

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

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

**RESPONDING FACTUM OF PLANET ENERGY
(Motion for the Appointment of an Interim Receiver)**

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**SERVICE LIST
(as at June 4, 2023)**

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PART I - OVERVIEW

1. Planet Energy delivers this factum in response to the motion (the “**Receivership Motion**”) brought by ACN seeking the appointment of an interim receiver pursuant to section 47.1 of the BIA and/or a receiver and manager pursuant to section 101 of the CJA over Planet Energy.
2. Capitalized terms not defined have the meanings ascribed to them in Planet Energy’s factum in support of its motion for a consolidation order, extension of the Proposal Period and approval of the Sale Process (the “**Main Factum**”). This factum supplements the Main Factum by responding to ACN’s factum on the Receivership Motion delivered June 2, 2023, and to address the cross-examination of ACN’s affiant, Robert Stevanovski, which was held on June 2, 2023.
3. Planet Energy respectfully submits that ACN has not met – or come close to – the high threshold required by this Court for the appointment of an interim receiver or receiver. ACN’s request for an interim receiver under section 47.1 of the BIA is a “drastic remedy” not remotely justified in the circumstances. It has not been demonstrated that an interim receiver is “necessary for the protection of” Planet Energy’s estate or the interests of any creditors and must fail on that basis alone. ACN’s request under section 101 of the CJA violates the stay of proceedings under section 69(1) of the BIA, and ACN has made no application to lift the stay.

4. ACN brings the Receivership Motion with the express intention of seeking to “take over Planet Energy”¹ and/or its customer contracts in a clear attempt to obtain an improper advantage over other creditors. The self-serving relief sought by ACN is inconsistent with established bankruptcy law and would be to the detriment of other creditors.

5. ACN advances only two arguments to justify the appointment of an interim receiver: (i) ACN claims that a receiver is necessary to procure a hedge for Planet Energy’s electricity contracts; and (ii) ACN says it does not trust Planet Energy’s management and that the Arbitral Award includes findings of fraudulent conduct. These arguments have no basis in fact and were manufactured for the purposes of the Receivership Motion:

(a) Contrary to his affidavit evidence and representations made to this Court, Mr. Stevanovski admitted on cross-examination that ACN has no intention of financing new hedges during the proposed receivership, and that its discussions with potential counterparties on hedging (including Shell, EDF Energy and NRG Energy) have been singularly focused on ACN negotiating a hedge contract for after it acquired Planet Energy and/or its customer contracts;² and

(b) There were no findings of “misconduct”, “subterfuge” or “fraud” in the Arbitral Award and, in any event, ACN’s allegations relate to conduct from over 5 years ago that was at issue in the Arbitration.³

6. On cross-examination, Mr. Stevanovski clearly set out ACN’s motives in seeking the appointment of an interim receiver, which are focused on ACN procuring Planet Energy’s

¹ Cross examination of Robert Stevanovski, June 2, 2023 (the “**Stevanovski Cross**”), at [Qs. 57](#) and [102-103](#), Transcript Brief of Planet Energy (“**Transcript Brief**”), pp 18 and 29-30.

² Stevanovski Cross at [Qs. 57, 84-85, 102-103](#) and [107](#), Transcript Brief, pp 18, 24-25, 29-30.

³ Affidavit of Nino Silvestri sworn May 26, 2023 (the “**Silvestri Affidavit**”) at [paras 86-96](#), Motion Record of Planet Energy (“**MR**”), pp 32-35.

business and/or customers rather than maximizing recovery for all creditors. Mr. Stevanovski repeatedly testified that ACN is looking to conduct financial due diligence through the receivership to facilitate a take-over of Planet Energy and/or its contracts, which would bypass the market canvass contemplated by the Sale Process. This was effectively confirmed by Mr. Stevanovski in an answer to an undertaking in which he stated that ACN would only consent to an extension of the Proposal Period to “**allow the receiver to explore with ACN** whether there is anything that can be done to save the business”.⁴

7. The fact that ACN is by far the largest creditor of Planet Energy (albeit an unsecured one) does not provide it, under established bankruptcy law, with *carte blanche* to take over the company for its exclusive benefit without regard to other creditors and stakeholders. Critically, when asked on cross-examination whether ACN was “prepared to make all creditors, including employees, unaffected”, Mr. Stevanovski advised that he “could not agree to... [and was] not prepared to make any statement like that”.⁵ Under the SAA, ACN expressly agreed that it was not a secured creditor and was not entitled to pursue remedies associated with a secured creditor:

ACN acknowledges that its rights to Gross Margin is contractual in nature, is not a traditional security interests and does not specifically attach to or encumber any assets of Planet, including, without limitation, to the ACN Customer contracts. ACN agrees that it will not assert or attempt to assert these rights via any UCC-1 or similar filings.⁶

8. Planet Energy requests that the Receivership Motion be dismissed and that this Court grant the relief sought on its motion to allow the Sale Process to proceed. If ACN wants to acquire Planet Energy’s business and/or customer contracts, it will have every opportunity to do so under the Sale Process recommended by the Proposal Trustee for the benefit of all creditors.

⁴ It should be noted that this answer is a correction of the answer provided during the cross-examination that ACN was opposed to any extension of the Proposal Period. Presumably ACN came to the realization, before delivering answers to undertakings, that if the Proposal Period is not extended then Planet Energy is deemed bankrupt, which would result in an immediate loss of value for creditors.

⁵ Stevanovski Cross at [Q. 298](#), Transcript Brief, p 74.

⁶ Silvestri Affidavit at [Exhibit D](#), Amended, Restated and Assigned Sales Agency Agreement dated November 9, 2023, MR p 147.

PART II - LAW AND ARGUMENT

A. ACN Never Intended to Support a Hedge During the Proposed Receivership

9. Since initially filing its Receivership Motion, ACN's primary justification for opposing Planet Energy's good faith efforts to maximize value for all creditors and seeking the appointment of the proposed receiver was the purported risk of Planet Energy's electricity business operating unhedged following Shell's termination of its swap agreements. ACN's evidence and representations to this Court was that it would work with the proposed receiver to implement new hedges for the benefit of all creditors and stakeholders:

7. I have been in discussions with representatives of Shell in respect of this matter. Based on those discussions, I believe that, with ACN's financial support in the context of a receivership, arrangements for continued supply and appropriate hedges can be put in place for the benefit of stakeholders...⁷

...

41. ACN has no confidence in the existing management of Planet Energy but would be prepared to provide [financial support for a hedge] in the context of the proposed receivership.

42. If a hedging strategy is to be an option, however, a receiver needs to be appointed as soon as possible.⁸

...

11. ACN's preference is that the Receiver be appointed immediately with a view to... (ii) making a final assessment... whether there is a viable hedging strategy that may be pursued under the direction of the Receiver.⁹

...

27. ACN believes that, working cooperatively with the Receiver, a hedging strategy might still be implemented for the benefit of all stakeholders.¹⁰

⁷ Affidavit of Robert Stevanovski, affirmed May 15, 2023 (the "**Stevanovski Affidavit**") at [para 7](#), Motion Record of the Creditor, ACN ("**ACN MR**"), p 25.

⁸ Stevanovski Affidavit at [paras 41-42](#), ACN MR, pp 39-40.

⁹ Supplementary Affidavit of Robert Stevanovski, affirmed June 2, 2023 (the "**Supp Stevanovski Affidavit**") at [para 11](#).

¹⁰ Factum of the Creditor, ACN, dated June 2, 2023 at [para 27](#).

10. Contrary to Mr. Stevanovski's affidavit evidence, ACN never intended to secure hedges within the context of a receivership. Mr. Stevanovski confirmed on cross-examination that ACN only proposed to implement hedges following a "take over" of Planet Energy's business. All conversations with potential hedging counterparties were in the context of ACN owning Planet Energy, never within the context of a receivership:

(a) **Q: "Based on the communications that we now have with Shell, is that Shell has expressed a view that it will not enter into hedging contracts with Planet Energy even with ACN's financial support, correct?"**

A: "... I'll go and repeat it again. First of all, Shell considered Planet Energy not a going concern, and was not interested in doing business with Planet Energy in the current condition. Our question to Shell was not whether they would support Planet Energy in a process with ACN backing it. That was never a question of Shell. Our question from Shell was if ACN were to take over the business, once we saw the financial - - proper financial information, and at that time if we thought it made sense to continue to run the business, and we owned it through the court process, would then Shell be interested in doing something with us?";¹¹ [emphasis added]

(b) **Q: "Okay. So why do you say that the options may still exist with other counterparties from Shell?"**

A: "Again, I am referring to ACN owning the asset through a court process. ACN never had intention to leave the business as is with the current management running in any process and us having more financial risk in it. These are all conversations if the court awarded ACN the business, or ACN was to purchase the business in some way if we looked at the financials, if we thought there was an ongoing business who we could do work with to potentially hedge that ongoing businesses [sic]. That's something we were looking and contemplating for the future";¹² [emphasis added]

(c) **Q: "Did EDF express an interest in participating in this hedge?"**

A: "They expressed interest in looking at the customers, the value and so on that we told them at this point we don't have access to. We told them that we would discuss it with them if we ever got access to that information. It's obviously important to understand the information that's within the customer base".¹³

¹¹ Stevanovski Cross at [Q. 102](#), Transcript Brief, p 29-30.

¹² Stevanovski Cross at [Q. 107](#), Transcript Brief, p 31.

¹³ Stevanovski Cross at [Q. 159](#), Transcript Brief, pp 41-42.

Q: “So just so I understand what these discussions are in relation to, is this a discussion about the acquisition of the customer contracts or simply a discussion about entering into a swap agreement?”

A: “The discussions specifically were if ACN was to buy the base, or through the court process, end up with the base, and if ACN saw through the financial information it made sense to keep the business moving, would EDC be interested in doing a hedge with us”.¹⁴ [emphasis added]

11. Mr. Stevanovski further admitted on cross examination that, despite his affidavit evidence to the contrary, he did not have any personal discussions with Shell; he has not participated in any of ACN’s discussions with potential counterparties to a hedging contract; and that ACN has singularly focused on appointing the proposed receiver to conduct financial due diligence and facilitate ACN’s acquisition of Planet Energy’s business and/or customer contracts for its own self interest.¹⁵

12. ACN has attempted to justify the appointment of a receiver by misleading this Court and Planet Energy’s other creditors and stakeholders about its intentions within such a proceeding. As set out above, it is clear that the receivership was never intended to mitigate risk related to Planet Energy’s electricity business operating unhedged, but was a tactical decision by ACN to gain an advantage as part of its strategy to potentially “take over” Planet Energy.

13. The appropriate path for addressing any potential risk related to Shell’s termination of Planet Energy’s swap agreements (which, as set out at paragraphs 58 to 59 of the Main Factum, is not an immediate risk) is to approve the Sales Process. The Sale Process, as set out at paragraphs 61 to 62 of the Main Factum, is ready to be implemented immediately and will be run by a Proposal Trustee as an officer of this Court. A receivership will not address the potential risk related to Planet Energy being unhedged in any different manner, and despite ACN’s submissions

¹⁴ Stevanovski Cross at [Q. 160](#), Transcript Brief, p 42.

¹⁵ Stevanovski Cross at, [Qs. 42-43, 57, 85-90, 99, 102-103, 107, 142, 160, 163, 177-179](#), Transcripts Brief, pp 14-15, 18, 24-26, 28-31, 38-39, 42-43, 46.

and affidavit on point, Mr. Stevanoski has acknowledged that a sales process is a reasonable option for proceeding to maximize value:

(a) **Q. “But in terms of the actual steps, you don’t have any idea what the differences would be between the steps that are being proposed by Planet Energy versus the restructuring set out in the affidavit. You are only talking about the people who were involved; is that right?”**

A. “I don’t know what steps other than ask for a sale that Planet is engaged in. I think there’s several different options, and we would like to look at what those options are, and that’s what we are proposing.”

Q. “Would one of those options be trying to seek a way to sell Planet Energy’s business or customer contracts to a third party?”

A. “That would be one option I believe of several different options”.¹⁶

B. The Relief Sought under Section 101 of the CJA is Unavailable to ACN

14. ACN’s motion under section 101 of the CJA is barred by the stay of proceedings effected by section 69(1) of the BIA as a result of these Proposal Proceedings.

15. Subsection 69(1) of the BIA prohibits ACN from asserting any remedy against Planet Energy or its property, or commencing or continuing any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy until Planet Energy files a proposal.¹⁷

16. In *2806401 Ontario Inc. o/a Allied Track Services Inc.*, this Court recently affirmed that where, as here, a creditor commences a proceeding to appoint a receiver under section 101 of the CJA, subsection 69(1) is triggered and the stay “must be lifted, if appropriate, to permit the application for the appointment of a receiver to proceed”.¹⁸ Given that ACN has not brought an application to lift the stay, the relief it seeks under section 101 of the CJA is unavailable on this motion.

¹⁶ Stevanovski Cross at [Qs. 238 and 239](#), Transcript Brief, pp 61-62.

¹⁷ *Bankruptcy and Insolvency Act*, RSC, 1985, c, B-3 (the “BIA”), [s 69\(1\)](#).

¹⁸ [2806401 Ontario Inc o/a Allied Track Services Inc](#), 2022 ONSC 5509 [*Allied Track Services*] at [paras 20-24](#).

i. There is no Basis to Lift the Stay

17. In any event, this Court will only lift the stay in circumstances where (a) ACN is materially prejudiced by the stay, or (b) it is otherwise equitable to do so.¹⁹ No such circumstances exist.

(a) No Material Prejudice

18. Material prejudice is assessed on an objective standard and “refers to the degree of the prejudice suffered vis-à-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect” the specific creditor in question.²⁰

19. ACN has not suffered any prejudice, let alone material prejudice, vis-à-vis its indebtedness. Prior to and since the release of the Arbitral Award, while applying to have the Arbitral Award set aside, Planet Energy has nevertheless significantly cut its costs, including by terminating service providers, leases, storage contracts, and more than 25% of its existing employees. Planet Energy has also taken steps to increase its cash flows by, among other things, increasing the monthly administrative fees charged to all of its Ontario gas and electric customers and returning unprofitable U.S. electricity customer contracts back to the utility supply.²¹ All of these steps were taken for the purpose of maximizing value for all of Planet Energy’s creditors, including ACN, in the event that the Set Aside Application was unsuccessful.²²

20. There is no evidence that Planet Energy has taken, or intends to take, any steps to prejudice ACN since filing its NOI and commencing these Proposal Proceedings. Planet Energy’s activities have been singularly focused on maximizing value through a sale or a proposal, with the benefit of guidance and oversight from the Proposal Trustee.²³

¹⁹ BIA, [s 69.4](#).

²⁰ *Re Cumberland Trading Inc*, 1994 CanLII 7458 (Ont Sup Ct J (Gen Div [Commercial List] [In Bankruptcy])) at [para 11](#).

²¹ Silvestri at [paras 37](#) and [60-61](#), MR, pp 16-17 and 23-25.

²² Silvestri Affidavit at [para 37](#), MR, p 16-17.

²³ Proposal Trustee’s First Report (the “**First Report**”) at [paras 44 and 45](#).

21. The Extended Cash Flow Forecast (as defined in the Proposal Trustee's First Report) projects that Planet Energy will experience a net cash inflow of approximately \$452,000 over the Forecast Period. Planet Energy is projected to have sufficient liquidity to fund both operating costs and the costs of the Proposal Proceedings during the Forecast Period.²⁴

22. The BIA proposal regime, including the overview by the Proposal Trustee, offers the same protections that ACN seeks from the appointment of a receiver. ACN has not alleged that the Proposal Trustee is not acting appropriately or in accordance with its duties as an officer of the Court, and there is no reason to doubt that the Proposal Trustee continues to act prudently and with a view to maximizing value for the benefit of all of Planet Energy's creditors.

(b) No Equitable Reason to Lift the Stay

23. The second basis upon which this Court can lift the stay (were such an application before it) is where equity requires it. This Court recently affirmed that it is not equitable or appropriate to lift the stay where, as here, one creditor seeks to improve its position or otherwise obtain an advantage in terms of recovery over other creditors.²⁵

24. The purpose of the Receivership Motion is unquestionably intended to gain an advantage over Planet Energy's other creditors. ACN seeks to appoint its own interim receiver to conduct due diligence and, if appropriate, facilitate a private sale of Planet Energy and/or its customer contracts to ACN (or an affiliate of ACN) instead of a sale through the public Sale Process.

25. It is neither equitable nor consistent with the BIA regime to lift the stay in circumstances where the Receivership Motion is intended to maximize ACN's own recovery without regard to the interests of other unsecured creditors.

²⁴ First Report at [paras 60 and 61](#).

²⁵ [Allied Track Services](#) at [para 25](#).

ii. The Appointment of a Receiver is Not Just or Convenient

26. The appointment of a receiver under section 101 of the CJA is only available to unsecured creditors, such as ACN, in “extraordinary” circumstances²⁶ where it “just or convenient to do so”.²⁷ ACN does not meet this high threshold.

27. This Court has considered several factors in assessing whether the appointment of a receiver is “just or convenient”, including that the applicant is a single unsecured creditor of the debtor, and the only creditor seeking such relief.²⁸ None of these factors justify an appointment:

- (a) Whether irreparable harm might be caused if no order is made. Parties must move expeditiously when seeking a remedy for irreparable harm, such as the appointment of a receiver.²⁹ ACN has not shown irreparable harm and has certainly not acted expeditiously with respect to matters at issue in the Arbitration. ACN's argument that it lacks trust in Planet Energy's management relates entirely to matters from over five years ago that were the subject of the Arbitration (and which were not the subject of any findings of fraud in the Arbitral Award). ACN did not seek the appointment of a receiver after the release of the Arbitral Award in February 2021. While ACN brought the Security Motion, which was dismissed by this Court on August 11, 2021, ACN did not seek any of the pre-judgment remedies (such as a Mareva injunction) Cavanagh J. indicated were available to it at the time. And ACN it did not seek to appoint a receiver after Cavanagh J. enforced the Arbitral Award in April 2022.

²⁶ [Bank of Nova Scotia v Freure Village of Clair Creek](#), 1996 CanLII 8258 (Ont Sup Ct J) at [para 12](#).

²⁷ *Courts of Justice Act*, RSO 1990, c C.43, [s 101](#).

²⁸ [Canadian Equipment Financing and Leasing Inc v The Hypoint Company Limited](#), 2022 ONSC 6186 at [para 25](#); [Re Terrace Corp \(In Bankruptcy\)](#), 2002 CanLII 6463 (Ont Sup Ct J) at [para 15](#).

²⁹ *Toronto Port Authority v Canada Auto Parks-Queenpark Ltd*, 2000 CarsellOnt 4241 at paras 9-10, 13-15, Book of Authorities of the Applicant (“BOA”), Tab 1; [De Cotiis and Others v De Cotiis et al](#), 2004 BCSC 1658 at [paras 85-86](#).

ACN will not suffer irreparable harm if the *status quo* is maintained. ACN is better protected in these current proceedings while Planet Energy is subject to the oversight of the Proposal Trustee, which was not the case in any of the preceding five years.

- (b) The apprehended or actual waste of the debtor's assets. There is no evidence of apprehended or actual waste of the debtor's assets, nor is there any immediate risk of such waste. The Proposal Trustee's First Report expressly states that "[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". As discussed in the Main Factum at paragraphs 58 to 59, it is immaterial in the short term that Planet Energy's retail electricity business is currently unhedged and, as set out above, the receivership does not provide any advantages for addressing such risk in any event. Ontario energy prices would have to increase by a very large and unexpected amount over current forecasts for Planet Energy's cash flows to be higher with an electricity swap in place. Planet Energy is projected to remain cash flow neutral or moderately positive during the proposed Extension Period.
- (c) The principle that the appointment of a receiver should be granted cautiously. No explanation has been provided as to the specific role the proposed receiver will serve, if appointed, or the tasks it will be expected to perform, other than Mr. Stevanovski's testimony that the receiver is to facilitate ACN's self-interested financial due diligence. It will necessarily take the proposed receiver, if appointed, several weeks learning Planet Energy's business and to acquire the same degree of knowledge that the Proposal Trustee has acquired after several years working with Planet Energy. Delay is not in the interest of either Planet Energy or any of its

creditors. If ACN is interested in acquiring Planet Energy, due diligence can be facilitated within the context of the Sales Process, and ACN can be governed by the court supervised process to ensure fairness.

- (d) The cost to the parties. The appointment of a receiver during the period to file a proposal is often redundant, as the proposal trustee is already performing many of the same duties that a receiver would. The added expense of a receiver to perform duplicate tasks will mean less recovery for creditors.³⁰
- (e) The prejudicial effect of the appointment on other creditors. As noted above, ACN's intention with respect to its proposed receiver appears to be to obtain a benefit (namely, the private acquisition of the Planet Energy business) to the detriment of Planet Energy's other creditors. Planet Energy's other creditors stand to benefit from the Sale Process, which contemplates a full market canvass with the goal of maximizing recovery for all of Planet Energy's creditors and stakeholders.

28. There is simply no legitimate basis for the appointment of a receiver under section 101 of the CJA. For ACN to succeed on its motion, this Court will have to (i) ignore the stay or agree to lift it without any request, evidence or argument by ACN to do so; and (ii) find that it is just and equitable for ACN to improve its position for recovery relative to Planet Energy's other creditors. Such an approach is contrary to the established bankruptcy regime.

C. ACN is Not Entitled to an Interim Receiver under Section 47.1 of the BIA

29. Appointment of an interim receiver under section 47.1 of the BIA is considered a "drastic remedy" and one that is only granted sparingly. The Court is required to "exercise greater caution

³⁰ [Re Atsana Semiconductor Corp \(Bankruptcy\)](#), 2005 CanLII 26595 (Ont Sup Ct J) [**Atsana Semiconductor**] at [paras 20-22](#); *Trez Capital Corporation v UC Investments Inc*, 2013 NSSC 381 at para 74, BOA, Tab 2.

in an application for an appointment than it would ordinarily use, as in an application for an interim injunction – a not dissimilar, but less drastic, proceeding”.³¹

30. Pursuant to subsection 47.1(3), the Court may only appoint an interim receiver 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.

31. To come within the “necessity” requirements of subsection 47.1(3), the onus is on the party seeking the appointment of an interim receiver (*i.e.*, ACN) to prove that there is a real danger of dissipation of the debtor’s assets. This danger must be more than speculation or suspicion that the company’s assets will be dissipated.³²

32. ACN has neither alleged nor proved any necessity to appoint an interim receiver. There is neither an actual and immediate danger of a dissipation of assets nor a realistic risk of asset dissipation if an interim receiver is not appointed. The Proposal Trustee’s First Report directly addresses any such suggestion as Planet Energy’s cash is under tight control (with all receipts and disbursements subject to monitoring by the Proposal Trustee) and the Proposal Trustee is monitoring commodity price fluctuation on a regular basis.

33. Planet Energy has and will continue to make full disclosure related to its business and assets. The spectre of danger conjured by ACN is based only on (i) manufactured allegations that Planet Energy requires, and could obtain, a hedge in respect of its electricity retail business during the contemplated receivership; and (ii) aspersions against Planet Energy’s management, all of which are grossly overstated or simply false, as detailed in the Main Factum at paragraph 9.

³¹ John D Honsberger & Vern DaRe, *Bankruptcy in Canada*, 4th ed (Canada Law Book: Toronto, 2009) at p 65, BOA, Tab 3.

³² [Maxium Financial Services Inc v Corporate Cars Cars Ltd Partnership](#), 2006 CanLII 40988 (Ont Sup Ct J) at [para 15](#).

34. Beyond the allegations related to activities at issue in the Arbitration, ACN's affidavit evidence made serious allegations that Planet Energy may be defrauding creditors by outsourcing call center and billing services to related parties:

- (a) "Planet Energy contracts with related parties to provide call center and billing services;³³ and
- (b) "In light of the Arbitrator's finding that Planet Energy attempted to incite fraudulent behaviour, as described above, it is also concerning to ACN that Planet Energy has historically outsourced its billing and call center activities... to two related companies".³⁴

35. On cross-examination Mr. Stevanoski admitted that these allegations, which were stated as fact in his affidavit, were solely based on his understanding from conversations over 5 years ago; nor could he identify the purported related companies and he admitted that he had no personal knowledge of Planet Energy's purported relationship with these call centers.³⁵ Mr. Silvestri confirmed in his affidavit evidence and on cross-examination that these allegations were false and Planet Energy never contracted with related parties for call centre or billing services.³⁶ Moreover, Planet Energy has disclosed all ongoing related parties transactions to the Proposal Trustee and ACN (and to its auditor).³⁷

36. ACN has identified no method by which Planet Energy has or will dissipate assets as part of these proceedings. Planet Energy's only motivation in this proceeding is to complete the Sale

³³ Stevanovski Affidavit at [para 5\(c\)](#), ACN MR, p 25.

³⁴ Stevanovski Affidavit at [para 38](#), ACN MR, p 36.

³⁵ Stevanovski Cross at [Qs. 268-276](#), Transcripts Brief, pp 68-70.

³⁶ Silvestri Affidavit at [para 94](#), MR, p 34; Silvestri Cross at [Qs. 76-85](#), Transcripts Brief, pp 95-97.

³⁷ Silvestri Affidavit at [para 95](#), MR pp 34-35; Supp Stevanovski Affidavit, [Exhibit D](#), May 26, 2023 Letter from Counsel to Planet Energy.

Process and generate the most value for its creditors, and it has been transparent with the Proposal Trustee and ACN in pursuing such efforts.

37. In contrast, ACN's sole interest in appointing a receiver is to facilitate its own due diligence on the business as part of a "take over" attempt. In similar circumstances in the case of *Atsana Semiconductor Corp (Re)*, this Court refused to appoint a receiver under section 47.1 of the BIA, noting that it is not appropriate to appoint a receiver at the request of a creditor attempting to acquire a debtor company or its assets to the detriment of the debtor's other creditors:

...What also concerns me is the undenied fact that the Applicant has indicated to Atsana that it might be interested in making its own offer to purchase Atsana's assets or undertaking. Consequently, the Applicant might be a competitor to the purchaser in the proposed transaction. This naturally brings into question whether there was more than one motive at play when the Applicant brought its motion seeking to get more information as to the nature of the proposed sale transaction. I must keep in mind that the goal of the court should be to fairly protect the rights of all creditors, and not to do anything that places the interests of one creditor ahead of those of the others.³⁸

38. Granting ACN's motion will detract from this goal and serve to advance ACN's self-serving interests to the detriment of Planet Energy's other creditors, which is inconsistent with established bankruptcy principles and the BIA regime more generally.

PART III - ORDER REQUESTED

39. For these reasons, Planet Energy requests that ACN's motion be dismissed, with costs.

40. In the alternative, Planet Energy requests that the interim receiver powers be limited to conservatory measures pursuant to section 47.1(2)(d) of the BIA. Specifically, an interim receiver's role should be limited to reporting to this Court on activities of Planet Energy which may prejudice creditors during these proceedings. The receivership order sought by ACN is overly broad and inappropriate for an interim receiver appointed pursuant to section 47.1 of the BIA.

³⁸ [Atsana Semiconductor](#) at [para 23](#).

Even if an interim receiver is appointed, Planet Energy should be permitted to continue its good faith efforts to maximize value for creditors and other stakeholders through the Sales Process.

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

A handwritten signature in black ink, appearing to read "Daniel S. Murdoch". The signature is fluid and cursive, with a prominent initial "D" and a long horizontal stroke at the end.

Daniel S. Murdoch

SCHEDULE "A"

LIST OF AUTHORITIES

Cases

1. [2806401 Ontario Inc o/a Allied Track Services Inc](#), 2022 ONSC 5509
2. [Bank of Nova Scotia v Freure Village of Clair Creek](#), 1996 CanLII 8258 (Ont Sup Ct J)
3. [Canadian Equipment Financing and Leasing Inc v The Hypoint Company Limited](#), 2022 ONSC 6186
4. [De Cotiis and Others v De Cotiis et al](#), 2004 BCSC 1658
5. [Maxium Financial Services Inc v Corporate Cars Cars Ltd Partnership](#), 2006 CanLII 40988 (Ont Sup Ct J)
6. [Re Atsana Semiconductor Corp \(Bankruptcy\)](#), 2005 CanLII 26595 (Ont Sup Ct J)
7. [Re Cumberland Trading Inc](#), 1994 CanLII 7458 (Ont Sup Ct J (Gen Div [Commercial List] [In Bankruptcy]))
8. *Toronto Port Authority v Canada Auto Parks-Queenpark Ltd*, 2000 CarsellOnt 4241 (Ont Sup Ct J)
9. *Trez Capital Corporation v UC Investments Inc*, 2013 NSSC 381

Textbooks

1. John D Honsberger & Vern DaRe, *Bankruptcy in Canada*, 4th ed (Canada Law Book: Toronto, 2009)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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.

Stay of proceedings — notice of intention

69 (1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

- (i)** the insolvent person's insolvency,
- (ii)** the default by the insolvent person of an obligation under the security agreement, or
- (iii)** the filing by the insolvent person of a notice of intention under section 50.4,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,

(c) Her Majesty in right of Canada may not exercise Her rights under

- (i)** subsection 224(1.2) of the *Income Tax Act*, or
- (ii)** any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that

(A) refers to subsection 224(1.2) of the *Income Tax Act*, and

(B) provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts,

in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, and

(d) Her Majesty in right of a province may not exercise her rights under any provision of provincial legislation in respect of the insolvent person where the insolvent person is a

debtor under the provincial legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a **province providing a comprehensive pension plan** as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a **provincial pension plan** as defined in that subsection,

until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

Limitation

(2) The stays provided by subsection (1) do not apply

(a) to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the notice of intention under section 50.4 was filed from dealing with those assets;

(b) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than ten days before the notice of intention under section 50.4 was filed, from enforcing that security, unless the secured creditor consents to the stay;

(c) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security if the insolvent person has, under subsection 244(2), consented to the enforcement action; or

(d) [Repealed, 2012, c. 31, s. 416]

Limitation

(3) A stay provided by paragraph (1)(c) or (d) does not apply, or terminates, in respect of Her Majesty in right of Canada and every province if

(a) the insolvent person defaults on payment of any amount that becomes due to Her Majesty after the filing of the notice of intention and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent

that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a **province providing a comprehensive pension plan** as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a **provincial pension plan** as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising Her rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a **province providing a comprehensive pension plan** as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a **provincial pension plan** as defined in that subsection.

Court may declare that stays, etc., cease

69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

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

Proceeding Commenced at Toronto

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