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

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

FACTUM OF THE APPELLANT, TRANSIT PETROLEUM INC.

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TABLE OF CONTENTS

PAGE

PART I - OVERVIEW

1. Transit Petroleum Inc. ("**Transit**") appeals from the decision of Mr. Justice Raikes dated January 28, 2019 in the Ontario Superior Court of Justice in Bankruptcy and Insolvency (the "**Decision**").

Decision, Appeal Book and Compendium ("**ABC**"), Tab 3, pp. 8-15.

2. In the Decision, Justice Raikes held that Transit had exercised a "remedy" contrary to the stay provision (the "**Stay**") under section 69 of the *Bankruptcy and Insolvency Act* ("**BIA**") that prevents a creditor from exercising a remedy for the recovery of a claim provable in bankruptcy. The Stay arose when 1787930 Ontario Inc., carrying on business as Messenger Freight Systems ("**178**" or "**Messenger**") filed a Notice of Intention to Make a Proposal ("**NOI**").

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [the "**BIA**"], s. 69(1).

3. In the result, Justice Raikes ordered Transit to return $83,734.05 (the "**Agreed Payment**") to 178. The Agreed Payment, which related to fuel supplied prior to the NOI, was withdrawn after the date of the NOI pursuant to a Pre-Authorized Debit ("**PAD**"). Justice Raikes also ordered the set-off of amounts owing by 178 to Transit in the amount of $48,434.30 for the post-NOI supply of fuel which 178 has failed to pay. The net amount payable to 178 as a result of the set-off is $35,299.75.

PART II - NATURE OF THE APPEAL

4. This is not a case of a creditor exercising a "remedy". Therefore, the Stay does not apply. Rather, this is a case of a financially distressed debtor who desperately

needed to secure Transit as a key supplier of fuel in order to keep its fleet of trucks on the road while it attempted to reorganize.

5. To achieve a successful reorganization, 178 agreed that Transit should be paid and retain the Agreed Payment for the pre-filing supply of fuel. By 178 agreeing to this payment, the withdrawal of the Agreed Payment by Transit could not be the exercise of a "remedy". This is consistent with the objective of restructuring legislation which is to give a debtor an opportunity to restructure and remain in business, a benefit to not only the debtor but also to all stakeholders of the distressed business.

6. The evidence of Transit was that it did not unilaterally take the Agreed Payment as a remedy to recover a debt. Rather, only days prior to the NOI, 178 and Transit had entered into an agreement for the PAD for the Agreed Payment. Subsequent to the filing of the NOI, 178 agreed by words and conduct that Transit should and could withdraw and retain the Agreed Payment in the ordinary course of business to permit 178 to remain in business while it restructured under the BIA.

7. Four employees of Transit gave evidence on the motion, being Monique Paul ("**Monique**"), a Credit Analyst at the time, Don Poort ("**Don**"), the Chief Financial Officer at the time, Tina Thorne ("**Tina**"), a Credit Analyst, and Trevor Chambers ("**Trevor**"), the Division Manager at the time. Only one employee of 178 gave evidence, Nathan McDaniel ("**Nathan**"), the Financial Controller.

8. The evidence of the four employees of Transit conflicted with the evidence of Nathan. Relying on the evidence of Nathan only, 178 took the position that there was no agreement for the PAD for the Agreed Payment and that Transit had wrongfully taken and retained the Agreed Payment. However, there is no credible evidence that

178 disputed that there was an agreement with Transit for the Agreed Payment, that 178 asked that the PAD not be submitted despite knowing that it was being submitted, that 178 asked Transit to stop the PAD, that 178 asked Libro to stop the PAD, or that 178 asked Transit to return the Agreed Payment once withdrawn. Rather, the evidence of Transit was that 178 had entered into the agreement for the Agreed Payment and that 178 had explicitly told Transit that it had allowed the Agreed Payment to be withdrawn and retained by Transit because 178 required Transit's continued supply of fuel as a key supplier during the post-NOI reorganization period.

9. Justice Raikes decided that the withdrawal of the PAD after the NOI for the pre-NOI debts was the exercise of a remedy contrary to section 69 of the BIA and that it was unnecessary to determine whether the parties reached an agreement regarding the Agreed Payment. As such, Justice Raikes ordered Transit to return the Agreed Payment to 178 less $48,434.30 for fuel supplied to 178 post-NOI in July 2018 which 178 failed to pay.

10. Transit appeals from the Decision of Justice Raikes for the following reasons:

(a) he erred in law in interpreting and applying section 69 of the BIA to the facts of the case, including errors of fact and law underlying that analysis, and he specifically erred in finding that the withdrawal of a PAD for the Agreed Payment constituted the exercise of remedy that was prohibited by operation of section 69 of the BIA;

(b) he erred in law in finding that it was unnecessary to determine whether the parties reached an agreement regarding the Agreed Payment;

(c) he erred in law in finding that had it been necessary to determine whether the parties reached an agreement, he was unable to make that determination based on conflicting affidavits and transcripts of cross-examinations;

(d) he erred in law by failing to draw an adverse inference from 178 failing to provide evidence from witnesses with first-hand knowledge of relevant and material facts;

(e) he erred in law by failing to assign little weight to the evidence of 178's only witness, Nathan, who gave inconsistent and inaccurate evidence and evidence that was not within his personal knowledge; and

(f) he erred in law by failing to address the proper rate of pre-judgment and post-judgment interest to be awarded to Transit for unpaid accounts for the supply of fuel after the filing of the NOI, based upon a contractual rate of interest.

PART III - THE FACTS

11. Transit was a key supplier to 178, a logistics company that picks up and delivers goods to customers on a schedule. 178 purchased approximately $200,000 worth of fuel on a monthly basis from Transit for 178's fleet of trucks.

> Transcript of the cross-examination of Nathan McDaniel on November 12, 2018 (the "**Nathan Transcript**"), Exhibit Book ("**Ex. Book**"), Tab 9, pp.164-165, qq. 13-25; p. 167, qq. 38-42, ABC, Tab 6, pp. 23-25.
> Proof of Claim of Transit, Exhibit "1" to the cross-examination of Monique Paul ("**Proof of Claim**"), Ex. Book, Tab 11, pp. 287-386, ABC, Tab 17, pp. 298-397.

12. By at least June 2018, 178 was experiencing significant financial difficulties. Unbeknownst to Transit, Canada Revenue Agency ("**CRA**") had frozen 178's Bank of Nova Scotia account. However, 178 told Transit that the Bank of Nova Scotia account had been closed due to fraudulent activity, not that CRA had frozen the bank account.

Affidavit of Monique Paul sworn October 4, 2018 ("**First Monique Affidavit**") at para. 5 and Exhibit "A", Ex. Book, Tab 5, pp.118-119, 123-127, ABC, Tab 12, pp. 211-212, 216-220.
Transcript from the cross-examination of Monique Paul conducted on November 12, 2018 (the "**Monique Transcript**"), Ex. Book, Tab 10, pp. 253-254, qq. 33-35, ABC, Tab 7, pp. 83-84.
Nathan Transcript, Ex. Book, Tab 9, p. 169, q. 54; p. 177, qq. 92-99; p. 178, q. 100, ABC, Tab 6, pp.26-28.

13. In order to secure the continued supply of fuel to keep its fleet of trucks on the road, on Thursday, June 28, 2018 before the long weekend, according to the evidence of Transit (and disputed by 178), 178 and Transit agreed to a payment schedule which included a PAD for the Agreed Payment to be withdrawn on Thursday, July 5, 2018 from 178's new account at Libro Credit Union ("**Libro**").

First Monique Affidavit at paras. 5-9 and Exhibit "A", Ex. Book, Tab 5, pp.118-119, 123-127, ABC, Tab 12, pp. 211-212, 216-220.
Affidavit of Monique Paul sworn October 23, 2018 ("**Second Monique Affidavit**") at paras. 4-6, Ex. Book, Tab 8, pp.155-156, ABC, Tab 15, pp. 248-249.
Affidavit of Tina Thorne sworn October 23, 2018 ("**Tina Affidavit**") at paras. 3-4, Ex. Book, Tab 7, pp.152-153, ABC, Tab 14, pp. 245-246.
Affidavit of Trevor Chambers sworn October 4, 2018 (the "**Trevor Affidavit**") at paras. 4-6, Exhibit "A", Ex. Book, Tab 6, pp. 142-143, ABC, Tab 13, pp. 235-236, 239.
Monique Transcript, Ex. Book, Tab 10, p. 258, q. 50; pp. 260-261, qq. 59-61; pp. 261-262, qq. 62-64; p. 263, q. 69; p. 275-276, qq. 100-103; p. 281, q. 119; p. 282, q. 123, ABC, Tab 7, pp. 85-93.
Nathan Transcript, Ex. Book, Tab 9, pp. 174-175, qq. 79-82; pp.185-186, qq. 131-133, ABC, Tab 6, pp. 29-31, ABC, Tab 6, pp. 29-32.

14. The communications leading to the agreement on Thursday, June 28 began following the return of the June 18, 2018 PAD. During a conversation on or about June 22, 2018, Monique and Nathan spoke about how to move forward with 178's account with regards to the PAD amounts and dates of withdrawals, as well as 178's account being frozen as a result of what Nathan described as fraudulent activity. Monique told Nathan she would follow up with an email outlining the details of their conversation and

Nathan said that he would go over the email and confirm the payment plan and provide new banking information.

First Monique Affidavit at para. 5, Exhibit "A", Ex. Book, Tab 5, pp.118-119, 123-127, ABC, Tab 12, pp. 211-212, 216-220.
Monique Transcript, Ex. Book, Tab 10, pp. 253-255, qq. 33-40, ABC, Tab 7, pp. 94-96.

15. Following that conversation, by e-mail dated June 22, 2018, Monique 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.

First Monique Affidavit, Exhibit "A", Ex. Book, Tab 5, p.126, ABC, Tab 12, p. 219.

16. By responding e-mail dated June 25, 2018 at 3:07 p.m., Nathan referred to the previous conversation noting that "it was a very challenging week with the *compromised account* [emphasis added] and frozen status" and that he would "have new banking details ready to relay by middle of this week". He requested that the PAD amounts be moved from Monday to Friday. There is no mention of any issues with CRA in that e-mail.

First Monique Affidavit, Exhibit "A", Ex. Book, Tab 5, p.125, ABC, Tab 12, p. 218.

17. Following that e-mail request, Monique and Tina had a telephone conversation with Nathan on June 26, 2018 at 11:33 a.m. During that call, Tina and Monique explained that the terms of payment would have to change from Net 14 to Net 7 if the PAD was changed from Monday to Thursday. Nathan agreed to the Net 7 payment terms and said that he understood why that change was required by Transit. Nathan does not remember the specifics of that phone call.

Second Monique Affidavit at para. 5, Ex. Book, Tab 8, pp.155-156, ABC, Tab 15, pp. 248-249.
Tina Affidavit at paras. 3-4, Ex. Book, Tab 7, pp.152-153, ABC, Tab 14, pp. 245-246.

Monique Transcript, Ex. Book, Tab 10, p. 258, q. 50-51, pp. 260-261, qq. 59-61, p. 262, q. 63, ABC, Tab 7, pp. 97-100.
Nathan Transcript, Ex. Book, Tab 9, pp. 174-175, qq. 79-82, ABC, Tab 6, pp. 33-34.

18. By e-mail to Monique dated June 27, 2018 at 5:40 p.m., Nathan on behalf of 178 offered the proposal which Monique accepted on behalf of Transit by e-mail on June 28, 2018 at 8:55 a.m. That proposal changed the first payment date from Monday, July 2, 2018 to Thursday, July 5, 2018. In Monique's e-mail, she confirmed that Transit would "accept this proposal" for the Agreed Payment. While the proposal set out in Nathan's e-mail did not note the previously accepted Net 7 terms that had been discussed on June 26, 2018, those Net 7 terms had been agreed upon verbally and were not changed by Nathan's June 28, 2018 e-mail. Contrary to Nathan's assertion in his second affidavit, Transit did not change any term offered by Nathan on behalf of 178 at all. Rather, Transit accepted the offer made by Nathan on behalf of 178.

First Monique Affidavit, Exhibit "A", Ex. Book, Tab 5, pp.123-124, ABC, Tab 12, pp. 216-217.
Second Monique Affidavit at para. 6, Ex. Book, Tab 8, pp.156, ABC, Tab 15, p. 249.
Trevor Affidavit at para. 6, Ex. Book, Tab 6, p. 143, ABC, Tab 13, p. 236.

19. As set out in Nathan's June 27, 2018 e-mail and agreed by Transit in its June 28, 2018 e-mail, the first PAD would be the Agreed Payment. Monique asked Nathan to confirm that there would not be any further NSF's or stopped payments noting that Transit had "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." Nathan did not call or e-mail Monique to indicate any disagreement with the June 28, 2018 e-mail.

Monique Transcript, Ex. Book, Tab 10, pp. 259-260, q. 57-58, pp. 261-262, qq. 62-64, pp. 275-276, qq. 100-103, p. 281, q. 119, ABC, Tab 7, pp. 101-106.

Nathan Transcript, Ex. Book, Tab 9, pp. 185-186, qq. 131-133, p. 198, qq. 190-191, ABC, Tab 6, pp. 35-37.

20. While Nathan was negotiating the payments, timing and terms with Transit, he knew that CRA had frozen the bank accounts in mid-June 2018 but did not mention that to Transit. He knew that 178 was considering a NOI by at least June 28, 2018 but entered into an agreement with Transit on that date for payment of its accounts beginning on July 5, 2018. Monique emailed Nathan on Friday, June 29, 2018 regarding the Agreed Payment, but Nathan did not say there was no agreement or that the PAD should not be submitted following the long weekend on Tuesday, July 3.

Nathan Transcript, Ex. Book, Tab 9, pp. 169, qq. 53-55, pp. 176-180, qq. 91-105, ABC, Tab 6, pp.38-43.
First Monique Affidavit, Exhibit "B", Ex. Book, Tab 5, p.128, ABC, Tab 12, pp. 221-222.
Affidavit of Nathan McDaniel sworn October 31, 2018 ("**Third Nathan Affidavit**") at Exhibit "A", Ex. Book, Tab 3, p.26, ABC, Tab 10, p. 136.

21. On Monday, July 2, 2018, a Canada Day long weekend holiday and only a few days after 178 and Transit had agreed to the payment schedule, 178 filed the NOI. 178 did not tell Transit that it had filed the NOI until three (3) days later on Thursday, July 5, 2018, after the PAD for the Agreed Payment had been withdrawn by Libro.

Affidavit of Nathan McDaniel sworn September 18, 2018 ("**First Nathan Affidavit**") at para. 3 and Exhibit "A", Ex. Book, Tab 1, pp. 1, 5-11., ABC, Tab 8, pp. 116, 119-126.
First Monique Affidavit at paras. 18, 21, Ex. Book, Tab 5, pp. 120-121, ABC, Tab 12, pp. 213-214.
Trevor Affidavit at paras. 11-13, 17, Ex. Book, Tab 6, pp. 143-144, ABC, Tab 13, pp. 236-237.
Affidavit of Don Poort sworn October 4, 2018 (the "**Don Affidavit**") at paras. 9-10, Ex. Book, Tab 4, p. 34, ABC, Tab 11, p. 138.

<u>July 3, 2018 PAD Submission to Libro</u>

22. Following the long weekend, Monique called Nathan on Tuesday, July 3, 2018 at 9:15 a.m. to confirm the PAD for the Agreed Payment. She left a voice message stating

that she 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. Because of the history of NSF's and stop payments, Monique wanted to ensure that the funds would be available for the Agreed Payment.

First Monique Affidavit at para. 10, Ex. Book, Tab 5, pp. 119, ABC, Tab 12, p. 212.
Monique Transcript, Ex. Book, Tab 10, pp. 261-262, q. 62, ABC, Tab 7, pp. 107-108.

23. Monique then sent an email to Nathan at 9:17 a.m. advising that she needed to submit the PAD by 10 a.m. for withdrawal on Thursday, July 5, 2018. Despite Monique's voice message and e-mail, Nathan did not contact Monique or anyone at Transit to ask that the PAD for the Agreed Payment not be submitted to Libro.

First Monique Affidavit at paras. 11-12, 14, Exhibit "B", Ex. Book, Tab 5, pp. 119-120, 128, ABC, Tab 12, pp. 212-213.
Trevor Affidavit at para. 8, Ex. Book, Tab 6, p. 143, ABC, Tab 13, p. 236.

24. Monique sent an email to Nathan at 11:17 a.m. on July 3, 2018 wherein she informed Nathan that she had put the PAD through for withdrawal on July 5, 2018. Nathan did not reply. The PAD submission was received and processed by Libro on July 3, 2018 at 11:45:29 a.m. for withdrawal from 178's account on July 5, 2018.

First Monique Affidavit at paras. 11, Exhibit "C", Ex. Book, Tab 5, pp. 119, 134, ABC, Tab 12, pp. 212, 227.
Don Affidavit at para. 5 and Exhibit "A", Ex. Book, Tab 4, pp. 33, 39-48, ABC, Tab 11, pp. 137-138, 143-151.
Nathan Transcript, Ex. Book, Tab 9, pp. 203, qq. 220, ABC, Tab 6, p. 44

25. Even though Monique was Nathan's contact at Transit and was the person he had communicated with regarding the Agreed Payment, he did not contact Monique to stop the PAD for the Agreed Payment.

First Monique Affidavit at para. 12, Ex. Book, Tab 5, p. 120, ABC, Tab 12, p. 213.
Second Monique Affidavit at para. 7, Ex. Book, Tab 8, pp.156, ABC, Tab 15, p. 249.

Nathan Transcript, Ex. Book, Tab 9, pp. 185, qq. 130-131, p. 197, q. 187, ABC, Tab 6, p. 45.

26. In fact, 178 has no documentary evidence of any request by Nathan or anyone at 178 to anyone at Transit requesting that the PAD not be submitted, that the PAD be stopped or that the Agreed Payment be returned. In any event, after the PAD was submitted to Libro, it was 178 who would have to provide instructions to Libro to stop the payment of the PAD. 178 did not do so.

Nathan Transcript, Ex. Book, Tab 9, pp. 186-187, qq. 134-140, p. 197, qq. 187-189, p. 238, q. 363, ABC, Tab 6, pp.46-50.
Answers to Undertakings of Nathan McDaniel ("**Nathan Undertakings**"), #3 and #4, Ex. Book, Tab 12, pp. 388, 426-429, ABC, Tab 16, pp. 251-257.

27. The evidence of Transit was that no one at 178 asked Transit to not submit the PAD for the Agreed Payment or to stop the PAD for the Agreed Payment once submitted on July 3, 2018 or to return the Agreed Payment once withdrawn (until after 178 had secured fuel from another supplier 9 days after the NOI). 178 could have contacted Libro to stop the PAD for the Agreed Payment, which it knew was being withdrawn, but it did not.

First Monique Affidavit at paras. 10-15, 20, 22, 24, 27, 29, 30 and Exhibits "B" and "C", Ex. Book, Tab 5, pp.119-122, 128-139, ABC, Tab 12, pp. 212-215, 221-232.
Second Monique Affidavit at paras. 7-8, Ex. Book, Tab 8, p. 156, ABC, Tab 15, p. 249.
Trevor Affidavit at paras. 8-10, 15, 16, Ex. Book, Tab 6, pp. 143-144, ABC, Tab 13, pp. 236-237.
Don Affidavit at paras. 5-7, 11, 14, 19-22, 29-30, Exhibit "H", Ex. Book, Tab 4, pp. 34-37, 104-106, ABC, Tab 11, pp. 137-141, 198-200.
Nathan Transcript, Ex. Book, Tab 9, pp. 186-187, qq. 134-140; pp. 203-205, qq. 219-229, ABC, Tab 6, pp. 47-48, 53-55.

<u>The July 5 Meeting</u>

28. Despite the filing of the NOI on July 2, 2018 and the continued supply of fuel by 178 post-NOI, it was not until the afternoon of July 5, 2018 during a meeting, after the

Agreed Payment had been withdrawn by Libro, that 178 told Transit about the NOI filing.

29. At the July 5 meeting, Louise Vonk ("**Louise**"), the owner of 178, and Blaine Skirtschak ("**Blaine**"), the General Manager of 178, told Monique and Trevor that 178 required the continued supply of fuel from Transit, a key supplier, post-NOI and that 178 had agreed to allow the Agreed Payment to be withdrawn so that 178 could continue in business. Both Monique and Trevor provided affidavits on the motion. Neither Louise nor Blaine gave evidence on the motion. Although Nathan was the only person who gave evidence on behalf of 178 on the motion, Nathan was not at the July 5 meeting.

> First Monique Affidavit at paras. 16-22, Ex. Book, Tab 5, pp. 120-121, ABC, Tab 12, pp. 213-214.
> Trevor Affidavit, paras. 11-16, Ex. Book, Tab 6, pp. 143-144, ABC, Tab 13, pp. 236-237.
> Monique Transcript, Ex. Book, Tab 10, p. 279, q. 114, ABC, Tab 7, p. 109.
> Nathan Transcript, Ex. Book, Tab 9, pp. 207-208, qq. 240-242, ABC, Tab 6, pp. 56-57.

Communications after the July 5 Meeting

30. During a call on Monday, July 9, 2018 between Nathan, Monique, Don and Trevor, it is the evidence of Transit that 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 Libro 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. 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.

First Monique Affidavit at paras. 24-26, Ex. Book, Tab 5, pp. 121-122, ABC, Tab 12, pp. 214-215.
Don Affidavit at paras. 11-12, 33, 36, Ex. Book, Tab 4, pp. 34-35, 37-38, ABC, Tab 11, pp. 138, 141-142.

31. 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, without a security deposit, Transit negotiated with 178 to continue the supply of fuel post-NOI.

Trevor Affidavit at para. 21, Ex. Book, Tab 6, pp. 144-155, ABC, Tab 13, pp. 237-238.
Don Affidavit at paras. 20, 23, 34-35, Ex. Book, Tab 4, pp. 35-38, ABC, Tab 11, pp. 139-140, 141-142.

32. Two days after the July 9 telephone call, on July 11, 2018, 178 put a stop payment on a previously agreed upon PAD for a payment to be processed on July 12, 2018 for post-NOI (not pre-NOI) fuel purchases. Transit had supplied fuel post-NOI to 178 for nine (9) days at that point in good faith and without a security deposit relying on the agreement that the Agreed Payment would be made on July 5 and thereafter that Transit could retain the Agreed Payment.

First Monique Affidavit at para. 28 and Exhibit "D", Ex. Book, Tab 5, pp. 122, 140, ABC, Tab 12, p. 215.
Don Affidavit at paras. 16-18 and Exhibit "C", Ex. Book, Tab 4, pp. 35, 53 ABC, Tab 11, p. 139.

33. Transit now knows that 178 secured the supply of fuel from Petro Canada with a security deposit. After 178 secured Petro Canada as a fuel supplier, it stopped payment on post-NOI fuel purchases from Transit and then, only after it had secured that supply of fuel, 178 sought, through its lawyers, the return of the Agreed Payment from Transit.

Don Affidavit at paras. 28-36 and Exhibits "G" and "I", Ex. Book, Tab 4, pp. 37-38, 91-103, 107-116, ABC, Tab 11, pp. 141-142, 187-197, 201-210.

34. 178 has not paid for fuel purchased from Transit post-NOI in the amount of $48,434.30 from July 2018.

Don Affidavit at paras. 25-27 and Exhibits "E" and "F", Ex. Book, Tab 4, pp. 36, 56-89, 90, ABC, Tab 11, pp. 140, 153-185, 186.

PART IV - ISSUES AND THE LAW

Standard of Review

35. The following standards of review are applicable to this appeal:

(a) On pure questions of law, the standard of review is correctness;

(b) On findings of fact, the appellate court may reverse the findings of the judge below where there has been a palpable and overriding error, being an error that is plainly seen;

(c) On inferences of fact where there is no palpable and overriding error with respect to underlying facts, the appellate court may interfere with the factual conclusions only where the inference-drawing process itself is palpably in error;

(d) On questions of mixed fact and law, the standard of palpable and overriding error applies, unless it is clear that the judge below made an extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law, subject to a standard of correctness.

Housen v. Nikolaisen, 2002 SCC 33, Appellant's Book of Authorities ("**BOA**"), Tab 1.

No Exercise of a Remedy

36. The motion judge erred in law in finding that Transit exercised a remedy. In reaching that conclusion, he also made a number of related errors of fact and law.

Decision, ABC, Tab 3, pp. 14-15, para. 45.

37. The motion judge made an error of fact in stating that Transit's Proof of Claim filed with the proposal trustee included the Agreed Payment. In fact, the amount which

is claimed on the Proof of Claim was $202,791.59 after deducting the Agreed Payment and that if the Agreed Payment were returned to 178, the amount to be claimed would be added to that amount, being $286,525.64. Although it is not entirely clear how this error affected the motion judge's reasoning, it appears that he relied on this fact in deciding that Transit had exercised a remedy contrary to section 69 of the BIA.

Decision, ABC, Tab 3, p. 13, para. 32.
Monique Transcript, Ex. Book, Tab 10, pp. 264-268, qq. 73-81, ABC, Tab 7, pp. 110-113.
Proof of Claim, Ex. Book, Tab 11, pp. 287-386, ABC, Tab 17, pp. 298-397.

38. While the motion judge was correct that the PAD for the Agreed Payment was for fuel already delivered and consumed before July 2, he misunderstood the relevance of that fact to the agreement reached. 178 agreed to allow that PAD to be withdrawn and retained by Transit *to ensure the ongoing supply of fuel post-NOI while it was attempting to restructure.*

Decision, ABC, Tab 3, p. 14, para. 44 a.

39. The motion judge erred in stating that Transit was aware of 178's financial difficulties as evidenced by the frozen bank account. We now know that CRA froze 178's bank account. However, at the relevant time, Nathan told Monique that the bank account was frozen as a result of fraudulent activity and that a new account was being opened. Had Nathan truthfully told Monique that the account had been frozen by CRA, 178 would not have continued to sell fuel to 178.

Decision, ABC, Tab 3, p. 14, para. 44 b.
Nathan Undertakings, #1 and #2, Ex. Book, Tab 12, pp. 388, 390-425, ABC, Tab 16, pp. 258-295.
Monique Transcript, Ex. Book, Tab 10, pp. 253-255, qq. 33-40, ABC, Tab 7, pp. 94-96.
Don Affidavit at para. 20, Ex. Book, Tab 4, pp. 35-36, ABC, Tab 11, pp. 139-140.

40. The motion judge erred in stating that Transit was aware of 178's financial difficulties as evidenced by NSF payments. While the motion judge was correct that Transit was aware of previous payments returned as NSF, Transit was also aware of stop payments being placed in March 2017, July 2017 and August 2017. As Trevor noted, however, 178 had always lived up to its agreed obligations in the past and they had no reason to believe that they would not this time. To Transit, this was no different than past situations where it had worked with 178 with payment plans.

Decision, ABC, Tab 3, p. 14, para. 44 b.

41. While the motion judge was correct that at the time Transit entered into the pre-NOI agreement for the Agreed Payment, Transit was unaware of 178's plan to restructure, the motion judge misunderstood the significance of 178 securing Transit's cooperation as a critical supplier after the NOI was filed. Without that supply of fuel during the post-NOI restructuring period, the delivery of services to 178's customers would have stopped. This would have negatively impacted not only its immediate cashflow, including its ability to pay employees and other suppliers, but also its reputation with customers and most likely future sales. As a result, securing the continued supply of fuel post-NOI by agreeing to allow Transit to withdraw and retain the Agreed Payment was entirely consistent with the objectives of restructuring legislation and resulted in a benefit to other stakeholders in addition to Transit.

42. The motion judge erroneously relied on the idea that 178 was able to quickly replace Transit as a supplier, stating that it only took 178 "a day or two of the July 9 meeting" to replace Transit as a supplier. There was a phone call on July 9 but no meeting and, in any event, there is no particular relevance to using July 9 as a

reference point for calculating how quickly 178 was able to secure fuel from another supplier. Rather, it took 178 nine (9) days from the date of the NOI (July 2 to July 11) to replace Transit as a supplier, during which time Transit supplied approximately $85,000 in fuel to 178. The motion judge erred in fact in finding that Transit had supplied fuel to 178 after the NOI in the amount of $48,434.30. There is no evidence of how long 178 had been looking for a fuel supplier pre-NOI or post-NOI before it switched to Petro Canada. The motion judge's statement of fact or inference drawing process was palpably in error when he found that 178 was able to quickly replace Transit as its fuel supplier.

Decision, ABC, Tab 3, p. 14, paras. 23 d., 44 c.
Don Affidavit at para. 25, Exhibit "E", Ex. Book, Tab 4, pp. 36, 56-89, ABC, Tab 11, p. 140, pp. 153-185.

43. The motion judge erred in finding that the PAD in question in the *Gene Moses* decision was simply to catch-up pre-NOI payments missed or dishonoured as with the Agreed Payment. The fact situation in the *Gene Moses* case is distinguishable from the case at bar.

Decision, ABC, Tab 3, p. 14, para. 44 d.

44. In the *Gene Moses* case, the debtor stated, and the creditor, GE Capital Leasing Services Inc. ("**GE**"), did not deny, that the method of payment was changed. Payments on the lease had been made by PAD but after the lease was restructured, payments were to be processed after specific authorization by Mr. and Ms. Moses. GE took the position that they had worked with the debtor but had advised the debtor it was imperative that payments be made. The judge did not find that the debtor had given any specific authorization to GE to process a PAD. The debtor stated that it had advised GE that a NOI had been filed but GE denied it. GE presented three PADs to

the bank post-NOI which were honoured. The judge held that the presentation of the PADs to collect the arrears of lease payments was the exercise of a remedy contrary to section 69 of the BIA.

> *Re Gene Moses Construction Ltd.* (1999), 9 C.B.R. (4th) 275 (B.C. S.C.) at paras. 2-5, 9, 14-15, BOA, Tab 2.

45. In the case at bar, there is no credible evidence that Transit simply processed and retained the Agreed Payment without any specific authorization from 178. Rather, the evidence of Transit was that 178 agreed to the Agreed Payment and specifically allowed the Agreed Payment to be processed and retained as Transit was a key supplier who was integral to 178's attempt to restructure. By contrast, in the *Gene Moses* case, based upon the facts, it was open to the judge to find that GE had unilaterally processed the three PADs. The decision does not note any discussion between GE and the debtor about authorizing the PADs to be processed or about the debtor agreeing to permit GE to retain the PADs to help the debtor restructure. There is no mention of any discussion about GE being critical to the debtor's restructuring.

46. Likewise, the motion judge erred in finding that the cheque in question in the *Startek* decision was simply to catch up pre-NOI payments missed or dishonoured as with the Agreed Payment. In *Startek*, the judge simply found that the creditor had negotiated a cheque twice and that the second negotiation of the cheque "without the knowledge or consent of Startek or the trustee" constituted the exercise of a remedy contrary to section 69 of the BIA.

> Decision, ABC, Tab 3, p. 14, para. 44 d.
> *Startek Computer Inc. (Trustee of) v. Samtack Computer Inc.*, 2000 BCSC 1316 at paras. 5, 9-11, BOA Tab 3.

47. In the case at bar, Transit did not attempt to negotiate a cheque twice. Rather Transit processed a PAD with the agreement of 178, both by words and conduct, and was specifically told to retain the Agreed Payment because Transit's ongoing supply of fuel was integral to 178's restructuring.

48. The motion judge erred in finding that there was no reason to treat the Agreed Payment any different from the other three PADs contemplated by the agreement made on June 28, 2018. To the contrary, the reason that the motion judge should have treated the Agreed Payment differently than the other three PADs was that 178 had specifically agreed to the payment of the Agreed Payment so as to ensure the continued supply of fuel which was critical to the survival of 178 during the restructuring. The payment of the other three PADs was not part of that discussion and is not relevant to the issue at hand.

Decision, ABC, Tab 3, p. 14, para. 44 e.

49. The motion judge erred in finding that it was unnecessary to determine whether the parties reached an agreement prior to the NOI and that such agreement would not change the analysis or result. As such, the motion judge erred in finding that it was not open to 178 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.

Decision, ABC, Tab 3, p. 15, para. 44 f. and 47.

50. In proposal proceedings under the BIA, the debtor does not usually seek permission from the Court to make a payment for a pre-filing claim. Rather, the debtor usually decides what has to be done and paid to ensure that key suppliers continue to supply. In "Dealing with Suppliers in a Reorganization", E. Patrick Shea noted:

> "There is, however, no specific prohibition in the BIA on the debtor effecting payment of claims provable in the proposal proceedings. Instead, the BIA provides the trustee in the proposal (or the bankruptcy trustee in the event the proposal fails) with remedies against any creditor who receives such a payment on the basis that the payment is a preference. Payments to critical suppliers in the context of proposal proceedings are best analyzed on the basis that they are a preference.
>
> ...
>
> In the context of proposals, section 97 arguably clarifies that payments to suppliers made in good faith after the date the proposal proceedings are commenced (even payments of pre-filing claims) are intended to be valid.
>
> E. Patrick Shea, "Dealing with Suppliers in a Reorganization" (2008) 37 C.B.R. (5th) 161 ["**Dealing with Suppliers in a Reorganization**"], at *WL pp. 1, 7-11, BOA, Tab 4.
> BIA, s. 97.

51. Thus, the preference provisions under section 95 of the BIA are available in proposals to address concerns over improper payments of pre-NOI claims. However, to create a rebuttable presumption of a preference, the payment must be made in favour of a creditor who is dealing at arm's length with the insolvent person during the period beginning on the day that is 3 months before the "date of the initial bankruptcy event" and ending on the "date of the bankruptcy." The "date of the initial bankruptcy event" is defined in section 2 of the BIA as the earlier of a number of dates and, in this case, is the date of the NOI, being July 2, 2018. For the purpose of section 95 of the BIA, section 101.1(2) of the BIA defines the "date of the bankruptcy" as, in this case, the "day on which a notice of intention is filed", being July 2, 2018. As a result, in this case, the preference is presumed if the payment is made 3 months before the NOI. The Agreed Payment was made after the NOI and is therefore arguably not subject to challenge as a preference under section 95.

> BIA, ss. 95, 101.1(1)-(2).

52. Even if the Agreed Payment were subject to challenge as a preferential payment, the proposal trustee, MNP, has not challenged the Agreed Payment.

53. Even if the Agreed Payment was subject to challenge and the proposal trustee had challenged the Agreed Payment as preferential, which it did not, Transit can rebut the presumption of a preferential payment as the payment was made in the ordinary course of business and to enable 178 to remain in business and to generate revenue. Without the supply of fuel, 178 could not have sustained operations or generate any income to satisfy its creditors.

> Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act*, 2018-2019 ed. (Toronto: Thomson Reuters, 2018-2019) at p. 597-598, 603-605, 610-613, BOA, Tab 5.
> *Re Norris* (1994), 161 A.R. 77 (Q.B. in Bankruptcy) at paras. 7-9, BOA, Tab 6, rev'd, 1996 ABCA 357 at paras. 13-16, 19, BOA, Tab 7.
> *Coast Wire Rope & Supply Ltd. (Trustee of) v. Trans Pacific Hardware Inc.*, 1999 BCCA 217 at para. 8, BOA, Tab 8.
> *Orion Industries Ltd. (Trustee of) v. Neil's General Contracting Ltd.*, 2013 ABCA 330 at paras. 10-12, BOA, Tab 9.
> *St. Anne-Nackawic Pulp Co. (Trustee of) v. Logistec Stevedoring (Atlantic) Inc.*, 2005 NBCA 55 at paras. 6, 13-14, 17, BOA, Tab 10.

54. It is worthy of note that under other federal restructuring legislation for larger companies, the *Companies' Creditors Arrangement Act* (the "**CCAA**"), payments to critical suppliers are contemplated.

> *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 11.4

55. Caselaw under the CCAA have allowed debtors to pay key suppliers for pre-filing amounts to achieve the objectives of restructuring legislation. In *Cinram International Inc.*, Mr. Justice Morawetz noted:

> 67. There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. As noted by Pepall J. in *Canwest Global Communications Corp., Re*, the recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction

to make such orders that will facilitate the debtor's restructuring of its business as a going concern.

...

68. There are many cases since the 2009 amendments where the Courts have authorized the applicants to pay certain pre-filing amounts where the applicants were not seeking a charge in respect of critical suppliers. In granting this authority, the Courts considered a number of factors, including:

a. whether the goods and services were integral to the business of the applicants;
b. the applicants' dependency on the uninterrupted supply of the goods or services;
c. the fact that no payments would be made without the consent of the Monitor;
d. the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;
e. whether the applicants had sufficient inventory of the goods on hand to meet their needs; and
f. the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

...

69. The CCAA Parties rely on the efficient and expedited supply of products and services from their suppliers and service providers in order to ensure that their operations continue in an efficient manner so that they can satisfy customer requirements. The CCAA Parties operate in a highly competitive environment where the timely provision of their products and services is essential in order for the company to remain a successful player in the industry and to ensure the continuance of the Cinram Business. The CCAA Parties require flexibility to ensure adequate and timely supply of required products and to attempt to obtain and negotiate credit terms with its suppliers and service providers. In order to accomplish this, the CCAA Parties require the ability to pay certain pre-filing amounts and post-filing payables to those suppliers they consider essential to the Cinram Business, as approved by the Monitor...

Re Cinram International Inc., 2012 ONSC 3767 at paras. 67-69, BOA, Tab 11.
Steven D. Dvorak and Helen M. E. Sevenoaks, "Section 11.4 CCAA and Beyond: A "Critical" Look at Critical Supplier Orders and the Payment of Pre-Filing Claims", 2012 ANNREVINSOLV 9 at pp. 9-10, BOA, Tab 12.
Re Eddie Bauer of Canada Inc. (2009), 55 C.B.R. (5th) 33 (Ont. S.C.J.) at para. 22, BOA, Tab 13.

56. The interpretation of section 69 of the BIA requires a purposive approach with "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". The motion judge failed to distinguish between the objectives of the bankruptcy/liquidation provisions of the BIA as compared to the

restructuring/proposal provisions of the BIA. As such, the motion judge erred in finding that the payment of the Agreed Payment was inconsistent with the objective of the BIA which he stated was to treat all creditors fairly. To the contrary, the payment of certain pre-filing amounts is consistent with the purpose of restructuring legislation, including the proposal provisions of the BIA, to permit the debtor to continue in business.

> Madam Justice Georgina R. Jackson and Dr. Janis Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", 2007 ANNREVINSOLV 3 ["**Selecting the Judicial Tool to get the Job Done**"] at pp. 9, 19-20, 24-25, BOA, Tab 14.
> Decision, ABC, Tab 3, pp. 13, 15, paras. 35, 45.

57. In *Re Ted Leroy Trucking [Century Services] Ltd.*, Deschamps J. (for the majority of the Supreme Court of Canada) described the purpose of restructuring legislation:

> 15 As I will discuss at greater length below, the purpose of the CCAA — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the BIA serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the BIA may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.
>
> ...
>
> 18 Early commentary and jurisprudence also endorsed the *CCAA's* remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.
>
> ...
>
> 24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation ...

Ted Leroy Trucking [Century Services] Ltd., Re, 2010 SCC 60 at paras. 16, 18, 24, BOA, Tab 15.

58. As such, the interpretation of the BIA proposal provisions should be harmonized with the CCAA with the goal in each case of encouraging reorganization over bankruptcy and liquidation. Using a purposive interpretation of section 69, the meaning of the word "remedy" has to be viewed in the context of permitting the debtor to carry on business. A remedy that impairs the objective of giving a debtor breathing room to negotiate with its creditors and to put together a restructuring plan in place to continue in business would likely be caught by section 69 and thus stayed.

59. The focus should not be on the simple fact that a PAD was withdrawn post-NOI for pre-NOI debts. By focussing on that simple fact and relying on the result in the *Gene Moses* case, the motion judge failed to consider the impact of 178 allowing Transit to withdraw and retain the Agreed Payment in the circumstances. By allowing Transit, as a key supplier, to withdraw and retain the Agreed Payment, Transit supplied almost $85,000 worth of fuel over 9 days so that 178 could keep its fleet of trucks on the road. Without fuel, there would be no trucks on the road, no revenue and unhappy customers who required their goods to be delivered according to a schedule. In the result, 178's cashflow would have suffered, it would have had even more difficulty in paying its creditors and would potentially have lost customers who would have had to find another trucking business to pick-up and deliver their goods. The failure of 178 to deliver its customers goods would have interfered with logistics and deadlines of many different parties.

60. Thus, the payment of the Agreed Payment to Transit did not impair the ability of 178 to reorganize at all; rather, it helped 178 to remain in business while it attempted to

reorganize which is entirely consistent with the objective of the proposal provisions under the BIA and the provisions of the CCAA. This was beneficial to other creditors, not prejudicial, because the creditors stood to lose much more if 178 was unable to make a proposal or if the proposal was rejected or not approved by the Court and 178 thereupon became bankrupt.

61. The BIA also preserves the court's equitable and ancillary powers. Thus, the inherent jurisdiction of the court is maintained and available as a tool where the BIA is silent on a point or has not dealt with a point exhaustively. The Court may grant relief where the benefits of that relief outweigh the relative prejudice to those affected by the relief. Accordingly, because the BIA is silent on the issue of the payment of a pre-filing claim in a proposal and there is no binding caselaw on the point generally or on the point specific to the facts in this case (where the debtor consents to the payment), the Court has the inherent jurisdiction to find that the benefits of Transit retaining the Agreed Payment (for example, allowing 178 to continue in operation, to pursue its restructuring, to pay its employees and other creditors, to allow customers to ship and receive goods), outweigh the prejudice, if any, to other parties.

BIA, s. 183(1).
Selecting the Judicial Tool to get the Job Done, *supra*, at p. 20, 24-26, BOA, Tab 14.
Re Wiggins (2003), 50 C.B.R. (4th) 306 (Ont. S.C.J.).at paras. 6-7, BOA, Tab 16.

<u>178 Agreed to Allow the Agreed Payment to be Withdrawn and Retained</u>

62. For the reasons noted above, the motions judge erred in finding that it was unnecessary to determine whether Transit and 178 had reached an agreement before the NOI. Had the motions judge not made that error, there was ample evidence before him to find that 178 and Transit did enter into an agreement pre-NOI for the Agreed

Payment and that 178 did allow the Agreed Payment to be withdrawn and retained by Transit post-NOI.

63. Not only did Nathan's silence prior to the July 5 meeting amount to an affirmation of that agreement, but Louise, Blaine and Nathan all verbally confirmed that Transit could retain the Agreed Payment as the continued supply of fuel was critical to the continued operation of 178 during the reorganization.

64. Nathan silently allowed the Agreed Payment to be processed when he was notified by Monique on July 3, 2018 that the PAD had to be submitted that morning in accordance with the agreement. At that point, 178 knew that Transit thought there was an agreement.

65. Even after Monique advised Nathan on the morning of July 3, 2018 that the PAD had been submitted to Libro, Nathan remained silent. He did not dispute the existence of the agreement or the terms of the agreement. He did not advise Transit to not submit the PAD for the Agreed Payment, to stop the PAD or to return the PAD once withdrawn. Silence may amount to conduct. 178 was aware of Transit's belief in the existence of the agreement and did nothing to deny it, rather acting as though there was an agreement. Even if the terms of the agreement were changed as 178 submits, which is denied by Transit, 178 acquiesced to those terms. Transit submits that 178 should be estopped from now denying that the agreement exists.

> *Maple Leaf Portland Cement Co. v. Owen Sound Iron Works Co.* (1913), 10 D.L.R. 33 (Ont. S.C.) at paras. 16-21, BOA, Tab 17.
> S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book Inc., 2005) at pp. 66-67, BOA, Tab 18.

66. 178 did agree to the Agreed Payment, did not request that it be stopped or repaid and in fact told Transit that they had agreed to the withdrawal of the Agreed Payment

because Transit was a key supplier without which 178 could not continue. The evidence shows that 178 intended to keep Transit as a supplier until it could find a replacement and as soon as it did, it stopped payment on post-NOI purchases from Transit. This shows that Transit was critical to 178's operation. 178 did not stop payment until the very day that it picked up cards for Petro Canada.

67. The motion judge erred in finding that the issue of the agreement did not lend itself to determination on the basis of conflicting affidavits and transcripts of cross-examinations. The evidence of Transit's four (4) witnesses was reliable whereas the evidence of 178's only witness, Nathan, was inaccurate, inconsistent and thus unreliable:

(i) In his affidavit evidence, Nathan states: "Although I did not request a return of the "Agreed Payment" from Don as he stated in Paragraph 14, I did request the return of the "Agreed Payment" from my Transit/Hogg contact Monique". On cross-examination, Nathan admitted that he did not think that he asked Monique to return the Agreed Payment because he decided to deal with Don on the matter.

> Affidavit of Nathan McDaniel sworn October 15, 2018 (the "**Second Nathan Affidavit**") at para. 6(e), Ex. Book, Tab 2, p. 19; ABC, Tab 9, p. 129.
> Nathan Transcript, Ex. Book, Tab 9, pp. 212-213, qq. 262-263, ABC, Tab 6, pp. 61-62.

(ii) In his first affidavit, Nathan stated that he made a demand for the return of the PAD to Don on July 11, 2018. In his second affidavit, in response to Don's evidence disputing such demand, Nathan stated that he did not actually contact Don to request a return of the Agreed Payment because his only contact person at Transit was Monique. On cross-examination, when it was pointed out that this evidence was contrary to his previous cross-examination evidence that he contacted Don, not Monique, to request a

return of the Agreed Payment, Nathan then stated that he thought he requested the return of the Agreed Payment during the July 9 call. When it was pointed out on cross-examination that in his second affidavit Nathan agreed that he did not request a return of the Agreed Payment on the July 9 call, Nathan then stated that his affidavit was incorrect and that he did ask for the return of the Agreed Payment on July 9. He then also stated "I was trying to exhaust all avenues with regards to this request, I asked Monique, I asked Don, I asked Trevor." However, he could not recall the dates of the alleged phone conversations with Monique, Don or Trevor. Moments before giving this evidence on cross-examination, as previously noted, Nathan had stated that he did not think that he asked Monique to return the Agreed Payment because he decided to deal with Don on the matter. Moments later on the cross-examination, Nathan agreed that he did not ask Trevor to return the Agreed Payment.

> First Nathan Affidavit at para. 8, Ex. Book, Tab 1, p. 2, ABC, Tab 8, p. 117.
> Second Nathan Affidavit at para. 6(b), 6(e), Ex. Book, Tab 2, p. 19, ABC, Tab 9, p. 129.
> Nathan Transcript, Ex. Book, Tab 9, pp. 212-217, qq. 263-279, ABC, Tab 6, pp. 61-66.

(iii) In his affidavit evidence, Nathan states that his only contact at Transit was Monique. On cross-examination, he stated that he had contact with Trevor on July 4, 2018 when he asked Trevor to stop the PAD for the Agreed Payment. This makes no sense given that Nathan also states that he had previously asked Monique, his contact at Transit, to stop or cancel the PAD (which Monique denies) and that Monique allegedly said that it was too late for Transit to stop the PAD. Trevor has given evidence that no one asked him to stop the PAD for the Agreed Payment. Further, if Trevor had been asked to stop the payment, Trevor would have communicated with Monique as Trevor had no control over it. 178 chose to only cross-examine Monique.

Second Nathan Affidavit at paras. 6(b), 6(c), 7(b), Ex. Book, Tab 2, pp. 19-20, ABC, Tab 9, pp. 129-130.
Nathan Transcript, Ex. Book, Tab 9, pp. 172-173, qq. 69-72; pp. 190-192, qq. 158-164, ABC, Tab 6, pp. 67-71.
Trevor Affidavit at paras. 8-10, Ex. Book, Tab 6, p. 143, ABC, Tab 13, p. 236.
Monique Transcript, Ex. Book, Tab 10, p. 285, qq. 134-135, ABC, Tab 7, p. 115.

(iv) In his affidavit evidence, Nathan stated twice that it was resolved on Friday, June 29, 2018 that 178 would file an NOI. Despite being given an opportunity to correct his affidavit evidence at the outset of the cross-examination and on a number of occasions during the cross-examination, Nathan stated that the decision was made after June 29, over the weekend, and filed on Monday, July 2, 2018.

Second Nathan Affidavit at para. 6(l), Ex. Book, Tab 2, p. 20, ABC, Tab 9, p. 130.
Third Nathan Affidavit at para. 10, Ex. Book, Tab 3, p. 10, ABC, Tab 10, p. 134.
Nathan Transcript, Ex. Book, Tab 9, pp. 181-183, qq. 108-118, ABC, Tab 6, pp. 72-74.

(v) In his affidavit evidence, Nathan stated three times that he contacted Libro and advised them to stop the PAD for the Agreed Payment but Libro was unable or unwilling to do so. For example, Nathan specifically swears "I contacted our financial institution and advised them to stop the pre-authorized payment system to Hogg, but they were unable or unwilling to cancel the pre-authorization immediately." And further, he swore, "As stated previously I was unable to stop the Agreed Payment". In addition, Nathan told MNP, the proposal trustee, that he attempted to put a stop payment on the PAD for the Agreed Payment. To the contrary, on cross-examination, Nathan admitted that he did not actually attempt to put a stop payment on the Agreed Payment at all. Rather, Nathan spoke with the Libro about stopping payment on the PAD scheduled for July 12, 2018 for post-NOI purchases, not the PAD for the Agreed Payment.

First Nathan Affidavit at para. 6, Ex. Book, Tab 1, p. 2, ABC, Tab 8, p. 117.
Second Nathan Affidavit at para. 6(c), 7(d), Ex. Book, Tab 2, pp. 19-21, ABC, Tab 9, pp. 129, 131.

Nathan Transcript, Ex. Book, Tab 9, pp. 198-205, qq. 192-231, ABC, Tab 6, pp. 75-82.

(vi) In his affidavit, Nathan stated that 178 did not require Transit to "keep afloat" as 178 continued in business since July without Transit's supply of fuel. On cross-examination, Nathan admitted that Transit continued to supply fuel to 178 and he confirmed in his answers to undertakings that Transit did so until July 12, 2018.

Second Nathan Affidavit at para. 6(c)(iii), Ex. Book, Tab 2, p. 19, ABC, Tab 9, p. 129.
Nathan Undertakings, Ex. Book, Tab 12, #7, pp. 389, 439, ABC, Tab 16, pp. 296-297.

68. 178 failed to submit evidence of Louise and Blaine who had first-hand knowledge of material contested facts. Instead, 178 shielded Louise and Blaine from cross-examination and instead relied on the evidence of Nathan who did not attend the July 5 meeting. To that extent, the Court may draw an adverse inference and assign little weight to that evidence.

R. v. Jolivet, 2000 SCC 29 at paras. 24-28, BOA, Tab 19.

69. Taken together, the evidence of Transit's four witnesses is consistent with the documentary evidence and the surrounding facts. 178 has not provided any evidence that it disputed the existence of the agreement or its terms and its subsequent conduct confirms that it did enter into that agreement.

70. There was no exercise of a remedy. 178 recognized that Transit was critical to its very survival and was prepared to do whatever was necessary to ensure the continued supply of fuel by Transit. As such, 178 entered into the agreement for the Agreed Payment prior to the NOI and to ensure ongoing supply of fuel post-NOI allowed the Agreed Payment to be withdrawn and retained by Transit. There is nothing in the BIA that states that 178 and Transit could not enter into that agreement. And there is

good reason for that. It is consistent with the objective of restructuring legislation to permit restructuring debtors to enter into agreements with critical suppliers to ensure the ongoing and continued supply of goods and services without interruption. While the payment in question is not a preferential payment under the BIA, even the preference provisions support payments to suppliers in the ordinary course of business and to enable them to remain in business.

PART V - ORDER REQUESTED

71. The appellant respectfully requests that the Order of Mr. Justice Raikes dated January 28, 2019 be set aside together with costs below and on the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of May, 2019.

Sherry A. Kettle
MILLER THOMSON LLP
Lawyer for the Appellant, Transit Petroleum Inc.

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

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

CERTIFICATE

I, Sherry A. Kettle, lawyer for the Appellant, Transit Petroleum Inc., certify that:

1. The record and the original exhibits from the court or tribunal from which the appeal is taken are not required.

2. The estimated time of my oral argument is 1 hour, not including reply.

Date: May 5, 2019

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Transit Petroleum Inc.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Housen v. Nikolaisen*, 2002 SCC 33.
2. *Re Gene Moses Construction Ltd.* (1999), 9 C.B.R. (4th) 275 (B.C. S.C.).
3. *Startek Computer Inc. (Trustee of) v. Samtack Computer Inc.*, 2000 BCSC 1316.
4. E. Patrick Shea, "Dealing with Suppliers in a Reorganization" (2008) 37 C.B.R. (5th) 161.
5. Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act*, 2018-2019 ed. (Toronto: Thomson Reuters, 2018-2019) at p. 597-598, 603-605, 610-613.
6. *Re Norris* (1994), 161 A.R. 77 (Q.B. in Bankruptcy).
7. *Re Norris*, 1996 ABCA 357.
8. *Coast Wire Rope & Supply Ltd. (Trustee of) v. Trans Pacific Hardware Inc.*, 1999 BCCA 217.
9. *Orion Industries Ltd. (Trustee of) v. Neil's General Contracting Ltd.*, 2013 ABCA 330.
10. *St. Anne-Nackawic Pulp Co. (Trustee of) v. Logistec Stevedoring (Atlantic) Inc.*, 2005 NBCA 55.
11. *Re Cinram International Inc.*, 2012 ONSC 3767.
12. Steven D. Dvorak and Helen M. E. Sevenoaks, "Section 11.4 CCAA and Beyond: A "Critical" Look at Critical Supplier Orders and the Payment of Pre-Filing Claims", 2012 ANNREVINSOLV 9.
13. *Re Eddie Bauer of Canada Inc.* (2009), 55 C.B.R. (5th) 33 (Ont. S.C.J.).
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16. *Re Wiggins* (2003), 50 C.B.R. (4th) 306 (Ont. S.C.J.).
17. *Maple Leaf Portland Cement Co. v. Owen Sound Iron Works Co.* (1913), 10 D.L.R. 33 (Ont. S.C.).

18. S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book Inc., 2005)

19. *R. v. Jolivet*, 2000 SCC 29.

SCHEDULE "B"
RELEVANT STATUTES

1. *Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3*

Stay of proceedings — notice of intention

69 (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,

...

until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

Preferences

95 (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

(a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

(b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

Protected transactions

97 (1) No payment, contract, dealing or transaction to, by or with a bankrupt made between the date of the initial bankruptcy event and the date of the bankruptcy is valid, except the following, which are valid if made in good faith, subject to the provisions of this Act with respect to the effect of bankruptcy on an execution, attachment or other process against property, and subject to the provisions of this Act respecting preferences and transfers at undervalue:

(a) a payment by the bankrupt to any of the bankrupt's creditors;

(b) a payment or delivery to the bankrupt;

(c) a transfer by the bankrupt for adequate valuable consideration; and

(d) a contract, dealing or transaction, including any giving of security, by or with the bankrupt for adequate valuable consideration.

Definition of *adequate valuable consideration*

(2) The expression ***adequate valuable consideration*** in paragraph (1)(c) means a consideration of fair and reasonable money value with relation to that of the property assigned or transferred, and in paragraph (1)(d) means a consideration of fair and reasonable money value with relation to the known or reasonably to be anticipated benefits of the contract, dealing or transaction.

Law of set-off or compensation

(3) The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences.

Application of sections 95 to 101

101.1 (1) Sections 95 to 101 apply, with any modifications that the circumstances require, to a proposal made under Division I of Part III unless the proposal provides otherwise.

Interpretation

(2) For the purposes of subsection (1), a reference in sections 95 to 101

(a) to "date of the bankruptcy" is to be read as a reference to "day on which a notice of intention is filed" or, if a notice of intention is not filed, as a reference to "day on which a proposal is filed"; and

(b) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor in respect of whom the proposal is filed".

Courts vested with jurisdiction

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice...

Courts of appeal — common law provinces

183 (2) Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

Court of Appeal of the Province of Quebec

(2.1) In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

Court of Appeal

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(a) if the point at issue involves future rights;

(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and

(e) in any other case by leave of a judge of the Court of Appeal.

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2. *Bankruptcy and Insolvency General Rules, Can. Reg. 368, rule 31(1).*

Appeal to Court of Appeal

31 (1) An appeal to a court of appeal referred to in subsection 183(2) of the Act must be made by filing a notice of appeal at the office of the registrar of the court appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.

(2) If an appeal is brought under paragraph 193(e) of the Act, the notice of appeal must include the application for leave to appeal.

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3. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 11.4

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied

that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

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: C6687

Court File Nos. 35-2395487 and 35-2395481

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at LONDON

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