

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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 **INSCAPE CORPORATION, INSCAPE**
(NEW YORK) INC., AND INSCAPE INC. (the "Applicants")

**FACTUM OF THE APPLICANTS
(Returnable November 28, 2023)**

November 24, 2023

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ARRANGEMENT OF INSCAPE CORPORATION, INSCAPE
(NEW YORK) INC., AND INSCAPE INC. (the "**Applicants**")

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**FACTUM OF THE APPLICANTS
(Returnable November 28, 2023)**

PART I - OVERVIEW

1. This is a motion made by Inscape Corporation, Inscape (New York) Inc., and Inscape Inc. (collectively, the “**Applicants**” or the “**Inscape Group**”) in furtherance of the wind-down and termination of the within proceedings under the *Companies’ Creditors Arrangement Act* (“**CCAA**”).
2. On this motion, the Applicants seek an order containing the following relief:
 - (a) if necessary, abridging the time for and validating service of this notice of motion and the motion record and dispensing with service on any person other than those served;
 - (b) extending the stay of proceedings in favour of the Applicants up to and including the earlier of (i) December 15, 2023, and (ii) the filing of the Discharge Certificate (as defined below);
 - (c) approving the fourth report of Alvarez & Marsal Canada Inc. dated April 15, 2023 (“**A&M**”, in such capacity, the “**Monitor**”), the fifth report of the Monitor dated June 6,

2023, the sixth report of the Monitor dated July 11, 2023, the seventh report of the Monitor dated October 24, 2023 and the eighth report of the Monitor, to be filed (the “**Eighth Report**”), and the activities and conduct of the Monitor described therein;

(d) approving the fees and disbursements of the Monitor, its Canadian counsel, Aird & Berlis LLP, and its U.S. counsel, Faegre Drinker Biddle & Reath LLP, including their respective fee accruals, as set out in the Eighth Report and the fee affidavits attached thereto;

(e) terminating these CCAA proceedings and releasing the Court-ordered charges granted, in each case effective as of the filing of a discharge certificate confirming that the Monitor has completed all of the steps necessary to complete the administration of the CCAA proceedings (the “**Discharge Certificate**”);

(f) discharging and releasing A&M in its capacity as Monitor in the CCAA proceeding, effective as of the filing of the Discharge Certificate, and granting certain releases in favour of the Monitor and its counsel;

(g) granting releases subject to the limitations under section 5.1(2) of the CCAA (“**Releases**”) in favour of the director and officers of the Applicants, its advisors, the Monitor and the Monitor’s counsel (the “**Released Parties**”); and

(h) such further and other relief as counsel may advise and as this Honourable Court may deem just.

PART II - BACKGROUND

A. Filing Under CCAA

3. The facts giving rise to these CCAA proceedings are set out in the affidavit of Eric Ehgoetz sworn January 11, 2023 filed in connection with the initial application in these CCAA proceedings.¹
4. Prior to bringing its application under the CCAA, the Inscope Group was in the business of manufacturing and selling office furniture equipment on contract to customers across North America and Europe. The Inscope Group's business operated at a net loss and experienced declining financial performance in each of the five years preceding this insolvency filing. The financial distress was exacerbated by the Covid-19 pandemic. Among other challenges, the Applicants experienced a dramatic decline in the size and sales mix of incoming orders, and much lower than expected order volumes. Shortages of production materials, supply chain issues, and increases in the costs of raw materials all combined to destroy profit margins.²
5. As a result of its insolvency, the Inscope Group determined that the best path forward to maximize value for its stakeholders was through a court-supervised CCAA process, including an orderly wind-up of the business and a controlled liquidation of assets.³

¹ A copy of the Affidavit of Eric Ehgoetz sworn January 11, 2023 is at Exhibit A to the Affidavit of Eric Ehgoetz sworn November 17, 2023 ("**Ehgoetz Affidavit**"), Tab 2A to the Motion Record of the Applicants dated November 17, 2023 (the "**Motion Record**").

² Ehgoetz Affidavit at paras 7-8, Tab 2A to the Motion Record.

³ Ehgoetz Affidavit at para 9, Tab 2A to the Motion Record.

B. Update on CCAA Proceedings

6. The Applicants' asset sale and collection efforts are substantially complete. The majority of the Applicants' intellectual property assets have been sold. Some are in the process of being transitioned to a third party purchaser.⁴ This process is anticipated to be completed by mid-December, 2023.⁵
7. The Applicants' efforts to collect outstanding accounts receivable are substantially complete. Since the Initial Order, approximately \$4.4 million has been collected. Minor additional receivables will be collected prior to the anticipated termination of these CCAA proceedings.⁶

C. Challenges During CCAA Proceedings and Activities of Director and Officers

8. The CCAA proceedings were complicated by a variety of unique challenges that had to be proactively addressed in order to create a stabilized environment conducive to maximizing outcomes for stakeholders. Such complicating factors included:⁷
 - (a) the fact that the Inscope Group was heavily reliant on a network of key dealers, and dealer relations had to be carefully managed during the wind-down to mitigate risks of dealers acting adversely and eroding realizations for Inscope's creditors;

⁴ Ehgoetz Affidavit at para 11, Tab 2A to the Motion Record.

⁵ Ehgoetz Affidavit at para 18, Tab 2A to the Motion Record.

⁶ Ehgoetz Affidavit at para 16, Tab 2A to the Motion Record.

⁷ Ehgoetz Affidavit at para 46, Tab 2A to the Motion Record.

- (b) the requirement to cost-efficiently maintain continued manufacturing operations for the purposes of completing product inventory necessary to fulfil customer orders, thereby maximizing the value of work in process and the collectability of accounts receivable;
 - (c) the presence of significant manufacturing, warehousing and sales operations and assets in Canada and the United States, giving rise to the need to contemporaneously commence “cross-border insolvency proceedings” to better protect the company’s property and undertaking;
 - (d) the business had a substantial number of employees in Canada and the United States, both unionized and non-unionized, many of which were deemed “critical”. Critical employees had to be persuaded to stay on with the company, particularly during the difficult and early stages of the wind-down when the company had announced its pending closure but needed to complete important bespoke manufacturing for key customers.
 - (e) the business maintained a total of four pension plans for its employees in Canada and the United States. Some of these were Defined Benefit Plans or had Defined Benefit predecessors, or other elements that complicated the termination of such plans; and
 - (f) The Inscope Group utilized a relatively complex centralized cash management system administered out of the Canadian head office and involving collections, disbursements, currency hedging and intercompany transfers designed to support employees, suppliers, customers and ongoing operations on both sides of the border.
9. Certain of the director and officers were asked to commit to staying on to the conclusion of the CCAA on the basis that their institutional knowledge of the company and industry

experience would be critically important to securing a successful outcome for creditors and stakeholders more broadly.⁸

10. The director and officers provided important direction leading up to and throughout the filing and administration of the CCAA proceedings. In doing so, they worked closely with company advisors in Canada and the United States and were intimately involved in a series of efforts measurably benefiting the company and its creditors.⁹
11. The director and officers also played an integral role in identifying, negotiating and facilitating transactions that resulted in the sale of substantially all of Inscope's assets.¹⁰

PART III - ISSUES

12. This factum addresses the following issues:
 - (a) whether the Releases should be approved;
 - (a) whether the stay of proceedings should be extended; and
 - (b) whether the CCAA proceedings should be terminated, including the release of the CCAA charges and the discharge of the Monitor.

⁸ Ehgoetz Affidavit at para 47, Tab 2A to the Motion Record.

⁹ Ehgoetz Affidavit at para 48, Tab 2A to the Motion Record.

¹⁰ Ehgoetz Affidavit at para 49, Tab 2A to the Motion Record.

PART IV - LAW

The Releases should be approved

13. The Applicants seek the Releases which include the present and former directors and officers of the Inscope Group, and the Monitor and its legal counsel. The proposed Releases cover all present and future claims against the Released Parties based upon any fact, matter of occurrence in respect of the Company and its assets, business or affairs, except any claim for fraud or willful misconduct or any claim that is not permitted to be released under section 5.1(2) of the CCAA.
14. Section 11 of the CCAA gives the Court authority to make any order it considers appropriate.¹¹ The granting of third-party releases is grounded in section 11, which may be utilized by the Courts to further the objectives of the CCAA.¹²
15. In 1997, amendments made to the CCAA included certain claims against directors of a debtor company that cannot be released or compromised. The proposed Releases do not infringe upon these exclusions which are set out at section 5.1 as follows:

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

- (a)** relate to contractual rights of one or more creditors; or

¹¹ CCAA, s. 11.

¹² [*Century Services Inc. v. Canada \(Attorney General\)*](#), 2010 SCC 60 at para 70.

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

16. The Ontario Court of Appeal in *Re Metcalfe & Mansfield Alternative Investments II Corp* discussed these amendments, stating that “the rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign.”¹³
17. When determining whether it is appropriate to grant such releases under section 11 of the CCAA courts have drawn on the well-established factors for approving releases under plans of compromise or arrangement.¹⁴ When modified in cases where there is no plan of compromise or arrangement, these factors include: ¹⁵
 - (a) whether the claims to be released are rationally connected to the restructuring;
 - (b) whether the restructuring can succeed without the releases;
 - (c) whether the parties to be released contributed to the restructuring;
 - (d) whether the releases benefit the debtor as well as its creditors generally;
 - (e) whether the debtor’s creditors have knowledge of the nature and effect of the releases; and
 - (f) whether the releases are fair, reasonable and not overly-broad.
18. No one factor is determinative.¹⁶ It is not necessary for all criteria to apply for a release to be granted and some factors may assume greater weight in one case than another.¹⁷

¹³ *Re Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587 at para 99.

¹⁴ See, for example: *Re Metcalfe & Mansfield Alternative investments II Corp.*, 2008 ONCA 587.

¹⁵ *Lydian International Limited (Re)*, 2020 ONSC 4006 at para 54; *Re Green Relief*, 2020 BCSC 318 at para 27.

¹⁶ *Lydian International Limited (Re)*, 2020 ONSC 4006 at para 54.

¹⁷ *Re Green Relief Inc.*, 2020 ONSC 6837 at para 28; *Re Harte Gold Corp*, 2022 ONSC 653 at para 80.

19. In *Re Green Relief Inc.*, an additional factor was to be considered when releases are opposed, being a consideration of the quality of the claims the objectors wish to maintain.¹⁸
20. Recognizing that parties apart from directors and officers may support a restructuring process, courts have considered and granted releases in favour of a variety of parties. Releases have routinely been granted for directors, officers, advisors, affiliated entities, interim financiers, plan sponsors, Court officers, and purchasers.¹⁹
21. The Court in *Re Green Relief Inc.* noted that the absence of a plan does not deprive the Court the jurisdiction to approve a release.²⁰ Recently, the Court in *Re Harte Gold Corp.* stated that “CCAA courts have frequently approved releases, both in the context of a plan and in the absence of a CCAA plan both on consent and in contested matters.”²¹
22. Releases have been granted by courts across Canada in various circumstances, including when courts are approving reverse vesting orders,²² terminating CCAA proceedings,²³ and approving transactions.²⁴
23. Applied here, the factors support the proposed Releases:

¹⁸ *Re Green Relief Inc.*, 2020 ONSC 6837 at paras 29-30.

¹⁹ See for example, *Re Canada Airlines Corp.*, 2000 ABQB 442 at para 86; *Re Harte Gold Corp.*, 2022 ONSC 653 at para 78.

Re Green Relief Inc., 2020 ONSC 6837 at para 23.

²¹ *Re Harte Gold Corp.*, 2022 ONSC 653 at para 79.

²² *Re Green Relief Inc.*, 2020 ONSC 6837.

²³ *Re Entrec Corporation*, 2020 ABQB 751 at paras 3-7.

²⁴ *In the Matter of a Plan of Arrangement of UrtheCast Corp.*, 2021 BCSC 1819 at paras 91-95.

(a) The Released Parties have made material contributions to this restructuring. Among other things, the director and officers have:²⁵

- (i) directed the highly contested, case-managed collections dispute with Inscape dealer, Prevolv Inc. in pursuit of a \$2,147,490 USD receivable;
- (ii) directed the negotiation and settlement of a \$464,277 USD trust claim by Inscape furniture vendor Empire Office Inc. Without the support of the director and officers in reaching the Empire Settlement, the dispute, which involved complex issues of NY Lien Law, would have had to have been litigated at additional cost to the estate;
- (iii) leveraged their personal and professional relationship with customer accounts to secure the timely collection of upwards of \$4 million in aggregate accounts receivable, amounting to a realization success rate of over 90%;
- (iv) coordinated and oversaw the continuation of critical post-filing manufacturing, also in furtherance of the maximum realization of accounts receivable;
- (v) oversaw and directed the payment of vacation pay owing to Inscape employees (in Canada and in the United States) totalling approximately \$495,000 among approximately 190 employees;

²⁵ Ehgoetz Affidavit at para 48, Tab 2A to the Motion Record.

- (vi) as soon as realizations were sufficient, sought the authority and direction from the Court to make a distribution to HUK 116 Limited up to the amount of its secured indebtedness to minimize the cost of capital for the benefit of the estate. This distribution was approved by the director and officers at some risk to themselves because the company's assets were then primed by the Directors' Charge which ranked in priority to the HUK 116 Limited claims;
 - (vii) negotiated and reached arrangements with the Applicants' landlords in respect of the Inscape Group's real property leases in Canada and in the United States, including reaching an agreement with the landlord under the head office and manufacturing facility in East Gwillimbury, Ontario that unlocked approximately \$1.4 million net in additional value to the estate;
 - (viii) completed the required tax filings during the course of the CCAA proceedings, including completing the filings necessary to ensure the receipt of a significant HST refund from CRA of \$832,673, for the benefit of the estate; and
 - (ix) oversaw and directed the successful transition and wind-down of the Company's Canadian pension plans'
- (b) The Releases are contemplated in stay agreements entered into by Eric Ehgoetz and Jon Szczur. The stay agreements recognize that these individuals have deep institutional knowledge of the company which, combined with their industry contacts and experience,

makes them critical contributors to the achievement of a best outcome in a liquidating CCAA proceeding;

(c) The Releases are necessary to bring finality to these CCAA proceedings and facilitate the release of the Court-ordered charges;

(d) The Releases were disclosed in the Applicants' motion materials served on the service list in advance of this motion;

(e) the Monitor supports the granting of the Releases on the basis, among other things, that the releases are proportionate given the beneficial contributions of the directors and officers to the CCAA proceeding; and

(f) The Releases are fair, reasonable and not overly-broad; the terms of the Releases being proposed follow the limitations imposed by the CCAA, and would not extend to any claims against directors and officers based on allegations of misrepresentations made by directors to creditors, or of wrongful and oppressive conduct by directors.

D. Extension of Stay

24. The Applicants seek an extension of the stay of proceedings up to the earlier of December 15, 2023 or the time of the filing of the Discharge Certificate.

25. The Court may grant an extension of the stay of proceedings where the Court is satisfied that (a) circumstances exist that make the order appropriate; and (b) that the Applicants have acted, and are continuing to act, in good faith and with due diligence.²⁶
26. The Discharge Certificate will be filed upon completion of the remaining activities required to complete these proceedings to the satisfaction of the Monitor. The following factors support the extension of the stay of proceedings:
- (a) the Applicants have acted and continue to act in good faith and with due diligence throughout these CCAA proceedings, including in negotiating and completing asset sales, collecting accounts receivable, negating settlements in respect of various complex, cross-border disputes, and assisting the Monitor with all matters related to the efficient and orderly wind-up of the business;
 - (b) it is anticipated that the Applicants will have sufficient liquidity to fund the ongoing operating costs during the requested extension period;
 - (c) the Monitor supports the extension of the stay; and
 - (d) no creditor will be materially prejudiced as a result of the stay extension.

²⁶ CCAA, s. 11.02(2)-(3).

E. Termination of CCAA Charges and Monitor's Discharge

27. Following completion of the remaining activities, as described in the Monitor's Eighth Report, these CCAA proceedings will be substantially complete. At such time, the Applicants are seeking to terminate these CCAA proceedings.
28. Upon service and filing of the Discharge Certificate, the Monitor will have completed its responsibilities as Monitor in these CCAA proceedings.
29. The Applicants request the discharge of all court-ordered priority charges effective as of the filing of the Discharge Certificate, including (all terms capitalized but not defined below are as defined in the Amended and Restated Initial Order):
 - (a) the Administration Charge;
 - (b) the Directors' Charge; and
 - (c) the KERP Charge.

PART V - ORDER REQUESTED

30. The Applicants respectfully request that this Honourable Court grant the relief provided for in the draft Order at **Tab "3"** to the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of November, 2023.



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SCHEDULE “A”

LIST OF AUTHORITIES

1. [*Century Services Ltd. v. Canada \(Attorney General\)*](#), 2010 SCC 60
2. [*Re Metcalfe & Mansfield Alternative Investments II Corp.*](#), 2008 ONCA 587
3. [*Lydian International Limited \(Re\)*](#), 2020 ONSC 4006
4. [*Re Green Relief*](#), 2020 BCSC 318
5. [*Harte Gold Corp. \(Re\), 2022*](#) ONSC 653
6. [*Re Canada Airlines Corp.*](#), 2000 ABQB 442
7. [*Re Entrec Corporation*](#), 2020 ABQB 751
8. [*In the Matter of a Plan of Arrangement of UrtheCast Corp.*](#), 2021 BCSC 1819

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **INSCAPE CORPORATION, INSCAPE (NEW YORK) INC., AND INSCAPE INC.**
the Applicants

Estate/Court File No.: CV-23-00692784-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

**APPLICANTS' FACTUM
(Returnable November 28, 2023)**

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