

Court No.: NB 21256  
Estate No.: 51-2000260

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF A PROPOSAL OF 663230 N.B. INC., a business corporation duly registered under the laws of the Province of New Brunswick carrying on business at 100 Rice Street, Edmundston, New Brunswick.

IN THE MATTER of an Application pursuant to Section 58(a) of the *Bankruptcy and Insolvency Act* for the approval of the Proposal of 663230 N.B. Inc.

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**PRE-HEARING BRIEF OF THE APPLICANT**  
**FOR THE APPLICATION BEING HEARD ON DECEMBER 10, 2015**

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## PART I – FACTS

### Background

1. 663230 NB Inc. (the “Corporation”) operates a 103-room hotel located in downtown Edmundston (the “Hotel”). Over the past 18 months, the Corporation has encountered financial challenges.
2. On May 29, 2015, the Corporation filed a Notice of Intention to Make a Proposal with the Office of the Superintendent of Bankruptcy of Canada pursuant to subsection 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “BIA”). Since then, the Corporation has worked with Deloitte Restructuring Inc., as Proposal Trustee, in good faith and with due diligence, to arrive at a viable proposal that is acceptable for the Corporation’s Creditors and which provides for a restructuring of the Corporation that will ensure sustainable operations of the Hotel.
3. The Corporation’s operations are based out of lands and buildings owned by the Corporation in the City of Edmundston which forms part of a building complex owned by Place Assomption Ltée/Assomption Place Ltd. (“Assomption”), the previous owner of the Hotel and supplier of essential services to the Hotel in accordance with various service agreements (the “Service Agreements”). The complex is comprised of various businesses and shops.
4. Business Development Bank of Canada (“BDC”) holds a first charge security interest over the Corporation’s real property, ranking *pari passu* with Caisse populaire Trois Rives Ltée (“Caisse”). Further, BDC holds a security interest over all of the Corporation’s present and after-acquired personal property.
5. Further to its first charge security interest ranking *pari passu* with BDC, the Caisse also holds a security interest over all of the Corporation’s present and after-acquired personal property.
6. In order to satisfy the purchase price of the Hotel, Assomption agreed to a Vendor Take-Back Mortgage for an amount totalling \$500,000.00. As such, Assomption holds a

second ranking security interest in the Corporation's real property and a security interest over all of the Corporations present and after-acquired personal property.

**The Financial Difficulties Giving Rise to the Notice of Intent to Make a Proposal**

7. Immediately after obtaining possession of the Hotel, the Corporation became aware of numerous structural and mechanical defects and deficiencies which resulted in additional sums being invested over and above the initial projected expenses to bring the Hotel up to industry standards and satisfy the requirements of Starwood Development under its License Agreement with the Corporation.
8. Furthermore, due to the design of the building complex surrounding the Hotel, the HVAC and electricity along with other similar essential services were based on a central system supplying the entire complex, which were all controlled and operated by Assomption. As such, the Corporation and Assomption entered into the various Service Agreements in order to ensure the continuous supply of electricity and hot/cold water for the HVAC.
9. During the year leading up to the filing of the Notice of Intention to Make a Proposal, there have been various disputes between the Corporation and Assomption with respect to the Service Agreement. Namely, the parties were unable to agree on the reasonableness of the charges for the said services and further, the temperature of the water supply for the HVAC system during the warm summer days and the cooler winter days, resulted in several complaints from its patrons with regards to irregular and uncomfortable room temperatures.
10. Furthermore, the Corporation was required, as a result of the acquisition of the Hotel, to compensate five former Assomption employees after they were terminated due to their incompatibility with the Hotel's new management and business model. The total cost of the employment dispute was \$144,000.00 in severance to former employees due to their years of service with their previous employer.
11. Prior to the filing of the Notice of Intention to Make a Proposal and despite the indemnity agreements in place between the parties, the Corporation and Assomption

remained unable to reach any form of agreement with respect to the Service Agreements, the mechanical and structural defects and the employee severance that fell within the indemnity obligations owed by Assomption. This forced the Corporation to undertake legal action against Assomption to enforce the provisions of various indemnity agreements between the parties.

12. Faced with the threat of essential services being discontinued by Assomption, the Corporation had no choice but to seek the stay provisions and the protection of the *BIA* in order that the within Proposal could ultimately be achieved. Fortunately, Assomption and the Corporation were able to reach settlement of the action and settle their ongoing disputes as per the provisions of the Proposal and a Collateral Agreement entered into by both parties and the personal guarantors.

### The Proposal

13. On November 18, 2015, a Creditors' meeting was held and a vote was put forward for the approval by the Corporation's creditors of the Proposal. By unanimous resolution, the Creditors approved the Proposal in its current form.
14. The Proposal provides *inter alia* for the reimbursement of the full value of the secured creditors' claims, namely, Caisse and BDC. Under the Proposal, both of these creditors have agreed to enter into a forbearance agreement whereby the advances will be dealt with in accordance with the terms of the existing loan agreements beginning in September 2016.
15. The Proposal further provides that, in consideration of a Collateral Agreement between Assomption, the Corporation and its personal guarantors, the amount of \$500,000.00 of the total indebtedness of the Corporation shall be considered and treated as unsecured debt in light of the fact that should a forced liquidation occur, the prior encumbered collateral would be insufficient to satisfy the total amount of debt.
16. Further, the Collateral Agreement provides for the discontinuance of the above-noted action under Court File Number EC-1-2015.

17. Finally, under the terms of the Proposal, the Corporation shall undertake to obtain its own HVAC system, electrical supply and meter and as such, shall discontinue the Service Agreements with Assomption within 12 months of the approval of the Proposal by this Court. Furthermore, the Corporation will, for the 12-month period during which the Service Agreements will remain in effect, prepay on a monthly basis the recurring charges to Assomption. The parties have also agreed to fully collaborate to ensure the efficient transfer and conversion of the HVAC and electrical systems to the new systems to be acquired and independently operated by the Corporation.
18. Pursuant to the terms of the Proposal, the unsecured creditors will be receiving an amount of \$600.00, representing the Convenience class portion of their claim. The remaining portion of each such proven claim by the unsecured creditors shall be paid an amount representing 10% of their proven claim in installment payments to be paid by the Corporation on November 30, 2015, August 31, 2016, November 30, 2016 and August 31, 2017.
19. On November 18, 2015, a Creditors' meeting was held and a vote was put forward for the approval by the Corporation's creditors of the Proposal. By unanimous resolution the Creditors approved the Proposal in its current form. The Corporation now seeks this Honourable Court's approval of the Proposal on the basis that it meets all of the conditions under the *BIA* to be ratified by this Court.

## PART II – ISSUES

20. The issue in this matter is whether the Court should approve the Proposal of 663230 N.B. Inc. as approved by all of the Corporation's creditors on November 6, 2015, pursuant to section 59 of the *BIA*.

### PART III - LAW AND ARGUMENT

21. The authority of the Court to approve the proposal arises pursuant to section 59 of the *BIA* which provides as follows:

Court to hear report of Trustee, etc.

59(1) The Court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.

Court may refuse to approve the proposal

(2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any of the offences mentioned in sections 198 to 200.

Reasonable security

(3) Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

Court may order amendment

(4) If a court approves a proposal, it may order that the debtor's constating instrument be amended in accordance with the proposal to reflect any change that may lawfully be made under federal or provincial law.

22. The onus to establish that the Proposal is one that should be approved by the Court rests with the Corporation. In *Re Magnus One Energy Corp.* (2009), (2009) CarswellAlta 488, 53 C.B.R. (5<sup>th</sup>) 243 (Alta Q.B.), Justice B.E. Romaine of the Alberta Court of Queen's Bench states at paragraph 10:



10 Prior to approving a Proposal, the Court must be satisfied that:

- i) the terms of the Proposal are reasonable,
- ii) the terms of the Proposal are calculated to benefit the general body of creditors, and
- iii) the Proposal is made in good faith.

23. It is against this backdrop that this Court must determine the test that is required to be met in the current circumstances for the approval of the Proposal by the Court. The Corporation submits that the required statutory terms set forth in the *BIA* and the relevant case law have been met by the Corporation and are included in the Proposal. As such, it is respectfully submitted that the Proposal should be approved by this Court.

**The Terms of the Proposal are Reasonable**

24. The Corporation submits that the Proposal is reasonable on its face. The Corporation submits that the events leading up to the filing of the Notice of Intention to Make a Proposal have been resolved. The disputes between Assumption and the Corporation which led to the filing of Court File Number EC-1-2015 have been resolved by the Collateral Agreement between the parties and the legal proceedings were discontinued.

25. The Corporation further submits that the 12-month period provided under the terms of the Proposal will allow sufficient time for securing new service providers for the essential services currently supplied under Service Agreements with Assumption from third parties at a lower cost and will ultimately result in the Corporation purchasing and installing stand-alone supply for electricity and hot/cold water for the HVAC, which will ultimately be operated by the Corporation independently from the current system owned and operated by Assumption. This will provide for long-term savings and will play a great role in ensuring the Corporation financial stability by increasing the cash flow, thus increasing the likelihood of successfully complying with the terms of the Proposal. The threat of disconnection will also be eliminated since all dispute issues between Assumption and the Corporation have been resolved and, more importantly,

the Corporation will no longer be dependent on the prior Hotel owner and operator regarding the provision of essential services.

26. The Corporation submits that the Proposal, in its entirety, is reasonable in the circumstances and the likelihood of the Corporation being successful in complying with the terms of the Proposal warrants its approval by this Court in order to allow the Corporation to complete the restructuring process it has undertaken and to pursue its operations successfully.

**The Terms of the Proposal are Calculated to Benefit the General Body of Creditors**

27. The Corporation submits that the Proposal is to the benefit of the general body of creditors who will be receiving a net amount that will exceed any amount which they would be receiving should the Proposal be rejected and the Corporation declared bankrupted as of the date of the filing of the Notice of Intention to Make a Proposal.
28. The Corporation reiterates that the Corporation's creditors have not expressed any opposition to the approval of the Proposal by the Court, but rather, the creditors have unanimously accepted the terms of the Proposal and consent to its approval by this Honorable Court. If the Proposal is not approved, there would be little, if any, recovery for the Corporation's unsecured creditors.

**The Proposal is Made in Good Faith**

29. The Corporation respectfully submits that it has acted in good faith and with due diligence from the date of the Notice of Intention to Make a Proposal. The Corporation has provided full disclosure of all of its assets and the encumbrances against them. Further, the Corporation has taken all necessary steps to retain professional services of various intervenors to assist with the Corporation's restructuring and continues to work with these professionals in the context of the Proposal.
30. The Corporation is actively engaged in negotiations with third parties in order to secure the supply of electricity and hot/cold water for the HVAC from independent sources

and/or for the installation of stand-alone facilities that would allow the Corporation to ensure its own supply of electricity and hot and cold water for the HVAC. At the time of the within Proposal, the Corporation continues to be actively engaged in negotiations with designers and suppliers for the installation of new hot/cold water for the HVAC stand-alone facility.

31. It is trite law that the Court will closely scrutinize any proposal submitted for its approval, even if the creditors have approved it and the trustee recommends acceptance. In *Gardner, Re*, (1921), 1 C.B.R. 424 (Ont. S.C.), the Ontario Superior Court approving the Debtor's proposal stated at paragraph 5:

5. [...] It is my duty to take into consideration not only the wishes and interests of the creditors but the conduct of the debtor, the interest of the public and future creditors, and the requirements of commercial morality. The burden of proof is on the party who opposes the approval of the composition or scheme. [...]

32. In the case at bar, the creditors have approved the Proposal set forth by the Corporation at the Creditors' meeting. Further the Proposal provides for payment in full of the indebtedness of BDC and the Caisse, representing the majority of the Corporation's creditors.

33. In *Blake Resources Ltd., Re*, 1983 CarswellAlta 253, 47 C.B.R. (N.S.) 41, Justice Forsyth of the Alberta Court of Queen's Bench, while discussing the degree of deference that should be exercised by a Court when approving a proposal which has previously been accepted by the required majority of creditors, states at paragraphs 23 to 26 of his reasons:

23 It is, I think, clear this is a unique proposal. Perhaps, however, that can be said of most proposals where a company which feels it has a chance of success in pulling itself out of the financial difficulties in which it is involved attempts to tailor something that will have the effect of satisfying the majority of its creditors as to its bona fides and as to the integrity of the managing officers, and comes up with something that meets these requirements.

24 I note that this particular proposal, both in its earliest forms and its final amended form, has been looked at carefully by former and present senior officers of the trustee, a most reputable firm of chartered accountants operating throughout Canada. It has been looked at by sophisticated creditors large and small, and the result of this investigation and consideration of the proposal has been that a large majority of such creditors both in number and in the amount of their claim have approved the proposal.

25 I agree completely with the views expressed by Montpetit J. in the case of *Re Orchard Fashions Inc.; Grobstein v. Bruck Mills Ltd.* (1961), 2 C.B.R. (N.S.) 103 (C.S. Que.) where he states at p. 104:

Under ordinary circumstances, and especially where a large majority of the creditors wish to have a proposal approval, I do not believe the Court should interfere and substitute, more or less, its judgment for that of the said majority.

On the other hand, there may be circumstances where the Court, whatever be the majority of creditors in accordance with the proposal, should take it upon itself to disapprove it.

26 I am not satisfied that those other circumstances exist in this case and, accordingly, I approve the proposal in its present form, as I mentioned earlier, subject to those terms yet to be completed, which include receiving the formal signed approval of the Ontario Securities Commission to the issuance of shares.

34. In *Stone, Re*, 1976 CarswellOnt 56, Justice Henry of the Ontario Supreme Court, In Bankruptcy, stated at paragraphs 1 and 2:

1 As I conceive the function of the court when called upon to approve a proposal, it is a matter of taking several interests into account.

2 The first interest is that of the debtor: to give him an opportunity to meet with his creditors and to find a way of producing assets or revenue which will provide them with a dividend outside of bankruptcy. The second interest is that of the creditors: to protect the creditors generally by ensuring that what is put up by way of a proposal is a reasonable one, but bearing in

mind that by the time it gets to the court the proposal has been supported by and is therefore desired by the majority of creditors. The third interest is that of the public at large in the integrity of the bankruptcy legislation.

35. In the case at bar, the Proposal has been looked at by sophisticated creditors, large and small, and the result of this investigation and consideration of the Proposal has been that not only on a large majority (whether in number or amount of their respective claims) but on a unanimous basis, all such creditors have confirmed their full support and approval for the Proposal.

### Conclusion

36. In conclusion, the Corporation respectfully submits that the formalities of the *BIA* have been fully complied with and that the terms of the Proposal are reasonable in the circumstances and the likelihood of the Corporation being successful in complying with the terms of the Proposal warrant its approval by this Court in order to allow the Corporation to complete the restructuring process it has undertaken and pursue its operations.

PART IV - RELIEF SOUGHT

37. The Corporation submits that this is an appropriate case for the Court to approve the proposal as it meets the requirements set out in section 59 of the *BIA*. The Corporation therefore respectfully requests an order that the Proposal of the Corporation be approved pursuant to section 59 of the *BIA*.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of December, 2015.



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LIST OF AUTHORITIES

*Re Magnus One Energy Corp.* (2009), CarswellAlta 488, 53 C.B.R. (5<sup>th</sup>) 243 (Alta Q.B.)

*Gardner, Re*, (1921), 1 C.B.R. 424 (Ont. S.C.)

*Blake Resources Ltd., Re*, 1983 CarswellAlta 253, 47 C.B.R. (N.S.) 41

*Stone, Re*, 1976 CarswellOnt 56





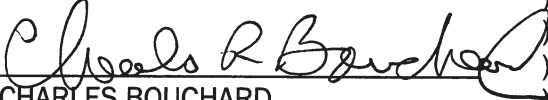
4. Immediately following its purchase, the current management opted to rebrand the Hotel under the current banner, namely Four Points by Sheraton, a member of the Starwood Hotel Group.
5. As a result of its rebranding and the various mechanical and structural issues that were discovered subsequently to the purchase of the Hotel, significant expenses were immediately required in order to insure the success of the Hotel and to maintain its operations at minimum industry standards. The initial budgeted investment required to repair the Hotel was in the vicinity of \$2,500,000.00. However, the Corporation was required to invest additional sums due to the unforeseen conditions of the Hotel and the rebranding requirements, thereby increasing the total investment by \$1,600,000.00.
6. Within the first twelve months of operation under the new ownership of the Hotel, a grievance was lodged with the Union representing its workers with respect to certain employees whose employment was terminated. The dispute was subsequently resolved and the Corporation was required to pay a total of \$144,000.00 in settlement of this claim, thus adding to the financial challenges the Corporation was already facing.
7. Further, in accordance with the Agreement for the Purchase and Sale of the Hotel, Assomption supplies the following essential services to the Hotel:
  - a. cold and hot water to supply HVAC;
  - b. electricity.
8. Recurrent payments for these essential services were to be completed on a monthly basis. However, the supply of cold and hot water for HVAC and of electricity by Assomption gave rise to various disputes between Assomption and the Corporation which ultimately resulted in the filing of a Notice of Action with Statement of Claim Attached by the Corporation against Assomption for the purpose of enforcing the indemnity obligations of Assomption. The details of the various disputes which led to the financial difficulties incurred by the Corporation and subsequently to the filing of a

Notice of Intent to Make a Proposal are more fully addressed in my Affidavit sworn to on June 24, 2015 and filed with this Court on June 26, 2015.

9. As part of the Proposal, the Corporation has submitted a viable plan to secure new procurement methods for the supply of cold and hot water for its HVAC system, namely by seeing to the installation of a new boiler room operating independently from the current system used by Assomption to supply the other buildings surrounding the Hotel. The Corporation has also made arrangements for the installation of a separate electrical meter to facilitate and secure the supply of electricity directly from the City of Edmundston without reliance on third parties.
10. Furthermore, in the course of the negotiations that led to the Proposal, all outstanding disputes regarding service charges for the supply of electricity and cold and hot water for the HVAC system and the indemnity obligations of Assomption were resolved and the Notice of Action with Statement of Claim attached identified as Court File No. EC-1-2015 was discontinued on a with prejudice basis.
11. From the date of the filing of the Notice of Intention to Make a Proposal, the Corporation has not sold any of the assets subject to the security interest of its creditors. I have actively worked with the Trustee to prepare a viable proposal for the Corporation and its operations. I believe that the Proposal, if approved by this Court in the same form as it was approved and accepted by all of the Corporation's Creditors, will provide a materially better return to both the secured and the unsecured creditors of the Corporation than would occur on the piecemeal liquidation of the Corporation's assets, which will result if the requested Proposal is not approved by this Court.
12. I make this affidavit in support of the Corporation's request that the proposal be approved by this Court pursuant to subsection 58(a) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, C. B-3.

SWORN TO at the City of Edmundston, )  
Province of New Brunswick, )  
this 30 day of November, 2015. )

BEFORE ME: )

  
CHARLES BOUCHARD, )  
A COMMISSIONER OF OATHS )  
PROVINCE OF NEW BRUNSWICK )  
My commission expires on )  
December 31, ~~2015~~ 2020 )

Cl.

  
ÉRIC LONG