal Belleville is expected to be approximately \$70,000 (the “Class B Compost Cost”).

96. As a Class A Compost facility, SusGlobal Belleville sold compost at approximately \$20 to \$30 per tonne of compost. Applying a conservative estimate of \$20 per tonne of compost, SusGlobal Belleville lost approximately \$150,000 in compost sales by not being able to sell the 7,500 tonne amount of composted biosolids in the Tipping Building (the “Opportunity Cost”).

97. The Claim Amount of \$580,000 was calculated by adding the \$300,000 Processing Cost, the \$60,000 Lost Contract Cost, the \$70,000 Class B Compost Cost, and the \$150,000 Opportunity Cost.

98. The Amended Claim Amount of \$755,400 (inclusive of HST) was calculated by adding the Penalty Consideration of \$100,000 plus the Claim Amount of \$655,400.

99. By letter dated November 13, 2017, BDO wrote to SusGlobal Belleville advising that it would not reimburse SusGlobal Belleville for any of its Claim Amount (the “BDO Letter”).

100. The BDO Letter references mathematical errors with respect to calculating the Pinchin Biosolid Amount. Based on the amount of time and woodchips it required SusGlobal Belleville to process the Organic Waste inventory in the Tipping Building as of the Closing Date to November 15, 2017, the 1,500 metric tonne Total Biosolid Amount is reasonable.

101. BDO failed to act honestly, in good faith, in compliance with the Court Order, in compliance with the APA, and in compliance with the ECA. BDO, as an officer of the court, must comply with the standard of conduct of meticulous correctness. BDO is responsible for damages suffered by SusGlobal Belleville resulting from BDO's conduct. SusGlobal Belleville was entitled to rely on the fact that the conduct of a court-appointed officer would be in compliance with the environmental laws of Ontario.

102. BDO was also grossly negligent in its conduct. In the alternative, BDO's conduct was wilful misconduct.

103. The Court could not and did not approve of this misconduct of BDO, which were not disclosed to the Court. BDO, in that regard owed a fiduciary duty to the Court, which it breached.

104. The conduct of BDO was a very marked departure from the conduct of a reasonable and prudent owner. Furthermore, the conduct of BDO was 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 that it knew what it was doing was wrong or was recklessly indifferent in its conduct.

105. SusGlobal Bellville has a strong prima facie case against BDO and in any event the claim against BDO is not frivolous or vexatious.

106. There was no implied term in the APA, or anywhere else, that the Receiver BDO could take possession of the business or operate the business and ignore the obligations under the ECA, the *Environmental Protection Act* (Ontario), or the Court Order.

107. BDO's omission to comply with the ECA was in reckless disregard of the legal duties of BDO under the ECA, the *Bankruptcy and Insolvency Act*, and Court Order and in reckless disregard of the consequences to SusGlobal Belville. In so conducting itself, BDO acted dishonestly and unfairly to SusGlobal Belleville.

108. Sections 243(1), 243(2), 247 and 14.06 of the *Bankruptcy and Insolvency Act*.

109. Rules 3, 11 and 14 of the Bankruptcy and Insolvency General Rules.

110. Sections 14, 186(3), 187(2), 190, 191 of the *Environmental Protection Act* (Ontario).
111. Sections 2 and 6 of the ECA.
112. Paragraphs 8, 16, 17, and 33 of the Court Order appointing BDO as Receiver of the Debtors.
113. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THIS MOTION:

114. The affidavit of Gerald Hamaliuk affirmed November 29, 2017 and exhibits thereto;
115. The supplementary affidavit of Gerald Hamaliuk affirmed December 17, 2017 and exhibits thereto;
116. The affidavit of Marc Hazout affirmed November 14, 2017 and exhibits thereto;
117. The affidavit of an expert including the expert report, to be sworn; and
118. Such further and other material as counsel may advise and this Honourable Court may permit.

January 18, 2018

SOLMON ROTHBART GOODMAN LLP

375 University Avenue
Suite 701
Toronto, ON M5G 2J5

Melvyn L. Solmon

Tel: 416-947-1093
Fax: 416-947-0079
Email: msolmon@srglegal.com

Lawyers for SusGlobal Energy Belleville Ltd.

ERIC K. GILLESPIE PROFESSIONAL CORPORATION

10 King Street East,
Suite 600
Toronto, ON M5C 1C3

Eric K. Gillespie

Tel: 416-703-6362
Fax: 416-703-9111
Email: egillespie@gillespielaw.ca

Andrew T.R. Chachula

Tel: 416-703-3912

Fax: 416-703-9111

Email: achachula@gillespielaw.ca

Lawyers for SusGlobal Energy Belleville Ltd.

BUSINESS DEVELOPMENT
BANK OF CANADA

- and -

ASTORIA ORGANIC MATTERS LTD.
and ASTORIA ORGANIC MATTERS
CANADA LP

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

Applicants

Respondents

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

Proceeding Commenced at Toronto

AMENDED NOTICE OF MOTION

SOLMON ROTHBART GOODMAN LLP

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

Melvyn L. Solmon

Tel: (416) 947-1093

Fax: (416) 947-0079

Email: msolmon@srglegal.com

Lawyers for SusGlobal Energy Belleville Ltd.

**ERIC K. GILLESPIE PROFESSIONAL
CORPORATION**

10 King Street East, Suite 600
Toronto, ON M5C 1C3

Eric K. Gillespie

Tel: 416-703-6362

Fax: 416-703-9111

Email: egillespie@gillespielaw.ca

Lawyers for SusGlobal Energy Belleville Ltd.

BUSINESS DEVELOPMENT
BANK OF CANADA

- and -

ASTORIA ORGANIC MATTERS LTD.
and ASTORIA ORGANIC MATTERS
CANADA LP

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

Applicants

Respondents

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

Proceeding Commenced at Toronto

SUPPLEMENTARY MOTION RECORD

SOLMON ROTHBART GOODMAN LLP

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

Melvyn L. Solmon

Tel: (416) 947-1093

Fax: (416) 947-0079

Email: msolmon@srglegal.com

Lawyers for SusGlobal Energy Belleville Ltd.

**ERIC K. GILLESPIE PROFESSIONAL
CORPORATION**

10 King Street East, Suite 600
Toronto, ON M5C 1C3

Eric K. Gillespie

Tel: 416-703-6362

Fax: 416-703-9111

Email: egillespie@gillespielaw.ca

Lawyers for SusGlobal Energy Belleville Ltd.
