

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

B E T W E E N:

DAVID ROBERTSON

Applicant

- and -

PAIDIEM PAYMENT SOLUTIONS INC.

Respondent

APPLICATION UNDER section 207 of the *Business Corporations Act*,
R.S.O. 1990, c.B16

FACTUM OF THE LIQUIDATOR

PART I - OVERVIEW

1. Paidiem Payment Solutions Inc. (“**Paidiem**”) is an Ontario company incorporated on June 28, 2019. It is a financial technology (fintech) company that provides payroll process for companies through a proprietary cloud-based workforce management and administration platform.
2. By special resolution dated October 14, 2020, Paidiem’s shareholders (both common and preferred) approved the wind-up of Paidiem and the appointment of MNP Ltd. as its court-appointed liquidator.
3. Pursuant to the order of the Honourable Justice Cavanagh of the Ontario Superior Court of Justice (Commercial List) dated November 23, 2022 (the “**Liquidation Order**”), it was ordered that Paidiem be wound-up pursuant to Part XVI and subsection 210(1) of the Ontario *Business Corporations Act*. The Liquidation Order also appointed MNP Ltd. (the “**Liquidator**”) as liquidator.

4. Since its appointment, the Liquidator conducted a stalking horse sales process pursuant to which 14546865 Canada Inc. (“**145CAN**”) – the stalking horse bidder - submitted the winning bid.

5. Pursuant to the stalking horse sales process, the Liquidator (solely in its capacity as the court-appointed liquidator of Paidiem) entered into a stalking horse purchase and sale agreement dated December 21, 2022 (as amended) with 145CAN (the “**145CAN APA**”) for the purchase of Paidiem’s assets (the “**Transaction**”). The 145CAN APA is, among other things, subject to court approval.

6. The Liquidator makes this motion for:

- (1) an Approval and Vesting Order approving the 145CAN APA and vesting Paidiem’s right, title and interest in and to the assets purchased pursuant to the 145CAN APA in 145CAN upon the closing of the Transaction; and
- (2) an Ancillary Order:
 - i. approving the First Report of the Liquidator dated March 10, 2023 (the “**First Report**”) and the activities and conduct of the Liquidator and its counsel as described therein including the disbursement of funds to satisfy the claim of BDC (Paidiem’s only secured creditor); and
 - ii. approving the Liquidator’s fees and disbursements including the fees and disbursements of its legal counsel as particularized in the First Report.

PART II - FACTS

7. On the date of the Liquidation Order, Paidiem held approximately \$1.7 million in various bank accounts including approximately \$104,800 in trust for future customer payrolls to be processed by the company. Paidiem’s only other material assets were its

accounts receivables (book value of \$141,072.06) and its intellectual property associated with the Platform (whose value was not reported in Paidiem's books).¹

8. Paidiem's known potential claimants as at the date of the Liquidation Order were as follows:²

- (1) Paidiem's sole secured creditor with a recorded debt owing of approximately \$166,400 was Business Development Bank of Canada ("**BDC**"). BDC was Paidiem's first-ranking creditor;
- (2) three unsecured creditors: (i) L-Spark Corporation (owed approximately \$39,000); (ii) David Robertson (amount owed unknown); and (iii) Shift 8 Inc. (amount owed unknown). The priority of the claims of the unsecured creditors would rank behind BDC but ahead of Paidiem's shareholders;
- (3) Paidiem's preferred shareholders who had invested approximately \$4.48 million in Paidiem. The priority of the claims of the preferred shareholders would rank behind all creditors but ahead of the common shareholders; and
- (4) the common shareholders.

9. As a start-up company, Paidiem's business does not generate sufficient revenues to offset its costs, which is primarily payroll costs. As a consequence, Paidiem's operating costs exceed its revenues by approximately \$105,000 per month (the "**Cash Burn**").³

THE LIQUIDATOR'S ACTIVITIES

10. Upon its appointment, the Liquidator undertook the following activities as more fully set out in the First Report:⁴

¹ First Report, paragraph 12, page 4 (Motion Record, Page 14)

² First Report, paragraph 13, page 4 (Motion Record, Page 14)

³ First Report, paragraph 15, page 5 (Motion Record, Page 15)

⁴ First Report, paragraph 16, page 5 (Motion Record, Page 16)

- (1) it established procedures and protocols with Paidiem's management for the monitoring and approval of on-going business operations including monitoring of bank accounts;
- (2) it obtained electronic copies of Paidiem's books and records;
- (3) it set up a trust account at TD Bank for the deposit of the proceeds from the intended liquidation of Paidiem's assets;
- (4) it filed a notice with the Ontario Ministry of Public and Business Service Delivery in accordance with section 210(4) of the OBCA with respect to the court-ordered wind-up of Paidiem;
- (5) it established a case website: <https://mnpdebt.ca/en/corporate/corporate-engagements/paidiempaymentsolutions> and posted to it copies of the Liquidation Order, the Claims Process Order and a form of Proof of Claim all pursuant to paragraph 27 of the Liquidation Order;
- (6) it published a copy of the Liquidation Notice in the National Post on December 9, 2022;
- (7) it sent a copy of the Liquidation Order, a Notice of Claim and a Proof of Claim form to each known claimant and shareholder of Paidiem and to the CRA;
- (8) it implemented a claims process;
- (9) it developed a sale process;
- (10) it implemented a key employee retention plan totalling \$30,000;
- (11) it commenced activities to prepare Paidiem's Scientific Research and Experimental Development (SR&ED Claim).
- (12) it arranged for the implementation of an Anti-Money Laundering compliance program; and

(13) it engaged Camelino Galessiere LLP as its counsel.

THE SALE PROCESS

11. Both before and after its appointment, the Liquidator engaged in discussions with a Richard Cromie (“**Cromie**”) and GreenSky Accelerator Funds IV, LP (both of which are preferred shareholders of Paidiem) (the “**Pref Share Group**”). Cromie advised that they were interested in purchasing Paidiem’s assets.⁵

12. Based in part on its discussions with the Pref Share Group, the Liquidator determined that the most reasonable and commercially efficient approach to market, solicit interest and sell Paidiem’s assets would be for the Liquidator to enter into a stalking horse purchased agreement with a company to be incorporated by the Pref Share Group and then to conduct a 2 staged stalking horse based sale process.⁶

13. On November 22, 2022, Cromie delivered an offer to the Liquidator setting out the basic terms for the purchase of Paidiem’s assets under a stalking horse agreement by a company to be incorporated.

14. On November 23, 2023, Cromie amended the offer by identifying 145CAN as the purchaser.

15. Over the next two weeks the Liquidator, in consultation with the 145CAN and the applicant herein developed and shared a sale process protocol (the “**Sale Process Protocol**”).

16. At a high level the Sale Process provided the following:⁷

- (1) the delivery of both a teaser document and a non-disclosure agreement to parties identified as potentially having an interest in purchasing Paidiem’s assets (the “**Prospective Participants**”);

⁵ First Report, paragraph 17, page 7 (Motion Record, Page 17)

⁶ First Report, paragraph 18, page 7 (Motion Record, Page 17)

⁷ The details of the Sale Process Protocol are set out in paragraph 22 of the First Report (Motion Record pages 18 through 23)

- (2) the publication of the opportunity to purchase in the National Post newspaper;
- (3) to make available to each Prospective Participant who delivered a signed NDA to the Liquidator up until the LOI Deadline (as later defined) (the “**First Due Diligence Period**”) access to an electronic data room maintained by the Liquidator, which contained confidential and sensitive information about Paidiem and the sale process, including the 145CAN APA;
- (4) any interested party was then required to submit a non-binding letter of interest (“**LOI**”) to the Liquidator by 5:00 p.m. Toronto time on February 6, 2023 (the “**LOI Deadline**”);
- (5) the LOI’s received would be evaluated by the Liquidator within 3 business days following the LOI Deadline. An LOI would be considered a Qualified LOI if, among other things, it proposed a price for the assets of Paidiem which was equal to or greater than the price offered pursuant to the 145CAN APA plus a break-fee of \$50,000 and plus \$100,000. An LOI also needed to be accompanied by a deposit equal to or greater than \$315,000 and 10% of the purchase price being proposed in the LOI;
- (6) if only one Qualified Bid is received by the LOI Deadline and that Qualified Bid was from the applicant herein or an entity that he controls then the sale process would proceed to an auction;
- (7) if no Qualified Bids are received by the LOI Deadline the sale process shall end and 145CAN would be deemed the Winning Bidder pursuant to the 145CAN APA;
- (8) if more than one Qualified Bid is received by the LOI Deadline there would then be a second Due Diligence Period with broadened access to the Data Room;

- (9) interested parties would then be obligated to submit a binding offer to the Liquidator by March 8, 2023 (the “**Bid Deadline**”);
- (10) if more than one Qualified Bid is received by the Bid Deadline then the winning bid would be determined pursuant to an auction to be held at the Liquidator’s offices or virtually.
17. 145CAN entered into the 145CAN APA with the Liquidator.⁸
18. As part of the process, the Liquidator required that both the Sale Process Protocol and the 145CAN APA be unanimously approved by all of Paidiem’s shareholders and that a copy of the executed resolution be delivered to the Liquidator by December 22, 2022.
19. On December 30, 2022, the Liquidator received the executed shareholders resolution approving the 145CAN APA and the Sale Process Protocol.⁹
20. The 145CAN APA was amended on January 5, 2023 to, *inter alia*, to extend the deadline before which the executed shareholder’s resolution was to be delivered to the Liquidator to January 6, 2023.¹⁰

IMPLEMENTATION OF THE SALE PROCESS

21. With the assistance of Paidiem’s management, the Liquidator identified thirty-three Prospective Participants; the Liquidator’s partner identified three more. On January 6, 2023, the Liquidator sent a teaser document to each of the thirty-six Prospective Participants.¹¹
22. On January 17, 2023, the Liquidator published an advertisement about the opportunity to purchase Paidiem’s assets in the National Post.¹²

⁸ First Report, paragraph 24, page 13 (Motion Record, Page 23)

⁹ First Report, paragraph 25, page 14 and Appendix D (Motion Record, Page 24 and 122)

¹⁰ First Report, paragraph 26, page 14 (Motion Record, Page 24)

¹¹ First Report, paragraph 27(a), (b) and (c), page 14 and Appendix F (Motion Record, Page 24 and 171)

¹² First Report, paragraph 27(f)(i), page 15 (Motion Record, Page 25)

23. Of the thirty-six Prospective Participants to which the teaser document was sent, six expressed an interest in the opportunity. The Liquidator delivered a form of NDA to each of those six.¹³

24. Of the six Prospective Participants to which the Liquidator delivered a form of NDA, four of them delivered executed NDA's to the Liquidator. Each of those four were provided access to the Data Room. The Liquidator engaged in discussions with each of the four Prospective Participants during the First Due Diligence Period.¹⁴

RESULTS OF THE SALE PROCESS

25. The Liquidator did not receive any LOI's (qualified or otherwise) by the LOI Deadline. Accordingly, pursuant to the Sale Process Protocol, 145CAN was the winning bidder pursuant to the 145CAN APA.¹⁵

MODIFICATION OF PAYMENT TERMS

26. The purchase price set out in the 145CAN APA is \$3,000,000. 145CAN has remitted a deposit to the Liquidator to be applied against the purchase price in the amount of \$450,000 which the Liquidator is holding in trust. Pursuant to the 145CAN APA, the balance of the purchase price is due within three Business days after the conditions of closing are met.

27. One condition of closing is that an Approval and Vesting Order be issued by the Court and shall not have been stayed, amended, modified, reversed or dismissed as at the Closing Date.

28. The Liquidator understands that the preferred shareholders, who were investing in 145CAN, expected that the 145CAN APA would close on or after the distribution of

¹³ First Report, paragraph 27(f)(ii), page 15 (Motion Record, Page 25)

¹⁴ First Report, paragraph 27(f)(iv) and (v), page 15 (Motion Record, Page 25)

¹⁵ First Report, paragraph 28, page 15 (Motion Record, Page 25)

the proceeds of the liquidation to claimants such that their distribution in the liquidation would be directed to fund their investment in 145CAN.¹⁶

29. As the Claims Process has not been completed, 145CAN has proposed that 145CAN pay the balance of the purchase price by promissory note to be executed by 145CAN and delivered to the Liquidator whose terms include but are not limited to the following:¹⁷

- (1) that it be payable on the earlier of (i) the date of the distribution to the preferred shareholders pursuant to an order of this court; and (ii) six months from the date of Closing;
- (2) secured in full by a first ranking charge/security over all of the property, assets and undertaking of 145CAN; and
- (3) no principal or payments to be made during the period that the promissory note is outstanding.

30. The Liquidator is supportive of the proposed modification of the payment terms of the 145CAN APA given that:¹⁸

- (1) there are no other bidders for Paidiem's assets and so the 145CAN APA would continue to be the best offer even with the proposed modification;
- (2) the closing of the Transaction would be able to close sooner which would result in greater cash being available for distribution to the claimants since the Cash Burn associated with the operation of Paideim would shift to 145CAN sooner;
- (3) based on the aggregate of available cash on hand currently (approximately \$800,000) and the cash deposit provided by 145CAN (\$450,000), there is sufficient cash available to cover the Cash Burn to closing, the

¹⁶ First Report, paragraph 31, page 17 (Motion Record, Page 27)

¹⁷ First Report, paragraph 33, page 17 (Motion Record, Page 27)

¹⁸ First Report, paragraph 34, page 17 (Motion Record, Page 27)

administration cost of these wind-up proceedings and to pay the claims of the unsecured creditors even those not yet determined. Accordingly, the unsecured creditors would not be prejudiced by the proposed modification to the 145CAN APA; and

- (4) neither the preferred shareholders or the common shareholders of Paidiem would be prejudiced by the proposed modification.

THE CLAIMS PROCESS

31. The Claims Process set out in the Liquidation Order requires the following:¹⁹

- (1) that a Liquidation Notice be published in the National Post;
- (2) that within 14 days of its appointment that the Liquidator post the Liquidation and Claims Bar Notice to the Case Website and to send to all known claimants a copy of the Liquidation and Claims Bar Notice including a Notice of Claim identifies for each claimant the amount of the claim based on Paidiem's books;
- (3) that every claimant who disagrees with the quantum of their claim as set out in the Notice of Claim and who wishes its claim to be corrected to file a Proof of Claim by January 12, 2023 (the "**Claims Bar Date**"). The Claims Bar Date also applies to persons who did not receive a Notice of Claim but wish to assert a claim in order to be entitled to receive a distribution from these proceedings;
- (4) that the Liquidator review all Proofs of Claim received before the Claims Bar Date and determined whether each claim should be allowed, partially allowed, disallowed or partially disallowed. Once that determination is made the Liquidator is to communicate the determination to each claimant

¹⁹ First Report, paragraph 39, page 20 (Motion Record, Page 30)

that delivered a Proof of Claim by sending them a Notice of Determination;

(5) that any claimant who wishes to object to the Liquidator's determination as set out in a Notice of Determination deliver to the Liquidator a Notice of Objection by no later than 14 Business dates after the Notice of Determination; and

(6) in the event that the Liquidator received a Notice of Objection, the Liquidator must bring a motion to the court to establish a process for the determination of the claim.

32. The Liquidator undertook the following activities pursuant to the Claims Process set out in the Liquidation Order:²⁰

(1) it published the Liquidation Notice in the National Post on December 9, 2022; and

(2) it sent the Liquidation and Claims Bar Notice together with a form of Proof of Claim to all known claimants including Mr. Robertson and Shift 8 Inc. and to CRA.

THE RESULT OF THE CLAIMS PROCESS

33. The Liquidator received Proofs of Claim prior to the Claims Bar Date and one after as follows:²¹

Claimant	Notes
BDC	BDC's Proof of Claim asserted a claim that was an amount different than was set out in the Notice of Claim prepared by the Liquidator

²⁰ First Report, paragraph 40, page 20 (Motion Record, Page 30)

²¹ First Report, paragraph 43, page 21 (Motion Record, Page 31)

Claimant	Notes
Robertson	Robertson's Proof of Claim asserted a claim that was not referred to in Paidiem's books
Shift 8 Inc.	Shift 8's Proof of Claim asserted a claim that was not referred to in Paidiem's books
MNP LLP	MNP LLP's Proof of Claim asserted a claim that was not referred to in Paidiem's books as the account was rendered after Date of Appointment. It was also filed after the Claims Bar Date.

BDC's CLAIM

34. The Notice of Claim prepared by the Liquidator indicated that BDC's claim as set out in Paidiem's books was \$166,400.²² BDC delivered a Proof of Claim to the Liquidator in which it asserted a secured claim in the amount of \$161,200 plus interest and legal costs.²³

35. The Liquidator reviewed BDC's loan documentation and determined that it was not entirely clear whether BDC was entitled to receive legal costs as claimed as the legal costs claimed were incurred in relation to the liquidation proceedings rather than in an attempt to enforce its security.²⁴

36. The Liquidator engaged in discussions with BDC's counsel who had raised the concern that BDC was not served with the original Notice of Application commencing these proceedings. BDC indicated that as a result of that oversight, it was compelled to retain legal counsel.²⁵

²² First Report, paragraph 46, page 22 (Motion Record, Page 32)

²³ First Report, paragraph 48, page 22 (Motion Record, Page 32)

²⁴ First Report, paragraph 49, page 22 (Motion Record, Page 32)

²⁵ First Report, paragraph 50, page 22 (Motion Record, Page 32)

37. The Liquidator ultimately determined that it was prudent to pay the legal fees being claimed since, among other things, the potential cost of contesting the issue would far outstrip the nominal amount of legal costs being claimed which would be detrimental to other stakeholders.²⁶

38. The Liquidator reviewed BDC's Proof of Claim and confirmed BDC's security.²⁷

39. Based on the above, the Liquidator paid the sum of \$165,456.93 to BDC on January 18, 2023 to satisfy its entire claim.²⁸

OTHER CLAIMS

40. The Proofs of Claim submitted by Robertson and Shift 8 Inc. are still under review and determination by the Liquidator.²⁹

41. MNP's Proof of Claim has been reviewed by the Liquidator. Although a Notice of Determination has not yet been delivered to MNP the Liquidator's intention is to reject the claim for not having been received prior to the Claims Bar Date.

PROFESSIONAL FEES AND DISBURSEMENTS

42. Pursuant to paragraph 18 of the Liquidation Order, the Liquidator and its counsel (Camelino Galessiere LLP) are to be paid their reasonable fees and disbursements unless otherwise ordered by the court. In addition, the Liquidation Order provides for a first ranking charge in favour of the Liquidator and its counsel over Paidiem's property, assets and undertakings for their fees and disbursements.

²⁶ First Report, paragraph 51, page 22 (Motion Record, Page 32)

²⁷ First Report, paragraph 45, page 22 (Motion Record, Page 32)

²⁸ First Report, paragraph 52, page 23 (Motion Record, Page 33)

²⁹ First Report, paragraph 54, page 23 (Motion Record, Page 33)

43. The Liquidator's accounts for the period from November 1, 2022 to February 28, 2023 total \$77,091.20 (exclusive of HST).³⁰

44. The accounts of Camelino Galessiere LLP for the period from November 19, 2022 to February 28, 2023 total \$12,868.50 (exclusive of HST). The Liquidator is of the view that the accounts of Camelino Galessiere LLP are reasonable and should be approved by this Honourable Court.³¹

PART III – ISSUES

45. The issues on this motion is whether the court should:

- (1) approve the Approval and Vesting Order;
- (2) approve the First Report of the Liquidator and its activities as set out therein including the payment of BDC's claim; and
- (3) approve the fees and disbursements of both the Liquidator and the Liquidator's counsel.

PART IV – LAW AND ARGUMENT

1. THE 145CAN APA SHOULD BE APPROVED

46. These liquidation proceedings were brought pursuant to part XVI of the OBCA and the Liquidator was appointed pursuant to section 210(1) of that statute.

47. Section 223(c) of the OBCA grants the court-appointed liquidator the authority to *“sell the property of the corporation by public auction or private sale and receive payment of the purchase price either in cause or otherwise”*.

48. Moreover, paragraph 3(j) of the Liquidation Order grants the Liquidator the power to *“sell, convey, transfer, lease or assign the Property or any part or parts thereof outside*

³⁰ First Report, paragraph 56, page 24 and Appendix J (Motion Record, Page 34 and 178)

³¹ First Report, paragraphs 57 and 58, page 24 and Appendix I (Motion Record, Page 34 and 178)

the ordinary course” provided that any sale transaction in which the consideration exceed \$500,000 may only be done with the approval of the court.

49. Finally, paragraph 3(k) of the Liquidation Order authorizes the Liquidator to apply for any vesting order to convey Paidiem’s assets to a purchaser free and clear of any liens or encumbrances affecting such property.

50. The court in *Royal Bank v. Soundair Corp.*³² articulated a number of well established principles for the approval of a sale of assets in an insolvency context. It is submitted that the *Soundair* principles applicable to a liquidation proceeding. They are as follows:

- (1) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- (2) the interests of all parties;
- (3) the efficacy and integrity of the process by which offers have been obtained;
- (4) whether there has been unfairness in the working out of the process.

51. It is submitted that the Sale Process Protocol that led to the selection of the 145CAN APA as the winning bid is in the best interest of all stakeholders and meets all of the *Soundair* principles. More particularly:

- (1) both the Sales Process Protocol and the 145CAN APA were developed by the Liquidator and were unanimously approved by all of the shareholders of Paidiem;
- (2) the sales process was an open and public process advertised in a national newspaper;

³² *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ONCA)

- (3) the opportunity was marketed specifically to 36 potentially interested parties and received initial interest from 6 potential participants;
- (4) the 145CAN APA was the best (and only) offer received pursuant to the process;
- (5) the Liquidator is satisfied that the sales process resulted in the maximum recovery for all stakeholders;

2. APPROVAL OF THE FIRST REPORT AND LIQUIDATOR'S ACTIVITIES

52. This court has the jurisdiction to approve the First Report along with the activities of the Liquidator described therein pursuant to its inherent powers. According this Honourable Court in *Bank of America Canada v. Willian Investments Ltd.*³³:

3.*this court has inherent jurisdiction to review and either approve or disapprove of the activities of a court appointed receiver....*

4. *I pause to note that it would be unusual and illogical that the received would come to court for prior approval but not post approval. If that were the case, one might expect the courts to be inundated with prior approval requests for virtually every activity.*

53. While the court's observations in the *Bank of America* case cited above were made in the context of a receivership proceeding, it is submitted that they are equally applicable to liquidation proceeds such as the one at bar.

54. In this case, the Liquidator's activities as set out in the First Report were conducted in a manner consistent with the powers granted to it pursuant to the OBCA and the Liquidation Order and each of the activities were in furtherer of the objective of an orderly liquidation of Paidiem's assets in a manner that fairly maximized recovery for all stakeholders.

³³ *Bank of America Canada v. Willann Investments Ltd.* (1993 20 CBR (3d) 223 (ONSC))

55. The Liquidator therefore respectfully requests that the First Report and its activities described therein be approved (including the distribution to BDC to satisfy its first ranking secured claim).

3. APPROVAL OF THE FEES OF THE LIQUIDATOR AND ITS COUNSEL

56. Paragraph 18 of the Liquidation Order provides that the Liquidator and its counsel shall be paid their reasonable fees and disbursements, in each case at the standard rates charges unless otherwise ordered by the court. Moreover, paragraph 19 of the Liquidation Order grants a first ranking charge – the Liquidator’s Charge – on Paidiem’s property as security for such fees and disbursements.

57. In determining whether to approve those fees and disbursements, the court should consider whether the remuneration and disbursements incurred are fair and reasonable taking into account the following factors³⁴:

- the nature, extent and value of the assets;
- the complications and difficulties encountered;
- the degree of assistance provided by the debtor;
- the time spent;
- the liquidator’s knowledge, experience and skill;
- the diligence and thoroughness displayed;
- the responsibilities assumed;
- the results of the liquidator’s efforts; and
- the cost of comparable services when performed in a prudent and economical manner.

³⁴ *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851

58. The Liquidator respectfully submits that taking into account the above factors that its fees and disbursements, along with those of its counsel, as detailed in the First Report should be approved.

PART V – ORDER SOUGHT

59. For the foregoing reasons the Liquidator respectfully requests:

- (1) an Approval and Vesting Order approving the 145CAN APA and vesting Paidiem’s right, title and interest in and to the assets purchased pursuant to the 145CAN APA in 145CAN upon the closing of the Transaction; and
- (2) an Ancillary Order:
 - i. approving the First Report of the Liquidator dated March 10, 2023 (the “**First Report**”) and the activities and conduct of the Liquidator and its counsel as described therein including the disbursement of funds to satisfy the claim of BDC (Paidiem’s only secured creditor); and
 - ii. approving the Liquidator’s fees and disbursements including the fees and disbursements of its legal counsel as particularized in the First Report.

All of which is respectfully submitted this
14th day of March, 2023 by

Camelino Galessiere LLP
Per: Gustavo F. Camelino
Lawyers for MNP Ltd.

SCHEDULE A

Authorities relied upon by the Liquidator:

1. *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ONCA)
2. *Bank of America Canada v. Willann Investments Ltd.* (1993 20 CBR (3d) 223 (ONSC)
3. *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851

SCHEDULE B

Statutes and Regulations relied upon by the Liquidator

Business Corporations Act

R.S.O. 1990, CHAPTER B.16

Powers of liquidators

223 (1) A liquidator may,

- (a) bring or defend any action, suit or prosecution, or other legal proceedings, civil or criminal, in the name and on behalf of the corporation;
- (b) carry on the business of the corporation so far as may be required as beneficial for the winding up of the corporation;
- (c) sell the property of the corporation by public auction or private sale and receive payment of the purchase price either in cash or otherwise;
- (d) do all acts and execute, in the name and on behalf of the corporation, all documents, and for that purpose use the seal of the corporation, if any;
- (e) draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the corporation;
- (f) raise upon the security of the property of the corporation any requisite money;
- (g) take out in the liquidator's official name letters of administration of the estate of any deceased contributory and do in the liquidator's official name any other act that is necessary for obtaining payment of any money due from a contributory or from the contributory's estate and which act cannot be done conveniently in the name of the corporation; and
- (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. R.S.O. 1990, c. B.16, s. 223 (1).

DAVID ROBERTSON
Applicant

PAIDIEM PAYMENT SOLUTIONS INC.
Respondent

and

Court File No: CV-22-00690376-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

**FACTUM ON BEHALF OF THE COURT-
APPOINTED LIQUIDATOR**

CAMELINO GALESSIERE LLP
Barristers & Solicitors
65 Queen Street West
Suite 440
Toronto, ON M5C 1H6

Gustavo F. Camelino
Law Society No.: 45607S
Tel: 416-306-3834
Email: gcamelino@cglegal.ca

Lawyers for MNP Ltd.

1993 CarswellOnt 216
Ontario Court of Justice (General Division)

Bank of America Canada v. Willann Investments Ltd.

1993 CarswellOnt 216, [1993] O.J. No. 1647, 17 C.P.C. (3d) 296, 20 C.B.R. (3d) 223, 41 A.C.W.S. (3d) 662

**BANK OF AMERICA CANADA v. WILLANN INVESTMENTS LIMITED and
CRANBERRY VILLAGE, COLLINGWOOD INC.**

Farley J.

Judgment: June 28, 1993

Docket: Doc. B22/91

Counsel: *Harry Underwood*, for receiver, Coopers & Lybrand Ltd.

Stephen Schwartz, for Prenor Trust Co. of Canada.

Frank Bennett and *John Spencer*, for Attorney General of Canada on behalf of Her Majesty the Queen in Right of Canada and in Right of Ontario.

Farley J.:

1 This was a motion for an order approving the receiver's activities and fees (including the fees of its counsel) as set out in the receiver's sixth report (covering the period October 1, 1992 to April 19, 1993) and seventh report (April 20, 1993 to June 13, 1993). At a previous hearing on May 14, 1993 the Crown had asked for an adjournment concerning the sixth report (the only report outstanding at that time) for the specific purpose of conducting consensual cross-examinations. Mr. Bennett who was fresh on the record (as of mid-morning today with no advance notice to other counsel) raised an objection as to my jurisdiction to hear the motion indicating that there was nothing in Blair J.'s original order establishing the receivership to allow for after-the-fact approval of the receiver's activities. His position was that the only jurisdiction I had was to pass the accounts of the receiver and approve its fees. He maintained that there was an inherent difference between passing of accounts and approval of activities.

2 I dealt with this general area in my earlier endorsement in this relating to previous reports (endorsement of May 2, 1993: see pp. 16-18). I again note that Mr. Bennett in his own text: F. Bennett, *Receiverships* (Carswell: Toronto, 1985), said at p. 297:

One of the purposes of passing accounts is to afford the receiver judicial protection in carrying out his powers and duties. Another purpose is to afford the debtor, the security holder and any other interested person the opportunity to question the receiver's activities to date.

In reply Mr. Bennett referred me to p. 298 of his text without specifying what was contained there; he gave me a copy of that page after the hearing concluded. I could find nothing of assistance on that page. In my view Mr. Bennett's own text supports the position of the receiver that I have jurisdiction. It seems to me that the nature of a specific approval hearing is much better to review conduct than a passing of accounts which focuses on receipts and disbursements.

3 It does not seem to me that approval of the activities of the receiver, a court appointee and therefore an officer of the court, requires specific words of authorization in the original order. To the extent that certain approval activities are mentioned in that order, I would regard these references as merely examples of what may take place. In my view this court has the inherent jurisdiction to review and either approve or disapprove of the activities of a court appointed receiver. I note here that in this instance the activities were well summarized in the two reports; however, such approval (if given) would be to the extent that the reports accurately summarized the material activities of the receiver. As to

inherent jurisdiction, see *80 Wellesley Street East Ltd. v. Fundy Bay Builders Ltd.* (1972), 25 D.L.R. (3d) 386 (Ont. C.A.), at pp. 389-390.

4 I pause to note that it would be unusual and illogical that the receiver could come to court for prior approval but not post approval. If that were the case, one might well expect the courts to be inundated with prior approval requests for virtually any activity.

5 It seems to me that a receiver should be able to come to court and bare its breast. Having done so, it has exposed itself to the sword of any interested party which may feel aggrieved of any action by that receiver. However, if the court feels that the receiver has met the objective test required of it, then the court may bestow a shield to the receiver for that reviewed and approved activity. If the activity is disapproved, then the receiver is in the unenviable position of watching itself be disembowelled in court with sanctions then or to be dealt with in accordance with arrangements then worked out.

6 I would therefore dismiss the Crown's objection to my jurisdiction (now raised as to the sixth and seventh report but apparently the subject of appeal as to earlier approvals).

7 Having come to that conclusion, I have also concluded that the receiver has met the objective test and that its activities and fees for the period covered by the sixth and seventh report should be approved. I note in this respect while all concerned acknowledged that the fees were "expensive" that Prenor Trust, which will ultimately bear the cost, was supportive of the receiver. While "expensive", I found the fees in line with the complications and protraction of this receivership.

8 Costs were asked for in this instance. Mr. Bennett submitted that a cost award against the Crown would discourage creditors in general from appealing and objecting. That should of course be avoided where creditors have taken a reasonable position; in other words, the mere fact that a creditor is not successful in persuading a court of the rightness of its position should not subject that creditor to a costs sanction. However, I view this day's events in a different light. In my view much time was wasted in the Crown's several requests for a further adjournment and there was no advance notice that jurisdiction would be challenged. I would also observe that the scheduled time for this matter was therefore greatly exceeded. Counsel on all sides of a matter owe a duty to ensure that the court office is kept up to date with a realistic estimate of time required. This will, of course, require the cooperation of counsel amongst themselves. (In speaking of cooperation, I note in passing that this motion was merely one of six motions dealt with today concerning this project.) Unfortunately none of the counsel involved in these six motions (there being other counsel with respect to the other five) was mindful of the practice directions' request that in a continuing complex or multiple motion file there be a sorting through and grouping of the materials to be dealt with the next day. In the present situation, this meant that several motion records had to be retrieved from the office once all the files were sorted out. There were as well the to-be-discouraged late filings. I note that Mr. Bennett indicated that his client never gave him a copy of the seventh report to review and that he had only reviewed the sixth report some 5 or 6 weeks ago for another purpose. His submissions with respect to the actual activities being reviewed were therefore rather limited in extent and time. Costs are awarded against the Crown payable forthwith to the receiver in the amount of \$1500 and Prenor Trust \$500.

Order accordingly.