

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

B E T W E E N :

**PAUL JOSEPH DIETRICH**

Applicant

- and -

**STEVEN ROBERT MCLAREN**

Respondent

APPLICATION UNDER sections 207, 209 and 210 of the  
*Business Corporation Act*, R.S.O. 1990, c. B16

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**MOVING PARTY (LIQUIDATOR)'S FACTUM**  
**(returnable October 13, 2022)**

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October 1, 2022

**GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
Toronto (ON) M5G 1V2  
Fax: (416) 597-3370

**R. Brendan Bissell – LSO #: 40354V**  
Tel: (416) 597-6489  
Email: [bissell@gsnh.com](mailto:bissell@gsnh.com)

Lawyers for Albert Gelman Inc. in its capacity  
as court-appointed liquidator

## I. NATURE OF THIS MOTION

1. This is a motion by Albert Gelman Inc. (“**AGI**”) in its capacity as liquidator (in such capacity, the “**Liquidator**”) appointed pursuant to the [\*Business Corporations Act\*](#), (the “**BCA**”) over all of the assets, undertakings and properties of 1827403 Ontario Inc. (“**1827403**”), 1853997 Ontario Inc. (“**1853997**”), 1885926 Ontario Inc. (“**1885926**”), 1950940 Ontario Inc. (“**1950940**”), 1950941 Ontario Inc. (“**1950941**”) and 1950979 Ontario Inc. (“**1950979**” and, together with 1827403, 1853997, 1885926, 1950940, 1950941 and 1950979, the “**Companies**”) for an order in suggested accordance with the draft included in the motion record:
  - (a) authorizing the Liquidator to pay the pre-appointment liabilities of the Companies in its discretion on terms that (i) the estate in question is not, and after any proposed payment will not be, insolvent, and (ii) the shareholders of the Companies, being Paul Dietrich and Steve McLaren consent to such payment;
  - (b) approving the second report of the Liquidator dated October 7, 2022 (the “**Second Report**”), as well as the activities of the Liquidator described therein.
  - (c) approving the Liquidator’s and its counsel’s fees and disbursements set out in the fee affidavits appended to the First Report (the “**Fee Affidavits**”).

## II. FACTS

### A. Background<sup>1</sup>

2. The Companies were all incorporated for purposes of real estate developments and management in the Peterborough area. The Companies’ sole shareholders are the Applicant and the Respondent (the “**Shareholders**”), respectively owning 50% of the shares of each

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<sup>1</sup> First Report of the Liquidator dated June 2, 2022, tab 2(C) of the Liquidator’s motion record, paras. 7-12.

of the Companies. Each of the Shareholders is also a director and officer of each of the Companies. 1853997 has one additional director, Greg Landry.

3. There has been litigation for about 6 to 12 months between Shareholders,<sup>2</sup> but arbitration proceedings between them led to an award that there be a liquidation of certain of their companies, and the Appointment Order was made on consent by this court to appoint AGI as Liquidator of the Companies.<sup>3</sup>

**B. State of Companies' affairs**

4. Two of the Companies are active and own and manage real property:
  - a. 1950979 owns and managed the property at 888 Whitefield Drive in Peterborough, a three-story, 27-unit residential apartment building of which occupation began in 2021, and with 24 units presently tenanted (the "**Whitefield Property**").
  - b. 1950941 owns and managed the property at 144 Brock Street in Peterborough, a two-story building with 2 tenanted residential apartments on the top floor and a vacant commercial restoration space on the main floor (currently unfit for use) (the "**Brock Property**").
5. The other Companies, being 1827403, 1853997, 1885926 and 1950940, had no business or other activities as of the Appointment Order.

**C. HST liability of 1950979<sup>4</sup>**

6. The Liquidator has learned that 1950979 failed to report or remit HST when it completed the construction of the Whitefield Property on April 15, 2021.

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<sup>2</sup> Further background is provided in the affidavit of Paul Dietrich sworn March 30, 2022 filed in support of application for the Appointment Order, of which a copy is at tab 2(D) of the Liquidator's motion record.

<sup>3</sup> A copy of the Appointment Order is at tab 2A (page 22) of the Liquidator's motion record.

<sup>4</sup> Paragraphs 15-19 of the Second Report; Tab 2 of the Liquidator's motion record.

7. The Liquidator has since arranged for the appropriate HST return to be filed through the Companies' external accountant on September 9, 2022. That return indicates that HST of \$602,443 is owing, plus any applicable penalties and interest. The accountant estimates that interest and penalties to date may be in the range of \$35,000-\$40,000.

**D. Other activities of the Liquidator<sup>5</sup>**

8. The Second Report also describes the Liquidator's activities in connection with the following matters:
  - a. engagement of a real estate agent and listing of the Whitefield and Brock Properties;
  - b. an agreement of purchase and sale having been accepted for the Whitefield Property, which is subject to a condition in the purchaser's favour for which the Liquidator is working with the purchaser to satisfy it;
  - c. a relisting and reduced price for the Brock Property;
  - d. the payment of \$515,000 towards the corporate tax liability of \$557,072 (before any interest and penalties) of 1827403 Ontario Inc. ("**182**");
  - e. the identification that 182 owns the two parcels of land that are one-foot reserves in trust for itself and a third party as 50/50 beneficial owners, and the Liquidator's intent to pursue a sale of 182's 50% beneficial interest by private auction among that third party and Messrs. Dietrich and McLaren as the logical purchasers of unconventional real property;
  - f. unsuccessful attempts to secure a partial repayment of the amounts owing to 182 by Parkview Homes in order to repay the remaining amounts owing for the corporate tax liability;

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<sup>5</sup> Paragraphs 20-43 of the Second Report; Tab 2 of the Liquidator's motion record.

- g. a case conference before the Hon. Frank Newbould in the ongoing arbitration proceedings between Messrs. Dietrich and McLaren, during which counsel for Mr. McLaren (as the principal of Parkview Homes) was asked to seek instructions for Parkview Homes to repay \$100,000 of the amounts owing to 182, but counsel has not advised that he has those instructions;
- h. in preparation for that arbitration case conference, the review by the Liquidator of the amounts owing by Parkview Homes to 182 as well as transactions by 182 of more than \$20,000 in the 18 months prior to the Liquidator's appointment, and the conclusion that the \$1,717,000 shown on the Companies' books and records is correct;
- i. assertions of set off by Parkview Homes in respect of the amounts owing to 182 due to similar amounts owing to Parkview Homes by the companies who own the Whitefield and Brock Properties,
- j. the Liquidator's intent to take enforcement steps against Parkview Homes in respect of the amounts owing to 182, as authorized by the Appointment Order, due to the likely inability of the company that owns the Brock Property to repay all amounts owing to Parkview Homes (having regard to the listing price and likely net proceeds of the sale of the Brock Property), which means that any potential set-off will be mathematically insufficient to address the amounts owing to 182; and
- k. attending to insurance coverage issues, the payment of municipal taxes, the filing of HST returns for all of the Companies, and management of the Whitefield Property and its tenants through a property manager.

9. The Second Report contains a fee affidavit in the usual form from the Liquidator.<sup>6</sup> The Supplementary Motion Record contains a fee affidavit in the usual form from the Liquidator's counsel.<sup>7</sup>

### **III. ISSUES AND LAW**

10. The issues are whether the court should make the orders sought with respect to **(A)** payment of pre-appointment liabilities of the Companies and, **(B)** the fee and activity approvals.

#### **A. Payment of pre-appointment liabilities**

11. Section 209 of the BCA provides that the court may “make any interim or other order as is considered just”. Section 223(h) provides that “A liquidator may do and execute all such other things as are necessary for winding up the business and affairs of the corporation and distributing its property.” It is trite that distributions are “practically necessary for the accomplishment of the objectives of the legislation”.<sup>8</sup>
12. As a general matter, the Liquidator intends to seek a Court Order setting a claims process and claims bar date at the appropriate time in these proceedings, which will likely be once all assets have been sold such that the Companies will no longer be actively carrying on business.
13. Before that time, however, in some cases it may be prudent and appropriate to pay some creditors. An example that has already been approved for payment in the June 13, 2022 Court's Order was an outstanding corporate tax liability of one of the Companies. Ongoing non-payment of those amounts were going to incur penalties and interest at CRA, which

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<sup>6</sup> Tab 2(J) of the Liquidator's motion record.

<sup>7</sup> Tab 1 Of the Liquidator's supplementary motion record.

<sup>8</sup> *Forjay Management Ltd. v 625536 B.C. Ltd.*, [2019 BCCA 368](#), para. 26.

would erode the estate and prejudice the interests of creditors and ultimately the interests of the equity holders in receiving the net funds after all liabilities are paid.

14. The HST obligation noted in the Second Report is analogous.
15. A motion and order is impractical and would be unduly costly for every liability that the Liquidator believes should be paid before the completion of the claims process. A general authority to make such payments when appropriate would be preferable.
16. The Liquidator is cognizant that there are several factors that ought be kept in mind when considering such payments:
  - (a) any liability should properly established, and
  - (b) payment of a liability should not result in any other equally-ranking creditor being disadvantaged.
17. The latter concern would in particular arise on any insolvency issues, because in that case the payment of one creditor over another could engage preference considerations.
18. In order to address these concerns, the Liquidator proposes that it should first be satisfied that there will be no insolvency issues in the making of any payment. The Liquidator then proposes that any payments only be authorized if the two shareholders of the Companies, Messrs. Dietrich and McLaren, consent. Their consent will ensure the propriety of the obligation and while there have been many instances of disagreement between them both before and after the appointment of the Liquidator, they have also been able to agree on many aspects of the Companies' affairs. The Liquidator therefore believes that seeking their consent will not unduly hinder payment of appropriate amounts.
19. The court may therefore grant the relief sought in this regard.

**B. Fee and activity approvals**

20. As mentioned by Morawetz RSJ (as he then was). in *Target*,<sup>9</sup> a *Companies' Creditors Arrangement Act* case, approval of a court officer's activities and reports is a relief "routinely granted." This is because court approval allows the Liquidator to move forward with the next steps in the proceeding, brings the Liquidator's activities before the court, allows an opportunity for the concerns of the stakeholders to be addressed and any problems to be rectified, enables the court to satisfy itself that the Liquidator's activities have been conducted in a prudent and diligent manner, provides protection for the Liquidator not otherwise provided in the BCA, and protects the creditors from the delay in distribution that would be caused by re-litigation of steps taken and potential indemnity claims by the Liquidator.<sup>10</sup>
21. As to the approval of the Liquidator and its independent counsel's fees, paragraph 18 of the Appointment Order provides that the Liquidator and its counsel shall pass their accounts before this court from time to time. The issue is whether the fees are fair and reasonable. Caselaw-developed criteria guiding this analysis include (i) the nature and extent of the proceeding, (ii) the complications and difficulties encountered, (iii) the time spent by the court officer and its counsel, (iv) the professionals' knowledge, experience and skill, (v) the results achieved, and (vi) the costs of comparable services. Further, the caselaw requires that the Fees be verified by affidavits of the main professionals involved disclosing details sufficient to allow a reasonable appreciation.<sup>11</sup>

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<sup>9</sup> *Target Canada Co. (Re)*, [2015 ONSC 7574](#).

<sup>10</sup> *Target*, paras. 2 and 23.

<sup>11</sup> See *Confectionately Yours Inc. (Re)*, [2002 CanLII 45059 \(ON CA\)](#), paras. 42-54.

22. The Liquidator's activities since its First Report have been reported to the court and stakeholders in the First Report and are appropriate, timely, commercially reasonable, and in the best interest of the Companies' estate. Filed with the Second Report are affidavits of Messieurs Bryan Gelman for the Liquidator and Brendan Bissell for its independent counsel, GSNH, which are supported by true copies of detailed bills and confirm that the Fees are comparable to those charged by other licensed insolvency trustee and law firms in Toronto for similar service. Also appended to the First Report are the Liquidator's detailed interim statements of receipts and disbursements for each of the Companies as at October 6, 2022.<sup>12</sup> This court's approval of the First Report and the Liquidator's activities set out therein would provide the desirable stability and other salutary effects observed in *Target*.

23. This court may therefore make the orders sought under this head of relief.

#### **IV. NATURE OF THE RELIEF SOUGHT**

24. The Liquidator therefore respectfully requests an order in accordance with the draft filed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 11<sup>th</sup> day of October 2022.

*Brendan Bissell*

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Brendan Bissell, of counsel for the Liquidator

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<sup>12</sup> Tab 2(I) of the Liquidator's motion record.

**SCHEDULE A – LIST OF AUTHORITIES**

1. *Forjay Management Ltd. v 625536 B.C. Ltd.*, [2019 BCCA 368](#)
2. *Target Canada Co. (Re)*, [2015 ONSC 7574](#).
3. *Confectionately Yours Inc. (Re)*, [2002 CanLII 45059 \(ON CA\)](#)

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**SCHEDULE B – RELEVANT STATUTES**

*Business Corporations Act, [R.S.O. 1990, c. B.16](#)*

**209** The court may make the order applied for, may dismiss the application with or without costs, may adjourn the hearing conditionally or unconditionally or may make any interim or other order as is considered just, and upon the making of the order may, according to its practice and procedure, refer the proceedings for the winding up to an officer of the court for inquiry and report and may authorize the officer to exercise such powers of the court as are necessary for the reference.

**223 (1)** A liquidator may,

- (h) do and execute all such other things as are necessary for winding up the business and affairs of the corporation and distributing its property.

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**PAUL JOSEPH DIETRICH**

Applicant

-and-

**STEVEN ROBERT MCLAREN**

Respondent

Court File No. CV-22-00679109-00CL

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**Proceeding commenced in TORONTO**

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**GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
Toronto, Ontario M5G 1V2  
Fax: 416-597-6477

**Brendan Bissell** (LSO #40354V)  
Tel: (416) 597-6489  
Email: [bissell@gsnh.com](mailto:bissell@gsnh.com)

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