

**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 CORPORATIONS ACT*, R.S.O. 1990, c. B.16

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**FACTUM OF THE LIQUIDATOR**

(approval and vesting order; approval of fees and activities)  
(motion returnable September 11, 2023)

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September 1, 2023

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## I. OVERVIEW

1. This is a liquidation proceeding under the Ontario *Business Corporations Act* (the “**BCA**”). The liquidator brings this motion for an approval and vesting order<sup>1</sup> (“**AVO**”) for the sale of a residential apartment building as part of the liquidation. The order sought does not deviate from the model order. The sale efforts were extensive, the process was usual, the transaction is the best offer received, the purchaser is assuming the only mortgage on title, and there is no known opposition. The motion also seeks fee and activity approvals and a sealing order for unredacted documents showing appraised value and price paid.<sup>2</sup>

## II. FACTS

2. By consent order dated April 4, 2022, this Court appointed Albert Gelman Inc. as liquidator (the “**Liquidator**”) of several companies co-owned by the Applicant and the Respondent, including 1950979 Ontario Inc. (“**1950979**”).<sup>3</sup>

3. 1950979 owns the property municipally known as 888 Whitefield Road, Peterborough (the “**Property**”). The Liquidator obtained an appraisal of the Property on May 17, 2022, hired a realtor, and put the Property on MLS on July 7, 2022.<sup>4</sup>

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<sup>1</sup> [The draft AVO is at Caselines page E534/E23.](#)

<sup>2</sup> [The draft ancillary order is at Caselines page E545/E34.](#)

<sup>3</sup> [A copy of the appointment order is at Caselines page E568/E57.](#)

<sup>4</sup> [Liquidator’s Fourth Report dated August 31, 2023 \(“\*\*Fourth Report\*\*”\), paras. 17-19; a redacted copy of the appraisal is at Caselines page E660/E149.](#)

4. The Liquidator had found a purchaser but on November 29, 2022 that purchaser declared it would not proceed. The Liquidator re-listed the Property on December 9, 2022.<sup>5</sup>

5. In early January 2023, the Applicant and Respondent's respective lawyers advised the Liquidator they were negotiating a transaction that could terminate the liquidation process. The Liquidator paused sale efforts. On April 18, 2023, the parties advised the Liquidator the transaction would not happen. The Liquidator re-listed the Property.<sup>6</sup>

6. The Liquidator and realtor sent a marketing package to 2,279 potential buyers. The Liquidator received 7 offers as of the offer date of May 24, 2023. The best offer is from 2117467 Ontario Inc. (the "**Purchaser**"), a company the Respondent owns.<sup>7</sup> The Liquidator selected that offer based on its fair consideration, fewest conditions, and certainty of closing.<sup>8</sup>

7. The purchase price is fair market value given the appraisal and market exposure. The Purchaser will assume the only mortgage on title, a value of about \$8.5 million. The mortgagee, Canada Mortgage Housing Corporation, consents. The Liquidator expects to receive the formal approval letter shortly.<sup>9</sup>

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<sup>5</sup> [Fourth Report, paras. 20, 21.](#)

<sup>6</sup> [Fourth Report, paras. 4-7, 21.](#)

<sup>7</sup> [A redacted copy of the Purchase Agreement is at Caselines page E767/E256.](#)

<sup>8</sup> [Fourth Report, paras. 22-24.](#)

<sup>9</sup> [Fourth Report, paras. 24-28.](#)

8. All the conditions in the purchase agreement are satisfied except the AVO. The Liquidator is satisfied that the Purchaser is willing and able to close. The Purchaser has paid a \$400,000 deposit to the realtor. The parties anticipate closing within 10 days. The transaction allows monetization of the Property in accordance with the liquidation process. There is no known opposition.<sup>10</sup>

9. Given the above, the Liquidator can recommend a transaction with a related party.<sup>11</sup>

### III. ISSUES AND LAW

10. The issues on this motion are: should the Court grant the AVO? Should the Court approve the Liquidator's fees and activities? And should the Court make the sealing order?

11. The Court has jurisdiction to grant the AVO, including under section [100](#) of the *Courts of Justice Act*<sup>12</sup> (the "CJA") as well as sections [207\(2\)](#),<sup>13</sup> [248\(3\)](#),<sup>14</sup> and [209](#)<sup>15</sup> of the BCA.<sup>16</sup> The Liquidator recommends the AVO. The above facts satisfy

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<sup>10</sup> [Fourth Report, paras. 27, 28.](#)

<sup>11</sup> [Fourth Report, para. 28\(f\).](#)

<sup>12</sup> "[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."

<sup>13</sup> "[207 \(2\)](#) Upon an application under this section, the court may make such order under this section or section 248 as it thinks fit."

<sup>14</sup> "[248 \(3\)](#) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing..."

<sup>15</sup> "[209](#) The court may make... any interim or other order as is considered just..."

<sup>16</sup> See for example [Wolfe et al v Taylor et al, 2020 MBCA 44](#) (vesting order made in liquidation under *Manitoba Corporations Act*) and [Rose-Isli Corp. v Frame-Tech Structures Ltd., 2023 ONSC 832](#) (upheld on appeal, [2023 ONCA 548](#) – vesting order made under CJA s. 100 in receivership under BCA s. 248).

the *Soundair* factors.<sup>17</sup>

12. The Court has jurisdiction to approve the Liquidator's reports and activities.<sup>18</sup> The last activity approval order was on December 21, 2022.<sup>19</sup> The Liquidator's activities since then are set out in detail in the Fourth Report. They are appropriate and in the interest of stakeholders.<sup>20</sup>

13. The December 21, 2022 activity approval order carved out paragraph 16(a) of the Liquidator's third report dated December 13, 2022. That paragraph addressed potential issues with HST payable.<sup>21</sup> All parties are now satisfied that this matter is no more an issue and so this paragraph can now be approved.<sup>22</sup>

14. The Court can approve the Liquidator's and its lawyers' fees under [s. 222](#)

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<sup>17</sup> The *Soundair* factors are: (i) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently; (ii) the interests of all parties; (iii) the efficacy and integrity of the process by which offers have been obtained; and (iv) whether there has been unfairness in the working out of the process: [Royal Bank of Canada v Soundair Corp., 1991 CanLII 2727 \(ON CA\)](#).

<sup>18</sup> See [Target Canada Co. \(Re\), 2015 ONSC 7574, paras. 2 and 23](#).

<sup>19</sup> [A copy of that order is at Caselines page E644/E133](#).

<sup>20</sup> [Fourth Report, paras. 29-43](#).

<sup>21</sup> Paragraph 16(a) ([at Caselines page E638/E127](#)) reads as follows: "16. To assist the stakeholders and the Court the Liquidator also wishes to briefly update two other items in connection with these liquidation proceedings: a. The first is that the HST payable in respect of 1950979, 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."

<sup>22</sup> [Fourth Report, para. 39](#).

of the BCA.<sup>23</sup> The fees are supported by fee affidavits sworn by the first-chairing professionals. The fee affidavits include true copies of detailed bills and confirm that the fees are comparable to those charged by other Toronto firms for like services.<sup>24</sup>

15. The confidential appendices to the Fourth Report should be sealed because they contain confidential valuation and pricing information.<sup>25</sup> If that were public and the transaction failed to close, it would jeopardize a further sale and prevent maximization of value.<sup>26</sup> The motion record includes copies of the confidential appendices with minimal redactions for the public record. The sealing order automatically expires on closing. The courts regularly make pre-closing sealing orders with AVOs. The *Sherman Estate* factors are met.<sup>27</sup>

#### **IV. RELIEF REQUESTED**

16. The Liquidator seeks orders in accordance with the draft orders included in the motion record.

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<sup>23</sup> “[222](#) The costs, charges and expenses of a winding up, including the remuneration of the liquidator, are payable out of the property of the corporation in priority to all other claims.” See [Confectionately Yours Inc. \(Re\), 2002 CanLII 45059 \(ON CA\), paras. 42-54.](#)

<sup>24</sup> [Fourth Report, paras. 44-47. The Liquidator’s fee affidavit is at Caselines page E827/E316. The Liquidator’s lawyers’ fee affidavit is at Caselines page E856/E345.](#)

<sup>25</sup> See [Danier Leather Inc. \(Re\), 2016 ONSC 1044, para. 84.](#)

<sup>26</sup> Fourth Report, paras.

<sup>27</sup> [Sherman Estate v Donovan, 2021 SCC 25, para. 38](#); those factors are whether: (i) court openness poses a serious risk to an important public interest; (ii) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (iii) as a matter of proportionality, the benefits of the order outweigh its negative effects. See also [s. 137\(2\) of the CJA.](#)

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1<sup>st</sup> DAY OF  
SEPTEMBER 2023**

/s Joel Turgeon

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**RECONSTRUCT LLP**  
Lawyers for the Applicants



**SCHEDULE "A" - LIST OF AUTHORITIES**

1. <a href="#"><u>Wolfe et al v Taylor et al, 2020 MBCA 44</u></a>
2. <a href="#"><u>Rose-Isli Corp. v Frame-Tech Structures Ltd., 2023 ONSC 832</u></a>
3. <a href="#"><u>Rose-Isli Corp. v Smith, 2023 ONCA 548</u></a>
4. <a href="#"><u>Royal Bank of Canada v Soundair Corp., 1991 CanLII 2727 (ON CA)</u></a>
5. <a href="#"><u>Target Canada Co. (Re), 2015 ONSC 7574</u></a>
6. <a href="#"><u>Confectionately Yours Inc. (Re), 2002 CanLII 45059 (ON CA)</u></a>
7. <a href="#"><u>Danier Leather Inc. (Re), 2016 ONSC 1044</u></a>
8. <a href="#"><u>Sherman Estate v Donovan, 2021 SCC 25</u></a>

## SCHEDULE "B" – STATUTORY AUTHORITIES

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

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.

137 (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.

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

207 (2) Upon an application under this section, the court may make such order under this section or [section 248](#) as it thinks fit.

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.

222 The costs, charges and expenses of a winding up, including the remuneration of the liquidator, are payable out of the property of the corporation in priority to all other claims.

248 (3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

- (a) an order restraining the conduct complained of;
- (b) an order appointing a receiver or receiver-manager;
- (c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
- (d) an order directing an issue or exchange of securities;
- (e) an order appointing directors in place of or in addition to all or any of the directors then in office;

- (f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;
- (g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the money paid by the security holder for securities;
- (h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
- (i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine;
- (j) an order compensating an aggrieved person;
- (k) an order directing rectification of the registers or other records of a corporation under section 250;
- (l) an order winding up the corporation under section 207;
- (m) an order directing an investigation under Part XIII be made; and
- (n) an order requiring the trial of any issue.

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PAUL JOSEPH DIETRICH  
MCLAREN  
Applicant  
Respondent

STEVEN ROBERT

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
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**LIQUIDATOR'S FACTUM**  
(approval and vesting order;  
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