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IN THE COURT OF QUEEN’S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**IN THE MATTER OF THE *COMPANIES’ CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF [APPLICANT’S NAME] (the "Applicant")**

**CHARGING ORDER**

THE INITIAL APPLICATION, made by the Applicant, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard and the Court granted an Order (the “**Initial Order**”) on the \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_,\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, New Brunswick.

WHEREAS the Applicant also requested in its initial application the granting of certain Charges, as defined below, in priority to the interests of the Applicant’s existing secured creditors.

ON READING the affidavit of [NAME] sworn [DATE] and the Exhibits thereto, the report[affidavit] of [NAME] dated [DATE], in its capacity as [proposed] Monitor of the Applicant, and on being satisfied that \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_the secured creditors who are likely to be affected by the Charges, as defined below, created herein were given notice as set out in the affidavit of service of [NAME] sworn [DATE] and the Exhibits thereto (the “**Affidavit of Service**”), and on hearing the submissions of counsel for [NAMES], no one appearing for [NAME][[1]](#footnote-2) although duly served as appears from the Affidavit of Service.

**IT IS ORDERED AND DECLARED THAT:**

SERVICE

1. The service of the Notice of Application and the Application Record as set out in the Affidavit of Service is deemed adequate[[2]](#footnote-3) so that this Application is properly returnable today and further service thereof is hereby dispensed with.

**INTERPRETATION**

1. All Capitalized words used in this Order that are not otherwise defined in this Order have the meanings ascribed to them in the Initial Order.

RESTRUCTURING

1. The Applicant may, subject to compliance with section 36 of the CCAA, and in addition to the powers granted in the Initial Order, dispose of redundant or non-material assets not exceeding $\* in any one transaction or $\* in the aggregate.

DIRECTORS’ AND OFFICERS’ INDEMNIFICATION AND CHARGE

1. The Applicant shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicant after the commencement of the within proceedings,[[3]](#footnote-4) except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or actionable misconduct.
2. The directors and officers of the Applicant shall be entitled to the benefit of and are hereby granted a charge (the "**Directors’ Charge**")[[4]](#footnote-5) on the Property, which charge shall not exceed an aggregate amount of $●, as security for the indemnity provided in this Order. The Directors’ Charge shall have the priority set out herein.
3. Notwithstanding any language in any applicable insurance policy to the contrary, (a)the Applicant's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with this Order, and (b) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge.

ADMINISTRATIVE CHARGE

1. The Monitor, counsel to the Monitor and the Applicant’s counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $●, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out herein.

DIP FINANCING

1. The Applicant is hereby authorized and empowered to obtain and borrow under a credit facility from [DIP LENDER’S NAME] (the "**DIP Lender**") in order to finance the Applicant's working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed $\_\_\_\_\_\_ (the “**DIP Facility**”) unless permitted by further Order of this Court.
2. The DIP Facility shall be substantially on the terms and subject to the conditions set forth in the commitment letter between the Applicant and the DIP Lender dated as of [Date] (the “**DIP Term Sheet**”) annexed hereto as Schedule “A”, as same may be amended from time to time with the Monitor’s written consent provided any amendment may not affect a secured creditor’s rights without further order of this Court.
3. The Applicant is hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "DIP Documents"), as are contemplated by the DIP Term Sheet or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Applicant is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Term Sheet as and when the same become due and are to be performed, notwithstanding any other provision of this Order or the Initial Order.
4. The DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lender’s Charge**") on the Property as security for any and all obligations of the Applicant under or pursuant to the DIP Facility and the DIP Term Sheet, which charge shall not exceed the aggregate amount owed to the DIP Lender under or pursuant to the DIP Facility and the DIP Term Sheet. The DIP Lender’s Charge shall have the priority set out herein.
5. Notwithstanding any other provision of this Order or the Initial Order:
6. the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender’s Charge or the DIP Term Sheet or any of the DIP Documents;
7. upon the occurrence of an event of default under the DIP Term Sheet or DIP Documents or the DIP Lender’s Charge, the DIP Lender, upon \_\_\_\_\_\_ days notice to the Applicant and the Monitor, may with leave of the Court exercise any and all of its rights and remedies against the Applicant or the Property under or pursuant to the DIP Term Sheet, DIP Documents and the DIP Lender’s Charge,; and
8. the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicant or the Property.
9. The DIP Lender shall be treated as unaffected in any Plan filed by the Applicant under the CCAA, or any proposal filed by the Applicant under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), with respect to any advances made under the DIP Term Sheet or the DIP Documents and with respect to any claims and rights the DIP Lender may have under or pursuant to any agreements related to the DIP Facility.

CRITICAL SUPPLIERS

1. Each of the entities listed in Schedule "B" hereto is a critical supplier of the Applicant as contemplated by section 11.4 of the CCAA (each, a "Critical Supplier"), provided that such designation shall not constitute a finding or determination that such entities are critical suppliers to any affiliate of the Applicant.
2. Each Critical Supplier shall continue to supply the Applicant with goods or services on terms and conditions that are consistent with existing arrangements and past practices.
3. The Applicant shall make prompt payment for goods and/or services supplied to them by a Critical Supplier. For greater clarity, an Applicant who receives goods and/or services from a Critical Supplier on and after the date of this Order shall make payment to such Critical Supplier for such goods or services on the next date on which such Applicant ordinarily issues cheques (provided that such date is at least two days, and no more than seven days, after the date on which such Applicant receives from such Critical Supplier an invoice for the purchase price of the goods or services supplied).
4. No Critical Supplier may require the payment of a deposit or the posting of any security in connection with the supply of goods or services to the Applicant after the date of this Order.
5. Each Critical Supplier shall be entitled to the benefit of and is hereby granted a charge (together, the "**Critical Supplier Charge**") on the Property in an amount equal to the purchase price of the goods and services supplied by such Critical Supplier and received by the Applicant after the date of this Order less all amounts paid to such Critical Supplier in respect of such goods and services. The Critical Supplier Charge shall have the priority set out herein.

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

1. The priorities of the Directors’ Charge, the Administration Charge, the Critical Supplier Charge and the DIP Lender’s Charge as among them, and as against the existing security held by any secured creditor prior to the issuance of this Order (the “**Existing Security**”), shall be as follows:
2. First – Administration Charge;
3. Second – DIP Lender’s Charge;
4. Third – Directors’ Charge; and
5. Fourth – Critical Supplier Charge
6. Fifth - Existing Security in such priority as they currently have.[[5]](#footnote-6)
7. The filing, registration or perfection of the Directors’ Charge, the Administration Charge, the Critical Supplier Charge and the DIP Lender’s Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.
8. Each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

1. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, the Existing Security or any of the Charges unless the Applicant also obtains the prior written consent of the Monitor, its existing secured creditors and the beneficiaries of the Charges (the “**Chargees**”), or further Order of this Court.
2. The Charges, the DIP Term Sheet and the DIP Documents shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by i) the pendency of these proceedings and the declarations of insolvency made herein; ii) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; iii) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; iv) the provisions of any federal or provincial statutes; or v) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicant. Notwithstanding any provision to the contrary in any Agreement:
3. neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Term Sheet or the DIP Documents shall create or be deemed to constitute a breach by the Applicant of any Agreement to which it is a party;
4. none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicant entering into the DIP Term Sheet, the creation of the Charges, or the execution, delivery or performance of the DIP Documents; and
5. the payments made by the Applicant pursuant to this Order, the DIP Term Sheet or the DIP Documents, and the granting of the Charges, do not and will not constitute fraudulent preferences, fraudulent conveyances, oppressive conduct, settlements or other challengeable, voidable or reviewable transactions under any applicable law.
6. Any Charge created by this Order over leases of real property in Canada shall only be a Charge on the Applicant's interest in such real property leases.
7. The Monitor, in addition to its prescribed rights and obligations under the CCAA and under the Initial Order, is hereby directed and empowered to:
8. assist the Applicant, to the extent required by the Applicant, in its dissemination to the DIP Lender and its counsel on a [TIME INTERVAL] basis of financial and other information as agreed to between the Applicant and the DIP Lender which may be used in these proceedings including reporting on a basis to be agreed with the DIP Lender; and
9. advise and/or assist the Applicant in its preparation of the Applicant’s cash flow statements and reporting required by the DIP Lender, which information shall be reviewed with the Monitor and delivered to the DIP Lender and its counsel on a periodic basis, but not less than [TIME INTERVAL], or as otherwise agreed to by the DIP Lender.
10. Any amounts actually advanced or expended pursuant to any of the Charges shall have the priority as provided for herein regardless of the time of advance or the use to which funds were actually put.

SERVICE AND NOTICE

1. The Applicant and the Monitor shall serve a copy of this Order on all secured creditors of the Applicant and shall be at liberty to serve this Order on such other Persons as either determines is appropriate. All such service shall be made in accordance with the provisions of the Initial Order.

GENERAL

1. The aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States is hereby requested, to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.
2. Each of the Applicant and the Monitor is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.
3. A party who makes a motion in these proceedings shall, subject to further Order, serve a motion record at least ten (10) calendar days’ before the date on which the motion is to be heard (the “**Return Date**”).
4. Any responding party objecting to the relief sought in a motion must serve responding materials no later than 4 p.m. on the date that is four (4) calendar days before the Return Date (the “**Objection Deadline**”). If the responding party will not be serving responding material but nevertheless intends to object to the relief sought in a motion, then such responding party must serve, by the Objection Deadline, a notice stating its objection to the relief sought and the grounds for such an objection (a “**Notice of Objection**”).
5. If either (i) responding materials, or (ii) a Notice of Objection is served in respect of a motion, the motion shall be heard on the Return Date, unless the Court orders otherwise.
6. If neither (i) responding materials; nor (ii) a Notice of Objection is served by the Objection Deadline, the Monitor shall contact the judge having carriage of the motion (the “**Presiding Judge**”) and request a determination as to (a) whether a hearing is necessary, (b) whether such hearing will be in person, by telephone or by written submissions only, and (c) which parties, if any, are required to make submissions on the motion (collectively, the “**Hearing Details**”). Promptly after being advised by the Presiding Judge of the Hearing Details, the Monitor shall advise the service list of such Hearing Details. If the Presiding Judge does not direct otherwise in any Hearing Details, then the motion shall be heard on the Return Date.

1. This Order and all of its provisions are effective as of \_\_\_\_\_\_\_ a.m./p.m Atlantic Standard/Daylight Time on the \_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_.

Dated at \_\_\_\_\_\_\_\_\_\_\_\_\_\_, New Brunswick, this \_\_\_\_\_ day of \_\_\_\_\_\_, \_\_\_\_\_\_.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Justice of the Court of Queen’s Bench

of New Brunswick

1. CCAA Sections 11.2(1), 11.3(1), 11.4(1), 11.51(1), 11.52(1), 32(1), 32(3), 33(2) and 36(2) require secured creditors likely to be affected by parts of the Order to be given notice. Insert their names above where provided.

   [↑](#footnote-ref-2)
2. The Applicant should seek to have service validated if it was done in a manner other than as authorized by the Rules of Court. [↑](#footnote-ref-3)
3. The broad indemnity language from Section 11.51 of the CCAA has been imported into this paragraph. The granting of the indemnity (whether or not secured by a Directors' Charge), and the scope of the indemnity, are discretionary matters that should be addressed with the Court. [↑](#footnote-ref-4)
4. Section 11.51(3) provides that the Court may not make this security/charging order if in the Court's opinion the Applicant could obtain adequate indemnification insurance for the director or officer at a reasonable cost. [↑](#footnote-ref-5)
5. The ranking of Charges is for illustration purposes only, and is not meant to be determinative. This ranking may be subject to negotiation, and should be tailored to the circumstances of the case before the Court. Similarly, the quantum and caps applicable to the Charges should be considered in each case. [↑](#footnote-ref-6)