

Clerk's Stamp

COURT FILE NO. B301-135903
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER SECTION 50.4 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C. B-3, AS AMENDED

AND IN THE MATTER OF ERIKSON NATIONAL ENERGY INC.

DOCUMENT

BENCH BRIEF

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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**Commercial List Chambers Application
Scheduled for December 9, 2024
before The Honourable Justice Campbell**

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I. INTRODUCTION

1. Erikson National Energy Inc. ("**Erikson**") is an oil and gas company that filed a Notice of Intention to make a proposal pursuant to section 50.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**") on October 1, 2024.
2. Erikson has successfully applied for two stay extensions. The first was granted by the Honorable Justice P. Johnston on October 21, 2024 ("**First Stay Order**"). The Second was granted by the Honorable Justice M. Burns on November 21, 2024 ("**Second Stay Order**").
3. Erikson has made significant progress in its efforts to make a proposal and seeks an order for the following relief from this Court:
 - (a) declaring service of this Application and its supporting materials good and sufficient, and if necessary, abridging time for notice of the Application to the time actually given;
 - (b) extending the time for Erikson's Proposal Extension Date and stay of proceedings up to and including January 18, 2025, or such other date as this Court may deem appropriate;
 - (c) approving the terms of the proposed form of asset purchase agreement between Erikson and the Gryphon Digital Mining Inc. ("**Gryphon**" or the "**Proposed Purchaser**"), or its nominee;
 - (d) Amending and restating the terms of the Amended and Restated Interim Financing Agreement and granting an increase in borrowing and charge to \$1.5 million; and
 - (e) such further and other relief as this Honourable Court may deem just.

II. STATEMENT OF FACTS

4. The facts for this application are set out in the Affidavit of Peter Neelands sworn December 3, 2024 ("**Neelands Affidavit**").¹

¹ Defined terms used in this Brief but are otherwise undefined shall have the meaning attributed to them in the Neelands Affidavit.

5. Erikson has continued to run in conjunction with Sayer Energy Advisors and the Proposal Trustee, the Solicitation and Investment Sales Process (“**SISP**”) that was approved by this Court during the First Stay Order. The SISP was developed in collaboration with Sayer Energy Advisors, KSV Restructuring Inc. (“**KSV**” or the “**Proposal Trustee**”), and the British Columbia Energy Regulator (“**BCER**”).

6. The SISP originally had a bid deadline of November 14, 2024 at noon. The SISP produced three bids from interested parties. Erikson has worked diligently to advance these bids to a stage where Court approval could be sought for them.

7. During the hearing for the Second Stay Order, Erikson learned that there was another entity, Kingscrest Acquisition Corp. (“**Kingscrest**”), that was interested in the assets. As a result, Erikson extended the bid deadline to December 3, 2024, to allow Kingscrest to participate in the court approved SISP and enable the existing bidders to advance their bids. Kingscrest declined the opportunity to participate in the court approved SISP.

8. Erikson has continued discussions with the three interested parties. One of the interested parties, Gryphon, has advance an Asset and Sale Purchase Agreement (“**Sales Agreement**”), which is substantially advanced for which Erikson seeks court approval.

9. Gryphon’s Sales Agreement contemplates the purchase of all of Erikson’s assets and assumption of cure costs. Erikson seeks an extension of time from this court so that it might finalize the proposed deal with Gryphon.

III. ISSUES

10. The issues before this Honorable Court are as follows:

- (a) Whether the stay and period for filing a proposal should be extended;
- (b) Whether the proposed transaction should be approved; and
- (c) Whether the interim financing should be approved.

IV. LAW AND ARGUMENT

A. Extending the Stay and Period for Filing a Proposal

11. Section 50.4(8) of the *BIA* provides that a debtor that has filed an NOI will be deemed to have made an assignment into bankruptcy if it does not file its proposal within 30 days of the filing of its NOI, unless pursuant to section 50.4(9) of the *BIA*:

(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.

12. Section 50.4(9) provides this Court with the discretion to grant the extension sought.

13. In *H & H Fisheries Ltd., Re*, the Nova Scotia Supreme Court indicated that the meaning of an applicant acting in "good faith" within the context of section 50.4(9)(b) of the *BIA* is tantamount to not acting in bad faith.² In its analysis, the Court specifically stated that "[t]he converse of good faith is bad faith and bad faith requires a motivation and conduct that is unacceptable."³

² *Re H&H Fisheries*, [2005 NSSC 346](#) at para 17. [Tab 1]

³ *Supra*.

14. In *Chester Basin Seafood Group Inc (re)*, the Nova Scotia Supreme Court took a differing view, finding that “good faith” imposes a positive obligation to act in “good faith”, requiring a review of the steps taken by a debtor post filing.⁴

15. Nothing in the record suggests that the Applicant has acted in bad faith. To the contrary, the Proposal Trustee, having worked with the Applicant since its NOI filing, agrees that the Applicant has been acting in good faith. This is evidenced by efforts taken to prepare cash flows, ensure payment of employees, negotiating financing for the process, maintenance of assets; and advancing a sales process for the benefit of all stakeholders.⁵

16. Turning to the second criteria, the Court has interpreted the requirement of “likely” to be able to make a viable proposal if the extension was granted to mean “it might well happen”.⁶ This is to be assessed based on whether a proposed proposal is “reasonable on its face to a reasonable creditor”.⁷

17. Taking steps that increase the likelihood of a viable proposal resulting, has been deemed sufficient to satisfy this criterion.⁸ In this instance, the advancement of the Sales Agreement and closing of the transaction would result in the assumption of a number of obligations of Erikson which would support the advancement of a proposal.

18. The final criterion requires consideration of whether any creditor will be *materially* prejudiced by the stay extension. “Materially prejudiced” has been interpreted as requiring a creditor to demonstrate that they will be substantially or considerably prejudiced by the extension.⁹ It is to be considered objectively, having regard for the prejudice suffered vis-à-vis the indebtedness and the attendant security.¹⁰

19. There is no evidence that the extension will cause substantial or considerable prejudice to Erikson’s creditors, to the contrary, the extension is supported by Erikson’s secured creditor and the extension is necessary to finalize the Gryphon deal.

⁴ *Chester Basin Seafood Group Inc (re)*, [2023 NSSC 388](#) at para 17-20. [Tab 2]

⁵ Neelands Affidavit at para 36

⁶ *T & C Steel Ltd. (Re)*, [2022 SKKB 236](#) at para 6 [Tab 3], citing *Cantrail Coach Lines Ltd. (Re)*, [2005 BCSC 351](#). [Tab 4]

⁷ *Supra* at para 66.

⁸ *In the Matter of the Bankruptcy of Bear Creek Contracting Ltd.*, [2021 BCSC 783](#) at para 64. [Tab 5]

⁹ *In the Matter of the Proposal of Cantrail Coach Lines Ltd.*, [2005 BCSC 351](#) at para 21. [Tab 4]

¹⁰ *H & H Fisheries*, *supra* at para 35-37. [Tab 1]

B. Approving the Transaction

20. The Ontario Court of Appeal in *Soundair* described the criteria to be considered by this Court when reviewing a proposed sales of assets in insolvency proceedings:

- (a) whether the seller has made a sufficient effort to obtain the best price and has not acted improvidently;
- (b) the interests of all the parties;
- (c) the efficacy and integrity of the process by which offers have been obtained; and
- (d) whether there has been unfairness in the working out of the process.¹¹

21. The Court in *Soundair* noted that a receiver's expertise in arranging a sale (in that case, of a commercial airline), is far removed from the Court's own expertise and, accordingly:

...the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.¹²

22. These criteria would similarly apply to a Proposal Trustee under a NOI process.

23. The criteria and principles set out in *Soundair* have been adopted and applied in Alberta, including by the Court of Appeal of Alberta.¹³

24. A Proposal Trustee, in carrying out its duties and exercising its powers, is obligated to deal with the debtor's property in a commercially reasonable manner.¹⁴ A court-appointed Proposal Trustee is to be afforded deference. In particular, it is assumed that the Proposal

¹¹ *Royal Bank of Canada v Soundair Corp*, [1991 CanLII 2727](#) at para 16 (ONCA) [*Soundair*] [Tab 6].

¹² *Soundair* at para 14 [Tab 6].

¹³ *PricewaterhouseCoopers Inc v 1905393 Alberta Ltd*, [2019 ABCA 433](#) at paras 10-12 [*PricewaterhouseCoopers*] [Tab 7]; *1705221 Alberta Ltd v Three M Mortgages Inc*, [2021 ABCA 144](#) at para 2 [*Three M*].

¹⁴ *PricewaterhouseCoopers* at para 13 [Tab 7], citing *Skyepharama PLC v Hyal Pharmaceutical Corp*, [2000 CanLII 5650](#) at para 4 (ONCA) [Tab 8].

Trustee's course of action and recommendation are appropriate unless the contrary is clearly shown.¹⁵

25. As the Court in *Soundair* noted, the Court should not lightly withhold its approval:

What [the] cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.¹⁶

1. **Erikson acted providently and made sufficient efforts to receive the best prices for the assets**

26. After considering its restructuring options, and in consultation with the Proposal Trustee, Erikson has determined that the best way to maximize value for its stakeholders is through the Transaction with Gryphon.

27. The SISP run by Erikson in consultation with the Proposal Trustee, Sayer Energy Advisors, and the BCER has resulted in a bid that would maximize the value of the Estate for all Stakeholders.

2. **The proposed sale is in the interests of the parties**

28. The primary concern in reviewing the interests of the parties is the interests of the creditors of the debtor. Erikson, and the Proposal Trustee, must consider the interests of all creditors and act for the benefit of the general body of creditors.¹⁷

29. The Transaction will maximize the value of the Estate and result in the assumption of cure costs providing benefits to a large number of stakeholders.

¹⁵ *Soundair* at paras 46-48 [Tab 6].

¹⁶ *Soundair* at paras 29-30 [Tab 6].

¹⁷ *Soundair* at paras 39-40 [Tab 6]; *Alberta Treasury Branches v Elaborate Homes Ltd*, [2014 ABQB 350](#) at para 61 [*Elaborate Homes*] [Tab 9].

30. The Transaction is supported by the primary secured creditor.

3. The efficacy and integrity of the Erikson's process was appropriate

31. It is not necessary to scrutinize every element of a sales process in coming to the decision to accept an offer.¹⁸ The process was court approved and the deadline for a bid was extended in accordance with the SISP.

32. The process for receiving and evaluating offers was fair and the Gryphon offer is clearly the best offer.

4. The SISP was fair

33. There is no basis for any party to allege that the Erikson's process, in collaboration with the Proposal Trustee and Sayer Energy Advisor was unfair.

34. In light of all of the *Soundair* factors, this Court should approve the Transaction.

C. Interim Financing

35. Erikson's cash flow forecast, prepared with the Proposal Trustee, projects that Erikson will require additional funds to enable it to carry on business as it finalizes the terms of the Proposed Transaction.

36. 50.6(1) of the *BIA* authorizes the Court to grant a charge over all of the Applicant's property in favour of a creditor who provides interim financing as follows:

50.6(1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

¹⁸ *Crown Trust Co et al v Rosenberg et al*, [1986 CanLII 2760](#) at paras 65-66 (ONSC) [*Crown Trust*] [Tab 10].

37. Section 50.6(5) of the BIA sets forth a non-exhaustive list of factors that the Court must consider in deciding to grant an interim financing charge pursuant to section 50.6 of the BIA as follows:

- (5) In deciding whether to make an order, the court is to consider, among other things,
 - (a) the period during which the debtor is expected to be subject to proceedings under this Act;
 - (b) how the debtor's business and financial affairs are to be managed during the proceedings;
 - (c) whether the debtor's management has the confidence of its major creditors;
 - (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
 - (e) the nature and value of the debtor's property;
 - (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
 - (g) the Trustee's Report.

38. An interim financing charge will impact all of the creditors' positions to some degree and will potentially reduce the total amount recoverable to them.¹⁹ However, if Erikson's interim financing charge is not granted than it is likely Erikson will not have sufficient funds to conclude the transaction and the primary party impacted by the increased financing is TEC who is supportive.

V. RELIEF SOUGHT

39. For the foregoing reasons, Erikson submits that the relief sought in paragraph 2 of this brief should be granted. The relief is supported by the Proposal Trustee and Erikson's secured

¹⁹ *OVG Inc. (Re)*, [2013 ONSC 1794](#) at para 34 [Tab 11].

lender and is necessary for Erikson to be able to advance a proposal for the benefits of its stakeholders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 15th day of October, 2024.

Estimated Time for
Argument: 30

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VI. TABLE OF AUTHORITIES

TAB

1. *Re H&H Fisheries*, [2005 NSSC 346](#)
2. *Chester Basin Seafood Group Inc (re)*, [2023 NSSC 388](#)
3. *T & C Steel Ltd. (Re)*, [2022 SKKB 236](#)
4. *In the Matter of the Proposal of Cantrail Coach Lines Ltd.*, [2005 BCSC 351](#)
5. *In the Matter of the Bankruptcy of Bear Creek Contracting Ltd.*, [2021 BCSC 783](#)
6. *Royal Bank of Canada v Soundair Corp*, [1991 CanLII 2727](#) (ONCA)
7. *PricewaterhouseCoopers Inc v 1905393 Alberta Ltd*, [2019 ABCA 433](#)
8. *Skyepharama PLC v Hyal Pharmaceutical Corp*, [2000 CanLII 5650](#)
9. *Alberta Treasury Branches v Elaborate Homes Ltd*, [2014 ABQB 350](#)
10. *Crown Trust Co et al v Rosenberg et al*, [1986 CanLII 2760](#)
11. *OVG Inc. (Re)*, [2013 ONSC 1794](#)