

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

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

**FACTUM OF PLANET ENERGY  
(Motion for Administration Order, Extension of  
Proposal Period and Approval of Sale Process)**

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AN INSOLVENT PERSON**

**SERVICE LIST  
(as at June 2, 2023)**

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**PART I - PURPOSE OF THIS MOTION**

1. Planet Energy (Ontario) Corp. ("**Planet Energy Ontario**") and Planet Energy (B.C.) Corp. ("**Planet Energy BC**", and with Planet Energy Ontario, "**Planet Energy**") bring this motion for (a) the administrative consolidation of their proceedings; (b) an extension to July 26, 2023 of the time to make a proposal; and (c) approval of the proposed sale process (the "**Sale Process**") for Planet Energy's business and/or assets.

2. On May 11, 2023, Planet Energy filed Notices of Intention to Make a Proposal (the "**NOI**") under the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") appointing Richter Inc. ("**Richter**") as proposal trustee (the "**Proposal Trustee**"). Planet Energy is insolvent due to the enforceability of a final arbitral award dated February 3, 2021 (the "**Arbitral Award**") in favour of All Communications Network of Canada Co. ("**ACN**") in the approximate amount of \$29 million plus post-judgment interest. On May 8, 2023, the Court of Appeal for Ontario released its decision dismissing Planet Energy's appeal of the dismissal of its application in this Court to set aside the Arbitral Award.

3. Absent the Arbitral Award, Planet Energy is an operating and cash flow positive business. Planet Energy filed the NOI to stay the enforcement of the Arbitral Award and provide it the room needed to consider its options to maximize recovery for all creditors. In consultation with the

Proposal Trustee, Planet Energy has determined that the Sale Process provides the best prospect for a proposal that will maximize creditor recoveries. ACN, on the other hand, has stated that it believes “Planet Energy’s business should be shut down”.<sup>1</sup>

4. ACN has filed a motion (the “**Receivership Motion**”) seeking the appointment of an interim receiver under section 47(1) of the BIA or a receiver and manager under section 101 of the *Courts of Justice Act* (Ontario) (the “**CJA**”). The request for a receiver under section 101 of the CJA is stayed by the NOI and ACN has not delivered an application to lift the stay.

5. In support of the Receivership Motion, ACN has served two affidavits from Robert Stevanovski, one sworn May 15, 2023 (the “**Sworn Stevanovski Affidavit**”) and another unsworn affidavit delivered June 1, 2023 (the “**Unsworn Stevanovski Affidavit**”). Mr. Stevanovski was not made available for cross-examination until the date of this factum. To ensure that the Court has time to review this main factum, Planet Energy will primarily address herein the relief sought on its own motion and will file a supplemental factum prior to the June 5<sup>th</sup> hearing to fully address the Receivership Motion, including the cross-examination of Mr. Stevanovski and any other evidence or argument filed by ACN.

6. ACN advances two arguments to support the appointment of an interim receiver: (a) its claim that Planet Energy’s customer contracts for electricity should be hedged against increases in the market price of electricity; and (b) its claims that Planet Energy’s management was found in the Arbitral Award to have engaged in fraud. These arguments are wrong in fact and do not meet the high threshold required to justify the appointment of an interim receiver under section 47(1) of the BIA.

7. **First**, Planet Energy is not able to purchase an electricity hedge, with or without the appointment of an interim receiver. Mr. Stevanovski’s claim that ACN could facilitate such a

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<sup>1</sup> Supplementary Affidavit of Robert Stevanovski dated June 1, 2023 (the “**Unsworn Stevanovski Affidavit**”) at para 8.

purchase with Shell (defined below) was rejected in a letter delivered by Shell to ACN, which Planet Energy only became aware of when Shell's in-house counsel delivered it to Planet Energy's external counsel.

8. ACN could, if it were so inclined, purchase an electricity swap on its own behalf to protect its recovery against potential rising electricity costs. More to the point, even if Planet Energy could hedge its electricity contracts at this time, doing so could strip significant value from its electricity contracts and reduce creditor recoveries. Moving expeditiously to sell Planet Energy's business and/or assets through the Sale Process, without a hedge in place, is the appropriate path to maximizing recoveries. Any prospective purchaser could then hedge or not hedge the customer contracts as it sees fit. On cross-examination, Mr. Stevanovski admitted that ACN is actively considering acquiring these contracts itself through its proposed receivership and has held discussions with other counterparties to hedge these customer contracts if acquired by ACN.

9. **Second**, contrary to the repeated statements in the Sworn Stevanovski Affidavit, the arbitrator did not make any finding in the Arbitral Award that Planet Energy's management committed fraud. Mr. Stevanovski's claims to the contrary are inflammatory, scandalous, and deserving of opprobrium. They are, unfortunately, a continuation of prior conduct, including inappropriate threats by ACN's counsel, never acted upon, of criminal charges against Planet Energy's management. Of particular relevance to the request for an interim receiver, these unsupported allegations of fraud also relate to matters that were the subject of the Arbitration (defined below) and occurred well over 5 years ago. In the intervening period, ACN has advanced no fewer than three motions for payment of security by Planet Energy premised on these same allegations, including one before this Court, all of which have been rejected.

10. The Arbitral Award was a staggering result for Planet Energy, and its application to have it set aside was unsuccessful. Planet Energy has no further recourse in respect of the Arbitral Award other than an application for leave to appeal to the Supreme Court of Canada, which does

not involve an automatic stay. Since the release of the Arbitral Award over two years ago, and even while seeking to set it aside, Planet Energy has acted to preserve its business and assets and reduce its costs in order to maximize creditor recoveries in the event that the Arbitral Award became enforceable. During this time, it has provided transparency to ACN and to this Court in respect of its financial affairs.

11. Planet Energy respectfully submits that the Sale Process is the appropriate course of action to maximize recovery for creditors and that an extension of time to file a proposal should be granted to allow this process to run its course. This path is certainly preferred to ACN's suggested course of shutting down Planet Energy's business without attempting to realize potential additional value for creditors through a sale which could also preserve employment for Planet Energy's remaining employees and allow Planet Energy's customer's to receive continuous service. When considering ACN's objection to the extension of time to file a proposal and the Sale Process, this Court should be alert to the fact that ACN is the master sales agent for Xoom, a Planet Energy competitor in Ontario,<sup>2</sup> and according to Mr. Stevanovski's evidence on cross-examination, is actively considering acquiring Planet Energy's customer contracts for itself.

## **PART II - FACTS**

### **A. Planet Energy's Business**

12. Planet Energy is an energy retailer that was established in 2006 and provides fixed-price electricity and natural gas supply contracts (primarily for five-year terms) to residential and commercial customers in Ontario.<sup>3</sup> Its traditional business model has been to generate gross margin through the difference between the fixed price charged to its customers on electricity and

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<sup>2</sup> Affidavit of Nino Silvestri sworn May 26, 2023 (the "**Silvestri Affidavit**") at [para 17](#) and [Exhibit E](#), Affidavit of Nino Silvestri sworn May 7, 2021 at para 59, Motion Record of Planet Energy ("**MR**"), pp 11 and 175-76.

<sup>3</sup> Silvestri Affidavit at [para 9](#), MR p 9.

natural gas supply and the fixed price it pays for its own supply pursuant to energy supply and swap agreements.<sup>4</sup>

13. Planet Energy obtains natural gas supply from Shell Energy North America (US) LP (“**Shell**”), while its customers receive electricity supply from public utilities. Until recently, Planet Energy purchased long-term natural gas supply contracts and electricity swap agreements (the “**Swap Agreements**”) from Shell to hedge against commodity price fluctuations and ensure a fixed gross margin on its customer contracts. Planet Energy’s relationship with Shell is principally governed by an Amended and Restated Global Agreement (the “**Global Agreement**”), with the natural gas supply and Swap Agreements supplementing its terms.<sup>5</sup> Shell is a secured creditor of Planet Energy.

14. Planet Energy entered into Swap Agreements with Shell periodically based on its customer contracts and projections of electricity usage for those customers. This allowed Planet Energy to hedge its consumer contracts contemporaneously with their execution, and adjust the fixed prices charged to customers to achieve a fixed margin based on swap prices at the time. Entering into a global swap agreement (as ACN appears to be proposing) for all of Planet Energy’s customer contracts is inconsistent with Planet Energy’s normal business practices and, as set out below, due to current swap prices would significantly discount the current value of the customer contracts.

## **B. The Arbitration**

15. Due to the regulated nature of the energy retailing business in Ontario and other jurisdictions, Planet Energy retained ACN to market and sell fixed-price energy products to potential customers, which were largely comprised of the friends and family of ACN’s sales

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<sup>4</sup> Silvestri Affidavit at [para 10](#), MR p 9.

<sup>5</sup> Silvestri Affidavit at [para 11](#), MR pp 9-10.

agents, who are called independent business owners (“**IBOs**”). ACN is an indirect subsidiary of ACN, LLC, a global multi-level marketing firm headquartered in North Carolina.

16. Planet Energy and ACN entered into an Amended, Restated and Assigned Sales Agency Agreement dated November 9, 2012 (the “**SAA**”) pursuant to which ACN agreed to act as a “master agent” to market and retail Planet Energy’s products and Planet Energy agreed to pay a commission to ACN for every referred customer who successfully registered for Planet Energy’s products and services in accordance with the SAA.<sup>6</sup>

17. On June 1, 2016, ACN notified Planet Energy that it would not renew the SAA for a subsequent term after its expiry on November 2016.<sup>7</sup> Almost immediately thereafter, an affiliate of ACN (which goes by the name of “**Xoom**”) submitted an application to the Ontario Energy Board (the “**OEB**”) for an energy retailer licence to compete against Planet Energy, proposing that ACN would operate as its master sales agent.

18. On March 2, 2018, Planet Energy delivered notice of an indemnification claim to ACN and advised that it would be withholding commission payments of approximately \$11 million as a set off against its claim. Planet Energy accrued these unpaid commissions as a liability and as cash.<sup>8</sup> Planet Energy’s indemnification claim related to customer allegations of unlawful misconduct by the IBOs, Ontario Energy Board (the “**OEB**”) compliance investigations, and the early termination of customer contracts. During one of the OEB proceedings, certain IBOs admitted under oath that they fraudulently signed up customers for Planet Energy’s products.<sup>9</sup>

19. On April 26, 2018, ACN commenced an arbitration (the “**Arbitration**”) seeking payment of the unpaid commissions. On June 12, 2018, Planet Energy delivered a counterclaim in the Arbitration seeking indemnification for the IBOs’ misconduct and alleging that ACN had breached

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<sup>6</sup> Silvestri Affidavit at [para 14](#), MR pp 10-11.

<sup>7</sup> Silvestri Affidavit at [para 17](#), MR p 11.

<sup>8</sup> Silvestri Affidavit at [para 20](#), MR p 12.

<sup>9</sup> Silvestri Affidavit at [para 18](#), MR p 12.

the SAA by failing to make reasonable commercial efforts to sell Planet Energy products and by sharing Planet Energy's confidential information to facilitate Xoom's entry into the Ontario market to compete with Planet Energy.<sup>10</sup>

20. The arbitrator released the Arbitral Award on February 3, 2021, awarding to ACN approximately \$29 million plus interest.<sup>11</sup> The Arbitral Award was almost three times the unpaid commissions that Planet Energy had accrued (i.e., the amounts it would have paid to ACN absent the Arbitration and related set-off) and included commissions (a) for gross margin that was never earned; (b) for future gross margin that Planet Energy had not yet (and may never) earn; and (c) that, according to OEB staff, are illegal under the *Energy Consumer Protection Act*.<sup>12</sup>

### **C. The Set Aside and Enforcement Applications**

21. On March 4, 2021, Planet Energy commenced an application in this Court to set aside the Arbitral Award (the "**Set Aside Application**"). On March 18, 2021, ACN commenced an application in this Court to enforce the Arbitral Award (the "**Enforcement Application**").<sup>13</sup>

22. In conjunction with these applications, ACN also brought a motion for an order requiring Planet Energy to post security in the full amount of the Arbitral Award as a condition to hearing the Set Aside Application (the "**Security Motion**"). In response to this motion, Planet Energy provided an affidavit from its Chief Executive Officer, Nino Silvestri, confirming that while Planet Energy would not be able to satisfy the full amount of the Arbitral Award, if enforced, Planet Energy:

- (a) was a going concern with positive cash flow;

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<sup>10</sup> Silvestri Affidavit at [para 21](#), MR pp 12-13.

<sup>11</sup> Silvestri Affidavit at [para 22](#), MR p 13.

<sup>12</sup> Silvestri Affidavit at [para 23](#) MR p 13.

<sup>13</sup> Silvestri Affidavit at [paras 24-25](#) MR p 13-14.

- (b) had not made any distributions or paid any dividends to shareholders since fiscal 2018, the year the Arbitration was commenced;
- (c) had not paid any bonuses to directors and officers since fiscal 2018, the year the Arbitration was commenced; and
- (d) had accrued as a liability and as cash the sales commissions to which ACN claimed entitlement following Planet Energy's decision to cease paying such commissions in March 2018.<sup>14</sup>

23. Planet Energy also provided a report from Richter which disclosed that Planet Energy had approximately \$12.8 million in cash on hand, excluding certain restricted cash, and had a US\$2.2 million contingent liability owed to Shell, resulting from the mark-to-market differences in the fair value of the commodity price under the Swap Agreements.<sup>15</sup>

24. In reliance on these materials, Cavanagh J. dismissed the Security Motion. The Arbitrator had dismissed similar arguments when ACN requested payment of security, on two separate occasions, during the Arbitration.<sup>16</sup>

25. In dismissing the Security Motion, Cavanagh J. stated that if ACN believed it had proper grounds to move for pre-judgment remedies, such as a *Mareva* injunction, it was at liberty to do so. ACN did not bring a motion or otherwise seek to obtain pre-judgment remedies at any time.

26. On April 7, 2022, Cavanagh J. dismissed the Set Aside Application and granted the Enforcement Application (the "**Cavanagh Decision**").<sup>17</sup>

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<sup>14</sup> Silvestri Affidavit at [paras 26-29](#), MR p 14-15.

<sup>15</sup> Silvestri Affidavit at [para 30-31](#), MR p 15.

<sup>16</sup> Silvestri Affidavit at [para 32](#), MR p 15-16.

<sup>17</sup> Silvestri Affidavit at [paras 32-33](#), MR p 15-16.

#### **D. The Mediation and Notice of Appeal**

27. Planet Energy served and filed a notice of appeal of the Cavanagh Decision with the Court of Appeal for Ontario. ACN agreed to an extension of time for Planet Energy to perfect its appeal to provide the parties an opportunity to mediate a potential settlement of the Arbitral Award, with Greg Watson of FTI as mediator.<sup>18</sup> For the mediation, Richter prepared a further report (the “**Second Richter Report**”), which provided an updated picture of Planet Energy’s financial position.<sup>19</sup> The parties engaged in the mediation process for almost 6 months prior to the hearing of the appeal.

#### **E. The Shell Termination**

28. In January 2023, Shell advised Planet Energy that it intended to let the Global Agreement expire in the ordinary course on October 1, 2023, as it was looking to wind down its relationship with Planet Energy due to its small size relative to Shell’s more significant customers.<sup>20</sup>

29. On March 22, 2023, Shell accelerated its termination of the Swap Agreements because of the failure of the mediation process with ACN and the impending appeal hearing. Shell advised Planet Energy that it had committed an Event of Default under the Global Agreement. As a result, Planet Energy was required to pay the Settlement Amount contemplated by the Global Agreement (*i.e.*, the cumulative difference in the mark to market price) of US\$1,872,748 and the outstanding principal amount of a U.S. Collateral Credit Facility provided by Shell in the amount of US\$285,000 (the “**Shell Payments**”).<sup>21</sup>

30. Although Shell was also entitled to terminate its supply agreements with Planet Energy – which would have immediately stopped the supply of any natural gas to Planet Energy’s customers – Planet Energy negotiated a forbearance agreement with Shell. Shell agreed not to

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<sup>18</sup> Silvestri Affidavit at [para 34](#), MR p 16.

<sup>19</sup> Silvestri Affidavit at [paras 36-37](#), MR p 16-17.

<sup>20</sup> Silvestri Affidavit at [para 40](#), MR p 17.

<sup>21</sup> Silvestri Affidavit at [para 41](#), MR p 18.

terminate the natural gas supply agreements if Planet Energy made the Shell Payments by March 24, 2023.<sup>22</sup> On April 25, 2023, Planet Energy informed ACN that Shell terminated the Swap Agreements and demanded payment of the Settlement Amount.

#### **F. The NOI**

31. On May 8, 2023, the Court of Appeal for Ontario dismissed Planet Energy's appeal of the Cavanagh Decision.<sup>23</sup> ACN did not agree to forbear on its enforcement of the Arbitral Award. As a result, on May 11, 2023, Planet Energy commenced these proposal proceedings (the "**Proposal Proceedings**") and Richter was appointed as the proposal trustee under the Proposal Proceedings.<sup>24</sup>

32. Planet Energy's Form 33 shows creditor claim amounts totalling approximately \$42.7 million, including secured claims of \$607,487.30 to Shell and \$2,426,225 to Scotiabank (and a duplicative amount to Export Development Canada) are secured debts. Any amounts payable to Scotiabank/EDC are based on outstanding letters of credit and are contingent. The remaining claims of \$37,285,420.78 (including ACN's claim of \$35,184,894) are unsecured.<sup>25</sup>

33. On May 19, 2023, Planet Energy filed its Form 29 and 4-week cash flows. The cash flows show Planet Energy as cash flow neutral over the period, despite the restructuring professional fees. Planet Energy, with the assistance of the Proposal Trustee, has also prepared an 11-week cash flow statement, which shows Planet Energy being cash flow neutral or moderately positive during the period.

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<sup>22</sup> Silvestri Affidavit at [paras 42-46](#), MR p 18-20.

<sup>23</sup> Silvestri Affidavit at [para 49](#), MR p 20-21.

<sup>24</sup> Silvestri Affidavit at [para 50](#), MR p 15.

<sup>25</sup> Silvestri Affidavit at [paras 51-53](#) and [Exhibit AA](#), Planet Energy's Form 33 dated May 11, 2023, MR p 15 and 614.

### **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

34. The issues to be determined on Planet Energy's motion are as follows:

- (a) should the Proposal Proceedings be administratively consolidated;
- (b) should this Court grant an extension of time for Planet Energy to file a proposal pursuant to section 50.4(9) of the BIA; and
- (c) should this Court approve the Sale Process.

35. As noted above, Planet Energy will file a supplemental factum to address ACN's request that an interim receiver be appointed pursuant to section 47.1 of the BIA or that a receiver and manager be appointed pursuant to section 101 of the CJA.

#### **A. Administrative Consolidation of the Proceedings Should Be Approved**

36. The operations of Planet Energy Ontario and Planet Energy BC were historically closely intertwined. Planet Energy BC is now dormant, has no operating activities, and is not forecasting any cash flow activity during the Proposal Proceedings. When Planet Energy BC was an operating entity, Planet Energy Ontario and Planet Energy BC operated under one banner, "Planet Energy", with common management and ownership including a single back office that provides payroll, accounting and treasury functions.<sup>26</sup>

37. Planet Energy BC's only creditors are those related to cross guarantees between Planet Energy BC and Planet Energy Ontario.<sup>27</sup> Any eventual sale as a result of the Sales Process would contemplate the purchase of the Planet Energy business in a single transaction.

38. The overarching principle in bankruptcy proceedings is to secure the just, most expeditious and least expensive determination of every proceeding on its merits.<sup>28</sup> Where, as

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<sup>26</sup> First Report of the Proposal Trustee, dated May 30, 2023 (the "Proposal Trustee Report") at [para 65](#).

<sup>27</sup> Proposal Trustee Report at [para 66](#).

<sup>28</sup> [Bankruptcy and Insolvency General Rules](#), CRC, c 368, s 3; RRO 1990, Reg 194, *Ontario Rules of Civil Procedure*, [Rule 1.04\(1\)](#).

here, there are two closely related bankruptcy proceedings, this Court has held it is appropriate to administratively consolidate the proceedings.<sup>29</sup> Consolidation will avoid duplicated filings and the maintenance of two identical Court records, which will reduce costs in the proceedings and administrative difficulties, ultimately for the benefit of Planet Energy's Creditors and the administration of justice more generally.

**B. The Time to File a Proposal Should Be Extended**

39. This Court has authority to extend the time for a debtor to file a proposal under section 50.4(9) of the BIA where, on a balance of probabilities, the insolvent person can establish 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.<sup>30</sup>

40. This is a low evidentiary threshold to meet, particularly for the first extension request.<sup>31</sup> Each of the factors under section 50.4(9) has been met by Planet Energy.

41. **Good Faith and Due Diligence:** Planet Energy has acted, and is continuing to act, in good faith and with due diligence in these Proposal Proceedings. This Court has found that the pursuit of a sale of assets in an attempt to maximize value for stakeholders is an indicator of good faith and due diligence.<sup>32</sup>

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<sup>29</sup> [Re Electro Sonic Inc](#), 2014 ONSC 942 at [para 4](#).

<sup>30</sup> *Bankruptcy and Insolvency Act*, RSC, 1985, c, B-3 ("BIA"), [s 50.4\(9\)](#).

<sup>31</sup> [Re Scotian Distribution Services Limited](#), 2020 NSSC 131 at [para 24](#); [Re T & C Steel Ltd](#), 2022 SKKB 236 at [para 20](#).

<sup>32</sup> [Re Colossus Minerals](#), 2014 ONSC 514 at [para 39](#).

42. Planet Energy has further demonstrated its good faith through cost cutting efforts, not only during these Proposal Proceedings, but since the release of the Arbitral Award. By the time the Second Richter Report was prepared, and with a mindset towards maximizing recovery for creditors in the event that the Set Aside Application (and/or subsequent appeal) was not successful, Planet Energy had reduced its selling, general and administration expenses by approximately \$5.9 million and disposed of its unprofitable U.S. based natural gas customer contracts.<sup>33</sup> Planet Energy also returned its U.S. based electricity customers back to utility supply in May and June 2022 during a period of abnormally high energy prices. In doing so, Planet Energy decided to sell back its U.S. based electricity supply to Shell and earned a net margin of approximately \$2.3 million USD. This turned out to be when energy prices were at their peak, maximizing Planet Energy's return, and they have reduced significantly in the year since.<sup>34</sup>

43. Prior to and after the release of the Arbitral Award in February 2021 Planet Energy also took significant steps to reduce costs and, where possible, increase revenues. These efforts by Planet Energy included (but are not limited to):

- (a) moving office buildings in Toronto, resulting in savings of approximately \$30,000 per month beginning September 2020;
- (b) terminating a contract with one of its call centre service providers in Jamaica in January 2022, resulting in savings of approximately \$45,000 USD per month;
- (c) instituting a hiring freeze and did not re-hire or replace any employees who resigned in 2022, resulting in savings of approximately \$150,000 per year;

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<sup>33</sup> Silvestri Affidavit at [para 37](#), MR pp 16-17.

<sup>34</sup> Silvestri Affidavit at [para 37](#), MR pp 16-17.

- (d) instituting a hiring freeze and did not re-hire or replace two risk management employees who resigned in 2023, resulting in savings of approximately \$160,000 per year;
- (e) terminating the employment of Planet Energy's Miami Office Manager effective January 2023, resulting in approximate savings of \$60,000 USD per year;
- (f) during these NOI proceedings, terminating six employees that would not be necessary in the context of a sale of the business;
- (g) negotiated a reduction in the licence agreements with Easybooks of \$10,000 per month effective June 1, 2023; and
- (h) reducing the salary of the CEO by \$21,000 per month effective June 1, 2023.<sup>35</sup>

44. In the Unsworn Stevanovski Affidavit, Mr. Stevanovski contends that Planet Energy has not acted in good faith based on its conduct during the Arbitration.<sup>36</sup> Planet Energy disputes these characterizations. But in any event, the test under section 50.4(9) relates to the good faith of the debtor under the NOI proceedings, not its conduct in any pre-insolvency litigation.<sup>37</sup>

45. The Proposal Trustee has also confirmed that "Planet Energy is acting in good faith and with due diligence in taking steps to facilitate the sale of its business and/or assets for the benefit of creditors".<sup>38</sup>

46. **Likelihood of a Viable Proposal:** The court assesses the likelihood of the debtor making a viable proposal under section 50.4(9) of the BIA on an objective standard.<sup>39</sup> The Court must consider what a reasonable creditor might expect to happen or what might reasonably be

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<sup>35</sup> Silvestri Affidavit at [paras 60-61](#), MR pp 23-25.

<sup>36</sup> Unsworn Stevanovski Affidavit at para 33.

<sup>37</sup> [Re 4519922 Canada Inc](#), 2015 ONSC 124 at [paras 42-45](#); [Re Cosgrove-Moore Bindery Services Ltd](#), 2000 CanLII 26981 (Ont CA) at [para 2](#).

<sup>38</sup> Proposal Trustee Report at [para 62\(i\)](#).

<sup>39</sup> [Nautican v Dumont](#), 2020 PESC 15 [[Nautican](#)] at [para 17](#).

expected to occur, rather than what a specific creditor would do, and in particular a creditor opposing the request for an extension.<sup>40</sup>

47. An extension of the proposal period will provide Planet Energy the time needed to conduct the Sale Process and contemplate the terms of a proposal for consideration by Planet Energy's creditors. Most importantly, it will allow Planet Energy to continue operating and servicing its customer contracts to maximize their value for sale, rather than losing their value in a deemed bankruptcy so that the only asset available for creditors is the current cash and accounts receivable. This plan should be contrasted to ACN's claim that Planet Energy's business should be "shut down". In assessing the proposed paths forward, the Court should consider the viewpoint of an objective creditor, not the subjective interests of a creditor that has been involved in difficult litigation with the debtor, is the sales agent for the debtor's primary competitor, and who has expressed an interest in acquiring the contracts for itself. The Court should also consider the impact of a shut down on Planet Energy's other stakeholders, including employees and customers.

48. A major creditor's statement that it will not support any proposal is not dispositive, as creditors often make such statements for strategic reasons.<sup>41</sup> Even a primary secured creditor's statements that it has "lost all confidence in current management", that it will "not negotiate" or that "any proposal is doomed to fail" are not determinative; they are mere "forecasts rather than evidence of established fact".<sup>42</sup>

49. In *Re Cantrail Coach Lines Ltd.*, the British Columbia Supreme Court held that where, as here, a proposal has not yet been formulated, a creditor's opposition is premature and not determinative of whether a viable proposal could be generated.<sup>43</sup> Planet Energy and the Proposal

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<sup>40</sup> *Nautican* at [paras 16-18](#).

<sup>41</sup> *NS United Kaiun Kaisha, Ltd v Cogent Fibre Inc*, 2015 ONSC 5139 at [para 18](#).

<sup>42</sup> *Re Kocken Energy Systems Inc*, 2017 NSSC 80 at [paras 20-21](#).

<sup>43</sup> *Re Cantrail Coach Lines Ltd*, 2005 BCSC 351 at [paras 13-20](#).

Trustee have proposed a Sale Process; however, absent Court approval, the Proposal Trustee cannot canvass the market and assess the potential interested purchasers or the value that it could generate for Planet Energy's stakeholders, including ACN.

50. Although ACN now takes the position that it will never support any proposal made by Planet Energy, this is inconsistent with its willingness to engage in a six month mediation process to resolve the Arbitral Award.<sup>44</sup>

51. **No Prejudice to Creditors:** Planet Energy's creditors will not be prejudiced by the requested extension. The cash flow statement prepared by Planet Energy with the assistance of the Proposal Trustee indicates that Planet Energy has sufficient cash flow to fund operations through the Sales Process and will generate positive cash flow of approximately \$425,000 during that time.<sup>45</sup> The Proposal Trustee has noted it continues to monitor daily cash flows, all invoices, disbursements and weekly variance and will report any material adverse change to the Court and Planet Energy's creditors. However, to date, "[n]othing has come to the Proposal Trustee's attention... related to Planet Energy's activities that would constitute a material adverse change or could materially prejudice creditors during the [proposal] proceedings".<sup>46</sup>

52. The Proposal Trustee, in its capacity as proposal trustee and an officer of the Court, supports Planet Energy's request for an extension of the time to deliver a proposal.<sup>47</sup>

53. In contrast, a denial of the request for an extension of time to file a proposal will be highly prejudicial to Planet Energy's creditors. If the Proposal Trustee fails to file a proposal within 30 days after the NOI was filed, section 50.4(8) of the BIA deems that Planet Energy will have made an assignment in bankruptcy:

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<sup>44</sup> Silvestri Affidavit at [paras 34-39](#), MR pp 16-17.

<sup>45</sup> Silvestri Affidavit, [Exhibit GG](#), Planet Energy's 11-week Cash Flow Statement, MR p 638.

<sup>46</sup> Proposal Trustee Report at [para 42\(i\)](#).

<sup>47</sup> Proposal Trustee Report at [para 62](#).

**50.4(8) Where assignment is deemed to have been made** – Where... the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.<sup>48</sup>

54. If Planet Energy is deemed to have made an assignment under section 50.4(8), it will not be able to file a proposal and Planet Energy will be bankrupt.<sup>49</sup> The Court has no discretion to extend the time to deliver a proposal other than on an application by the debtor under section 50.4(9).<sup>50</sup>

55. Accordingly, if this Court does not extend the time to make a proposal, there are similarly no grounds to appoint the interim receiver requested by ACN, and instead the assets of Planet Energy will vest in the Proposal Trustee as trustee-in-bankruptcy. This is likely to preclude any continuing operation of Planet Energy and eliminate any value from its customer contracts.

### **C. The Sales Process Should Be Approved**

56. Planet Energy's key assets are:

(a) Cash of approximately \$9 million;

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<sup>48</sup> BIA, [s 50.4\(8\)](#).

<sup>49</sup> [Re Royalton Banquet and Convention Centre Ltd](#), 2007 CanLII 21970 (Ont Sup Ct J (In Bankruptcy)).

<sup>50</sup> BIA, [s 50.4\(10\)](#).

- (b) Customer contracts representing approximately 19,000 residential customer equivalents; and
- (c) Accounts receivable (as at March 2023) of approximately \$1.3 million, including (i) approximately \$575,000 related to the disposition of U.S. contracts (estimated using a present value calculated based on a discount rate of about 5 percent) and (ii) approximately \$600,000 representing billed and accrued revenue due from utility companies.<sup>51</sup>

57. Planet Energy is not presently in run-off, as Mr. Stevanovski states in the Sworn Stevanovski Affidavit. Planet Energy continues to re-contract customers when their contracts are expiring and soliciting small commercial customers in order to maximize the value of its customer book.

58. Mr. Stevanovski further contends that Planet Energy's "contracts with customers can be viewed as either an asset or liability" and that "[i]n these circumstances, its only real asset is its cash".<sup>52</sup> Due to the termination of the Swap Agreements, Planet Energy was obliged to pay approximately \$2.2 million USD to Shell as the forward market prices were less than the average weighted price of the Swap Agreement prices. Based on forward estimates of electricity prices, which project that Planet Energy's customer book will return significant cash flow in the near to medium term, ACN's approach would eliminate a significant source of potential recovery for Planet Energy's creditors.<sup>53</sup>

59. As of May 24, 2023, the present value of the mark-to-market of Planet Energy's electricity customer book is \$2.8 million and the present value of the discounted gross margin of Planet

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<sup>51</sup> Silvestri Affidavit at [para 65](#), MR pp 25-26.

<sup>52</sup> Affidavit of Robert Stevanovski sworn May 15, 2023 at [para 6](#), Motion Record of ACN ("**ACN MR**"), p 25.

<sup>53</sup> Silvestri Affidavit at [para 69](#), MR p 26.

Energy's gas supply customer book is \$687,000. These are based on a discount rate of 10% to account for risk, and the Platts M2MS Index, a regular projection of the Ontario commodity price published by S&P Global Inc., an independent third-party research company, relied on by market participants.<sup>54</sup>

60. The expected recovery on any sale of Planet Energy's customer book is dependent on several factors including whether the contracts are purchased by a strategic buyer or new player in the market and the various assumptions used by prospective purchasers in assessing the value of the customer book, such as the discount rate, attrition, volume and renewal opportunities.<sup>55</sup>

61. The Proposal Trustee, in consultation with Planet Energy, has prepared proposed terms and conditions for a sales process for Planet Energy's business and/or assets. Given the limited number of potential bidders and the relative simplicity of Planet's assets, the Proposal Trustee estimates that a sales process can be completed in 8 to 10 weeks based on the following timeline:

<b>Milestone</b>	<b>Date</b>
Teaser Letter sent to Prospective Participants	By June 9, 2023 or shortly thereafter
Due Diligence by Prospective Participants	June 5, 2023 – August 3, 2023
Offer Deadline	August 4, 2023 at 5:00 p.m. (Toronto time)
Auction (if any)	August 11, 2023
Motion to Approve the Winning Bid	On or after August 21, 2023 (dependent on Court availability)

<sup>54</sup> Silvestri Affidavit at [paras 70](#) and [79](#), MR p 27 and 29.

<sup>55</sup> Silvestri Affidavit at [para 71](#), MR p 27.

62. The Sales Process can also commence immediately following court approval as all preparation has already been completed.<sup>56</sup>

63. Subject to court approval, Planet Energy would be willing to consult with ACN and its advisors during this sales process provided a mutually acceptable confidentiality agreement is executed and that it does not eliminate a potential bidder (because ACN cannot be privy to information that would not be available to other bidders if it chooses to participate in the sale process).<sup>57</sup>

64. In the event that a reasonable offer for Planet Energy's business and/or the customer contracts is not obtained through the Sales Process, a determination can be made at that time whether a proposal can be made to permit Planet Energy to distribute certain cash to creditors and run out the customer contracts for the benefit of creditors or whether to return those customers to utility supply.<sup>58</sup>

65. Planet Energy's business, and at minimum its customer contracts, have real potential value that can be attained for the benefit of its creditors, including ACN and Planet Energy's employees, over and above Planet Energy's current cash and accounts receivable. In the Proposal Trustee's assessment, the proposed Sales Process is "an appropriate means of determining third-party interest in Planet Energy's business or assets".<sup>59</sup> Given that Planet Energy is projected to be cash flow neutral or moderately positive during the period of any sales process, and as discussed further below, it would be prejudicial to creditors to foreclose on the value of

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<sup>56</sup> Proposal Trustee Report at [para 42\(iii\)](#).

<sup>57</sup> Silvestri Affidavit at [para 73](#), MR p 28.

<sup>58</sup> Silvestri Affidavit at [para 74](#), MR p 28.

<sup>59</sup> Proposal Trustee Report at [para 42\(iii\)](#).

these contracts by returning customers to utility supply and/or entering into new swap agreements.<sup>60</sup>

66. Pursuant to section 65.13 of the BIA, the Court is authorized to approve a sale of assets in a proposal proceeding. Subsection 65.13(4) of the BIA sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the trustee approved the process leading to the proposed sale or disposition;
- (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.<sup>61</sup>

67. **The Sales Process is Reasonable**: The Sales Process was prepared by Planet Energy in conjunction with the Proposal Trustee, which has extensive experience selling distressed assets and businesses. The Sales Process is reasonable because:

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<sup>60</sup> Silvestri Affidavit at [para 75](#), MR p 28.

<sup>61</sup> BIA, [s 65.13\(4\)](#).

- (a) it provides for a wide marketing of the Company's assets and business by the Proposal Trustee;
- (b) it allows for a fair, efficient and transparent market test for the benefit of all stakeholders; and
- (c) its proposed timelines of the Sale Process are sufficient to allow interested parties to perform diligence and submit offers while balancing the need to complete the Sales Process quickly to minimize any chance that electricity prices change in a materially adverse manner.<sup>62</sup>

68. **Maximizing Value for Creditors**: The Sales Process was developed in consultation with the Proposal Trustee, who has approved of its terms.<sup>63</sup> The Proposal Trustee has filed a report stating that the implementation of the Sales Process would provide the best opportunity to identify and complete a sale of Planet Energy's business and/or assets, stating:

The Proposal Trustee is of the view that the relief requested by Planet Energy, including the Extension, is necessary, commercially reasonable and justified. The Proposal Trustee is also of the view that granting the relief requested will provide Planet Energy with the best opportunity to identify and complete a going concern sale of its business and/or assets, thereby preserving value for the benefit of Planet Energy's stakeholders.<sup>64</sup>

69. Additionally, as referenced above, the Sales Process contemplates that ACN will be consulted during the process provided it executes a satisfactory confidentiality agreement and it does not eliminate potential bidders from the Sales Process.

70. In the Unsworn Stevanovski Affidavit, ACN sets out the argument that there will not be an interested purchaser for the unhedged customer contracts. This position does not reconcile with ACN's continued request to install an interim receiver, nor its own acknowledged consideration of

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<sup>62</sup> Proposal Trustee Report at [para 53](#).

<sup>63</sup> Silvestri Affidavit at [para 72](#), MR p 27; Proposal Trustee Report at [paras 45](#) and [53](#).

<sup>64</sup> Proposal Trustee Report at [para 69](#).

acquiring the contracts itself. If the only value was in Planet Energy's cash, then Planet Energy should be deemed bankrupt. However, this would involve assigning a value of nil to Planet Energy's customer contracts despite their mark to market value, without testing the market, and in circumstances where Planet Energy is cash flow positive over the period of the Sales Process. As set out above, such an approach would be prejudicial to Planet Energy's creditors. In considering this position, as referenced above, the Court needs to consider ACN's interest in acquiring the contracts and its business of acting as the master sale agent of Xoom, a primary competitor of Planet Energy. If Planet Energy ceases operating, ACN will likely be keen to sign up Planet Energy's customers to new fixed price contracts with Xoom, if it does not acquire the contracts directly.

**PART IV - ORDER REQUESTED**

71. For these reasons, Planet Energy seeks the relief set out in its notice of motion.

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

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Daniel S. Murdoch

**SCHEDULE “A”**  
**LIST OF AUTHORITIES**

1. *Nautican v Dumont*, 2020 PESC 15
2. *NS United Kaiun Kaisha, Ltd v Cogent Fibre Inc*, 2015 ONSC 5139
3. *Re 4519922 Canada Inc*, 2015 ONSC 124
4. *Re Cantrail Coach Lines Ltd*, 2005 BCSC 351
5. *Re Colossus Minerals Inc*, 2014 ONSC 514
6. *Re Cosgrove-Moore Bindery Services Ltd*, 2000 CanLII 26981 (Ont CA)
7. *Re Electro Sonic Inc*, 2014 ONSC 942
8. *Re Kocken Energy Systems Inc*, 2017 NSSC 80
9. *Re Royalton Banquet and Convention Centre Ltd*, 2007 CanLII 21970 (Ont Sup Ct J (In Bankruptcy))
10. *Re Scotian Distribution Services Limited*, 2020 NSSC 131
11. *Re T & C Steel Ltd*, 2022 SKKB 236

## SCHEDULE "B"

### TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

#### **Where assignment deemed to have been made**

**150 (8)** Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee

#### **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 not extend time**

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

## **Factors to be considered**

**65.13 (4)** In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the trustee approved the process leading to the proposed sale or disposition;
- (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

### ***Bankruptcy and Insolvency General Rules, C.R.C., c. 368***

**3** In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules

### ***Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194***

General Principle

**1.04 (1)** These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

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

Proceeding Commenced at Toronto

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