



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-22-00679109-00CL DATE: 13 October 2022

NO. ON LIST: 5

TITLE OF PROCEEDING: PAUL DIETRICH v. STEVEN MCLAREN

BEFORE JUSTICE: MADAM JUSTICE KIMMEL

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party, Crown:**

Name of Person Appearing	Name of Party	Contact Info
Brendan Bissell	For Albert Gelman Inc. (as Court-Appointed Liquidator)	<a href="mailto:bissell@gsnh.com">bissell@gsnh.com</a>
Bryan Gelman	For the Liquidator	<a href="mailto:bgelman@albertgelman.com">bgelman@albertgelman.com</a>

**For Defendant, Respondent, Responding Party, Defence:**

Name of Person Appearing	Name of Party	Contact Info
Danny Nunes	For the Applicant: P. Dietrich	<a href="mailto:danny.nunes@dlapiper.com">danny.nunes@dlapiper.com</a>
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**For Other, Self-Represented:**

Name of Person Appearing	Name of Party	Contact Info

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**ENDORSEMENT OF JUSTICE KIMMEL:**

1. Albert Gelman Inc. ("AGI") was appointed as liquidator (in such capacity, the "Liquidator") 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").
2. By this motion, the Liquidator seeks the court's advance authorization to make certain discretionary payments to pre-appointment creditors of the Companies (the "Payments") in circumstances where the Liquidator deems it necessary or appropriate for the due administration of the assets over which it has been appointed and it is satisfied of the existence of the debt and that the payor company is not, or will not as a result of the payment become, insolvent. The Liquidator will only make these payments if the two principal equity holders (and parties to this application) agree. They are not opposing this motion.
3. The other parties on the service list, the federal and provincial taxation and mortgage authorities, have not indicated any opposition to the motion. Counsel for the Liquidator has orally confirmed the non-opposition of the Canada Revenue Agency, while the others have simply not responded.
4. The Liquidator is concerned that it will not be efficient or cost effective to come to court to deal with each individual proposed Payment as they arise. The Liquidator is prepared to take on the responsibility for defending and bearing the consequences of any Payment it makes that may later be challenged by another creditor as a preference favouring the payee creditor. An additional paragraph has been added to the draft order presented to make it clear that the Liquidator's determination of the appropriateness of any such Payment at the time it is made is not binding on any other person who may later complain that the solvency of the payor. The court's omnibus authorization to the Liquidator to make these payments is similarly not to be taken as an explicit or implicit determination regarding the solvency of the payor Company in the context of any future challenge that may be raised.
5. With that caveat, the requested order comes within the general powers of the court under s. 209 of the BCA (that provides that the court may "make any interim or other order as is considered just") and s. 223(h) of the BCA (that 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"). The need to make some pre-appointment Payments and the inefficiency of having to seek the court's approval on a case by case basis, coupled with the responsibility for these Payments that Liquidator has assumed, satisfy me that the requested order is just and appropriate in the circumstances.
6. The Liquidator also seeks approval of its Second Report dated October 7, 2022, the activities described therein and associated professional fees and disbursements.
7. It has become routine for court appointed officers and their legal advisors to seek the court's approval of their activities and reports and that relief is "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. See, by analogy, *Target Canada Co. (Re)*, 2015 ONSC 7574, at paras. 2 and 23.
8. The Appointment Order contemplates that the Liquidator will seek the court's approval of its fees and that of its counsel from time to time. They must be shown to be 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. See *Confectionately Yours Inc. (Re)*, 2002 CanLII 45059 (ON CA), paras. 42-54.

9. The Second Report and Fee affidavits filed provide support for all of these considerations. They are not opposed by the primary stakeholders.
10. The Receiver's activities, as described in its Second Report, and fees for which approval is sought appear to be fair and reasonable, having regard to what has transpired. They are approved.
11. Order to go in the form signed by me today with immediate effect and without the necessity of formal issuance and entry.

A handwritten signature in black ink, appearing to read "Kimmel J.", written in a cursive style.

KIMMEL J.