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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  
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THIS DOCUMENT

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**Commercial List Chambers Application  
Scheduled for October 21, 2024  
before The Honourable Justice Johnson**

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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**").

2. This brief is submitted on behalf of the applicant, Erikson in support of an application for the following relief:

- (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 within which Erikson is required to file a proposal to its creditors, under section 50.4 of the *BIA*, for 40 days to November 30, 2024;
- (c) extending the stay of proceedings in the within matter for 40 days to November 30, 2024;
- (d) Granting an Administration Charge in the amount of \$200,000;
- (e) Approving the Sale and Investment Solicitation Process; and
- (f) such further and other relief as this Honourable Court may deem just.

## **II. STATEMENT OF FACTS**

3. The facts applicable to this application are set out in the Horrox Affidavit in support of this application and the First Report of KSV Restructuring Inc. (the "**Proposal Trustee**").

## **III. ISSUES**

4. 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 Sale and Investment Solicitation Process ("**SISP**") should be approved; and

- (c) Whether the Administrative Charge should be approved.

#### IV. LAW AND ARGUMENT

##### A. Extending the Stay and Period for Filing a Proposal

5. 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.

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

7. 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.<sup>1</sup> 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."<sup>2</sup>

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

<sup>2</sup> *Supra*.

8. 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.<sup>3</sup>

9. 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, and advance a sales process in cooperation with the British Columbia Energy Regulator for the benefit of all stakeholders.<sup>4</sup>

10. 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”.<sup>5</sup> This is to be assessed based on whether it would a proposed proposal is “reasonable on its face to a reasonable creditor”.<sup>6</sup>

11. While early in the NOI process, Erikson has commenced steps necessary to facilitate the development of a proposal. The outcome of the sale and investment solicitation process will form the basis for a proposal or plan of arrangement. Taking steps that will increase the likelihood of a viable proposal resulting, has been deemed sufficient to satisfy this criterion.<sup>7</sup>

12. 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.<sup>8</sup> It is to be considered objectively, having regard for the prejudice suffered vis-à-vis the indebtedness and the attendant security.<sup>9</sup>

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<sup>3</sup> *Chester Basin Seafood Group Inc (re)*, [2023 NSSC 388](#) at para 17-20. [Tab 2]

<sup>4</sup> Horrox Affidavit at para. 29.

<sup>5</sup> *T & C Steel Ltd. (Re)*, [2022 SKKB 236](#) at para 6 [Tab 3], citing *Cantrail Coach Lines Ltd. (Re)*, [2005 BCSC 351](#). [Tab 4]

<sup>6</sup> *Supra* at para 66.

<sup>7</sup> *In the Matter of the Bankruptcy of Bear Creek Contracting Ltd.*, [2021 BCSC 783](#) at para 64. [Tab 5]

<sup>8</sup> *In the Matter of the Proposal of Cantrail Coach Lines Ltd.*, [2005 BCSC 351](#) at para 21. [Tab 4]

<sup>9</sup> *H &H Fisheries, supra* at para 35-37. [Tab 1]

13. 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 run a sales process in order to advance a proposal.

**B. SISP**

14. In approving a SISP the court can consider the non-exclusive factors set out in 65.13(4) of the *BIA*, including:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the trustee approved the process leading to the proposed sale or disposition;
- (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.<sup>10</sup>

15. Courts have also referred to the well-known *Soundair* principles: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties.<sup>11</sup>

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<sup>10</sup> *BIA* s. 65.13(4) [Tab 6]

<sup>11</sup> *Royal Bank of Canada v Soundair Corp*, 1991 CanLII 2727 (ONCA) [Tab 7]

16. When approving a SISP, the role of the Court is to focus on the integrity of the process, it is not necessary for the Court to go into the minutia of that process.<sup>12</sup>

17. 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 conducting the proposed SISP. Erikson submits that the proposed SISP satisfies not only the s.65.13(4) of the *BIA* criteria, but also the modified *Soundair* factors set out above. The proposed SISP will provide an expedient and efficient means of soliciting offers to acquire all, or substantially all of, Erikson's property or business.

18. The single phased process was developed in recognition that the business had been marketed the prior year. The proposed SISP contemplates the running of a robust process over 1 month. The process contemplates a marketing launch of October 16, 2024, a bid deadline of November 14, 2024, and a sale approval application of November 25, 2024, with a target closing date of November 30, 2024.

19. The proposed SISP is fair to all stakeholders and satisfies s. 65.13(4) of the *BIA* as well as the *Soundair* factors.

**C. Administrative Charge**

20. Ensuring the success of these proceedings requires the continued engagement of professionals-namely, the Proposal Trustee, the Proposal Trustee's legal counsel and the Applicant's legal counsel. Section 64.2 of the *BIA* provides this Court with the authority to grant a charge in favour of such professionals to secure such professional fees:

64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

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<sup>12</sup> *Tool Shed Brewing Company Inc (Re)*, [2024 ABKB 234](#) at para 40 [Tab 8], citing *Royal Bank of Canada v Keller & Sons*, [2016 MBCA 46](#) at para 11 [Tab 9]

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division.

21. The proposed services are essential both to a successful proceeding under the *BIA* as well as for the conduct of the *SISP*.

22. The quantum of the proposed charge is appropriate given the complexity of the Applicant's business and the *SISP*.

23. Finally, the Court of Appeal in the context of receiverships, has found that a priority charge for administration charges are appropriately granted and necessary to provide certainty so that professionals take mandates.<sup>13</sup> The Applicant submits that this same logic also extends to Proposal Trustees, who, like receivers, are officers of the Court. Thus, a priority should be granted to the Proposal Trustee, the Proposal Trustee's counsel, and counsel for the Applicant.

## V. RELIEF SOUGHT

24. 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 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 15<sup>th</sup> day of October, 2024.

Estimated Time for  
Argument: 30

BENNETT JONES LLP

Per: Keely Cameron  
Keely Cameron / Michael Selnes/ Luc  
Rollingson  
Counsel for the Applicant  
Erikson National Energy Inc.

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<sup>13</sup> *Edmonton (City) v Alvarez & Marsal Canada Inc*, [2019 ABCA 109](#) at para 17 [Tab 10]



## 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. *Bankruptcy and Insolvency Act*, [RSC 1985, c B-3](#)
7. *Royal Bank of Canada v Soundair Corp*, [1991 CanLII 2727](#) (ONCA)
8. *Tool Shed Brewing Company Inc (Re)*, [2024 ABKB 234](#)
9. *Royal Bank of Canada v Keller & Sons*, [2016 MBCA 46](#)
10. *Edmonton (City) v Alvarez & Marsal Canada Inc*, [2019 ABCA 109](#)