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RESPONDENT	ERIKSON NATIONAL ENERGY INC.
DOCUMENT	**BENCH BRIEF OF THE RESPONDENT**

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Commercial List Chambers Application
Scheduled for December 9, 2024
before The Honourable Justice G.A. Campbell

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I. INTRODUCTION

1. This matter involves an energy company, Erikson National Energy Inc. ("**Erikson**"), who seeks to advance a proposal through its Notice of Intention Proceedings that will ensure that its environmental obligations are addressed through the sale of all of its assets and maximize recovery to its stakeholders. More specifically, Erikson seeks to advance and close a transaction with a bidder who participated in the court approved sales process. However, the British Columbia Energy Regulator (the "**BCER**") now seems determined to block this process, wishing instead to pursue a transaction with Kingscrest Acquisition Corp. ("**Kingscrest**"), a party that previously terminated discussions with Erikson and its secured lender; did not participate in the sales process; and now seeks a more favourable deal with the BCER through a Receivership. A deal that is detrimental to Erikson and its stakeholders as it seeks to use a reverse vesting order to transfer millions in liabilities to an insolvent residual corporation, leaving them to be addressed by the BCER's orphan fund.[1]

2. Not only does the BCER's application amount to regulatory overreach, but it further seeks to advance an inferior outcome and prejudice Erikson's restructuring efforts. Notably, the only parties who appear to benefit from the application are (i) the BCER is, as it has negotiated that Kingscrest will pay its legal fees,[2] and (ii) Kingscrest, a party that did not comply with the Court-approved sales process and, even if it had, now seeks to advance an inferior offer.

3. Erikson submits that it is not just, convenient or appropriate for a Receiver to be appointed in these circumstances. Contrary to its statutory mandate, the BCER has actively interfered with an ongoing sales process, and now attempts to prevent Erikson from finalizing a transaction that avoids delay and is the best interest of industry, stakeholders, and the public at large.

4. This ignores the BCER's role, the fact that definitive agreements were only advanced by bidders in the last few days, and the fact that Erikson has finalized a purchase and sales agreement, for which approval is sought, in that short period of time.

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[1] Affidavit of Peter Neelands filed December 3, 2024 at para 17(a) [Neelands Affidavit].
[2] Transcript of Cross Examination on Affidavit of Mr. Janzen, dated November 28, 2024, at 80:33 - 81:2 [Janzen Cross Examination].

5. It is not the BCER's role to negotiate transactions, sell Erikson's assets or approve a transaction. It is Erikson, in conjunction with the Proposal Trustee and Sayer Energy Advisor, that is tasked with running a sales process and negotiating a transaction in the best interest of its stakeholders.[3] Further, it is the Court's role to determine if a transaction should be approved. Following such approval, under its enabling legislation, the BCER may consider a permit transfer application "on application in writing signed by both a permit holder and person who wants to acquire the permit".[4]

6. The BCER should not be permitted to use a receivership application to mount a collateral attack on the court approved sales process which it did not appeal.[5] The BCER's application should be denied, and Erikson's application should be granted so it can seek to finalize its transaction.

II. STATEMENT OF FACTS

A. Background

7. Erikson is an Alberta headquartered oil and gas company. It has assets located in the Greater Fort Nelson and Greater Fort St. John areas of British Columbia, which were purchased through the Ranch Energy Corp. ("**Ranch**") receivership.[6] Third Eye Capital Corporation ("**TEC**") is Erikson's primary secured creditor.[7]

8. Erikson's employees supervise and manage its assets, which are all presently shut-in.[8]

9. Following its establishment, there were several factors that negatively impacted Erikson's liquidity:

(a) the natural gas market stayed largely depressed, and there was no normalization in Western Canadian natural gas prices to the seasonally driven elevated levels;

(b) there were multiple fires in the area which impacted operations;

(c) various LNG projects were stalled, which limited LNG exports; and

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[3] Neelands Affidavit, *supra* note 1, at paras 12-14.
[4] *Energy Resource Activities Act, SBC 2008, c 36* at section 29 [*ERAA*]. **[TAB 1]**
[5] *Tool Shed Brewing Company Inc (Re),* 2024 ABKB 234 at paras 40, 102. [**TAB 2**]
[6] Affidavit of Mark Horrox, filed October 18, 2024 [Horrox Affidavit] at para 6.
[7] *Ibid*, at para 8.
[8] *Ibid*, at para 7.

(d) there were greater regulatory requests to expend funds on dormant sites and post security.[9]

10. For the most part, Erikson's assets remained unprofitable due to market prices.[10] The revenues that were generated were reinvested into operations and the sales process.[11]

B. Compliance with the BCER

11. Since its incorporation, Erikson has sought to comply with its obligations under the *Energy Resource Activities Act* ("***ERAA***").[12] Contrary to the BCER's statement, Erikson has not "consistently failed to meet its obligations".[13]

12. Erikson sought to comply with the BCER's regulatory requirements despite challenging environmental and market conditions.[14] The BCER, however, sought to impose and levy a number of purely financial requirements, despite being aware of these negative externalities.

13. The catalyst for Erikson's non-compliance was the issuance of the direction to carry out specific actions in respect of the 2011-vintage Wildboy frac water storage site originally built and operated by Penn West Petroleum Ltd. (the "**Site**"). Erikson never operated the site and its third party environmental experts were of the view that the Site posed limited risk due to the location of the site and the average of the monitoring wells being below BC Contaminated Sites Regulation standards and trending downwards.[15] Despite this, Erikson spend over $3 million constructing a dedicated disposal pipeline in the winter of 2021 and pumped 4668m3, 12,700m3, and 10,000m3 of water, during 2021, 2022 and 2023, respectively, to create freeboard at the after spring runoff.[16]

14. The BCER deemed that this work was insufficient and directed further work. On September 7, 2023, Erikson advised that, due to a wildfire evacuation order and damage to road infrastructure, they were unable to access the Site and complete work under the April 29, 2022 Order. Erikson indicated that they intended to install a new pump system and pump

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[9] *Ibid*, at para 9.
[10] *Ibid*, at para 10.
[11] *Ibid*, at para 10.
[12] *ERAA, supra* note 4.
[13] BCER's Brief, filed October 7, 2024, at para 2.
[14] Horrox Affidavit, *supra* note 6, at paras 32-33.
[15] *Janzen Cross Examination, supra* note 2, at Exhibit 2, Water Sampling Summary (p. 5 of the PowerPoint Presentation (PDF p. 145)).
[16] *Ibid* at Exhibit 2 at p. 1-2.

approximately 1,000 cubic metres of fluid a day from the Site until the pond was empty, following which they would complete an environmental report. As the work at the pond is not yet complete and the completion of the environmental report is pending. Despite the BCER's recognition that the Site was under an evacuation order, less than a week later it issued an order taking carriage of the Site and limiting Erikson's asset to carry out work.[17]

15. Mr. Janzen confirmed on cross-examination that the Orders issued by the BCER to Erikson only relate to money (the payment of funds or posting of security):

> Q And you're not aware, Mr. Janzen, of any issue of noncompliance or regulatory or environmental risk that's been associated with this matter for at least the last three months; correct?
>
> A The noncompliances of Erikson still stand to this day.
>
> Q The noncompliances are the cash orders which you've in fact requested – that you've directed or the BCER has directed with respect to Erikson. They haven't put up the money. Correct?
>
> A They have not met security orders. Correct.[18]

16. In any event, despite the BCER claiming that the outstanding orders support the appointment of a receiver, as recently as September 2024, the BCER told Erikson it would not take adverse regulatory action while negotiations for a sale to Kingscrest were ongoing.[19] Further, as part of its negotiations with Kingscrest, the BCER advised agreed to extend the timeframe to 2026 for addressing dormancy and shut down requirements and:

> The BCER confirms that following a transaction that conforms to the requirements set out above,
>
> • neither Erikson nor Residual Co. will be responsible for the following orders previously issued by the BCER pursuant to the *Energy Resource Activities Act* to Erikson:

[17] *Ibid* at Exhibit 2 at p. 4.
[18] *Ibid* at 7:25-33.
[19] *Ibid* at 72:2 - 74:15.

> [List of applicable s.30/49/50 Orders, including Frac Pond work, Frac Pond cost recovery, outstanding security, outstanding amounts owed for remaining levies]
>
> • the BCER intends to promptly consider termination of the [s.30/49/50 Orders]; and
>
> • the BCER intends to promptly consider amendments to [Section 38 Orders re DPR s.41.1 requirements].[20]

17. Erikson is continuing to provide oversight over its assets and expending significant funds to protect the assets.[21]

C. First Sale Process

18. In January 2023, following a slight improvement in market conditions, Erikson sought to sell its shares, and began formal marketing efforts with Sayer Energy Advisors ("**Sayer**").[22] Although the bid stayed open until March 2, 2023, gas prices declined again, and Erikson did not receive any acceptable offers.[23]

19. In February 2023, to prevent any further losses, Erikson suspended its operations and reduced its number of employees.[24] As part of these efforts, Erikson winterized the sites, which it continues to monitor and provide electricity when needed.[25] The company also employs staff nearby to ensure the sites are protected from vandalism, theft, and any emergencies.[26]

D. Proposed Transaction

20. Following the first sales process, Erikson continued to pursue a transaction.

21. In the summer of 2024, Erikson entered into a letter of intent with Kingscrest, as the latter expressed interest in purchasing Erikson's assets or shares. Erikson introduced the BCER to Kingscrest to discuss the regulatory requirements that the BCER would require as part of the approval. Erikson has since learned that through the discussions held between the BCER and Kingscrest, the BCER suggested that Kingscrest leave certain assets behind in order to

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[20] *Ibid* at Exhibit 3 at PDF p. 382/515.
[21] Neelands Affidavit, *supra* note 1, at paras 8 and 9.
[22] Horrox Affidavit, *supra* note 6, at para 31
[23] *Ibid*, at para 32.
[24] *Ibid*, at para 26.
[25] *Ibid.*
[26] *Ibid.*

reduce "inefficiencies" that would be unfavourable to Kingscrest.[27] To further accommodate this, the BCER was working on a Treasury Board submission to raise the current ceiling on the Orphan Levy and was considering booking $30 million of liabilities to the BCER financial statements.[28]

22. On September 24, 2024, the BCER sent a demand for compliance in relation to outstanding orders that it had previously issued against Erikson. In response, Erikson advised that it was still pursuing the transaction with Kingscrest and would file a NOI.

23. On October 1, 2024, Erikson filed a NOI to make a proposal pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act* ("**BIA**"),[29] with KSV Restructuring Inc. ("**KSV**") named as the proposal trustee.[30]

24. However, shortly thereafter, the BCER filed an originating application for a receivership on October 3, 2024. Since then, the NOI process has developed favourably, with a successful bidder being identified through the Court approved sales process, a process that is not as rigid as the BCER suggests but rather enables Erikson and the Proposal Trustee to evaluate bids, deem a bid to be qualified, and amend timelines.[31]

III. ISSUE

25. The issue before this Honorable Court is should a Receiver be appointed?

IV. LAW AND ARGUMENT

A. The Receiver should not be appointed

1. The BCER is acting as a creditor

26. The BCER asserts that the stay provided under section 69(1) of the *BIA* does not apply. The BCER claims that it brings this Application as a regulator, rather than a creditor, because it is enforcing obligations under the *ERAA*. It is not, however, seeking to enforce obligations,

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[27] Janzen Cross Examination, *supra* note 2, at Exhibit 3, PDF p. 204/515.
[28] *Ibid* at Exhibit 1, p. 2-3 (PDF p. 133-134).
[29] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [**BIA**].
[30] Horrox Affidavit, *supra* note 6, at para 13.
[31] Order of Justice Johnston, pronounced October 21, 2024, filed October 29, 2024, at Schedule "A", at clauses 18, 20, 22, 23, 25, 26, 27, and 34.

but rather advance a transaction with a party for whom they have waived most—if not all—of the obligations at issue.

27. The stay *does* apply to the BCER—it has a provable claim in bankruptcy and is acting not as a regulator, but an unsecured creditor, relying on the issuance of orders seeking to require payment and seeking to advance a transaction that will enable it to recover its legal fees.[32]

28. Further, its alleged lack of confidence in Erikson is primarily related to its insolvency and failure to make payments to the BCER, which is exemplified by the fact that the majority of its orders relate to financial matters.[33]

29. In *Newfoundland and Labrador v AbitibiBowater Inc*, the Court identified a three-part test for determining whether a regulatory obligation is a claim provable in bankruptcy:

> First, there must be a debt, a liability or an obligation to a creditor. Second, the debt, liability or obligation must be incurred before the debtor becomes bankrupt. Third, it must be possible to attach a monetary value to the debt, liability or obligation. [34]

30. Each of these conditions are satisfied in this instance.

31. The facts in this case are distinguishable from *Orphan Well Association v Grant Thornton Ltd,* where the regulator was acting in a *bona fide* regulatory capacity and did not seek to benefit financially.[35] In this situation, there is an ulterior motive for seeking receivership. By interfering with the sale process, and negotiating its own deal with Kingscrest, the BCER negotiated a means of obtaining a preferential payment via its proposed receivership, resulting in a gain more akin to the circumstances in *AbitibiBowater*.

32. As a result, despite its claims that it is trying to act in the public interest, the BCER stands to benefit directly from the receivership and the proposed transaction with Kingscrest (a transaction that would be worse for the public than what is being advanced by Erikson). This is demonstrably incorrect. Contrary to the BCER's suggestion that the appointment of a receiver will ensure public safety, environmental protection, and conservation of energy

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[32] Janzen Cross Examination, *supra* note 2, at 80:26-28.
[33] BCER Brief, filed October 7, 2024, at paras 26 and 27.
[34] *Newfoundland and Labrador v AbitibiBowater Inc*, 2012 SCC 67 at para 26 [***AbitibiBowater***]. **[TAB 3]**
[35] *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 **[TAB 4]**

resources, its own emails with Kingscrest, and the fact they seeking to frustrate a transaction that will address all obligations, demonstrates the opposite.

33. The BCER's appointment of a receiver will not increase safety, as evidenced by the fact that it has taken no steps to even understand what is required to maintain the assets. Further, the receiver is sought to advance a transaction that will leave liabilities on the BC government's financial statements and to the detriment of the industry funders of the orphan fund.

34. As Mr. Janzen confirmed on cross-examination, the BCER seeks to install via a receivership the sale agreement that Erikson and Kingscrest were unable to conclude between the two of them:

> Q But, in any event, you've referred to a transaction that was negotiated between Kingscrest and Erikson. You've just now confirmed that that transaction did not proceed. What transaction are you referring to?
>
> A The transaction that was proposed to us by Kingscrest that they had taken back to Erikson and continued to negotiate and they could not conclude the deal.
>
> Q So the transaction that you're referring to when you say "the transaction proposed to us" -- what you're meaning is Kingscrest's proposal to the BCER; right?
>
> A Kingscrest's proposed transaction to the BCER. Correct.[36]

35. In acting as a creditor and attempting to negotiate the sale of Erikson's assets via receivership, the BCER has stepped beyond the pale. The BCER is ultimately a creature of statute and cannot exceed the jurisdiction lawfully granted to it by that statue:

> Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. *That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale*

[36] Janzen Cross Examination, *supra* note 2, at 14:7-15.

> *and purview of the statutory scheme under which it is adopted"*: *Catalyst*, at paras. 15 and 25-28; see also *Green*, at para. 44. As Rand J. noted in *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given: see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 7; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at paras. 32-33; *Nor-Man Regional Health Authority*, at para. 6.[37]

36. In Erikson's submission, the BCER is attempting to improperly negotiate and install a receiver, all while hiding behind the guise of regulator, in an effort to advance a deal that it views as being preferable for its own interests. This should not be permitted.

2. The existing stay should be upheld

37. When faced with applications that are competing for *Companies' Creditors Arrangement Act* ("**CCAA**")[38] protection and a receivership, the Court will consider the relevant requirements, which, for CCAA jurisdiction, include appropriateness, good faith and due diligence.[39]

38. For ongoing CCAA applications, the Court has referred to the *McLaren* factors, which assess the following:

(a) when the plan is likely to fail;

(b) the applicant shows hardship;

(c) the applicant shows necessity for payment;

(d) the applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;

(e) it is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time;

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[37] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 108. **[TAB 5]**
[38] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [**CCAA**].
[39] *Affinity Credit v Vortex Drilling*, 2017 SKQB 228 at para 18. **[TAB 6]**

(f) after the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period;

(g) there is a real risk that a creditor's loan will become unsecured during the stay period;

(h) it is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period; and

(i) it is in the interests of justice to do so.[40]

39. The Court has not overturned CCAA stays where the debtors have made significant efforts to obtain financing and have acted in good faith with due diligence.[41]

40. Further, even if the Court accepts that the BCER is acting properly as a regulator, this is not a case where the court should permit the BCER to override the existing stay.

41. Erikson submits similar considerations apply in this situation under the NOI Proceeding, and the Court should continue the stay. Erikson has acted in good faith in advancing these proceeding and obtained significant amounts of financing to advance a resolution truly in the best interests of all stakeholders. Lifting the stay, however, would jeopardize Erikson's efforts to execute an alternative restructuring plan and severely impact its stakeholders, including its employees, creditors and shareholders.

3. The BCER is not entitled to interfere with the sales process

42. While the BCER is an important stakeholder, it is not the only stakeholder. Nor is it entitled to have a veto over Erikson's insolvency process. While nothing prevents the BCER from continuing to regulate energy activities, it is not entitled to take steps to seek to enforce debts; yet that is what it is attempting to do through its various orders.

43. In *BZAM Ltd Plan of Arrangement*, 2024 ONSC 1645, the Court noted that courts have granted stays where there are concerns with permitting the termination of licenses, as this would amplify social and economic losses.[42] While the existing permits do not appear to be at

[40] *Canadian Airlines Corp. (Re)*, 2000 CanLII 28202 (AB KB) at para 20. **[TAB 7]**
[41] *Azure Dynamics Corporation (Re)*, 2012 BCSC 781 at paras 5, 6, 20, 29. **[TAB 8]**
[42] *BZAM Ltd Plan of Arrangement*, 2024 ONSC 1645 at paras 46-49. **[TAB 9]**

risk at this point, the actions of the BCER have arguably already impeded economic relations by interfering with discussions that Erikson was having with a potential purchaser, and through its materials which seek to hinder a court sales process and completing a transaction that fully addresses Erikson's assets.

44. The BCER's role is to regulate energy resource activities in a manner that protects public safety and the environment, supports reconciliation with Indigenous peoples and the transition to low-carbon energy, conserves energy resources and fosters a sound economy and social well-being.[43] It cannot negotiate the sale of assets it does not own and especially for the purpose of orphaning assets.

4. The Receivership is not just and convenient in the circumstances

45. Unlike the Alberta Energy Regulator and various securities regulators, the BCER does not have explicit authority to appoint a receiver, and a request to do so should only be granted in narrow circumstances. Such circumstances do not exist here.

46. The issues raised by the regulator date from 2016, and pre-date the ownership of the assets by Erikson. The evidence from Erikson is that the sites have been winterized and continue to be maintained by Erikson at significant financial cost. There is no safety or environmental risk. Mr. Janzen confirmed as much (several times) during his cross-examination, including with his lack of knowledge of any specific environmental issues:

> Q And when you say "close to waterbodies," the environmental reports that I've looked at indicate that it's approximately 5 kilometres from the nearest flowing waterway from any of the facilities. Is that ballpark correct?
>
> A I would not be able to confirm those details, but there are significant enlarged watersheds in the region.[44]
>
> …
>
> A To the best of my knowledge, the BCER has made inspections at select assets.
>
> Q And can you confirm, for the record, that there's been no instance of noncompliance during that term?

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[43] *ERAA*, *supra* note 4, at section 4.
[44] Janzen Cross Examination, *supra* note 2, at 4:34-38.

A I can't confirm the current state of compliance with those inspections.[45]

…

Q … [Y]ou can't today as your capacity as the executive director of the BCER that there's even one instance of noncompliance that you're aware of in the last three months. Isn't that true?

A You had asked me about specific inspections that had taken place in the last three months, *of which I don't know the results*. However, when I speak to *potential* public safety and environment concerns, those relate to the *potentials* for emergencies, the *potentials* for integrity concerns with respect to wells that have been shut in, that *may* not have been properly suspended, and the long-term integrity of those wells could not be maintained. There's a very small number of personnel that are overseeing the assets *in the event of* an emergency. It's not great confidence that, you know, there may be sufficient capacity in order to respond, nor are we aware of there being sufficient funding in order to respond.[46]

…

Q And you're not aware, Mr. Janzen, of any issue of noncompliance or regulatory or environmental risk that's been associated with this matter for at least the last three months; correct?

A The noncompliances of Erikson still stand to this day.

Q The noncompliances are the cash orders which you've in fact requested – that you've directed or the BCER has directed with respect to Erikson. They haven't put up the money. Correct?

A They have not met security orders. Correct.[47]

…

Q And, in fact, you're aware that [protection, preservation, and winterization] that's being done now by Erikson and KSV; correct?

A I don't have full knowledge of exactly what they're doing in the field at this moment.[48]

47. Similarly, Mr. Janzen could not provide any details of any diligence done to determine Kingscrest's ability to undertake the work expected of Erikson, or that would be expected of a

[45] *Ibid* at 5:3-7.
[46] *Ibid* at 5:25-36 (emphasis added). All of these concerns are entirely speculative.
[47] *Ibid* at 7:25-33.
[48] *Ibid* at 8:4-7.

purchaser.[49] When asked about the plan to install a different licensed insolvency trustee to act as receiver in place of the Proposal Trustee, Mr. Janzen's level of due diligence regarding its ability to carry out its mandate was similarly limited and he advised:

> Q. Right. And there again, now that we're into freezing temperatures, you're not aware of any instance where there is, in fact, anything that a receiver would require to do that's not being done already; right?
>
> A. I have no other knowledge.[50]

48. The non-compliances noted by the BCER, which they say support a receiver, are financial in nature. To the extent they are outstanding, they are outstanding because of a lack of funds, which has been acknowledged by the BCER, including by the acquiescence of the BCER to Erikson not complying with them. As recently as September 2024, the BCER told Erikson it did not have to comply while negotiations for a sale were ongoing. [51] Then, in the face of these ongoing negotiations, the BCER sought to change its position and require compliance in a matter of days. This was insufficient notice, and it did not meet the requirements of procedural fairness.

49. As set out in its Affidavit and Brief, the BCER seeks the appointment of a receiver to a facilitate a transaction to Kingscrest. Not only does the BCER propose to advance this transaction in the absence of engagement with Erikson, but it does so notwithstanding that Kingscrest failed to comply with the court ordered sales process and in contravention of section 29 of the *ERAA* which requires the permit holder's agreement, apart from in limited circumstances which do not apply here.

> 29. (1) On application in writing signed by both a permit holder and a person who wants to acquire the permit, the regulator

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[49] *Ibid* at 12:16-31. Mr. Janzen was similarly unable to speak to whether Kingscrest as a company, or a future company to be formed by Kingscrest, had any experience in owning or operating oil and gas assets: 22-23. The BCER refused to produce a presentation regarding Kingscrest's plans, as it was subject to a non-disclosure agreement and could not be disclosed to Erikson, *the actual owner of the assets*: see 26-27.

[50] *Ibid* at 8:30 - 9:20, 13:39 - 14:2, 16:5 - 16:40.

[51] *Ibid* at 72:2 - 74:15

> (a) may transfer the permit to that person, subject to any conditions the regulator considers necessary, and
>
> (b) if the regulator transfers the permit under paragraph (a), must transfer, despite anything in a specified enactment prohibiting the transfer, all authorizations issued to the permit holder for related activities of an energy resource activity permitted, or an off-site environmental mitigation activity required, by the permit.
>
> (1.1) On application in writing signed by both an authorization holder and a person who wants to acquire the authorization, the regulator may transfer, despite anything in a specified enactment prohibiting the transfer, the authorization to that person, subject to any conditions the regulator considers necessary.
>
> (1.2) Despite subsection (1), an application under that subsection is not required to be signed by the permit holder if
>
> (a) the permit is cancelled under section 26, 33 or 43.3,
>
> (b) the permit is declared to be spent under section 27,
>
> (c) the permit relates to an orphan site under section 45, or
>
> (d) the regulator is satisfied that the permit holder no longer exists or cannot be located.

50. It is not surprising that the BCER does not have unlimited powers to transfer permits. While the BCER controls the ability to carry out regulated activities, it does not own the underlying infrastructure which requires significant investment. The BCER is also not a party to the requisite agreements which are required to conduct energy activities.

51. In this instance, the BCER is asking the Court to appoint a receiver, in order to override Erikson's entitlement to have a say in what happens to its assets and its business. A business, which has been supported by Erikson's secured creditor at a significant cost over the last number of years.

52. Seeking a receivership to advance the Kingscrest transaction is contrary to the recognized *Soundair* principles.[52]

53. Kingscrest did not participate in the SISP, it would be unfair to those that did to enable it to bypass the process for completion of a transaction, especially one that clearly does not reflect the best price or the interests of all parties.

54. Further, the BCER lacks sufficient familiarity with the assets, business or shares that they seek to transact with. The conversion to a receivership will only result in delays, additional costs and the loss of the transaction Erikson seeks to advance through the court process which will enable all environmental liabilities to be assumed and cure costs to be paid.

55. The Court has jurisdiction to grant a receivership order pursuant to section 13(2) of the *Judicature Act*.[53] The question is whether it is "just and convenient" to appoint a receiver.[54] The Court has recognized that a receivership order "should not be lightly granted."[55]

56. When considering whether to appoint a receiver and manager, the Court should: (i) explore whether there are other remedies that could serve to protect the interests of the applicant; (ii) balance the rights of both the applicants and the other stakeholders (including the secured and unsecured creditors); and (iii) consider the effect of granting the Draft Receiver Order.[56]

57. The Court should consider a wide number of factors when determining whether to appoint a receiver.[57] Based on *Paragon*, these considerations include:

(a) whether irreparable harm might be caused if no order is made (although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed);

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[52] *Royal Bank of Canada v Soundair Corp*, (1991) 1991 CanLII 2727 (ON CA) at 6 **[TAB 10]**, and endorsed in *River Rentals Group Ltd v Hutterian Brethren Church of Codesa*, 2010 ABCA 16 at para 12. **[TAB 11]**
[53] *Judicature Act*, RSA 2000, c J-2 [**JA**].
[54] *Servus Credit Union Ltd v Proform Management Inc,* 2020 ABQB 316 at para 65 [**Servus Credit**]. **[TAB 12]**
[55] *Law Society of Alberta v Higgerty*, 2023 ABKB 499 at para 25 [**Higgerty**]. **[TAB 13]**
[56] *Ibid*, at para 25.
[57] *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*, 2002 ABQB 430 at para 27 [**Paragon**]. **[TAB 14]**

(b) the risk to the security holder, taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

(c) the nature of the property;

(d) the preservation and protection of the property pending judicial resolution;

(e) the balance of convenience to the parties;

(f) the principle that the appointment of a receiver is extraordinary relief, which should be granted cautiously and sparingly;

(g) the effect of the order upon the parties;

(h) the conduct of the parties;

(i) the cost to the parties; and

(j) the likelihood of maximizing return to the parties.

58. Applying these factors, a receiver is neither just nor convenient in the circumstances.

(a) Irreparable harm

59. BCER will not incur any irreparable harm if the Court does not grant the receivership. Erikson's assets are protected and preserved. Since February 2023, Erikson has winterized its assets, and it has conducted ongoing monitoring of the sites.

60. Moreover, a receiver will hinder the closing of a transaction for all of Erikson's assets. Erikson is best placed to secure this sale, as it has the most knowledge of the assets. The BCER's receivership, which is intended to effect the sale of a select group of assets to Kingscrest, cannot be the preferable process.

61. A receivership would also result in prejudice to the professionals and secured creditors as the BCER is seeking to prime the court granted charges provided for in the NOI Proceedings and grant Kingscrest a priority charge over Erikson's assets.

(b) Nature of the property

62. The properties owned by Erikson include a gas processing plant, wells, water storage sites, pipelines, and other infrastructure. Erikson has taken steps to maintain the properties throughout these proceedings.

(c) Preservation and protection of property

63. Erikson has the financial resources and expertise to preserve its assets. The company has employees at a camp site nearby, and these individuals protect the site from any crimes or emergency situations that could arise.

64. In terms of cash flow, TEC and its proposed purchaser have committed to supporting Erikson and its ongoing capital needs to enable the transaction to close.

(d) Balance of convenience to the parties

65. The balance of convenience supports Erikson. There is no prejudice to the BCER in not appointing a receiver. Instead, Erikson would be prejudiced, as a receivership would destroy the deal that flowed from the sales process and contemplates the transfer of all of the assets, leave environmental obligations unaddressed for which Erikson and its directors and officers could have liability. [58]

66. Further, appointing receiver now will result in the loss of employment of Erikson's staff to their detriment (shortly before the holidays) and the detriment of the assets which are located in remote British Columbia.

(e) Principle that appointment of a receiver is extraordinary relief

67. At this stage, given that the sales process has resulted in a transaction for the sale of all Erikson's assets, it would be extraordinary, and destructive to value, to appoint a receiver.

[58] *ERAA*, *supra* note 2, at Division 2.1 and ss 43.01-43.12

(f) Effect of the order upon the parties

68. The order will have detrimental impacts on Erikson, its employees, and those who will benefit from the Gryphon transaction which will result in all assets being assumed, cure costs being paid and future taxes and royalties for the province.

(g) Conduct of the parties

69. Erikson has acted in good faith throughout this process. It has diligently pursued a sales transaction, focusing on a sale that could address all environmental obligations and maximize value. By contrast, based on its conduct, the BCER should be estopped and precluded from seeking the appointment of a receiver.

(h) Cost to the parties

70. Given that the BCER intends to install a new licensed insolvency trustee to run the receivership, rather than utilizing the Proposal Trustee with its commensurate industry knowledge and familiarity with the assets, there can be no doubt that the receivership will drive costs and impact the funds available to Erikson, its creditors and stakeholders.

(i) Likelihood of maximizing return to the parties

71. It is unlikely that a receiver will maximize return to the parties. As noted, there are additional costs and delays that will result in pursuing a transaction with Kingscrest and further the transaction will leave millions in liabilities unaddressed. There will also be impacts to Erikson's business, and its stakeholders.

V. RELIEF SOUGHT

72. Erikson pursued a transaction with Kingscrest in good faith. Yet, despite claiming to support the proposed deal, the BCER actively interfered and negotiated its own arrangement will result in millions of dollars in liabilities being left behind. The BCER now brings this Application to compel Erikson into a receivership for the purpose of executing its side deal for select assets, on the eve of Erikson closing its own *en bloc* deal.

73. The actions of the BCER are self-serving, contrary to the public interest and cannot be permitted. Throughout this process, the BCER denied Erikson procedural fairness, disregarded

the legitimate expectations that it established, and limited the cross-examination of important evidence. The BCER is not acting in the public interest.

74. Given the BCER's conduct, Erikson asks this Court to dismiss the receivership Application, with costs payable to Erikson.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 5th day of December, 2024.

Estimated Time for Argument: 30 minutes

BENNETT JONES LLP

Per: Keely Cameron

Keely Cameron / Luc Rollingson
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VI. TABLE OF AUTHORITIES