SUPERIOR COURT OF JUSTICE

# COUNSEL SLIP/ENDORSEMENT

**COURT FILE NO.:** BK-23-02943168-0031/BK-23-02943175-0031 **DATE:** 14 June 2023

**NO. ON LIST:** 3

**TITLE OF PROCEEDING:** **PLANET ENERGY (B.C.) CORP. v. ALL COMMUNICATIONS NETWORK OF CANADA CO. ET AL.**

**BEFORE JUSTICE:** **MADAM JUSTICE STEELE**

## PARTICIPANT INFORMATION

**For Plaintiff, Applicant, Moving Party, Crown:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
| Daniel Murdoch | Planet Energy | dmurdoch@stikeman.com |
| Gavin Inkster | " | ginkster@stikeman.com |
| Lee Nicholson | " | leenicholson@stikeman.com |
| Zev Smith | " | zsmith@stikeman.com |
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**For Defendant, Respondent, Responding Party, Defence:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
| Patrick Corney | Ontario Energy Board | pcorney@millerthomson.com |
| Max Starnino | ACN | Max.starnino@paliareroland.com |
| Kris Borg-Olivier | ACN | Kris.borg-Olivier@paliareroland.com |
| Evan Snyder | ACN | Evan.Snyder@paliareroland.com |
| George Benchetrit | For Proposed Trustee | george@chaitons.com |
| Jonathan Joffe | For Proposed Trustee | jjoffe@richter.ca |

**For Other, Self-Represented:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
| Bobby Kofman | Propose Receiver | bkofman@ksvadvisory.com |
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**ENDORSEMENT OF MADAM JUSTICE STEELE:**

1. Motions heard via Zoom on June 5, 2023.

2. Planet Energy (Ontario) Corp. ("Planet Energy Ontario") and Planet Energy (B.C.) Corp. ("Planet Energy BC," and together, "Planet Energy") seek:
    i. Administrative consolidation of their proceedings;
    ii. An extension to July 26, 2023 of the time to make a proposal; and
    iii. Approval of the proposed sale process for Planet Energy's business and/or assets.

3. The Proposal Trustee supports the relief sought by Planet Energy.

4. All Communications Network of Canada, Co. ("AC") seeks an order appointing KSV Restructuring Inc. ("KSV" or "Receiver") as interim receiver and receiver and manager of all of Planet Energy's assets. In the alternative, AC seeks the termination of these proceedings. AC has indicated that if a Receiver is appointed, AC is prepared to agree to a brief extension of time to allow the Receiver to assess options for stabilizing the business.

5. For the reasons set out below, I have determined that an interim receiver shall be appointed under section 47.1 of the *Bankruptcy and Insolvency Act* (the "BIA"). In addition, a brief extension of time (21 days) shall be granted to allow the Receiver time to assess options for stabilizing the business.

**Background**

6. AC is a direct selling company organized under the laws of Nova Scotia. AC contracts with independent business owners, who are typically entrepreneurs or small business owners by referring customers for the telecommunications, energy, and other residential and commercial services provided by AC or by third parties with whom AC contracts. Planet Energy had contracted with AC to market and sell fixed-price energy products to potential customers.

7. Planet Energy is a natural gas and electricity retailer with residential and commercial customers. Only Planet Energy Ontario remains active and continues to operate.

8. Planet Energy is indebted to AC for the net amount of $29,259,787, plus interest, pursuant to an arbitral award, dated February 3, 2021, that has been affirmed by this Court and by the Ontario Court of Appeal (the "Judgment"). The Court of Appeal's judgment dismissing Planet Energy's appeal was released on May 8, 2023.

9. On May 11, 2023, AC'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 AC's motion record was sent to Planet Energy's lawyers by email at the end of the day on May 11, 2023.

10. On May 11, 2023, Planet Energy filed Notices of Intention to Make a Proposal under the *Bankruptcy and Insolvency Act* (Canada) (the "BIA") appointing Richter Inc. ("Richter") as proposal trustee (the "Proposal Trustee").

11. AC's Judgment debt represents between 94% and 99% of Planet Energy's aggregate unsecured debt as shown on its creditor listing. Planet Energy now owes AC approx. $35 million.

12. As at the filing date, Planet Energy had secured/unsecured obligations totally approx. $42.7 million (excluding employee termination and severance payments and potential landlord claims). Planet Energy has two secured creditors: Shell Energy North America (US) L.P. ("Shell") in the total amount of approx. $607,500; and Bank of Nova Scotia in the total amount of approx. $2.4 million (and a duplicative amount to Export Development Canada).

13. Planet Energy employs 17 employees. It has current cash of approx. $9 million and accounts receivable of approx. $1.3 million. Planet Energy's other main asset is its electricity and natural gas customer contracts (approx. 19,000 residential customer equivalent contracts).

14. Until recently Planet energy purchased long-term natural gas supply contracts and electricity swap agreements from Shell to hedge against commodity price fluctuations and ensure a fixed gross margin on its customer contracts.

15. In March 2023, Shell advised Planet Energy that it was not prepared to extend further credit to Planet Energy pursuant to their electricity swap transactions under the Amended and Restated Global Agreement, dated October 1, 2017 (the "Global Agreement"). On March 22, 2023, Shell delivered a Default Notice to Planet Energy under the terms of the Global Agreement, terminating electricity swap agreements and demanding payment of US$2,157,748, representing amounts owing pursuant to the Global Agreement with respect to the electricity related swaps. Accordingly, Planet Energy is now operating without a hedge in respect of its retail electricity business. Planet Energy's natural gas contracts with Shell remain in place. However, Shell has indicated that it will not renew upon expiry in October 2023.

**Analysis**

16. Given the extensive history of litigation between the parties, and the unequivocal position of AC, the largest creditor, that AC will not support any proposal put forward by the current management of Planet Energy, I first consider whether it is appropriate to appoint a receiver under s. 47.1 of the BIA.

17. Section 47.1 of the BIA contemplates the appointment of a receiver in the context of proposal proceedings. It provides:

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

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

18. AC referred to *Maxium Financial Services v. Corporate Cars Limited Partnership*, 2006 CanLII 40988 (ON SC). In that case, the senior secured creditor of the debtor, brought a motion to appoint a receiver under s. 47.1 following the respondent's filing of two proposals. The creditor had lost confidence in the debtor as a result of its failure to hold certain funds received in trust and questionable accounting, among other things. In granting the creditor's motion, the Court 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.

19. The Court in *Maxium* appointed the receiver. The Court, at para. 17, rejected the debtor's objections that the appointment of an interim receiver would add to the expense of the proposal proceedings and that sufficient monitoring was available to the creditor through the proposal proceedings. The Court also rejected the debtor's argument that there must be an immediate risk to assets, at para. 15, and stated:

> 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 with legitimate reasons, lost confidence, I do not think that there has to an actual immediate risk to assets.

20. AC argues that the appointment of the Receiver is appropriate in this case as Planet Energy is now operating unhedged, putting its cash at risk and exposing creditors to risk. Planet Energy has not previously operated unhedged. Planet Energy's lawyer wrote in a letter to AC's lawyer, on May 3, 2023:

> Planet Energy is now operating without a hedge in respect of its electricity retail business. This is a significant change to Planet Energy's business and exposes Planet Energy to market and commodity price risk. While 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.

21. AC states that it has no confidence in Planet Energy's management given the extensive history of "scorched earth" litigation between the parties. Further, no other creditor has objected to the proposed appointment of a Receiver.

22. Planet Energy argues that the issues AC had with regard to Planet Energy's management were five years ago and states that there was no finding of fraud in the arbitral award. However, the arbitral

award was subject to ongoing court proceedings in this Court and the Court of Appeal until very recently. Further, although there were no specific findings of "fraud" in the arbitral award, the arbitrator made certain statements upon which AC bases its concerns, including:

- In particular, the Arbitrator finds that Planet failed to provide ACN accurate and complete reports in connection with the SAA and that Planet materially underpaid commissions owed to ACN in the amounts determined by Stout as set forth in the chart at Paragraph 369 above: (para. 416 of Arbitral Award).
- Such suspicion is particularly warranted here given the evidence that Planet already *surreptitiously manipulated* database information to deprive ACN of commission payments (in material breach of Section 3(e)) and Planet's obvious self-interest in having the Arbitrator find that there were no material inaccuracies in its reports and calculations: (para. 423 of Arbitral Award).
- Paragraphs 260-263 of the Arbitral Award.

23. Planet Energy argues that the appointment of a Receiver would be duplicative and add cost to the proposal proceedings already in place. As noted above, that argument was rejected in the *Maxium* case.

24. Planet Energy further argues that AC does not intend to address the hedging issue immediately, but instead intends to obtain Planet Energy's contracts without a sales process. AC has had discussions with Shell regarding a hedge being put in place once AC acquired the assets or business.

25. I am satisfied that the appointment of a Receiver is necessary and appropriate in the circumstances. AC has lost all confidence in Planet Energy and will not work with entrenched management. Similar to *Maxium*, AC, although not a secured creditor, is by far the largest creditor with the most at stake. AC, with legitimate reason due to the history between the parties, including the findings of the arbitrator referenced above, does not have confidence in Planet Energy's entrenched management. Relying on *Maxium* in these circumstances, there does not have to be an actual immediate risk to assets. Nonetheless, there are also genuine concerns regarding the fact that Planet Energy is currently unhedged with respect to its electricity contracts (having never operated in such a way in the past), exposing its business and creditors to market risk.

26. In addition, AC has made it clear that if the stay is extended with current management in place at Planet Energy, without a Receiver, they will return with a motion under s. 50.4(11) of the BIA.

27. The limits on the Court's discretion to grant an extension of time and, the basis to terminate the period for making a proposal are set out ss. 50.4(9) and (11) of the BIA. In this motion, Planet Energy sought to extend the time under s. 50.4(9) of the BIA. That section requires that (i) the insolvent person has acted in good faith and with due diligence; (ii) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and (iii) no creditor would be materially prejudiced if the extension being applied for were granted.

28. AC made it clear that if Planet Energy was successful in obtaining an extension of the stay under s. 50.4(9) of the BIA, it would return with a motion under s. 50.4(11) of the BIA relying on paragraph (c):

(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

(c) The insolvent person will not likely be able to make a proposal, before the expiration of the period in question, <u>that will be accepted by the creditors, or</u>
(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. [emphasis added]

29. Unlike s. 50.4(9), which requires the insolvent person to satisfy each of the requirements in order for the stay extension to be granted, s. 50.4(11) only requires the creditor to satisfy one of the requirements.

30. AC states that Planet Energy will not be able to make a proposal that will be accepted by its creditors and, therefore, cannot satisfy s. 50.4(9)(b) of the BIA. AC has the controlling vote. Based on the history between the parties, including years of "scorched earth" litigation, AC does not trust and will not support any proposal put forward by current management of Planet Energy. However, as discussed below, based on *Baldwin,* this is not the test under s. 50.4(9)(b).

31. AC argues that based on *Cumberland Trading Inc., Re* 1994 CanLII 7458 (ON SC) 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 confidence in the insolvent party, does not have to wait and see what the proposal is before indicating their intention to vote against it. In *Cumberland*, Farley J. stated, at para. 9, in reference to s. 50.4(11)(c) of the BIA:

> It seems to me that clause (c) above deals specifically with the situation where there has been no proposal tabled. It provides that there is no absolute requirement that the creditors have to wait to see what the proposal is before they can indicate they will vote it down. I do not see anything in BIA which would affect a creditor (or group of creditors) with a veto position from reaching the conclusion that nothing the insolvent debtor does will persuade the creditor to vote in favour of whatever proposal may be forthcoming. I think that this view is strengthened when one considers that the court need only be satisfied that "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..." (emphasis added). This implies that there need not be a certainty of turndown. The act of making the proposal is one that is still yet to come. I am of the view that Skyview's position as indicated above is satisfactory proof that Cumberland will not likely be able to make a proposal that will be accepted by the creditors of Cumberland.

32. Planet Energy referred the Court to *Re Baldwin Investors Inc.*, [1994] O.J. No. 271. In *Baldwin,* Farley J. dismissed the debtors' appeal for an extension of time to file proposals. The Registrar had been of the view that the debtors failed to meet all three tests under s. 50.4(9) of the BIA. Farley J. was of the view that the Registrar had inadvertently used the wrong test in s. 50.4(9)(b), but even applying the correct test, he was of the view that the extension should not be granted. The Registrar had focused on the fact that the major creditor had lost confidence in the debtor and would not vote for any proposal the

debtor put forward. Farley J. stated that "this is not the test of s. 50.4(9)(b)." He further noted, at para. 4, that "it appears that Parliament wished to distinguish between a situation of a viable proposal (s. 50.4(9)(b) and (11)(b)) versus a situation in which it is likely that the creditors will not vote for this proposal, no matter how viable that proposal (s. 50.4(11)(c) but with no corresponding clause in s. 50.4(9))." Farley J. then determined that the debtors had not shown that they were likely to make a viable proposal. Importantly, in my view, Farley J. went on to note, at para. 8:

> I would also point out that it was clear that if the debtor companies had won a victory in this appeal, it would have been a Pyhrric victory. The Bank would have been able to come right back in with a motion based on s. 50.4(11)(c).

33. That is the case here. AC has made it clear that if they are unsuccessful, they will return with a motion under s. 50.4(11)(c). Based on the fractured history between the parties, I accept AC's submission on this point.

34. As noted above, AC indicated that they consented to a brief extension of the stay period if a Receiver was in place.

35. As noted above, Planet Energy requested that the proceedings be administratively consolidated. Planet Energy BC is now dormant with not operating activities. The Court has held it is appropriate to administratively consolidate proceedings, where there are two closely related bankruptcy proceedings, as is the case here: *Re Electro Sonic Inc.*, 2014 ONSC 942, at para. 4. There was no opposition raised to this request. Accordingly, the proceedings shall be administratively consolidated.

**Disposition**

36. Order to go as follows:

i. KSV is appointed as interim receiver of the property, assets and undertakings of Planet Energy substantially in the standard form approved by the Commercial List Users Committee; and

ii. The proposal period and the stay of proceedings is hereby extended for a further twenty-one days.

iii. The proceedings bearing Court/Estate File No. 31-2943175 and 31-2943168 shall be administratively consolidated.