



MILLER THOMSON
AVOCATS | LAWYERS

MILLER THOMSON LLP
ONE LONDON PLACE
255 QUEENS AVENUE, SUITE 2010
LONDON, ON N6A 5R9
CANADA

T 519.931.3500
F 519.858.8511

MILLERTHOMSON.COM

March 26, 2019

Delivered Via Facsimile

Swanick and Associates
101-225 Duncan Mill Road
North York, ON M3B 3K9

Sherry A. Kettle
Direct Line: 519.931.3534
skettle@millerthomson.com

File: 0217040.0004

Fax No. 1.416.510.1945

Attention: Bruce A. Simpson

- and -

Fax No. 1.416.323.5240

MNP Ltd.
111 Richmond Street West
Suite 300
Toronto, ON M5H 2G4

Attention: Sheldon Tittle

Dear Sirs:

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

Attached is a Notice of Motion returnable on April 15, 2019 at the Court of Appeal which is hereby being served upon you. Please advise if you will consent to the relief sought on this motion.

Yours truly,

MILLER THOMSON LLP

Per:


Sherry A. Kettle

SAK/sj

Enc.

c: client

38241628.1

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

COURT OF APPEAL FOR ONTARIO

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

**MOTION RECORD
OF TRANSIT PETROLEUM INC.**

March 26, 2019

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
Fax: 519.858.8511
Email: skettle@millerthomson.com

Lawyers for Transit Petroleum Inc.

TO: The Service List

SERVICE LIST

TO: **Swanick & Associates**
Barristers and Solicitors
Suite 101
225 Duncan Mill Road
Don Mills, ON M3B 3K9

Bruce Simpson
Tel: 416.510.1888
Fax: 416.519.1945

Lawyers for 1787930 Ontario Inc.

AND TO: **MNP Ltd,**
111 Richmond Street West
Suite 300
Toronto, ON M5H 2G4

Sheldon Title
Tel: 416.323.5240

Trustee of 1787930 Ontario Inc.

INDEX

COURT OF APPEAL FOR ONTARIO

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

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TAB DOCUMENT

- 1 Notice of Motion returnable April 15, 2019, together with Certificate
- 2 Affidavit of Trevor Chambers sworn March 26, 2019 and the exhibits annexed
 thereto
- A Endorsement of Mr. Justice Raikes dated January 28, 2019
- 3 Draft Notice of Appeal and Certificate of Evidence

TAB

“1”

COURT OF APPEAL FOR ONTARIO

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

NOTICE OF MOTION

Transit Petroleum Inc. ("Transit"), a creditor of 1787930 Ontario Inc. ("178"), will make a motion to a single judge of the Court of Appeal for Ontario on Monday, April 15, 2019, at 10 a.m. or as soon after that time as the motion can be heard, at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

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

THE MOTION IS FOR:

- (a) An Order abridging the time for serving and filing this Motion Record, if necessary;
- (b) An Order extending the time to serve and file or granting leave to serve and file a Notice of Appeal in respect to the Order of Mr. Justice Raikes dated January 28, 2019 (the "**First Raikes Order**");
- (c) An Order directing that the appeal of the First Raikes Order be heard together with the appeal of the Order of Mr. Justice Raikes dated March 13, 2019 (the "**Second Raikes Order**");
- (d) Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

- (a) the requested extension will not cause prejudice to the respondent;
- (b) there are arguable grounds of appeal;
- (c) it is in the interest of justice that an extension be granted;
- (d) Transit is appealing the Second Raikes Order in respect to costs of the motion which relates the First Raikes Order
- (e) This Court has jurisdiction to hear the appeal pursuant to ss. 183(2) and 193 and specifically section 193(c) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended as because the property involved in the appeal exceeds in value \$10,000;
- (f) Leave to appeal is not required;
- (g) *Bankruptcy and Insolvency General Rules*, Can. Reg. 368, Rule 31;
- (h) such further and other grounds as counsel may request and this Honourable Court may permit.

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

- (a) The Affidavit of Trevor Chambers March 26, 2019; and
- (b) Such further and other motion as counsel may advise and as this Honourable Court may permit.

March 26, 2019

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

Sherry A. Kettle LSO#: **53561B**
skettle@millerthomson.com
Tel: 519.931.3534
Fax: 519.858.8511

Lawyers for Transit Petroleum Inc.

TO: **Swanick & Associates**
Barristers and Solicitors
Suite 101
225 Duncan Mill Road
Don Mills, ON M3B 3K9

Bruce Simpson
Tel: 416.510.1888
Fax: 416.519.1945

Lawyers for 1787930 Ontario Inc.

AND TO: **MNP Ltd.**
111 Richmond Street West
Suite 300
Toronto, ON M5H 2G4

Sheldon Title
Tel: 416.323.5240

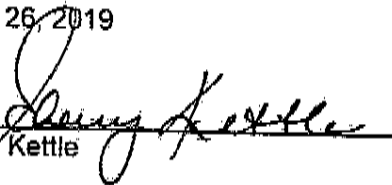
Trustee of 1787930 Ontario Inc.

CERTIFICATE

I, Sherry Kettle, lawyer for the Respondent, certify that:

- (i) The estimated time of my oral argument is 30 minutes.

March 26, 2019



Sherry Kettle

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

Court of Appeal File No.:

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

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at London

NOTICE OF MOTION

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
Fax: 519.858.8511
Email: skettle@millerthomson.com

Lawyers for Transit Petroleum Inc.

TAB

“2”

**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 March 26, 2019)**

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

1. I am the Vice-President, formerly Division Manager, 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.
2. I swear this affidavit in support of a motion for an extension of time to appeal the Order of Mr. Justice Raikes dated January 28, 2019 (the "Decision"). A copy of the Endorsement of Mr. Justice Raikes dated January 28, 2019 is attached hereto as Exhibit "A".
3. I believe that the appeal is meritorious, that there is an arguable ground(s) of appeal and that the appeal is not frivolous.
4. I do not know of any reason that the granting of an extension of time to appeal will prejudice the respondent, 1787930 Ontario Inc., carrying on business as Messenger Freight Systems ("178").
5. In my view, it is in the interest of justice that an extension be granted so that the Court of Appeal can interpret the meaning of the "exercise of a remedy" under section 69 of the *Bankruptcy and Insolvency Act* and the application of that interpretation to the facts of the matter which I summarize below.

The Agreed Payment

6. 178 is a transportation logistics company. It is hired to pick up and deliver goods.
7. Transit was a key supplier to 178. According to the evidence given by Nathan McDaniel ("Nathan"), the Financial Controller of 178 and the Transit proof of claim marked as an Exhibit on the cross-examination of Nathan, 178 purchased approximately \$200,000 worth of fuel on a monthly basis from Transit for 178's fleet of trucks.
8. 178 set-up a pre-authorized payment system to pay Transit's invoices.
9. By at least June 2018, 178 was experiencing significant financial difficulties. Unbeknownst to Transit, Canada Revenue Agency had frozen 178's Bank of Nova Scotia account. Monique Paul ("Monique"), formerly a Credit Analyst with Transit, gave evidence on her cross-examination that she was told by 178 that the Bank of Nova Scotia account had been closed due to fraudulent activity, not that CRA had frozen the bank account.
10. 178 required the continued supply of fuel from Transit to keep its fleet of trucks on the road. At the end of June 2018, 178 entered into negotiations with Transit to pay the outstanding amounts owing for payments that had not cleared 178's bank account.
11. In order to secure the continued supply of fuel, on Friday, June 28, 2018 before the long weekend, 178 and Transit agreed to a payment schedule which included a pre-authorized debit ("PAD") for \$83,734.05 (the "Agreed Payment") on Thursday, July 5, 2018 from 178's new account at Libro Credit Union ("Libro"). Monique and Nathan corresponded about the payment schedule and I was involved in the final decision to accept Nathan's offer for the payment plan which included the Agreed Payment.
12. On Monday, July 2, 2018, a Canada Day long weekend holiday and only a few days after Transit had accepted 178's offer, 178 filed a Notice of Intention to File a Proposal (the "NOI"), although 178 did not tell Transit that it had filed an NOI until July 5, 2018. MNP Ltd. is the Proposal Trustee.

July 3, 2018 PAD Submission to Libro

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

14. Four employees of Transit gave evidence on this motion, being myself, Monique, Don Poort ("Don"), the Chief Financial Officer of Transit at the time, and Tina Thorne, a Credit Analyst at Transit. Only one employee of 178, Nathan, gave evidence. The evidence of the four employees of Transit conflicted with the evidence of Nathan.

15. The evidence of Transit on the motion was that no one at 178 asked Transit to not submit the PAD for the Agreed Payment or to stop the PAD for the Agreed Payment once submitted on July 3, 2018.

The July 5 Meeting

16. Despite the filing of the NOI on July 2, 2018 and the continued supply of fuel by 178 post-NOI, it was not until the afternoon of July 5, 2018 during a meeting, after the Agreed Payment had been withdrawn by Libro, that 178 told Transit about the NOI filing.

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

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

Communications After the July 5 Meeting

19. I was present during a telephone conference with Nathan as well as other representatives of Transit, being Monique and Don, on Monday, July 9, 2018.

20. During this call, 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. The conversation ended relatively abruptly after this as neither Transit nor 178 were willing to change their position on this requirement.

21. On July 11, 2018, 178 put a stop payment on a previously agreed upon PAD for a payment to be processed on July 12, 2018 for post-NOI fuel purchases. As a result, Transit deactivated 178's fuel cards.

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

23. 178 has not paid for fuel purchased from Transit post-NOI in the amount of \$48,434.30.

24. Transit did not unilaterally take the Agreed Payment as a way to recover a debt that 178 refused to pay. Rather, prior to the NOI, 178 and Transit had an agreement for the PAD for the Agreed Payment. Subsequent to the filing of the NOI, 178 agreed by words and conduct that Transit should and could withdraw and retain the Agreed Payment in the ordinary course of business to permit 178 to remain in business.


25. I have reviewed the evidence of Nathan and note that there were a number of inaccurate and inconsistent statements which were disputed by myself, Monique and Don.

26. Contrary to paragraphs 28(g) and 32 of the Decision, the Proof of Claim filed in 178's proposal proceeding does not include the PAD for the Agreed Payment. Rather, the amount of \$202,791.59 which was claimed on the Proof of Claim as the amount owing excluded the Agreed Payment which was received by Transit. In other words, the amount owing to Transit was \$286,525.64 before the Agreed Payment was deducted. The amount claimed on the Proof of Claim was \$202,791.59, being \$286,525.64 less the Agreed Payment of \$83,734.04.

SWORN BEFORE ME at the City of Kitchener,
in the Regional Municipality of Waterloo, this 26th
day of March, 2019.


A Commissioner for taking Affidavits (or as may be)

Brittany Marie Thompson, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law,
Expires June 12, 2020.


Trevor Chambers

TAB

“A”

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

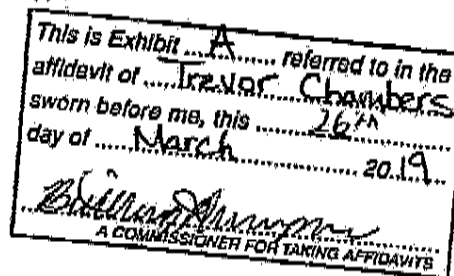
Bruce Simpson and Mr. Ly Counsel, for 1787930 Ontario Inc.

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-authorized 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.



Brittany Marie Thompson, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires June 12, 2020.

- [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 5th, 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. Santack Computer Inc.* (2000), 20 C.B.R. (4th) 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.*, 2003 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 *Bankruptcy 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 *BLA*. 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 *BLA*. It is contrary to the objective of the *BLA* 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.



Justice R. Raikes

Date: January 28, 2019

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

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

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at London

AFFIDAVIT OF TREVOR CHAMBERS
(Sworn March 26, 2019)

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

Sherry A. Kettle, LSO #535618
Tel: 519.931.3534
Fax: 519.858.8511
Email: skettle@millerthomson.com

Lawyers for Transit Petroleum Inc.

TAB

“3”

COURT OF APPEAL FOR ONTARIO

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

NOTICE OF APPEAL

Transit Petroleum Inc. ("Transit"), a creditor of 1787930 Ontario Inc. ("178"),
APPEALS to the Court of Appeal from the order of Mr. Justice Raikes dated January 28,
2019 made at London.

THE APPELLANT ASKS that the order be set aside and an order be granted as
follows:

1. The appeal be allowed, and the order requiring Transit to return the sum of
\$83,734.05 (the "Agreed Payment") to 178 be set aside;
2. Transit receive its costs of this appeal.

THE GROUNDS OF APPEAL are as follows:

1. The motion judge erred in law in interpreting section 69 of the *Bankruptcy and
Insolvency Act* (the "BIA");
2. The motion judge erred in applying section 69 of the BIA to the facts of the case and
specifically erred in finding that the withdrawal of a pre-authorized debit for the
Agreed Payment constituted the exercise of remedy that was prohibited by operation
of section 69 of the BIA;

3. The motion judge erred in finding that it was unnecessary to determine whether the parties reached an agreement regarding the Agreed Payment;
4. The motion judge erred in finding that he was unable to determine whether the parties reached an agreement regarding the Agreed Payment;
5. The motion judge erred in law by failing to draw an adverse inference from 178 failing to provide evidence from witnesses with first-hand knowledge of relevant and material facts;
6. The motion judge erred in law by failing to assign little weight to the evidence of 178's only witness, Nathan McDaniel, who gave inconsistent and inaccurate evidence and evidence that was not within his personal knowledge; and
7. The motion judge made an overriding and palpable error in finding that the amount claimed by Transit in its Proof of Claim filed in 178's proposal proceeding includes the Agreed Payment.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS: ss. 183(2) and 193 (c) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended as the property involved in the appeal exceeds in value \$10,000. Leave to appeal is not required.

March 26, 2019

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

Sherry A. Kettle LSO#: 53561B
skettle@millerthomson.com
Tel: 519.931.3534
Fax: 519.858.8511

Lawyers for Transit Petroleum Inc.

TO: **Swanick & Associates**
Barristers and Solicitors
Suite 101
225 Duncan Mill Road
Don Mills, ON M3B 3K9

Bruce Simpson
Tel: 416.510.1888
Fax: 416.519.1945

Lawyers for 1787930 Ontario Inc.

AND TO: **MNP Ltd.**
111 Richmond Street West
Suite 300
Toronto, ON M5H 2G4

Sheldon Title
Tel: 416.323.5240

Trustee of 1787930 Ontario Inc.

IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427
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NOTICE OF APPEAL

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
Fax: 519.858.8511
Email: skettle@millerthomson.com

Lawyers for the Appellant,
Transit Petroleum Inc.

COURT OF APPEAL FOR ONTARIO

**IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427
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THE PROVINCE OF ONTARIO**

**APPELLANT'S CERTIFICATE RESPECTING EVIDENCE
(TRANSIT PETROLEUM INC.)**

The appellant certifies that the following evidence is required for the appeal, in the appellant's opinion:

1. Exhibit numbers: Exhibit "1" to the Cross-examination of Monique Paul conducted on November 12, 2018;
2. The affidavit evidence of:
 - (a) Nathan McDaniel sworn September 18, 2018; and
 - (b) Nathan McDaniel sworn October 15, 2018;
 - (c) Nathan McDaniel sworn October 31, 2018;
 - (d) Affidavit of Don Poort sworn October 4, 2018;
 - (e) Affidavit of Monique Paul sworn October 4, 2018;
 - (f) Affidavit of Trevor Chambers sworn October 4, 2018;
 - (g) Affidavit of Tina Thorne sworn October 23, 2018;
 - (h) Affidavit of Monique Paul sworn October 23, 2018;
3. The oral evidence of:
 - (a) Transcript of the cross-examination of Nathan McDaniel conducted on November 12, 2018; and
 - (b) Transcript of the cross-examination of Monique Paul conducted on November 12, 2018.

March 26, 2019

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

Sherry A. Kettle LSO#: 53561B
skettle@millerthomson.com
Tel: 519.931.3534
Fax: 519.858.8511

Lawyers for the Appellant
Transit Petroleum Inc.

TO: **Swanick & Associates**
Barristers and Solicitors
Suite 101
225 Duncan Mill Road
Don Mills, ON M3B 3K9

Bruce Simpson
Tel: 416.510.1888
Fax: 416.519.1945

Lawyers for 1787930 Ontario Inc.

AND TO: **MNP Ltd.**
111 Richmond Street West
Suite 300
Toronto, ON M5H 2G4

Sheldon Title
Tel: 416.323.5240

Trustee of 1787930 Ontario Inc.

COURT OF APPEAL FOR ONTARIO
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**APPELLANT'S CERTIFICATE
RESPECTING EVIDENCE**

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

Sherry Kettle LSUC#: 53561B
Tel: 519.931.3534
Fax: 519.858.8511

Lawyers for the Appellant, Transit Petroleum Inc.

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MOTION RECORD

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
Fax: 519.858.8511
Email: skettle@millerthomson.com

Lawyers for Transit Petroleum Inc.