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

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

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

June 4, 2023

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

1. All Communications Network of Canada, Co. ("**ACN**"), delivers this factum in reply to the cases cited in the primary factum of the debtors, Planet Energy Corp., Planet Energy (Ont.) Corp., and Planet Energy (B.C.) Corp. (collectively, "**Planet Energy**").

Case Law	Cited in Planet Energy Factum at:	Cited for the proposition that:	ACN's reply:
Re Scotian Distribution Services Limited, 2020 NSSC 131 *Re T & C Steel Ltd*, 2022 SKKB 236	Para. 40	There is a low evidentiary threshold to meet when applying for an extension of time under s. 50.4(9) of the *BIA*, particularly for the first extension request.	The law is that the debtor must show, on a balance of probabilities, that the extension is justified: see *Royalton Banquet and Convention Centre Ltd*, 2007 CanLII 21970 (cited by Planet Energy in its primary factum); also see *2806401 Ontario Inc. o/a Allied Track Services Inc*., 2022 ONSC 5509 at para. 39 (cited by Planet Energy in its responding factum). *Re Scotian Distribution Services Limited* and *Re T & C Steel Ltd.* are distinguishable and do not assist Planet Energy. ***Re Scotian Distribution Services Limited.*** ACN notes that: (1) the debtor's motion to extend was unopposed (see paras. 15, 22); (2) the registrar affirmed that the burden of proof is a balance of probabilities (para. 24); and (3) the registrar made much of the Covid-19 pandemic, which had just hit at the time of the hearing, and was willing to give the debtor the benefit of the doubt "in the current context" (paras. 24-25). The registrar's comment at paragraph 24 that "at least on a first extension, [the civil standard of proof] will not likely be a difficult standard to meet" is fact-specific and distinguishable from the present case. ***Re T & C Steel Ltd.*** While the Court cited *Re Scotian Distribution*, in passing, for the proposition that the onus on a first extension application "will likely not be a difficult standard to meet", ACN notes that : (1) the Court made no analysis of *Re Scotian Distribution* and did not consider the context of that case; and (2) the Court's comments on *Re Scotian Distribution* were in obiter, because the

			Court was not considering an motion for a first extension application in that case (see para. 20).
Re Colossus Minerals Inc, 2014 ONSC 514	Para 41	The pursuit of a sale of assets in an attempt to maximize value for stakeholders is an indicator of good faith and due diligence.	The Court did not establish any general proposition that the pursuit of a sale is an indicator of good faith; Wilton-Siegel J. merely found that the applicant in that case was acting in good faith in seeking authorization for a SISP (para. 39). ACN also notes this motion to extend was unopposed (para. 1).
Re 4519922 Canada Inc, 2015 ONSC 124 *Re Cosgrove-Moore Bindery Services Ltd*, 2000 CanLII 26981 (Ont CA)	Para 44	The test under s. 50.4(9) relates to the good faith of the debtor under the NOI proceedings, not its conduct in any pre-insolvency litigation.	Even if Planet Energy's past misconduct is not specifically considered under the "good faith" criterion of the test to extend/ terminate the proposal period, Planet Energy's misconduct is unquestionably relevant under s. 50.4(11)(c) criteria (not likely to be able to make a proposal that will be accepted by creditors).
Nautican v Dumont, 2020 PESC 15	Para 46	The court assesses the likelihood of the debtor making a viable proposal under section 50.4(9) of the BIA on an objective standard, and not in light of what a specific creditor might expect to happen.	Again, ACN's specific concerns are unquestionably relevant under s. 50.4(11)(c). The relationship between s. 50.4(9)(b) and s. 50.4(11)(c) of the *BIA* is addressed by Justice Farley in the *Baldwin Valley Investors Inc., Re* case (cited by the Court in *Nautican v. Dumont* in the paragraph immediately preceding that which Planet Energy relies upon).
NS United Kaiun Kaisha, Ltd v Cogent Fibre Inc, 2015 ONSC 5139	Para 48	A major creditor's statement that it will not support any proposal is not dispositive [under s. 50.4(9)], as creditors often make such statements for strategic reasons.	*NS United* is distinguishable and does not assist Planet Energy. ACN notes: (1) in *NS United*, the debtor had not engaged in any previous misconduct (the veto-yielding creditor simply had no interest in negotiating with the debtor, who, it was clear, had no real proposal); and (2) that as Penny J. notes, the exercise of discretion under ss. 50.4(9) and (11) of the *BIA* is highly fact dependent (para. 34).

Re Kocken Energy Systems Inc, 2017 NSSC 80	Para 48	Even a primary secured creditor's statements that it has "lost all confidence in current management" are merely forecasts rather than evidence of established facts [on a motion under s. 50.4(9)].	*Re Kochen* is distinguishable. In that case, the basis for the secured creditor's assertion that it had lost all confidence was its belief that the debtor was transferring its assets to a related company. The debtor denied wrongdoing, and the Court noted that it was in no position to resolve these evidentiary contradictions (paras. 8-12, 16). In the present case, the basis for ACN's loss of confidence is the incontrovertible findings of fact of the Arbitrator.
Re Cantrail Coach Lines Ltd, 2005 BCSC 351	Para 49	Where a proposal has not yet been formulated, a creditor's opposition is premature and not determinative of whether a viable proposal could be generated.	*Re Cantrail* and other cases do stand for this proposition. A separate line of case law supports the position articulated by Justice Farley in *Cumberland Tranding Inc*. (cited in ACN's primary factum) that a creditor in a veto position who has lost confidence can effectively short cut an application under s. 50.4(9) by seeking a termination under s. 50.4(11)(c). There is no appellate authority on this point, but at least two cases have considered these two apparently divergent lines of authority and have concluded that, in fact, the cases simply turn on their own procedural and business realities and that such cases are highly fact dependent: see *NS United Kaiun Kaisha, Ltd* (cited by Planet Energy) at paras. 33-34; also see *Enirgi Group Corp. v. Andover Mining Corp.*, 2013 BCSC 1833 at paras. 54-61.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of June, 2023.

Massimo Starnino/ Kris Borg-Olivier/ Evan Snyder

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COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

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