

**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

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

June 6, 2022

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as court-appointed liquidator

I. NATURE OF THIS APPLICATION

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, at its discretion, to pay or make incremental payments towards the corporate income tax liability of 1827403 in respect of its fiscal year ended October 31, 2021, up to the amount of \$557,072 in addition to any applicable interest, penalty or like amount payable by 1827403 in respect thereof under tax legislation (the “**Tax Liability**”), to the extent of and only with funds that are or may become from time to time available in the estate of 1827403, and unless and until 1827403 becomes insolvent within the meaning of the *Bankruptcy and Insolvency Act* (Canada) as determined by the Liquidator acting reasonably.
 - b. amending the order of this court made in this file on April 4, 2022 appointing the Liquidator as such (the “**Appointment Order**”) to the extent that the Liquidator is authorized and directed to pay any liability of any of the Companies (or the portion thereof) that becomes due after the Appointment Order in accordance with the terms thereof and in the normal course, to the extent of and only from funds that are or may become from time to time available in the applicable estate of the Companies.

- c. approving the first report of the Liquidator dated June 2, 2022 (the “**First Report**”) and the activities described therein.
- d. approving the fees and disbursements of the Liquidator and its independent legal counsel, Goldman Sloan Nash & Haber LLP (“**GSNH**”).

II. FACTS

A. Background¹

- 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,² but arbitration proceedings between them led to an award that there be a liquidation, and the Appointment Order was made on consent by this court to appoint AGI as Liquidator of the Companies.³

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

¹ First Report, tab 2 of the Liquidator’s motion record, paras. 7-12.

² 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 2B (page 38) of the Liquidator’s motion record.

³ A copy of the Appointment Order is at tab 2A (page 22) of the Liquidator’s motion record.

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.
6. The following table summarizes the main assets and liabilities of the Companies as presently known.⁴

Company	Asset		Liability		
	Description	Value	Description	Creditor	Amount
1827403 ⁵	Cash	≈\$530,000			
	Related party receivable (Parkview Homes ⁱⁱ)	≈\$1.7M ⁱⁱⁱ	Tax Liability ⁱ	CRA	\$557,072 in principal
	One-Foot Reserves ^{iv}	TBD			
1853997 ⁶	Cash	\$3,854	-	-	-
1885926 ⁷	Cash	≈\$30,000	-	-	-
1950940 ⁸	Cash	≈\$2,800	Related party debt	Parkview Homes	≈\$49,000
1950941 ⁹	Brock Property	TBD ^v	Related party debt	Parkview Homes	≈\$1M
	Cash	≈\$25,000	Property taxes	City of Peterborough	\$2,662
1950979 ¹⁰	Whitefield Property	TBD ^{vi}	Mortgage	CMHC ^{vii}	≈\$8.5M
			Related party debt	Parkview Homes	≈\$700,000
	Cash	≈\$1.27M	Potential HST liability ^{viii}	CRA	-
			Property taxes	City of Peterborough	\$2,741

⁴ Unless otherwise indicated in the First Report, the information noted in the table is based on the trial balance reports prepared by the Shareholders and provided to the Liquidator summarizing the assets and liabilities of each of the Companies as at January 31, 2022 (the “**Trial Balance Reports**”), and has not necessarily been independently determined by the Liquidator. A summary of the Trial Balance Reports is at tab 2C (page 42) of the Liquidator’s motion record.

⁵ First Report, tab 2 of the Liquidator’s motion record, paras. 35-44.

⁶ First Report, tab 2 of the Liquidator’s motion record, paras. 45-46.

⁷ First Report, tab 2 of the Liquidator’s motion record, para. 47.

⁸ First Report, tab 2 of the Liquidator’s motion record, paras. 48.

⁹ First Report, tab 2 of the Liquidator’s motion record, paras. 27-34.

¹⁰ First Report, tab 2 of the Liquidator’s motion record, paras. 13-26.

ⁱ On April 28, 2022, the Companies' external accountant, BDO Canada LLP ("**BDO**"), provided the Liquidator with 1827403's corporate tax return for its fiscal year ended October 31, 2021 which determines that 1827403 is subject to the Tax Liability. The Tax Liability was not included on the Trial Balance Reports. First Report, paras. 40-44.

ⁱⁱ The Liquidator understands that Parkview Homes Inc. ("**Parkview Homes**") is a company owned and operated by Steve McLaren (one of the Shareholders) and is therefore a related party. First Report, para. 18.

ⁱⁱⁱ The Liquidator's understanding of Mr. McLaren's position regarding this receivable is that Mr. McLaren would refuse to cause Parkview Homes to pay that account receivable on the basis that Parkview Homes is owed a similar amount from one or more of the other Companies. The Liquidator is currently evaluating how to proceed in regard to this account receivable. First Report, para. 36.

^{iv} The "**One-Foot Reserves**" are two one-foot strips of land in Peterborough, and are residual land from two previous development projects. The Liquidator is seeking the advice of commercial real estate brokers in respect of the possible marketing and sale of the One-Foot Reserves. First Report, paras. 37-38.

^v The Liquidator has engaged an appraiser in respect of the Brock and Whitefield Properties. The Appraiser requires, inter alia, historical financial statements in order to complete the appraisals. Those could not be provided by the Shareholders and so the Liquidator is working with BDO to reconstitute the same. First Report, paras. 26(o) and 34(e).

^{vi} See note v. above.

^{vii} The Liquidator understands that 1950979 obtained financing for the construction of the Whitefield Property from the Canadian Mortgage and Housing Corporation ("**CMHC**"). Such financing is secured by a mortgage registered on the Whitefield Property (the "**CMHC Mortgage**"). The Liquidator understands that the CHMC Mortgage was granted on favourable terms in consideration of, among other things, certain "mortgagor commitments" as to 'affordability', 'accessibility', 'energy efficiency' and 'contamination' requirements, as set out in Schedule A-3 to the CHMC Mortgage. First Report, para. 14. Copies of the CHMC mortgage documents are tabs 2E and 2F of the Liquidator's motion record.

^{viii} The Liquidator understands that a harmonized sales tax ("**HST**") self-assessment was required, but not filed, as of the date of the first tenancy occupation of the Whitefield Property. The Liquidator has engaged BDO to provide advice and assistance in this regard. First Report, para. 19.

7. The table below summarizes the main matters, other than those set out above, dealt with or being dealt with by the Liquidator in respect of each of the Companies.

Matter	Description	First Report reference
Whitefield and Brock Properties management (1950979 and 1950941)	<ul style="list-style-type: none"> - Regularize and reconcile rent payments, bookkeeping, and affairs generally (ongoing dispute between the Shareholders appears to have greatly impaired timely and active management) - Retained property manager - Repairs, maintenance, and health, safety & metering regularization - Re-keying due to lack of master key - Contacted realtors and appraiser for eventual marketing and sale 	<p>Paras. 23-26 (Whitefield Property)</p> <p>Paras. 27-34 (Brock Property)</p>
“Paid Liabilities”	<p>All Paid Liabilities except the Balterre Contracting Limited holdback release payment (the “Holdback Release”) are 8 relatively small amounts (totalling \$3,707.02 and averaging \$463.38) for normal course, ongoing business expenses (e.g. telecom, maintenance, safety, etc.).</p> <p>The Holdback Release was for the final invoice on account of construction work to allow for the release of the 10% holdback that had been withheld as required under the <i>Construction Act</i>. This was done with the Shareholders’ approval to avoid Companies’ liability, including special remedies under the <i>Act</i> such as liens.</p>	<p>Para. 50 Appendix “N”</p>
Other file administration matters	Set up case website, gave notice to Director under the BCA, changed bank accounts signing authority, reviewed responses to requests for information and documents, registered Appointment Order on title, etc.	<p>Para. 49</p>

III. ISSUES AND LAW

8. The issues are whether the court should make the orders sought with respect to (A) the Tax Liability, (B) the amendment to the Appointment Order, and (C) the fee and activity approvals.

A. Payment of the Tax Liability

9. 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”.¹¹
10. While distributions in solvent liquidations are generally simpler including due to questions of preferences, classes and proratedness being inapplicable, the corollary is that there may be statutory (and perhaps even constitutional) concerns if the liquidating entity is insolvent, i.e., if, on a balance, not all creditors will be paid in full.
11. There is no such concern with respect to 1827403. First, the order sought is carefully worded to prevent distributions if 1827403 ever becomes insolvent. Second, the Liquidator has performed a review of 1827403’s books and records. The Liquidator has located no evidence, and has no reason to believe, that 1827403 has any creditor other than CRA with respect to the Tax Liability, or any debt other than the Tax Liability. There are no PPSA registrations against 1827403.¹²
12. Considering that the Tax Liability remains outstanding and continues to accrue interest, the Liquidator believes that it is in the interest of 1827403’s estate, including CRA and, ultimately, the Shareholders, to pay down as much of the Tax Liability as the cash situation of 1827403 may allow from time to time, accounting for current cash on hand (being approximately \$530,000), the costs and future costs of this proceeding attributable to the

¹¹ *Forjay Management Ltd. v 625536 B.C. Ltd.*, [2019 BCCA 368](#), para. 26.

¹² First Report, tab 2 of the Liquidator’s motion record, paras. 41, 42.

liquidation of 1827403 as determined by the Liquidator, and any eventual partial or total collection on the account receivable of approximately \$1.7 million owing from Parkview Homes.¹³

13. The court may therefore grant the relief sought in this regard.

B. Amendment to the Appointment Order

14. No single provision of the Appointment Order expressly directs the Liquidator to pay the post-Appointment Order liabilities of the Companies in accordance with their terms. This is typical of administration processes involving a stay of proceedings, such a notices of intention to make a proposal proceedings under the [*Bankruptcy and Insolvency Act*](#) (see s. 65.1(4)).

15. The Liquidator requests clarity in this regard, which will help it achieve its mandate including by allowing the Liquidator to point stakeholders to one clear paragraph in case of any question regarding the provision of goods or services post-Appointment Order.

16. The order sought is carefully limited “to the extent of and only from funds that are or may become from time to time available in the applicable estate of the Companies.”

17. As noted above, s. 209 of the BCA provides that the court may “make any interim or other order as is considered just”. Moreover, the court’s inherent jurisdiction always includes the power to revise, amend or supplement its own orders for clarification purposes.

18. The court may therefore grant the relief sought in this regard.

¹³ First Report, tab 2 of the Liquidator’s motion record, paras. 43, 44.

C. Fee and activity approvals

19. As mentioned by Morawetz J. in *Target*,¹⁴ 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.¹⁵
20. 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.¹⁶
21. The Liquidator's activities since the Appointment Order have been reported to the court and stakeholders in the First Report and are appropriate, timely, commercially reasonable,

¹⁴ *Target Canada Co. (Re)*, [2015 ONSC 7574](#).

¹⁵ *Target*, paras. 2 and 23.

¹⁶ See *Confectionately Yours Inc. (Re)*, [2002 CanLII 45059 \(ON CA\)](#), paras. 42-54.

and in the best interest of the Companies' estate. Filed with the First Report are affidavits of Messieurs Bryan Gelman for the Liquidator and Joël Turgeon 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 services.¹⁷ Also appended to the First Report are the Liquidator's detailed interim statements of receipts and disbursements for each of the Companies as at May 31, 2022.¹⁸ 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*.¹⁹

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

IV. NATURE OF THE RELIEF SOUGHT

23. The Liquidator therefore respectfully requests an order in accordance with the draft filed:
- a. authorizing the Liquidator, at its discretion, to pay or make incremental payments towards the Tax Liability, to the extent of and only with funds that are or may become from time to time available in the estate of 1827403, and unless and until 1827403 becomes insolvent within the meaning of the *Bankruptcy and Insolvency Act* (Canada) as determined by the Liquidator acting reasonably.
 - b. amending the Appointment Order to the extent that the Liquidator is authorized and directed to pay any liability of any of the Companies (or the portion thereof) that becomes due after the Appointment Order in accordance with the terms thereof and

¹⁷ The fee affidavits are at tabs 2P (page 104) and 2Q (page 128) of the Liquidator's motion record.

¹⁸ Tab 2O (page 102) of the Liquidator's motion record.

¹⁹ Third Report, tab 2 (page 10) of the MR, paras. 30-34.

in the normal course, to the extent of and only from funds that are or may become from time to time available in the applicable estate of the Companies.

- c. approving the First Report and the activities described therein.
- d. approving the fees and disbursements of the Liquidator and its independent legal counsel, GSNH.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of June 2022.

Brendan Bissell

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Lawyers for the Liquidator

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 \(ON CA\)](#)

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.

PAUL JOSEPH DIETRICH

Applicant

-and-

STEVEN ROBERT MCLAREN

Respondent

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

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