

# SWANICK & ASSOCIATES

Lawyers Practicing in Association

Brent W. Swanick, B. Comm., LL.B., LL.M.  
Bruce A. Simpson, B.Sc., LL.B.  
Jae-Yon Jung B.A.(Hons) LL.B.  
Derek A.J. D'Oliveira, M.A., LL.B. (1952-2005)  
John I. Zeiler, B.A. LL.B. (1943-2011)

225 Duncan Mill Road  
Suite 101  
Toronto, ON M3B 3K9  
Telephone (416) 510-1888  
Telecopier (416) 510-1945  
Bruce A. Simpson's Extension 229  
Email: [Bruce@bruceasimpson.com](mailto:Bruce@bruceasimpson.com)  
Law Clerk's Extension 233  
Email: [laura@bruceasimpson.com](mailto:laura@bruceasimpson.com)

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File No.

December 4, 2018

**Via Fax 416-596-7894**

**MNP Ltd.**  
111 Richmond Street West  
Suite 300  
Toronto, ON M5H 2G4  
ATTN: SHELDON TITLE


Dear Sirs:

**Re: 1787930 Ontario Inc. – Transit Petroleum a division of Hogg Fuel and Supply Ltd.**

Please find enclosed the Factum of the Moving Party which which is being served upon you.

Yours very truly,

**SWANICK & ASSOCIATES**

Per:   
Bruce A. Simpson  
BAS:lc

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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

**FACTUM OF THE MOVING PARTY**

(Returnable December 19, 2018)

December 4, 2018

**SWANICK & ASSOCIATES**

Barristers and Solicitors

225 Duncan Mill Road

Suite 101

Don Mills, Ontario

M3B 3K9

Bruce A. Simpson (18977E)

Michael C. Ly (74673C)

(416) 510-1888 - phone

(416) 5101945 - fax

Lawyers for 1787930 Ontario Inc.

TO: **MILLER, THOMSON**

One London Place

255 Queens Avenue

Suite 2010

London, ON N6A 5R8

Sherry Kettle

(519) 931-3500 - phone

(519) 858-8511 - fax

Lawyers for Transit Petroleum a division of Hogg Fuel and Supply Ltd.

TO: **The Superintendent of Bankruptcy**

451 Talbot Street

Suite 303

London, ON N6A 5C9

TO: **MNP Ltd.**

111 Richmond Street West

Suite 300

Toronto, ON M5H 2G4

Sheldon Title

416-323-5240 - phone

416-573-5320 - Cell Phone

Trustee of 1787930 Ontario Inc.

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**FACTUM OF THE MOVING PARTY**

(Returnable December 19, 2018)

**PART I - OVERVIEW**

(All dates 2018 unless otherwise specified)

1. 1787930 Ontario Inc. (“178”) purchased fuel for its fleet of trucks from Transit Petroleum Inc., a division of Hogg Fuel and Supply Ltd. (“Transit”). 178’s payments to Transit were made by way of pre-authorize debit (“PAD”). In mid-June, the Canada Revenue Agency issued a Requirement to Pay (“RTP”) and froze 178’s Bank of Nova Scotia (“BNS”) account from which the PAD payments were drawn. BNS then served a *Bankruptcy and Insolvency Act* (“BIA”) section 144 Notice to Enforce Security, seeking the repayment of several million dollars and they prepared materials to proceed to appoint a receiver.
2. Following the service of the RTP, 178 and Transit discussed the terms for payment of the arrears owing to Transit. On June 28, 178 was advised that BNS required 178 to proceed by way of Notice of Intention to File a Proposal (“NOI”) if BNS were to forbear from enforcement procedures. No further negotiations with Transit took place and on July 2, 178 issued a NOI.
3. On July 5 Transit drew down a PAD payment for \$83,734.05 for the supply of pre-NOI fuel. Transit has defined this payment in its Responding Materials as the “Agreed Payment”. 178 denies that it ever agreed to the repayment terms sought by Transit, and or to the release of the July 5 PAD payment. As a result of the “Agreed Payment”, Transit received funds in priority to 178’s other unsecured creditors, contrary to the BIA principle of ratable distribution. 178 submits that a debtor does not have the authority to prefer one unsecured creditor over another. 178 seeks the return of the \$83,734.05 which Transit collected for the pre-NOI supply of fuel.

**PART II - FACTS**

4. 178 purchased fuel for its fleet of trucks from Transit. 178 paid Transit by way of PAD payments.

*Motion Record (originally returnable on Oct 2), ("Oct 2 Motion Record")*

*Affidavit of Nathan McDaniel sworn September 18 ("McDaniel Affidavit Sept 18") - Tab 2 - Page 5, Para 2*

5. Transit's Credit Analyst Monique Paul ("**Ms. Paul**") acknowledged on June 22, that 178's PAD account was frozen.

*Responding Motion Record dated October 4, 2018, ("Oct 4 Responding Motion Record")*

*Affidavit of Monique Paul sworn Oct 4 ("Paul Affidavit Oct 4") - Tab 2 - Pages 96 & 97 - Para 5*

6. In mid-June, BNS served a BIA section 144 Notice of Intention to Enforce Security.

*Second Supplementary Motion Record (returnable December 19) ("Second Supplementary Motion Record")*

*Second Supplementary Affidavit of Nathan McDaniel sworn October 31 ("McDaniel Affidavit Oct 31") - Tab 1 - Page 2 - Para 9*

7. By email correspondences between Ms. Paul and 178's Financial Controller Nathan McDaniel ("**Mr. McDaniel**") the terms of payment of arrears stated to be \$167,468.09 as of July 2 were discussed.

*Oct 4 Responding Motion Record - Paul Affidavit Oct 4 - Tab 2 - Page 97 - Para 6-9*

*Oct 4 Responding Motion Record - Paul Affidavit Oct 4 - Tab 2A - Pages 102 - 106*

8. By email to Mr. McDaniel dated June 22, Ms. Paul made specific reference to: "As per our conversation ..." thereby referencing prior oral communication for the purpose of resolving the arrears payments. In a June 26 email Ms. Paul also referenced a prior discussion with Mr. McDaniel.

*Oct 4 Responding Motion Record - Paul Affidavit Oct 4 - Tab 2A - Pages 104 & 105*

9. In Ms. Paul's email of June 22 she referenced that the total amount owing as of July 2 is projected to be \$167,468.09. Thereafter Ms. Paul proposes four payments to retire these arrears.

*Oct 4 Responding Motion Record - Paul Affidavit Oct 4 - Tab 2A - Page 105*

10. On June 27, Mr. McDaniel proposed certain dates and amounts to “effectively have the arrears amount paid ...”, being the sum of \$167,468.09.

*Oct 4 Responding Motion Record - Paul Affidavit Oct 4 - Tab 2A - Page 103*

11. Ms. Paul responded by email at 8:55 AM on Thursday June 28, including the following qualifications:

- (a) “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 the below stipulations.” (emphasis added);
- (b) “... if we agree to move your PAD to Thursday we will need to change your terms to Net 7 ... we cannot keep your terms at Net 14 ...” (emphasis added);
- (c) “... going forward we need to be assured that we will no longer have any problems ...”; and
- (d) “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.” (emphasis added).

Ms. Paul’s email does not make reference to any prior oral discussion(s) or agreements. In fact, Ms. Paul’s email makes clear that there is no agreement as of June 28 at 8:55 AM.

*Oct 4 Responding Motion Record - Paul Affidavit Oct 4 - Tab 2A - Page 102*

12. On June 28 at 12:57 PM Sheldon Title, the Licensed Insolvency Trustee at MNP Ltd., 178’s Proposal Trustee, confirmed to 178 that “... he [BNS’s legal counsel] is pushing for us [178 and MNP] to file a NOI ... before consideration is given to forbearing [and] ... he [BNS counsel] was in the midst of preparing receivership materials.” As a result, 178 then became unable to make a global resolution with its unsecured creditors.

*Second Supplementary Motion Record - McDaniel Affidavit Oct 31 - Tab 1A*

13. At 3:39 PM on June 29, Ms. Paul emailed Mr. McDaniel and stated that “It is almost 4pm and we have not heard back from you regarding the information below.”, being her 8:55 AM, June 28<sup>th</sup> email with: stipulations, the need to change to Net 7, the need to be reassured, and the need for approval. 178 had not approved Transit’s revised terms and conditions.

*Oct 4 Responding Motion Record - Paul Affidavit Oct 4 - Tab 2A - Pages 108 & 109*

14. At 4:05 PM on Friday June 29 Mr. McDaniel responded to Ms. Paul, "Would you please call me on Tuesday ... I want to make sure I am on the same page with you." (emphasis added). As subsequently became clear, Transit and 178 were not *ad idem* as to the terms and condition of retiring the arrears nor in agreement as to the amount of the arrears.

*Oct 4 Responding Motion Record - Paul Affidavit Oct 4 - Tab 2A - Page 108*

15. By July 2, it was determined by 178 that: it was unable to negotiate a resolution of the RTP, the BNS was not prepared to forbear, and it was subsequently determined that the Transit debt was significantly greater than the amount being considered in the prior emails. On cross-examination Mr. McDaniel stated that it was determined by 178's principal over the weekend of June 30 and July 1 that it was necessary to proceed with the NOI which was therefore issued on July 2.

*Second Supplementary Motion Record - McDaniel Affidavit Oct 31 - Tab 1 - Page 2 - Para 10*  
*Cross-Examination on Affidavits of Nathan McDaniel on Nov 12, Pages 25-26*

16. Ms. Paul called Nathan on July 3, after the NOI had been issued, 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 ..." payable on the 5<sup>th</sup> for \$83,734.05.

*Oct 4 Responding Motion Record - Paul Affidavit Oct 4 - Tab 2 - Page 97 - Para 10*

17. Mr. McDaniel issued an internal email on July 4 at 2:37 PM confirming he requested that Trevor Chambers, fuel manager at Transit, put a stay on the PAD.

*Second Supplementary Motion Record - McDaniel Affidavit Oct 31 - Tab 1B*  
*Oct 2 Motion Record, McDaniel Affidavit Sept 18" - Tab 2 - Page 6, Para 5*

18. Without further correspondence or discussion, on July 5, Transit drew down the PAD in the amount of \$83,734.05 and applied those funds towards 178's pre-NOI debt obligations.

*Oct 2 Motion Record - McDaniel Affidavit Sept 18 - Tab 2 - Page 6 - Para 7*

19. Transit did not advise 178 that Transit would proceed to draw down the \$83,734.05 PAD on Thursday July 5 unless they were advised to the contrary. 178 never agreed to the July 5 payment.

*Oct 4 Responding Motion Record - Paul Affidavit Oct 4 - Tab 2 - Page 108 - Para 10*

20. Mr. McDaniel has stated that the payment of the \$83,734.05 was never agreed to.

*Supplementary Affidavit of Nathan McDaniel sworn Oct 15 ("Supplementary McDaniel Affidavit Oct 15") - Tab 1 - Pages 1 & 2 - Para 3, 5(g) and 6(1)*

21. Ms. Paul subsequently filed Transit's Proof of Claim in 178's Proposal wherein, after applying the \$83,734.05 PAD, Transit claimed an outstanding balance as at July 2 of \$202,791.59. The arrears of \$167,468.09 cited in Transit's emails of June 22-28 were understated by reason of the change from Net 14 to Net 7.

*Transit's Proof of Claim in the Matter of the proposal of 178 Schedule "A"*

22. By email dated July 19, demand was made for the repayment of the Agreed Payment amount.

*Oct 4 Responding Motion Record - Affidavit of Don Poort sworn October 4 ("Poort Affidavit Oct 4") - Tab 1 - Page 4 - Paragraph 21*

*Oct 4 Responding Motion Record - Poort Affidavit Oct 4 - Tab 1D - Pages 27 & 28*

23. The Proof of Claim filed by Transit in 178's Proposal confirms that the July 5 payment of \$83,734.05 was applied towards Transit's pre-NOI arrears. Transit has refused to return the \$83,734.05.

*Transit's Proof of Claim in the Matter of the proposal of 178 Schedule "A"*

24. Transit has not obtained leave of the court pursuant to BIA s. 69.4 lifting the stay, to pursue recovery of payment of the \$83,734.05 which was a pre-NOI debt provable in bankruptcy.

### **PART III - POINTS IN ISSUE**

25. Is Transit permitted by law to take a post-NOI payment for a pre-NOI debt?

26. Is 178 entitled by law to enter into an agreement or consent to pay a creditor for pre-NOI debt from post-NOI corporate funds?

### **PART IV - THE LAW**

27. Section 69(1) of the *BIA* creates a stay *ipso facto* on the filing of a notice of intention. The section reads:

**Stay of proceedings — notice of intention**

s. 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,

*Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 as amended, s. 69: Applicant's Brief of Authorities, Tab 1*

Lloyd W. Houlden, Geoffrey B. Morawetz & Janice P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters Canada, 2018) at F-114, page 491: Applicant's Brief of Authorities, Tab 4 ("*Annotated Bankruptcy and Insolvency Act: Applicant's Brief of Authorities, Tab 4*")

28. After the filing of a notice of intention, a comprehensive prohibition on remedies against the debtor or the debtor's property is imposed. Section 69.4 of the *BIA* reads:

**Court may declare that stays, etc., cease**

s. 69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

*Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 as amended, s. 69.4: Applicant's Brief of Authorities, Tab 2*

29. The proceeds realized from the property of a bankrupt are applied in a scheme of distribution set out in the *BIA*, which includes, *inter alia*, secured creditors, preferred creditors, and unsecured creditors.



***Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 as amended, s. 136(1): Applicant's Brief of Authorities, Tab 3***

## **PART V - CASE LAW**

30. One of the purposes of the *BIA* is to provide for the financial rehabilitation of insolvent persons. The Nova Scotia Court of Appeal stated that “The Act provides a regime whereby the creditors of the bankrupt will pursue their claims by collective action through the trustee so that the assets of the bankrupt can be realized and distributed on an equitable basis subject to the priorities of preferred creditors and the rights of secured creditors.”

***Dartmouth (City) v. Barclays Bank of Canada* (1996), 40 C.B.R. (3d) 1, 151 N.S.R. (2d) 264 at para 55: Applicant's Brief of Authorities, Tab 6**

**Lloyd W. Houlden, Geoffrey B. Morawetz & Janice P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters Canada, 2018) at A-2, page 2: Applicant's Brief of Authorities, Tab 5 (“*Annotated Bankruptcy and Insolvency Act: Applicant's Brief of Authorities, Tab 5*”)**

31. In addition, the *BIA* is aimed “at protecting creditors of insolvent persons ensuring orderly and fair administration of the bankrupt's assets among creditors on a *pari passu* basis,” and it “provides an expeditious and inexpensive method of compelling an insolvent debtor to turn over his or her property to a trustee for rateable distribution among his or her creditors.”

***Re AEVO Co. v. D & A Macleod Co.* (1991), 7 C.B.R. (3d) 33, 4 O.R. (3d) 368 at para 22: Applicant's Brief of Authorities, Tab 7**

***Pinestone Resort & Conference Centre Inc., Re*, [1999] O.J. No. 774, 118 O.A.C. 338 at para 5: Applicant's Brief of Authorities, Tab 8**

***Annotated Bankruptcy and Insolvency Act, supra* at F-114, page 491: Applicant's Brief of Authorities, Tab 4**

32. If a business is unable to continue to operate, the *BIA* “provides a means whereby people who are in financial difficulties may resolve those difficulties” and “provides an orderly method of distributing whatever assets remain available for the creditors”.

***Re Wooltex Recycling (Can.) Ltd.*, 56 C.B.R. (N.S.) 271, 1985 CarswellOnt 191 at para 15: Applicant's Brief of Authorities, Tab 9**

***Annotated Bankruptcy and Insolvency Act, supra* at A-2, page 2: Applicant's Brief of Authorities, Tab**

33. After the filing of a notice of intention, a comprehensive prohibition on remedies against the debtor or the debtor's property is imposed. The purpose is to prevent proceedings by a creditor that might give one creditor an advantage over other creditors: "...upon becoming insolvent, he can no longer do any act out of the ordinary course of business which has the effect of preferring a particular creditor over other creditors. If one creditor receives a preference over other creditors as a result of the debtor acting intentionally and in fraud of the law, this defeats the equality of the bankruptcy laws."

***Hudson v. Benallack*, [1975] 6 W.W.R. 109, [1976] 2 S.C.R. 168 at para 21: Applicant's Brief of Authorities, Tab 10**

34. Section 69.3(1.1), effective July 7, 2008, specifies that the stay of proceedings in respect of a bankrupt ceases to apply in respect of a creditor on the date that the bankruptcy trustee is discharged. Knowledge that a notice of intention has been filed is unnecessary for a stay of proceeding to be effective as against creditors. In addition, the stay comes into effect on the filing of the notice, as opposed to when the creditor has received proof of the filing.

***Gene Moses Construction Ltd., Re*, [1999] B.C.J. No. 141, 4 B.C.T.C. 76 at para 15: Applicant's Brief of Authorities, Tab 11 ("*Gene Moses Construction Ltd.*")**

***Hover, Re*, 2000 ABQB 938, [2000] A.J. No. 1496 at para 36: Applicant's Brief of Authorities, Tab 12  
*Annotated Bankruptcy and Insolvency Act, supra* at F-114, page 491: Applicant's Brief of Authorities, Tab 4**

35. In *Gene Moses Construction Ltd., Re*, the debtor made lease payments by pre-authorized debits. After a notice of intention had been filed, the creditor presented three debit memos to the debtor's bank. Masters Powers held that the word "remedy" in s. 69(1) must be given a broad meaning. It was also held that the presentation of debit memos for payment of arrears after a notice of intention had been filed was the exercise of a remedy under s. 69(1). Therefore the funds were ordered to be repaid to the debtor.

***Gene Moses Construction Ltd., Re, supra* at para 5, 14: Applicant's Brief of Authorities, Tab 11**

36. Transit had no right to the \$83,734.05 it took on July 5, because:

1. At the time that the PAD was taken, a NOI had already been issued; and


2. There was no agreement reached (i.e. the parties were not *ad idem*) for Transit to take the funds; and
3. The debtor did not have the ability to alter the provisions of the *BIA* by making post-NOI payments for pre-NOI debts.

Not having a right at the time they took the funds, Transit did not have the right to retain the funds.

## PART VI - ORDER SOUGHT

37. The moving party seeks an Order that Transit Petroleum Inc. pay the sum of \$83,734.05 to 1787930 Ontario Inc., with costs on a substantial indemnity basis.

All of which is respectfully submitted  
December 3, 2018

  
**SWANICK & ASSOCIATES**  
Barristers and Solicitors  
225 Duncan Mill Road  
Suite 101  
Don Mills, Ontario  
M3B 3K9  
Bruce A. Simpson (18977E)  
Michael C. Ly (74673C)  
(416) 510-1888 - phone  
(416) 5101945 - fax  
Lawyers for 1787930 Ontario Inc.

TO: **MILLER, THOMSON**  
One London Place  
255 Queens Avenue  
Suite 2010  
London, ON N6A 5R8  
Sherry Kettle  
(519) 931-3500 - phone  
(519) 858-8511 - fax  
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451 Talbot Street  
Suite 303  
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TO: **MNP Ltd.**  
111 Richmond Street West  
Suite 300  
Toronto, ON M5H 2G4  
Sheldon Title  
416-323-5240 - phone  
416-573-5320 - Cell Phone  
Trustee of 1787930 Ontario Inc.

## Schedule A

|   | TAB NO. |
|---|---------|
| <i>Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 as amended, s. 69</i>   | 1       |
| <i>Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 as amended, s. 69.4</i>   | 2       |
| <i>Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 as amended, s. 136(1)</i>   | 3       |
| Lloyd W. Houlden, Geoffrey B. Morawetz & Janice P. Sarra, <i>The 2018-2019 Annotated Bankruptcy and Insolvency Act</i> (Toronto: Thomson Reuters Canada, 2018) at F-114, page 491 | 4       |
| Lloyd W. Houlden, Geoffrey B. Morawetz & Janice P. Sarra, <i>The 2018-2019 Annotated Bankruptcy and Insolvency Act</i> (Toronto: Thomson Reuters Canada, 2018) at A-2, page 2     | 5       |
| <i>Dartmouth (City) v. Barclays Bank of Canada</i> (1996), 40 C.B.R. (3d) 1, 151 N.S.R. (2d) 264  | 6       |
| <i>Re AEVO Co. v. D &amp; A Macleod Co.</i> (1991), 7 C.B.R. (3d) 33, 4 O.R. (3d) 368   | 7       |
| <i>Pinestone Resort &amp; Conference Centre Inc., Re</i> , [1999] O.J. No. 774, 118 O.A.C. 338  | 8       |
| <i>Re Wooltex Recycling (Can.) Ltd.</i> , 56 C.B.R. (N.S.) 271, 1985 CarswellOnt 191  | 9       |
| <i>Hudson v. Benallack</i> , [1975] 6 W.W.R. 109, [1976] 2 S.C.R. 168   | 10      |
| <i>Gene Moses Construction Ltd., Re</i> , [1999] B.C.J. No. 141, 4 B.C.T.C. 76  | 11      |
| <i>Hover, Re</i> , 2000 ABQB 938, [2000] A.J. No. 1496  | 12      |

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Suite 101  
225 Duncan Mill Road  
Don Mills, Ontario  
M3B 3K9

ATTN: BRUCE SIMPSON 18977E  
(416) 510-1888 - phone  
(416) 510-1945 - fax

Lawyers for the 1732427 Ontario Inc. and  
1787930 Ontario Inc.