Court of Appeal File No. M50303
File Numbers: 35-2395487 and 35-2395481

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

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

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PART I – THE DECISIONS BELOW

1) Transit Petroleum Inc. ("**Transit**") seeks an extension of time to appeal the decision of Justice Raikes rendered January 28, 2019 (the "**Merits Decision**") in which Transit was ordered to return certain funds to 1787930 Ontario Inc. ("178") which Transit obtained by processing a pre-authorized debit ("PAD") after 178 had issued a Notice of Intention to File a Proposal under the Bankruptcy and Insolvency Act on July 2, 2018 (the "**NOI**"). For the reasons set out below, 178 submits that Transit's motion should be dismissed.

PART II - FACTS

2) In the Merits Decision, Justice Raikes invited the parties to make cost submissions. Following the receipt of both sides' submissions, Justice Raikes rendered a costs decision on March 13, 2019 (the "**Costs Decision**").

3) Transit served a Notice of Appeal from the Costs Decision on March 21, 2019.

4) Later, on March 26, 2019, Transit brought the present Motion for leave to extend time for an appeal of the Merits Decision. Transit had not raised the prospect of an appeal of the Merits Decision at any time before appealing the Costs Decision, nor has it claimed to have formed an intention to appeal within the relevant period or provided an explanation for the delay.

Affidavit of Trevor Chambers sworn March 26, 2019; Motion Record, Tab 2.

5) 178 has a weekly payroll in the range of $95,000 and $97,000. Prior to the financial difficulty it experienced in mid-2018, 178 paid its employees by pre-authorized debit, but it was unable to continue with that arrangement. Post NOI, 178 paid employee wages by cheque, and remitted withholdings thereafter. This arrangement allowed for careful management of cash flow, but 178 was not always able to honour its payroll obligations in a timely fashion. As a result, employee morale suffered, employees expressed concerns to management, and several employees resigned.

Affidavit of Louise Vonk sworn April 8, 2019 ("Vonk Affidavit) at paragraph 5; Responding Motion Record, page 2.

6) In an effort to appease 178's employees and address these concerns, in mid-March 2019 178 implemented a new payroll processing system with the assistance of a third-party payroll processor, which arrangement requires more careful management of cash flow. Management determined this arrangement was a necessary step to prevent attrition and assure employees of the stability of their employment but would not have implemented it had there been remaining uncertainty about the subject-matter of the Merits Decision.

Vonk Affidavit at paragraph 6.

7) The proposed appeal is also delaying completion of Messenger's proposal and straiting relationships with 178's existing suppliers.

Vonk Affidavit at paragraph 7.

PART III – ISSUES AND THE LAW

8) Under Rule 31(1) of the Bankruptcy and Insolvency General Rules, a appeal to the Court of Appeal from a decision rendered in a bankruptcy must be commenced "within ten days after the order or decision appealed from, or within such further time as a judge of the Court of Appeal stipulates."

> Bankruptcy and Insolvency General Rules, C.R.C. c. 368, s. 31(1)

9) In an appeal in a bankruptcy proceeding, the same test applies as would for an appeal under the *Rules of Civil Procedure*.

> *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited*, 2012 ONCA 569 (CanLII) at par. 39.

10) The governing principle on this motion is whether the "justice of the case" requires that an extension be given. Each case depends on its own circumstances. The relevant considerations include:

a. whether the moving party formed a bona fide intention to seek leave to appeal within the relevant time period;

b. the length of, and explanation for, the delay in filing;

c. any prejudice to the responding party, caused, perpetuated or exacerbated by the delay; and

d. the merits of the proposed appeal.

> *Reid v. College of Chiropractors of Ontario*, 2016 ONCA 779 (CanLII) at paragraph 14.

THE APPELLANT DID NOT FORM ANY INTENTION TO APPEAL WITHIN THE RELEVANT TIME PERIOD

11) The moving party's evidence tendered in support of the motion is the affidavit of Trevor Chambers sworn March 26, 2019. Mr. Chambers does not state, in his affidavit, that the Appellant formed an intention to appeal within the relevant time period, nor is there any evidence given from which that intention can be inferred.

12) To the contrary, it is apparent that the intention to appeal was formed at least three weeks after the relevant time period expired. On March 21, 2019, the appellant served a Notice of Appeal with respect to the Costs Decision. Having turned its mind to an appeal, Transit proceeded with respect to the Costs Decision only, without reference to the Merits Decision. Had Transit had the requisite intention to appeal at the time, its Notice of Appeal would not have bee restricted to the Costs Decision.

THERE IS NO EXPLANATION FOR THE DELAY IN FILING

13) Mr. Chambers, in his Affidavit, does not acknowledge that the filing was delayed and as such provides no explanation for the delay.

THERE IS PREJUDICE ARISING FROM THE DELAY

14) After March 1, 2019, 178 conducted itself on the basis of its financial position reflecting the final determination of the Merits Decision. The impact of that result was that 178's financial position was improved by $83,734.05, as it was due

$35,299.75 and had paid the post-NOI fuel debt of $48,434.30, which would have remained payable had Transit been entitled to retain the PAD monies.

Vonk Affidavit at paragraph 4.

15) 178 relied upon the certainty of the results in the Merits Decision after the expiry of the appeal period in order to implement its new pre-authorized payroll processing. The new process would not have been implemented had an appeal been pending, but for 178 to now cancel the payroll deposit arrangement would be catastrophically destabilizing to its relationship with its employees. Extending the time for appeal would therefore be real prejudice arising from the delay.

Vonk Affidavit at paragraph 6.

16) All claims advanced in the proposal have been determined save for the claim by Transit. The relief sought by transit will delay the closure of the 178 proposal as it prevents the trustee from making a final determination of the Transit claim.

Vonk Affidavit at paragraph 7.

THE PROPOSED APPEAL IS UNMERITORIOUS

17) The grounds for the proposed appeal commence with a claim that the motion judge erred in law in interpreting section 69 of the *Bankruptcy and Insolvency Act* and in applying that provision to the withdrawal of a pre-authorized debit.

18) There was no error in the motion judge's interpretation of section 69 of the *BIA*, which was well rooted in authority. The motion judge referenced the interpretation in the section in the *Annotated Bankruptcy and Insolvency Act* by

Lloyd W. Houlden and Geoffrey B. Morawetz, then turned to consider *Gene Moses Construction Ltd., Re*, 1999 CarswellBC 149; *Startek Computer Inc. (Trustee of) v. Samtack Computer Inc.* (2000), 20 C.B.R. (4th) 166, 2000 CarswellBC 1802, 2000 BCSC 1316 (CanLII) (S.C. [In Chambers]); and *Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.*, 2005 CanLII 81263 (ON SC), 2005 CarswellOnt 9935 (S.C.J.). The referenced cases consider the negotiation of debit memos and cheques provided prior to the filing of an NOI and which were both held to be remedies in the context of s. 69. For the reasons given by the motions judge, the cases cannot be distinguished. The motion judge's interpretation of s. 69 was amply supported by the weight of this authority.

19) The balance of the grounds for the proposed appeal attack the motion judge's findings of fact, to which a high degree of deference is accorded.

20) The motion judge reviewed the evidence, noted at paragraph 27 that there were facts in dispute, and enumerated the undisputed facts at paragraph 28. The motion judge was careful to render a decision which did not rely upon any of the facts in dispute but rested only on undisputed facts. The motion judge considered the possibility that the PAD was part of the alleged "agreement" made prior to the NOI and determined that the resolution of that issue would not change the analysis or result. There is no reason to doubt the correctness of the motion judge's analysis.

THE JUSTICE OF THE CASE DOES NOT REQUIRE THAT AN EXTENSION BE GIVEN

21) None of the four relevant considerations support the granting of an extension, nor are there unusual circumstances which the moving party relies on to buttress its

request for the indulgence of an extension. This is not a case which calls out for a remedy.

PART IV - DISPOSITION

22) For the reasons above, it is respectfully submitted that the motion for an extension for time should be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Paul Neil Feldman per OS

Paul Neil Feldman

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COURT OF APPEAL FOR ONTARIO

Proceeding commenced at London

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