Court File No. CL-25-00753596-0000

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

STEPHEN GILBERTSON and
UNITED STATES AIR COMPRESSOR INCORPORATED

Applicants
(Moving Parties)

- and -

MEHMET BORA KUZUCAN, ZORBEY DOGUKAN KUZUCAN, DENIZ DINCER, US AIR COMPRESSOR (CANADA) INC. and US AIR COMPRESSORS INC.

Respondents
(Responding Parties)

AN APPLICATION PURSUANT TO SECTION 241 of the *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, as amended, and SECTION 101 of the *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, as amended

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FACTUM OF THE MOVING PARTIES
(Motion Re Receiver's Charge)

September 9, 2026

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PART I - OVERVIEW

1. The Applicants bring this motion, at the request of TDB Restructuring Limited (the "**Receiver**"), for an order granted the customary Receiver's Charge and Receiver's Borrowing Charge with respect to the receivership of US Air Compressor (Canada) Inc. (the "**Canadian Entity**").

2. On July 28, 2026, the Honourable Justice Myers released an endorsement (the "**Decision**") in which order that TDB Restructuring Limited was to be appointed as the receiver of the Canadian Entity (the "**Receivership Order**"). Justice Myers expressly ordered that the Receivership Order should not contain the provisions related to the priming charges but that such charges could be sought at a later date on notice to the secured creditors.[1]

3. Accordingly, the current Receivership Order does not include the standard Receiver's Charge or Receiver's Borrowing Charge.

4. When the Receiver took possession of the Canadian Entity, it discovered that there was only approximately $34,000 in the Canadian Entity's bank accounts.

5. At the request of the Receiver, the Applicants bring this motion for an order granting the Receiver's Charge and Receiver's Borrowing Charge in the form set out in the Commercial List's model orders. All parties that have made registrations in the PPSA

[1] Endorsement of Justice Myers dated July 28, 2026 (the "**Decision**") at para 125, being Exhibit "A" to the Affidavit of Stephen Gilbertson affirmed August 27, 2026 (the "**Gilbertson Affidavit**"), <u>Motion Record</u> ["<u>MR</u>"], Tab 2, Exhibit A, p 43.

Registry against the Canadian Entity, as well as the federal and provincial governments, will have been served with the Motion Record for this motion.

6. The charges sought are standard in receivership orders on the Commercial List and are necessary to protect the Receiver as a court officer and to enable it to carry out its mandate, particularly given that the Receiver found only minimal funds in the Canadian Entity's bank account.

7. The Applicants understand that the Receiver supports the granting of the Receiver's Charge and the Receiver's Borrowing Charge (and related provisions).

PART II - FACTS

8. On July 28, 2026, Justice Myers released his Decision, in which he held that TDB Restructuring Limited was to be appointed as the Receiver over the Canadian Entity.

9. In his Decision, Justice Myers directed that the Commercial List template receivership order be used "with no priming of existing security interests at this time" and that "[i]f the Receiver seeks a priming charge for its fees or directions as to its mandate, a motion may be brought on notice to secured creditors".[2]

10. Accordingly, the Receiver Order was signed and entered without the customary Receiver's Charge and Receiver's Borrowing Charge (and related provisions).[3]

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[2] Decision at para 125, MR, Tab 2, Exhibit A, p 43.
[3] Order of Justice Myers dated August 12, 2026 (the "**Receivership Order**", being Exhibit "B" to the Gilbertson Affidavit, MR, Tab 2, Exhibit B, pp 45-63.

11. After the Receivership Order was signed and entered, the Receiver took possession of the Canadian Entity. Upon doing so, the Receiver found only approximately $34,000 in the Canadian Entity's bank accounts.[4]

12. The Receiver has advised the Applicants that it requires the Receiver's Charge and Receiver's Borrowing Charge to be granted on normal and customary terms in order to carry out its mandate.

13. Notice of this motion has been provided to all secured creditors registered on the Ontario PPSA registry against the Canadian Entity.

14. Without the granting of the Receiver's Charge and the Receiver's Borrowing Charge, the Receiver will not be able to carry out its mandate, to the detriment of the Canadian Entity's stakeholders.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

15. The issue on this motion is that an Order should be granted to provide the Receiver with the Receiver's Charge and the Receiver's Borrowing Charge consistent with the customary terms of the Model Receivership Order.

A. Receivers Are Court Officers Who Require Protection

16. A court-appointed receiver is an officer of the court. As Justice Myers noted in the Decision,[5] a court-appointed receiver is "a licensed insolvency professional who operates independent of the parties."

[4] Gilbertson Affiavit, para. 9, MR, Tab 2, p 16.
[5] Decision at para 117, MR, Tab 2, Exhibit A, p 42.

17. It is well established that receivers, as court-appointed officers, are entitled to the protection of charges over the property in receivership to secure their fees and disbursements. Without such protection, no receiver would accept an appointment, as they would be at risk of not being compensated for their professional services.

18. The Court has jurisdiction to grant a super-priority charge in priority to existing secured creditors. The jurisdiction to grant such charges, as well as the need and customary nature of granting such charges, is reflected by the fact that both the Receiver's Charge and the Receiver's Borrowing Charge are standard provisions of the Model Receivership Order.

19. The jurisdiction to grant super-priority charges arises from a number of different sources. Courts relied on the common law and on their inherent (or implied) jurisdiction to grant super-priority charges as part of ordering a receivership. In particular, Courts have held that they have jurisdiction to grant super-priority charges where: (a) the receiver's appointment was to preserve and realize assets for the benefit of all interested parties, including secured creditors; (b) the receiver needed to expend money for the necessary preservation or improvement of the property; or (c) the request for a receiver was made by or was done with the consent of security creditors.[6] The granting of super-

[6] *Re Residential Warranty Company of Canada Inc. (Bankrupt)*, 2006 ABQB 236 at para 80, citing *Robert F. Kowal Investments Ltd v. Deeder Electric Ltd*, 1975 CanLII 681 (ONCA). See also *Father & Son Investments Inc. v. Maverick Brewing Corporation*, 2007 ABQB 651 at para 34; *Premium Products Inc. v. Bernhard*, 2011 ONSC 5784 at para 40; *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750; *Edmonton (City) v. Alvarez & Marsal Canada Inc*, 2019 ABCA 109 at paras 16-17.

priority charges has also been codified in the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*.[7]

20. The Court also has the power to grant super-priority charges under its statutory power under section 101 of the Courts of Justice Act to appoint a receiver on "such terms as are considered just". For example, in *Ontario Securities Commission v. Bridging Finance Inc.*, in which a receiver was appointed pursuant to the *Courts of Justice Act* and the *Securities Act*, the Court granted super-priority charges (including Receiver's Borrowing Charge) based on the Court's statutory or inherent jurisdiction to make any order it sees fit.[8] The Court in that case later granted a charge with respect to certain KERP entitlements based on the Court's statutory and inherent jurisdiction to make any order it considers just.[9] Courts have also approved financing facilities in the context of receiverships in which they provide a super-priority charge in favour of the lender.[10]

B. The Receiver's Charge Is Standard and Necessary

21. The Receiver's Charge secures the fees and disbursements of the Receiver, and its counsel, both before and after the making of the Receivership Order. This is a standard provision in the Commercial List Model Receivership Order, which provides as follows:

> *THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the*

[7] See section 31(1) of the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 and section 11.02(4) of the *Companies' Creditors Arrangement Act,* RSC 1985, c C-36.
[8] *Ontario Securities Commission v. Bridging Finance Inc.*, Order of the Honourable Justice Hainey, dated April 30, 2021; Order of the Honourable Justice Hainey, dated May 3, 2021.
[9] *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347 at paras 14-17.
[10] See, for example, *KEB Hana Bank as Trustee et al. v. Mizrahi Commercial (The One) LP et al.*, 2023 ONSC 5881 at paras 51-57; and *DGDPBC Holdings Ltd. v. Third Eye Capital Corporation*, 2021 ABCA 226 at para 21.

> *"Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to section 14.06(7), 81.4(4), and 81.6(2) of the BIA.*

22. The Receiver's Charge is necessary in this case because the Receiver has found only minimal funds in the Canadian Entity's bank account, and it is unclear what secured creditors, if any, exist with respect to the Canadian Entity. In order to be able to carry out its mandate, the Receiver requires assurance that its fees and disbursements will be paid. Accordingly, it is necessary that the normal and customary Receiver's Charge be granted.

C. The Receiver's Borrowing Charge Is Necessary

23. The Receiver's Borrowing Charge, and related provisions, will enable the Receiver to borrow funds for carrying out its mandate. This is also a standard provision in the Commercial List Model Receivership Order. The Receiver may require borrowed funds to preserve and realize upon the assets of the Canadian Entity, pay essential operating expenses, or fund its administration of the receivership estate, including its fees and disbursements if there are not sufficient funds in the receivership estate itself.

24. Given the minimal funds found in the Canadian Entity's bank account, the Receiver's Borrowing Charge is necessary to enable the Receiver to borrow funds to carry out its court-ordered mandate. No lender would advance funds to the Receiver without the security of a borrowing charge with priority over existing security interests.

25. The Receiver will have to ensure that certain expenses are paid for in order to preserve and protect the property. For instance, the Receiver will have to ensure that rent on the leased premises are paid, service fees for third-party warehouse providers are

paid, insurance is in place to protect the valuation assets and that there are funds necessary to pay for workers whose assistance the Receiver requires.[11]

D. The Charges Should Have Priority Over All Security Interests

26. The Commercial List Model Receivership Order provides that both the Receiver's Charge and the Receiver's Borrowing Charge form a first and second priority charge on the property, respectively, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, subject to sections 14.06(7), 81.4(4), and 81.6(2) of the *Bankruptcy and Insolvency Act*.

27. This priority is standard and necessary. Without it, the Receiver would have no assurance of payment for its services and no lender would advance funds to pay for the costs of the receivership. The entire purpose of the receivership – which is to protect the interests of all stakeholders, including secured creditors – would be frustrated if these charges are not granted.

28. In this case, no creditor or other stakeholder will be prejudiced by the granting of the requested charges. If the requested charges are not granted, then either the company will be forced into bankruptcy or a secured creditor will have a receiver appointed in which similar charges and costs will be incurred.

29. Justice Myers expressly contemplated that a motion for a priming charge could be brought on notice to secured creditors. All parties that have made a filing on the PPSA

[11] Gilbertson Affidavit at para 11, MR, Tab 2, p 16.

registry in respect of the Canadian Entity, and the federal and provincial governments, have been served with this motion.

PART IV - RELIEF REQUESTED

30. The Applicants respectfully request:

(a) An Order granting a Receiver's Charge on the Property as a first priority charge to secure the fees and disbursements of the Receiver and its counsel;

(b) An Order granting a Receiver's Borrowing Charge on the Property as security for borrowings by the Receiver up to a maximum of $250,000;

(c) An Order providing that the Receiver's Charge and the Receiver's Borrowing Charge shall have priority over all security interests, trusts, liens, charges and encumbrances, statutory or otherwise;

(d) In the alternative, an Amended and Restated Receivership Order incorporating the above charges; and

(e) Such further and other relief as this Honourable Court may consider just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of August, 2026.

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750

2. *DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation*, 2021 ABCA 226

3. *Edmonton (City) v. Alvarez & Marsal Canada Inc*, 2019 ABCA 109

4. *Father & Son Investments Inc. v. Maverick Brewing Corporation*, 2007 ABQB 651

5. *KEB Hana Bank as Trustee et al. v. Mizrahi Commercial (The One) LP et al.*, 2023 ONSC 5881

6. *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347

7. *Ontario Securities Commission v. Bridging Finance Inc.*, Order of the Honourable Justice Hainey, dated April 30, 2021

8. *Ontario Securities Commission v. Bridging Finance Inc.*, Order of the Honourable Justice Hainey, dated May 3, 2021

9. *Premium Products Inc. v. Bernhard*, 2011 ONSC 5784

10. *Re Residential Warranty Company of Canada Inc. (Bankrupt)*, 2006 ABQB 236

11. *Robert F. Kowal Investments Ltd v. Deeder Electric Ltd*, 1975 CanLII 681 (ONCA)

I certify that I am satisfied as to the authenticity of every authority.

Note: Under the Rules of Civil Procedure, an authority or other document or record that is published on a government website or otherwise by a government printer, in a scholarly journal or by a commercial publisher of research on the subject of the report is presumed to be authentic, absent evidence to the contrary (rule 4.06.1(2.2)).

Date September 9, 2026

Signature

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act
RSC 1985, c B-3

14.06(7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security

> **(a)** is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and
>
> **(b)** ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

31(1) With the permission of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and give security on the debtor's property in any amount, on any terms and on any property that may be authorized by the court and those advances, obligations and money borrowed must be repaid out of the debtor's property in priority to the creditors' claims.

81.4(4) A security under this section ranks above every other claim, right, charge or security against the person's current assets — regardless of when that other claim, right, charge or security arose — except rights under sections 81.1 and 81.2.

81.6(2) A security under this section ranks above every other claim, right, charge or security against the person's assets, regardless of when that other claim, right, charge or security arose, except rights under sections 81.1 and 81.2 and securities under sections 81.3 and 81.4.

Companies' Creditors Arrangement Act
RSC 1985, c C-36

11.02(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Courts of Justice Act
RSO 1990, c C.43

101(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

(2) An order under subsection (1) may include such terms as are considered just.

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