

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

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**MOTION RECORD  
OF TRANSIT PETROLEUM INC.**

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December 17, 2020

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**ONTARIO  
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IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427  
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# TAB 1

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

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

**NOTICE OF MOTION**

Transit Petroleum Inc. will make a motion to the Bankruptcy Court on a date to be determined via telephone conference.

PROPOSED METHOD OF HEARING: The motion is to be heard:

- in writing under subrule 37.12.1(1) because it is on consent or unopposed or made without notice;
- in writing as an opposed motion under subrule 37.12.1(4);
- orally via telephone conference.

THE MOTION IS FOR:

1. An Order:
  - (a) if necessary, abridging the time for invalidating the method of service of the Notice of Motion and Motion Record and directing that any further service of the Notice of the Motion and Motion Record be dispensed with such that this motion is properly returnable on the date that it is heard;
  - (b) if necessary, declaring that the stay of proceedings (the “**Stay**”) arising by operation of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”) as a result of the Notice of Intention to Make a Proposal (the “**NOI Proceedings**”) of 1732427 Ontario Inc. and 1787930 Ontario Inc. cob Messenger Freight Services (“**Messenger**”) be lifted *nunc pro tunc* to permit the delivery and filing of this Notice of Motion and Motion Record and the granting of the relief requested herein;

- (c) declaring that the stay of proceedings (the “**Stay**”) arising by operation of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”), as a result of the proposal of Messenger, a defendant in the Proposed Action, be lifted and granting leave, *nunc pro tunc* if necessary, to allow Transit to commence an action against Messenger substantially in the form attached at Schedule “A” to this Notice of Motion (the “**Proposed Action**”);
- (d) such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

1. MNP Ltd. was appointed as Trustee in the Notice of Intention to Make a Proposal of Messenger;
2. In the Proposed Action, the claims against Messenger include those that are not released by the acceptance of the Proposal in these NOI Proceedings, including claims for fraud and fraudulent misrepresentation;
3. Unless Transit is permitted to commence the Proposed Action against Messenger, it is likely to be materially prejudiced;
4. It is just and equitable that leave to commence the Proposed Action against Messenger be granted;
5. Sections 69.1, 69.31, 69.4, 178(1)(d), 178(1)(e) of the BIA;
6. Rules 3, 4, 6, 9, 11 and 13 of the of the *Bankruptcy and Insolvency General Rules* under the *BIA*;
7. Rules 2.03, 3.02, 16, 37 and 39 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194;
8. Such further and other grounds as counsel may advise and this Honourable Court permits;

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. Affidavit of Trevor Chambers sworn December 17, 2020; and

2. Such further and other material as counsel may advise and this Honourable Court may permit.

December 17, 2020

**MILLER THOMSON LLP**

One London Place  
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Lawyers for Transit Petroleum Inc.

TO: THE SERVICE LIST

SCHEDULE "A"



Court File No.:

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

TRANSIT PETROLEUM INC.

Plaintiff

- and -

1787930 ONTARIO INC. o/a MESSENGER FREIGHT SYSTEMS and LOUISE VONK-HIDDINK

Defendants

**STATEMENT OF CLAIM**

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date:

Issued by \_\_\_\_\_  
Local registrar

Address of 85 Frederick St.  
court office Kitchener, ON

TO: 1787930 Ontario Inc.  
150 Dennis Road  
St. Thomas, Ontario  
N5P 0B6

AND TO: Louise Vonk-Hiddink  
11 Mulberry Lane  
St. Thomas, Ontario  
N5R 6J6

### CLAIM

1. The plaintiff, Transit Petroleum Inc. ("**Transit**"), claims:
  - (a) damages against the defendants, 1787930 Ontario Inc. ("**178**") and Louise Vonk-Hiddink ("**Louise**") , in the amount of \$156,644.44 for fraudulent misrepresentation, fraud, breach of contract and breach of duty of good faith and honest performance of a contract;
  - (b) a declaration that the within claim for damages in relation to the period preceding the filing of a Notice of Intention to File a Proposal ("**NOI**") by 178 is a claim that is not released by order of discharge by virtue of being of the nature of a debt or liability listed within s.178(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**");
  - (c) a declaration that 178 and Louise have been oppressive or unfairly prejudicial to the plaintiff, along with relief pursuant to s. 249 of the *Business Corporations Act*, R.S.O. 1990, c. B.16. (the "**OBCA**") for compensation in the sum of \$156,644.44 or such further amount as shall be proven at trial;
  - (d) aggravated, exemplary and punitive damages in the sum of \$300,000;
  - (e) pre-judgment and post-judgment interest at a rate of 19.56% per annum pursuant to an agreement between the parties or, in the alternative, as the rates provided for pursuant to the *Courts of Justice Act*, R.S.O. 1990 c. C-43;
  - (f) costs of this action on a full indemnity basis, together with all applicable taxes thereon; and
  - (g) such further and other relief as this Honourable Court may deem just.

2. The plaintiff, Transit is a corporation incorporated pursuant to the laws of Ontario and carries on business in Southwestern Ontario with its head office located in Kitchener, Ontario. Transit is a supplier of petroleum products.

3. The defendant 178, carrying on business as Messenger Freight Systems, is a corporation incorporated pursuant to the laws of Ontario. 178 is a logistics company that picks up and delivers goods to customers on a schedule.

4. The defendant Louise is an individual resident in the province of Ontario and was, at all material times, the sole director and officer of 178.

## **BACKGROUND**

5. On or about March 10, 2011, 178 executed an application for credit with Transit (the "**Credit Agreement**").

6. The Credit Agreement provided for the ongoing supply of petroleum products to 178 purchased on credit with Transit. The Credit Agreement also stated the following, among other things:

- (a) 178 agrees to pay the total amount set out in each invoice issued by Transit for such purchases within 15 days; and
- (b) Interest is charged on overdue amounts at a rate of 1.5% per month (19.56% per annum) (the "**Contractual Interest Rate**").

7. 178 executed a pre-authorized debit ("**PAD**") agreement with Transit for the payment of invoices submitted by Transit by way of pre-authorized debit payments.

8. In accordance with the Credit Agreement, Transit sold petroleum products to 178 from time to time, and 178 paid for these amounts by way of pre-authorized debit payments ("**PADs**").

9. Transit was a key supplier to 178. 178 purchased approximately \$200,000 worth of fuel on a monthly basis from Transit for 178's fleet of trucks.

## **DEFAULT ON CREDIT AGREEMENT AND NEGOTIATION OF PAYMENT PLAN**

10. In or around June of 2018, PADs for amounts owing on invoices by 178 began to be returned to Transit, noted as “insufficient funds”. As of June 22, 2018, the balance of arrears owing to Transit by 178 on unpaid invoices was approximately \$170,000.

11. On June 18, 2018, a PAD payment on an invoice due by 178 did not go through. Transit received the returned PAD with a notification from the bank indicating 178’s account as “Account Frozen”.

12. Monique Paul, credit analyst with Transit, (“**Monique**”), contacted Nathan McDaniel, Financial Controller of 178, (“**Nathan**”), to inquire about 178’s frozen account status and about getting Transit’s overdue accounts paid. During a conversation on or about June 22, 2018, Nathan informed Monique that 178’s bank account had been frozen due to fraudulent activity. 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.

13. At this time, and unbeknownst to Transit, 178 knew that its bank account had actually been frozen by the Canada Revenue Agency (the “**CRA**”) for unpaid and outstanding tax arrears, not because of fraudulent activity.

14. Relying on the statement by Nathan that the freezing of 178’s bank accounts was unrelated to financial distress or insolvency, Transit continued supplying fuel products to 178 on credit and entered into discussions and negotiations with 178 regarding a payment plan for repayment of the amounts owing on its unpaid invoices.

15. Following the conversation on June 22, 2018, 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.

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.

17. Following that e-mail request, Monique and Tina Thorne (“**Tina**”), a Credit Analyst with 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.

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 dated July 28, 2018, she confirmed that Transit would “accept this proposal” for the Agreed Payment (the “**Payment Plan**”). 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.

19. At this time, the defendants knew, and concealed from Transit, that 178 was insolvent and considering a NOI but entered into the agreement for the Payment Plan in any event with Transit for payment of its accounts beginning on July 5, 2018.

20. Monique asked Nathan to confirm that there would not be any further NSF’s (not sufficient funds) 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 Monique’s June 28, 2018 e-mail.

21. Monique emailed Nathan on Friday, June 29, 2018 regarding the July 5 Agreed Payment (as defined and described below), 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.

22. At no time during these discussions and negotiations did the defendants inform Transit of its intention to file a Notice of Intention to Make a Proposal (“**NOI**”), that it was considering filing an NOI, or that it was insolvent and unable to fulfill its obligation to pay under a payment plan and for fuel products purchased going forward.

23. At this time and all relevant times, the defendants knew that 178 was insolvent and continued to purchase fuel from and become indebted to Transit.

24. The defendants made representations while knowing them to be false to Transit about 178's financial circumstances and ability and intention to pay to ensure that Transit continued to supply fuel to 178 while it was insolvent.

25. The defendants intended that Transit rely on those false representations to ensure that Transit, a key supplier, would continue to supply fuel to 178's fleet of trucks.

#### **WITHDRAWAL OF JULY 5 AGREED PAYMENT**

26. The Payment Plan contemplated four installment payments to be paid by 178 by way of PAD, with the first PAD to be paid on July 5, 2018 and the last PAD to be paid on July 23, 2018. The first payment in the amount of \$83,734.05 was to be paid by PAD on Thursday July 5, 2018 (the "**July 5 Agreed Payment**").

27. On Tuesday, July 3, 2018, the first day of regular business hours back following the Canada Day long weekend, Monique attempted to get into contact with 178 by telephoning and emailing Nathan, for the purpose of confirming the submission of the PAD for the July 5 Agreed Payment, in order to ensure there were sufficient funds in 178's bank account.

28. Upon receiving no response from Nathan or any other representative at 178, Monique proceeded to have the PAD for the July 5 Agreed Payment submitted to Libro Credit Union ("**Libro**") on July 3, 2018 for processing and withdrawal to occur on Thursday, July 5, 2018.

29. Monique informed Nathan by email that the PAD for the July 5 Agreed Payment had been submitted.

30. Even though Monique was Nathan's contact at Transit and was the person he had communicated with regarding the July 5 Agreed Payment, he did not contact Monique to stop the PAD for the July 5 Agreed Payment.

31. The defendants did not ask Transit to not submit the PAD for the July 5 Agreed Payment or to stop or cancel the PAD for the July 5 Agreed Payment once it was submitted.

32. 178 did not stop the PAD for the July 5 Agreed Payment.

#### **REVEALING OF 178'S FILING OF AN NOI**

33. On Thursday, July 5, 2018 at 1:00 p.m., a meeting between representatives of Transit and representatives of 178 was held at the Transit office. In attendance at this meeting on

behalf of 178 was Louise and Blaine Skirtscak, General Manager of 178, ("**Blaine**"), and on behalf of Transit was Trevor Chambers, Division Manager of Transit, ("**Trevor**"), and Monique.

34. During this meeting, 178 informed Transit that three days earlier, on Monday, July 2, 2018, it had filed an NOI under the BIA. This was the first point in time that Transit had knowledge of the potential or actual filing of an NOI by 178.

35. During this meeting, Louise communicated that 178 required the continued support of its key vendors for fuel and truck drivers in order to continue to operate during this time, and she told Transit that 178 was willing to do whatever was necessary to keep Transit as their fuel supplier. Louise stated that the outstanding balance owing to Transit would be paid in full, as Transit was a key supplier to 178.

36. Louise and Blaine also told Transit during this meeting, that they had insisted that the PAD for the July 5 Agreed Payment be permitted to go through and applied to the pre-NOI amounts due because 178 needed Transit as a supplier in order to help keep it in business. It was communicated by 178 that the July 5 Agreed Payment PAD rightfully went through to Transit, and that Transit was able to and should retain this July 5 Agreed Payment.

37. Based upon 178's representations that the July 5 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.

38. During a call on Monday, July 9, 2018 between Nathan, Monique, Don Poort ("**Don**"), the Chief Financial Officer of Transit at the time, and Trevor Chambers ("**Trevor**"), the Division Manager at Transit at the time, Nathan advised that he had allowed the PAD for the July 5 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.

39. At no time during the July 9, 2018 phone call did Nathan ask for the July 5 Agreed Payment to be returned to 178 or advise that the return of the July 5 Agreed Payment from Transit would be sought.



40. The defendants agreed by words and conduct that Transit should and could withdraw and retain the July 5 Agreed Payment to be applied to the pre-NOI obligations of 178 to Transit.

41. 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 July 5 Agreed Payment would be made on July 5 and thereafter that Transit could retain the July 5 Agreed Payment.

42. Despite Transit's good faith dealings with 178, 178 had approached Petro Canada for the supply of fuel and agreed to provide a security deposit to Petro Canada for that supply of fuel.

43. After 178 secured Petro Canada as a fuel supplier, 178 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 July 5 Agreed Payment from Transit.

44. Transit supplied fuel in the post-NOI period in the aggregate amount of \$84,434.28. 178 paid \$36,000 to Transit on account of a portion of these post-NOI fuel supplies. There is a balance remaining on the unpaid invoices for supply of fuel in the post-NOI period due and owing by 178 to Transit of \$48,434.28 ("**Post-NOI Amount Owing**").

## **PROPOSAL PROCEEDINGS**

45. 178 filed a proposal with MNP Ltd. ("**MNP**"), as proposal trustee, which was accepted by the requisite majority of creditors and approved by the court (the "**Proposal**").

46. 178 brought a motion in the proposal proceedings pursuant to s.69(1) of the BIA for an order requiring the return of funds received by Transit following the issuance of its NOI on July 2, 2018, in the amount of the July 5 Agreed Payment.

47. By Endorsement of Justice Raikes on January 28, 2019 (the "**Raikes Decision**"), Transit was ordered to return the July 5 Agreed Payment to 178, after the Post-NOI Amount Owing was set off, in the net amount of \$35,299.75.

48. Transit appealed the Raikes Decision. By decision dated December 3, 2019 (the "**Court of Appeal Decision**"), the Court of Appeal set aside the Raikes Decision and remitted the

matter to Justice Raikes for a new hearing on all issues except for Transit's entitlement to the Post-NOI Amount Owing. In addition, the Court of Appeal held that Transit was entitled to costs of the appeal in the agreed amount of \$15,000 (the "**Costs Award**") inclusive of disbursements and applicable taxes, with the disposition of costs of the motion below being reserved to Justice Raikes.

49. 178 has not paid the Post-NOI Amount Owing or the Costs Award to Transit.

### **SURVIVAL OF CLAIM**

50. Pursuant to s.62(2.1) of the BIA, Transit's claim for damages arising from the supply of fuel provided in the pre-NOI period is not discharged by the acceptance of the Proposal as they are debts or liabilities referred to in subsection 178(1) of the BIA and specifically ss. 178(1)(d) and (e), being claims based on (i) fraudulent misrepresentation and (ii) a debt or liability arising out the defendants' fraud, embezzlement, misappropriation, or defalcation while acting in a fiduciary capacity.

51. The Proposal did not explicitly provide for the compromise of the claims under section 178 of the BIA. Transit, as an unsecured creditor, did not vote for the acceptance of the Proposal.

### **FRAUDULENT MISREPRESENTATION**

52. The defendants are liable for damages arising from their statements of misrepresentation made to Transit, which were relied upon and resulted in losses by way of amounts owing to Transit for pre-NOI fuel purchases and damages arising in relation to post-NOI fuel purchases.

53. Transit submits that exceptional circumstances exist to result in the liabilities of the corporation of 178 attaching directly and personally to Louise.

54. Louise is the sole director and officer of 178. She is also the owner of 178. As such, Louise was at all material times the directing and controlling mind of 178. 178 was at all material times dominated and controlled by Louise.

55. Louise expressly directed that 178 provide representations to Transit which she knew were false. These representations concerned 178's willingness and ability to repay its amounts

owing to Transit for pre-NOI and post-NOI purchases and the valid and rightful entitlement of Transit to the July 5 Agreed Payment.

56. As 178's controlling mind, Louise directed a wrongful thing to be done, namely the making of fraudulent misrepresentations by herself and others, including Nathan, and on this basis, personal liability for the losses suffered by Transit as a result attaches to Louise.

57. The corporate personality of 178 was used as a veil behind which Louise attempted to shield herself from liability for conduct that was harmful and prejudicial to Transit's interests as a creditor. Louise's own actions were themselves tortious, and as such, result in the lifting of 178's corporate veil and attaching of liability for these actions to Louise personally.

***Misrepresentation 1: Statement that 178's Bank Accounts Were Frozen Due to Fraudulent Activity***

58. On June 22, 2018, Nathan stated to Monique that 178's bank accounts had been frozen due to fraudulent activity. This was a false representation. CRA had frozen the bank accounts because of tax arrears.

59. Nathan, on behalf of 178, knew that this representation made to Transit was false. As the Financial Controller of 178, Nathan was at all material times familiar with the current financial status and affairs of 178, and as such, had knowledge of the real reason for the freezing of its bank accounts.

60. The false representation caused Transit to act.

61. The false representation caused Transit to enter into negotiations as to a payment arrangement, and ultimately, agree to the Payment Plan, whereby 178 was to provide payments on its arrears by way of four installments, including the first installment by way of a PAD for the July 5 Agreed Payment. Transit was willing to negotiate and agree to the Payment Plan for the eventual repayment of arrears owing by 178 because it had no knowledge of CRA freezing 178's bank accounts or 178's insolvency.

62. Transit relied on the misrepresentation that 178's bank accounts had simply been frozen on account of fraudulent activity, and this resulted in negotiating and entering into the Payment Plan. Had Transit known that CRA had frozen the bank accounts because of unpaid and outstanding tax arrears, Transit would not have agreed to the Payment Plan with 178.

63. In addition, the false representation caused Transit to act by deciding to continue to supply fuel to 178. Had Transit known of the true reason for the freezing of 178's bank accounts, Transit would not have continued to supply fuel products to 178 thereafter. Transit would have been aware of 178's inability to pay its accounts as they became due and, as such, would have stopped supplying additional fuel products to 178, both pre-NOI and post-NOI, for which 178 was unable or unwilling to pay.

64. Transit's actions, done in reliance on the false representations made by the defendants, resulted in a loss to Transit.

***Misrepresentation 2: Misrepresentations During Negotiations as to Payment Plan and Ability of 178 to Pay Transit***

65. On or around June 22, 2018, Transit and 178 commenced negotiations and discussions surrounding the resolution of outstanding amounts owing to Transit by 178 by way of its unpaid accounts. These negotiations continued from June 22, 2018 until June 28, 2018.

66. On June 28, 2018, 178 and Transit agreed to a Payment Plan which provided for the payment for outstanding arrears by way of four installment payments in order to eventually satisfy the total outstanding balance owed to Transit for unpaid invoices. The first of these installment payments was the July 5 Agreed Payment.

67. Throughout the negotiations and leading up to the day on which the PAD for the July 5 Agreed Payment was withdrawn, the defendants falsely represented to Transit that 178 intended to make all payments to Transit, including the July 5 Agreed Payment, and that Transit could withdraw and retain the July 5 Agreed Payment on account of the pre-NOI amount owing to Transit.

68. The defendants knew that these representations to Transit were false and they knew that 178 could not and/or would not pay for purchases, both pre-NOI and post-NOI.

69. In the days leading up to the submission of the July 5 Agreed Payment and during the negotiations as to the terms of the Payment Plan with Transit, 178 knew that it was insolvent and that it was considering, planning and intended to file an NOI. The defendants intentionally concealed this intention or consideration from Transit.

70. At the time of submission of the PAD for the July 5 Agreed Payment, the defendants knew that the NOI had been filed three days prior. The defendants did not advise Transit about the NOI until July 5, 2018, days after 178 knew that the PAD for the July 5 Agreed Payment had been submitted by Transit.

71. 178's false representations caused Transit to act.

72. Transit relied upon 178's representation that it would abide by the terms of the agreed Payment Plan and that the July 5 Agreed Payment was being validly paid to Transit to satisfy pre-NOI obligations. This false representation caused Transit to allow 178 to continue obtaining fuel products on credit with Transit.

73. Had the misrepresentation not been made, Transit would have stopped supplying fuel products because it would have been aware that 178 was unable or unwilling to honour the terms of a Payment Plan, that 178 was intending to demand the return of the PAD for the July 5 Agreed Payment and that 178 did not intend to pay Transit for post-NOI purchases.

74. Transit's actions, done in reliance on 178's false representations, resulted in a loss to Transit.

***Misrepresentation 3: Misrepresentation that Transit was Entitled to Retain the Funds from the PAD for the July 5 Agreed Payment to Satisfy 178's Pre-NOI Obligations***

75. Following submission of the PAD on July 5, 2018 and filing of 178's NOI, the defendants made multiple representations as described herein to Transit that the PAD for the July 5 Agreed Payment had been permitted to go through, that 178 did not wish or intend to stop it, cancel it, or ask for the repayment of it, and that Transit would rightfully be able to and should retain the July 5 Agreed Payment. The defendants knew that these representations were false.

76. Louise herself was present at the meeting held on July 5, 2018 at Transit's office. She herself provided statements of misrepresentations on behalf of 178 to Transit. She personally communicated the following statements to representatives of Transit, among other things, that:

- (a) the outstanding balance for both pre-NOI and post-NOI purchases owing to Transit would be repaid in full;

- (b) 178 directed the July 5 Agreed Payment to be allowed to go through, that this payment rightfully belonged to Transit who should retain same, and that 178 would not seek the return of the July 5 Agreed Payment;
- (c) Transit was a vital vendor of 178 which it required in order to continue to operate; and
- (d) 178 would do whatever was necessary to keep Transit as its supplier of fuel.

77. Louise directed 178 to make statements and act fraudulently.

78. Both 178 and Louise knew that the representations were false. The defendants knew that 178 was unwilling or unable to satisfy its accounts outstanding for pre-NOI and post-NOI purchases owing to Transit. The defendants knew that the intention of 178 was to seek the return of the July 5 Agreed Payment and did eventually demand the return of the July 5 Agreed Payment. Given this knowledge, the defendants made statements that were false and acted fraudulently.

79. These representations were made in order to secure Transit as 178's fuel supplier which was crucial to allow it to continue on its operations.

80. These misrepresentations caused Transit to act.

81. The defendants' acknowledgement of Transit's entitlement to the July 5 Agreed Payment PAD and that Transit would be able to rightfully retain the July 5 Agreed Payment funds in partial satisfaction of pre-NOI obligations caused Transit to agree to continue supplying fuel products.

82. Had the defendants not made these misrepresentations, Transit would not have continued to supply fuel products to 178.

83. Transit's actions done in reliance on 178's misrepresentation resulted in a loss suffered by Transit.

## **Fraud**

84. The defendants made false representations, as described above.

85. The defendants had knowledge of the falsehood of these representations at the time of making them.

86. In the alternative, the defendants recklessly made the misrepresentations without belief in their truth.

87. Louise, as the controlling mind of 178 at all material times, can be found to be personally liable for damages flowing from fraud, as she expressly directed a wrongful thing to be done, namely, the making of these false representations, which amounts to fraud.

88. Louise was acting in a fiduciary capacity at all material times, as a director of 178. She had a duty to act in the best interests of 178. By committing fraud on behalf of the corporation, she breached this fiduciary duty.

89. The defendants' misrepresentations caused Transit to act by causing it to agree to the Payment Plan and to continue supplying fuel on an ongoing basis on credit to 178.

90. The conduct of the defendants amounts to fraud.

91. As a consequence of its reliance on the false representations made by the defendants, Transit has suffered damages.

92. The damages incurred by Transit as a result of the fraudulent misrepresentations and fraud are comprised of two parts, one arising during the period leading up to the filing of 178's NOI on July 2, 2018, and the other arising during the period following the filing of 178's NOI.

### **Breach of Contract**

93. Further and in the alternative, Transit submits that the defendants, 178 and Louise, are liable to it for damages resulting from breach of contract.

94. Transit and 178 entered into a contract, the Credit Agreement, on March 10, 2011 which required 178 to, among other things, provide payments on all invoices due within 15 days of the invoice.

95. Transit issued invoices to 178 which remain unpaid, including both pre-NOI and post-NOI invoices.

96. 178 failed to provide payments on these invoices within 15 days of the dates on the invoices. The failure to pay these invoices when due is a breach of the Credit Agreement.

97. Louise, as the controlling mind of 178 at all material times, expressly directed a wrongful thing to be done, namely, the Credit Agreement to be breached.

98. Transit is entitled to damages arising from the defendants' breach of contract.

99. The Credit Agreement provides that accounts not paid by their due date are subject to an interest charge from the date of maturity at the rate of 1.5% per month, or 19.56% per annum, as shown on the invoices.

### **Breach of Duty of Honest Performance of Contract**

100. Further and in the alternative, Transit submits that it is entitled to damages arising from the defendants' breach of its duty of honest performance.

101. 178, as a contractual party with Transit, had a duty of honest performance which required it to be honest with Transit in relation to the performance of its contractual obligations under the Credit Agreement and the Payment Plan.

102. Transit submits that 178 failed to be honest with it in relation to the performance of its contractual duties and as such, breached its duty of honest contractual performance.

103. 178 knowingly mislead Transit in relation to matters linked to performance of the Credit Agreement and the Payment Plan including 178's payment of the July 5 Agreed Payment. It mislead Transit by doing the following, among other things:

- (a) misleading Transit by misrepresenting and concealing the true reason for the freezing of its bank accounts on June 22, 2018;
- (b) misleading Transit by concealing and failing to disclose the nature and extent of its level of financial difficulty from Transit prior to the filing of its NOI and following the filing of its NOI until July 5, 2018;
- (c) misleading Transit by engaging in bad faith negotiations as to the Payment Plan arrangements between June 22 and June 28, 2018;
- (d) misleading Transit by misrepresenting that it had a good faith intention and willingness to agree to and abide by the Payment Plan's terms, including providing the July 5 Agreed Payment;



- (e) misleading Transit by misrepresenting that it had the financial ability to agree to and abide by the Payment Plan's terms, including providing the July 5 Agreed Payment.
- (f) misleading Transit by concealing and failing to disclose 178's intention, plan, or consideration of filing an NOI, including following the date of filing of the NOI and up until July 5, 2018;
- (g) misleading Transit by misrepresenting that the July 5 Agreed Payment was a valid payment and rightfully belonged to Transit and that it would not seek, and had no intention of seeking, the return or repayment of same;
- (h) misleading Transit by engaging in bad faith negotiations and discussions during the July 5, 2018 meeting and discussions thereafter;
- (i) misleading Transit by misrepresenting that 178 intended in good faith and was willing to repay amounts owing to Transit to settle its pre-NOI obligations in an attempt to keep it as its fuel supplier;
- (j) misleading Transit by misrepresenting that 178 would pay for all post-NOI purchases; and
- (k) misleading Transit by misrepresenting that 178 was unable to provide Transit with a security deposit because it was disallowed by MNP Ltd.

104. Transit further submits that Louise, as the controlling mind of 178, is also personally liable for losses suffered as a result of the breach of the duty of honest contractual performance, by expressly directing that such dishonest and misleading statements and actions be made by 178.

105. If the defendants had fulfilled their duty of honest performance, Transit would not have continued on supplying fuel products beginning on or around June 22, 2018 until July 11, 2018.

106. Transit has suffered damages as a result of the defendants' breach of their duty of honest contractual performance.

### **Oppression Remedy**

107. Transit was at all material times an unsecured creditor of 178 pursuant to the Credit Agreement.

108. Transit is entitled to make a claim for an oppression remedy, as it had a reasonable expectation of being treated fairly as a creditor.

109. Transit and 178 had a long commercial relationship, from on or about 2011 until 2018, during which Transit provided substantial amounts of fuel products to 178 on credit.

110. On multiple occasions over the course of this relationship, 178 demonstrated an inability or delay in paying its accounts when due to Transit, including, without limitation, multiple PADs for payments due being returned from the bank indicating 178's account was noted as "insufficient funds" and stop payments being placed on scheduled PAD payments by 178. On each occurrence, Transit engaged in good faith negotiations and discussions with 178 to enter into mutually agreeable arrangements for the repayment of the amounts outstanding, and 178 demonstrated a good faith willingness to settle its outstanding accounts. As such, a relationship of understanding and fairness developed between the parties.

111. As a key supplier to 178, its products were integral to the carrying on of 178's business involving operating and driving its large fleet of trucks for its freight transportation purposes.

112. Transit thus had a reasonable expectation of being treated fairly as a creditor of 178.

113. Beginning on June 22, 2018, 178's actions failed to meet this expectation of fairness and caused detrimental consequences to Transit that amounted to oppression, unfair prejudice, and unfair disregard of its interests. Such actions done by 178 include, among other things, oppressing, unfairly prejudicing, and unfairly disregarding the interests of Transit by:

- (a) misrepresenting and concealing the true reason for the freezing of its bank accounts on June 22, 2018;
- (b) concealing and failing to disclose the nature and extent of its level of financial difficulty from Transit prior to the filing of its NOI and following the filing of its NOI until July 5, 2018;
- (c) engaging in bad faith negotiations with Transit as to the Payment Plan arrangements between June 22 and June 28, 2018;
- (d) misrepresenting that it had a good faith intention and willingness to agree to and abide by the Payment Plan's terms, including providing the July 5 Agreed Payment;
- (e) misrepresenting that it had the financial ability to agree to and abide by the Payment Plan's terms, including providing the July 5 Agreed Payment.

- (f) concealing and failing to disclose 178's intention, plan, or consideration of filing an NOI, including following the date of filing and up until July 5, 2018;
- (g) misrepresenting that the July 5 Agreed Payment was a valid payment and rightfully belonging to Transit and that it would not seek the return or repayment of same;
- (h) engaging in bad faith negotiations during the July 5, 2018 meeting;
- (i) misrepresenting that 178 intended to repay amounts owing to Transit to settle its outstanding pre-NOI obligations in an attempt to keep it as its fuel supplier;
- (j) misrepresenting that 178 intended to pay Transit for all obligations relating to the post-NOI supply of fuel; and
- (k) misrepresenting that 178 could not supply Transit with a security deposit on account of its trustee disallowing same.

114. Louise, as the controlling mind of 178, is also personally liable for 178's oppressive conduct, as she directed the above wrongful things to be done by 178, which amounted to oppressive, unfairly prejudicial, and unfairly disregarding actions to Transit.

115. Leading up to and throughout the insolvency of 178, 178 was required to take its creditors' interests into account. Transit's interests as a creditor with a legitimate interest in getting its accounts paid were oppressed, unfairly prejudiced, and unfairly disregarded by 178.

116. The conduct mislead and deceived Transit as to the financial status of 178 and to the willingness and intention of 178 to pay Transit. The oppressive conduct of the defendants caused Transit to supply additional fuel products to 178 on credit.

117. This oppressive, unfairly prejudicial, and unfairly disregarding conduct of 178 caused Transit to suffer damages.

## **DAMAGES**

118. The defendants are liable for damages for the pre-NOI period running from June 22, 2018 until July 2, 2018 for purchases in the amount of \$108,210.16. This amount remains unpaid.

119. Further, during the period from the filing of the NOI on July 2, 2018 to the date when Transit stopped supplying fuel to 178 on July 11, 2018, Transit supplied to 178 fuel products in the aggregate amount of \$84,434.28. 178 has provided a partial payment on these post-NOI fuel purchases in the amount of \$36,000. This results in the Post-NOI Amount Owing of \$48,434.28.

120. Transit submitted an Amended Proof of Claim dated March 26, 2019 in the Proposal for an unsecured claim of \$286,525.64 for pre-NOI obligations of 178 to Transit. This amount assumes the return of the July 5 Agreed Payment from Transit to 178 based on the Raikes Decision. The Court of Appeal has set aside the Raikes Decision and returned it to Justice Raikes for determination but that determination has not been made. Transit has not received any payments from the proposal proceedings.

121. The Credit Agreement entered into between 178 and Transit includes the Contractual Interest Rate of 19.56% per annum on all unpaid accounts accruing from the due date. This interest rate is the one to govern all unpaid accounts for fuel supplied by Transit to 178.

122. The actions of the defendants were high handed, shocking and arrogant and warrant an award of aggravated, exemplary or punitive damages.

123. Transit pleads and relies upon the provisions of the:

- (a) *Business Corporations Act*, R.S.O. 1990, c. B.16, including section 241; and
- (b) *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

124. The plaintiff proposes that this action be tried in Kitchener, Ontario.

December \_\_\_\_, 2020

**MILLER THOMSON LLP**  
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255 Queens Avenue, Suite 2010  
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Lawyers for the Plaintiff, Transit Petroleum Inc.

TRANSIT PETROLEUM INC.  
Plaintiff

and

1787930 ONTARIO INC. and LOUISE  
VONK-HIDDINK  
Defendants

Court File No.:

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at KITCHENER

**STATEMENT OF CLAIM**

**MILLER THOMSON LLP  
ONE LONDON PLACE  
255 QUEENS AVENUE, SUITE 2010  
LONDON, ON CANADA N6A 5R8**

**Sherry A. Kettle**, LSO #53561B  
Tel: 519.931.3534  
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Lawyers for the plaintiff, Transit Petroleum Inc.

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

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**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at London

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**NOTICE OF MOTION**

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**MILLER THOMSON LLP**

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

**Sherry A. Kettle**, LSO #53561B  
Tel: 519.931.3534  
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Lawyers for Transit Petroleum Inc.

## TAB 2

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

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

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

**AFFIDAVIT OF TREVOR CHAMBERS  
(Sworn December 17<sup>th</sup>, 2020)**

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

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

**THE NOI PROCEEDINGS**

2. MNP Ltd. ("**MNP**") was appointed as proposal trustee under a Notice of Intention ("**NOI**") to Make a Proposal of 1732427 Ontario Inc. and 1787930 Ontario Inc. (the "**NOI Proceedings**").

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

4. 178 commenced legal proceedings as part of these NOI Proceedings against Transit for the recovery of a certain PAD payment that was withdrawn from 178's bank account after the filing of the NOI (the "**Transit Litigation**").

5. I have previously sworn an affidavit in Transit Litigation.

6. The motion brought by 178 in the Transit Litigation was heard by Justice Raikes. Justice Raikes held that the PAD payment should be returned to 178, less set off for the debt



owing for fuel supplied after the filing of the NOI. Attached as **Exhibit "A"** is a copy of Justice Raike's Endorsement dated January 28, 2019.

7. Transit appealed Justice Raike's decision to the Court of Appeal. By decision dated December 3, 2019, the Court of Appeal set aside the decision of Justice Raikes and remitted the matter back to Justice Raikes for a new hearing, except for Transit's entitlement to payment of post-NOI fuel purchases. Attached hereto as **Exhibit "B"** is a copy of the Court of Appeal decision.

8. The motion has not been scheduled with Justice Raikes.

#### **STATUS OF NOI PROCEEDINGS**

9. MNP brought a motion returnable on September 15, 2020 for, among other things, the approval of a distribution to creditors and authorizing the delivery by MNP of a Certificate of Full Performance upon receipt of certain payments. In its report to the Court, MNP noted that if the relief sought was granted, MNP could proceed to its discharge without having to wait for the outcome of the Transit Litigation. The Endorsement and Order of Madam Justice Mitchell on this motion is attached hereto as **Exhibit "C"**.

10. I am advised by Transit's counsel, Sherry Kettle, that she has been in contact with MNP to determine the status of the NOI Proceedings and to determine if MNP has been discharged as proposal trustee in the NOI Proceedings. By e-mail dated October 5, 2020, Sheldon Title of MNP advised Ms. Kettle that MNP had received a Certificate of Full Performance and was arranging for a meeting of inspectors, submission of the final Statement of Receipts and Disbursements ("**SRD**") to the Office of the Superintendent of Bankruptcy ("**OSB**") for comments and taxation before making final distribution and proceeding to its discharge.

11. I am further advised by Ms. Kettle that she followed up again with Mr. Title by e-mail on October 28, 2020 for an update. By return e-mail, Mr. Title advised Ms. Kettle that the Inspectors meeting was held on October 27, 2020 and the approved SRD was going to be submitted for comments to the OSB.

12. Ms. Kettle also advises that she has followed up with MNP for information on timing to discharge and more recently for an update but she has not heard anything further. Attached as **Exhibit "D"** is a copy of the e-mail string between Ms. Kettle and MNP.

13. Ms. Kettle advises me that she obtained an Insolvency Search from the Government of Canada dated December 14, 2020 and that this search did not show that MNP had been discharged. Attached hereto as **Exhibit "E"** is a copy of the Insolvency Search.

#### **PROPOSED CLAIM**

14. Transit is of the view that it has a claim against 178 and its principal, Louise Vonk-Hiddink, in respect to claims for, among other things, fraud and fraudulent misrepresentation. Attached hereto as **Exhibit "F"** is a copy of the proposed Statement of Claim.

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

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

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

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

19. No one at 178 told me that this PAD should not be submitted. I was not contacted by anyone at 178 to stop this PAD. I was not contacted by the Credit Union regarding any request made to it to stop the PAD.

- 4 -

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

21. At the July 5 Meeting, Louise and Blaine together told us that CRA froze 178's bank account around mid-June. They told us that 178 then contacted MNP who suggested that 178 should file a NOI to restrict further action by Canada Revenue Agency and to give 178 some breathing room to re-organize financially in order to carry on with business.

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

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

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

25. During the July 5 Meeting, there was no request by Louise or Blaine for a return of the PAD payment.

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

27. Transit specifically relied on the representations of 178 that all purchases would be paid for by 178 and that the July 5, 2018 payment had been allowed to go through so that 178 could continue in business. Transit continued to supply fuel to 178 post-NOI at 178's


request and continued to do business with 178 in good faith and based on 178's representations.

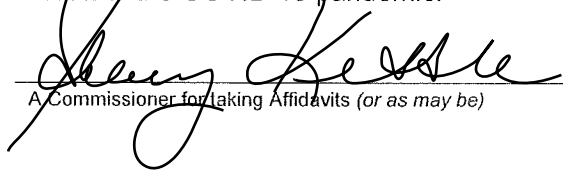
28. In the Proposed Claim, Transit alleges that 178 knowingly made representations that were false and that Transit relied on those representations to its detriment resulting in damages.

**LIFTING THE STAY OF PROCEEDINGS**

29. Transit will suffer irreparable prejudice if the limitations period for its claim expires. It is for this reason that Transit brings the motion to lift the stay of proceedings.

SWORN BEFORE ME over videoconference on the 17<sup>th</sup> day of December, 2020. The affiant was located in the City of KITCHENER, in the Province of Ontario and the Commissioner was located in the City of London, in the Province of Ontario. This affidavit was commissioned remotely as a result of the COVID-19 pandemic.

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

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

Attached are Exhibits "A" to "G" to the  
Affidavit of Trevor Chambers sworn the  
17<sup>th</sup> day of December, 2020

  
\_\_\_\_\_  
A Commissioner, Etc.

**EXHIBIT "A"**

**CITATION:** 1787930 Ontario Inc. v. Transit Petroleum, 2019 ONSC 716  
**COURT FILE NO.:** 35-2395487 & 35-2395481  
**ESTATE FILE NO.:** 35-2395481  
**DATE:** 20190128

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**IN BANKRUPTCY AND INSOLVENCY**

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

**BEFORE:** Justice R. Raikes

**COUNSEL:** Sherry Kettle Counsel, for Transit Petroleum

Bruce Simpson and Mr. Ly Counsel, for 1787930 Ontario Inc.

Trustee of 1787930 Ontario Inc. – MNP Ltd. (Att'n: Sheldon Title)

**HEARD:** December 19, 2018

**ENDORSEMENT**

- [1] 1787930 Ontario Inc. is a logistics company carrying on business as Messenger Freight Systems (hereafter “Messenger”). It operates a fleet of trucks for delivery of goods to customers.
- [2] Transit Petroleum (hereafter “Transit”) was a supplier of fuel for Messenger’s trucks. It supplied approximately \$200,000 of fuel to Messenger each month.
- [3] Messenger paid for the fuel by pre-authorised debits (“PADs”) from its account with the Bank of Nova Scotia. By June 2018, Messenger was in arrears for fuel already supplied by Transit. Some of the PADs did not go through because Messenger lacked sufficient funds to cover the payment (NSF). In addition, Messenger stopped payment on some payments due.
- [4] In mid-June 2018, the Canada Revenue Agency (“CRA”) issued a Requirement to Pay (“RTP”) and froze Messenger’s account at the Bank of Nova Scotia from which the PADs were drawn to pay Transit. Unbeknownst to Transit, the Bank of Nova Scotia then served Messenger with a Notice to Enforce Security pursuant to s. 144 of the *Bankruptcy and Insolvency Act* (“BIA”) seeking repayment of monies owing to the Bank, and informed Messenger that they were preparing materials to appoint a receiver.

- [5] The PAD payment due on June 18, 2018 did not go through. Transit received the PAD back with a notification from the Bank: “Account Frozen”.
- [6] On June 22, 2018, Nathan McDaniel (“McDaniel”), the Financial Controller at Messenger, spoke by telephone with Monique Paul (“Paul”), a Credit Analyst at Transit, concerning the overdue account; specifically, how Messenger was going to pay the arrears and ongoing fuel supplies. According to Paul, she was informed by McDaniel that Messenger’s account was frozen because of fraudulent activity.
- [7] By email dated June 22, 2018 to McDaniel, Paul confirmed Messenger’s proposal to pay the arrears by four PAD’s with the first on Monday, July 2 and the last on July 23, 2018. The proposal by McDaniel contemplated the following payments:

Monday, July 2, 2018 - \$83,734.05  
Monday, July 9, 2018 – regular amount owing plus \$27,911.35 for arrears  
Monday, July 16, 2018 – same as July 9  
Monday, July 23, 2018 – same as July 9

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

- [8] On June 25, 2018, McDaniel emailed Paul to request that the first payment be changed from Monday, July 2 to Friday, July 6.
- [9] On June 26, 2018, Paul and Tina Thorne (“Thorne”) spoke with McDaniel by telephone with respect to the requested change. They advised McDaniel that if the change was made to Thursday, the terms of payment would have to change from Net 14 to Net 7. Paul and Thorne aver that McDaniel agreed to that change during the telephone call; McDaniel does not recall what was discussed in that call.
- [10] After the telephone call, Paul emailed McDaniel on June 26, 2018. Paul indicated that Transit was prepared to change the PAD’s from Mondays to Thursdays “with the below proposal on getting the account current”. The proposal is materially different from that outlined in the June 22 email above. It contemplates three, not four payments. The first payment is \$111,645.40, the second \$83,004.86 and the last is the regular fuel payment plus \$27,911.35. The email is silent with respect to change of credit terms from Net 14 to Net 7.
- [11] McDaniel emailed Paul on June 27 at 5:40 PM. He wrote:

Much thanks for the patience and support that both you and Tina have demonstrated; it means a lot to me. Attached is a scan of a voided check [sic] from our new checking [sic] account; please use this banking information for future billings. With regards to the below – mentioned proposal, I would ask that



we adjust is [sic] slightly to be more in line with our original conversation. Would you let me know if my proposal is acceptable?

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

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

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

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

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

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

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

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

- [13] McDaniel emailed Paul on June 29, 2018 at 4:05 PM. He apologized for his delay and advised that he was being pulled in several directions. He asked her to call him on Tuesday when she was back in the office and indicated: "I just have a few questions regarding the terms... I want to make sure I am on the same page with you." No further communications took place between McDaniel and Paul until July 3, 2018 when Paul emailed McDaniel to ask him to call as soon as possible.
- [14] Transit takes the position that the June 28, 2018 email by Paul merely confirms the terms that had previously been agreed upon and accepts McDaniel's proposal as to the amounts and timing of payment. In other words, the change from Net 14 to Net 7 was already agreed upon and implicit in McDaniel's proposal of June 27 which Transit was accepting.
- [15] Messenger takes the position that the change to Net 7 was not previously agreed to, did not form part of McDaniel's proposal and represents a counter-offer to his June 27, 2018 proposal. In short, Paul asked for confirmation of acceptance/approval because it represented a change in the terms previously discussed. Thus, there was no agreement on

June 28, 2018, nor was there any communication of acceptance of Transit's proposed terms at any point before July 5, 2018.

- [16] On June 28, 2018, the Bank of Nova Scotia informed Messenger that it required Messenger to proceed by way of Notice of Intention to File a Proposal ("NOI") failing which the Bank would not forbear from enforcement procedures. No further discussions took place with Transit between June 28 and July 2 when, Messenger issued a NOI.
- [17] Thus, by the time Paul left a voicemail message and emailed McDaniel on July 3, the NOI had already been issued. In her voicemail message, she indicated that she needed to hear back from him by 10 AM that day to confirm that he would have no issues with the PAD on July 5. She testified that she simply wanted to make sure that funds would be available given the past history of NSF's and stop payments.
- [18] When she did not hear back from McDaniel, Paul sent a further email at 11:17 AM on July 3 in which she informed him that she had put the PAD through for withdrawal for July 5, 2018. She deposed that McDaniel did not respond and the PAD was submitted to Libro on July 3, 2018 at 11:45 AM for withdrawal from Messenger's account on July 5.
- [19] Messenger did not stop payment on the PAD and, according to Transit's witnesses, it did not advise Transit of the NOI before the PAD was processed and funds were transferred from the account to Transit on July 5.
- [20] On July 4, 2018, McDaniel sent an internal email at 2:37 PM in which he confirmed that he had asked Chambers, fuel manager at Transit, to put a hold or stay on the PAD for July 5. McDaniel deposes that there was no agreement to pay the \$83,734.05 on July 5 because he never accepted the changed terms. He also disputes that Transit was not informed that the PAD should not go through.
- [21] Transit asserts that it was unaware of the NOI until a meeting on July 5 at approximately 1 PM. The owner of Messenger, Louise Vonk (hereafter "Vonk"), and general manager, Blaine Skirtschak (hereafter "Skirtschak"), met with Paul and Trevor Chambers of Transit. During that meeting, Vonk informed Paul and Chambers that Messenger had filed a NOI on July 2, 2018 to restrict further action by CRA and to give Messenger some time to reorganize financially to carry on business.
- [22] During the July 5 meeting, Vonk indicated that Messenger needed Transit's support to keep operating and she was willing to do whatever was necessary to keep Transit as its fuel supplier. She did not request return of the monies received by Transit from the July 5 PAD. According to Paul and Chambers, Vonk advised that she allowed the PAD to go through because Transit was a "vital vendor" necessary for Messenger to remain in business.
- [23] Neither Vonk nor Chambers filed responding affidavits to dispute the evidence of the discussion at the meeting on July 5, 2018.
- [24] On July 6, 2018, Paul called McDaniel twice and left voice messages to discuss the following week's PAD for post-NOI purchases of fuel. McDaniel emailed Paul at 5:50 PM

on July 6 to apologize for not reaching out and advised that he would contact her on Monday, July 9, 2018.

- [25] On July 9, 2018, McDaniel spoke by telephone with Paul, Chambers and Don Poort, CFO for Transit. According to affidavits by Paul and Poort, McDaniel did not request return of the monies received by Transit on July 5 from the PAD. McDaniel advised in that telephone call that he had allowed the PAD to be processed because he had agreed to that payment on June 28, the payment had been processed and received by Transit before they knew of the NOI, and Messenger needed Transit to continue as a supplier to stay in business.
- [26] In his supplementary affidavit sworn October 15, 2018, McDaniel deposed, *inter alia*, that:
- a. he asked Paul on July 3 not to proceed with the July 5 PAD;
  - b. he tried unsuccessfully to stop the July 5 payment;
  - c. he did not retroactively authorize the July 5 PAD, nor did he offer the reasons proffered by Transit's witnesses for allowing the PAD to go through; and
  - d. he did not ask Poort for return of the July 5 PAD monies, but he did ask Paul for same.
- [27] As is evident, there are facts in dispute. Counsel for Transit asks me to find that McDaniel's evidence is not credible or reliable. She points to inconsistencies which she asserts undermine his evidence. The facts in dispute are material to whether there was an agreement to pay the arrears by four PAD's including the first on July 5, whether Messenger asked Transit not to proceed with that payment before July 5, and whether Messenger approved of that payment after the NOI was issued as part of an arrangement to ensure ongoing fuel supply from Transit.
- [28] Despite these factual issues, the following facts are not disputed:
- a. Messenger issued its NOI on July 2, 2018;
  - b. The PAD for \$83,734.05 was submitted to Libro on July 3 and processed on July 5, 2018, three days after the NOI was issued;
  - c. That payment was on account of monies owing by Messenger to Transit for fuel supplied before the NOI was issued;
  - d. After the NOI was issued, Transit supplied additional fuel to Messenger in the amount of \$48,434.30;
  - e. On July 11, 2018, Messenger entered into arrangements with Petro Canada for fuel for its trucks;
  - f. Messenger severed its fuel supply relationship with Transit on that date;
  - g. Transit filed a Proof of Claim in Messenger's Proposal in the amount of \$202,791.59 as arrears owing as of July 2, 2018. That figure includes the monies subsequently received on July 5 through the PAD.

## **Position of Parties**

### **a. Messenger**

[29] Messenger takes the following positions on this application:

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

**b. Transit**

[30] Transit takes the following positions:

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

**Analysis**

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

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

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

- [33] Section 69.4 of the *BIA* permits a creditor affected by the operation of section 69 to apply to the court for a declaration that that section does not operate for that creditor. The court may make such declaration if it is satisfied that the creditor is likely to be materially prejudiced by the continued operation of that section or it is equitable on other grounds to make that declaration: s. 69.4
- [34] Transit has never sought relief under section 69.4.
- [35] In *The Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters Canada, 2018) by Lloyd W. Houlden and Geoffrey B. Morawetz, the authors explain the intent and purpose of s. 69 and stay of proceedings in the following terms:

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

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

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

- [36] The word “remedy” in s. 69(1)(a) is to be given a broad interpretation: *Gene Moses Construction Ltd., Re*, 1999 CarswellBC 149 at paras. 9 and 10. Remedies are not restricted to proceedings of a judicial nature: *Gene Moses*, para. 11.
- [37] In *Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.*, 2005 CarswellOnt 9935 (S.C.J.), Lederman J. considered the scope of the meaning of “remedy” in the context of s. 69. He wrote at paras. 11 and 12:

11. While I agree that the word “remedy” in section 69(1)(a) should be given a broad interpretation, it must be a purposive one that is in accord with the objectives of the *BIA* generally, and in particular, the specific purposes of the stay provisions against secured and unsecured creditors, giving, in the words of E.B. Leonard and R.G. Marantz in their article, “Debt restructuring under the

*Bankruptcy and Insolvency Act*, June 1, 1995 – Stays of Proceedings, under the *Bankruptch and Insolvency Act*” (for the 1995 Insolvency Institute of Canada lectures), “a reorganizing debtor an opportunity to have some ‘breathing room’ during which to negotiate with its creditors and hopefully put together a prospective financial restructuring which would meet their requirements.”

12. A purposive definition of the word ‘remedy’ in section 69(1)(a) would suggest that, remedies which in any way hinder or could impair that process are caught within the section and are stayed. The issue should be approached contextually on a case-by-case basis and the remedy sought should be considered in terms of its impact on the objectives of the statutory stay provision. It is the impact rather than the generic nature of the relief sought which should govern. Therefore, if the injunctive relief sought detrimentally affects or could impair the ability of the insolvent person to put forth a proposal, it should be stayed, whereas, if the nature of the injunction sought would have no effect whatsoever on that ability, it should not be stayed.

- [38] In *Gene Moses*, the debtor construction company leased logging equipment with financial assistance from GE Capital Leasing. Monthly lease payments were payable. The lease payments were restructured at some point but were payable monthly by way of preauthorized debits (PAD’s). The construction company executed a NOI under the *BIA* which was filed with the official receiver on December 17, 1998. Five days later, GE presented three debit memos to the company’s bank totaling \$29,149. The bank honoured the debit memos and paid the money to GE.
- [39] The construction company sought return of the monies paid to GE after the NOI was issued. At para. 14, Master Powers held:
- I conclude that “remedy” in section 69 must be given a broad meaning. I also conclude that in presenting the debit memos for payment of the arrears of lease payments GE Capital was exercising a remedy to try and collect its debt. The exercise of this remedy is stayed pursuant to section 69(1) of the *Bankruptcy and Insolvency Act* and therefore GE Capital was not entitled to the use of those debit memos.
- [40] In *Startek Computer Inc. (Trustee of)*, Startek purchased computer equipment from Samtack. Startek paid for the goods by a cheque that was returned NSF. Startek then issued a second cheque to pay for the goods. Startek filed a NOI. Four days later, Samtack presented the first cheque to the bank again and this time it was honoured. Startek sought return of the funds received.
- [41] Harvey J. of the British Columbia Supreme Court held at para. 11 that by renegotiating the first cheque without the knowledge or consent of Startek or the trustee, the creditor (Samtack) “exercised a remedy and violated the existing state of proceedings”.

- [42] Transit distinguishes the result in *Startek* on the basis that Messenger expressly consented to the PAD being exercised on July 5, 2018, and subsequently confirmed that consent by word and conduct.
- [43] Transit argues that fuel is an essential requirement for a trucking business. Messenger needed time to restructure its debts while continuing to operate. It could not operate without fuel. As Ms. Vonk indicated at the July 9 meeting, Transit was a vital supplier. Allowing Transit to negotiate and retain the monies from the July 5 PAD is entirely consistent with the objectives of the *BIA*. Accordingly, the negotiation of that PAD on July 5 did not constitute the exercise of a “remedy”.
- [44] I disagree for the following reasons:
- a. The July 5, 2018 PAD was for fuel already delivered and consumed before July 2;
  - b. While Transit was aware that Messenger was having financial difficulties as evidenced by the frozen bank account and NSF payments, Transit was not aware of the full extent of Messenger’s difficulties or its plan to restructure its debt going forward. This is not a case where Messenger shared its plan, went to Transit to secure its future cooperation as a critical supplier and Transit agreed to do so only if its arrears were paid;
  - c. Messenger was able to replace Transit as a supplier within a day or two of the July 9 meeting;
  - d. Like the PAD’s in *Gene Moses* and the cheque in question in *Startek*, the July 5 PAD was simply to catch up payments missed or dishonoured before the NOI;
  - e. The July 5 PAD was part of an alleged “agreement” that contemplated four payments. Transit does not assert nor did it move under s. 69.4 to assert that the other three payments are other than debts provable in bankruptcy that are captured by the proposal made. There is no reason to treat the July 5 PAD different from the other PAD’s contemplated by the “agreement”; and
  - f. It was not open to Messenger to determine which creditors should be paid for monies already owing and to give its consent to payments to some creditors in preference to others.
- [45] I find that the July 5 PAD constitutes a remedy that is captured by the stay in s. 69(1)(a) of the *BIA*. It is contrary to the objective of the *BIA* to treat all creditors fairly to permit Transit to retain the monies received.
- [46] As mentioned, Transit did supply fuel in July 2018 after the NOI was issued and before Messenger switched to Petro Canada. It is entitled to set off the debt owing for that fuel

against the monies payable to Messenger for the July 5 PAD. In the result, Transit shall pay to Messenger the sum of \$35,299.75.

- [47] It is unnecessary for me to determine whether the parties reached an agreement on June 28 or at any point before July 2, 2018. The fact of such agreement would not change the analysis or result above. I note, however, that that issue did not lend itself to determination on the basis of conflicting affidavits and transcripts of cross-examinations. Were it necessary to determine that issue, I would direct a trial of an issue.
- [48] It is likewise unnecessary to determine whether the July 5 payment amounts to a fraudulent preference. I have grave misgivings with respect to Messenger's standing to assert that claim. It strikes me as passing odd that the party who preferred one creditor over others should make the application.
- [49] If the parties cannot agree on costs, they may make submissions not exceeding 3 pages within 21 days.



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Justice R. Raikes

**Date:** January 28, 2019



**EXHIBIT "B"**

## COURT OF APPEAL FOR ONTARIO

CITATION: 1732427 Ontario Inc. v. 1787930 Ontario Inc., 2019 ONCA 947

DATE: 20191203

DOCKET: C66803, C66871

Rouleau, Roberts and Harvison Young JJ.A.

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

Sherry Kettle, for the appellant, Transit Petroleum Inc.

Paul Neil Feldman and Oscar Strawczynski, for the respondent,  
1787930 Ontario Inc.

Heard: November 15, 2019

On appeal from the order of Justice Russell M. Raikes of the Superior Court of Justice, dated January 28, 2019, with reasons reported at 2019 ONSC 716, and 2019 ONSC 1623.

### REASONS FOR DECISION

[1] The appellant appeals from the motion judge's order requiring it to pay to the respondent the sum of \$35,299.75, plus pre-judgment interest, and costs in the sum of \$31,767.52.

[2] The motion judge allowed in part the respondent's motion to recover monies paid to the appellant after it had filed a notice of intention to file a proposal in bankruptcy ("NOI") on July 2, 2018. The motion judge found that the pre-authorized debit payment in the amount of \$83,734.05 ("the PAD") made to the appellant post-NOI, under a payment plan concluded pre-NOI, related to pre-NOI debts. As a result, contrary to s. 69(1)(a) of the *Bankruptcy and Insolvency*

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*Act*, R.S.C. 1985, c. B-3 ("*BIA*"), the PAD represented a prohibited "remedy against the insolvent person or the insolvent person's property". The motion judge concluded that the appellant should return the PAD to the respondent, net of the \$48,434.30 owing to the appellant for post-NOI fuel purchases. The appellant's entitlement to the latter is not disputed on appeal.

[3] The appellant submits that the motion judge erred in characterizing the payment as the prohibited exercise of a creditor's remedy when it represented a *bona fide* agreement concluded on July 5, 2018 to satisfy past debts in order to continue a vital fuel supply to assist in the respondent's restructuring.

[4] The respondent argues that the motion judge correctly determined that the July 5th PAD was a prohibited self-help creditor's remedy because it was payment for past fuel purchases. Moreover, once he determined that the PAD was a prohibited remedy, the motion judge was not required to consider any alleged agreements because the parties could not ratify what was otherwise prohibited. In any event, the respondent maintains that the appellant did not raise an alleged July 5th agreement before the motion judge but confined its argument to the impact of a pre-NOI agreement.

[5] In our view, the motion judge erred by failing to consider whether the parties had entered into a legitimate agreement to pay past debts in order to

Page: 3

secure the future supply of fuel. As a result, the matter should be remitted to him for a new hearing.

[6] In determining whether the July 5th PAD was a remedy, the motion judge was required to consider all the relevant surrounding circumstances in which it occurred. Accordingly, it is useful to set out a brief synopsis of the relevant context leading up to and concerning the July 5th PAD and the alleged agreement between the parties.

[7] Up until July 11, 2018, the appellant supplied fuel to the respondent, a trucking company. The respondent was experiencing serious financial difficulties and had fallen into arrears in payments to the appellant for fuel supplied. In June 2018, the parties entered into negotiations to conclude an agreement governing payment of past and future fuel purchases.

[8] While the motion judge declined to determine whether the parties had reached an agreement prior to the filing of the NOI on July 2nd, the appellant submits that pursuant to the agreement that it says was reached on June 28th, on notice to and without objection from the respondent, it submitted the PAD for payment on July 3<sup>rd</sup>, which was processed and paid to the appellant on July 5th.

[9] The appellant did not learn of the NOI until its meeting with the respondent on July 5, 2018. As noted at para. 21 of the motion judge's reasons, at that meeting, the respondent's owner, Louise Vonk, accompanied by its general

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manager, Blaine Skirtschak, informed the appellant's representatives, Monique Paul and Trevor Chambers, that the respondent "had filed a NOI on July 2, 2018 to restrict further action by CRA and to give [the respondent] some time to reorganize financially to carry on business".

[10] In para. 22 of his reasons, the motion judge summarized the appellant's evidence concerning the respondent's representations which the appellant says formed the July 5th agreement between the parties:

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

[11] The appellant insists that the issue of a July 5th agreement was raised before the motion judge. Paragraph 30 of the motion judge's reasons provide some support for the appellant's submission that it had advanced the argument that it was a key supplier who, subsequent to the NOI, was permitted to keep the July 5 PAD for past debts in furtherance of an agreement to maintain supply to the respondent as it restructured its business. Similarly, the appellant points to para. 31 of the affidavit of Trevor Chambers in which he deposes that:

Transit specifically relied on the representations of [the respondent], including Louise, Blaine and Nathan, that all purchases would be paid for by [the respondent] and

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that the Agreed Payment had been allowed to go through so that [the respondent] could continue in business. Transit continued to supply fuel to [the respondent] post-NOI at [the respondent's] request and continued to do business with [the respondent] in good faith and based on [the respondent's] representations.

[12] To be fair to the motion judge, it is not entirely clear to what extent in argument on the motion the appellant characterized the July 5th exchanges as constituting an agreement. However, it seems common ground that the motion judge did not squarely consider whether, in context, that exchange represented a *bona fide* agreement with a key supplier to pay past debts in order to secure a vital future supply of fuel for the respondent's continued operations.

[13] We do not agree with the respondent's submissions that the parties could not enter into an agreement for the payment of past debts in order to secure future fuel supplies. This would undermine the first stage of the *BIA* process that serves to encourage a debtor's successful reorganization as a going concern. Creditors and debtors alike benefit from the latter's continued operation. The goal of the stay and preference provisions under ss. 69, 95, 96 and 97 of the *BIA* is to give the debtor some breathing room to reorganize. Legitimate agreements with key suppliers also form a vital part of that process.

[14] Apposite is the commentary of E. Patrick Shea, "Dealing with Suppliers in a Reorganization" (2008) 37 C.B.R. (5th) 161 who writes:

There is, however, no specific prohibition in the *BIA* on the debtor effecting payment of claims provable in the

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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 [of the BIA]<sup>1</sup> 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. [Emphasis added.]

[15] It is our view whether the parties concluded a *bona fide* agreement on July 5th for the payment of past fuel supplies in consideration for continued fuel supply was a key issue to be determined on the respondent's motion. The determination of the issue of the July 5th PAD and alleged agreement could affect the motion judge's characterization of the PAD as a prohibited remedy under s. 69(1) of the *BIA*. As the motion judge made no factual findings respecting this issue, it is not possible nor desirable for this court to come to any determination. Given our reasons, the fairest route, as the parties agree, is to remit the matter to the motion judge for a new hearing.

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<sup>1</sup> Section 97(1) of the *BIA* provides as follows: 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.


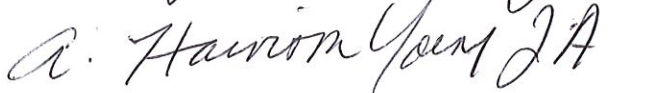
Page: 7

[16] We leave to the motion judge's discretion how best to manage the re-adjudication of this matter. With respect to the pre-NOI agreement, the motion judge concluded that, if he were inclined to do so, conflicts in the evidentiary record precluded him from making any findings concerning that agreement and he would order that the issue proceed to trial. It may be that is the case in relation to the alleged July 5th agreement. It will be up to the motion judge to decide whether he can make the necessary findings on the motion or whether the resolution of all these issues requires a trial.

[17] Accordingly, we set aside the motion judge's order and remit the matter to the motion judge for a new hearing on all issues except for the appellant's entitlement to the payment of \$48,434.30 for post-NOI fuel purchases.

[18] The appellant is entitled to its partial indemnity costs of the appeal in the agreed upon amount of \$15,000, inclusive of disbursements and applicable taxes. The disposition of the costs of the motion below is reserved to the motion judge.





**EXHIBIT "C"**

Court No.: 35- 2395487 and 35-2395481

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

SEPTEMBER 15, 2020 VIA TELECONFERENCE

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(IN BANKRUPTCY & INSOLVENCY)

(PROCEEDING COMMENCED AT LONDON)

P. SHEA - Proposal trustee  
S. TITEL - MNP (Trustee)  
S. KETTLE - Transit Petroleum

MOTION RECORD

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Lawyers for MNP Ltd.

All affected creditors and other stakeholders were properly served with notice of this motion and take no position. In particular, Transit Petroleum formally indicated to the Court it takes no position on the relief sought.  
Order signed in draft form provided.  
→ Mitchell J.

Court No.: 35- 2395487 and 35-2395481

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

THE HONOURABLE M	)	TUESDAY, THE 15 <sup>th</sup> DAY
	)	
JUSTICE MITCHELL	)	OF SEPTEMBER 2020

**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**

**ORDER**


**THIS MOTION**, made by MNP Ltd. (the “**Proposal Trustee**”) in its capacity as Trustee under the Amended Proposal of 1787930 Ontario Inc. cob Messenger Freight (“**Messenger**”) and 1732427 Ontario Inc., was heard this day via telephone conference at 80 Dundas Street in London, Ontario.

**ON READING** the Report of the Trustee dated 1 September 2020 (the “**Fourth Report**”) and on hearing the submissions of counsel for the Proposal Trustee and Transit Petroleum, no one else appearing;

1. **THIS COURT ORDERS** that capitalized terms not otherwise defined in this Order shall have the meaning ascribed to them in the Fourth Report.
2. **THIS COURT ORDERS** that the claim of Transit Petroleum shall be admitted by the Proposal Trustee at \$202,791.59.
3. **THIS COURT ORDERS** that Messenger remit the Trust Funds in the amount of \$5,970.54, or such other amount as the Proposal Trustee may direct in writing, to

Swanick & Associates to be held and distributed by Swanick & Associates to either Messenger or Transit Petroleum as described in the Fourth Report.

4. **THIS COURT ORDERS** that Messenger shall pay to the Proposal Trustee the Administrative Fees and Expenses incurred or to be incurred in completing the administration of the Amended Proposal as described in the Fourth Report.
5. **THIS COURT ORDERS** that the Proposal Trustee be and is hereby authorized and directed to deliver a Certificate of Full Performance upon payment of the amounts referenced in paragraphs 3 and 4.
6. **THIS COURT ORDERS** that the distribution to the Election Creditors as described in the Fourth Report be and is hereby approved.
7. **THIS COURT ORDERS** that the activities of the Proposal Trustee as set forth in the Fourth Report be and are hereby approved.

  
\_\_\_\_\_  
JUSTICE A.K. MITCHELL

Court File No.: 35- 2395487 and 35-2395481

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

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(IN BANKRUPTCY AND INSOLVENCY)**  
  
(PROCEEDING COMMENCED AT LONDON)

**ORDER**

**GOWLING WLG (CANADA) LLP**  
Barristers & Solicitors  
100 King Street West, Suite 1600  
1 First Canadian Place  
Toronto, ON M5X 1G5

**E. Patrick Shea (LSUC No. 39655K)**  
Tel: (416) 369-7399/ Fax: (416) 862-7661  
Email: [patrick.shea@gowlingwlg.com](mailto:patrick.shea@gowlingwlg.com)

Solicitors for MNP Ltd.

**EXHIBIT "D"**

**Kettle, Sherry**

---

**From:** Kettle, Sherry <skettle@millerthomson.com>  
**Sent:** Sunday, December 13, 2020 6:47 PM  
**To:** Sheldon Title  
**Subject:** RE: In the Matter of the Notice of Intention to Make a Proposal of 1732427 Ontario Inc. and 1787930 Ontario Inc., et al - Court File Nos.: 35-2395487 and 35-2395481 [MTDMS-Legal.FID7656427]

Hi Sheldon,

Hope all is well. Can you please provide me with an update on this. Thank you.

Kind regards,

**SHERRY A. KETTLE, CPA, CA**

Partner

**Miller Thomson LLP**

One London Place  
255 Queens Avenue, Suite 2010  
London, Ontario N6A 5R8

**Direct Line:** +1 519.931.3534

**Fax:** +1 519.858.8511

**Email:** [skettle@millerthomson.com](mailto:skettle@millerthomson.com)  
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**From:** Kettle, Sherry <skettle@millerthomson.com>  
**Sent:** Wednesday, October 28, 2020 6:05 PM  
**To:** Sheldon Title <Sheldon.Title@mdp.ca>  
**Subject:** RE: In the Matter of the Notice of Intention to Make a Proposal of 1732427 Ontario Inc. and 1787930 Ontario Inc., et al - Court File Nos.: 35-2395487 and 35-2395481 [MTDMS-Legal.FID7656427]

Thank you Sheldon. Any idea of timing for the process of taxation, distribution and discharge?

**SHERRY A. KETTLE, CPA, CA**

Partner

**Miller Thomson LLP**

One London Place  
255 Queens Avenue, Suite 2010  
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**From:** Sheldon Title <[Sheldon.Title@mnt.ca](mailto:Sheldon.Title@mnt.ca)>  
**Sent:** Wednesday, October 28, 2020 4:16 PM  
**To:** Kettle, Sherry <[skettle@millერთhompson.com](mailto:skettle@millერთhompson.com)>  
**Subject:** Re: In the Matter of the Notice of Intention to Make a Proposal of 1732427 Ontario Inc. and 1787930 Ontario Inc., et al - Court File Nos.: 35-2395487 and 35-2395481 [MTDMS-Legal.FID7656427]

Sherry,

We held the Inspectors meeting yesterday whereat the Inspectors approved the SRD. We're now arranging for the SRD to be submitted for comments.

Regards,  
Sheldon

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

**DIRECT** [416.263.6945](tel:416.263.6945)  
FAX [416.323.5240](tel:416.323.5240)  
CELL [416.573.5320](tel:416.573.5320)  
MNP Ltd.  
[111 Richmond Street West](#)  
[Suite 300](#)  
[Toronto, ON](#)  
[M5H 2G4](#)  
[sheldon.title@mnt.ca](mailto:sheldon.title@mnt.ca)  
[mntpdebt.ca](http://mntpdebt.ca)



Sent from my iPhone

On Oct 28, 2020, at 4:13 PM, Kettle, Sherry <[skettle@millერთhompson.com](mailto:skettle@millერთhompson.com)> wrote:



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Hi Sheldon,

Just following up on this. Please let me know the status. Thanks.

Kind regards,

**SHERRY A. KETTLE, CPA, CA**  
Partner

**Miller Thomson LLP**  
One London Place  
255 Queens Avenue, Suite 2010  
London, Ontario N6A 5R8  
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**millერთhompson.com**

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**From:** Kettle, Sherry <[skettle@millერთhompson.com](mailto:skettle@millერთhompson.com)>  
**Sent:** Monday, October 5, 2020 5:26 PM  
**To:** Sheldon Title <[Sheldon.Title@mnt.ca](mailto:Sheldon.Title@mnt.ca)>  
**Subject:** RE: In the Matter of the Notice of Intention to Make a Proposal of 1732427 Ontario Inc. and 1787930 Ontario Inc., et al - Court File Nos.: 35-2395487 and 35-2395481 [MTDMS-Legal.FID7656427]

Thank you Sheldon.

Kind regards,

**SHERRY A. KETTLE, CPA, CA**  
Partner

**Miller Thomson LLP**  
One London Place  
255 Queens Avenue, Suite 2010  
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**From:** Sheldon Title <[Sheldon.Title@mnp.ca](mailto:Sheldon.Title@mnp.ca)>

**Sent:** Monday, October 5, 2020 5:23 PM

**To:** Kettle, Sherry <[skettle@millertthomson.com](mailto:skettle@millertthomson.com)>

**Subject:** [\*\*EXT\*\*] RE: In the Matter of the Notice of Intention to Make a Proposal of 1732427 Ontario Inc. and 1787930 Ontario Inc., et al - Court File Nos.: 35-2395487 and 35-2395481 [MTDMS-Legal.FID7656427]

Hi Sheri,

Messenger has remitted payment of the Trust Funds and the additional fees, and has received a Certificate of Full Performance pursuant to the September 15, 2020 order.

We are now in the process of arranging for a meeting of the Inspectors, submission of our final SRD to the OSB for comments and taxation before making final distribution and proceeding to our discharge.

Should you have any questions, please call.

Regards,  
Sheldon

**Sheldon Title, CPA, CA, CIRP, LIT** <image002.jpg>  
SENIOR VICE-PRESIDENT

**DIRECT 416.263.6945**  
FAX 416.323.5240  
CELL 416.573.5320  
111 Richmond Street West  
Suite 300  
Toronto, ON  
M5H 2G4  
[sheldon.title@mnp.ca](mailto:sheldon.title@mnp.ca)  
[mnpdebt.ca](http://mnpdebt.ca)

<image003.jpg>

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**From:** Kettle, Sherry <[skettle@millertthomson.com](mailto:skettle@millertthomson.com)>

**Sent:** October 5, 2020 4:44 PM

**To:** Sheldon Title <[Sheldon.Title@mnp.ca](mailto:Sheldon.Title@mnp.ca)>

**Subject:** In the Matter of the Notice of Intention to Make a Proposal of 1732427 Ontario Inc. and 1787930 Ontario Inc., et al - Court File Nos.: 35-2395487 and 35-2395481 [MTDMS-Legal.FID7656427]

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Hi Sheldon,

Hope you had a nice weekend. Has the proposal trustee been discharged in this matter?

Thank you.

Kind regards,

**SHERRY A. KETTLE, CPA, CA**

Partner

**Miller Thomson LLP**

One London Place  
255 Queens Avenue, Suite 2010  
London, Ontario N6A 5R8

**Direct Line:** +1 519.931.3534

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**EXHIBIT "E"**



Government  
of Canada

Gouvernement  
du Canada

**Bankruptcy and Insolvency Records Search (BIA) search results |  
Résultats de la recherche dans le Registre des dossiers de faillite et d'insolvabilité  
(LFI)**

2020-12-14

Search Criteria | Critères de recherche : Name | Nom = 1787930 Ontario Inc.  
Reference | Référence : 202567.22

A search of the Office of the Superintendent of Bankruptcy records has revealed the following information, for the period 1978 to 2020-12-10, based on the search criteria above-mentioned.

Une recherche dans les dossiers du Bureau du surintendant des faillites a permis de trouver l'information suivante, pour la période allant de 1978 à 2020-12-10, selon les critères de recherche susmentionnés.

BIA Estate Number | Numéro du dossier en vertu de la LFI : 35-2395481  
BIA Estate Name | Nom du dossier en vertu de la LFI : 1787930 Ontario Inc.  
Alias: 1787930 ONTARIO INC  
MESSENGER FREIGHT SYSTEMS

Birth Date | Date de naissance :  
Province : Ontario | Ontario  
Address | Adresse : 150 Dennis Road, St. Thomas, Ontario, N5P0B6  
Estate Type | Type de dossier : COMMERCIAL PROPOSAL | PROPOSITION COMMERCIALE  
Date of Proceeding | Date de la procédure : 2018-10-12  
Total Liabilities\* | Total du passif\* : \$5,648,247  
Total Assets\* | Total de l'actif\* : \$2,746,439  
First Meeting of Creditors | Première assemblée des créanciers : 2018-11-02 11:30:00  
Discharge Status | Statut de la libération : PROPOSAL FULLY PERFORMED | EXÉCUTION INTÉGRALE DE LA PROPOSITION  
Effective Date | Date d'entrée en vigueur : 2020-09-17  
Court Number | Numéro de cour : 35-2395481

\* As declared by debtor | Tel que déclaré par le débiteur

Appointed Licensed Insolvency Trustee or Administrator | MNP LTD / MNP LTEE  
Syndic autorisé en insolvabilité ou administrateur nommé :  
Responsible Person | Personne responsable : TITLE, SHELDON JAY  
Address | Adresse : 111 Richmond ST W, Suite 300, Toronto, Ontario, Canada, M5H2G4  
Telephone | Téléphone : 416-263-6945  
Fax | Télécopieur : 416-323-5242  
Licensed Insolvency Trustee or Administrator's Discharge Date | Date de la libération du syndic autorisé en insolvabilité ou de l'administrateur :

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Protéger l'intégrité  
du système  
d'insolvabilité



**EXHIBIT "F"**



Court File No.:

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

TRANSIT PETROLEUM INC.

Plaintiff

- and -

1787930 ONTARIO INC. o/a MESSENGER FREIGHT SYSTEMS and LOUISE VONK-HIDDINK

Defendants

**STATEMENT OF CLAIM**

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date:

Issued by \_\_\_\_\_  
Local registrar

Address of 85 Frederick St.  
court office Kitchener, ON

TO: 1787930 Ontario Inc.  
150 Dennis Road  
St. Thomas, Ontario  
N5P 0B6

AND TO: Louise Vonk-Hiddink  
11 Mulberry Lane  
St. Thomas, Ontario  
N5R 6J6

### CLAIM

1. The plaintiff, Transit Petroleum Inc. ("**Transit**"), claims:
  - (a) damages against the defendants, 1787930 Ontario Inc. ("**178**") and Louise Vonk-Hiddink ("**Louise**") , in the amount of \$156,644.44 for fraudulent misrepresentation, fraud, breach of contract and breach of duty of good faith and honest performance of a contract;
  - (b) a declaration that the within claim for damages in relation to the period preceding the filing of a Notice of Intention to File a Proposal ("**NOI**") by 178 is a claim that is not released by order of discharge by virtue of being of the nature of a debt or liability listed within s.178(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**");
  - (c) a declaration that 178 and Louise have been oppressive or unfairly prejudicial to the plaintiff, along with relief pursuant to s. 249 of the *Business Corporations Act*, R.S.O. 1990, c. B.16. (the "**OBCA**") for compensation in the sum of \$156,644.44 or such further amount as shall be proven at trial;
  - (d) aggravated, exemplary and punitive damages in the sum of \$300,000;
  - (e) pre-judgment and post-judgment interest at a rate of 19.56% per annum pursuant to an agreement between the parties or, in the alternative, as the rates provided for pursuant to the *Courts of Justice Act*, R.S.O. 1990 c. C-43;
  - (f) costs of this action on a full indemnity basis, together with all applicable taxes thereon; and
  - (g) such further and other relief as this Honourable Court may deem just.

2. The plaintiff, Transit is a corporation incorporated pursuant to the laws of Ontario and carries on business in Southwestern Ontario with its head office located in Kitchener, Ontario. Transit is a supplier of petroleum products.

3. The defendant 178, carrying on business as Messenger Freight Systems, is a corporation incorporated pursuant to the laws of Ontario. 178 is a logistics company that picks up and delivers goods to customers on a schedule.

4. The defendant Louise is an individual resident in the province of Ontario and was, at all material times, the sole director and officer of 178.

## **BACKGROUND**

5. On or about March 10, 2011, 178 executed an application for credit with Transit (the "**Credit Agreement**").

6. The Credit Agreement provided for the ongoing supply of petroleum products to 178 purchased on credit with Transit. The Credit Agreement also stated the following, among other things:

- (a) 178 agrees to pay the total amount set out in each invoice issued by Transit for such purchases within 15 days; and
- (b) Interest is charged on overdue amounts at a rate of 1.5% per month (19.56% per annum) (the "**Contractual Interest Rate**").

7. 178 executed a pre-authorized debit ("**PAD**") agreement with Transit for the payment of invoices submitted by Transit by way of pre-authorized debit payments.

8. In accordance with the Credit Agreement, Transit sold petroleum products to 178 from time to time, and 178 paid for these amounts by way of pre-authorized debit payments ("**PADs**").

9. Transit was a key supplier to 178. 178 purchased approximately \$200,000 worth of fuel on a monthly basis from Transit for 178's fleet of trucks.

## **DEFAULT ON CREDIT AGREEMENT AND NEGOTIATION OF PAYMENT PLAN**

10. In or around June of 2018, PADs for amounts owing on invoices by 178 began to be returned to Transit, noted as “insufficient funds”. As of June 22, 2018, the balance of arrears owing to Transit by 178 on unpaid invoices was approximately \$170,000.

11. On June 18, 2018, a PAD payment on an invoice due by 178 did not go through. Transit received the returned PAD with a notification from the bank indicating 178’s account as “Account Frozen”.

12. Monique Paul, credit analyst with Transit, (“**Monique**”), contacted Nathan McDaniel, Financial Controller of 178, (“**Nathan**”), to inquire about 178’s frozen account status and about getting Transit’s overdue accounts paid. During a conversation on or about June 22, 2018, Nathan informed Monique that 178’s bank account had been frozen due to fraudulent activity. 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.

13. At this time, and unbeknownst to Transit, 178 knew that its bank account had actually been frozen by the Canada Revenue Agency (the “**CRA**”) for unpaid and outstanding tax arrears, not because of fraudulent activity.

14. Relying on the statement by Nathan that the freezing of 178’s bank accounts was unrelated to financial distress or insolvency, Transit continued supplying fuel products to 178 on credit and entered into discussions and negotiations with 178 regarding a payment plan for repayment of the amounts owing on its unpaid invoices.

15. Following the conversation on June 22, 2018, 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.

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.

17. Following that e-mail request, Monique and Tina Thorne (“**Tina**”), a Credit Analyst with 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.

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 dated July 28, 2018, she confirmed that Transit would “accept this proposal” for the Agreed Payment (the “**Payment Plan**”). 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.

19. At this time, the defendants knew, and concealed from Transit, that 178 was insolvent and considering a NOI but entered into the agreement for the Payment Plan in any event with Transit for payment of its accounts beginning on July 5, 2018.

20. Monique asked Nathan to confirm that there would not be any further NSF’s (not sufficient funds) 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 Monique’s June 28, 2018 e-mail.

21. Monique emailed Nathan on Friday, June 29, 2018 regarding the July 5 Agreed Payment (as defined and described below), 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.

22. At no time during these discussions and negotiations did the defendants inform Transit of its intention to file a Notice of Intention to Make a Proposal (“**NOI**”), that it was considering filing an NOI, or that it was insolvent and unable to fulfill its obligation to pay under a payment plan and for fuel products purchased going forward.

23. At this time and all relevant times, the defendants knew that 178 was insolvent and continued to purchase fuel from and become indebted to Transit.

24. The defendants made representations while knowing them to be false to Transit about 178's financial circumstances and ability and intention to pay to ensure that Transit continued to supply fuel to 178 while it was insolvent.

25. The defendants intended that Transit rely on those false representations to ensure that Transit, a key supplier, would continue to supply fuel to 178's fleet of trucks.

#### **WITHDRAWAL OF JULY 5 AGREED PAYMENT**

26. The Payment Plan contemplated four installment payments to be paid by 178 by way of PAD, with the first PAD to be paid on July 5, 2018 and the last PAD to be paid on July 23, 2018. The first payment in the amount of \$83,734.05 was to be paid by PAD on Thursday July 5, 2018 (the "**July 5 Agreed Payment**").

27. On Tuesday, July 3, 2018, the first day of regular business hours back following the Canada Day long weekend, Monique attempted to get into contact with 178 by telephoning and emailing Nathan, for the purpose of confirming the submission of the PAD for the July 5 Agreed Payment, in order to ensure there were sufficient funds in 178's bank account.

28. Upon receiving no response from Nathan or any other representative at 178, Monique proceeded to have the PAD for the July 5 Agreed Payment submitted to Libro Credit Union ("**Libro**") on July 3, 2018 for processing and withdrawal to occur on Thursday, July 5, 2018.

29. Monique informed Nathan by email that the PAD for the July 5 Agreed Payment had been submitted.

30. Even though Monique was Nathan's contact at Transit and was the person he had communicated with regarding the July 5 Agreed Payment, he did not contact Monique to stop the PAD for the July 5 Agreed Payment.

31. The defendants did not ask Transit to not submit the PAD for the July 5 Agreed Payment or to stop or cancel the PAD for the July 5 Agreed Payment once it was submitted.

32. 178 did not stop the PAD for the July 5 Agreed Payment.

#### **REVEALING OF 178'S FILING OF AN NOI**

33. On Thursday, July 5, 2018 at 1:00 p.m., a meeting between representatives of Transit and representatives of 178 was held at the Transit office. In attendance at this meeting on

behalf of 178 was Louise and Blaine Skirtscak, General Manager of 178, ("**Blaine**"), and on behalf of Transit was Trevor Chambers, Division Manager of Transit, ("**Trevor**"), and Monique.

34. During this meeting, 178 informed Transit that three days earlier, on Monday, July 2, 2018, it had filed an NOI under the BIA. This was the first point in time that Transit had knowledge of the potential or actual filing of an NOI by 178.

35. During this meeting, Louise communicated that 178 required the continued support of its key vendors for fuel and truck drivers in order to continue to operate during this time, and she told Transit that 178 was willing to do whatever was necessary to keep Transit as their fuel supplier. Louise stated that the outstanding balance owing to Transit would be paid in full, as Transit was a key supplier to 178.

36. Louise and Blaine also told Transit during this meeting, that they had insisted that the PAD for the July 5 Agreed Payment be permitted to go through and applied to the pre-NOI amounts due because 178 needed Transit as a supplier in order to help keep it in business. It was communicated by 178 that the July 5 Agreed Payment PAD rightfully went through to Transit, and that Transit was able to and should retain this July 5 Agreed Payment.

37. Based upon 178's representations that the July 5 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.

38. During a call on Monday, July 9, 2018 between Nathan, Monique, Don Poort ("**Don**"), the Chief Financial Officer of Transit at the time, and Trevor Chambers ("**Trevor**"), the Division Manager at Transit at the time, Nathan advised that he had allowed the PAD for the July 5 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.

39. At no time during the July 9, 2018 phone call did Nathan ask for the July 5 Agreed Payment to be returned to 178 or advise that the return of the July 5 Agreed Payment from Transit would be sought.



40. The defendants agreed by words and conduct that Transit should and could withdraw and retain the July 5 Agreed Payment to be applied to the pre-NOI obligations of 178 to Transit.

41. 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 July 5 Agreed Payment would be made on July 5 and thereafter that Transit could retain the July 5 Agreed Payment.

42. Despite Transit's good faith dealings with 178, 178 had approached Petro Canada for the supply of fuel and agreed to provide a security deposit to Petro Canada for that supply of fuel.

43. After 178 secured Petro Canada as a fuel supplier, 178 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 July 5 Agreed Payment from Transit.

44. Transit supplied fuel in the post-NOI period in the aggregate amount of \$84,434.28. 178 paid \$36,000 to Transit on account of a portion of these post-NOI fuel supplies. There is a balance remaining on the unpaid invoices for supply of fuel in the post-NOI period due and owing by 178 to Transit of \$48,434.28 ("**Post-NOI Amount Owing**").

## **PROPOSAL PROCEEDINGS**

45. 178 filed a proposal with MNP Ltd. ("**MNP**"), as proposal trustee, which was accepted by the requisite majority of creditors and approved by the court (the "**Proposal**").

46. 178 brought a motion in the proposal proceedings pursuant to s.69(1) of the BIA for an order requiring the return of funds received by Transit following the issuance of its NOI on July 2, 2018, in the amount of the July 5 Agreed Payment.

47. By Endorsement of Justice Raikes on January 28, 2019 (the "**Raikes Decision**"), Transit was ordered to return the July 5 Agreed Payment to 178, after the Post-NOI Amount Owing was set off, in the net amount of \$35,299.75.

48. Transit appealed the Raikes Decision. By decision dated December 3, 2019 (the "**Court of Appeal Decision**"), the Court of Appeal set aside the Raikes Decision and remitted the

matter to Justice Raikes for a new hearing on all issues except for Transit's entitlement to the Post-NOI Amount Owing. In addition, the Court of Appeal held that Transit was entitled to costs of the appeal in the agreed amount of \$15,000 (the "**Costs Award**") inclusive of disbursements and applicable taxes, with the disposition of costs of the motion below being reserved to Justice Raikes.

49. 178 has not paid the Post-NOI Amount Owing or the Costs Award to Transit.

### **SURVIVAL OF CLAIM**

50. Pursuant to s.62(2.1) of the BIA, Transit's claim for damages arising from the supply of fuel provided in the pre-NOI period is not discharged by the acceptance of the Proposal as they are debts or liabilities referred to in subsection 178(1) of the BIA and specifically ss. 178(1)(d) and (e), being claims based on (i) fraudulent misrepresentation and (ii) a debt or liability arising out the defendants' fraud, embezzlement, misappropriation, or defalcation while acting in a fiduciary capacity.

51. The Proposal did not explicitly provide for the compromise of the claims under section 178 of the BIA. Transit, as an unsecured creditor, did not vote for the acceptance of the Proposal.

### **FRAUDULENT MISREPRESENTATION**

52. The defendants are liable for damages arising from their statements of misrepresentation made to Transit, which were relied upon and resulted in losses by way of amounts owing to Transit for pre-NOI fuel purchases and damages arising in relation to post-NOI fuel purchases.

53. Transit submits that exceptional circumstances exist to result in the liabilities of the corporation of 178 attaching directly and personally to Louise.

54. Louise is the sole director and officer of 178. She is also the owner of 178. As such, Louise was at all material times the directing and controlling mind of 178. 178 was at all material times dominated and controlled by Louise.

55. Louise expressly directed that 178 provide representations to Transit which she knew were false. These representations concerned 178's willingness and ability to repay its amounts

owing to Transit for pre-NOI and post-NOI purchases and the valid and rightful entitlement of Transit to the July 5 Agreed Payment.

56. As 178's controlling mind, Louise directed a wrongful thing to be done, namely the making of fraudulent misrepresentations by herself and others, including Nathan, and on this basis, personal liability for the losses suffered by Transit as a result attaches to Louise.

57. The corporate personality of 178 was used as a veil behind which Louise attempted to shield herself from liability for conduct that was harmful and prejudicial to Transit's interests as a creditor. Louise's own actions were themselves tortious, and as such, result in the lifting of 178's corporate veil and attaching of liability for these actions to Louise personally.

***Misrepresentation 1: Statement that 178's Bank Accounts Were Frozen Due to Fraudulent Activity***

58. On June 22, 2018, Nathan stated to Monique that 178's bank accounts had been frozen due to fraudulent activity. This was a false representation. CRA had frozen the bank accounts because of tax arrears.

59. Nathan, on behalf of 178, knew that this representation made to Transit was false. As the Financial Controller of 178, Nathan was at all material times familiar with the current financial status and affairs of 178, and as such, had knowledge of the real reason for the freezing of its bank accounts.

60. The false representation caused Transit to act.

61. The false representation caused Transit to enter into negotiations as to a payment arrangement, and ultimately, agree to the Payment Plan, whereby 178 was to provide payments on its arrears by way of four installments, including the first installment by way of a PAD for the July 5 Agreed Payment. Transit was willing to negotiate and agree to the Payment Plan for the eventual repayment of arrears owing by 178 because it had no knowledge of CRA freezing 178's bank accounts or 178's insolvency.

62. Transit relied on the misrepresentation that 178's bank accounts had simply been frozen on account of fraudulent activity, and this resulted in negotiating and entering into the Payment Plan. Had Transit known that CRA had frozen the bank accounts because of unpaid and outstanding tax arrears, Transit would not have agreed to the Payment Plan with 178.

63. In addition, the false representation caused Transit to act by deciding to continue to supply fuel to 178. Had Transit known of the true reason for the freezing of 178's bank accounts, Transit would not have continued to supply fuel products to 178 thereafter. Transit would have been aware of 178's inability to pay its accounts as they became due and, as such, would have stopped supplying additional fuel products to 178, both pre-NOI and post-NOI, for which 178 was unable or unwilling to pay.

64. Transit's actions, done in reliance on the false representations made by the defendants, resulted in a loss to Transit.

***Misrepresentation 2: Misrepresentations During Negotiations as to Payment Plan and Ability of 178 to Pay Transit***

65. On or around June 22, 2018, Transit and 178 commenced negotiations and discussions surrounding the resolution of outstanding amounts owing to Transit by 178 by way of its unpaid accounts. These negotiations continued from June 22, 2018 until June 28, 2018.

66. On June 28, 2018, 178 and Transit agreed to a Payment Plan which provided for the payment for outstanding arrears by way of four installment payments in order to eventually satisfy the total outstanding balance owed to Transit for unpaid invoices. The first of these installment payments was the July 5 Agreed Payment.

67. Throughout the negotiations and leading up to the day on which the PAD for the July 5 Agreed Payment was withdrawn, the defendants falsely represented to Transit that 178 intended to make all payments to Transit, including the July 5 Agreed Payment, and that Transit could withdraw and retain the July 5 Agreed Payment on account of the pre-NOI amount owing to Transit.

68. The defendants knew that these representations to Transit were false and they knew that 178 could not and/or would not pay for purchases, both pre-NOI and post-NOI.

69. In the days leading up to the submission of the July 5 Agreed Payment and during the negotiations as to the terms of the Payment Plan with Transit, 178 knew that it was insolvent and that it was considering, planning and intended to file an NOI. The defendants intentionally concealed this intention or consideration from Transit.

70. At the time of submission of the PAD for the July 5 Agreed Payment, the defendants knew that the NOI had been filed three days prior. The defendants did not advise Transit about the NOI until July 5, 2018, days after 178 knew that the PAD for the July 5 Agreed Payment had been submitted by Transit.

71. 178's false representations caused Transit to act.

72. Transit relied upon 178's representation that it would abide by the terms of the agreed Payment Plan and that the July 5 Agreed Payment was being validly paid to Transit to satisfy pre-NOI obligations. This false representation caused Transit to allow 178 to continue obtaining fuel products on credit with Transit.

73. Had the misrepresentation not been made, Transit would have stopped supplying fuel products because it would have been aware that 178 was unable or unwilling to honour the terms of a Payment Plan, that 178 was intending to demand the return of the PAD for the July 5 Agreed Payment and that 178 did not intend to pay Transit for post-NOI purchases.

74. Transit's actions, done in reliance on 178's false representations, resulted in a loss to Transit.

***Misrepresentation 3: Misrepresentation that Transit was Entitled to Retain the Funds from the PAD for the July 5 Agreed Payment to Satisfy 178's Pre-NOI Obligations***

75. Following submission of the PAD on July 5, 2018 and filing of 178's NOI, the defendants made multiple representations as described herein to Transit that the PAD for the July 5 Agreed Payment had been permitted to go through, that 178 did not wish or intend to stop it, cancel it, or ask for the repayment of it, and that Transit would rightfully be able to and should retain the July 5 Agreed Payment. The defendants knew that these representations were false.

76. Louise herself was present at the meeting held on July 5, 2018 at Transit's office. She herself provided statements of misrepresentations on behalf of 178 to Transit. She personally communicated the following statements to representatives of Transit, among other things, that:

- (a) the outstanding balance for both pre-NOI and post-NOI purchases owing to Transit would be repaid in full;

- (b) 178 directed the July 5 Agreed Payment to be allowed to go through, that this payment rightfully belonged to Transit who should retain same, and that 178 would not seek the return of the July 5 Agreed Payment;
- (c) Transit was a vital vendor of 178 which it required in order to continue to operate; and
- (d) 178 would do whatever was necessary to keep Transit as its supplier of fuel.

77. Louise directed 178 to make statements and act fraudulently.

78. Both 178 and Louise knew that the representations were false. The defendants knew that 178 was unwilling or unable to satisfy its accounts outstanding for pre-NOI and post-NOI purchases owing to Transit. The defendants knew that the intention of 178 was to seek the return of the July 5 Agreed Payment and did eventually demand the return of the July 5 Agreed Payment. Given this knowledge, the defendants made statements that were false and acted fraudulently.

79. These representations were made in order to secure Transit as 178's fuel supplier which was crucial to allow it to continue on its operations.

80. These misrepresentations caused Transit to act.

81. The defendants' acknowledgement of Transit's entitlement to the July 5 Agreed Payment PAD and that Transit would be able to rightfully retain the July 5 Agreed Payment funds in partial satisfaction of pre-NOI obligations caused Transit to agree to continue supplying fuel products.

82. Had the defendants not made these misrepresentations, Transit would not have continued to supply fuel products to 178.

83. Transit's actions done in reliance on 178's misrepresentation resulted in a loss suffered by Transit.

## **Fraud**

84. The defendants made false representations, as described above.

85. The defendants had knowledge of the falsehood of these representations at the time of making them.

86. In the alternative, the defendants recklessly made the misrepresentations without belief in their truth.

87. Louise, as the controlling mind of 178 at all material times, can be found to be personally liable for damages flowing from fraud, as she expressly directed a wrongful thing to be done, namely, the making of these false representations, which amounts to fraud.

88. Louise was acting in a fiduciary capacity at all material times, as a director of 178. She had a duty to act in the best interests of 178. By committing fraud on behalf of the corporation, she breached this fiduciary duty.

89. The defendants' misrepresentations caused Transit to act by causing it to agree to the Payment Plan and to continue supplying fuel on an ongoing basis on credit to 178.

90. The conduct of the defendants amounts to fraud.

91. As a consequence of its reliance on the false representations made by the defendants, Transit has suffered damages.

92. The damages incurred by Transit as a result of the fraudulent misrepresentations and fraud are comprised of two parts, one arising during the period leading up to the filing of 178's NOI on July 2, 2018, and the other arising during the period following the filing of 178's NOI.

### **Breach of Contract**

93. Further and in the alternative, Transit submits that the defendants, 178 and Louise, are liable to it for damages resulting from breach of contract.

94. Transit and 178 entered into a contract, the Credit Agreement, on March 10, 2011 which required 178 to, among other things, provide payments on all invoices due within 15 days of the invoice.

95. Transit issued invoices to 178 which remain unpaid, including both pre-NOI and post-NOI invoices.

96. 178 failed to provide payments on these invoices within 15 days of the dates on the invoices. The failure to pay these invoices when due is a breach of the Credit Agreement.

97. Louise, as the controlling mind of 178 at all material times, expressly directed a wrongful thing to be done, namely, the Credit Agreement to be breached.

98. Transit is entitled to damages arising from the defendants' breach of contract.

99. The Credit Agreement provides that accounts not paid by their due date are subject to an interest charge from the date of maturity at the rate of 1.5% per month, or 19.56% per annum, as shown on the invoices.

### **Breach of Duty of Honest Performance of Contract**

100. Further and in the alternative, Transit submits that it is entitled to damages arising from the defendants' breach of its duty of honest performance.

101. 178, as a contractual party with Transit, had a duty of honest performance which required it to be honest with Transit in relation to the performance of its contractual obligations under the Credit Agreement and the Payment Plan.

102. Transit submits that 178 failed to be honest with it in relation to the performance of its contractual duties and as such, breached its duty of honest contractual performance.

103. 178 knowingly mislead Transit in relation to matters linked to performance of the Credit Agreement and the Payment Plan including 178's payment of the July 5 Agreed Payment. It mislead Transit by doing the following, among other things:

- (a) misleading Transit by misrepresenting and concealing the true reason for the freezing of its bank accounts on June 22, 2018;
- (b) misleading Transit by concealing and failing to disclose the nature and extent of its level of financial difficulty from Transit prior to the filing of its NOI and following the filing of its NOI until July 5, 2018;
- (c) misleading Transit by engaging in bad faith negotiations as to the Payment Plan arrangements between June 22 and June 28, 2018;
- (d) misleading Transit by misrepresenting that it had a good faith intention and willingness to agree to and abide by the Payment Plan's terms, including providing the July 5 Agreed Payment;



- (e) misleading Transit by misrepresenting that it had the financial ability to agree to and abide by the Payment Plan's terms, including providing the July 5 Agreed Payment.
- (f) misleading Transit by concealing and failing to disclose 178's intention, plan, or consideration of filing an NOI, including following the date of filing of the NOI and up until July 5, 2018;
- (g) misleading Transit by misrepresenting that the July 5 Agreed Payment was a valid payment and rightfully belonged to Transit and that it would not seek, and had no intention of seeking, the return or repayment of same;
- (h) misleading Transit by engaging in bad faith negotiations and discussions during the July 5, 2018 meeting and discussions thereafter;
- (i) misleading Transit by misrepresenting that 178 intended in good faith and was willing to repay amounts owing to Transit to settle its pre-NOI obligations in an attempt to keep it as its fuel supplier;
- (j) misleading Transit by misrepresenting that 178 would pay for all post-NOI purchases; and
- (k) misleading Transit by misrepresenting that 178 was unable to provide Transit with a security deposit because it was disallowed by MNP Ltd.

104. Transit further submits that Louise, as the controlling mind of 178, is also personally liable for losses suffered as a result of the breach of the duty of honest contractual performance, by expressly directing that such dishonest and misleading statements and actions be made by 178.

105. If the defendants had fulfilled their duty of honest performance, Transit would not have continued on supplying fuel products beginning on or around June 22, 2018 until July 11, 2018.

106. Transit has suffered damages as a result of the defendants' breach of their duty of honest contractual performance.

### **Oppression Remedy**

107. Transit was at all material times an unsecured creditor of 178 pursuant to the Credit Agreement.

108. Transit is entitled to make a claim for an oppression remedy, as it had a reasonable expectation of being treated fairly as a creditor.

109. Transit and 178 had a long commercial relationship, from on or about 2011 until 2018, during which Transit provided substantial amounts of fuel products to 178 on credit.

110. On multiple occasions over the course of this relationship, 178 demonstrated an inability or delay in paying its accounts when due to Transit, including, without limitation, multiple PADs for payments due being returned from the bank indicating 178's account was noted as "insufficient funds" and stop payments being placed on scheduled PAD payments by 178. On each occurrence, Transit engaged in good faith negotiations and discussions with 178 to enter into mutually agreeable arrangements for the repayment of the amounts outstanding, and 178 demonstrated a good faith willingness to settle its outstanding accounts. As such, a relationship of understanding and fairness developed between the parties.

111. As a key supplier to 178, its products were integral to the carrying on of 178's business involving operating and driving its large fleet of trucks for its freight transportation purposes.

112. Transit thus had a reasonable expectation of being treated fairly as a creditor of 178.

113. Beginning on June 22, 2018, 178's actions failed to meet this expectation of fairness and caused detrimental consequences to Transit that amounted to oppression, unfair prejudice, and unfair disregard of its interests. Such actions done by 178 include, among other things, oppressing, unfairly prejudicing, and unfairly disregarding the interests of Transit by:

- (a) misrepresenting and concealing the true reason for the freezing of its bank accounts on June 22, 2018;
- (b) concealing and failing to disclose the nature and extent of its level of financial difficulty from Transit prior to the filing of its NOI and following the filing of its NOI until July 5, 2018;
- (c) engaging in bad faith negotiations with Transit as to the Payment Plan arrangements between June 22 and June 28, 2018;
- (d) misrepresenting that it had a good faith intention and willingness to agree to and abide by the Payment Plan's terms, including providing the July 5 Agreed Payment;
- (e) misrepresenting that it had the financial ability to agree to and abide by the Payment Plan's terms, including providing the July 5 Agreed Payment.

- (f) concealing and failing to disclose 178's intention, plan, or consideration of filing an NOI, including following the date of filing and up until July 5, 2018;
- (g) misrepresenting that the July 5 Agreed Payment was a valid payment and rightfully belonging to Transit and that it would not seek the return or repayment of same;
- (h) engaging in bad faith negotiations during the July 5, 2018 meeting;
- (i) misrepresenting that 178 intended to repay amounts owing to Transit to settle its outstanding pre-NOI obligations in an attempt to keep it as its fuel supplier;
- (j) misrepresenting that 178 intended to pay Transit for all obligations relating to the post-NOI supply of fuel; and
- (k) misrepresenting that 178 could not supply Transit with a security deposit on account of its trustee disallowing same.

114. Louise, as the controlling mind of 178, is also personally liable for 178's oppressive conduct, as she directed the above wrongful things to be done by 178, which amounted to oppressive, unfairly prejudicial, and unfairly disregarding actions to Transit.

115. Leading up to and throughout the insolvency of 178, 178 was required to take its creditors' interests into account. Transit's interests as a creditor with a legitimate interest in getting its accounts paid were oppressed, unfairly prejudiced, and unfairly disregarded by 178.

116. The conduct mislead and deceived Transit as to the financial status of 178 and to the willingness and intention of 178 to pay Transit. The oppressive conduct of the defendants caused Transit to supply additional fuel products to 178 on credit.

117. This oppressive, unfairly prejudicial, and unfairly disregarding conduct of 178 caused Transit to suffer damages.

## **DAMAGES**

118. The defendants are liable for damages for the pre-NOI period running from June 22, 2018 until July 2, 2018 for purchases in the amount of \$108,210.16. This amount remains unpaid.

119. Further, during the period from the filing of the NOI on July 2, 2018 to the date when Transit stopped supplying fuel to 178 on July 11, 2018, Transit supplied to 178 fuel products in the aggregate amount of \$84,434.28. 178 has provided a partial payment on these post-NOI fuel purchases in the amount of \$36,000. This results in the Post-NOI Amount Owing of \$48,434.28.

120. Transit submitted an Amended Proof of Claim dated March 26, 2019 in the Proposal for an unsecured claim of \$286,525.64 for pre-NOI obligations of 178 to Transit. This amount assumes the return of the July 5 Agreed Payment from Transit to 178 based on the Raikes Decision. The Court of Appeal has set aside the Raikes Decision and returned it to Justice Raikes for determination but that determination has not been made. Transit has not received any payments from the proposal proceedings.

121. The Credit Agreement entered into between 178 and Transit includes the Contractual Interest Rate of 19.56% per annum on all unpaid accounts accruing from the due date. This interest rate is the one to govern all unpaid accounts for fuel supplied by Transit to 178.

122. The actions of the defendants were high handed, shocking and arrogant and warrant an award of aggravated, exemplary or punitive damages.

123. Transit pleads and relies upon the provisions of the:

- (a) *Business Corporations Act*, R.S.O. 1990, c. B.16, including section 241; and
- (b) *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

124. The plaintiff proposes that this action be tried in Kitchener, Ontario.

December \_\_\_\_, 2020

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

**Sherry A. Kettle**, LSO #53561B  
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Lawyers for the Plaintiff, Transit Petroleum Inc.

TRANSIT PETROLEUM INC.  
Plaintiff

and

1787930 ONTARIO INC. and LOUISE  
VONK-HIDDINK  
Defendants

Court File No.:

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at KITCHENER

**STATEMENT OF CLAIM**

**MILLER THOMSON LLP  
ONE LONDON PLACE  
255 QUEENS AVENUE, SUITE 2010  
LONDON, ON CANADA N6A 5R8**

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Lawyers for the plaintiff, Transit Petroleum Inc.

**EXHIBIT "G"**

Not for a bit please, I have to get caught up on a few things. Thanks.

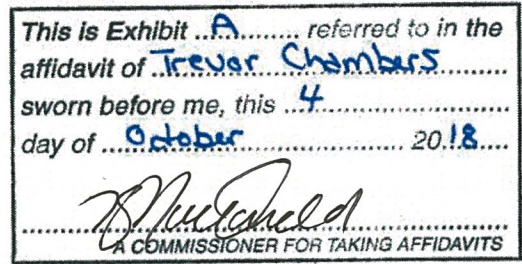
Trevor Chambers | Division Manager  
Transit Petroleum Inc.  
t 519 571 1220 ext.1170 | m 519 242 0188  
1 888 717 FUEL (3835)

**From:** Monique Paul  
**Sent:** June-28-18 8:26 AM  
**To:** Trevor Chambers  
**Subject:** FW: MESSENGER FREIGHT SYSTEMS

Tina and I are going to come down and discuss this with you!

Thanks,

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



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

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

Good afternoon Monique,

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

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

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

Cheers,

Nathan

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

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

Good Afternoon Nathan,

Thank you for speaking with Tina and myself!

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

Thursday July 5, 2018 ~~\$111,645.40~~

Thursday July 12, 2018 \$55,093.51 + \$27,911.35= ~~\$83,004.86~~

Thursday July 19, 2018 regular amount owing + \$27,911.35 (total unknown at this time)

This will then bring your account current.

Thanks,

**Monique Paul**



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

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

Good afternoon Monique,

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

Cheers,

Nathan

Nathan McDaniel  
Financial Controller  
Messenger Freight System  
150 Dennis Road  
P.O. Box 100  
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<http://www.messengerfreight.ca>

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

Nathan,

As per our conversation we have received Monday June 18<sup>th</sup>, 2018 PAD back as Account Frozen  
Account # 96246010 \$9,542.21  
Account # 96242510 \$49,590.24  
Total **\$59,132.45**

We are also holding this week's PAD Monday June 25<sup>th</sup>, 2018  
Account # 96246010 \$8,976.19  
Account # 96242510 \$47,579.43  
Total **\$56,555.62**  
Leaving us in arrears of two weeks for **\$115,688.07**

Monday July 2, 2018  
Account # 96246010 \$10,707.65  
Account # 96242510 \$41,072.37  
Total **\$51,780.02**

Total owing as of Monday July 2, 2018 \$51,780.02 + \$115,688.07= **\$167,468.09**

**Below is how you are proposing to pay this**  
**Monday July 2, 2018 \$83,734.05**  
**Monday July 9, 2018 regular amount owing + \$27,911.35**  
**Monday July 16, 2018 regular amount owing + \$27,911.35**  
**Monday July 23, 2018 regular amount owing + \$27,911.35**

Please confirm this is what you would like us to do and I will go and talk to the fuel manager and see if he will approve this option or not.

I have also attached a new PAD form for you to fill out with the new banking information

Thanks,

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

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

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

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**AFFIDAVIT OF TREVOR CHAMBERS**  
**(SWORN DECEMBER 17, 2020)**

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**MOTION RECORD**  
**OF TRANSIT PETROLEUM INC.**

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