

**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 2675970 ONTARIO INC., 2733181
ONTARIO INC., 2385816 ALBERTA LTD., 2161907 ALBERTA
LTD., 2733182 ONTARIO INC., 2737503 ONTARIO INC.,
2826475 ONTARIO INC., 14284585 CANADA INC., 2197130
ALBERTA LTD., 2699078 ONTARIO INC., 2708540 ONTARIO
CORPORATION, 2734082 ONTARIO INC., TS WELLINGTON
INC., 2742591 ONTARIO INC., 2796279 ONTARIO INC.,
10006215 MANITOBA LTD., AND 80694 NEWFOUNDLAND &
LABRADOR INC. (individually, an "Applicant" and
collectively, the "Applicants")**

**FACTUM OF THE APPLICANTS
(RE AMENDED AND RESTATED INITIAL ORDER)**

September 4, 2024

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TO: THE SERVICE LIST

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PART I – OVERVIEW

1. The Applicants own, operate, and franchise retail dispensaries in Canada selling cannabis products and accessories directly to consumers under the brand name “Tokyo Smoke”; they also maintain an online platform for direct-to-consumer cannabis sales and deliveries (the “**Business**”).

2. On August 28, 2024, the Applicants sought and obtained an initial order (the “**Initial Order**”) under the *Companies Creditors Arrangement Act*, RSC 1985, c. C-36, as amended (the “**CCAA**”).¹ The Initial Order, among other things:

- a. appointed Alvarez & Marsal Canada Inc. as the monitor of the Applicants’ under the CCAA (in such capacity, the “**Monitor**”);
- b. provided for an initial stay of proceedings to and including September 6, 2024 (the “**Stay Period**”);
- c. approved a debtor-in-possession credit facility (the “**DIP Facility**”) on the terms provided in the interim financing term sheet entered into among TS Investments Corp. as lender (“**TS Investments**” or the “**DIP Lender**”) and the Applicants dated August 27, 2024 (the “**DIP Term Sheet**”);
- d. approved the Applicants borrowing up to \$3.3 million under the DIP Facility;
- e. extended the stay of proceedings to certain of the Applicants’ affiliates;
- f. granted super-priority charges over all the Applicants’ assets, properties and undertakings (the “**Property**”) in the following order of priority:

¹ A copy of the [Initial Order](#) is Exhibit “A” to the affidavit of Andrew Williams sworn September 3, 2024, included at Tab 2 of the Applicants’ motion record (the “**Second Williams Affidavit**”).

- i. first – an administration charge in the maximum amount of \$400,000 as security for the payment of the professional fees and disbursements incurred and to be incurred by the Monitor, counsel to the Monitor and counsel to the Applicants (the “**Administration Charge**”);
 - ii. second – an interim financing charge in favour of the DIP Lender in the maximum principal amount of \$3.3 million plus interest, fees and costs as security for the Applicants’ obligations under the DIP Term Sheet (the “**DIP Lender’s Charge**”), which charge is subordinate to the security held by the Bank of Montreal (“**BMO**”); and
 - iii. third – a charge in favour of the Applicants’ directors and officers in the maximum amount of \$2.25 million as security for the Applicants’ obligation to indemnify them from obligations and liabilities they may incur as directors or officers of the Applicants after the granting of the Initial Order, except for gross negligence or willful misconduct (the “**Directors’ Charge**”);
- g. authorized the Applicants to pay certain pre-filing amounts to critical suppliers of the Applicants, with the consent of the Monitor and in accordance with the terms of the DIP Term Sheet and the Cash Flow Projection (as defined herein), up to maximum amount of \$330,000;
- h. authorized the Applicants to pay post-filing interest due to BMO;
- i. authorized the Applicants to continue to use the Cash Management System (as defined in the Initial Order); and

- j. directed a comeback hearing to take place before the Court on September 6, 2024, at 8:30 am Toronto time (the “**Comeback Hearing**”).

3. This factum is delivered in support of the Applicants’ motion returnable at the Comeback Hearing, seeking an amended and restated initial order that is critical for the Applicants to pursue a successful restructuring and to permit the Business to continue as a going concern, namely, an amended and restated initial order in the form appended at Tab 3 to the Applicants’ motion record (the “**ARIO**”), which, among other things:

- a. extends the Stay Period up to and including December 6, 2024;
- b. permits the Applicants to pay pre-filing amounts to certain key suppliers, with the consent of the Monitor and in accordance with the terms of the DIP Term Sheet and Cash Flow Projection (as defined below);
- c. authorizes the Applicants to increase the amounts which may be borrowed by the Applicants pursuant to the DIP Term Sheet from \$3.3 million to \$8 million and expands the DIP Lender’s Charge to the maximum principal amount of \$8 million plus interest, fees and costs;
- d. increases the Administration Charge from \$400,000 to \$850,000;
- e. increases the Directors’ Charge from \$2.25 million to \$3 million;
- f. approves the key employee retention plan (the “**KERP**”) and grants a Court-ordered priority charge against the Property for security for payments under the KERP in the maximum amount of \$218,500 (the “**KERP Charge**”); and

- g. seals Schedule 'A' of the KERP attached as Confidential Exhibit "1" thereto (the **"Confidential Exhibit"**).

4. The relief sought in the ARIO – including the extended Stay Period, an increase in the amount of interim financing, and the approval of the KERP – will protect the *status quo* and maintain a stabilized environment in which the Applicants will be able to conduct a sale and investment solicitation process (the **"SISP"**) (if approved by the Court), protect the going-concern value of the Business, and continue working with due diligence and in good faith on the Applicants' operational restructuring initiatives.

5. In contrast, without the protections of the CCAA, the opportunity for the Applicants to streamline their operations and to increase the viability of the Business will likely be lost, and the Business will not be able to continue as a going concern. A shutdown of operations would cause the loss of hundreds of jobs, and will destroy value for stakeholders.

6. The relief sought on this motion is supported by the Monitor, the DIP Lender, and the Applicants' primary secured creditor, BMO.

7. For these and additional reasons set out in greater detail below, the Applicants submit that the relief sought at the Comeback Hearing is fair, reasonable, and in the interests of the Applicants and their stakeholders.

PART II – FACTS

A. Background

8. The background to these CCAA proceedings and more detailed information on the Applicants is set out in the Affidavit of Andrew Williams sworn August 28, 2024 (the **"Initial Affidavit"**), delivered in support of the Initial Order, and in the Affidavit of Andrew Williams

sworn September 3, 2024, delivered in support of the relief sought at this hearing (the “**Second Williams Affidavit**”).

9. The Applicants’ Business has three segments: (i) the operation of corporate retail stores; (ii) franchising the Tokyo Smoke brand; and (ii) the operation of an online platform for sales and deliveries (the “**Digital Platform**”).²

10. The Applicants’ financial difficulties are attributable to a combination of factors including, changes in the licensing regime which devalued cannabis retail licenses and saturated the market, challenges in the cannabis retail space as a result of the lack of product differentiation and downward price pressure, burdensome real property lease terms at underperforming retail stores, and increased operating costs due to the broader economic environment.³

11. The Applicants initiated these CCAA proceedings to allow the Applicants the breathing room and stability to undertake operational and financial restructuring initiatives that will support the long-term viability of the Business and to allow them to access the interim financing needed to do so.⁴

12. The continuation of these CCAA proceedings under a stay of proceedings is critical to the ongoing operations and restructuring efforts of the Applicants.⁵ The Applicants have historically relied on loans from BMO and TS Investments to fund their working capital needs.⁶ Without the granting of the ARIO and access to further funding under the DIP Term Sheet, the Applicants have no liquidity to continue operations or to implement any operational solutions to

² Initial Affidavit sworn August 28, 2024, attached as Exhibit “C” to the Second Williams Affidavit at [para 26](#).

³ Second Williams Affidavit at [para 9](#).

⁴ Second Williams Affidavit at [para 10](#).

⁵ Second Williams Affidavit at [para 11](#).

⁶ Initial Affidavit at [para 97](#).

resolve their financial issues.⁷ In such circumstances, the Applicants would be forced to cease all operations.⁸

B. The ARIO

(a) Extension of the Stay Period

13. The Stay Period expires on September 6, 2024. At the Comeback Hearing, the Applicants seek to extend the Stay Period up to and including December 6, 2024.

14. The extension of the Stay Period is necessary to maintain operations in the ordinary course while the Applicants work to maximize their restructuring efforts during these CCAA proceedings, and to come back before this Court to the SISF and corresponding stalking horse agreement.⁹

(b) DIP Facility Increase and Increase to the DIP Lender's Charge

15. At the commencement of these CCAA proceedings, the Applicants entered into the DIP Term Sheet with the DIP Lender, pursuant to which the DIP Lender agreed to advance the principal amount of \$3.3 million during the initial 10-day Stay Period (the “**Initial Advance**”).¹⁰ The Initial Order authorized the Applicants to borrow the Initial Advance and granted the DIP Lender's Charge to secure the obligations of the Applicants to the DIP Lender in the same amount.¹¹

16. The Applicants now seek approval to increase the maximum amount that they may borrow under the DIP Facility to \$8 million, the maximum available under the DIP Term Sheet,

⁷ Second Williams Affidavit at [para 11](#); See also, Initial Affidavit at [para 139](#).

⁸ Second Williams Affidavit at [para 11](#).

⁹ Second Williams Affidavit at [para 31](#).

¹⁰ Second Williams Affidavit at [para 3](#).

¹¹ Second Williams Affidavit at [para 3](#).

and to increase the amount of the DIP Lender's Charge to \$8 million, plus interest, fees and costs.¹²

17. The increased borrowings are necessary to meet the Applicants' interim financing needs during the extended Stay Period, including the costs to complete the SISP and KERP.

(c) KERP and KERP Charge

18. The Applicants, with the assistance of the Monitor, have developed a KERP to facilitate and encourage the continued participation of certain key employees who are critical to the Applicants' Business during these CCAA proceedings (the "**Key Employees**"). Without the KERP, there is a material risk that key members of the Applicants' management team would accept competing employment opportunities.¹³ This would have a material adverse effect on the Applicants' ability to restructure, perform the SISP (if approved by the Court) and operate the Business, at a time when stability is paramount.¹⁴

19. The Applicants' multi-faceted Business cannot be operated without an experienced and specialized management team given, among other things, the Business' complex national infrastructure, the highly regulated nature of cannabis retail, the need for real time logistics, and the importance of preserving customer service standards.¹⁵

20. The maximum aggregate amount payable under the KERP is \$218,500, the particulars of which are set out in Schedule "A" of the KERP. The proposed KERP payments are based on the individual's position and salary and vary from 6.98% to 15.11% of each employee's salary.

¹² Second Williams Affidavit at [para 4](#).

¹³ Second Williams Affidavit at [para 59](#).

¹⁴ Second Williams Affidavit at [para 52](#).

¹⁵ Second Williams Affidavit at [para 51](#).

21. The proposed ARIO provides for the granting of the KERP Charge in the maximum amount of \$218,500 to secure the obligations of the Applicants to the Key Employees under the KERP.

22. The proposed ARIO also provides for the sealing of Schedule “A” to the KERP, found at Confidential Exhibit “1” to the Second Williams Affidavit. The information appended to the KERP is sensitive personal and compensation information that may cause harm to the beneficiaries of the KERP and the Applicants if disclosed publicly.¹⁶

(d) Payment of Pre-Filing Amounts to Critical Suppliers

23. The Applicants seek authorization to increase the maximum amount for pre-filing payments owing to critical suppliers and contractors. The Initial Order granted the Applicants authority to make pre-filing payments as appropriate up to the maximum amount of \$330,000 during the initial 10-day Stay Period, with consent of the Monitor.¹⁷

24. To avoid disruption to the Business, the Applicants seek authorization to increase the quantum that the Applicants can pay to certain suppliers for pre-filing expenses, with the consent of the Monitor and in accordance with the terms of the DIP Term Sheet and the Cash Flow Projection (as defined herein). The Applicants are not proposing to define or limit the amount of the pre-filing payments as any request to make pre-filing payments will be addressed by the Applicant on a case by case basis in consultation with the Monitor.

25. The proposed form of the ARIO provides that payments to critical suppliers and contractors will only be made with the consent of the Monitor and where the Monitor agrees the

¹⁶ Second Williams Affidavit at [para 61](#).

¹⁷ Second Williams Affidavit at [para 65](#).

payments are essential to the Applicants' Business and operations. This provides the flexibility required to deal with business and operational needs as they arise.

(e) Increase to the Administration Charge

26. The Applicants seek an increase to the Administration Charge from \$400,000 to the maximum amount of \$850,000. The increased quantum of the Administration Charge corresponds to the anticipated fees of the restructuring professionals during the extended Stay Period, which is reflected in the cash flow projection prepared by the Applicants in consultation with the Monitor and appended to the pre-filing report of the Monitor dated August 27, 2024 (the "**Cash Flow Projection**").¹⁸

27. The Administration Charge will allow the Applicants to have continuous access to critical accounting and legal advice during the Stay Period, including to implement the proposed SISP, effectively liaise with secured creditors and stakeholders, and assist in restructuring initiatives.¹⁹

28. The increase to the Administration Charge is supported by the Monitor and the DIP Lender.²⁰

(f) Increase to the Directors' Charge

29. As part of the relief granted in the Initial Order, this Court authorized a Directors' Charge up to a maximum of \$2.25 million for the initial 10-day Stay Period. As noted in the Initial Affidavit, the directors of the Applicants have expressed concern about their exposure and are unlikely to remain in office without adequate indemnity.²¹

¹⁸ Second Williams Affidavit at [para 38](#).

¹⁹ Second Williams Affidavit at [para 40](#).

²⁰ Second Williams Affidavit at [para 41](#).

²¹ Initial Affidavit at [para 161](#).

30. To ensure the continuing engagement of the Applicants' directors, and to avoid any disruption associated with their departure, the Applicants request that the Directors' Charge be increased to \$3 million for these CCAA proceedings. The Monitor is supportive of the increase to the Directors' Charge.

(g) Proposed Ranking of Charges

31. The proposed ARIO provides that the charges, as amongst them and in relation to the existing security held by BMO, shall be ranked as follows:

First – Administration Charge (to the maximum amount of \$850,000);

Second – the existing security held by BMO;

Third – DIP Lender's Charge (to the maximum principal amount of \$8 million);

Fourth – Directors' Charge (to the maximum amount of \$3 million); and

Fifth – KERP Charge (to the maximum amount of \$218,500).

PART III – ISSUES

32. The issues on this motion in respect of the relief sought under the ARIO are whether the Court should:

- a. extend the Stay Period to December 6, 2024;
- b. authorize the Applicants to pay pre-filing amounts to certain key suppliers with the consent of the Monitor;
- c. authorize the Applicants to borrow up to \$8 million under the DIP Facility, and increase the DIP Lender's Charge to the maximum principal amount of \$8 million;

- d. increase the Administration Charge to the maximum amount of \$850,000;
- e. increase the Directors' Charge to the maximum amount of \$3 million;
- f. approve the KERP and grant the KERP Charge in the maximum amount of \$218,500; and
- g. grant a sealing order sealing Schedule "A" of the KERP.

PART IV – LAW & ARGUMENT

A. The Stay Period Should be Extended to December 6, 2024

33. The Initial Order provided for a Stay Period up to and including September 6, 2024. The proposed ARIO seeks to extend the Stay Period to December 6, 2024.

34. Section 11.02(2) of the CCAA gives this Court the authority to grant an extension of the Stay Period for any period "it considers necessary".²² To do so, this Court must be satisfied that circumstances exist that make the order appropriate and that the Applicants have acted, and are acting, in good faith and with due diligence.²³ A stay of proceedings is appropriate to provide a debtor with breathing room while it seeks to emerge from the CCAA.²⁴

35. The Applicants have acted and are continuing to act in good faith and with due diligence. Since the granting of the Initial Order, among other things, the Applicants have reached out to numerous stakeholders, including various suppliers, its senior secured creditor, BMO, their employees, and their affected landlords.²⁵

²² CCAA, [s 11.02\(2\)](#).

²³ CCAA, [s 11.02\(3\)](#).

²⁴ *Ted Leroy Trucking [Century Services] Ltd (Re)*, 2010 SCC 60 at [para 14](#).

²⁵ Second Williams Affidavit at [paras 13-20](#).

36. The Applicants have also terminated employees where necessary, delivered disclaimer notices for five franchise agreements with franchisees, and delivered disclaimer notices for certain leases (detailed in the Second Williams Affidavit), all with a view to preserving the Applicants' liquidity.

37. The Applicants believe the extension of the Stay Period to and including December 6, 2024 is necessary and appropriate in the circumstances. The requested extension of the Stay Period will provide the Applicants with the breathing space and operational stability to continue operations while maximizing value for the benefit of their stakeholders through these CCAA proceedings and SISF (if approved by the Court).²⁶

38. The Cash Flow Projection demonstrates that the Applicants have sufficient liquidity to operate through the proposed extension of the Stay Period to and including December 6, 2024.²⁷

39. The Monitor and the DIP Lender are both supportive of the proposed extension of the Stay Period.²⁸

B. The Pre-Filing Payments to Critical Suppliers Should be Approved

40. This Court has previously granted relief allowing Applicants to pay pre-filing amounts to trade creditors if the disruption of supply would imperil the debtor's business. In such cases, the Court empowered the monitor to exercise its discretion in approving payments to critical unsecured creditors with respect to their pre-filing claims.²⁹

²⁶ Second Williams Affidavit at [para 31](#).

²⁷ Second Williams Affidavit at [para 35](#).

²⁸ Second Williams Affidavit at [para 37](#).

²⁹ *Inscape Corporation, Re*, Amended and Restated Initial Order issued January 20, 2023 [Court File No. CV-23-00692784-00CL] at [para 7](#).

41. The Applicants receive supply of cannabis and cannabis products from a small number of regulated suppliers.³⁰ Further, other vendors provide key services that cannot be easily replaced without disruption, such as services to maintain the Digital Platform.³¹ The continued cooperation of key suppliers is necessary for the Applicants to maintain their normal course operations.³² It is therefore necessary that the Applicants have the ability to make payments of pre-filing amounts to key suppliers with the consent of the Monitor in order to allow them to react in a timely and flexible manner to any potential disruption to the Business.

42. The Monitor, BMO and the DIP Lender each support the Applicants' request to make pre-filing payments to key suppliers with the consent of the Monitor.³³

C. This Court Should Approve Increased Borrowings Under the DIP Term Sheet and Grant an Expanded DIP Lender's Charge

43. Pursuant to the Initial Order, this Court approved the Applicants' execution of the DIP Term Sheet, authorized the Applicants to borrow the Initial Advance of \$3.3 million under the DIP Term Sheet during the initial 10-day Stay Period, and granted a corresponding DIP Lender's Charge in the same amount. The Applicants are now seeking authority to increase the amounts which may be drawn under the DIP Facility up to the maximum principal amount of \$8 million.³⁴

44. Subsection 11.2(1) of the CCAA provides the Court with the statutory jurisdiction to grant an interim financing charge "on notice to the secured creditors who are likely to be affected by the security or charge – in an amount that the court considers appropriate...having regard to its

³⁰ Second Williams Affidavit at [para 66](#).

³¹ Second Williams Affidavit at [para 66](#).

³² Second Williams Affidavit at [para 66](#).

³³ Second Williams Affidavit at [para 67](#).

³⁴ Second Williams Affidavit at [para 42](#).

cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.”³⁵

45. All secured creditors who are affected by the proposed DIP Lender’s Charge, including the increase thereof, have been served with a copy of the Applicants’ Motion Record.

46. The Court has approved the DIP Term Sheet and granted the DIP Lender’s Charge in the initial amount of \$3.3 million, taking into account the factors set out at Section 11.2(4) of the CCAA.³⁶ The Applicants submit that the factors under Section 11.02(4) of the CCAA continue to be satisfied under the circumstances, and support the request for an expansion of the borrowings under the DIP Term Sheet and a corresponding increase to the DIP Lender’s Charge.

47. In particular, the Cash Flow Projection shows that the Applicants require access to the full amount of the DIP Facility to provide the Applicants with necessary funding to continue their Business and operations and to advance their restructuring efforts, including the implementation of the proposed SISP.³⁷

48. The Monitor supports the increase to the maximum amount permitted to be drawn on the DIP Facility by the Applicants and the corresponding increase to the DIP Lender’s Charge.³⁸ The Cash Flow Projection demonstrates that at least \$7.4 million will have to be advanced under the DIP Term Sheet to fund the Applicants’ working capital needs for the 15-weeks reflected in the Cash Flow Projection.³⁹

³⁵ CCAA, [s 11.2\(1\)](#).

³⁶ Endorsement of Justice Cavanagh dated August 28, 2024 at [para 19](#).

³⁷ Second Williams Affidavit at [para 43](#).

³⁸ Second Williams Affidavit at [para 45](#).

³⁹ A copy of the [Cash Flow Projection](#) is attached as Exhibit “E” to the Second Williams Affidavit.

D. The Court Should Approve the Increased Administration Charge

49. The Court's jurisdiction to increase the Administration Charge stems from s. 11.52 of the CCAA.⁴⁰ This Court has found that the initial Administration Charge was reasonable and appropriate, and that the criteria set out in the caselaw in connection with administration charges were met.

50. The proposed ARIO provides for an increase of the quantum of the Administration Charge, from \$400,000 to \$850,000. This amount corresponds to the maximum amount of professional fees that the Applicants are expected to incur on an accrual basis during the Stay Period.⁴¹

51. The Administration Charge is necessary to secure the fees and disbursements of counsel to the Applicants, the Monitor, and counsel to the Monitor. The Administration Charge is necessary to permit the Applicants access to restructuring advice and professionals during the Stay Period, including those needed to advance the proposed SISF and other restructuring initiatives. The professionals whose fees are secured under the Administration Charge will continue to serve critical and distinct roles in these proceedings.⁴²

52. The increase to the Administration Charge is supported by the Monitor and the DIP Lender.⁴³

E. The Court Should Approve the Increased Directors' Charge

53. Pursuant to s. 11.51 of the CCAA, the Court is authorized to grant the Directors' Charge in the amount the Court considers appropriate, provided notice is given to the secured creditors

⁴⁰ CCAA, [s 11.52](#).

⁴¹ Second Williams Affidavit at [para 38](#).

⁴² Second Williams Affidavit at [para 40](#).

⁴³ Second Williams Affidavit at [para 41](#).

who are likely to be affected by it.⁴⁴ The Initial Order provided for a Directors' Charge in the amount of \$2.25 million for the initial 10-day Stay Period.

54. The proposed ARIO provides for an increase of the quantum of the Directors' Charge, from \$2.25 million to \$3 million, reflecting the additional exposure of the directors during the extended Stay Period. As noted in the Initial Affidavit, the directors' involvement in these proceedings is conditional upon the granting of the Directors' Charge to secure the amounts indemnified by the Applicants.⁴⁵

55. The increase to the Directors' Charge is supported by the Monitor and the DIP Lender.

F. The KERP and KERP Charge Should be Approved

56. This Court has approved employee retention plans and charges in several proceedings.⁴⁶ Factors generally considered by the Court include whether: (a) the Monitor approves of the KERP; (b) the beneficiaries of the KERP would consider other employment opportunities if the charge was not approved; (c) the beneficiaries of the KERP are crucial to the successful restructuring of the debtor company; (d) a replacement could be found in a timely manner; (e) the board of directors exercised their business judgment in developing the KERP; and (f) whether the KERP is supported or consented to by secured creditors of the debtor.⁴⁷

57. The Court in *Aralez* reflected on the existing factors established by caselaw and set out three considerations which provide a framework for courts to consider the objective business judgment underlining a proposed KERP:

⁴⁴ CCAA, [s 11.51](#).

⁴⁵ Initial Affidavit at [paras 161-162](#).

⁴⁶ See for example, *Ontario Securities Commission v Bridging Finance Inc.*, 2021 ONSC 4347 at [paras 13 and 17](#) [**Bridging Finance**]; *Just Energy Group Inc. et al*, 2021 ONSC 7630 at [paras 7-25](#) [**Just Energy**]; and *Target Canada Co., Re*, 2015 ONSC 303 at [para 59](#).

⁴⁷ *Aralez Pharmaceuticals Inc. (Re)*, 2018 ONSC 6980 at [para 29](#), citing *Re Cinram International Inc.*, 2012 ONSC 3767 at para 37 [**Aralez**]; *Just Energy*, *supra* at [para 7](#).

- (a) the arm's length input, including from the Monitor, into the design, scope and implementation;
- (b) the necessity on a case-by-case basis of the retention program; and
- (c) whether the program's design reasonably relates to the goals pursued, which goals must be of demonstrable benefit to the objectives of the restructuring process.⁴⁸

58. The Applicants submit that the proposed KERP complies with the factors set out above and is consistent with KERP arrangements that have been previously approved by CCAA courts. In particular:

- (a) the KERP was developed by the Applicants, with the assistance of the Monitor;
- (b) the Monitor and DIP Lender support the approval of the KERP and the KERP Charge;
- (c) the Key Employees work at the Applicants' head office and hold managerial positions for various critical parts of the Business including merchandising, accounting, legal, and operations. These Key Employees would likely consider other employment options if the KERP is not approved;
- (d) the Applicants require the continued participation of the Key Employees to avoid any disruptions to the Applicants' Business that could affect the SISP and ultimately any transaction resulting therefrom. Finding qualified individuals to replace them would be disruptive, difficult and time consuming, particularly in the context of a CCAA proceeding and given the Key Employees' institutional knowledge related to the Applicants' Business. Retaining existing employees

⁴⁸ *Aralez, supra* at [para 30](#).

through closing of a transaction is therefore essential to a successful restructuring outcome;

- (e) the KERP seeks to encourage employees to continue their employment through to the completion of a transaction under a SISP, or Court approval of a plan of arrangement in the CCAA proceeding; and
- (f) the quantum of the KERP is appropriate in the circumstances.⁴⁹

G. Sealing of the Confidential Exhibit

59. The Applicants request that this Court seal the Confidential Exhibit to the Second Williams Affidavit which contains a list of employees who are beneficiaries of the KERP, along with their names and amounts payable under the KERP to those employees.⁵⁰

60. This Court has the discretion pursuant to section 137(2) of the *Courts of Justice Act*⁵¹ and its inherent jurisdiction to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

61. In *Sherman Estate v. Donovan*, the Supreme Court of Canada held that the person asking a court to exercise discretion in a way that limits the open court presumption must establish that: (a) court openness poses a serious risk to an important public interest; (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.⁵²

⁴⁹ Second Williams Affidavit at [paras 51-56](#) and [58-60](#).

⁵⁰ Second Williams Affidavit at [para 61](#).

⁵¹ RSO 1990, c C.43, [s 137\(2\)](#).

⁵² *Sherman Estate v Donovan*, 2021 SCC 25 at [para 38](#).

62. The foregoing test has been satisfied. The Confidential Exhibit contains a confidential summary with respect to the KERP which details individual personal information and the payments for each eligible employee.⁵³

63. Courts have previously granted sealing orders in respect of individual compensation arrangements relating to key employee retention plans.⁵⁴ Protecting the sensitive personal and compensation information of employees is an important public interest that should be protected. Employees also have a reasonable expectation that their names and salary information will be kept confidential. As a matter of proportionality, the benefits of sealing the requested information outweigh any negative effects, as the aggregate amount of the KERP has been disclosed to stakeholders and the retention of the Key Employees benefits all stakeholders by allowing the Applicants to maximize any potential value in a SISP.

PART V – RELIEF REQUESTED

64. The Applicants submit that the relief sought is in the interests of the Applicants and their stakeholders and in furtherance of the restructuring pursuant to the CCAA. The Applicants therefore seek an ARIO in the form appended at Tab 3 to the Applicants' Motion Record.

⁵³ Second Williams Affidavit at [para 61](#).

⁵⁴ See for example, *Bridging Finance*, *supra* at [paras 23-27](#); *Just Energy*, *supra* at [paras 26-29](#); *Golf Town Canada Holdings Inc (Re)*, Initial Order issued September 14, 2016 [Court File No CV-16-11527-00CL] at [para 64](#); *Acerus Pharmaceuticals Corporation et al (Re)*, Amended and Restated Initial Order issued February 3, 2023 [Court File No CV-23- 00693595-00CL] at [para 65](#).

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4th DAY OF SEPTEMBER, 2024

/s RECON

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SCHEDULE "A"**List of Authorities**

1. [*Acerus Pharmaceuticals Corporation et al \(Re\)*, Amended and Restated Initial Order issued February 3, 2023 \[Court File No CV-23- 00693595-00CL\]](#)
2. [*Aralez Pharmaceuticals Inc. \(Re\)*, 2018 ONSC 6980](#)
3. [*Golf Town Canada Holdings Inc \(Re\)*, Initial Order issued September 14, 2016 \[Court File No CV-16-11527-00CL\]](#)
4. [*Inscape Corporation, Re*, Amended and Restated Initial Order issued January 20, 2023 \[Court File No. CV-23-00692784-00CL\]](#)
5. [*Just Energy Group Inc. et al*, 2021 ONSC 7630](#)
6. [*Ontario Securities Commission v Bridging Finance Inc.*, 2021 ONSC 4347](#)
7. [*Sherman Estate v Donovan*, 2021 SCC 25](#)
8. [*Ted Leroy Trucking \[Century Services\] Ltd \(Re\)*, 2010 SCC 60](#)

SCHEDULE "B"**Statutory Authorities****Companies' Creditors Arrangement Act, RSC 1985, c. C-36, as amended****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.

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[Courts of Justice Act, RSO 1990, c C.43](#)

Sealing documents

137(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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

Court File No. CV-24-00726584-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF 2675970 ONTARIO INC. et al.
Applicants

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceedings commenced at Toronto

**FACTUM OF THE APPLICANTS
(RE AMENDED AND RESTATED INITIAL
ORDER)**

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