

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**THE BANK OF NOVA SCOTIA**

Applicant

- and -

**UPPER CANADA GROWERS LTD. and UCG LAND INC.**

Respondents

**AND IN THE MATTER OF AN APPLICATION under section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended**

**FACTUM OF THE APPLICANT  
(Appointing Receiver)**

May 9, 2025

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## PART I - OVERVIEW<sup>1</sup>

1. The Applicant, The Bank of Nova Scotia (the “**Bank**”), brings this application for an order (the “**Receivership Order**”), among other things, appointing BDO Canada Limited (“**BDO**”) as receiver and manager (in such capacity, the “**Receiver**”), without security, of all the present and future assets, undertakings, and properties of Upper Canada Growers Ltd. (“**UCG**”) and UCG Land Inc. (“**UCG Land**” and together with UCG, the “**Companies**”) acquired for or used in relation to a business carried on by the Companies, including all proceeds thereof (the “**Property**”), which Property includes, without limitation, certain Real Property owned by UCG Land in Southwestern Ontario.

2. The Companies are related corporations involved in orchard and nursery operations in Southwestern Ontario. On January 17, 2025, they commenced proposal proceedings (the “**Proposal Proceedings**”) under the *Bankruptcy and Insolvency Act* (Canada) (“**BIA**”) by filing notices of intention to make a proposal (the “**NOIs**”), which named BDO as the proposal trustee (in such capacity, the “**Proposal Trustee**”).<sup>2</sup> The stay of proceedings and deadline for the Companies to make a proposal to their creditors expire on May 16, 2025.<sup>3</sup>

3. In connection with the Proposal Proceedings, the Companies obtained a SISP Order pursuant to which the Proposal Trustee ran a court-approved sale and investment solicitation process (“**SISP**”) to market and solicit interest in a sale or investment in all or substantially all of the Companies’ assets and/or business. The deadline for final binding offers has passed; no such

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<sup>1</sup> Capitalized terms used but not defined in this Overview are defined below. All references to “\$” or dollar amounts contained herein are to Canadian dollars unless otherwise specified.

<sup>2</sup> Affidavit of James Cook sworn May 5, 2025 [“**Cook Affidavit**”] at para 6, **Application Record of The Bank of Nova Scotia dated May 6, 2025** [“**Application Record**”], Tab 2.

<sup>3</sup> Cook Affidavit at para 2, **Application Record, Tab 2**.

offers were received. For this reason, neither the Companies nor the Proposal Trustee will be seeking a further extension of the time to file a proposal, such that the Companies will be deemed to have made assignments in bankruptcy immediately after May 16, 2025.

4. Prior to the Proposal Proceedings, the Bank made credit facilities available to the Companies under the Credit Agreement on a secured basis. As of May 5, 2025, the total indebtedness owing to the Bank under the Credit Agreement was \$24,894,903.52 and US\$45,436.12, inclusive of accrued and unpaid interest as of such date but exclusive of costs (the **“Pre-Filing Indebtedness”**).<sup>4</sup>

5. The Bank also made an interim DIP Facility available to the Company, secured by a Court-ordered DIP Charge, for the purpose of funding its cash requirements during the Proposal Proceedings. As of May 5, 2025, the total indebtedness owing to the Bank under the DIP Term Sheet was \$2,107,479.45, inclusive of accrued and unpaid interest as of such date but exclusive of costs (the **“DIP Indebtedness**, and together with the Pre-Filing Indebtedness, the **“Indebtedness”**).<sup>5</sup>

6. Prior to the Proposal Proceedings, the Companies had each defaulted on their obligations owing to the Bank under the Credit Agreement. On November 15, 2024, the Bank gave the Companies notice of such defaults, made demand upon the Companies for the repayment of the Pre-Filing Indebtedness, and delivered: (a) notices of intention to enforce a security pursuant to section 244 of the BIA (the **“244 Notices”**) and (b) notices of intent by a secured creditor (the

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<sup>4</sup> Cook Affidavit at para 5, **Application Record, Tab 2.**

<sup>5</sup> Cook Affidavit at para 5, **Application Record, Tab 2.**

“FDMA Notices”) under section 21 of the *Farm Debt Mediation Act* (Canada) (“FDMA”).<sup>6</sup> The notice periods under the 244 Notices and the FDMA Notices elapsed prior to the Companies commencing the Proposal Proceedings, and therefore this Application is not subject to the stay of proceedings.

7. The Companies are also in default of their obligations under the DIP Term Sheet, as a result of, among other reasons, their inability to complete the SISP.

8. The appointment of the Receiver is just and appropriate in the circumstances and ought to be granted without delay. In the Bank’s view, the timely appointment of the Receiver is necessary to preserve the Bank’s security interests in the Property and safeguard the collateral, particularly in light of the impending deemed bankruptcies of the Companies, and the failure to secure any binding offers under the SISP. The GSAs, the Standard Charge Terms, and the DIP Term Sheet provide that, upon the occurrence of an event of default, the Bank is entitled to seek the appointment of a receiver of the property of the Companies. The appointment of the Receiver will preserve value and allow for the implementation of an orderly sale or liquidation of the Property under the supervision of this Court and for the benefit of all stakeholders.

9. The Proposal Trustee supports the Bank’s Application and consents to its appointment as Receiver.

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<sup>6</sup> Cook Affidavit at para 8, **Application Record, Tab 2.**

## PART II - FACTS

### A. Background

#### *The Parties*

10. The Bank is a Canadian financial institution under Schedule 1 of the *Bank Act* (Canada) (the “**Bank Act**”).<sup>7</sup> As described in greater detail below, the Bank made certain credit facilities available to the Companies.

11. UCG is a privately held corporation under the *Business Corporations Act* (Ontario) (“**OBCA**”) with its registered head office in Niagara-On-The-Lake.<sup>8</sup> UCG operates a nursery and orchard business in Southwestern Ontario, primarily in Harrow, Ontario, where it grows disease-free rootstock and develops and maintains fruit orchards.<sup>9</sup>

12. UCG Land is a privately held corporation under the OBCA with its registered head office in Toronto.<sup>10</sup> UCG Land operates as a real estate holding company for the properties used by UCG in its nursery and orchard operations.<sup>11</sup> UCG Land is the fee simple owner of five parcels of real property in Southwestern Ontario (collectively, the “**Real Property**”).<sup>12</sup>

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<sup>7</sup> Cook Affidavit at para 13, **Application Record, Tab 2.**

<sup>8</sup> Cook Affidavit at para 14, **Application Record, Tab 2.**

<sup>9</sup> Cook Affidavit at paras 4 & 15, **Application Record, Tab 2.**

<sup>10</sup> Cook Affidavit at para 16, **Application Record, Tab 2.**

<sup>11</sup> Cook Affidavit at paras 4 & 16, **Application Record, Tab 2.**

<sup>12</sup> Cook Affidavit at para 17 & Exhibits “C”-“G”, **Application Record, Tab 2.**

*The Loan and Security Documents*

13. Pursuant to a credit facility agreement dated as of May 13, 2024, among the Bank, as lender, and the Companies, as borrowers and guarantors (the “**Original Credit Agreement**” and as may have been amended, the “**Credit Agreement**”), the Bank made available to the Companies credit facilities in the aggregate principal amounts of \$27,250,000 and US\$50,000.<sup>13</sup>

14. The Companies each executed a general security agreement dated as of November 29, 2023 in favour of the Bank (the “**UCG GSA**” and the “**UCG Land GSA**” and together, the “**GSAs**”).<sup>14</sup> Pursuant to the GSAs, the Companies granted to the Bank a security interest in all of the Companies’ present and after-acquired personal property and proceeds thereof as general and continuing security for the payment and performance of all obligations, indebtedness, and liabilities owing to the Bank, whether as principal or surety.<sup>15</sup>

15. As additional security for the payment and performance of the obligations under the Credit Agreement, UCG Land granted the Bank a first-ranking charge on the Real Property in the principal amount of \$20,000,000 (the “**Charge**”) registered on title on November 30, 2023.<sup>16</sup> The Charge is governed by the Bank’s Set of Standard Charge Terms No. 201809 (the “**Standard Charge Terms**”).<sup>17</sup> There are no other active charges registered on title to the Real Property.<sup>18</sup>

16. The Companies also granted the following to the Bank as additional security:

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<sup>13</sup> Cook Affidavit at para 19 & Exhibit “H”, **Application Record, Tab 2.**

<sup>14</sup> Cook Affidavit at paras 24 & 35, Exhibits “L” & “U”, **Application Record, Tab 2.**

<sup>15</sup> Cook Affidavit at paras 24 & 35, **Application Record, Tab 2.**

<sup>16</sup> Cook Affidavit at para 43, Exhibit “CC”, **Application Record, Tab 2.**

<sup>17</sup> Cook Affidavit at para 44, Exhibits “DD”, **Application Record, Tab 2.**

<sup>18</sup> Cook Affidavit, Exhibits “C”-“G”, **Application Record, Tab 2.**

- (a) assignments of insurance proceeds dated as of November 29, 2023 made by each of the Companies in favour of the Bank;<sup>19</sup>
- (b) a general assignment of rents and leases dated as of November 29, 2023 made by UCG Land in favour of the Bank and registered on title to the Real Property;<sup>20</sup> and
- (c) security pursuant to section 427 of the Bank Act made by each of the Companies in favour of the Bank whereby the Companies granted to the Bank a continuing security interest in their fertilizer, forestry equipment, forestry implements, and products of the forest, and all proceeds thereof.<sup>21</sup>

17. Each of the Companies also executed guarantee agreements dated as of November 29, 2023 in favour of the Bank, in which each of the Companies guaranteed the payment of all debts and liabilities owing or remaining unpaid by the other to the Bank, up to an unlimited amount (collectively, the “**Guarantees**”).<sup>22</sup> The Guarantees provide that, upon default in payment of any sum owing by UCG or UCG Land, as applicable, to the Bank, the Bank may treat all guaranteed liabilities as due and payable and may forthwith collect from the applicable guarantor the total amount guaranteed thereunder.<sup>23</sup>

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<sup>19</sup> Cook Affidavit at paras 25 & 36, Exhibits “M” & “V”, **Application Record, Tab 2.**

<sup>20</sup> Cook Affidavit at para 46, Exhibit “EE”, **Application Record, Tab 2.**

<sup>21</sup> Cook Affidavit at paras 26-29 & 37-40, Exhibits “N”-“R”, “W”-“AA”, **Application Record, Tab 2.**

<sup>22</sup> Cook Affidavit at paras 21-22, Exhibits “J”-“K”, **Application Record, Tab 2.**

<sup>23</sup> Cook Affidavit at para 23, **Application Record, Tab 2.**

***The Bank's Security Interests are Perfected by Registration under the OPPSA***

18. The Bank's security interests in the Companies' personal property are perfected by registrations against the Companies under the *Personal Property Security Act* (Ontario) ("**OPPSA**").<sup>24</sup> Search results under the Personal Property Security Registration System for registrations made against the Companies disclose, among other things, that:

- (a) secured creditors have registered security interests against UCG both prior to and after the Bank's registrations in respect of specific equipment and/or motor vehicle collateral;<sup>25</sup> and,
- (b) there are no security registrations against UCG Land prior to the Bank's registrations.<sup>26</sup>

19. Agricultural Credit Corporation ("**ACC**") also has a prior registration against UCG under the OPPSA (the "**ACC Existing Registration**") in respect of the following collateral description:

A security interest in all present and future deciduous tree crops of the Debtor, including all proceeds thereof, for which a cash advance payment was issued by the Creditor under the "Advance Payments Program" (APP) pursuant to the Agricultural Marketing Programs Act (AMPA) and any subsequent present and future agricultural products of the same nature produced by the Debtor whether or not harvested, and whether or not attached by root to the land of the Debtor.

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<sup>24</sup> Cook Affidavit at paras 30 & 41, Exhibits "S" & "BB", **Application Record**.

<sup>25</sup> Cook Affidavit at para 31 & 34, **Application Record, Tab 2**.

<sup>26</sup> Cook Affidavit at para 42, **Application Record, Tab 2**.

A security interest in all proceeds made payable to the Debtor under the Business Risk Management Program (BRM).<sup>27</sup>

20. On November 21, 2023, ACC delivered to the Bank an Acknowledgement and Postponement, in which ACC acknowledged, confirmed, and agreed with the Bank that ACC would not assert any priority based upon the ACC Existing Registration with respect to any present or after-acquired property or assets of the Companies, and postponed and subordinated the ACC Existing Registration and any other security interest ACC may have in the present or after acquired property of the Companies to the Bank's security, other than in respect of the ACC Collateral.<sup>28</sup>

21. ACC and all other OPPSA registrants have been served with this application.

### *The Defaults under the Credit Agreement*

22. As a result of continuing defaults, on November 15, 2024, the Bank's external legal counsel, Fasken Martineau DuMoulin LLP, issued a letter to the Companies, on behalf of the Bank, accelerating and demanding repayment of the Pre-Filing Indebtedness under the Credit Agreement and the Guarantees (the "**Demand Letter**").<sup>29</sup> The Demand Letter provided an unlimited list of the Companies' defaults under the Credit Agreement and enclosed the 244 Notices and the FDMA Notices.<sup>30</sup> The notice periods under the 244 Notices elapsed on November 25, 2024, and the notice periods under the FDMA Notices elapsed on November 30, 2024.<sup>31</sup>

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<sup>27</sup> Cook Affidavit at para 32, **Application Record, Tab 2.**

<sup>28</sup> Cook Affidavit at para 33, Exhibit "T", **Application Record, Tab 2.**

<sup>29</sup> Cook Affidavit at paras 54-55, Exhibit "GG", **Application Record, Tab 2.**

<sup>30</sup> Cook Affidavit at paras 54-55, Exhibit "GG", **Application Record, Tab 2.**

<sup>31</sup> Cook Affidavit at para 56, **Application Record, Tab 2.**

23. Despite the demand, the Companies have not repaid the Pre-Filing Indebtedness.<sup>32</sup>

**B. The Proposal Proceedings**

24. On January 17, 2025, each of the Companies filed NOIs under Part III Division I of the BIA.<sup>33</sup> Among other relief in the Proposal Proceedings, the Companies sought and obtained extensions of time for the stay of proceedings, and the stay is currently set to expire on May 16, 2025.<sup>34</sup>

***The DIP Term Sheet***

25. In connection with the Proposal Proceedings, the Companies, as borrowers, and the Bank, as interim lender, entered into a DIP facility agreement dated as of January 28, 2025 (the “**DIP Term Sheet**”).<sup>35</sup> Under the DIP Term Sheet, the Bank agreed to provide the Companies a debtor-in-possession (“**DIP**”) super-priority non-revolving multiple draw credit facility (the “**DIP Facility**”) in the maximum aggregate amount of \$2,700,000, to be used by the Companies to fund, among other things, the ordinary course working capital and other general corporate needs of the Companies, as well as the costs of the Proposal Proceedings.<sup>36</sup> As of May 5, 2025, the Bank has advanced a total principal amount of \$2,100,000 under the DIP Facility.<sup>37</sup>

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<sup>32</sup> Cook Affidavit at para 57, **Application Record, Tab 2.**

<sup>33</sup> Cook Affidavit at para 58, **Application Record, Tab 2.**

<sup>34</sup> Cook Affidavit at para 63, **Application Record, Tab 2.**

<sup>35</sup> Cook Affidavit at para 65, Exhibit “NN”, **Application Record, Tab 2.**

<sup>36</sup> Cook Affidavit at para 66, **Application Record, Tab 2.**

<sup>37</sup> Cook Affidavit at para 71, **Application Record, Tab 2.**

*The SISP*

26. On February 6, 2025, the Bankruptcy Court granted an Order approving the SISP to be administered by the Proposal Trustee (the “**SISP Order**”).<sup>38</sup> The Proposal Trustee has conducted the SISP pursuant to the terms appended to the SISP Order (the “**SISP Terms**”).

27. The SISP Terms set forth a two-phased process with key milestones. In respect of those key milestones:

- (a) the Proposal Trustee received five Expressions of Interest (“**EOIs**”) by the EOI Deadline on Friday, March 28, 2025;
- (b) with the approval of the Bank and in accordance with the SISP Terms, the Proposal Trustee designated three Qualified Bidders by Tuesday, April 1, 2025; and,
- (c) no Binding Letters of Intent (“**LOIs**”) were received by the LOI Deadline on Friday April 25, 2025.<sup>39</sup>

28. Because they received no LOIs, the Companies have failed to meet the SISP milestones relating to the selection of an offer, which passed on April 30, 2025 and will be unable to meet future SISP milestones, including for executing definitive transaction documents and closing a transaction.<sup>40</sup>

29. The Bank learned that Robert Haynes, one of the directors of the Companies, had

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<sup>38</sup> Cook Affidavit at para 72, **Application Record, Tab 2.**

<sup>39</sup> Cook Affidavit at para 74, **Application Record, Tab 2.**

<sup>40</sup> Cook Affidavit at paras 73 & 76, **Application Record, Tab 2.**

interfered in the SISP. Specifically, on April 11, 2025, Mr. Haynes sent an email to one of the Qualified Bidders suggesting that it should be making a lower offer for the purchase of the Property and that the Bank would likely agree to the closing of such transaction.<sup>41</sup>

***Status of the Proposal Proceedings***

30. The time for the Companies to file a proposal pursuant to section 50.4(9) of the BIA expires on May 16, 2025.<sup>42</sup> Neither the Proposal Trustee nor the Companies intend to seek an extension of the stay of proceedings in the Proposal Proceedings beyond May 16, 2025, and the Companies do not intend to file proposals to their creditors.<sup>43</sup> The Companies will be deemed to have made assignments into bankruptcy at the conclusion of the existing stay period.<sup>44</sup>

31. In light of the events occurring under the SISP, the Companies are in breach of the terms of the SISP and have failed to meet the SISP milestones.<sup>45</sup> The Bank is also of the view that there is no reasonable possibility that the Companies will be able to complete a sale or investment transaction that is acceptable to the Bank. These constitute events of default under the DIP Term Sheet.<sup>46</sup>

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<sup>41</sup> Cook Affidavit at para 75, **Application Record, Tab 2**. Third Report of the Proposal Trustee dated May 6, 2025 at para 28, *In the Matter of the Notice of Intention to Make a Proposal of UCG Land Inc., in the City of Hamilton, in the Province of Ontario, In the Matter of the Notice of Intention to Make a Proposal of Upper Canada Growers Ltd., in the City of Hamilton, in the Province of Ontario* [the “Proposal Proceedings”], Motion Record of the Proposal Trustee dated May 6, 2025 [“Proposal Trustee’s Motion Record”], Tab 2.

<sup>42</sup> Cook Affidavit, Exhibit “KK” (Proposal Proceedings, Order of Justice Sheard dated March 25, 2025 at para 2), **Application Record, Tab 2**.

<sup>43</sup> Cook Affidavit at para 77, **Application Record, Tab 2**.

<sup>44</sup> Cook Affidavit at para 77, **Application Record, Tab 2**. *Bankruptcy and Insolvency Act*, [RSC 1985, c. B-3](#) [“BIA”], s [50.4\(8\)](#).

<sup>45</sup> Cook Affidavit at para 69, **Application Record, Tab 2**.

<sup>46</sup> Cook Affidavit at para 69, **Application Record, Tab 2**.

32. Given the foregoing, and in light of this application, the Proposal Trustee has brought a motion within the Proposal Proceedings seeking, among other relief, an order discharging the Proposal Trustee and authorizing the BDO to act as the trustee-in-bankruptcy of the Companies upon their deemed bankruptcies. That motion is scheduled to be heard alongside this application.

### **PART III - ISSUES**

33. The issues on this application are:

- (a) Does this Court have jurisdiction to appoint the Receiver?
- (b) Is it just or convenient to appoint the Receiver without further delay?
- (c) Are the terms of the requested order appropriate?

34. The Bank submits that the answer to each of the above questions is “yes”.

### **PART IV - LAW AND ARGUMENT**

#### **A. This Court Has the Jurisdiction to Appoint the Receiver**

35. Section 243(1) of the BIA and section 101 of the *Courts of Justice Act* (the “CJA”) each provide this Court with the authority to appoint a receiver if the Court determines it is just or convenient.

36. The Bank has complied with the technical requirements of section 244 of the BIA by sending the Companies the 244 Notices and by waiting the prescribed ten (10) day notice period. The Bank has also complied with the requirements under the FDMA by sending the Companies the FDMA Notices and by waiting the prescribed fifteen (15) day notice period.

37. The stay of proceedings in effect under subsection 69(1) of the BIA as a result of the Companies filing the NOIs does not stay the Bank from bringing this application. Subsection 69(2)(b) of the BIA provides that the stay of proceedings under subsection 69(1) does not apply to prevent a secured creditor from enforcing their security where they gave notice of intention to enforce under subsection 244(1) more than ten days before the debtor filed the notice of intention to make a proposal.<sup>47</sup> As noted above, the 244 Notice Period elapsed on November 25, 2024, well before the Companies filed the NOIs.

38. This Court is the appropriate jurisdiction in which the Bank should seek the appointment of the Receiver. An application to appoint a receiver must be brought in the judicial district of the “locality of the debtor”.<sup>48</sup> This Court is the Bankruptcy Court in the district in which the registered office of one of the Companies and the principal residence of one of the Companies’ directors is located. It is also the same Court in which the Proposal Proceedings have been commenced by the Companies.

39. BDO is qualified to act as Receiver in accordance with subsection 243(4) of the BIA and has provided its consent to act.<sup>49</sup>

**B. It is Just and Convenient to Appoint the Receiver without Further Delay**

40. The Bank seeks the appointment of the Receiver pursuant to both the BIA and CJA. Both section 243 of the BIA and section 101 of the CJA permit the Court to appoint a receiver

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<sup>47</sup> BIA, s [69\(1\)-\(2\)](#).

<sup>48</sup> BIA, ss [2\(1\)](#) “locality of a debtor”, [243\(5\)](#).

<sup>49</sup> Cook Affidavit, Exhibit “OO”, **Application Record, Tab 2**.

where it is “just or convenient” to do so.<sup>50</sup>

41. In determining what is just or convenient under section 243(1) of the BIA or section 101 of the CJA, the Court should consider all of the circumstances, but should pay particular attention to the nature of the property and the rights and interests of all parties in relation thereto, which includes the rights of the secured creditor under its security.<sup>51</sup> There are no preconditions for the exercise of the Court’s discretion to appoint a receiver. Factors to consider in determining whether it is appropriate to appoint a receiver include, among others:

- (a) the fact that the creditor has the right to appoint a receiver under the loan documentation;
- (b) the nature of the property;
- (c) the conduct of the parties; and,
- (d) the likelihood of maximizing return to the parties.<sup>52</sup>

42. These factors are not a checklist, but a collection of considerations, to be viewed holistically, to determine whether, in all the circumstances, the appointment of a receiver is just or convenient.<sup>53</sup>

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<sup>50</sup> BIA, s [243](#); *Courts of Justice Act*, [RSO 1990, c C.43](#), s [101](#).

<sup>51</sup> *Waygar Capital Inc v El Mocambo Entertainment Inc. et al*, [2025 ONSC 2034](#) at [para 4](#); *Bank of Nova Scotia v Freure Village on the Clair Creek* (1996), [1996 O.J. No. 5088](#) (SCJ) at [para 10](#).

<sup>52</sup> *Canadian Equipment Finance and Leasing Inc. v The Hypoint Company Limited*, [2022 ONSC 6186](#) at [para 25](#) [*Canadian Equipment Finance*].

<sup>53</sup> *Pandion Mine Finance Fund LP v Otso Gold Corp*, [2022 BCSC 136](#) at [para 54](#).

***The GSAs, Standard Charge Terms, and DIP Term Sheet Contemplate the Relief Sought***

43. The extraordinary nature of the appointment of a receiver is significantly reduced where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of the receiver. The courts do not regard the nature of the remedy as so extraordinary where the relevant security permits the appointment because the applicant is merely seeking to enforce a term of an agreement already made by the parties.<sup>54</sup>

44. Where a creditor's security provides for the appointment of a receiver, there is no requirement for the applicant to establish that it will suffer irreparable harm if the proposed receiver is not appointed.<sup>55</sup> Further, a receiver should be appointed where the creditor has lost faith in the debtor, unless there is good reason to deny the appointment.<sup>56</sup>

45. The appointment of a receiver is also less extraordinary when dealing with a default under a mortgage.<sup>57</sup>

46. In this case, the relevant security documents expressly provide for the appointment of a court-appointed receiver over the Property in the present circumstances. The GSAs, the Standard Charge Terms, and the DIP Term Sheet each provide that, upon the occurrence of an event of default thereunder, the Bank may appoint a receiver of the Property.<sup>58</sup> The relief that the

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<sup>54</sup> *Elleway Acquisition Ltd v Cruise Professionals Ltd.*, [2013 ONSC 6866](#) at [para 27](#); *Macquarie Equipment Finance Limited v Validus Power Corp et al*, [2023 ONSC 4772](#) at [para 6](#) [*Macquarie*].

<sup>55</sup> *Canadian Equipment Finance* at paras [25\(a\)-26](#).

<sup>56</sup> *Macquarie* at [para 10](#), citing *Bank of Montreal v Carnival National Leasing Ltd.*, [2011 ONSC 1007](#) at [paras 24, 28-29](#).

<sup>57</sup> *BCIMI Construction Fund Corporation et al v The Clover on Yonge Inc.*, [2020 ONSC 1953](#) at [paras 43-44](#); *Canadian Western Bank v 2563773 Ontario Inc.*, [2023 ONSC 4766](#) at [para 8](#).

<sup>58</sup> Cook Affidavit at paras 44, 52, 70, **Application Record, Tab 2**.

Bank seeks is therefore not extraordinary or equitable. Rather, it is contractual in nature and expressly contemplated in these circumstances.

***The Receiver is needed to preserve the Companies' collateral and Real Property***

47. The Bank is of the view that the appointment of the Receiver is the only way to preserve value for all stakeholders at this time, particularly in light of the Companies' urgent liquidity needs and the imminent end of the Proposal Proceedings.<sup>59</sup> The Bank is no longer willing to advance funds under the DIP Term Sheet; without those advances or any likely sale or investment transaction arising out of the SISP, the Companies will have insufficient cash to fund their operations.<sup>60</sup> Failure to appoint the Receiver at this time could jeopardize the Bank's interests in the Property, including the Real Property, as well as the interests of all other stakeholders.

48. In the context of the imminent bankruptcies of the Companies, the Receiver will be able to take control of and protect the Real Property and other property of the Companies for the benefit of all stakeholders.<sup>61</sup>

***The Bank has Lost Confidence in the Companies' Management***

49. In light of the Companies' defaults under the Credit Agreement and DIP Term Sheet, and the events that occurred during the SISP (particularly Mr. Haynes' interference with the bidding process therein), the Bank has lost confidence in the management of the Companies

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<sup>59</sup> Cook Affidavit at para 80(a), **Application Record, Tab 2.**

<sup>60</sup> Cook Affidavit at para 80(a), **Application Record, Tab 2.**

<sup>61</sup> Cook Affidavit at para 80(c), **Application Record, Tab 2.**

and their ability to preserve the collateral.<sup>62</sup> Notably, the Proposal Trustee also considered Mr. Haynes' email to be prejudicial to the SISP, and indicative of Mr. Haynes' failure to act in good faith.<sup>63</sup>

***The Receivership will Maximize the Return for all Stakeholders***

50. As noted above, the Property is encumbered by the registered interests of other secured parties under the OPPSA. The appointment of the Receiver, who will owe obligations to the Court and all stakeholders generally, will allow for a transparent assessment of realization strategies for the benefit of all stakeholders, and will facilitate value-maximizing transactions under the supervision of this Court.

**C. The Terms of the Receivership Order are Appropriate**

51. The proposed Receivership Order is based upon the Model Receivership Order of the Commercial List User Committee of the Superior Court of Toronto (Commercial List), subject to changes reflecting the circumstances of this case.<sup>64</sup>

52. The proposed Receivership Order provides for the following charges on the Property (the "**Charges**"), subject to the priority ranking<sup>65</sup> as set out therein:

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<sup>62</sup> Cook Affidavit at para 80(b), **Application Record, Tab 2.**

<sup>63</sup> Proposal Trustee's Third Report at para 29, **Proposal Trustee's Motion Record, Tab 2.**

<sup>64</sup> See the Blackline of the Draft Receivership Order to the Commercial List User Committee Model Receivership Order, **Application Record, Tab 4.**

<sup>65</sup> Draft Receivership Order at paras 28-29, **Application Record, Tab 3.**

- (a) **Receiver’s Charge:** secures the reasonable fees and disbursements of the Receiver and their counsel;<sup>66</sup>
  
- (b) **Receiver’s Borrowings Charge:** secures the payment of the monies borrowed by the Receiver, together with interest and charges thereon, for the purpose of funding the exercise of the powers and duties conferred by the Receivership Order in a principal amount not to exceed \$500,000;<sup>67</sup>
  
- (c) **Proposal Proceedings Charges:** continues the following charges that were granted in the context of the Proposal Proceedings subject to the terms of the Receivership Order (collectively, the “**Proposal Proceedings Charges**”):
  - (i) *DIP Charge:* secures the maximum aggregate amount of \$2,700,000 for the obligations owing to the Bank under the DIP Term Sheet, plus interest, fees, and expenses;<sup>68</sup>
  
  - (ii) *Administration Charge:* secures only the payment of professional fees and disbursements of the Proposal Trustee and its counsel, incurred before the effective time of the Receivership Order in an aggregate amount not to exceed \$500,000 (these are amounts which are not secured by the Receiver’s Charge);<sup>69</sup> and

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<sup>66</sup> Draft Receivership Order at para 19, **Application Record, Tab 3.**

<sup>67</sup> Draft Receivership Order at para 22, **Application Record, Tab 3.**

<sup>68</sup> Draft Receivership Order at para 27, **Application Record, Tab 3.**

<sup>69</sup> Draft Receivership Order at para 27, **Application Record, Tab 3.**

- (iii) *Directors' Charge*: secures only payment of valid claims under the indemnity provided in the Proposal Proceedings between the date of filing the NOIs and the effective time of the Receivership Order in an aggregate maximum amount of \$150,000.<sup>70</sup>

53. Continuing the Proposal Proceedings Charges under the Receivership Order, subject to the terms therein, is consistent with the terms of receivership orders issued after the commencement of proposal proceedings under the BIA.<sup>71</sup>

54. All other registered secured parties have been served with this application and have not, at this time, objected to the requested relief. Therefore, consistent with section 243(6) of the BIA, the Charges will not rank ahead of the security interests of any secured creditor who would be materially affected by the Receivership Order who does not have notice of these proceedings.<sup>72</sup>

55. The Charges are necessary and appropriate in the circumstances:

- (a) The Receiver is essential to the proposed process, and the Receiver's Charge will secure the payment of the Receiver and its counsel's fees incurred in respect of these proceedings.

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<sup>70</sup> Draft Receivership Order at para 27, **Application Record, Tab 3**.

<sup>71</sup> *Cannect Mortgage Investment Corporation v Claireville Property Holdings Inc*, CV-21-00672999-00CL, [Receivership Order](#) (14 December 2021) at para 25; *Farm Credit Canada v Whyte's Foods Inc./Les Ailments Whyte's Inc., et al*, CV-23-00707205-00CL, [Receivership Order](#) (6 October 2023) at para 21; *Wells Fargo Capital Finance Corporation Canada v Whyte's Food Inc., et al*, CV-23-00707052-00CL, [Receivership Order](#) (6 October 2023) at para 21.

<sup>72</sup> BIA, s [243\(6\)](#).

- (b) The Receivership Order provides the Receiver with the authority to market and sell any part of the Property, including the Real Property, and to enter into an engagement with Avison Young Canada for the purposes of same. It is anticipated that the sale of the Real Property will take some time, and that the Receiver will not have sufficient funds in the estate to meet necessary, interim expenditures. It is therefore appropriate for this Court to authorize the Receiver to borrow funds on a priority basis under the Receiver's certificates to fund the costs of the receivership, subject to the monetary limit set forth under the Receivership Order.
- (c) The Receivership Order also provides transparency to stakeholders regarding the receivership costs, by providing that the Receiver's accounts remain subject to a passing of accounts before the Court.

56. The proposed Receiver supports the relief sought by the Bank on this application.<sup>73</sup>

#### **PART V - ORDER REQUESTED**

57. For the reasons outlined above, the Bank respectfully requests that this Honourable Court grant an order substantially in the form as the draft Receivership Order found at Tab 3 of the Application Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 9<sup>th</sup> day of May, 2025.

*Per: Fasken Martineau DuMoulin LLP*

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**Fasken Martineau DuMoulin LLP**

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<sup>73</sup> Proposal Trustee's Third Report at paras 49-64, **Proposal Trustee's Motion Record, Tab 2.**

**SCHEDULE “A”**

**LIST OF AUTHORITIES**

**Statutes and Regulations**

1. *Bankruptcy and Insolvency Act*, [RSC 1985, c B-3](#), ss [2\(1\)](#) “locality of the debtor”, [50.4\(8\)](#), [69\(1\)-\(2\)](#), [243](#).
2. *Courts of Justice Act*, [RSO 1990, c C.43](#), s [101](#).

**Case Law**

1. *Bank of Montreal v Carnival National Leasing Ltd.*, [2011 ONSC 1007](#)
2. *Bank of Nova Scotia v Freure Village on the Clair Creek* (1996), [1996 O.J. No. 5088](#) (SCJ)
3. *BCIMI Construction Fund Corporation et al v The Clover on Yonge Inc.*, [2020 ONSC 1953](#)
4. *Canadian Equipment Finance and Leasing Inc. v The Hypoint Company Limited*, [2022 ONSC 6186](#)
5. *Canadian Western Bank v 2563773 Ontario Inc.*, [2023 ONSC 4766](#)
6. *Cannect Mortgage Investment Corporation v Claireville Property Holdings Inc*, CV-21-00672999-00CL
7. *Elleway Acquisition Ltd v Cruise Professionals Ltd.*, [2013 ONSC 6866](#)
8. *Farm Credit Canada v Whyte’s Foods Inc./Les Ailments Whyte’s Inc., et al*, CV-23-00707205-00CL
9. *Macquarie Equipment Finance Limited v Validus Power Corp et al*, [2023 ONSC 4772](#)
10. *Pandion Mine Finance Fund LP v Otso Gold Corp*, [2022 BCSC 136](#)
11. *Waygar Capital Inc v El Mocambo Entertainment Inc. et al*, [2025 ONSC 2034](#)

12. *Wells Fargo Capital Finance Corporation Canada v Whyte's Food Inc., et al*, CV-23-00707052-00CL

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

Date May 9, 2025

Per: Fasken Martineau DuMoulin LLP  
Fasken Martineau DuMoulin LLP

**SCHEDULE “B”**

**TEXT OF STATUTES, REGULATIONS & BY – LAWS**

1. *Bankruptcy and Insolvency Act*, [RSC 1985, c B-3](#), ss [2\(1\)](#) “locality of a debtor”, [50.4\(8\)](#), [69\(1\)-\(2\)](#), [243](#).
2. *Courts of Justice Act*, [RSO 1990, c C.43](#), s [101](#).

<b><i>Bankruptcy and Insolvency Act</i>, <a href="#">RSC 1985, c B-3</a></b>
<p><b>Interpretation</b></p> <p><b>Definitions</b></p> <p><b>2</b> In this Act,</p> <p><b>locality of a debtor</b> means the principal place</p> <ul style="list-style-type: none"><li>(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,</li><li>(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or</li><li>(c) (c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated; (localité)</li></ul>
<p><b>Where assignment deemed to have been made</b></p> <p><b>(8)</b> Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),</p> <ul style="list-style-type: none"><li>(d) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;</li><li>(e) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;</li><li>(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and</li><li>(f) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.</li></ul>

**Stay of proceedings — notice of intention**

**69 (1)** Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

- (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,
- (b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on
  - (i) the insolvent person's insolvency,
  - (ii) the default by the insolvent person of an obligation under the security agreement, or
  - (iii) the filing by the insolvent person of a notice of intention under section 50.4,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,

- (c) Her Majesty in right of Canada may not exercise Her rights under
  - (i) subsection 224(1.2) of the Income Tax Act, or
  - (ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that
    - (A) refers to subsection 224(1.2) of the Income Tax Act, and
    - (B) provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts,

in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, and

- (d) Her Majesty in right of a province may not exercise her rights under any provision of provincial legislation in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation and the provision has a similar purpose to subsection 224(1.2) of the Income Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum
  - (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or
  - (ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a provincial pension plan as defined in that subsection,

until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

### **Limitation**

(2) The stays provided by subsection (1) do not apply

- (a) to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the notice of intention under section 50.4 was filed from dealing with those assets;
- (b) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than ten days before the notice of intention under section 50.4 was filed, from enforcing that security, unless the secured creditor consents to the stay;
- (c) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security if the insolvent person has, under subsection 244(2), consented to the enforcement action; or
- (d) [Repealed, 2012, c. 31, s. 416]

### **Secured Creditors and Receivers**

#### **Court may appoint receiver**

**243 (1)** Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

#### **Restriction on appointment of receiver**

**(1.1)** In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

#### **Definition of receiver**

(2) Subject to subsections (3) and (4), in this Part, receiver means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or

bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

- (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
- (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

**Definition of receiver — subsection 248(2)**

(3) For the purposes of subsection 248(2), the definition receiver in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

**Trustee to be appointed**

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

**Place of filing**

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

**Orders respecting fees and disbursements**

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver’s claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

**Meaning of disbursements**

(7) In subsection (6), disbursements does not include payments made in the operation of a business of the insolvent person or bankrupt.

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

**Injunctions and receivers**

**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. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

**Terms**

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

THE BANK OF NOVA SCOTIA

-and-  
Applicant

UPPER CANADA GROWERS LTD. and UCG LAND INC.  
Respondents  
Court File No. CV-25-00090131-0000

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**Proceeding commenced at Hamilton**

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