

Court File No. BK-23-02943168-0031
Estate No. 31-2943168

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

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
PLANET ENERGY (B.C.) CORP.
AN INSOLVENT PERSON**

Court File No. BK-23-02943175-0031
Estate No. 31-2943175

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

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
PLANET ENERGY (ONTARIO) CORP.
AN INSOLVENT PERSON**

**FACTUM OF THE CREDITOR,
ALL COMMUNICATIONS NETWORK OF CANADA, CO.**

June 2, 2023

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TO: THE SERVICE LIST

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ALL COMMUNICATIONS NETWORK OF CANADA, CO.**

PART I. OVERVIEW

1. All Communications Network of Canada, Co. ("**ACN**"), the debtors' only material creditor, moves for an order appointing KSV Restructuring Inc. as interim receiver and receiver and manager (in such capacity, "**KSV**" or the "**Receiver**"), without security, of all of the assets, undertakings and properties of the debtors, Planet Energy Corp., Planet Energy (Ont.) Corp., and Planet Energy (B.C.) Corp. (collectively, "**Planet Energy**" or the "**Debtors**"), and, absent such appointment, asks that these proceedings be terminated, and that the Debtors not be allowed to gamble with ACN's money. There is no prospect of a successful proposal so long as entrenched management remain in place.

2. Planet Energy is indebted to ACN for the net amount of \$29,259,787, plus interest, pursuant to an arbitral award that has been affirmed by this Court and by the Court of Appeal for Ontario (the “**Judgment**”). On May 11, 2023, shortly after the release of the Court of Appeal’s decision, Planet Energy filed its Notice of Intention to Make a Proposal (the “**NOI**”). The Judgment debt represents between 94% and 99% of Planet Energy’s aggregate unsecured debt as shown on its creditor listing.

3. ACN's recovery is being put at risk by ongoing operations. Following the delivery of notice of default by Shell Energy North America (US) L.P. (“**Shell**”), which supplies energy to Planet Energy, Planet Energy is now unhedged with respect to its electricity contracts, which represent the majority of its business. As admitted by Planet Energy’s own lawyer, Planet Energy is now exposed to market and commodity price risk, such that “any negative changes to the price of electricity could severely impact Planet Energy’s business, cash position and value” (emphasis ours).

4. Furthermore, ACN has no confidence in management of Planet Energy, as a result of their demonstrated history of misconduct, subterfuge and fraud, as described below.

5. In these circumstances, ACN is seeking the appointment of the Receiver to supplant management of Planet Energy, so that it can have a meaningful discussion with a trusted counter-party regarding the future prospects of this business. Specifically, ACN seeks to (i) validate the information set out in the affidavit of Nino Silvestri sworn May 26, 2023 (the “**Silvestri Affidavit**”); and (ii) make a final assessment as to whether there is potential value in Planet Energy’s customer

contracts, and whether there is a viable hedging strategy that may be pursued under the direction of the Receiver. In the absence of the Receiver’s appointment, ACN opposes the continuation of these proceedings and seeks their termination.

6. Debtors who do not have the support of their major creditor—particularly those debtors that have been found to have engaged in subterfuge and to have counselled their employees to commit fraud—should not get to use restructuring statutes to control and profit from their liquidation, at the risk and expense of creditors.

PART II. FACTS

A. *The Parties*

7. ACN is a direct selling company organized under the laws of Nova Scotia. More particularly, ACN contracts, in Canada, with thousands of independent business owners (“**IBOs**”), who are typically individual entrepreneurs or small business owners seeking to earn additional income by referring customers for the telecommunications, energy, and other residential and commercial services provided by ACN or by third parties with whom ACN contracts.¹

8. Planet Energy has at times marketed and sold natural gas and electricity in Canada. Of the Planet Energy entities, only Planet Energy (Ont.) Corp. remains active and, either directly or through its subsidiaries or affiliates, continues to operate in Ontario and other Canadian and American jurisdictions.²

¹ Affidavit of Robert Stevanovski sworn May 11, 2023 (“**Stevanovski Affidavit**”), para. 7, Motion Record of the Moving Party (“**MR**”), Tab 2, p. 26.

² Stevanovski Affidavit, para. 9, MR, Tab 2, p. 26.

B. The Judgment Debt

9. ACN and Planet Energy had a sales agency agreement pursuant to which ACN used its IBOs to refer customers for Planet Energy's energy products. In return for ACN's efforts, Planet Energy was obligated to make monthly "Gross Margin" commission payments to ACN.³

10. On April 27, 2018, ACN commenced an arbitration (the "**Arbitration**"), pursuant to the parties' Amended, Restated and Assigned Sales Agency Agreement Canada, dated November 9, 2012 (the "**SAA**"), alleging various breaches of the SAA, principally related to Planet Energy's failure to pay "Gross Margin" commissions due to ACN under the SAA. In response, Planet Energy asserted a number of counterclaims against ACN.⁴

11. On February 3, 2021, the Arbitrator issued a final award (the "**Award**"), in which she found, at paragraph 481 of the Award, that "ACN's claims have been upheld in all material respects and ACN is the prevailing party in the arbitration."⁵ In the result, applying a conversion of the USD amounts to CAD on the basis of a 1.35 to 1 exchange rate as provided by the Award, Planet Energy was found to be obligated to ACN in the net amount of \$28,096,588.20, plus interest that continues to accrue.⁶

³ Stevanovski Affidavit, para. 11, MR, Tab 2, p. 27.

⁴ Stevanovski Affidavit, paras. 12-13, MR Tab 2, pp. 27-28.

⁵ Stevanovski Affidavit, para. 18, MR Tab 2, pp. 28-29; February 3, 2021 Award—Exhibit "E" to the Stevanovski Affidavit, MR Tab 2(E), p. 188, para. 481.

⁶ Stevanovski Affidavit, paras. 19-20, MR Tab 2, pp. 29-30; February 3, 2021 Award—Exhibit "E" to the Stevanovski Affidavit, MR Tab 2(E), pp. 189-190, para. 489.

C. Recognition of the Award

12. In March 2021, the parties commenced proceedings in the Ontario Superior Court of Justice (Commercial List) in respect of the Award:

- (a) On March 5, 2021, Planet Energy commenced an application (Court File No. CV-21-00658223-00CL) seeking, among other things, an Order setting aside the Award (the “**Planet Application**”); and
- (b) On March 18, 2021, ACN commenced an application (Court File No. CV-21-00659022-00CL) seeking, among other things, an Order recognizing and enforcing the Award (the “**ACN Application**”).⁷

13. On April 7, 2022, the Honourable Justice Cavanagh dismissed the Planet Application and granted the ACN Application, ordering Planet Energy to pay to ACN \$29,259,787 together with prejudgment interest accruing from August 20, 2021 and post-judgment interest (the “**Enforcement Order**”).⁸

14. On May 6, 2022, Planet Energy appealed the Enforcement Order to the Court of Appeal for Ontario (the “**Appeal**”). The Appeal was heard by the Court on March 27, 2023. In its decision released May 8, 2023, the Ontario Court of Appeal dismissed the Appeal.⁹

⁷ Stevanovski Affidavit, para. 21, MR Tab 2, pp. 30-31.

⁸ Stevanovski Affidavit, para. 22, MR Tab 2, p. 31.

⁹ Stevanovski Affidavit, paras. 24-26, MR Tab 2, p. 31

D. *These Proceedings*

15. Immediately following the release of Ontario Court of Appeal’s decision, on Tuesday, May 9, 2023, and then again on Wednesday, May 10, 2023, the lawyers for ACN and for Planet Energy had discussions regarding payment of the Judgment. Satisfactory arrangements for payment of the Judgment could not be reached, and on Thursday, May 11, 2023, ACN’s counsel wrote to the Court asking to schedule a motion to appoint a receiver for the purpose of enforcing its judgment. A copy of ACN’s motion record in respect of the appointment of a receiver was sent to the lawyers for Planet Energy, by email, at the end of day on Thursday, May 11, 2023.¹⁰

16. Very shortly after delivery of the motion record, the lawyers for Planet Energy notified ACN’s lawyers that Planet Energy had filed the NOI, admitting its insolvency and naming Richter LLP, which had previously been retained by Planet Energy in connection with ACN’s litigation before this Court, as the trustee under proposal (the “**Proposal Trustee**”).¹¹

E. *Planet Energy’s Creditors*

17. On May 12, 2023, in response to a request from ACN’s lawyers, the Proposal Trustee delivered to ACN’s lawyers the creditor lists that were filed with the office of the Official Receiver in connection with Planet Energy’s NOI (the “**Creditor Lists**”). The Creditor Lists do not show which debts are secured and which are unsecured. However, ACN’s lawyers had recently conducted PPSA searches in respect of Planet Energy

¹⁰ Stevanovski Affidavit, para. 27, MR Tab 2, p. 32.

¹¹ Stevanovski Affidavit, para. 28, MR Tab 2, p. 32.

(Ontario) Corp. and Planet Energy (B.C.) Corp., and these searches disclose security registrations only on behalf of Shell, albeit in different capacities.¹²

18. Taking the various claims on the Creditor Lists as given for present purposes¹³, and as indicated in the table below, it appears that the Judgment in favour of ACN represents between 94% and 99% of Planet Energy’s aggregate unsecured debt.¹⁴

Total Debt	\$ 42,745,358.08
Less: Alleged Secured Debt	
Scotia LCs	\$ (2,426,225.00)
EDC Guarantee	\$ (2,426,225.00)
Shell	\$ (607,487.30)
Total Unsecured Debt	\$ 37,285,420.78
Less: Alleged Contingent Debt	
Prime Real Estate	\$ (1,600,000.00)
Total Unsecured Net of Contingent Claim	\$ 35,685,420.78
ACN Claim per Form 33	\$ 35,184,894.00
ACN Claim as a % of Unsecured Debt	94.37%
ACN Claim as a % of Non-Contingent Unsecured Debt	98.60%

F. Termination of Shell Energy Swaps: Planet Energy is Naked and Creditors are at Risk

19. In a letter dated May 3, 2023, sent by Planet Energy’s lawyers to ACN’s lawyers, ACN was informed of the following:

- (a) In March 2023, Shell advised Planet Energy that it was not prepared to extend further credit to Planet Energy pursuant to their electricity swap

¹² Stevanovski Affidavit, paras. 29-30, MR Tab 2, pp. 32-33; Planet Energy (Ontario) Corp. PPSA—Exhibit “K” to the Stevanovski Affidavit, MR Tab 2(K); Planet Energy (B.C.) Corp. PPSA—Exhibit “L” to the Stevanovski Affidavit, MR Tab 2(L). Affidavit of Nino Silvestri sworn May 26, 2023 at para. 51-53, Exhibit AA.

¹³ For the avoidance of doubt, ACN does not admit the accuracy of the Debtor’s claim representations; all claims remain subject to proof in the ordinary course.

¹⁴ Stevanovski Affidavit, paras. 31-32, MR Tab 2, pp. 33-34; see the Notice of Intention to Make a Proposal—Exhibits “I” and “J” to the Stevanovski Affidavit, Tabs 2(I) and (J).

transactions under the Amended and Restated Global Agreement, dated October 1, 2017 (the “**Global Agreement**”).

- (b) Planet Energy explored alternate arrangements involving cash collateral or a letter of credit, without success.
- (c) On March 22, 2023, Shell delivered a Default Notice to Planet Energy pursuant to the terms of the Global Agreement, terminating related electricity swap agreements and demanding that Planet Energy pay US\$2,157,748 to Shell, representing amounts owing pursuant to the Global Agreement with respect to the electricity related swaps. Shell did not terminate Planet Energy’s gas supply in connection with this default and agreed to forbearance terms with respect to the remaining gas supply. However Shell advised Planet Energy that it would not renew the parties’ supply agreement when it expires on October 1, 2023.¹⁵

20. Planet Energy is now operating without a hedge in respect of its retail electricity business, which represents the majority of its business. This means that Planet Energy is exposed to market and commodity price risk with respect to the supply of electricity. As noted by Planet Energy’s own lawyer: “[w]hile Planet Energy has experienced short-term increases to its cash flow due to favourable short-term electricity prices, **any negative changes to the price of electricity could severely impact Planet Energy’s business, cash position and value**” (emphasis ours). A negative price movement could severely prejudice stakeholders, including not only creditors such as ACN, but

¹⁵ Stevanovski Affidavit, para. 33, MR Tab 2, p. 34; May 3, 2023 letter from Planet Energy’s lawyers to ACN’s lawyers—Exhibit “M” to the Stevanovski Affidavit, MR, Tab 2(M).

also customers who might lose the benefit of their fixed price contracts if Planet Energy ceases to operate.¹⁶

21. It is no surprise that, at least since 2012 when current management took over control of Planet Energy, there has never been a material period of time during which Planet Energy went unhedged with respect to Ontario electricity, preferring to lock in its margins rather than placing those margins at the mercy of electricity price fluctuations.¹⁷ Yet now that it is, effectively, ACN's money at risk, Planet Energy professes not to have any concerns about operating its business unhedged.

G. ACN has no Confidence in the Management of Planet Energy

22. ACN has no confidence in the management of Planet Energy, which has a demonstrated history of attempting to deprive ACN of funds due to it through misconduct, subterfuge and fraud.¹⁸

23. The underlying Arbitration was necessitated by Planet Energy's refusal to pay ACN commissions which were unquestionably due and payable, on the purported basis of alleged misconduct by ACN, all of which was roundly rejected by the Arbitrator. Among other findings of fact, the Arbitrator found that Planet Energy surreptitiously manipulated database information to deprive ACN of commission payments without

¹⁶ Stevanovski Affidavit, para. 34, MR Tab 2, p. 35; May 3, 2023 letter from Planet Energy's lawyers to ACN's lawyers—Exhibit "M" to the Stevanovski Affidavit, MR, Tab 2(M), pp. 259-260.

¹⁷ Cross-Examination of Nino Silvestri, June 2, 2023, Q. 155-159, 164.

¹⁸ Stevanovski Affidavit, paras. 36-38, MR Tab 2, pp. 35-38; Stevanovski Supp. Affidavit, paras. 20-22.

detection, and instructed an employee of Planet Energy to lie to ACN if it ever raised questions about missing commissions.¹⁹

24. Information about Planet Energy's misconduct only came to ACN's attention as a result of the parties' litigation, the appointment of a forensic auditor, and the willingness of a former Planet Energy employee to reveal and testify to the steps she was directed to take to surreptitiously deprive ACN of commissions. Planet Energy did not volunteer any of this information to ACN.²⁰

H. ACN's Request that KSV be Appointed as Receiver

25. In the circumstances described above, ACN cannot work collaboratively with and support Planet Energy so long as entrenched management remain in place. ACN will never support a proposal by entrenched management having regard to their fraudulent behaviour as experienced by ACN and as found by the Arbitrator.²¹

26. ACN is therefore moving to appoint the Receiver, in whom it has confidence, to take control of the assets, undertakings and properties of Planet Energy for the purpose of realizing thereon, if possible, subject to court supervision, in such manner as the Receiver considers appropriate and as this Court may approve.²²

27. Importantly, ACN hopes to bring stability to Planet Energy's business through the receivership, for the benefit of all parties, including its customers. Shell has most

¹⁹ Stevanovski Affidavit, paras. 36-37, MR Tab 2, pp. 35-38; February 3, 2021 Award—Exhibit "E" to the Stevanovski Affidavit, MR Tab 2(E), pp. 141-142, 173, paras. 260-269, 423.

²⁰ Supplementary Affidavit of Robert Stevanovski sworn June 2, 2023 ("**Stevanovski Supp. Affidavit**"), para. 20.

²¹ Stevanovski Affidavit, paras. 39, 43, MR Tab 2, pp. 39-40.

²² Stevanovski Affidavit, para. 40, MR Tab 2, p. 39.

recently advised that it is not prepared to negotiate a hedge with Planet Energy given that the company is in run-off, but ACN believes that, working cooperatively with the Receiver, a hedging strategy might still be implemented for the benefit of all stakeholders.²³

28. However, if a hedging strategy is to be an option, the Receiver needs to be appointed as soon as possible. In these circumstances, ACN proposes that KSV be appointed Receiver over all of the assets, undertakings and properties of Planet Energy. KSV is prepared to accept the appointment on the terms of the proposed order.²⁴

I. Planet Energy's Cross-Motion

29. Planet Energy has brought a cross-motion seeking an order, among other things, extending the time for filing a proposal and approving a sales process in respect of its business. As noted above, in the absence of a receivership, ACN opposes the relief sought by Planet Energy.

30. While Planet Energy has forecasted a gross margin of approximately \$2.8 million in respect of its customer contracts, it is not clear to ACN that there is any value in Planet Energy's book of business, given that:

- (a) It appears very unlikely that a prospective purchaser would be prepared to buy Planet Energy's book of business on an as-is, unhedged basis for any amount approaching \$2.8 million.

²³ Stevanovski Supp. Affidavit, paras. 5-8.

²⁴ Stevanovski Affidavit, para. 44, MR Tab 2, p. 40.

(b) Rather, the more likely scenario is that a prospective purchase would require the contracts to be fully hedged, or, at the very least, hedged in the near-term. As Mr. Silvestri acknowledges, this would result in a considerable decrease in the value of Planet Energy's forecasted gross margin.²⁵

31. Moreover, ACN is concerned that Planet Energy's stated intention to continue its operations through to July 25, 2023 without a hedge in place poses significant risk to its creditors. Even if Planet Energy's position is not in immediate jeopardy in the current market environment, circumstances might easily change to the prejudice of Planet Energy and its creditors.²⁶ Indeed, Mr. Stevanovski acknowledges that risk when he comments on the "risk premium" that swap providers incorporate into their price offers.

32. While Mr. Silvestri claims to be sanguine about the risk of operating unhedged based on his asserted belief about the favourable state of the electricity market, his past projections in regard to the energy business have turned out to be significantly flawed – for example, in connection with Richter's June 2021 report, Mr. Silvestri provided Richter with projections that Planet Energy's United States electricity business would thrive, more than doubling its revenues from 2021 to 2025. Ultimately, Planet Energy ended up shuttering its U.S. business in its entirety less than a year after Mr. Silvestri provided those bullish projections.²⁷ ACN does not wish to see the scarce assets available to satisfy its debt placed at risk, particularly not based on the projections of

²⁵ Stevanovski Supp. Affidavit, paras. 11-15.

²⁶ Stevanovski Supp. Affidavit, para. 11, 16-17.

²⁷ Cross-Examination of Nino Silvestri, June 2, 2023, Q. 96-114.

someone with no stake in the outcome and with a demonstrated history of misconduct and flawed projections.

33. Finally, ACN is concerned that the information provided by the Proposal Trustee and Planet Energy to date has left a number of unanswered questions regarding the expenses incurred by Planet Energy prior to and during the NOI proposal period, Planet Energy's cash flow during this period, and the value of Planet Energy's business and assets.²⁸ In particular, ACN is not currently persuaded by Planet Energy's claim that it is projected to be cash flow neutral or moderately positive during the period of the proposed sales process.²⁹

²⁸ Stevanovski Supp. Affidavit, paras. 23-31.

²⁹ Stevanovski Supp. Affidavit, paras. 24, 31.

PART III. ISSUES, LAW AND ARGUMENT

34. There are two issues to be determined on this motion:

- (a) Is the appointment of the Receiver necessary for the protection of the debtor's estate or the interests of one or more creditors?

Yes. ACN's concerns regarding Planet Energy's assets go beyond mere suspicion or speculation, and appointing the Receiver will facilitate a discussion regarding the opportunity for a de-risking strategy and a transition of Planet Energy's business.

- (b) Should Planet Energy be granted an extension to file its proposal and should a sale process be approved at this time?

In the absence of a receivership, No. As holder of 94% to 97% of the debt: ACN does not want the cash to remain at risk; ACN has signalled that it will exercise its veto over any proposal. The proceedings should be terminated immediately.

If a Receiver is appointed, ACN is prepared to agree to a brief extension of time (21 days) to allow the Receiver to assess options for stabilizing the business. A sale process should not be approved unless and until the business can be stabilized, so that ACN's recovery is not put at risk.

A. Appointment of the Receiver

1. Relevant law

35. The Court's discretion to appoint the Receiver is set out in s. 47.1 of the *Bankruptcy and Insolvency Act*, RSC 1985 c. B-3 (the "**BIA**") and s. 101(1) of the *Courts of Justice Act*, RSO 1990, c C.43 (the "**CJA**"):

BIA, s. 47.1	CJA, s. 101
<p>47.1(1) Appointment of interim receiver If a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1), the court may at any time after the filing, subject to subsection (3), appoint as interim receiver of all or any part of the debtor's property,</p> <ul style="list-style-type: none">(a) the trustee under the notice of intention or proposal;(b) another trustee; or(c) the trustee under the notice of intention or proposal and another trustee jointly. <p>[...]</p> <p>47.1(3) When appointment may be made An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of</p> <ul style="list-style-type: none">(a) the debtor's estate; or(b) the interests of one or more creditors, or of the creditors generally.	<p>Injunctions and receivers</p> <p>101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.</p>

36. Under s. 101 of the *CJA*, in determining whether it is just or convenient to appoint a receiver, the court must have regard to all of the circumstances, and may consider (a) whether the lenders' security is at risk of deteriorating; (b) whether there is a need to stabilize and preserve the debtors' business; (c) whether there is loss of confidence in the debtors' management; and (d) the positions and interests of other creditors.³⁰

³⁰ See *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, [2020 ONSC 1953 \(Commercial List\)](#) at para. 45.

37. Under s. 47.1(3) of the *BIA*, there must be more than mere suspicion or speculation concerning the debtor's assets before an interim receiver is warranted. However, there is no requirement of the *BIA* to show an actual immediate risk to the debtor's assets.³¹

38. In *Maxium Financial Services*, CIBC, the senior secured creditor of the respondent, brought a motion to appoint a receiver under s. 47.1 of the *BIA* following the respondent's filing of two proposals. CIBC had lost confidence in the respondent as a result of the respondent's failure to hold certain funds in trust, its loss of certain assets and its questionable accounting.³² In granting CIBC's motion, Campbell J. held:

I accept that there must be more than a suspicion or speculation concerning the assets of a company before an interim receiver is warranted. Where, as here, the major secured creditors who have the most at risk have with legitimate reason lost confidence, I do not think that there has to be an actual immediate risk to assets.³³ [emphasis added]

39. The Court also noted that CIBC did not support the respondent's proposals, and that the practical effect of this position was that the proposals were deemed refused.³⁴ The Court did not give effect to the respondent's objections that (a) the appointment of an interim receiver would add to the expense of the proposal proceedings, and (b) sufficient monitoring was available to CIBC through the proposal proceedings.³⁵

³¹ *Maxium Financial Services Inc. v. Corporate Cars Limited Partnership*, [2006 CanLII 40988 \(ON SC\)](#) at paras. 12-15. Also see *CWB Maxium Financial Inc. v. 2026998 Alberta Ltd.*, [2020 ABCA 118](#) at paras. 12-17, where the Court addressed materially identical language under s. 47(3) of the *BIA*.

³² *Maxium Financial Services Inc. v. Corporate Cars Limited Partnership*, [2006 CanLII 40988 \(ON SC\)](#) at paras. 10, 16.

³³ *Maxium Financial Services Inc. v. Corporate Cars Limited Partnership*, [2006 CanLII 40988 \(ON SC\)](#) at para. 15.

³⁴ *Maxium Financial Services Inc. v. Corporate Cars Limited Partnership*, [2006 CanLII 40988 \(ON SC\)](#) at paras. 18-20.

³⁵ *Maxium Financial Services Inc. v. Corporate Cars Limited Partnership*, [2006 CanLII 40988 \(ON SC\)](#) at para. 17.

2. KSV should be appointed as Receiver

40. As in *Maxium*, the evidence on this motion establishes that a receivership is appropriate for the protection of the debtor's estate or the interests of one or more creditors.

41. The appointment of the Receiver is just and convenient. Planet Energy is operating unhedged, putting its cash at risk and exposing creditors to risk. As Planet Energy's lawyer candidly volunteered: "**any negative changes to the price of electricity could severely impact Planet Energy's business, cash position and value**" (emphasis ours).³⁶

42. ACN has no confidence in Planet Energy's management, and, to date, no other creditor has objected to the appointment of the Receiver.³⁷

43. The appointment of the Receiver is also warranted under s. 47.1 of the *BIA*. ACN's concerns regarding Planet Energy's assets go beyond mere suspicion or speculation and are grounded in incontrovertible fact. In particular:

- (a) Planet Energy has a demonstrated history of engaging in misconduct, subterfuge and fraud to evade its payment obligations to ACN, as described above and as found as fact by the Arbitrator.³⁸
- (b) As Planet Energy admits, it is currently unhedged with respect to its electricity contracts, exposing its business and creditors to market risk.

³⁶ May 3, 2023 letter from Planet Energy's lawyers to ACN's lawyers—Exhibit "M" to the Stevanovski Affidavit, MR, Tab 2(M), pp. 259-260.

³⁷ Stevanovski Supp. Affidavit, para. 6.

³⁸ Stevanovski Affidavit, paras. 5, 36-37, MR, Tab 2, pp. 35-38.

44. ACN—by far the largest creditor of Planet Energy—has with legitimate reason lost all confidence in Planet Energy, and cannot work with and will never support a proposal by entrenched management.³⁹ In these circumstances, the Receiver’s appointment is necessary and appropriate.

3. The appropriate process is a receivership

45. Debtors who do not have the support of their major and controlling creditor—particularly those that have been found to have engaged in subterfuge and to have counselled their employees to commit fraud—should not get to use restructuring statutes to control and profit from their liquidation, at the risk and expense of creditors.⁴⁰

46. In such circumstances, the appropriate process is a receivership in which a court officer is in control—not these proposal proceedings controlled by Planet Energy. The monitoring and oversight of the Proposal Trustee is simply not a sufficient to answer to ACN’s legitimate concerns.⁴¹ Moreover, in the circumstances of this case, the replacement of entrenched management by the Receiver increases the opportunity for restructuring because ACN is prepared to work with a trusted third party.

47. While Mr. Silvestri has questioned whether the Receiver would have the ability to continue operating Planet Energy’s business pursuant to its license issued by the Ontario Energy Board, that ability is specifically provided for by section 21.1 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c 15, Sched. B, which contemplates that a

³⁹ Stevanovski Affidavit, para. 43, MR Tab 2, p. 40.

⁴⁰ See *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, [2020 ONSC 1953 \(Commercial List\)](#) at para. 105; also see *Dondeb Inc., Re*, [2012 ONSC 6087 \(Commercial List\)](#).

⁴¹ Stevanovski Supp. Affidavit, para. 35. Also see *Maxium Financial Services Inc. v. Corporate Cars Limited Partnership*, [2006 CanLII 40988 \(ON SC\)](#).

receiver may effectively piggy-back on the licence of the debtor and need not obtain a license of its own.

B. Extension of Time to File a Proposal

48. Absent the appointment of KSV as Receiver with a view to stabilizing Planet Energy's business, ACN opposes an extension of time to file a proposal and seeks an immediate end to these proceedings.

49. The limits on the Court's discretion to grant an extension of time and, conversely, the basis to terminate the period for making a proposal, are set out at ss. 50.4(9) and (11) of the *BIA*, respectively:

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.

[...]

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

- (a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
- (b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
- (c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
- (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

50. Where a proposal has yet to be tabled, s. 50.4(11)(c) of the *BIA* contemplates that a creditor in a veto position, who has lost all confidence in the insolvent person, need not wait to see what the proposal is before indicating that they will vote it down.⁴²

51. If Planet Energy is to operate unhedged, and without a receiver in place, then it cannot satisfy its onus under s. 50.4(9) of the *BIA*, and the period for making a proposal should be terminated. In particular:

- (a) In the face of its unhedged position and its increasing exposure to market and commodity price risk in the summer months, as described above, Planet Energy's request for an extension until July 25, 2023, over the objection of the creditor that is entitled to 94% to 99% of the assets does not reflect good faith and due diligence—it reflects obstinance and a lack of care.
- (b) Planet Energy will not be able to make a proposal that will be accepted by its creditors. ACN has the controlling vote; it does not trust and will not support any proposal by entrenched management having regard to their fraudulent behaviour as found by the Arbitrator and as described above.

⁴² *Cumberland Trading Inc., Re*, [1994 CanLII 7458 \(Gen. Div., Commercial List\)](#) at para. 9.

PART IV. ORDER SOUGHT

52. ACN seeks an order:

- (a) appointing KSV as interim receiver and receiver and manager of the property, assets and undertakings of Planet Energy substantially in the standard form approved by the Commercial List Users Committee, as appended to its Notice of Motion; and,
- (b) if the Receiver is appointed, ACN would not oppose a 21-day extension to allow for the exploration of options to de-risk the business and avoid bankruptcy;
- (c) absent the appointment of the Receiver, denying Planet Energy's request for an extension of time to file a proposal, resulting in a bankruptcy which will allow ACN to receive the benefit of the cash-in-hand.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of June, 2023.



Massimo Starnino/ Kris Borg-Olivier/ Evan
Snyder

SCHEDULE A – TABLE OF AUTHORITIES

1. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, [2020 ONSC 1953 \(Commercial List\)](#)
2. *Maxium Financial Services Inc. v. Corporate Cars Limited Partnership*, [2006 CanLII 40988 \(ON SC\)](#)
3. *CWB Maxium Financial Inc. v. 2026998 Alberta Ltd.*, [2020 ABCA 118](#)
4. *Dondeb Inc., Re*, [2012 ONSC 6087 \(Commercial List\)](#)
5. *Cumberland Trading Inc., Re*, [1994 CanLII 7458 \(Gen. Div., Commercial List\)](#)

SCHEDULE B – TABLE OF STATUTORY AUTHORITIES

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Appointment of interim receiver

47.1 (1) If a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1), the court may at any time after the filing, subject to subsection (3), appoint as interim receiver of all or any part of the debtor's property,

- (a) the trustee under the notice of intention or proposal;
- (b) another trustee; or
- (c) the trustee under the notice of intention or proposal and another trustee jointly.

Duration of appointment

(1.1) The appointment expires on the earliest of

- (a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,
- (b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and
- (c) court approval of the proposal.

Directions to interim receiver

(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

- (a) carry out the duties set out in subsection 50(10) or 50.4(7), in substitution for the trustee referred to in that subsection or jointly with that trustee;
- (b) take possession of all or part of the debtor's property mentioned in the order of the court;
- (c) exercise such control over that property, and over the debtor's business, as the court considers advisable;
- (d) take conservatory measures; and
- (e) summarily dispose of property that is perishable or likely to depreciate rapidly in value.

When appointment may be made

(3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

- (a) the debtor's estate; or
- (b) the interests of one or more creditors, or of the creditors generally.

Place of filing

(4) An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Extension of time for filing proposal

50.4(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.

[...]

Court may terminate period for making proposal

50.4(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

- (a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
- (b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
- (c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

Courts of Justice Act, RSO 1990, c C.43

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

Ontario Energy Board Act, 1998, S.O. 1998, c 15, Sched. B

Liquidators, etc.

21.1 (1) None of the following prevent the exercise by the Board of any jurisdiction conferred by this or any other Act with respect to a regulated utility:

1. The fact that a liquidator, receiver, manager or other official of the regulated utility has been appointed by a court in Ontario.
2. The fact that a writ of sequestration has been issued in Ontario with respect to the regulated utility.
3. The fact that a person is managing or operating the regulated utility under the authority of a court in Ontario.

Obligations of liquidators, etc.

(2) A regulated utility interim official shall manage and operate the regulated utility in accordance with,

- (a) this Act;
- (b) any other Act, to the extent that it confers jurisdiction on the Board;
- (c) any applicable licence, order or direction issued by the Board under this Act or an Act referred to in clause (b);

- (d) any applicable rule made under section 44 or code issued under section 70.1;
and
- (e) any applicable assurance of voluntary compliance given to the Board
under section 112.7.

Must obey Board

(3) A regulated utility interim official, and any person acting under a regulated utility interim official, shall obey all orders of the Board within its jurisdiction in respect of the regulated utility, and the Board may enforce its orders against the official or person even though the official or person is appointed by, or acts under the authority of, a court.

Definitions

(4) In this section,

“regulated utility” means,

- (a) a gas distributor, gas transmitter or storage company whose rates are approved or fixed by the Board under section 36, and
- (b) a distributor or transmitter whose rates are approved or fixed by the Board under section 78; (“service public réglementé”)

“regulated utility interim official” means,

- (a) a liquidator, receiver, manager or other official of a regulated utility who has been appointed by a court in Ontario,
- (b) a person acting in respect of a regulated utility under the authority of a writ of sequestration that has been issued in Ontario, or
- (c) a person who is managing or operating a regulated utility under the authority of a court in Ontario. (“agent intérimaire d’un service public réglementé”)

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A
PROPOSAL OF PLANET ENERGY (B.C.) CORP., AN
INSOLVENT PERSON**

**IN THE MATTER OF THE NOTICE OF INTENTION TO
MAKE A PROPOSAL OF PLANET ENERGY (ONTARIO)
CORP., AN INSOLVENT PERSON**

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF THE CREDITOR,
ALL COMMUNICATIONS NETWORK OF CANADA, CO.**

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