

Supreme Court of Nova Scotia

Application by _____ (the “Applicant”)
for relief under the *Companies’ Creditors Arrangement Act*

Charging Order

Before the Honourable Justice [name or blank] in chambers

The Applicant applied for relief under the *Companies’ Creditors Arrangement Act* including an initial order, which has been granted, and further orders on further motion;

The initial order was granted on the _____ day of _____, 20____ (the “Initial Order”) and the Applicant now moves for an order providing certain Charges in priority to existing security;

The Applicant [*applied/moved*] for a charging order along with supporting documents including the affidavit of service of _____ (the “Affidavit of Service”), the affidavit of _____, and [*the affidavit of _____ on behalf of the proposed Monitor./a report of the Monitor.*]¹

The following parties appeared and made submissions on the motion: _____,
and no one appeared on behalf of _____.

¹ A charging order may be sought as part of the relief claimed in the notice of chambers application, it may be sought by notice of motion returnable at the same time as the chambers application, or it may be sought later by notice of motion. In the first and second situations, an affidavit of the proposed Monitor is appropriate. Otherwise, the Monitor would have been appointed and a report is appropriate.

On motion of the applicant the following is ordered and declared:

Service

1. The service of the [*notice of application/notice of motion*] and the supporting documents as set out in the Affidavit of Service is deemed adequate² so that the [*application/motion*] is properly returnable today and further service thereof is hereby dispensed with.

Interpretation

2. 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

3. 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

4. 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

² The Applicant should seek to have service validated if it was done in a manner other than as authorized by the *Civil Procedure Rules*.

proceedings,³ 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 negligence or actionable misconduct.

5. The directors and officers of the Applicant shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge")⁴ 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.

6. 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

7. 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.

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.

⁴ Subsection 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.

DIP Financing and Charge

8. The Applicant is hereby authorized and empowered to obtain and borrow under a credit facility from _____ (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.

9. 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 _____ (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.

10. The Applicant is hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs, and other 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 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.

11. 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 the DIP Facility and the DIP Term Sheet. The DIP Lender's Charge shall have the priority set out herein.

12. Notwithstanding any other provision of this Order or the Initial Order:

- a. 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;
- b. 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
- c. 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.

13. The Applicant is enjoined from making a proposal under the *Bankruptcy and Insolvency Act* by which any advance made under the DIP Term Sheet or the DIP Documents could be repaid at less than one hundred cents on the dollar, or by which any claims or other rights of the DIP Lender under any agreement related to the DIP Facility could be compromised, unless the DIP Lender agrees otherwise in writing.

Critical Suppliers and Charge

14. 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.

15. 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.

16. The Applicant shall make prompt payment for goods or services supplied to them by a Critical Supplier. For greater clarity, an Applicant who receives goods 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.

17. 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.

18. 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

19. 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:

- a. First – Administration Charge ;
- b. Second – DIP Lender's Charge;
- c. Third – Directors' Charge ;
- d. Fourth – Critical Supplier Charge; and

e. Fifth – Existing Security in such priority as they currently have.⁵

20. 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.

21. 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.

22. 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.

23. 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 for a bankruptcy order 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; or iv) 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

⁵ The wording about ranking of Charges is for illustration purposes only. This ranking may be subject to determination and negotiation, and should be tailored to the circumstances of the case before the Court.

"Agreement") which binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

- a. 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;
- b. 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
- c. 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.

24. 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.

25. The Monitor, in addition to its prescribed rights and obligations under the CCAA and under the Initial Order, is hereby directed and empowered to:

- a. assist the Applicant, to the extent required by the Applicant, in its dissemination, to the DIP Lender and its counsel on a [weekly/monthly/other] 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

- b. advise 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 [weekly/monthly/other] , or as otherwise agreed to by the DIP Lender.

26. 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

27. 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 it determines is appropriate. All such service shall be made in accordance with the provisions of the Initial Order.

General

28. The aid and recognition of any court, tribunal, or regulatory or administrative body having jurisdiction outside Nova Scotia 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, or 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.

29. Each of the Applicant and the Monitor be at liberty and 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.

30. Any interested party, including the Applicant and the Monitor, may apply to this Court to vary or amend this Order on such notice provided for under the *Civil Procedure Rules* or on such notice as this Court may order.

31. This Order and all of its provisions are effective as of [a.m./p.m.] [Atlantic Standard/Atlantic Daylight Saving] Time on the _____ day of _____, 20__.

Issued _____, 20__

Prothonotary