

Court of Appeal File No: M50303
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 MOVING PARTY
(Returnable April 15, 2019)**

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PART I - THE NATURE OF THE MOTION

1. Transit Petroleum Inc. ("**Transit**"), a creditor of 1787930 Ontario Inc. ("**178**"), seeks an Order extending the time to serve and file or granting leave to serve and file a Notice of Appeal in respect to the Order of Mr. Justice Raikes dated January 28, 2019 (the "**First Raikes Order**") and an Order directing the appeal of the First Raikes Order be heard together with the appeal of the Order of Mr. Justice Raikes dated March 13, 2019 (the "**Second Raikes Order**").

PART II - THE FACTS

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

Affidavit of Trevor Chambers sworn March 26, 2019, Motion Record dated March 26, 2019, Tab 2 at paras. 6-7 (the "**Chambers Affidavit**").

3. By at least June 2018, 178 was experiencing significant financial difficulties. Unbeknownst to Transit, Canada Revenue Agency 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 Canada Revenue Agency had frozen the bank account.

Chambers Affidavit, para. 9.

4. In order to secure the continued supply of fuel to keep its fleet of trucks on the road, on Friday, June 28, 2018 before the long weekend, 178 and Transit agreed to a payment schedule which included a pre-authorized debit ("**PAD**") for \$83,734.05 (the "**Agreed Payment**") to be withdrawn on Thursday, July 5, 2018 from 178's new account at Libro Credit Union ("**Libro**").

Chambers Affidavit, paras. 8, 10-11.

5. 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 a Notice of Intention to File a Proposal (the "**NOI**"). 178 did not tell Transit that it had filed an NOI until July 5, 2018 after the PAD for the Agreed Payment had been withdrawn by Libro.

Chambers Affidavit, para. 12.

July 3, 2018 PAD Submission to Libro

6. On July 3, 2018, in accordance with the agreement between Transit and 178, a PAD was submitted to Libro for the Agreed Payment.

Chambers Affidavit, para. 13.

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, a Credit Analyst, and Trevor Chambers ("**Trevor**"), the Division Manager at the time. Only one employee of 178, Nathan McDaniel ("**Nathan**"), gave evidence. The evidence of the four employees of Transit conflicted with the evidence of Nathan.

Chambers Affidavit, para. 14.

8. The evidence of Transit on the motion 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.

Chambers Affidavit, para. 15.

The July 5 Meeting

9. 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.

Chambers Affidavit, para. 16.

10. 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. As noted above, 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.

Chambers Affidavit, para. 17.

11. Based upon this representation, Transit entered into negotiations with 178 to continue the supply of fuel post-NOI.

Chambers Affidavit, para. 18.

Communications after the July 5 Meeting

12. During a call on Monday, July 9, 2018 between Nathan, Monique, Don and Trevor, 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.

Chambers Affidavit, paras. 19-20.

13. Two days later, 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. As a result, Transit deactivated 178's fuel cards.

Chambers Affidavit, para. 21.

14. 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, through its lawyers, sought the return of the Agreed Payment from Transit.

Chambers Affidavit, para. 22.

15. 178 has not paid for fuel purchased from Transit post-NOI in the amount of \$48,434.30.

Chambers Affidavit, para. 23.

16. Transit did not unilaterally take the Agreed Payment as a way to recover a debt that 178 refused to pay. Rather, prior to the NOI, 178 and Transit had 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.

Chambers Affidavit, para. 24.

PART III - ISSUES AND THE LAW

17. There are two issues:

(a) whether an order should be made extending the time to serve and file or granting leave to serve and file a Notice of Appeal in respect to the First Raikes Order;

(b) whether an order should be made directing the appeal of the First Raikes Order be heard together with the appeal of the Second Raikes Order.

A. Extension of Time is Provided for under the Bankruptcy and Insolvency Act

18. Rule 31(1) of the *Bankruptcy and Insolvency Act* (the "BIA") provides that an appeal to a Court of Appeal must be made by filing a notice of appeal at the office of the registrar of the Bankruptcy Court 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.

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

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 183(2), s. 193

19. The BIA therefore explicitly allows for an extension of time for filing a notice of appeal at the discretion of the judge of the Court of Appeal.

20. The governing principle is whether the justice of the case requires that an extension be granted. Factors that are relevant to the within motion for an extension include 1) there is an arguable ground or grounds of appeal; 2) 178 will not be prejudiced by extending the time; and 3) it is in the interest of justice that an extension be granted.

B. Arguable ground of appeal

21. The primary issue for extending the time to appeal is whether the appeal is meritorious. The threshold to establish whether or not an appeal is meritorious is low.

The applicant needs to establish an arguable case or that the appeal is not frivolous.

Canada v. MKM Manufacturing Ltd., 2003 BCCA 652 at para. 5 (Brief of Authorities, Tab 1)

22. The proposed Notice of Appeal is attached at Tab 3 of the Motion Record. The grounds of appeal are that the motion judge erred:

- i. in interpreting section 69 of the BIA;
- ii. in applying section 69 of the BIA to the facts of the case and 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 (para. 45);
- iii. in finding that it was unnecessary to determine whether the parties reached an agreement regarding the Agreed Payment (para. 47);
- iv. in finding that he was unable to determine whether the parties reached an agreement regarding the Agreed Payment; (para. 47)
- v. 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 (para. 23);
Chambers Affidavit, para. 14
- vi. 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 (para. 27);
Chambers Affidavit, paras. 14 and 25

- vii. 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 (para. 46); and
- viii. in finding that the amount claimed by Transit in its Proof of Claim filed in 178's proposal proceeding includes the Agreed Payment (para. 28).

Chambers Affidavit, para. 26

Chambers Affidavit, Exhibit "A", First Raikes Decision.

23. Transit submits that the appeal is meritorious. At a minimum, the appeal meets the low threshold of establishing an arguable case and is not frivolous.

C. No prejudice

24. The First Raikes decision was rendered on January 28, 2019. The Second Raikes decision in respect to costs was rendered on March 13, 2019. A Notice of Appeal has been served and filed in respect to the Second Raikes Decision. As such, all proceedings under that order are stayed.

Chambers Affidavit, Exhibit "A"

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 195

25. The length of time since January 28, 2019 has not been inordinate. There is no concern as to the loss of memory or other evidence that could prejudice this matter.

Cunningham v. Hutchings, 2017 ONCA 938 at para. 18 (Brief of Authorities, Tab 2)

26. The evidence and facts underlying the appeal already delivered in respect to the Second Raikes Order are the same as the First Raikes Order.

D. Interests of justice

27. The overriding factor is whether it is in the interests of justice to grant the extension.

Canada v. MKM Manufacturing Ltd., 2003 BCCA 652 at para. 7 (Brief of Authorities, Tab 1)

Cunningham v. Hutchings, 2017 ONCA 938 at para. 25 (Brief of Authorities, Tab 2)

28. Leave may be granted even if no intention to appeal was formulated prior to the 10-day period prescribed by the *Bankruptcy and Insolvency Rules*.

Atlantic Pressure Treating Ltd v. Bay Chaleur Construction, 1987 CarswellNB 29 (C.A.) at para. 8 (Brief of Authorities, Tab 3)

29. The proposed appeal is arguable and there is no real prejudice to 178.

E. Hearing of the appeals together

30. The facts and evidence underlying the First Raikes Order and Second Raikes Order are the same. It would be efficient and effective to hear the two appeals together.

Cunningham v. Hutchings, 2017 ONCA 938 at para. 25 (Brief of Authorities, Tab 2)

PART IV - ORDER REQUESTED

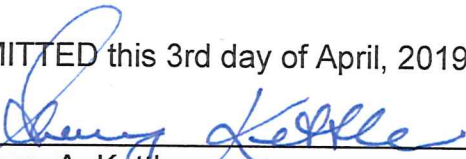
31. For the above reasons, Transit requests an Order:

(c) extending the time to serve and file or granting leave to serve and file a Notice of Appeal in respect to the First Raikes Order; and

(d) directing that the appeal of the First Raikes Order be heard together with the appeal of the Second Raikes Order.

32. The estimated time of my oral argument is 30 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of April, 2019.



Sherry A. Kettle
MILLER THOMSON LLP

Lawyer for the moving party, Transit Petroleum
Inc.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Canada v. MKM Manufacturing Ltd.*, 2003 BCCA 652
2. *Cunningham v. Hutchings*, 2017 ONCA 938
3. *Atlantic Pressure Treating Ltd v. Bay Chaleur Construction*, 1987 CarswellNB 29
(C.A.)

SCHEDULE "B"

RELEVANT STATUTES

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss. 183(2), s. 193.

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,

- o (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,

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

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.

Stay of proceedings on filing of appeal

195 Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an

order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

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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Proceeding commenced at London

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(RETURNABLE APRIL 15, 2019)**

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