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December 11, 2018

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- and -

MNP Ltd.
111 Richmond Street West
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Toronto, ON M5H 2G4
Attention: Sheldon Title

Fax No. 416.323.5240

Dear Sirs:


**Re: In the matter of the Notice of Intention to Make a Proposal of 1787930 Ontario
cob as Messenger Freight
Court File No. 35-2395481**

Please find enclosed the Responding Factum of Transit Petroleum Inc. which is hereby served pursuant to the *Rules of Civil Procedure*.

Yours truly,

MILLER THOMSON LLP

Per:


Sherry A. Kettle
SAK/sj
Enc.
c: client

36016553.1

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

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

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

**FACTUM OF THE RESPONDING PARTY,
TRANSIT PETROLEUM INC.
(RETURNABLE DECEMBER 19, 2018)**

December 11, 2018

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Trustee of 1787930 Ontario Inc.

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

IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427
ONTARIO INC. AND 1787930 ONTARIO INC. BOTH OF THE CITY OF ST. THOMAS, IN
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**FACTUM OF THE RESPONDING PARTY,
TRANSIT PETROLEUM INC.
(RETURNABLE DECEMBER 19, 2018)**

PART I - INTRODUCTION

1. On this motion, the moving party, 1787930 Ontario Inc., carrying on business as Messenger Freight Systems ("**178**"), seeks the return of \$83,735.05 (the "**Agreed Payment**") from Transit Petroleum Inc. ("**Transit**").
2. 178 is a transportation logistics company. It is hired to pick up and deliver goods. Transit was a key supplier to 178, supplying approximately \$200,000 worth of fuel on a monthly basis for 178's fleet of trucks.
3. By at least June 2018, 178 was experiencing significant financial difficulties. Payments to 178 had not cleared the bank and, unbeknownst to Transit, CRA had frozen 178's Bank of Nova Scotia account.
4. 178 required the continued supply of fuel from Transit to keep its fleet of trucks on the road. At the end of June 2018, 178 entered into negotiations with Transit to pay the outstanding amounts owing for payments that had not cleared 178's bank.
5. In order to secure the continued supply of fuel, 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 the Agreed Payment on Thursday, July 5, 2018 from 178's new account at Libro Credit Union ("**Libro**").
6. On Monday, July 2, 2018, 178 filed a Notice of Intention to File a Proposal (the "**NOI**"). MNP Ltd. is the Proposal Trustee.

7. In the days that followed the NOI, there is no credible evidence that 178 disputed that there was an agreement with Transit for the Agreed Payment on the last business day before the NOI, that 178 asked that the PAD for the Agreed Payment not be submitted on Tuesday, July 3, 2018 being the first business day following the long weekend, that 178 asked Transit to stop the PAD for the Agreed Payment, that 178 asked Libro to stop the PAD for the Agreed Payment or that 178 asked Transit to return the Agreed Payment.

8. 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, after the Agreed Payment had been withdrawn by Libro, that 178 told Transit about the NOI filing. 178 told Transit that as a key supplier, it required the continued supply of fuel from Transit post-NOI and that 178 had agreed to allow the Agreed Payment to be withdrawn so that 178 could continue in business. Based upon this representation, Transit entered into negotiations with 178 to continue the supply of fuel post-NOI.

9. However, while negotiating with Transit for the continued supply of fuel post-NOI, 178 secured the supply of fuel from another supplier, Petro Canada. 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 fuel purchases. As a result, Transit deactivated 178's fuel cards. It was not until after 178 secured the supply of fuel from Petro Canada and stopped payment on post-NOI fuel purchases from Transit that 178, through its lawyers, sought the return of the Agreed Payment from Transit.

10. The Agreed Payment should not be returned to 178. 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 withdraw and retain the Agreed Payment in the ordinary course of business to permit 178 to remain in business. As such, Transit did not exercise a remedy to recover the Agreed Payment and the Agreed Payment does not constitute a preferential payment.

PART II - THE FACTS

Background

11. 178 is a transportation logistics company. It delivers goods to customers using trucks which are dependent upon fuel to operate. Those customers require the delivery of goods purchased according to a schedule.

Transcript of the cross-examination of Nathan McDaniel on November 12, 2018 (the "Nathan Transcript"), p.7, q. 13-25.

12. 178 purchased a significant amount of fuel from Transit, in the range of \$200,000 per month.

*Nathan Transcript, p. 10, q.38-42.
Proof of Claim of Transit, Exhibit "1" to the cross-examination of Nathan McDaniel.*

13. 178 set-up pre-authorized debits ("**PADs**") to pay Transit's invoices.

Responding Motion Record of Transit dated October 23, 2018 ("Responding Motion Record"), Affidavit of Don Poort sworn October 4, 2018 (the "Don Affidavit"), p. 1, para. 2.

14. There was a history of 178 either putting stop payments on the PADs to Transit or Transit receiving "not sufficient funds" ("**NSF**") notifications after PADs were submitted by Transit to 178's financial institution. Prior to the Agreed Payment, PADs had been received back by Transit as NSF in April and May 2018.

*Answers to Undertakings of Nathan McDaniel ("**Nathan's Undertakings**"), Tabs 1 and 2.*

Responding Motion Record, Affidavit of Trevor Chambers sworn October 4, 2018 (the "Trevor Affidavit"), p. 124, para. 4.

Transcript from the cross-examination of Monique Paul conducted on November 12, 2018 (the "Monique Transcript"), p. 17, q. 58.

15. In addition, the June 18, 2018 PAD was received back as "Account Frozen".

Responding Motion Record, Affidavit of Monique Paul sworn October 4, 2018 (the "First Monique Affidavit"), p. 96-97, para. 5, Exhibit "A", p.105.

Communications prior to the July 5 Meeting

16. Following the return of the June 18, 2018 PAD, Monique Paul ("**Monique**"), a Credit Analyst at Transit, spoke with Nathan McDaniel ("**Nathan**"), the Financial Controller at 178, on or about June 22, 2018. During that conversation, 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, p. 97, para. 5, Exhibit "A", p.105.
Monique Transcript, p. 11, q. 33-35.*

17. 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.

18. 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 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, p. 97, para. 5, Exhibit "A", p.105.

19. Following that e-mail request, Monique and Tina Thorne ("**Tina**"), a Credit Analyst at Transit, 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.

*Sur-Reply Motion Record of Transit dated October 23, 2018 ("**Sur-Reply Motion Record**"), Affidavit of Monique Paul sworn October 23, 2018 (the "**Second Monique Affidavit**"), p. 4, para. 5.*

Sur-Reply Motion Record, Affidavit of Tina Thorne sworn October 23, 2018, p. 1, para. 4.

*Monique Transcript, p. 15, q. 50, 59-61, 63; p. 39, q. 123.
Nathan Transcript, p. 17-18, q. 82.*

20. 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.

Sur-Reply Motion Record of Transit, Affidavit of Monique Paul sworn October 23, 2018 (the "Second Monique Affidavit"), p. 5, para. 6, Exhibit "A", p.105.

21. 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.

*Trevor Affidavit, p. 125, para. 6.
Monique Transcript, p. 18, q. 62-64; p. 20, q. 69; p. 32, q. 100-103; p. 38, q. 119.
Nathan Transcript, p. 28-29, q. 131-133.*

22. 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.

*First Monique Affidavit, p. 108, Exhibit "B".
Nathan Transcript, p. 12, q. 54; p. 20-21, q. 92-95, 100.*

July 3, 2018 PAD Submission to the Credit Union

23. Following the long weekend, Monique called Nathan on Monday, 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 be sure that the funds would be available for the Agreed Payment.

*First Monique Affidavit, p. 97, para. 10, Exhibit "A".
Monique Transcript, p. 18, q. 62.*

24. 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, p. 97-98, paras. 11-12, Exhibit "B", p.108.
Trevor Affidavit, p. 125, para. 8.*

25. 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, p. 97-98, paras. 11-12, 14, Exhibit "C", p.115.
Don Affidavit, p. 1-2, para. 5, Exhibit "A", p.9.
Nathan Transcript, p. 46; q. 220.*

26. 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.

Second Monique Affidavit, p. 5, para. 7.

27. 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, p. 29, q. 134-140; p. 81, para. 363.
Nathan's Undertakings, #3, Tab "3", #4.*

The July 5 Meeting

28. It was not until Thursday, July 5, 2018 at around 1 p.m. during a meeting with representatives of 178 that Transit was advised of the NOI (the "**July 5 Meeting**"). The Agreed Payment had already withdrawn by Libro.

29. In attendance at that meeting on behalf of 178 was Louise Vonk ("**Louise**"), the owner of 178, and Blaine Skirtschak ("**Blaine**"), the General Manager of 178. Nathan did not attend that meeting. Trevor Chambers ("**Trevor**"), Division Manager at Transit, and Monique attended the meeting on behalf of Transit.

Nathan Transcript, p. 52, q. 242.

30. At the July 5 Meeting, Louise told Monique and Trevor that CRA froze 178's bank account around mid-June 2018 and that 178 had filed an NOI on Monday, July 2, 2018 to

restrict further action by CRA and to give 178 some breathing room to re-organize financially in order to carry on with business. Louise also told Monique and Trevor that 178 required the support of Transit to continue to operate and that she was willing to do whatever was necessary to keep Transit as their supplier of fuel.

First Monique Affidavit, p. 98-99, paras. 16-19.
Trevor Affidavit, p. 125-126, paras. 11-14.

31. During the July 5 Meeting, Louise and Blaine did not request a return of the Agreed Payment. Rather, Louise made it very clear that 178 had allowed the PAD for the Agreed Payment to go through and had told MNP that it had done so because Transit was, in her words, a "vital vendor" necessary for 178 to remain in business.

First Monique Affidavit, p. 98-99, para. 20.
Trevor Affidavit, p. 126, paras. 15-16.
Monique Transcript, p. 36, q. 114.

Communications After the July 5 Meeting

32. Monique called Nathan twice and left voice messages for Nathan on Friday, July 6, 2018 to discuss the following week's PAD for post-NOI purchases. Nathan emailed Monique back at 5:50 p.m. on Friday, July 6, 2018 to apologize for not reaching out to her and said that he would contact Monique on Monday, July 9, 2018.

First Monique Affidavit, p. 99, para. 23.

33. Don Poort ("**Don**"), the Chief Financial Officer of Transit, Monique, Trevor and Nathan had a phone conversation on Monday, July 9, 2018. During that call, Nathan did not request a return of the Agreed Payment during the July 9, 2018 call. Rather, 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 Affidavit, p. 2-3, paras. 11 - 14.
First Monique Affidavit, p. 99-100, paras. 24, 27.

34. Nathan called Monique on Wednesday, July 11, 2018 at 3:37 p.m. He told Monique that he needed to stop payment on the \$62,693.03 PAD for post-NOI purchases. Monique

told Nathan that the PAD had already been submitted to Libro. Nathan said that he would call Libro to put a stop payment on the \$62,693.03 PAD. The stop payment was placed on the \$62,693.03 PAD on July 11, 2018, the same day that Nathan requested Libro to stop the payment. Nathan did not request the return of the Agreed Payment during that call.

*First Monique Affidavit, p. 100, paras. 28, 29, Exhibit "D".
Nathan's Undertakings, #5, Tab "5".*

35. Unbeknownst to Transit, 178 had contacted Petro Canada for the supply of post-NOI fuel during the same time that Transit was in good faith negotiating with 178 for the supply of post-NOI fuel. The answers to undertakings of 178 show that 178 had by July 10, 2018 entered into an agreement with Petro Canada and had requested 80 Petro Pass cards for drivers of its fleet of trucks. Nathan arranged to have those Petro Pass cards picked up on July 11, 2018, the very day that 178 put a stop payment on the July 12 payment for post-NOI purchases.

*Nathan Transcript, p. 7980, q. 352, 357.
Nathan's Undertakings, #8, Tab "8".*

36. Transit specifically relied on the representations of 178, including Louise, Blaine and Nathan, that all post-NOI purchases would be paid for by 178 and that the Agreed Payment had been allowed to go through so that 178 could continue in business. Transit continued to supply fuel to 178 post-NOI at 178's request in good faith and based on 178's representations. Despite continuing to sell fuel to 178 post-NOI until 178 placed the stop payment on July 11, 2018, 178 has refused to pay for all of the post-NOI purchases and now demands the return of the Agreed Payment. The balance owing to Transit for post-NOI purchases is \$48,434.30.

*Trevor Affidavit, p. 126, para. 21.
Don Affidavit, p. 3-4, paras. 20-23; p.4, para. 27; p. 5-6, paras. 34-35.
Nathan Affidavit, p. 7, para. 14.
Nathan's Undertakings, #7.*

PART III - ISSUES AND THE LAW

37. The issue on this motion is whether or not Transit is entitled to retain the Agreed Payment.

38. The Agreed Payment should not be returned to 178 because:

(a) There was an agreement for the PAD for the Agreed Payment. As such, Transit did not exercise a remedy contrary to section 69 of the BIA.

(b) The Agreed Payment does not represent a post-NOI preferential payment taken by Transit for pre-NOI debts. As a key supplier, it was agreed that Transit would retain the Agreed Payment in the ordinary course of business so that 178 could remain in business. As a payment in the ordinary course of business to allow 178 to remain in business, the Agreed Payment is not a preferential payment.

Transit and 178 Entered into an Agreement for the July 5, 2018 PAD

39. On Friday, June 28, 2018, 178 entered into an agreement with Transit for the PAD for the Agreed Payment to be withdrawn on Thursday, July 5, 2018. Monique specifically stated that Transit accepted Nathan's proposal. There is no documentary evidence from 178 disputing that agreement.

Nathan Transcript, p. 41, q. 191.

40. 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. At that point, 178 knew that Transit thought there was an agreement because the PAD was submitted to Libro. Even after Monique advised Nathan on the morning of July 3, 2018 that the PAD had been submitted to Libro, Nathan remained silent. Silence may amount to conduct.¹

41. Two full days later, during the afternoon of Thursday, July 5, Louise told representatives of Transit that 178 had allowed the Agreed Payment to be withdrawn that morning and had told MNP as well, because 178 required the fuel supplied by Transit in order to remain in business. There is no documentary evidence from 178 to the contrary. There is no documentary evidence showing any request to not submit or to stop the PAD for the Agreed Payment or to return the Agreed Payment. Rather, the conduct of 178 prior to the July 5 Meeting supports the conclusion that there was an agreement for the PAD for the Agreed Payment and that 178 had agreed that the Agreed Payment should be withdrawn post-NOI and retained by Transit. Further, the evidence of Transit is that Transit would not

¹ *Maple Leaf Portland Cement Co. v. Owen Sound Iron Works Co.*, 1913 CarswellOnt 36 (S.C.) at paras. 16-21; S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book Inc., 2005) at p. 66-67.

have spent the time and effort to try and work through a payment plan with 178 for post-NOI purchases had 178 demanded the return of the Agreed Payment.

Don Affidavit, paras. 10, 14, 19, 20.
Trevor Affidavit, paras. 16, 20.
Second Monique Affidavit, p. 5, para. 8.

42. In response, 178 submitted a second affidavit of Nathan wherein he simply states that Louise did not insist that MNP allow the Agreed Payment and that she did not advise Transit that MNP had authorized the Agreed Payment. Nathan was not at the July 5 Meeting. Louise was insulated from cross-examination by not delivering an affidavit on what may be a relevant contested fact and, to that extent, the Court may draw an adverse inference and assign little weight to that evidence.²

Second Nathan Affidavit, p. 5, para. 7(c); p. 6, para. 8(d).

43. 178 did in fact require Transit to continue supplying fuel in order to remain in business. 178 agreed 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. 178 made representations to Transit and appeared to be negotiating with Transit for the continued supply of fuel after the NOI. 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. Transit did not stop payment until the very day that it picked up cards for Petro Canada.

44. 178 relies upon the *Gene Moses Construction Ltd.* case where it was held that the presenting of three debit memos for payment of lease arrears following the filing of a proposal was an exercise of a "remedy" to try and collect its debt. The exercise of that remedy was stayed by section 69(1) of the *Bankruptcy and Insolvency Act* (the "BIA")³ and the creditor was not entitled to the use of the debit memos. However, contrary to the *Gene Moses* case, Transit did not exercise a "remedy". Rather, as set-out above, Transit withdrew the Agreed Payment on the consent of 178.

² *R. v. Jolivet*, 2000 SCC 29 at paras. 24-28.

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

45. In *Startek Computer Inc. (Trustee of) v. Samtack Computer Inc.*,⁴ the Court noted that the creditor had negotiated a cheque after the filing of a NOI without the knowledge or consent of the debtor or the proposal trustee. As a result, the creditor had exercised a remedy and violated the stay of proceedings.

46. Unlike the *Gene Moses* case and the *Startek* case, 178 consented to the withdrawal of the Agreed Payment. As such, the withdrawal of the Agreed Payment is not the exercise of a remedy and does not violate the stay of proceedings.

The Agreed Payment is not a Preferential Payment

47. The Agreed Payment was made in the ordinary course of business and to enable 178 to continue in business. As such, the withdrawal of the Agreed Payment was not a preferential payment.

48. The test to establish a preferential payment under section 95 of the BIA requires: 1) the transfer took place within three months of the bankruptcy/NOI; 2) the debtor was insolvent at the time of payment; and 3) payment was made with a view to giving the creditor a preference over other creditors.⁵ Section 95 of the BIA applies to bankruptcies and proposals.⁶

49. The applicant has the initial onus of establishing a *prima facie* case. If elements 1 and 2 are established and the creditor received a preference in fact, then s. 95(2) operates to create a rebuttable presumption that the third element has been met.⁷ The creditor must rebut the presumption with evidence to prove, on balance, that preference of the creditor was not the dominant intention of the debtor.⁸ If the court is satisfied on balance that the debtor was pursuing a purpose other than to favour particular creditors over others, the presumption is displaced and the application fails. The onus is on the creditor to rebut the presumption, and the objective⁹ intention of the debtor governs¹⁰.

⁴ *Startek Computer Inc. (Trustee of) v. Samtack Computer Inc.*, 2000 BCSC 1316.

⁵ *Re Norris*, 1996 ABCA 357 at para. 13.

⁶ *BIA*, ss. 95, 101.1.

⁷ *Re Norris*, supra note 5, at para. 14.

⁸ *Ibid* at para. 15.

⁹ *Coast Wire Rope & Supply Ltd (Bankrupt Estate of) v Trans Pacific Hardware Inc.*, 1999 BCCA 217 ["**Coast Wire**"] at para. 8.

50. The presumption of preferential payment is rebutted where that payment is made in the ordinary course of business.¹¹ Payment “in the ordinary course of business” is fact dependent.

51. Payments to purchase goods or services required for the ongoing conduct of the bankrupt’s business have been found to be payments made in the ordinary course of business.¹² In particular “even a preferential payment made by an insolvent company at a time when its financial collapse is inevitable may be found to be legitimate if the payment was made with a view to generating income or liquidating assets to satisfy the insolvent’s creditors.”¹³

52. Payments in the ordinary course of business are ordinarily made for one of two reasons – [f]irstly, so that the bankrupt might take advantage of favourable payment terms or, secondly, to secure a continued supply of goods and services from those trade creditors in order that it might continue in its business.”¹⁴

53. A creditor may rebut the presumption where it can show that the payment was made by the debtor in the *bone fide* expectation that such payment would allow the debtor to remain in business.¹⁵

54. In *Coast Wire*, the Court outlined the test for ascertaining “intent” under Section 95(1) of the BIA :

- (a) The conduct of the parties may be a better measure of the debtor's intention than his expressed words;
- (b) A debtor's *bona fide* intention to stay in business could be found, even if that intention proved to be hopeless in the result;

¹⁰ *Orion Industries Ltd v Neil's General Contracting Ltd*, 2013 ABCA 330 at para. 10.

¹¹ *Ibid* at para. 11 citing *Canadian Credit Men's Association Ltd v Jenkins*, [1928] 3 DLR 139 at 144.

¹² *Ibid* at para. 12.

¹³ *Ibid* at para. 12, citing *St Anne-Nackawic Pulp Co (Trustee of) v Logistec Stevedoring (Atlantic) Inc*, 2005 NBCA 55.

¹⁴ *Re Norris* (1994), 28 C.B.R. (3D) 167 (Alta Q.B.) [*overturned for other reasons] at para. 7.

¹⁵ *Re A.R. Colquhoun & Son Ltd.* (1936), 18 C.B.R. 124 (Sask. K.B.) at para. 4.

(c) Reasonableness of the asserted intention to stay in business must be demonstrated on a balance of probabilities; and

(d) The issue of dominant intention is tested objectively, and therefore is dependent upon a showing of circumstances which rendered the intention reasonable.¹⁶

55. Fuel is imperative to the operation of a trucking company. Without the supply of fuel by Transit, 178 would be unable to remain in operation or generate any income in order to satisfy its creditors.

56. As noted above, by both words and conduct, 178 demonstrated its intention to allow Transit to withdraw and retain the Agreed Payment in the ordinary course of business, to permit 178 to remain in business.

Inaccuracies and Inconsistencies in Nathan's Evidence

57. Nathan's evidence is inaccurate and inconsistent in a number of respects:

(a) In MNP's First Report to the Court dated July 26, 2018, based upon information provided by Nathan, the proposal trustee states that on July 4 and 5, 178 attempted to stop the Agreed Payment first by approaching Transit and then by contacting Libro. In his affidavit evidence, Nathan alleges that he asked Monique to stop the PAD for the Agreed Payment on or about July 3, 2018 when Transit resumed work following the holiday. On cross-examination, however, Nathan could not recall if he called Monique after her e-mail to him on July 3, 2018 and thought that he actually called Monique on July 4, 2018. Monique states that she did not speak with Nathan following the June calls until July 9. Despite the e-mail correspondence between Nathan and Monique regarding the payment, there are no e-mails where Nathan asked Monique to do any of those things.

Don Affidavit, p. 67, 75, Exhibit "G"
Second Nathan Affidavit, p. 3, para. 6(b); p. 4, para. 7(b)
Nathan Transcript, p. 29, q. 134-139; p. 30-31, q. 142-147; p. 33, q. 158; p. 34-35, q. 162; p. 36-39, q. 166-180.
Nathan's Undertakings, #3, Tab "3".

¹⁶ *Coast Wire, supra*, note 9 at paras. 8-12.

(b) 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.

Second Nathan Affidavit, p. 3, para. 6(b); p. 4, para. 7(b)
Nathan Transcript, p. 55-56, q.263.

(c) In his first affidavit, Nathan stated that he made a demand for the return of the PAD to Don. 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, p. 6, para. 8.
Second Nathan Affidavit, p. 3, para. 6(b), 6(e)
Nathan Transcript, p. 55-61, q.263-288

(d) 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 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 did not cross-examine Trevor.

Trevor Affidavit, p. 125, paras. 8-10.
Monique Transcript, p. 42, q. 134-135.
Second Nathan Affidavit, p. 6, para. 5.
Nathan Transcript, p. 15-16, q. 69-72.

(e) 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.

Supplementary Motion Record of 178, Affidavit of Nathan McDaniel sworn October 15, 2018 (the "Second Nathan Affidavit"), p. 4, para. 6(l).

Second Supplementary Motion Record of 178, Affidavit of Nathan McDaniel sworn October 31, 2018 (the "Third Nathan Affidavit"), p. 2, para. 10.

Nathan Transcript, p. 24-26, q. 108-118.

(f) 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 "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 Credit Union about stopping payment on the second PAD scheduled for July 12, 2018 for post-NOI purchases.

First Nathan Affidavit, p. 6, para. 6.
Second Nathan Affidavit, p. 3, para. 6(c); p. 5, para. 7(d)
Nathan Transcript, p. 36-38, q. 166-173; p. 41, q. 192-193; p. 44-46, q. 211-218, 221; p47, q. 228;

(g) 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. At that point, 178 stopped payment to Transit for post-NOI purchases on the very day that it received gas cards from a replacement fuel supplier.

*Second Nathan Affidavit, p. 3, para. 6(c)(iii).
Nathan Undertakings, #7.*

(h) We now know that the Canada Revenue Agency (“CRA”) froze 178’s bank account. However, 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.

Monique Transcript, p. 11, q. 33-40.

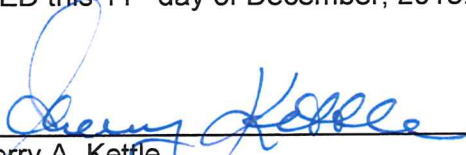
58. Transit’s evidence is supported by evidence of a number of employees with first-hand knowledge of key events. 178 chose to only submit Nathan’s evidence which is inconsistent and inaccurate. 178 failed to submit evidence of Louise or Blaine who both had first-hand knowledge of relevant facts and were both under the control of 178. This Court is entitled to assign little weight to Nathan’s evidence in a number of key respects and to prefer the evidence of Transit.

59. 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 withdraw and retain the Agreed Payment in the ordinary course of business to permit 178 to remain in business. As such, Transit did not exercise a remedy to recover the Agreed Payment and the Agreed Payment does not constitute a preferential payment.

PART IV - ORDER REQUESTED

60. Transit requests an order dismissing the relief sought by 178 on this motion together with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of December, 2018.



Sherry A. Kettle
MILLER THOMSON LLP

Lawyer for Transit Petroleum Inc.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Maple Leaf Portland Cement Co. v. Owen Sound Iron Works Co.*, 1913 CarswellOnt 36 (S.C.).
2. S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book Inc., 2005) at p. 66-67.
3. *R. v. Jolivet*, 2000 SCC 29 at paras. 24-28.
4. *Startek Computer Inc. (Trustee of) v. Samtack Computer Inc.*, 2000 BCSC 1316.
5. *Re Norris*, 1996 ABCA 357.
6. *Coast Wire Rope & Supply Ltd (Bankrupt Estate of) v Trans Pacific Hardware Inc*, 1999 BCCA 217.
7. *Orion Industries Ltd v Neil's General Contracting Ltd*, 2013 ABCA 330 at para 11 citing *Canadian Credit Men's Association Ltd v Jenkins*, [1928] 3 DLR 139 at 144.
8. *St Anne-Nackawic Pulp Co (Trustee of) v Logistec Stevedoring (Atlantic) Inc*, 2005 NBCA 55.
9. *Re Norris* (1994), 28 C.B.R. (3D) 167 (Alta Q.B.).
10. *Re A.R. Colquhoun & Son Ltd. (1936)*, 18 C.B.R. 124 (Sask. K.B.).

SCHEDULE "B" RELEVANT STATUTES

1. *Bankruptcy and Insolvency Act*, RSC, 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,

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or

(iii) the filing by the insolvent person of a notice of intention under section 50.4,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,

(c) Her Majesty in right of Canada may not exercise Her rights under

(i) subsection 224(1.2) of the *Income Tax Act*, or

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that

(A) refers to subsection 224(1.2) of the *Income Tax Act*, and

(B) provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts,

in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, and

(d) Her Majesty in right of a province may not exercise her rights under any provision of provincial legislation in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a **province providing a comprehensive pension plan** as defined in subsection 3(1) of the

Canada Pension Plan and the provincial legislation establishes a **provincial pension plan** as defined in that subsection,

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

Limitation

(2) The stays provided by subsection (1) do not apply

(a) to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the notice of intention under section 50.4 was filed from dealing with those assets;

(b) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than ten days before the notice of intention under section 50.4 was filed, from enforcing that security, unless the secured creditor consents to the stay;

(c) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security if the insolvent person has, under subsection 244(2), consented to the enforcement action; or

(d) [Repealed, 2012, c. 31, s. 416]

Limitation

(3) A stay provided by paragraph (1)(c) or (d) does not apply, or terminates, in respect of Her Majesty in right of Canada and every province if

(a) the insolvent person defaults on payment of any amount that becomes due to Her Majesty after the filing of the notice of intention and could be subject to a demand under

(i) subsection 224(1.2) of the Income Tax Act,

(ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(B) is of the same nature as a contribution under the Canada Pension Plan if the province is a **province providing a comprehensive pension plan** as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a **provincial pension plan** as defined in that subsection; or

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”.

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

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

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

FACTUM OF THE RESPONDING PARTY,
TRANSIT PETROLEUM INC.
(RETURNABLE DECEMBER 19, 2018)

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