

Court File No. 31-2943175
Estate No. 31-2943175

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

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

MEMORANDUM OF LAW AND ARGUMENT OF THE MOVING PARTY

September 25, 2023

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TO: THE SERVICE LIST

1. This is a procedural motion by All Communications Network of Canada, Co. (“**ACN**”) for an order terminating these proposal proceedings by Planet Energy (Ontario) Corp. (“**PEONT**”), substituting KSV Restructuring Inc. (“**KSV**”), which is currently the Interim Receiver of PEONT (the “**Interim Receiver**”), as licensed insolvency trustee in these proceedings (the “**Trustee**”) (i.e., trustee in bankruptcy) of PEONT, and granting corollary relief.

2. The motion is expected to be unopposed.

3. The court’s jurisdiction to grant the relief being sought can be found in sections 50.4(11)(c) and 57.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”).

4. Section 50.4(11)(c) of the BIA provides as follows:

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...

(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...

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.¹

5. Section 57.1 of the BIA provides as follows:

57.1 Where a declaration has been made under subsection 50(12) or 50.4(11), the court may, if it is satisfied that it would be in the best interests of the creditors to do so, appoint a trustee in lieu of the trustee appointed under the notice of intention or proposal that was filed.²

¹ BIA, [s. 50.4\(11\)\(c\)](#). Note: [s. 50.4\(8\)](#) is the provision which deems a bankruptcy to have occurred where a proposal is not filed within the time permitted by the BIA or where the debtor fails to comply with certain other obligations.

² BIA, [s. 57.1](#).

6. PEONT is a reseller of natural gas and electricity in Ontario.³
7. ACN is PEONT's largest creditor and is owed in excess of \$28 million (the "**ACN Debt**") pursuant to an arbitral award dated February 3, 2021. The award has been affirmed by an order of this court dated April 27, 2022, which was affirmed an order of the Court of Appeal for Ontario dated May 5, 2023 (the "**Court of Appeal Decision**").⁴
8. Based on the information that is currently available, ACN is estimated to represent in excess of 95% of PEONT's debt⁵, and therefore has a veto over any proposal.⁶
9. PEONT commenced these proceedings shortly after the release of the Court of Appeal Decision, by filing a Notice of Intention to Make a Proposal ("**NOI**"), appointing Richter Inc. ("**Richter**") as the proposal trustee in the NOI proceedings (the "**Proposal Trustee**").⁷
10. PEONT's management did not have ACN's support, and on June 8, 2023, KSV was appointed as Interim Receiver, without security, of all the property, assets and

³ Affidavit of Tom Ulry affirmed September 21, 2023, Motion Record of ACN dated September 21, 2023 ("**MR**"), Tab 2 (the "**Ulry Affidavit**"), p. 18, para. 3.

⁴ Ulry Affidavit, MR Tab 2, p. 18, paras. 4-5.

⁵ Ulry Affidavit, MR Tab 2, p. 18, para. 6.

⁶ BIA, [s. 54\(2\)\(d\)](#): the proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors — other than, unless the court orders otherwise, a class of creditors having equity claims — vote for the acceptance of the proposal by a majority in number and two thirds in value of the unsecured creditors of each class present, personally or by proxy, at the meeting and voting on the resolution.

⁷ Ulry Affidavit, MR Tab 2, p. 18, para. 7.

undertakings of PEONT, and has been administering the affairs of PEONT since that time.⁸

11. Efforts to sell PEONT's assets and undertaking were unsuccessful⁹, and the amount available for distribution to creditors is expected to be less than \$10 million, considerably less than the ACN Debt.

12. On August 17, 2023, this Court extended the time for PEONT to file a proposal in these proceedings to and including October 2, 2023, in order to facilitate an orderly wind-down of the business by the Interim Receiver and to determine if a distribution proposal or a bankruptcy was most advantageous for stakeholders.¹⁰

13. The principal issues outstanding in the interim receivership at the time of the last stay extension were:

- (a) the notification of customers that PEONT would be winding up its business and would no longer be providing them with energy services and, where necessary, the orderly transition of these customers to the applicable utility service provider; and,
- (b) the resolution of regulatory proceedings commenced against a U.S. subsidiary of PEONT in the State of Pennsylvania (the "**Pennsylvania Proceedings**") which the Interim Receiver has been overseeing because

⁸ [Order](#) of the Honourable Madame Justice Steele dated June 8, 2023; [Endorsement](#) of the Honourable Madame Justice Steele dated June 14, 2023; Ulry Affidavit, MR Tab 2(B): Second Report of the Interim Receiver dated August 14, 2023.

⁹ Ulry Affidavit, MR Tab 2, p. 19, para. 9, and at MR Tab 2(B): Second Report of the Interim Receiver dated August 14, 2023, p. 82, para. 5.

¹⁰ Ulry Affidavit, MR Tab 2, p. 19, para. 10, and MR Tab 2(C): Endorsement of the Honourable Justice Conway, dated August 17, 2023.

PEONT had posted a letter of credit in connection with services provided to consumers in that jurisdiction (the “**Scotia LC**”)—the Interim Receiver disputes that Scotia LC covers any penalties or fines arising from the Pennsylvania Proceedings.¹¹

14. Since August 17, 2023:

(a) The customer transition process has gone well. PEONT has notified its remaining customers that it is unable to continue to carry on business and that their utility services would be transitioned. To that end:

(i) natural gas customers have all been transitioned to their applicable utility service provider; and,

(ii) the transition of electricity customers is ongoing but is expected to be completed in the near term.¹²

(b) Discussions with respect to the regulatory proceedings in Pennsylvania have not resulted in a settlement to date, although efforts to resolve such proceedings consensually are ongoing.¹³

15. ACN has had several discussions with the Interim Receiver having regard to the circumstances described above, and, as a result, does not perceive any advantage to and is not supportive of a proposal¹⁴.

¹¹ Ulry Affidavit, MR Tab 2, pp. 19-20, para. 11.

¹² Ulry Affidavit, MR Tab 2, p. 20, para. 12.

¹³ Ulry Affidavit, MR Tab 2, p. 20, para. 12.

16. To the contrary, ACN anticipates some time and cost savings in the event of an immediate bankruptcy, particularly with KSV as the Trustee, inasmuch as:

- (a) a bankruptcy will avoid the cost and delay of drafting a proposal and related reports to creditors, convening a meeting of creditors to consider and vote on the proposal and, if accepted by the creditors, preparing materials to seek Court approval of the proposal, and of administering the proposal; and,
- (b) professional costs will be limited to one set of professionals.¹⁵

17. Given ACN's lack of support, a proposal acceptable to creditors is not likely.

18. It is in the interest of creditors that KSV assume the role of Trustee of PEONT because, since the appointment of the Interim Receiver, KSV and its counsel have attended to all operational matters, including, most recently, the transition of customers in consultation with representatives of the Ontario Energy Board, and the Pennsylvania Proceedings. As Trustee, KSV will be able to maintain and continue those processes to facilitate the transition to bankruptcy as seamlessly as possible, and the making of distributions to creditors as expeditiously as possible.¹⁶

¹⁴ Ulry Affidavit, MR Tab 2, pp. 20-21, para. 13.

¹⁵ Ulry Affidavit, MR Tab 2, pp. 20-21, para. 13.

¹⁶ Ulry Affidavit, MR Tab 2, p. 21, para. 14. Also see *Sport Maska Inc. v. RBI Plastique Inc.*, 2005 NBQB 394 (CanLII) at [para. 45](#) [interim receiver appointed in lieu of proposal trustee pursuant to s. 57.1 of the BIA].

19. If the KSV is not substituted as Trustee, then, on bankruptcy, KSV's appointment as Interim Receiver would terminate automatically by operation of law¹⁷, and Richter would continue as Trustee at least pending a motion to substitute the trustee at the First Meeting of Creditors.¹⁸ While Trustee, Richter would be required to bring itself up to speed and interject itself in respect of the customer transition process, the Pennsylvania Proceedings, and any other operational matters. ACN submits that this transfer of responsibility and lack of continuity will result in needless expense and delay and could even give rise to suboptimal results in respect of negotiations or dealings with third parties, such as the energy regulators and customers.

20. ACN therefore seeks an order substantially in the form filed in these proceedings, terminating the proposal proceedings, substituting KSV as Trustee, discharging KSV as Interim Receiver and discharging Richter as Trustee (and in connection with such discharge, approving fees and disbursements, including legal fees and disbursements, and providing releases in the usual form).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of September, 2023.



Of counsel to ACN, a creditor

¹⁷ BIA, [s. 47.1\(1.1\)](#): the appointment of the Interim Receiver expires upon the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed.

¹⁸ BIA, [s. 50.4\(8\)\(c\)](#).

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PROCEEDING COMMENCED AT
TORONTO

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