

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427  
ONTARIO INC. AND 1787930 ONTARIO INC. BOTH OF THE CITY OF ST. THOMAS,  
IN THE PROVINCE OF ONTARIO

**RESPONDENT'S COMPENDIUM**

September 9, 2019

**FELDMAN LAWYERS**

390 Bay Street  
Suite 1402  
Toronto, Ontario  
M5H 2Y2

**Paul Neil Feldman** LSO# 29469B  
Email. paul@feldmanlawyers.ca

Tel: 416-601-6821  
Fax: 416-601-2272

Lawyers for the Respondent, 1787930 Ontario Inc.  
for the purpose of the Appeal

To: **MILLER THOMSON LLP**  
One London Place  
255 Queens Avenue, Suite 2010  
London, Ontario  
N6A 5R8

**Sherry A. Kettle** LSO #53561B  
Tel. 519-931-3534  
Fax. 519-858-8511  
Email. [skettle@millერთhompson.com](mailto:skettle@millერთhompson.com)

Lawyers for the Appellant, Transit Petroleum Inc.

And To: **MNP LTD.**  
111 Richmond Street West, Suite 300  
Toronto, Ontario  
M5H 2G4

**Sheldon Title**  
Tel. 416-323-5240

Licensed Insolvency Trustee of 1787930 Ontario Inc.

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IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427  
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**RESPONDENT'S COMPENDIUM  
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19.

pay so we wanted them to approve that they were not going to have any more split payments, NSF's or stopped payments.

63. Q. And is it not true that you also have to get their approval on the net seven days?

A. No. We already had their approval.

64. Q. And to your understanding can you direct me to any approval from 178 prior to three p.m. on Friday, June the 29th, did you receive that requested approval?

A. In verbal with Nathan but not in writing. Not regarding this.

MR. SIMPSON: I see.

A. But the terms and the amounts was already agreed upon with Nathan verbally.

65. MR. SIMPSON: Q. Okay but the verbal agreement which you're relying upon predated this email?

A. Correct.

66. Q. And there was no approval after this email was sent of this?

A. Correct. I've never spoken to Nathan again after this email until July ninth.

67. Q. And as at the close of business then

22.

Ms. Paul I am entering as exhibit A, you know what there's exhibits A and B in here so I'm gonna change that to one.

MS. KETTLE: That's fine.

MR. SIMPSON: I'm going to enter as exhibit one the Proof of Claim which I've just read you the title of, of Transit Petroleum Inc. in the proposal of 178. There is a tab A and a tab B with numerous invoices attached I'm not going to state the number of pages but we will enter this as exhibit one.

EXHIBIT NUMBER ONE - Proof of Claim in the Proposal of 1787930 Ontario Inc. cob as Messenger Freight Systems - Produced and marked.

75. MR. SIMPSON: Q. Ms. Paul if I can take you to the first page of the proof of claim and at paragraph three it states that the debtor which is 178 was at the date of proposal namely the second day of July, 2018 and still is indebted to the creditor in the sum of \$202,791.59 is that your understanding?

A. Yes.

76. Q. And at the third page of this

Court File Numbers: 35-2395487 and 35-2395481  
Estate File Numbers: 35-2395487 and 35-2395481

ONTARIO  
SUPERIOR COURT OF JUSTICE  
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF  
1732427 ONTARIO INC. AND 1787930 ONTARIO INC. BOTH OF THE CITY OF ST.  
THOMAS, IN THE PROVINCE OF ONTARIO

**SECOND SUPPLEMENTARY AFFIDAVIT**

(sworn October 31, 2018)

I, Nathan McDaniel of the Town of Aylmer, in the Province of Ontario, **MAKE OATH  
AND SAY AS FOLLOWS:**

1. I am the Financial Controller for 1787930 Ontario Inc. ("178") and as such have personal knowledge of the matters hereinafter deposed to. Where my knowledge is stated to be on information and belief or documents provided, I verily believe such information to be true. All dates referenced herein are for the calendar year 2018 unless otherwise stated.
  
2. I have reviewed the affidavits of Monique Paul ("Monique's Affidavit"), and of Tina Thorne ("Tina's Affidavit") both sworn October 23, which were served in a "Sur-Reply Motion Record of Transit Petroleum Inc." ("Transit/Hogg") on October 23, after the final agreed date for filing materials as set out in the court ordered timetable.
  
3. Tina's Affidavit is her first production in this proceeding.
  
4. In response to Paragraphs 3 and 4 of Tina's Affidavit and Paragraphs 4, 5 and 6 of Monique's Affidavit the following comments are necessary to provide a complete and accurate explanation of what in fact took place.
  
5. Monique's email of June 22, included at page 105 of her October 4<sup>th</sup> affidavit in the Responding Motion Record (all page references are to this production unless otherwise stated) acknowledges that 178's account was frozen as confirmed at page 104 in my email of June 25.



2

At all materials times when we were discussing the payment of arrears to Transit/Hogg and the continuing supply of fuel, they were aware of 178's other financial pressures.

6. Monique's email of June 26, at 11:55 included at page 111 references the phone call of 11:33 AM which is relied upon in both Monique's Affidavit (paragraph 5) and Tina's Affidavit, (paragraph 4) in support of the proposition that I agreed to "Net 7 payment terms". I did not.

7. Monique's email at 11:55 AM references proposed payment amounts and dates, but makes no reference to the Net 7 payment terms which they now allege were agreed to during that call.

8. Monique raised the issue of changing the terms from Net 14 to Net 7 in her 8:55 AM email of June 28 at page 109, and stated that "We [Transit/Hogg] need the above approved no later than 3 pm on Friday June 29, 2018". I did not approve the change of terms.

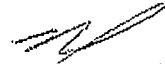
9. As a result of 178's account being frozen, BNS served a Notice to Enforce Security. By email at 12:57 PM on June 28, Sheldon Title the Licensed Insolvency Trustee at MNP Ltd. and 178's Proposal Trustee advised 178 that counsel for BNS was "pushing us to file a NOP". Annexed hereto and marked as Exhibit "A" to this my affidavit is a true copy of the email from Sheldon Title to Bruce Simpson dated June 28.

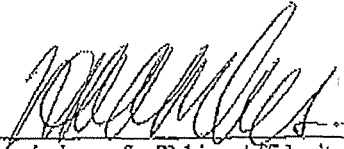
10. As of June 29 it was concluded that 178 was unable to negotiate a resolution with CRA to forbear from enforcing their Requirement To Pay ("RTP") which had resulted in the frozen account with BNS, thus compromising 178's ability to carry on normal business financial transactions. As a result, on June 29 it was resolved that 178 would file a NOI.

11. By internal email at 178 at 2:37 PM on July 4, I confirmed that I had requested Transit/Hogg's fuel manager Trevor Chambers to put a stay on the PAP scheduled for Thursday July 5. Annexed hereto and marked as Exhibit "B" to this my affidavit is a true copy of the email of July 4.

12. I make this affidavit in reply to Monique's Affidavit and Tina's Affidavit which were served in the "Sur-Reply Motion Record of Transit Petroleum Inc.", and for no improper purpose.

SWORN before me in the City of )  
St. Thomas in the Province of Ontario, )  
this 31<sup>st</sup> day of October, 2018. )

  
\_\_\_\_\_  
Nathan McDaniel

  
\_\_\_\_\_  
Commissioner for Taking Affidavits  
MARK THOMAS COOMBES

**TAB**

**“A”**

**Bruce Simpson**

From: Sheldon Title <Sheldon.Title@mnp.ca>  
 Sent: Thursday, June 28, 2018, 12:57 PM  
 To: Bruce Simpson  
 Cc: Louise Vonk; Brent Swanick; nathan@messengerfreight.ca  
 Subject: Re: cra

Thanks Bruce,

I spoke with Tim again this morning. He is pushing for us to file a NOI. He wants something in writing to say what is happening before consideration is given to forbearing, but when I called him he was in the midst of preparing receivership materials.

Brent, I told him that we're now engaged in discussions with 5 parties and that we'll need 3-4 months to complete a refinancing/restructuring. He asked for Brent to submit something "substantial", but as noted above, I believe the BNS would prefer we head forward with a NOI.

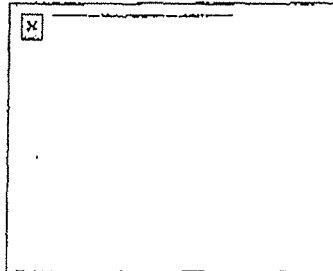
Please advise how you wish to proceed.

Louise, Nathan needs to complete the spreadsheets I sent so that we are ready to file.

Regards,  
Sheldon

**Sheldon Title, CPA, CA, CIRP, LIT**  
SENIOR VICE-PRESIDENT

**DIRECT 416.263.6945**  
**FAX 416.323.5240**  
**CBLL 416.573.5320**  
111 Richmond Street West  
Suite 300  
Toronto, ON  
M5H 2G4  
sheldon.title@mnp.ca  
mnpdebt.ca



This is exhibit A.....referred to in the  
 affidavit of Nathan McDaniel.....  
 sworn before me, this 31st.....  
 day of October.....20 18.....  
 .....  
 A Commissioner, etc.  
**MARK THOMAS COOMBS**

**TAB**

**“B”**

**Bruce Simpson**

**From:** Nathan McDaniel <nathan@messengerfreight.ca>  
**Sent:** Wednesday, October 31, 2018 9:29 AM  
**To:** Bruce Simpson  
**Subject:** FW: MESSENGER FREIGHT SYSTEMS  
**Importance:** High

is exhibit B referred to in the  
 affidavit of Nathan McDaniel  
 sworn before me, this 31st  
 day of October 2018  
 Mark Thomas Coombes  
 A Commissioner, etc.  
 MARK THOMAS COOMBES

**From:** Nathan McDaniel [mailto:nathan@messengerfreight.ca]  
**Sent:** July 4, 2018 2:37 PM  
**To:** 'louise@messengerfreight.ca' <louise@messengerfreight.ca>; 'Evan Wilson' <evan@messengerfreight.ca>;  
 'blaine@messengerfreight.ca' <blaine@messengerfreight.ca>  
**Subject:** FW: MESSENGER FREIGHT SYSTEMS  
**Importance:** High

All,

I spoke to Trevor Chambers (Fuel Manager) regarding meeting tomorrow. I asked him to put a stay on the PAP scheduled for end of the week. He said he is nervous about our account. I advised that we would like to meet in person to solidify the arrangement.

We should discuss strategy prior to meeting, but I think the broad strokes should be that after much thought the painful decision to file the NOI was made on July 2. We are working with our Trustee to put MFS in a profitable position going forward. Per the law and per our Trustee, we are bound to only pay for goods and services received on/after July 2nd. ALL invoices will be paid before delivery (CBD estimate). It is worth mentioning that the NOI process is not the same as bankruptcy or receivership. As part of the NOI process, MFS is being given an opportunity to restructure the business with the objective of returning to profitability. He will follow up with me by end of day with a time for tomorrow.

Cheers,

Nathan

**From:** Nathan McDaniel [mailto:nathan@messengerfreight.ca]  
**Sent:** June 29, 2018 4:05 PM  
**To:** 'Monique Paul' <mpaul@hoggfuel.com>  
**Subject:** RE: MESSENGER FREIGHT SYSTEMS  
**Importance:** High

Hi Monique,

My apologies for the delay; I was pulled a several directions today as well as yesterday. Would you please call me on Tuesday when you are back in the office? I just have a few questions regarding the terms...I want to make sure I am on the same page with you.

Cheers,

Nathan

**From:** Monique Paul [mailto:mpaul@hoggfuel.com]  
**Sent:** June 29, 2018 3:39 PM  
**To:** Nathan McDaniel <nathan@messengerfreight.ca>  
**Subject:** RE: MESSENGER FREIGHT SYSTEMS  
**Importance:** High

Nathan,

It is almost 4pm and we have not heard back from you regarding the information below. Can you please advise?

Thanks,

*Monique Paul*  
*Credit Analyst*  
*Hogg Fuel and Supply Ltd.*  
*Transit Petroleum Inc.*  
*519-579-5330 Ext 1161*  
[mpaul@hoggfuel.com](mailto:mpaul@hoggfuel.com)



---

**From:** Monique Paul  
**Sent:** Thursday, June 28, 2018 8:55 AM  
**To:** 'Nathan McDaniel'  
**Subject:** RE: MESSENGER FREIGHT SYSTEMS  
**Importance:** High

Good Morning Nathan,

I have discussed at length your proposal with Tina Thorne the Credit manager and Trevor Chambers the Fuel Manager and we have all agreed we will accept this proposal, with below stipulations.

July 5	\$83,734.05	(50% of the arrears amount)
July 12	regular amount plus \$27,911.35	(16.67% of the arrears amount)
July 19	regular amount plus \$27,911.35	(16.67% of the arrears amount)
July 26	regular amount plus \$27,911.35	(16.67% of the arrears amount)

Currently terms are Net 14 with Monday PAD making your invoices 15 days old, if we agree to move your PAD to Thursday we will need to change your terms to Net 7 making your invoices 11 days old, we cannot keep your terms at Net 14 and pull on Thursday as that makes the invoices 19 days old.

We have continuously gone above and beyond to work with Messenger on their financial issues, but going forward we need to be reassured that we will no longer have any problems going forward which is why we are agreeing to the Thursday PAD.

We have already had to pay the fuel purchased and used by Messenger, as our terms are Net 7 with our supplier.

We need to be clear that this will be the last time we can split payments due to the inability to pay your fuel purchases on the agreed upon pull date.

We need the above approved no later than 3pm on Friday June 29, 2018, in order to pull the first payment on Thursday July 5<sup>th</sup>, 2018.

Thanks,

Monique Paul  
Credit Analyst  
Hogg Fuel and Supply Ltd.  
Transit Petroleum Inc.  
519-579-5330 Ext 1161  
mpaul@hoggfuel.com



---

**From:** Nathan McDaniel [mailto:nathan@messengerfreight.ca]  
**Sent:** Wednesday, June 27, 2018 5:40 PM  
**To:** Monique Paul  
**Subject:** RE: MESSENGER FREIGHT SYSTEMS

Good afternoon Monique,

Much thanks for the patience and support that both you and Tina have demonstrated; It means a lot to me. Attached is a scan of a voided cheque from our new checking account; please use this banking information for future billings. With regards to the below-mentioned proposal, I would ask that we adjust it slightly to be more in line with our original conversation. Would you please let me know if my proposal is acceptable?

July 5	\$83,734.05	(50% of the arrears amount)
July 12	regular amount plus \$27,911.35	(16.67% of the arrears amount)
July 19	regular amount plus \$27,911.35	(16.67% of the arrears amount)
July 26	regular amount plus \$27,911.35	(16.67% of the arrears amount)

With this payment plan, we would effectively have the arrears amount paid up by EOM July.

Cheers,

Nathan

Nathan McDaniel  
Financial Controller  
Messenger Freight System  
150 Dennis Road



P.O. Box 100  
St. Thomas, ON N5P 0B6  
Bus: 519-631-9604 x107  
Fax: 519-631-1135  
<http://www.messengerfreight.ca>



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From: Monique Paul [<mailto:mpaul@hoggfuel.com>]  
Sent: June 26, 2018 11:55 AM  
To: Nathan McDaniel <[nathan@messengerfreight.ca](mailto:nathan@messengerfreight.ca)>  
Subject: RE: MESSENGER FREIGHT SYSTEMS

Good Afternoon Nathan,

Thank you for speaking with Tina and myself

We are willing to change the PAD to Thursdays from Mondays with the below proposal on getting the account current.

Thursday July 5, 2018 \$111,645.40  
Thursday July 12, 2018 \$55,093.51 + \$27,911.35= \$83,004.86  
Thursday July 19, 2018 regular amount owing + \$27,911.35 (total unknown at this time)  
This will then bring your account current.

Thanks,

Monique Paul  
Credit Analyst  
Hogg Fuel and Supply Ltd.  
Transit Petroleum Inc.  
519-579-5330 Ext 1161  
[mpaul@hoggfuel.com](mailto:mpaul@hoggfuel.com)



**From:** Nathan McDaniel [<mailto:nathan@messengerfreight.ca>]  
**Sent:** Monday, June 25, 2018 3:07 PM  
**To:** Monique Paul  
**Subject:** RE: MESSENGER FREIGHT SYSTEMS

Good afternoon Monique,

Thank you for making the time to talk last week. As discussed it was a very challenging week with the compromised account and frozen status. We thoroughly appreciate your patience and understanding. I should have the new banking details ready to relay by middle of this week. Regarding payments, would it be possible to move our PAD date to Friday in lieu of Monday? I am seeing through analysis of Max's cash flow projections that it is a challenge allocating amounts as such on Monday.

Cheers,

Nathan

Nathan McDaniel  
Financial Controller  
Messenger Freight System  
150 Dennis Road  
P.O. Box 100  
St. Thomas, ON N5P 0B6  
Bus: 519-631-9604 x107  
Fax: 519-631-1135  
<http://www.messengerfreight.ca>



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**From:** Monique Paul [<mailto:mpaul@hogefuel.com>]  
**Sent:** June 22, 2018 10:36 AM  
**To:** [nathan@messengerfreight.ca](mailto:nathan@messengerfreight.ca)  
**Subject:** MESSENGER FREIGHT SYSTEMS  
**Importance:** High

Nathan,

Court File Nos. 35-2395487 and 35-2395481  
Estates File Nos. 35-2395487 and 35-2395481

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
IN BANKRUPTCY AND INSOLVENCY**

IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL  
OF 1732427 ONTARIO INC. AND 1787930 ONTARIO INC.  
BOTH OF THE CITY OF ST. THOMAS, IN THE PROVINCE OF ONTARIO

**AFFIDAVIT OF MONIQUE PAUL  
(Sworn October 4, 2018)**

I, Monique Paul of the City of Kitchener, in the Regional Municipality of Waterloo,  
MAKE OATH AND SAY:

1. I am a Credit Analyst at Transit Petroleum Inc. ("**Transit**") and, as such, have knowledge of the matters to which I depose. Where I do not possess personal knowledge, I have stated the source of my information in all such cases and do verily believe same to be true.

2. As a credit analyst at Transit, my job responsibilities include reviewing credit applications, performing credit checks, determining credit limits and terms, opening new accounts, verifying weekly preauthorized debit reports, emailing invoices, making collection calls, and handling credit and collections issues.

3. Transit supplied petroleum products to 1787930 Ontario Inc., carrying on business as Messenger Freight Systems ("**178**"). 178 set-up a pre-authorized payment system to pay Transit's invoices.

4. I have reviewed the affidavit of Nathan McDaniel ("**Nathan**"), Financial Controller of 178, sworn September 18, 2018 ("**Nathan's Affidavit**") in connection with 178's motion for the return of the Agreed Payment, as defined and described below.

Communications prior to the July 5 Meeting

5. I spoke with Nathan on or about June 22, 2018. During that conversation, we spoke about how to move forward with 178's account with regards to the pre-authorized payment/debit ("**PAD**") amounts and dates of withdrawals, as well as 178's frozen bank

account. I told Nathan I would follow up with an email outlining the details of our conversation and Nathan told me he would go over the email and confirm the payment plan and provide me with new banking information.

6. By e-mail dated June 22, 2018, I noted that the balance that would be owing to Transit as of July 2, 2018 was \$167,468.09. I also summarized how Nathan had proposed that the balance would be paid by four (4) PADs beginning on Monday, July 2 and ending on Monday, July 23, 2018.

7. By responding e-mail dated June 25, 2018, Nathan asked if the PAD dates could be moved to Fridays instead of Mondays.

8. By e-mails dated June 26 to 28, 2018, it was agreed that the four (4) PAD payments would begin on Thursday, July 5, 2018 instead of July 2, 2018 with the first PAD being in the amount of \$83,734.05. The e-mail string between myself and Nathan from June 22 to 28, 2018 is attached hereto as **Exhibit "A"**.

9. As set out in Nathan's June 27, 2018 e-mail and agreed by Transit in its June 28, 2018 e-mail, the four (4) PADs would be as follows:

July 5	\$83,734.05	(50% of the arrears amount)
July 12	regular amount plus \$27,911.35	(16.67% of the arrears amount)
July 19	regular amount plus \$27,911.35	(16.67% of the arrears amount)
July 26	regular amount plus \$27,911.35	(16.67% of the arrears amount)

July 3, 2018 PAD Submission to the Credit Union

10. I called Nathan on July 3, 2018 at 9:15 a.m. to confirm the PAD for the amount of \$83,734.05 (the "**Agreed Payment**") and left a voice message stating that I needed to hear back from him by 10 a.m. to confirm that he would have no issues with the PAD for the Agreed Payment. I did not hear back from Nathan.

11. I sent an email to Nathan at 9:17 a.m. and then again at 11:17 a.m. on July 3, 2018 when I informed Nathan that I had put the PAD through for the Agreed Payment on July 5, 2018. Attached hereto and marked has **Exhibit "B"** is a copy of e-mail correspondence to Nathan dated July 3, 2018 at 9:17 a.m. Attached hereto and marked as **Exhibit "C"** is a copy of e-mail correspondence to Nathan dated July 3, 2018 at 11:17 a.m.

12. Nathan did not contact me to ask me to not put the PAD through for the Agreed Payment or to put a stop payment on the PAD for the Agreed Payment. The next time I spoke to Nathan was on Monday July 9, 2012 as set out below.

13. I am advised by Cindy Burchett, Accounting Manager at Transit, that on July 3, 2018 Transit submitted a PAD which included a line item (among others to other customers) to the Libro Credit Union (the "**Credit Union**") for the Agreed Payment to be debited from 178's account on July 5, 2018 pursuant to the agreement with 178.

14. I was not contacted by anyone at 178 to stop the PAD for the Agreed Payment that was submitted on July 3, 2018.

15. I was not contacted by the Credit Union regarding any request made to it to stop the PAD for the Agreed Payment that was submitted on July 3, 2018.

#### The July 5 Meeting

16. I attended a meeting on Thursday, July 5, 2018 at around 1 p.m. at the Transit office (the "**July 5 Meeting**"). In attendance at that meeting on behalf of 178 was Louise Vonk ("**Louise**"), who I understand is the owner of 178, and Blaine Skirtschak ("**Blaine**"), the General Manager of 178. In addition to myself, Trevor Chambers ("**Trevor**"), Division Manager at Transit, attended the meeting on behalf of Transit.

17. At the July 5 Meeting, Louise told us that CRA froze 178's bank account around mid-June. She told us that 178 then contacted MNP Ltd. ("**MNP**") who suggested that 178 should file a Notice of Intention to Make a Proposal ("**NOI**") to restrict further action by CRA and to give 178 some breathing room to re-organize financially in order to carry on with business.

18. During the July 5 Meeting, Louise also told us that MNP filed the NOI on Monday, July 2, 2018 and that the NOI papers would be sent out to creditors in the following days. Louise told us that she wanted to meet with us before we received the NOI papers to provide advance notice and to explain the process. Louise said that she understood that 178 required the support of its three or four key vendors for fuel, trucks and contract drivers in order to continue to operate.

19. During the July 5 Meeting, Louise indicated that she was aware that the terms of payment between Transit and 178 for post-NOI purchases would change and that she was

willing to do whatever was necessary to keep Transit as their supplier of fuel. During that meeting Louise made it clear that the outstanding balance for both pre-NOI and post-NOI purchases owing to Transit would be paid in full. Louise suggested we could add an "admin fee" of \$5,000 to \$10,000 to every post-NOI invoice and apply against pre-NOI invoices, if we wanted to.

20. During the July 5 Meeting, Louise made it very clear that 178 had told MNP to allow the PAD for the Agreed Payment to Transit to go through because 178 needed Transit as a supplier and because Transit was, in her words, a "vital vendor" in order for 178 to remain in business.

21. Prior to the July 5 Meeting, I did not know that 178 had filed an NOI on July 2, 2018.

22. During the July 5 Meeting, there was no request by Louise or Blaine for a return of the Agreed Payment.

Communications After the July 5 Meeting

23. I called Nathan twice and left voice messages for Nathan on Friday, July 6, 2018 to discuss the following weeks PAD for post-NOI purchases. Nathan emailed me back at 5:50 p.m. on Friday, July 6, 2018 to apologize for not reaching out to me but he would contact me on Monday, July 9, 2018.

24. I participated in a telephone conference with Nathan, Don Poort ("Don"), the Chief Financial Officer of Transit, and Trevor on Monday, July 9, 2018. During that call, Nathan advised the Transit representatives that he had allowed the PAD for the Agreed Payment to be processed because (i) 178 and Transit had agreed to the payment on June 28, 2018, two business days prior to the NOI being filed on Monday, July 2, 2018; (ii) the payment had been processed by the Credit Union and received by Transit before Transit knew about the NOI; and (iii) 178 valued working with Transit as 178 tried to keep afloat and 178 needed Transit to continue as a supplier to remain in business.

25. During the July 9, 2018 call, Don told Nathan that we could continue to work with 178 if Transit received a \$50,000 deposit and then did PAD pulls daily of \$15,000 as a short-term solution until Transit actually saw the proposal. Nathan informed us that he would not be able to provide a deposit as it would be considered preferential treatment according to MNP.

26. I refer to paragraph 5 of Nathan's Affidavit wherein he states that he personally advised me that 178 was not permitted by law to pay accounts which are owed for fuel supplied prior to July 2, 2018, and that 178 was prepared to pay for fuel supplied following the NOI. The first time that I became aware of the NOI was with Louise and Blaine in the July 5 Meeting. I did not speak to Nathan regarding the NOI until Monday, July 9, 2018.

27. Nathan did not request a return of the Agreed Payment during the July 9, 2018 call.

28. Nathan called me on Wednesday, July 11, 2018 at 3:37 p.m. He told me that he needed to stop payment on the \$62,693.03 PAD for post-NOI purchases. I told Nathan that the PAD had already been submitted to the Credit Union. Nathan said that he would call the Credit Union to put a stop payment on the \$62,693.03 PAD. The stop payment was placed on the \$62,693.03 PAD on July 11, 2018 because the funds were not deposited into the Transit account on July 12, 2018. The Attached as **Exhibit "D"** is a copy of my e-mail to Don regarding this telephone conversation with Nathan.

29. Nathan did not request the return of the Agreed Payment during our July 11, 2018 telephone conversation.

30. No one at 178 or MNP has asked me to direct Transit to return the Agreed Payment to 178.

SWORN BEFORE ME at the City of Kitchener,  
in the Regional Municipality of Waterloo, this  
4<sup>th</sup> day of October, 2018.

  
A Commissioner for taking Affidavits (or as may be)

}   
Monique Paul

Kennedy Erin MacDonald, a Commissioner, etc.,  
Province of Ontario, while a Student-at-Law.  
Expires June 12, 2020.

IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427  
ONTARIO INC. AND 1787930 ONTARIO INC. BOTH OF THE CITY OF ST. THOMAS, IN THE  
PROVINCE OF ONTARIO

Court File Nos. 35-2395487 and 35-2395481  
Estates File Nos. 35-2395487 and 35-2395481

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**IN BANKRUPTCY AND INSOLVENCY**  
Proceeding commenced at London

**AFFIDAVIT OF MONIQUE PAUL**  
**(SWORN OCTOBER 4, 2018)**

**MILLER THOMSON LLP**  
One London Place  
255 Queens Avenue, Suite 2010  
London, ON Canada N6A 5R8

**Sherry A. Kettle, LSO #53561B**  
Tel: 519.931.3534  
Fax: 519.858.8511  
Email: skettle@millerthomson.com

Lawyers for Transit Petroleum Inc.



Court File Nos. 35-2395487 and 35-2395481  
Estates File Nos. 35-2395487 and 35-2395481

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
IN BANKRUPTCY AND INSOLVENCY**

IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL  
OF 1732427 ONTARIO INC. AND 1787930 ONTARIO INC.  
BOTH OF THE CITY OF ST. THOMAS, IN THE PROVINCE OF ONTARIO

**AFFIDAVIT OF DON POORT  
(Sworn October 4, 2018)**

I, Don Poort of the City of Cambridge, in the Regional Municipality of Waterloo, MAKE OATH AND SAY:

1. I am the Chief Financial Officer at Transit Petroleum Inc. ("Transit") and, as such, have knowledge of the matters to which I depose. Where I do not possess personal knowledge, I have stated the source of my information in all such cases and do verily believe same to be true.

2. Transit supplied petroleum products to 1787930 Ontario Inc., carrying on business as Messenger Freight Systems ("178"). 178 set-up a pre-authorized payment system to pay Transit's invoices.

3. I have reviewed the affidavit of Nathan McDaniel ("Nathan"), Financial Controller of 178, sworn September 18, 2018 ("Nathan's Affidavit") in connection with 178's motion for the return of the Agreed Payment, as defined and described below.

July 3, 2018 PAD Submission to Credit Union

4. I was advised by Monique Paul ("Monique"), a credit analyst at Transit, on September 27 and September 28, 2018 that on July 3, 2018 Transit submitted a pre-authorized debit ("PAD") to the Libro Credit Union (the "Credit Union"), which included a line item (among others to other customers), for \$83,734.05 (the "Agreed Payment") to be debited from 178's account on July 5, 2018.

5. The PAD was submitted to the Credit Union for the Agreed Payment on July 3 at 11:45:29 a.m. The amount of that submission includes multiple customers (7 pages, single

spaced). Two line items in the 7 pages are associated with 178 (account 96242510 for \$69,121.02, and account 96246010 in the amount of \$14,613.03). The total of that PAD, including the Agreed Payment, was credited to our account on July 5, 2018. Attached hereto and marked as Exhibit "A" is a copy of the redacted submission for the PAD containing the Agreed Payment together with a redacted Transit bank statement showing the total PAD deposit on July 5, 2018.

6. I was never contacted by anyone at 178 to stop the PAD for the Agreed Payment that was submitted on July 3, 2018.

7. I was never contacted by the Credit Union regarding any request made to it to stop the PAD for the Agreed Payment that was submitted on July 3, 2018.

#### Communications After the July 5 Meeting

8. On the morning of July 5, 2018, I was advised by Trevor Chambers ("Trevor"), Division Manager at Transit, that he and Monique were going to attend a meeting with 178 at 1 p.m. that same day. Later on July 5, 2018, Trevor told me that he and Monique did attend a meeting with representatives of 178 on Thursday, July 5, 2018 on or about 1 p.m. at which time they were advised that 178 had filed a Notice of Intention to Make a Proposal ("NOI") on Monday, July 2, 2018 (the "July 5 Meeting"). I note that our office was closed Monday, July 2, 2018 for the Canada Day long weekend.

9. I first became aware of the NOI on Thursday, July 5, 2018 when Trevor told me following the July 5 Meeting.

10. I had no conversations with 178 prior to Monday, July 9, 2018. My communications with 178 began on July 9, 2018 and ended on July 11, 2018. My communications were with Nathan.

11. I participated in a telephone conference with Nathan, Monique and Trevor on Monday, July 9, 2018. During that call, Nathan advised the Transit representatives that he had allowed the PAD for the Agreed Payment to be processed because (i) 178 and Transit had agreed to the payment on Thursday, June 28, 2018, two business days prior to the NOI which was filed on Monday, July 2, 2018; (ii) the payment had been processed by the Credit Union and received by Transit before Transit knew about the NOI; and (iii) 178 valued

working with Transit as 178 tried to keep afloat and 178 needed Transit to continue as a supplier to remain in business.

12. During the July 9, 2018 call, I raised the possibility of 178 providing a security deposit to Transit. Nathan advised the representatives of Transit that 178 was not able to provide a security deposit under the NOI. Nathan specifically said that MNP Ltd., the proposal trustee, would not allow 178 to provide Transit with a security deposit as that would be seen as "preferential treatment".

13. As set out below, I later learned that 178 did provide a security deposit to Petro Canada some time later despite having told us that 178 was prevented from doing so.

14. Nathan did not request a return of the Agreed Payment during the July 9, 2018 call.

15. During our phone conversations following the July 9, 2018 call, Nathan and I discussed payment of post-NOI purchases and our e-mail exchanges clarified our discussions regarding post-NOI purchases. Attached hereto and marked as **Exhibit "B"** is a copy of an e-mail string between Nathan and myself following the July 9, 2018 call regarding payment for purchases following the NOI.

16. On July 11, 2018, Monique sent an email to me wherein she indicated that Nathan had tried to reach me to put a stop payment on the \$62,693.03 for post-NOI purchases. Attached hereto and marked as **Exhibit "C"** is a copy of this e-mail.

17. Nathan issued a stop payment on July 11, 2018 around 4:10 p.m. on the amount of \$62,693.03 which represented the amount owing to Transit for the period July 3 to July 9, 2018, for post-NOI purchases by 178 from Transit.

18. I spoke with Nathan around 4:17 p.m. on July 11, 2018 regarding the stop payment. After that call, Transit deactivated the 178 fuel cards.

19. In Nathan's Affidavit, he states that he demanded the return of the Agreed Payment by telephone on July 11, 2018. I have no recollection of that demand.

20. I have no recollection of Nathan requesting a return of the Agreed Payment at any time during our telephone discussions or e-mail correspondence between July 9, 2018 and

July 11, 2018. Had he done that, Transit would not have spent the time and effort to try and work through a payment plan with 178 for post-NOI purchases.

21. My first recollection of any demand by 178 for the return of the Agreed Payment was on July 20, 2018 when Transit's lawyer, Sherry Kettle, forwarded an e-mail string from Sheldon Title of MNP and Bruce Simpson, a lawyer for 178. Attached hereto and marked as **Exhibit "D"** is a copy of the July 20, 2018 email.

22. Even if Nathan requested a return of the Agreed Payment on July 11, 2018, which I have no recollection of, it was after we had already been told that 178 had allowed the Agreed Payment to be processed so that Transit would continue to supply fuel in order that 178 could continue in business.

23. Based upon 178's representations that the Agreed Payment was allowed to go through and promises to pay all accounts on terms agreed upon with Transit, Transit continued to supply petroleum products to 178. As set out below, 178 still has an outstanding balance owing to Transit for July 2018 post-NOI purchases.

24. I have not spoken with anyone at MNP regarding the Agreed Payment.

Post-NOI Billing and Payments

25. Following the issuance of the NOI on July 2, 2018, Transit supplied fuel to 178 for which it has invoiced the sum of \$84,434.30. Attached hereto and marked as **Exhibit "E"** are copies of these invoices.

26. Following the issuance of the NOI, 178 has paid the sum of \$36,000 to Transit for post-NOI purchases. Attached hereto and marked as **Exhibit "F"** is a copy of a statement for 178 showing this payment as well as post-NOI invoices. I also refer to Exhibit "B" hereto wherein Nathan states that Transit can proceed with the \$36,000 PAD that had been previously authorized but not for the remaining balance owing for the week.

27. The balance owing to Transit for post-NOI purchases is \$48,434.30 (\$84,434.30 less \$36,000).

Letter to 178's Lawyer

28. Transit received a copy of the First Report of the Proposal Trustee dated July 26, 2018, a copy of which, without exhibits, is attached hereto as **Exhibit "G"**.

29. By letter dated August 8, 2018, Transit's lawyer, Sherry Kettle, sent a letter to 178's lawyer, Bruce Simpson, setting out Transit's position. Attached hereto as **Exhibit "H"** is a copy of this letter.

30. I am advised by Ms. Kettle that she did not receive a response to her request for details of 178's attempt(s) to stop the payment of the Agreed Payment "by approaching Transit Petroleum and then by contacting its credit union" on July 4 and 5, 2018 or details of the attempts by Transit to stop the payment of the Agreed Payment, as suggested by the statement that "[n]either Transit Petroleum or the credit union were able to stop the payment", as stated in the First Report of the Proposal Trustee.

31. I note that at paragraphs 36 and 37 of the First Report of the Proposal Trustee, the proposal trustee states when it became apparent to 178 that Transit was not prepared to continue providing fuel to 178, 178 approached Petro Canada on July 23, 2018. The report also states that Petro Canada sought protection for payment and a security payment to secure post-NOI supplies.

32. Transit received a copy of the Second Report of the Proposal Trustee dated September 10, 2018, a copy of which, without exhibits, is attached hereto as **Exhibit "I"**.

33. I note that at paragraph 15(a)(iii) of the Second Report of the Proposal Trustee, the proposal trustee states that 178 advanced \$80,000 to Petro Canada as a security deposit to secure the supply of fuel. This is contrary to what Nathan told us during our July 9, 2018 telephone call when we were negotiating post-NOI payment terms. Nathan specifically told us that 178 could not provide a security deposit as the proposal trustee told him that it would amount to preferential treatment.

34. Transit specifically relied on the representations of 178, including Louise, Blaine and Nathan, that all purchases would be paid for by 178 and that the Agreed Payment had been allowed to go through so that 178 could continue in business. Transit continued to supply fuel to 178 post-NOI at 178's request and continued to do business with 178 in good faith and based on 178's representations.

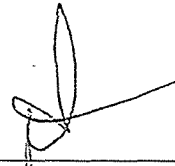
35. Transit continued to negotiate post-NOI payment terms with 178 in good faith and agreed to payment terms with Transit. Nathan committed to a payment of approximately \$60,000 to be paid by PAD on July 12, 2018. Despite that agreement, 178 unilaterally issued a stop payment for that PAD on July 11, 2018. At that point, Transit no longer felt comfortable supplying fuel to 178.

36. 178 then went to Petro Canada and gave Petro Canada an \$80,000 security deposit, despite having told Transit that MNP had told 178 that it was prevented from doing so. According to the First Report of the Proposal Trustee, it appears that the \$80,000 security deposit was paid to Petro Canada sometime after July 23, 2018 instead of paying Transit for the outstanding balance owing to Transit on post-NOI purchases, as set out above, which had been issued prior to July 23, 2018.

SWORN BEFORE ME at the City of Kitchener,  
in the Regional Municipality of Waterloo, this 4<sup>th</sup>  
day of October, 2018.



A Commissioner for taking Affidavits (or as may be)



Don Poort

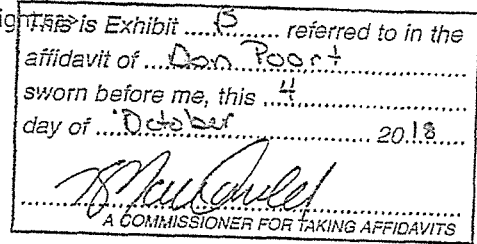
**Kennedy Erin MacDonald, a Commissioner, etc.,  
Province of Ontario, while a Student-at-Law.  
Expires June 12, 2020.**

**TAB**

**“B”**

Jarrell, Susan

From: Nathan McDaniel <nathan@messengerfreight.ca>  
Sent: Wednesday, July 11, 2018 3:31 PM  
To: Don Poort  
Subject: RE: in re: proposal  
  
Importance: High



Hi Don,

My apologies for missing your call. Please only execute the PAP that I authorized: \$36,000 for estimated fuel purchases on 7/9/18, 7/10/18 & 7/11/18. I need to talk to you regarding the remaining balance for the week. My cell is 519-319-7086.

Cheers,

Nathan

Kennedy Erin MacDonald, a Commissioner, etc.,  
Province of Ontario, while a Student-at-Law.  
Expires June 12, 2020.

From: Don Poort [mailto:dpoot@hoggfuel.com]  
Sent: July 11, 2018 1:54 PM  
To: Nathan McDaniel <nathan@messengerfreight.ca>  
Subject: FW: in re: proposal

I am not around much longer this afternoon.

We will be submitting (today) a PAD for \$62,639.03 dated tomorrow (July 12) (\$50,639.03 + \$12,000).

As it turns out, I don't actually get the funds until the end of the day (10pm), so I will take \$24,000 on Friday. That way, as agreed, by Friday night I will have enough to cover fuel draws for Friday plus funds in advance of the following day (in this case, on the weekend and Monday). On Monday, I will be drawing \$12,000 in funds for Tuesday's fuel, etc.

Thanks.

From: Don Poort  
Sent: Wednesday, July 11, 2018 12:35 PM  
To: 'Nathan McDaniel' <nathan@messengerfreight.ca>  
Subject: RE: in re: proposal

Nathan

Please find the information that answers your question (attached). We have gone through a detailed review of your account to ensure that all numbers are accurate and complete with current information up to July 8. I need to have a conversation with you early this afternoon about one more point for our discussion. What time after 1PM can I call you?

Thanks



From: Nathan McDaniel [mailto:nathan@messengerfreight.ca]  
Sent: Tuesday, July 10, 2018 3:57 PM  
To: Don Poort <dpoort@hoggfuel.com>  
Subject: RE: in re: proposal

Hi Don,

Much thanks for making the time to talk today. I am fine with the PAD for \$36,000 to come out tomorrow to cover the estimated fuel (i.e. \$12,000/day) for the period July 9, July 10, and July 11. Would you please send me a revised amount owing for the period July 3 – July 8?

Cheers,

Nathan

From: Don Poort [mailto:dpoort@hoggfuel.com]  
Sent: July 10, 2018 3:03 PM  
To: Nathan McDaniel <nathan@messengerfreight.ca>  
Subject: RE: in re: proposal

I am here

From: Nathan McDaniel [mailto:nathan@messengerfreight.ca]  
Sent: Tuesday, July 10, 2018 2:59 PM  
To: Don Poort <dpoort@hoggfuel.com>  
Subject: RE: in re: proposal

Hi Don,

My apologies for missing your call...I will call you in a few minutes.

Thanks,

Nathan

From: Don Poort [mailto:dpoort@hoggfuel.com]  
Sent: July 10, 2018 2:16 PM  
To: Nathan McDaniel <nathan@messengerfreight.ca>  
Subject: RE: in re: proposal

Left you a voicemail.

I am back in the office (519-579-5330) – have me paged.

Thanks.

From: Nathan McDaniel [mailto:nathan@messengerfreight.ca]  
Sent: Tuesday, July 10, 2018 1:34 PM  
To: Don Poort <dpoort@hoggfuel.com>  
Subject: RE: in re: proposal

Hi Don,

Thank you for sending your proposal. Would you please give me a call at your earliest convenience?

Cheers,

Nathan

From: Don Poort [<mailto:dpoort@hogefuel.com>]  
Sent: July 10, 2018 11:35 AM  
To: Nathan McDaniel <[nathan@messengerfreight.ca](mailto:nathan@messengerfreight.ca)>  
Subject: RE: in re: proposal  
Importance: High

Thank you for your proposal.

Given the current situation, until we have been brought current under the terms described below, effective July 11, 2018, Messenger will be restricted to a daily maximum fuel draw of \$5,000.

Your balance with Transit as at end of business on July 9, 2018 is as follows:

Amounts up to and including July 2:

- Account # 96242510 (Transit Cardlocks): \$ 170,745.30
- For Account # 96246010: (Ultramar Cardlocks): \$ 32,746.52 (estimated for July 1 and July 2 included)
- Total under NOI: \$ 203,491.82

Your balance from July 3 – July 9 is: \$62,989.06

In order to eliminate the daily maximum, Messenger is required to pay the July 3 – July 9<sup>th</sup> balance above PLUS:

- For Account # 96242510 (Transit Cardlocks): Transit will be executing a PAD pull in the amount of \$12,000. This represents an approximation of daily draw by Messenger.
- For Account # 96246010: (Ultramar Cardlocks): Transit will also be executing a PAD for your Ultramar draw in the amount of \$11,000. This represents an approximation of the weekly draw by Messenger within the Ultramar system.

To be clear, if paid on July 10, 2018, Transit requires a payment in the amount of \$85,989.06 prior to lifting the daily maximum restriction. Each day beyond July 10, 2018, an additional \$12,000 will be required.

From the date of payment forward:

- For Account # 96242510: Each week day morning Transit will inform Messenger of the prior day's fuel purchases and will simultaneously execute a PAD pull for that full amount.
- For Account # 96246010: On Tuesday of each week Transit will inform Messenger of the prior week's fuel purchases through the Ultramar system, and will simultaneously execute a PAD pull for that amount.

For the period in time during which Transit is required to perform these additional administrative services, Messenger will be charged an Administration fee of \$1,000 per week. This amount will be added to each Monday's PAD draw.

Once we are back to normal credit terms, we will require a \$50,000 deposit on the account, and the initial maximum daily limit will be \$15,000 per day.

Thank you

Don Poort, CPA, CA  
CFO  
Transit Petroleum

From: Nathan McDaniel [mailto:nathan@messengerfreight.ca]  
Sent: Monday, July 09, 2018 2:43 PM  
To: Don Poort <dpoort@hoggfuel.com>  
Subject: in re: proposal

Hi Don,

Much thanks for making the time to talk today. With the NOI filed we can commit to the following for payments:

- \*Payments of \$12,000 per day billed on Monday, Tuesday, Thursday and Friday for COD fuel purchases.
- \*If the amounts received throughout the week are in excess of the invoices for the current week's fuel purchases, the excess would be applied as a credit for future invoices (i.e. no arrears payment applications)
- \*If the amounts received throughout the week are deficient to the invoices for the current week's fuel purchases, the deficiency would be covered on the Monday payment.
- \*Payment of \$60,000 on Thursday of the current week (7/12/18) [Total payments for the current week would be \$120,000].

I would be fine with the payments being made via PAP starting tomorrow (\$24,000 on 7/10/18). Please let me know if you have any questions.

Cheers,

Nathan

Nathan McDaniel  
Financial Controller  
Messenger Freight System  
150 Dennis Road  
P.O. Box 100  
St. Thomas, ON N5P 0B6  
Bus: 519-631-9604 x107  
Fax: 519-631-1135  
<http://www.messengerfreight.ca>



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IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427  
ONTARIO INC. AND 1787930 ONTARIO INC. BOTH OF THE CITY OF ST. THOMAS, IN THE  
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ONTARIO  
SUPERIOR COURT OF JUSTICE  
IN BANKRUPTCY AND INSOLVENCY  
Proceeding commenced at London

AFFIDAVIT OF DON POORT  
(SWORN OCTOBER 4, 2018)

MILLER THOMSON LLP  
One London Place  
255 Queens Avenue, Suite 2010  
London, ON Canada N6A 5R8

Sherry A. Kettle, LSO #53561B  
Tel: 519.931.3534  
Fax: 519.858.8511  
Email: skettle@millerthomson.com

Lawyers for Transit Petroleum Inc.

Court File Nos. 35-2395487 and 35-2395481  
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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
IN BANKRUPTCY AND INSOLVENCY**

IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL  
OF 1732427 ONTARIO INC. AND 1787930 ONTARIO INC.  
BOTH OF THE CITY OF ST. THOMAS, IN THE PROVINCE OF ONTARIO

**AFFIDAVIT OF TREVOR CHAMBERS  
(Sworn October 4, 2018)**

I, Trevor Chambers of the City of Cambridge in the Regional Municipality of Waterloo,  
MAKE OATH AND SAY:

1. I am the Division Manager of Transit Petroleum Inc. ("Transit") and, as such, have knowledge of the matters to which I depose. Where I do not possess personal knowledge, I have stated the source of my information in all such cases and do verily believe same to be true.
2. Transit supplied petroleum products to 1787930 Ontario Inc., carrying on business as Messenger Freight Systems ("178"). 178 set-up a pre-authorized payment system to pay Transit's invoices.
3. I have reviewed the affidavit of Nathan McDaniel ("Nathan"), Financial Controller of 178, sworn September 18, 2018 in connection with 178's motion for the return of the Agreed Payment, as defined and described below.

Communications prior to the July 5 Meeting

4. On or before June 22, 2018, I was made aware by Monique Paul ("Monique"), a credit analyst at Transit, that 178 had made the request to Monique to "skip" a weekly payment and then split that payment into four payments to be paid in equal installments for four weeks. We had done this for 178 in the past when they ran into cashflow issues and had made a similar request. 178 was a very important customer to Transit and we felt that working with them in this regard was warranted. This was, however, the fourth or fifth time that we had approved their request over the course of the last few years and we explained that we could not continue to do this moving forward.

5. From this point, Monique communicated with Nathan about the timing and amounts to be withdrawn. Attached hereto and marked as Exhibit "A" is an email string dated June 22, 2018 through June 28, 2018, between Monique and Nathan.

6. It was mutually agreed between Monique and myself that we would accept Nathan's proposal dated Wednesday, June 27, 2018 at 5:40pm. In the past, 178 had always lived up to the agreed obligations so we had no reason to believe that they would not this time.

July 3, 2018 PAD Submission to Credit Union

7. I was advised by email from Monique that on July 3, 2018 Transit would be submitting a PAD to the Credit Union for the amount of \$83,734.05 (the "Agreed Payment") to be debited from 178's account.

8. No one at 178 told me that the PAD for the Agreed Payment should not be submitted.

9. I was not contacted by anyone at 178 to stop the PAD for the Agreed Payment that was submitted on July 3, 2018.

10. I was not contacted by the Credit Union regarding any request made to it to stop the PAD for the Agreed Payment that was submitted on July 3, 2018.

The July 5 Meeting

11. I attended a meeting on Thursday, July 5, 2018 at around 1 p.m. at the Transit office (the "July 5 Meeting"). In attendance at that meeting on behalf of 178 was Louise Vonk ("Louise"), who I understand is the owner of 178, and Blaine Skirtschak ("Blaine"), the General Manager of 178. In addition to myself, Monique attended the meeting on behalf of Transit.

12. At the July 5 Meeting, Louise and Blaine together told us that CRA froze 178's bank account around mid-June. They told us that 178 then contacted MNP Ltd. ("MNP") who suggested that 178 should file a Notice of Intention to Make a Proposal ("NOI") to restrict further action by CRA and to give 178 some breathing room to re-organize financially in order to carry on with business.

13. During the July 5 Meeting, Louise and Blaine told us that MNP filed the NOI on Monday, July 2, 2018 and that the NOI papers would be sent out to creditors in the following

days. Louise told us that she wanted to meet with us before we received the NOI papers to provide advance notice and to explain the process. Louise said that she understood that 178 required the support of its three or four key vendors for fuel, trucks and contract drivers in order to continue to operate.

14. During the July 5 Meeting, Louise indicated that she was aware that the terms of payment between Transit and 178 would change for post-NOI purchases and that she was willing to do whatever was necessary to keep Transit as their supplier of fuel. During that meeting Louise made it clear that the outstanding balance for both pre-NOI and post-NOI purchases owing to Transit would be paid in full.

15. During the July 5 Meeting, Louise made it very clear that 178 had insisted that MNP allow the Agreed Payment to Transit to go through because 178 needed Transit as a supplier and because Transit was an important vendor in order for 178 to remain in business.

16. During the July 5 Meeting, there was no request by Louise or Blaine for a return of the Agreed Payment.

17. Prior to the July 5 Meeting, I did not know that 178 had filed an NOI on July 2, 2018.

Communications After the July 5 Meeting

18. I was present during a telephone conference with Nathan as well as other representatives of Transit, being Monique and Don Poort ("Don"), the Chief Financial Officer of Transit, on Monday, July 9, 2018.

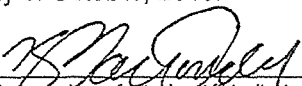
19. During this call, Don indicated to Nathan that 178 must provide a security deposit to Transit in order for Transit to continue to supply fuel to 178. Nathan told Don that 178 was not able to provide a security deposit under the NOI. The conversation ended relatively abruptly after this as neither Transit nor 178 were willing to change their position on this requirement.

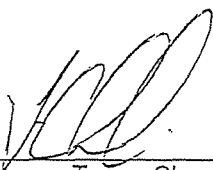
20. No one at 178 or MNP has asked me to direct Transit to return the Agreed Payment to 178.

21. Transit specifically relied on the representations of 178, including Louise, Blaine and Nathan, that all purchases would be paid for by 178 and that the Agreed Payment had been

allowed to go through so that 178 could continue in business. Transit continued to supply fuel to 178 post-NOI at 178's request and continued to do business with 178 in good faith and based on 178's representations.

SWORN BEFORE ME at the City of Kitchener,  
in the Regional Municipality of Waterloo, this 4<sup>th</sup>  
day of October, 2018.

  
\_\_\_\_\_  
A Commissioner for taking Affidavits (or as may be)

  
\_\_\_\_\_  
Trevor Chambers

**Kennedy Erin MacDonald, a Commissioner, etc.,  
Province of Ontario, while a Student-at-Law.  
Expires June 12, 2020.**



IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427  
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ONTARIO  
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AFFIDAVIT OF TREVOR CHAMBERS  
(SWORN OCTOBER 4, 2018)

MILLER THOMSON LLP  
One London Place  
255 Queens Avenue, Suite 2010  
London, ON Canada N6A 5R8

Sherry A. Kettle, LSO #535561B  
Tel: 519.931.3534  
Fax: 519.858.8511  
Email: skettle@millerthomson.com

Lawyers for Transit Petroleum Inc.

District of: Ontario  
Division No. 06 - London  
Court No.  
Estate No.

- FORM 33 -  
Notice of Intention To Make a Proposal  
(Subsection 50.4(1) of the Act)

In the matter of the proposal of  
1787930 Ontario Inc. c/o as Messenger Freight Systems  
of the City of St. Thomas  
in the Province of Ontario

Take notice that:

1. 1787930 Ontario Inc. c/o as Messenger Freight Systems, an insolvent person, state, pursuant to subsection 50.4(1) of the Bankruptcy and Insolvency Act (the "Act"), that we intend to make a proposal to our creditors.
2. MNP LTD. of 300 - 111 Richmond Street West, Toronto, ON, M5H 2G4, a licensed trustee, has consented to act as trustee under the proposal. A copy of the consent is attached.
3. A list of the names of the known creditors with claims of \$250 or more and the amounts of their claims is also attached.
4. Pursuant to section 69 of the Act, all proceedings against us are stayed as of the date of filing of this notice with the official receiver in our locality.

Dated at the City of Toronto in the Province of Ontario, this 2nd day of July 2018.



1787930 Ontario Inc. c/o Messenger Freight Systems  
Insolvent Person

To be completed by Official Receiver:

\_\_\_\_\_  
Filing Date

\_\_\_\_\_  
Official Receiver

District of: Ontario  
 Division No. 05 - London  
 Court No.  
 Estate No.

FORM 33 -  
 Notice of Intention To Make a Proposal  
 (Subsection 60.4(1) of the Act)

In the matter of the proposal of  
 1787930 Ontario Inc c/o as Messenger Freight Systems  
 of the City of St. Thomas  
 in the Province of Ontario

List of Creditors with claims of \$250 or more.				
Creditor	Address		Account#	Claim Amount
Active Heavy Towing Recovery Tilt	1764 Victoria Street North Kitchener ON N2B 3E5			1,158.25
Altruck Idealease	405 Laird Road Guelph ON N1G 4P7			805,931.58
Altruck International Truck Centres	405 Laird Road Guelph ON N1G 4P7			61,159.86
Baker Heavy Towing Inc.	250 Dundas St South Cambridge ON N1R 8A8			665.50
Bank of Nova Scotia	Harrison Pensa 450 Talbot Street PO Box 3237 London ON N6A 4K3			2,019,960.00
Bank of Nova Scotia	Harrison Pensa LLP 450 Talbot Street PO Box 3237 London ON N6A 4K3			42,363.98
BFI Print & Promotion Solutions	6-1031 Hubrey Road London ON N6N 1B4			4,186.65
Brent W. Swankk	225 Duncan Mill Road Don Mills ON M3B 3K9			54,977.23
Carrier Truck Centres	645 Athlone Place WOODSTOCK ON N4S 7V8			5,612.85
Checker Flag Leasing	4-5845 Luke Road Mississauga ON L4W 2K6			1,286.20
Checkers Cleaning Supply	371 Scanlan Street London ON N5W 6G9			3,360.54
COMTOW	2677 Drew Road Mississauga ON L4T 3X1			844.12
Country Collision	40133 Longhurst Line R.R. #7 St. Thomas ON N5P 3T2			694.56

District of: Ontario  
 Division No. 05 - London  
 Court No.  
 Estate No.

- FORM 33 -  
 Notice of Intention To Make a Proposal  
 (Subsection 50.4(1) of the Act)

In the matter of the proposal of  
 1787930 Ontario Inc cdb as Messenger Freight Systems  
 of the City of St. Thomas  
 in the Province of Ontario

List of Creditors with claims of \$250 or more.			
Creditor	Address	Account#	Claim Amount
CRA - Tax - Ontario Quebec Insolvency Intake Centre	Shawinigan - Sud National Verification and Collection Centre 4695 Shawinigan-Sud Blvd Shawinigan-sud QC G9P 5H9		202,110.00
DNO Towing	1020 Talbot Street St. Thomas ON N5P 1G3		395.50
Dowler-Karn Limited Sherry Robinson	43841 Talbot Line, RR #3 St Thomas ON N5P 3S7		261.50
Duncan Mill Consultants	225 Duncan Mill Road, Suite 101 Toronto ON M3B 3K9		15,034.65
Express Employment Professionals	PO Box 9245 Postal Sln A Toronto ON M5W 3M1		1,956.31
Expressway Trucks	2943 Cedar Creek Road Ayr ON N0B 1E0		18,716.78
Forest City Staffing	80 Meg Drive London ON N6E 3T8		748,662.05
Granval	3-35 Lingard Rd Cambridge ON N1T 2H4		3,295.00
GTM Legal Services	PO Box 1413, 426 King St West Prescott ON K0E 1T0		339.00
Kal Tire	20 Enterprise Drive London ON N3N 1A7		21,715.13
KAS Personnel Services Inc.	7895 Tranmere Drive, Unit #18 Mississauga ON L5S 1V9		90,507.91
KJM Alignment Services Inc.	3 Phoebe Cres Elmira ON N3B 3B8		322.05
Lifrow Limited	PO. Box 8092, Stn A Toronto ON M5W 3W5.		908.44
Masterlift Inc.	2899 Plymouth Drive OAKVILLE ON L6H 6G7		315.27

District of: Ontario  
 Division No. 05 - London  
 Court No.  
 Estate No.

-FORM 33 -  
 Notice of Intention To Make a Proposal  
 (Subsection 60.4(1) of the Act)

In the matter of the proposal of  
 1787930 Ontario Inc cbb as Messenger Freight Systems  
 of the City of St. Thomas  
 in the Province of Ontario

List of Creditors with claims of \$250 or more.				
Creditor	Address		Account#	Claim Amount
Perfect Pen & Stationery	PO Box 4090 Station A Toronto ON M5W 0E9			849.08
ProTrans Personnel Service	1575 Bishop Street North, Suite 400 Cambridge ON N1R 7J4			169,498.58
ProTreadz 2012	4230 Fountain St. N Cambridge ON N3H 4R7			813.35
Reactus Team	96 Hinrichs Cr Cambridge ON N1T 0A9			10,197.52
Revolution Staffing	69 Mary Street Barrie ON L4V 1T2			9,749.86
Rob Gillies Truck & Auto Service	21 Laing Blvd St. Thomas ON N5P 4B5			7,698.78
ROSS TOWING	995 POND MILLS ROAD London ON N6N 1C3			1,525.50
Safety-Kleen Canada	PO Box 15221, Station A Toronto ON M5W 1C1			1,453.86
Shareholder	150 Dennis Road London ON N6P 0B6			92,362.00
Spectrum Communications	79 Wellington Street London ON N6B 2K4			761.22
TEF Link Security Group Inc.	18 Concession St, Unit 103, Suite 2 Cambridge ON N1R 2G6			3,204.65
The Agency Employment Services	125 Wallace Avenue North Listowel ON N4W 1K8			48,999.70
The Aylmer Express	390 Talbot Street East Box 160 Aylmer ON N5H 2R9			4,123.37
Trailer Wizards	4849 Hastings Street Burnaby BC V5C 2K6			2,651.29
Transit Hogg Fuel & Supply Limited	5 Hill Street Kitchener ON N2G 4R3			96,950.58

District of: Ontario  
 Division No. 05 - London  
 Court No.  
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- FORM 33 -  
 Notice of Intention To Make a Proposal  
 (Subsection 50.4(1) of the Act)

In the matter of the proposal of  
 1787930 Ontario Inc cdb as Messenger Freight Systems  
 of the City of St. Thomas  
 in the Province of Ontario

List of Creditors with claims of \$250 or more.			
Creditor	Address	Account#	Claim Amount
Transit Trailer Limited	22217 Bloomfield Road, RR #3 Chatham ON N7M 5J3		3,257.32
Tubby's Truck & Trailer	545 Hudson Drive Dorchester ON N0L 1G5		10,324.98
Twin City Graphics	350 Shirley Avenue, Unit 3 Kitchener ON N2B 2E1		592.12
Verus Valuations Ltd.	23850 River Road Maple Ridge BC V2W 1B7		333.35
Workplace Safety Insurance Board	PO Box 4115 Station A Toronto ON M5W 2V3		19,500.00
Yale Industrial Trucks Inc.	37 Intrepid Court London ON N5V 4N8		1,371.97
<b>Total</b>			<b>4,592,971.86</b>



1787930 Ontario Inc. cdb as Messenger Freight Systems  
 Insolvent Person

- Proposal Consent -

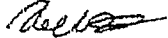
In the matter of the proposal of  
1787930 Ontario Inc. ccb as Messenger Freight Systems  
of the City of St. Thomas  
in the Province of Ontario

To whom it may concern,

This is to advise that we hereby consent to act as trustee under the Bankruptcy and Insolvency Act for the proposal of 1787930 Ontario Inc. ccb as Messenger Freight Systems.

Dated at the City of Toronto in the Province of Ontario, this 2nd day of July 2018.

MNP LTD. - Licensed Insolvency Trustee



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300 - 111 Richmond Street West  
Toronto ON M5H 2G4  
Phone: (416) 596-1711 Fax: (416) 323-5242



Industry Canada  
Office of the Superintendent  
of Bankruptcy Canada

Industrie Canada  
Bureau du surintendant  
des faillites Canada

District of Ontario  
Division No. 05 - London  
Court No. 35-2395481  
Estate No. 35-2395481

In the Matter of the Notice of Intention to make a  
proposal of:

1787930 Ontario Inc.  
Insolvent Person  
MNP LTD / MNP LTÉE  
Licensed Insolvency Trustee

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Date of the Notice of Intention: July 02, 2018

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CERTIFICATE OF FILING OF A NOTICE OF INTENTION TO MAKE A PROPOSAL  
Subsection 50.4 (1)

I, the undersigned, Official Receiver in and for this bankruptcy district, do hereby certify that the aforementioned Insolvent person filed a Notice of Intention to Make a Proposal under subsection 50.4 (1) of the *Bankruptcy and Insolvency Act*.

Pursuant to subsection 69(1) of the Act, all proceedings against the aforementioned Insolvent person are stayed as of the date of filing of the Notice of Intention.

Date: July 03, 2018, 09:22

E-File/Dépôt Electronique

Official Receiver

Federal Building - London, 451 Talbot Street, Suite 303, London, Ontario, Canada, N6A5C9; (877)376-9902

**Canada**



2019 ONSC 716  
Ontario Superior Court of Justice

1787930 Ontario Inc. v. Transit Petroleum

2019 CarswellOnt 1120, 2019 ONSC 716, 301 A.C.W.S. (3d) 697

## **IN BANKRUPTCY AND INSOLVENCY**

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427 ONTARIO INC.  
AND 178930 ONTARIO INC. BOTH OF THE CITY OF ST. THOMAS, IN THE PROVINCE OF ONTARIO

R. Raikes J.

Heard: December 19, 2018

Judgment: January 28, 2019

Docket: 35-2395487, 35-2395481

Counsel: Sherry Kettle, for Transit Petroleum  
Bruce Simpson, Mr. Ly, for 1787930 Ontario Inc.

Subject: Insolvency

APPLICATION by debtor for order requiring creditor to return payment obtained subsequent to filing of Notice of Intent to File Proposal.

### ***R. Raikes J.:***

1 1787930 Ontario Inc. is a logistics company carrying on business as Messenger Freight Systems (hereafter "Messenger"). It operates a fleet of trucks for delivery of goods to customers.

2 Transit Petroleum (hereafter "Transit") was a supplier of fuel for Messenger's trucks. It supplied approximately \$200,000 of fuel to Messenger each month.

3 Messenger paid for the fuel by pre-authorized debits ("PADs") from its account with the Bank of Nova Scotia. By June 2018, Messenger was in arrears for fuel already supplied by Transit. Some of the PADs did not go through because Messenger lacked sufficient funds to cover the payment (NSF). In addition, Messenger stopped payment on some payments due.

4 In mid-June 2018, the Canada Revenue Agency ("CRA") issued a Requirement to Pay ("RTP") and froze Messenger's account at the Bank of Nova Scotia from which the PADs were drawn to pay Transit. Unbeknownst to Transit, the Bank of Nova Scotia then served Messenger with a Notice to Enforce Security pursuant to s. 144 of the *Bankruptcy and Insolvency Act* ("BIA") seeking repayment of monies owing to the Bank, and informed Messenger that they were preparing materials to appoint a receiver.

5 The PAD payment due on June 18, 2018 did not go through. Transit received the PAD back with a notification from the Bank: "Account Frozen".

6 On June 22, 2018, Nathan McDaniel ("McDaniel"), the Financial Controller at Messenger, spoke by telephone with Monique Paul ("Paul"), a Credit Analyst at Transit, concerning the overdue account; specifically, how Messenger was going to pay the arrears and ongoing fuel supplies. According to Paul, she was informed by McDaniel that Messenger's account was frozen because of fraudulent activity.

7 By email dated June 22, 2018 to McDaniel, Paul confirmed Messenger's proposal to pay the arrears by four PAD's with the first on Monday, July 2 and the last on July 23, 2018. The proposal by McDaniel contemplated the following payments:

Monday, July 2, 2018 - \$83,734.05

Monday, July 9, 2018 — regular amount owing plus \$27,911.35 for arrears

Monday, July 16, 2018 — same as July 9

Monday, July 23, 2018 — same as July 9

Paul asked McDaniel to confirm the proposal before she spoke to the fuel manager to get his approval. With the account at the Bank of Nova Scotia frozen, McDaniel needed to provide new banking details in order for the PAD's to be processed. She attached a new PAD for him to fill out.

8 On June 25, 2018, McDaniel emailed Paul to request that the first payment be changed from Monday, July 2 to Friday, July 6.

9 On June 26, 2018, Paul and Tina Thorne ("Thorne") spoke with McDaniel by telephone with respect to the requested change. They advised McDaniel that if the change was made to Thursday, the terms of payment would have to change from Net 14 to Net 7. Paul and Thorne aver that McDaniel agreed to that change during the telephone call; McDaniel does not recall what was discussed in that call.

10 After the telephone call, Paul emailed McDaniel on June 26, 2018. Paul indicated that Transit was prepared to change the PAD's from Mondays to Thursdays "with the below proposal on getting the account current". The proposal is materially different from that outlined in the June 22 email above. It contemplates three, not four payments. The first payment is \$111,645.40, the second \$83,004.86 and the last is the regular fuel payment plus \$27,911.35. The email is silent with respect to change of credit terms from Net 14 to Net 7.

11 McDaniel emailed Paul on June 27 at 5:40 PM. He wrote:

Much thanks for the patience and support that both you and Tina have demonstrated; it means a lot to me. Attached is a scan of a voided check [sic] from our new checking [sic] account; please use this banking information for future billings. With regards to the below — mentioned proposal, I would ask that we adjust is [sic] slightly to be more in line with our original conversation. Would you let me know if my proposal is acceptable?

July 5 \$83,734.05 (50% of the arrears amount)

July 12 regular amount plus \$27,911.35 (16.67% of the arrears amount)

July 19 regular amount plus \$27,911.35 (16.67% of the arrears amount)

July 26 regular amount plus \$27,911.35 (16.67% of the arrears amount)

With this payment plan, we would effectively have the arrears amount paid up by EOM July.

12 Paul responded by email dated June 28, 2018 at 8:55 AM. She indicated that his proposal had been discussed at length with Thorne and Trevor Chambers, the fuel manager. She wrote: ". . . we will accept this proposal, with below stipulations." After setting out the same payment schedule and amounts proposed by McDaniel in his June 27 email, she wrote:

Currently terms are Net 14 with Monday PAD making invoices 15 days old, if we agree to move your PAD to Thursday we will need to change your terms to Net 7 making your invoices 11 days old, we cannot keep your terms at Net 14 and Paul on Thursday as that makes the invoices 19 days old.

We have continuously gone above and beyond to work with Messenger on their financial issues, but going forward we need to be reassured that we will no longer have any problems going forward which is why we are agreeing to the Thursday PAD.

We have already had to pay the fuel purchased and used by Messenger, as out [sic] terms are Net 7 with our supplier.

We need to be clear that this will be the last time we can split payments due to the inability to pay your fuel purchases on the agreed-upon pull date.

*We need the above approved no later than 3pm on Friday June 29, 2018, in order to pull the first payment on Thursday, July 5<sup>th</sup>, 2018. [Italics added]*

13 McDaniel emailed Paul on June 29, 2018 at 4:05 PM. He apologized for his delay and advised that he was being pulled in several directions. He asked her to call him on Tuesday when she was back in the office and indicated: "I just have a few questions regarding the terms . . . I want to make sure I am on the same page with you." No further communications took place between McDaniel and Paul until July 3, 2018 when Paul emailed McDaniel to ask him to call as soon as possible.

14 Transit takes the position that the June 28, 2018 email by Paul merely confirms the terms that had previously been agreed upon and accepts McDaniel's proposal as to the amounts and timing of payment. In other words, the change from Net 14 to Net 7 was already agreed upon and implicit in McDaniel's proposal of June 27 which Transit was accepting.

15 Messenger takes the position that the change to Net 7 was not previously agreed to, did not form part of McDaniel's proposal and represents a counter-offer to his June 27, 2018 proposal. In short, Paul asked for confirmation of acceptance/approval because it represented a change in the terms previously discussed. Thus, there was no agreement on June 28, 2018, nor was there any communication of acceptance of Transit's proposed terms at any point before July 5, 2018.

16 On June 28, 2018, the Bank of Nova Scotia informed Messenger that it required Messenger to proceed by way of Notice of Intention to File a Proposal ("NOI") failing which the Bank would not forbear from enforcement procedures. No further discussions took place with Transit between June 28 and July 2 when, Messenger issued a NOI.

17 Thus, by the time Paul left a voicemail message and emailed McDaniel on July 3, the NOI had already been issued. In her voicemail message, she indicated that she needed to hear back from him by 10 AM that day to confirm that he would have no issues with the PAD on July 5. She testified that she simply wanted to make sure that funds would be available given the past history of NSF's and stop payments.

18 When she did not hear back from McDaniel, Paul sent a further email at 11:17 AM on July 3 in which she informed him that she had put the PAD through for withdrawal for July 5, 2018. She deposed that McDaniel did not respond and the PAD was submitted to Libro on July 3, 2018 at 11:45 AM for withdrawal from Messenger's account on July 5.

19 Messenger did not stop payment on the PAD and, according to Transit's witnesses, it did not advise Transit of the NOI before the PAD was processed and funds were transferred from the account to Transit on July 5.

20 On July 4, 2018, McDaniel sent an internal email at 2:37 PM in which he confirmed that he had asked Chambers, fuel manager at Transit, to put a hold or stay on the PAD for July 5. McDaniel deposes that there was no agreement to pay the \$83,734.05 on July 5 because he never accepted the changed terms. He also disputes that Transit was not informed that the PAD should not go through.

21 Transit asserts that it was unaware of the NOI until a meeting on July 5 at approximately 1 PM. The owner of Messenger, Louise Vonk (hereafter "Vonk"), and general manager, Blaine Skirtschak (hereafter "Skirtschak"), met with Paul and Trevor Chambers of Transit. During that meeting, Vonk informed Paul and Chambers that Messenger had filed a NOI on July 2, 2018 to restrict further action by CRA and to give Messenger some time to reorganize financially to carry on business.

22 During the July 5 meeting, Vonk indicated that Messenger needed Transit's support to keep operating and she was willing to do whatever was necessary to keep Transit as its fuel supplier. She did not request return of the monies received by Transit from the July 5 PAD. According to Paul and Chambers, Vonk advised that she allowed the PAD to go through because Transit was a "vital vendor" necessary for Messenger to remain in business.

23 Neither Vonk nor Chambers filed responding affidavits to dispute the evidence of the discussion at the meeting on July 5, 2018.

24 On July 6, 2018, Paul called McDaniel twice and left voice messages to discuss the following week's PAD for post-NOI purchases of fuel. McDaniel emailed Paul at 5:50 PM on July 6 to apologize for not reaching out and advised that he would contact her on Monday, July 9, 2018.

25 On July 9, 2018, McDaniel spoke by telephone with Paul, Chambers and Don Poort, CFO for Transit. According to affidavits by Paul and Poort, McDaniel did not request return of the monies received by Transit on July 5 from the PAD. McDaniel advised in that telephone call that he had allowed the PAD to be processed because he had agreed to that payment on June 28, the payment had been processed and received by Transit before they knew of the NOI, and Messenger needed Transit to continue as a supplier to stay in business.

26 In his supplementary affidavit sworn October 15, 2018, McDaniel deposed, *inter alia*, that:

- a. he asked Paul on July 3 not to proceed with the July 5 PAD;
- b. he tried unsuccessfully to stop the July 5 payment;
- c. he did not retroactively authorize the July 5 PAD, nor did he offer the reasons proffered by Transit's witnesses for allowing the PAD to go through; and
- d. he did not ask Poort for return of the July 5 PAD monies, but he did ask Paul for same.

27 As is evident, there are facts in dispute. Counsel for Transit asks me to find that McDaniel's evidence is not credible or reliable. She points to inconsistencies which she asserts undermine his evidence. The facts in dispute are material to whether there was an agreement to pay the arrears by four PAD's including the first on July 5, whether Messenger asked Transit not to proceed with that payment before July 5, and whether Messenger approved of that payment after the NOI was issued as part of an arrangement to ensure ongoing fuel supply from Transit.

28 Despite these factual issues, the following facts are not disputed:

- a. Messenger issued its NOI on July 2, 2018;
- b. The PAD for \$83,734.05 was submitted to Libro on July 3 and processed on July 5, 2018, three days after the NOI was issued;
- c. That payment was on account of monies owing by Messenger to Transit for fuel supplied before the NOI was issued;
- d. After the NOI was issued, Transit supplied additional fuel to Messenger in the amount of \$48,434.30;

- e. On July 11, 2018, Messenger entered into arrangements with Petro Canada for fuel for its trucks;
- f. Messenger severed its fuel supply relationship with Transit on that date;
- g. Transit filed a Proof of Claim in Messenger's Proposal in the amount of \$202,791.59 as arrears owing as of July 2, 2018. That figure includes the monies subsequently received on July 5 through the PAD.

### **Position of Parties**

#### ***a. Messenger***

29 Messenger takes the following positions on this application:

- a. the payment received by Transit on July 5, 2018 by PAD is barred by s. 69(1)(a) of the *BIA*;
- b. allowing Transit to retain those monies on account of pre-NOI debt is contrary to the objectives of the *BIA*;
- c. there was no agreement to pay those monies by PAD on July 5 — at most, the parties had discussions but no agreement was reached;
- d. the payment amounts to a fraudulent preference vis-à-vis other creditors of Messenger; and
- e. at most, Transit should retain only the amount payable for post-NOI fuel supplied to Messenger which amounts to \$48,434.30. The balance should be repaid.

#### ***b. Transit***

30 Transit takes the following positions:

- a. the July 5 PAD payment does not constitute the exercise of a remedy and, accordingly, is not barred by s.69 of the *BIA*;
- b. the PAD was made to Transit pursuant to an agreement made on June 28, 2018. That agreement was subsequently confirmed by Messenger's representatives;
- c. the payment received by Transit on July 5, 2018 is consistent with the objectives of the *BIA* which promote arrangements to give debtors time and means to restructure financially to continue in business;
- d. Messenger has no standing to assert a claim of fraudulent preference; and
- e. In any event, the payment in question was not a fraudulent preference.

### **Analysis**

31 Section 69(1) of the *BIA* immediately stays any remedies against a debtor upon issuance of a NOI. Section s.69(1) states:

- (1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,
  - (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

32 In cross-examination, Paul confirmed that the full amount outstanding as at July 2, 2018 was a claim provable in bankruptcy. The amount then outstanding included the amount later received on July 5, 2018 when the PAD was processed. The Proof of Claim filed included the \$83,734.05 received on July 5, 2018.

33 Section 69.4 of the *BIA* permits a creditor affected by the operation of section 69 to apply to the court for a declaration that that section does not operate for that creditor. The court may make such declaration if it is satisfied that the creditor is likely to be materially prejudiced by the continued operation of that section or it is equitable on other grounds to make that declaration: s. 69.4

34 Transit has never sought relief under section 69.4.

35 In *The Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters Canada, 2018) by Lloyd W. Houlden and Geoffrey B. Morawetz, the authors explain the intent and purpose of s. 69 and stay of proceedings in the following terms:

One of the objects of the *Bankruptcy and Insolvency Act* is to provide for the orderly and fair distribution of the property of a bankrupt among his or her creditors on a *pari passu* basis . . . : *R. v. Fitzgibbon* (1990), 78 C.B.R. (N.S.) 193, 1990 CarswellOnt 172 (S.C.C.). Sections 69, 69.1, 69.2 and 69.3 are designed to prevent proceedings by a creditor that might give the creditor an advantage over other creditors.

Sections 69, 69.1, 69.2 and 69.3 do not give the court power to order a stay; rather they create a stay *ipso facto* on the filing of a notice of intention or of a proposal or consumer proposal or on bankruptcy by prohibiting a creditor from instituting or continuing the proceedings mentioned in the sections without leave of the Bankruptcy Court: *Re Cohen* (1948), 29 C.B.R. 111, aff'd 29 C.B.R. 163 (Ont. C.A.); *3031085 Nova Scotia Ltd. v. Classic Freight Systems Ltd.* (2002), 34 C.B.R. (4th) 313, 2002 CarswellNS 245, 2002 NSSC 151 (N.S. S.C. [In Chambers]). . . .

Knowledge that a notice of intention or proposal has been filed or that the debtor has gone into bankruptcy is unnecessary for a stay to be effective. If a creditor cashes a cheque that it has received from the debtor after the debtor has filed a notice of intention, the money must be repaid. The cashing of the cheque is a remedy within s. 69(1) (a): *Startek Computer Inc. (Trustee of) v. Samtack Computer Inc.* (2000), 20 C.B.R. (4<sup>th</sup>) 166, 2000 CarswellBC 1802, 2000 BCSC 1316 (S.C. [In Chambers]).

36 The word "remedy" in s. 69(1)(a) is to be given a broad interpretation: *Gene Moses Construction Ltd., Re*, 1999 CarswellBC 149 (B.C. S.C.) at paras. 9 and 10. Remedies are not restricted to proceedings of a judicial nature: *Gene Moses*, para. 11.

37 In *Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.*, 2005 CarswellOnt 9935 (Ont. S.C.J.), Lederman J. considered the scope of the meaning of "remedy" in the context of s. 69. He wrote at paras. 11 and 12:

11. While I agree that the word "remedy" in section 69(1)(a) should be given a broad interpretation, it must be a purposive one that is in accord with the objectives of the *BIA* generally, and in particular, the specific purposes of the stay provisions against secured and unsecured creditors, giving, in the words of E.B. Leonard and R.G. Marantz in their article, "Debt restructuring under the *Bankruptcy and Insolvency Act*, June 1, 1995 — Stays of Proceedings, under the *Bankruptch and Insolvency Act*" (for the 1995 Insolvency Institute of Canada lectures), "a reorganizing debtor an opportunity to have some 'breathing room' during which to negotiate with its creditors and hopefully put together a prospective financial restructuring which would meet their requirements."

12. A purposive definition of the word 'remedy' in section 69(1)(a) would suggest that, remedies which in any way hinder or could impair that process are caught within the section and are stayed. The issue should be approached contextually on a case-by-case basis and the remedy sought should be considered in terms of its impact on the objectives of the statutory stay provision. It is the impact rather than the generic nature of the relief sought which

should govern. Therefore, if the injunctive relief sought detrimentally affects or could impair the ability of the insolvent person to put forth a proposal, it should be stayed, whereas, if the nature of the injunction sought would have no effect whatsoever on that ability, it should not be stayed.

38 In *Gene Moses*, the debtor construction company leased logging equipment with financial assistance from GE Capital Leasing. Monthly lease payments were payable. The lease payments were restructured at some point but were payable monthly by way of preauthorized debits (PAD's). The construction company executed a NOI under the *BIA* which was filed with the official receiver on December 17, 1998. Five days later, GE presented three debit memos to the company's bank totaling \$29,149. The bank honoured the debit memos and paid the money to GE.

39 The construction company sought return of the monies paid to GE after the NOI was issued. At para. 14, Master Powers held:

I conclude that "remedy" in section 69 must be given a broad meaning. I also conclude that in presenting the debit memos for payment of the arrears of lease payments GE Capital was exercising a remedy to try and collect its debt. The exercise of this remedy is stayed pursuant to section 69(1) of the *Bankruptcy and Insolvency Act* and therefore GE Capital was not entitled to the use of those debit memos.

40 In *Startek Computer Inc. (Trustee of) v. Samtack Computer Inc.* [2000 CarswellBC 1802 (B.C. S.C. [In Chambers])], Startek purchased computer equipment from Samtack. Startek paid for the goods by a cheque that was returned NSF. Startek then issued a second cheque to pay for the goods. Startek filed a NOI. Four days later, Samtack presented the first cheque to the bank again and this time it was honoured. Startek sought return of the funds received.

41 Harvey J. of the British Columbia Supreme Court held at para. 11 that by renegotiating the first cheque without the knowledge or consent of Startek or the trustee, the creditor (Samtack) "exercised a remedy and violated the existing state of proceedings".

42 Transit distinguishes the result in *Startek* on the basis that Messenger expressly consented to the PAD being exercised on July 5, 2018, and subsequently confirmed that consent by word and conduct.

43 Transit argues that fuel is an essential requirement for a trucking business. Messenger needed time to restructure its debts while continuing to operate. It could not operate without fuel. As Ms. Vonk indicated at the July 9 meeting, Transit was a vital supplier. Allowing Transit to negotiate and retain the monies from the July 5 PAD is entirely consistent with the objectives of the *BIA*. Accordingly, the negotiation of that PAD on July 5 did not constitute the exercise of a "remedy".

44 I disagree for the following reasons:

- a. The July 5, 2018 PAD was for fuel already delivered and consumed before July 2;
- b. While Transit was aware that Messenger was having financial difficulties as evidenced by the frozen bank account and NSF payments, Transit was not aware of the full extent of Messenger's difficulties or its plan to restructure its debt going forward. This is not a case where Messenger shared its plan, went to Transit to secure its future cooperation as a critical supplier and Transit agreed to do so only if its arrears were paid;
- c. Messenger was able to replace Transit as a supplier within a day or two of the July 9 meeting;
- d. Like the PAD's in *Gene Moses* and the cheque in question in *Startek*, the July 5 PAD was simply to catch up payments missed or dishonoured before the NOI;
- e. The July 5 PAD was part of an alleged "agreement" that contemplated four payments. Transit does not assert nor did it move under s. 69.4 to assert that the other three payments are other than debts provable in bankruptcy that are captured by the proposal made. There is no reason to treat the July 5 PAD different from the other PAD's contemplated by the "agreement"; and

f. It was not open to Messenger to determine which creditors should be paid for monies already owing and to give its consent to payments to some creditors in preference to others.

45 I find that the July 5 PAD constitutes a remedy that is captured by the stay in s. 69(1)(a) of the *BIA*. It is contrary to the objective of the *BIA* to treat all creditors fairly to permit Transit to retain the monies received.

46 As mentioned, Transit did supply fuel in July 2018 after the NOI was issued and before Messenger switched to Petro Canada. It is entitled to set off the debt owing for that fuel against the monies payable to Messenger for the July 5 PAD. In the result, Transit shall pay to Messenger the sum of \$35,299.75.

47 It is unnecessary for me to determine whether the parties reached an agreement on June 28 or at any point before July 2, 2018. The fact of such agreement would not change the analysis or result above. I note, however, that that issue did not lend itself to determination on the basis of conflicting affidavits and transcripts of cross-examinations. Were it necessary to determine that issue, I would direct a trial of an issue.

48 It is likewise unnecessary to determine whether the July 5 payment amounts to a fraudulent preference. I have grave misgivings with respect to Messenger's standing to assert that claim. It strikes me as passing odd that the party who preferred one creditor over others should make the application.

49 If the parties cannot agree on costs, they may make submissions not exceeding 3 pages within 21 days.

*Application granted in part.*



**Nathan McDaniel**

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**From:** Nathan McDaniel <nathan@messengerfreight.ca>  
**Sent:** July 10, 2018 12:19 PM  
**To:** 'Don Poort'  
**Subject:** RE: in re: proposal

Hi Don,

I will call you shortly to discuss.

-Nathan

**From:** Don Poort [mailto:dpoot@hoggfuel.com]  
**Sent:** July 10, 2018 11:35 AM  
**To:** Nathan McDaniel <nathan@messengerfreight.ca>  
**Subject:** RE: in re: proposal  
**Importance:** High

Thank you for your proposal.

Given the current situation, until we have been brought current under the terms described below, effective July 11, 2018, Messenger will be restricted to a daily maximum fuel draw of \$5,000.

Your balance with Transit as at end of business on July 9, 2018 is as follows:

Amounts up to and including July 2:

- Account # 96242510 (Transit Cardlocks): \$ 170,745.30
- For Account # 96246010: (Ultramar Cardlocks): \$ 32,746.52 (estimated for July 1 and July 2 included)
- Total under NOI: \$ 203,491.82

Your balance from July 3 – July 9 is: \$62,989.06

In order to eliminate the daily maximum, Messenger is required to pay the July 3 – July 9<sup>th</sup> balance above PLUS:

- For Account # 96242510 (Transit Cardlocks): Transit will be executing a PAD pull in the amount of \$12,000. This represents an approximation of daily draw by Messenger.
- For Account # 96246010: (Ultramar Cardlocks): Transit will also be executing a PAD for your Ultramar draw in the amount of \$11,000. This represents an approximation of the weekly draw by Messenger within the Ultramar system.

To be clear, if paid on July 10, 2018, Transit requires a payment in the amount of \$85,989.06 prior to lifting the daily maximum restriction. Each day beyond July 10, 2018, an additional \$12,000 will be required.

From the date of payment forward:

- For Account # 96242510: Each week day morning Transit will inform Messenger of the prior day's fuel purchases and will simultaneously execute a PAD pull for that full amount.
- For Account # 96246010: On Tuesday of each week Transit will inform Messenger of the prior week's fuel purchases through the Ultramar system, and will simultaneously execute a PAD pull for that amount.

For the period in time during which Transit is required to perform these additional administrative services, Messenger will be charged an Administration fee of \$1,000 per week. This amount will be added to each Monday's PAD draw.

Once we are back to normal credit terms, we will require a \$50,000 deposit on the account, and the initial maximum daily limit will be \$15,000 per day.

Thank you

Don Poort, CPA, CA  
CFO  
Transit Petroleum

From: Nathan McDaniel [mailto:nathan@messengerfreight.ca]  
Sent: Monday, July 09, 2018 2:43 PM  
To: Don Poort <dpoort@hoggfuel.com>  
Subject: in re: proposal

Hi Don,

Much thanks for making the time to talk today. With the NOI filed we can commit to the following for payments:

- \*Payments of \$12,000 per day billed on Monday, Tuesday, Thursday and Friday for COD fuel purchases.
- \*If the amounts received throughout the week are in excess of the invoices for the current week's fuel purchases, the excess would be applied as a credit for future invoices (i.e. no arrears payment applications)
- \*If the amounts received throughout the week are deficient to the invoices for the current week's fuel purchases, the deficiency would be covered on the Monday payment.
- \*Payment of \$60,000 on Thursday of the current week (7/12/18) [Total payments for the current week would be \$120,000].

I would be fine with the payments being made via PAP starting tomorrow (\$24,000 on 7/10/18). Please let me know if you have any questions.

Cheers,

Nathan

Nathan McDaniel  
Financial Controller  
Messenger Freight System  
150 Dennis Road  
P.O. Box 100  
St. Thomas, ON N5P 0B6  
Bus: 519-631-9604 x107  
Fax: 519-631-1135  
<http://www.messengerfreight.ca>



IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL OF  
1732427 ONTARIO INC. AND 1787930 ONTARIO INC. BOTH OF THE CITY OF ST.  
THOMAS, IN THE PROVINCE OF ONTARIO

Court of Appeal File No.: C66871  
Court File Nos.: 35-2395487 and 35-2395481

**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced at Toronto

**FACTUM OF THE RESPONDENT,  
1787930 ONTARIO INC.**

**FELDMAN LAWYERS**  
390 Bay Street  
Suite 1402  
Toronto Ontario  
M5H 2Y2

**Paul Neil Feldman** LSO Registration No. 29469B  
Tel: 416-601-6821 Fax: 416-601-2272

Lawyers for the Respondent, 1787930 Ontario Inc.  
for the purpose of the Appeal