

**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 December 21, 2022)**

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December 13, 2022

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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., 1853997 Ontario Inc., 1885926 Ontario Inc., 1950940 Ontario Inc. , 1950941 Ontario Inc. (“**1950941**”) and 1950979 Ontario Inc. (together the “**Companies**”) for:
  - (a) an approval and vesting order in respect of a sale transaction (the “**Transaction**”) in which the Liquidator has entered into an agreement on behalf of 1950941 with Steven Robertson in trust dated October 9, 2022 (since assigned to 1000353840 Ontario Inc.), as purchaser (the “**Purchaser**”) to sell all of 1950941’s assets, including a building at 144 Brock Street in Peterborough; and
  - (b) an Order:
    - (i) sealing the Confidential Appendices to the Third Report pending the filing of a Liquidator’s Certificate for the sale of all of the assets of 1950941 or further Court Order,
    - (ii) approving the third report of the Liquidator dated December 13, 2022 (the “**Third Report**”), as well as the activities of the Liquidator described therein, and
    - (iii) approving the Liquidator’s and its counsel’s fees and disbursements set out in the fee affidavits appended to the Third 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 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 at appointment

4. Two of the Companies are active and own and manage real property:
  - a. 1950979 Ontario Inc. owns and manages 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**").

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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.

<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(F) of the Liquidator's motion record.

<sup>3</sup> A copy of the Appointment Order is at tab 2A (page 17) of the Liquidator's motion record.

5. The other Companies, being 1827403, 1853997, 1885926 and 1950940, had no business or other activities as of the Appointment Order.

**C. Limited update by the Liquidator**

6. The Liquidator has provided the Third Report primarily to support approval of the Transaction.
7. In addition to that, the Liquidator wishes to briefly bring to the attention of the Court and the stakeholders two further points:<sup>4</sup>
  - a. The first is that the HST payable in respect of 1950979 Ontario Inc., for which approval to pay was sought in the motion heard on October 13, 2022 and the resulting order, has not been paid. Issues that were discussed in that hearing resulted in considerations by the Liquidator of possible personal liability as a result. Discussions with Messrs. Dietrich and McLaren about arrangements to address that possible liability are ongoing. Until those issues have been addressed to the satisfaction of the Liquidator, it does not intend to pay the HST in question before a claims process and claims bar has been ordered by the Court, which the Liquidator will see following the disposition of all of the assets of the Companies;
  - b. The second is that the conditional agreement of purchase and sale in respect the Whitefield Property that was previously reported by the Liquidator will not be proceeding. The purchaser under that agreement has purported to rely on the expiry of a condition in its favour. The Liquidator believes that the purchaser may be in breach of its obligation under that agreement including an obligation to act in good faith in respect of the condition and agreement. The Liquidator is accordingly not

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<sup>4</sup> Third Report, para. 16; Tab 2 of the Liquidator's motion record, pages 10-11.

releasing the deposit and will bring a motion to the Court for directions on whether the purchaser is in breach of its obligations and if so what the consequent damages are once the Whitefield Property has been resold. Further detail on the facts and issues in relation to this issue will be dealt with in the report on that motion. The Liquidator is relisting the Whitefield Property for sale on MLS and is requesting new offers by January 12, 2023.

**D. Sale of the Brock Property**

8. The Liquidator's Third Report notes the following regarding this proposed sale:<sup>5</sup>
  - a. the Liquidator requested listing proposals from brokers and ultimately retained David Watkins of RE/MAX Hallmark First Group Realty Ltd. to be its broker for the sale of the Brock Property;
  - b. the broker listed the Brock Property on MLS and prepared a marketing package in support of that listing;
  - c. the Brock Property was listed on July 7, 2022 with an initial list price of \$699,000;
  - d. some inquiries were received including two offers, but the Liquidator was not prepared to accept those offers;
  - e. on August 5, 2022, the listing price was lowered to \$680,000;
  - f. thereafter, three offers were received, which the Liquidator again chose not to accept;
  - g. on September 8, 2022, the listing price was reduced again to \$599,000;

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<sup>5</sup> Third Report, paras. 18-35; Tab 2 of the Liquidator's motion record, pages 11-13.

- h. after that point, three offers were received, which resulted in the Liquidator entering into negotiation with one of them to arrive at an agreement of purchase and sale (the “**APS**”) dated October 9, 2022;<sup>6</sup>
  - i. the APS was conditional, but conditions were waived through an Amending Agreement dated October 21, 2022;<sup>7</sup>
  - j. a deposit of \$20,000 was received with the signing of the APS and a further deposit of \$30,000 was received upon the waiver of conditions, both of which are in the broker’s trust account;
  - k. the purchaser under the APS has assigned its interest to 1000353840 Ontario Inc.; and
  - l. the only remaining condition in the APS is the grant of an Approval and Vesting Order.
9. The Liquidator reports that the price in the APS is reasonable having regard to the appraisal it obtained of the Brock Property.<sup>8</sup>
10. The Liquidator has also relied upon the broker’s summary of offers and prices received.<sup>9</sup>

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<sup>6</sup> A copy of the APS with the price redacted is attached at Appendix J to the Third Report; Tab 2(J) of the Liquidator’s motion record, pages 134-146. An unredacted copy of the APS will be filed with the Court as Confidential Appendix 2.

<sup>7</sup> A copy of the Amending Agreement with the price redacted is attached at Appendix J to the Third Report; Tab 2(J) of the Liquidator’s motion record, pages 150-152. An unredacted copy of the APS will be filed with the Court as Confidential Appendix 2.

<sup>8</sup> Third Report, para. 33(a); Tab 2 of the Liquidator’s motion record, page 13. A copy of the appraisal will be filed with the Court as Confidential Appendix 1.

<sup>9</sup> A copy of the broker’s summary will be filed with the Court as Confidential Appendix 3.

**E. Fees of the Liquidator and its counsel**

11. The Third Report also contains a fee affidavit in the usual form from the Liquidator and its counsel.<sup>10</sup>

**III. ISSUES AND LAW**

12. The issues are whether the court should make the orders sought with respect to **(A)** approval of the APS, **(B)** sealing the confidential appendices, and, **(C)** the fee and report approvals.

**A. Approval of the APS**

13. This court has jurisdiction to make the approval and vesting orders sought, including under s. 100 and 101 of the *Courts of Justice Act*<sup>11</sup> (the “**CJA**”).
14. It is trite that this court’s discretion to make approval and vesting orders is guided by the *Soundair*<sup>12</sup> criteria: **(i)** whether the receiver has made a sufficient effort to get the best price and has not acted improvidently, **(ii)** the efficacy and integrity of the process by which offers are obtained, **(iii)** whether there has been unfairness in the working out of the process, and **(iv)** the interests of all parties. The interests of all parties include those of the purchasers.<sup>13</sup>
15. Here, for clarity, the sale process undertaken by the Liquidator was not pre-approved by this court by way of a sale process order *per se*. The sale process was undertaken under the appointment order.

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<sup>10</sup> Tabs 2(L) and (M) of the Liquidator’s motion record.

<sup>11</sup> [R.S.O. 1990, c. C.43](#).

<sup>12</sup> *Royal Bank of Canada v Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#) (“*Soundair*”), p. 9.

<sup>13</sup> *Reciprocal Opportunities Incorporated v Sikh Lehar International Organization*, [2018 ONCA 713](#), paras. 55-56 and 61-62.

16. The caselaw is that a preapproved sale process may be ideal, but it is not necessary.<sup>14</sup> The process may even predate any filing.<sup>15</sup> The threshold is reasonableness, not perfection; the same *Soundair* criteria apply.<sup>16</sup> Courts have also considered whether additional sale efforts could realistically lend a better result, taking costs and opportunity costs into account. If not, this supports the approval of the transaction at hand.<sup>17</sup>
17. An important factor is that the Liquidator is satisfied of the process' thoroughness and fairness in the circumstances. When speaking of a receiver, which for all practical purposes is not different than the Liquidator in this case, the case law notes that the court "should place a great deal of confidence in the receiver's expert business judgement",<sup>18</sup> especially when, as here, the process was managed from the outset by an officer of the court.<sup>19</sup>
18. Here, as recounted above and in the Third Report, the sale process for the Brock Property followed the typical sequence for marketing a conventional real estate asset.
19. The processes provided a commercially reasonable amount of time in the circumstances (i.e. approximately 3 months exposure to market) for prospective purchasers to complete due diligence and submit. The processes were public and attracted reasonable market interest, as recounted above. Ultimately, the processes led to one offers that the Liquidator accepted as reasonable, which speaks to the reasonableness of the sale process itself.

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<sup>14</sup> *Bloom Lake, g.p.l. (Arrangement relatif à)*, [2015 QCCS 1920](#) ("**Bloom Lake**"), para. 29; *Soundair*, p. 17-18.

<sup>15</sup> *Nelson Education Limited (Re)*, [2015 ONSC 5557](#) ("**Nelson**"), paras. 31-33.

<sup>16</sup> *Bloom Lake*, para. 59; see also para. 39; *Soundair*, p. 8; see also p. 17-19.

<sup>17</sup> *Elleway Acquisitions Limited v 4358376 Canada Inc.*, [2013 ONSC 7009](#) ("**Elleway**"), paras. 33-34, 37.

<sup>18</sup> *Skyepharma PLC v Hyal Pharmaceutical Corp.*, [1999 CanLII 15007 \(ON SC\)](#), paras. 3, 7.

<sup>19</sup> *Tool-Plas Systems Inc. (Re)*, [2008 CanLII 54791 \(ON SC\)](#), paras. 4, 5, 18.



20. As to vesting, the APS is subject to this court vesting the purchased assets in the applicable purchaser free and clear. This is a “normal relief given in an asset sale” in court supervised sale proceedings and it is appropriate in this case for the reasons highlighted above.<sup>20</sup>

**B. Sealing the confidential appendices**

21. When dealing with Court supervised sale processes, a time-limited sealing order for details of the value of the assets to be sold is often granted. The reason is that public disclosure of the values could impair the sale process and thereby harm the interest of stakeholders.

22. In this case, specific and narrow redactions have been made only as to the sale prices in the APS and the Amending Agreement so that the details being withheld are as limited as possible. Redactions as to the appraisal and the broker’s listing of offers received are not feasible. In all cases, however, the materials to be sealed will only be kept that way until a transaction to sell the Brock Property has closed or pending further order, both of which are normal limitations posed on sealing orders in such cases.

23. Sealing is appropriate in this matter in the manner sought.

**C. Fee and activity approvals**

24. As mentioned by Morawetz RSJ (as he then was). in *Target*,<sup>21</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

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<sup>20</sup> *Nelson*, para. 40.

<sup>21</sup> *Target Canada Co. (Re)*, [2015 ONSC 7574](#).

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>22</sup>

25. 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>23</sup>
26. The Liquidator's activities in its Third 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 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.

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<sup>22</sup> *Target*, paras. 2 and 23.

<sup>23</sup> See *Confectionately Yours Inc. (Re)*, [2002 CanLII 45059 \(ON CA\)](#), paras. 42-54.

27. This court's approval of the Third Report and the Liquidator's activities set out therein would provide the desirable stability and other salutary effects observed in *Target*.
28. This court may therefore make the orders sought under this head of relief.

**IV. NATURE OF THE RELIEF SOUGHT**

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

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 13<sup>th</sup> day of December 2022.

*Brendan Bissell*

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Brendan Bissell, of counsel for the Liquidator

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**SCHEDULE A – LIST OF AUTHORITIES**

*Bloom Lake, g.p.l. (Arrangement relatif à)*, [2015 QCCS 1920](#)

*Confectionately Yours Inc. (Re)*, [2002 CanLII 45059 \(ON CA\)](#)

*Elleway Acquisitions Limited v 4358376 Canada Inc.*, [2013 ONSC 7009](#)

*Forjay Management Ltd. v 625536 B.C. Ltd.*, [2019 BCCA 368](#)

*Nelson Education Limited (Re)*, [2015 ONSC 5557](#)

*Reciprocal Opportunities Incorporated v Sikh Lehar International Organization*, [2018 ONCA 713](#),

*Royal Bank of Canada v Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#)

*Skyepharma PLC v Hyal Pharmaceutical Corp.*, [1999 CanLII 15007 \(ON SC\)](#)

*Target Canada Co. (Re)*, [2015 ONSC 7574](#).

*Tool-Plas Systems Inc. (Re)*, [2008 CanLII 54791 \(ON SC\)](#),

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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.

### *Courts of Justice Act, [R.S.O. 1990, c. C.43](#)*

#### **Vesting orders**

**100** A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

#### **Injunctions and receivers**

**101 (1)** In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

#### **Terms**

**(2)** An order under subsection (1) may include such terms as are considered just.

#### **Documents public**

**137 (1)** On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

#### **Sealing documents**

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

#### **Court lists public**

**(3)** On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

**Copies**

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

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**PAUL JOSEPH DIETRICH**

Applicant

-and-

**STEVEN ROBERT MCLAREN**

Respondent

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

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***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**  
**COMMERCIAL LIST**  
**Proceeding commenced in TORONTO**

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