

**ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)**

**IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C., 1985, C.
B-3, AS AMENDED**

Court File No. 32-3175819
Estate No. 32-3175819
BK-25-03175820-0032

**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**

Court File No. 32-3175820
Estate No. 32-3175820
BK-25-03175819-0032

**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**

FACTUM OF UCG LAND INC. AND UPPER CANADA GROWERS LTD.
(Motion for Initial Order and SISP Order returnable on February 6, 2025 at 10:00 AM)

February 3, 2025

DICKINSON WRIGHT LLP

Barristers & Solicitors
199 Bay Street
Suite 2200, Box 447
Toronto, ON M5L 1G4

JOHN D. LESLIE (29956P)

Tel: (416) 646-3801
Email: jleslie@dickinsonwright.com

DAVID Z. SEIFER (77474F)

Tel: (416) 646-6867
Email: dseifer@dickinsonwright.com

Lawyers for Upper Canada Growers Ltd. and
UCG Land Inc.

TO: **SERVICE LIST**

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PART I - OVERVIEW

1. On January 17, 2025, each of UCG Land Inc. (“**LandCo**”) and Upper Canada Growers Ltd. (“**UCG**” and collectively with LandCo, the “**Companies**”) filed a notice of intention to make a proposal under Division I of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the “**BIA**”). BDO Canada Limited is the Companies’ proposal trustee (the “**Proposal Trustee**”).
2. The Companies, with the support of its senior secured lender, the Proposal Trustee and the Companies’ shareholders, seek two principal orders.
3. First, an initial proposal order (the “**Initial Order**”), for, among other things, the following:
 - (a) if necessary, abridging the time for service and filing of the notice of motion and the motion record, validating service of the notice of motion and the motion record so that this motion is properly returnable on February 6, 2025, and dispensing with further service thereof;
 - (b) administratively consolidating the NOI proposal proceedings of LandCo in Court File No. 32-3175819 and of UCG in Court File No. 32-3175820 under one title of proceeding in the style set out at paragraph 4 of the draft Initial Order;
 - (c) extending the time for the Companies to file proposals under section 50.4(9) of the BIA by 45 days to and including April 1, 2025;
 - (d) approving the first report of the Proposal Trustee dated on or about January 28, 2025, to be filed separately with the Court (the “**First Report**”), and the activities of the Proposal Trustee set out therein;
 - (e) enhancing the scope of the power and authority of the Proposal Trustee, as set out herein, so as to enable the Proposal Trustee to fully administer the SISP (as defined below) and to monitor and oversee the operations of the Companies’ business enterprise through the Proposal Proceedings;
 - (f) authorizing the Companies to enter into the interim financing term sheet (the “**DIP Term Sheet**”) with the Bank of Nova Scotia (“**BNS**”), as interim lender, and granting BNS a super priority charge (the “**DIP Charge**”) in an amount not to exceed \$2,700,000, plus interest, fees and expenses, against the

Companies' property, assets and undertakings as security for all of the Companies' obligations to BNS under the DIP Term Sheet;

- (g) granting a super-priority charge against the Companies' property, assets and undertakings in an amount not to exceed \$500,000 in favour of the Companies' legal counsel, the Proposal Trustee and the Proposal Trustee's legal counsel as security for the professional fees and disbursements of counsel to the Companies, the Proposal Trustee and counsel to the Proposal Trustee (the "**Administration Charge**");
- (h) granting a charge against the Companies' property, assets and undertakings in an amount not to exceed \$150,000 in favour of the Companies' directors and officers, to secure the Companies' obligation to indemnify the directors for certain potential liabilities (the "**Directors' Charge**");
- (i) approving a key employee retention plan (the "**KERP**"), attached as Confidential Appendix 1 to the Affidavit of Robert Haynes sworn January 28, 2025;
- (j) sealing Confidential Appendix 1 to the Haynes Affidavit until further order of the court.

4. Second, a SISP order (the "**SISP Order**"), among other things, approving the sale and investment solicitation process (the "**SISP**") attached as Appendix E to the First Report, and authorizing the Proposal Trustee to implement the SISP.

5. The Companies are insolvent. They commenced these proposal proceedings (the "**Proposal Proceedings**") following discussions with their senior secured lender, BNS, and the Proposal Trustee. It was agreed that the Proposal Proceedings would be the preferred means by which to preserve and realize value for all stakeholders. As of the date of this factum, there is no opposition to the Companies' request for the Initial Order and SISP Order.

PART II - FACTS

A. Background

6. UCG operates a nursery and orchard business in Southwestern Ontario, primarily in Harrow, Ontario. LandCo operates as a real estate holding company for the land and buildings used by UCG in its nursery and orchard business.¹

7. The Companies are primarily financed by BNS with the BNS Credit Facilities (as defined below) being cross-collateralized and cross-guaranteed by both UCG and LandCo.²

8. In November, 2024, BNS issued a demand for repayment and Notices of Intention to Enforce Security.³

9. The Companies are insolvent, with more than \$20 million secured debt owing to its senior secured lender, BNS, and approximately \$3.7 million in unsecured debt owing.⁴

10. Following discussions with BNS and the Proposal Trustee, it was agreed that the Companies would commence the Proposal Proceedings, funded by BNS as interim lender, as a preferred means by which to preserve and realize value for all stakeholders.⁵

¹ Affidavit of Robert Haynes sworn January 29, 2025 at paras 6-7 (“**Haynes Affidavit**”), Companies’ Motion Record (“**MR**”), A28.

² Haynes Affidavit at para 15, MR, A30.

³ Ex. U, Haynes Affidavit, MMR, A216.

⁴ First Report of Proposal Trustee dated January 29, 2025 (“**First Report**”) at paras 35 and 55, D11 and D14.

⁵ Haynes Affidavit at para 31, MR, A36.

11. Accordingly, on January 17, 2025, each of the Companies filed a notice of intention to make a proposal under Division I of the BIA, with BDO Canada Limited as the Proposal Trustee.⁶

B. The Seven Main Heads of Relief

(i) Administrative Consolidation

12. The Companies are related corporations and part of a single business enterprise. They are intrinsically linked, and, as of October 2023, the same shared management, back-office and accounting functions. The Companies also have the same non-independent directors. All business activities are managed through UCG. The Companies also share the same senior secured creditor, BNS, who will also be the interim lender in these proposal proceedings.⁷

13. Consolidating the proposal proceedings will be efficient and avoid an unnecessary multiplicity of proceedings and costs.

(ii) Approval of the SISP and Enhanced Powers of the Proposal Trustee

14. The following is a summary of the SISP:⁸

- (a) the SISP contemplates a dual track process, which will allow for the acceptance of bids for investments and restructuring proposals, as well as bids to acquire the business and assets of the Companies (the “**Opportunity**”);
- (b) the Proposal Trustee will administer the SISP and will seek written approval from BNS in respect of certain key steps and milestones, as required;

⁶ Ex. A, Haynes Affidavit, MR, A48.

⁷ Haynes Affidavit at paras 4-14, MR, A27-A30.

⁸ Ex. Y, Haynes Affidavit, MR, A325.

- (c) as soon as reasonably practicable, the Proposal Trustee will prepare a list of potentially interested parties for participation in the SISP and will provide them with a 'teaser' to participate in the SISP;
- (d) all participants will be required to execute a non-disclosure agreement and disclose indirect and direct principals of the participant;
- (e) any party executing a non-disclosure and confidentiality agreement will be invited to review a virtual data room including the salient details of the business and assets of the Companies and to submit non-binding expressions of interest by March 28, 2025;
- (f) the Proposal Trustee will review the expressions of interest and invite select parties by no later than April 1, 2025 to submit binding letters of intent in the form of a completed agreement of purchase and sale by April 25, 2025;
- (g) all offers must be, and all transactions will proceed, on an "as is, where is" basis and will not be conditional on diligence or financing;
- (h) the final bid (or bids) will be selected and executed;
- (i) the Proposal Trustee will then seek Court approval of the selected transaction (or transactions); and
- (j) the transaction(s) shall close by June 13, 2025.

15. The SISP, including the procedures and milestones, are consistent with insolvency practices and procedures in like circumstances, are favourable to the Companies and are reasonable having regard to the circumstances.⁹

16. The SISP will facilitate a transparent, Court-supervised process in an attempt to maximize potential realizations on, and/or investment in, the business enterprise.¹⁰

17. So as to facilitate the SISP and enable to Proposal Trustee to monitor and facilitate the Proposal Proceedings and any restructuring initiatives in respect of the Companies'

⁹ Haynes Affidavit at para 51, MR, A43.

¹⁰ Haynes Affidavit at para 51, MR, A43.

business, the Companies are requesting that the authority and power of the Proposal Trustee be enhanced, as set out in the draft Initial Order.¹¹

18. The Proposal Trustee has reviewed and agreed to the permissive enhanced powers as set out in the draft Initial Order.

(iii) Authorization of the DIP Term Sheet and DIP Charge

19. As revealed in the cash flow forecast appended to the First Report, the Companies will require funding to facilitate these proceedings, to implement the SISP and to fund working capital needs during the NOI period. For these reasons, the Companies are seeking approval of the DIP Term Sheet and the DIP Charge.¹²

20. The DIP Term Sheet between BNS, as interim lender, and the Companies, as joint and several borrowers, will make up to \$2.7 million available to the Companies for use in accordance with the cash flow forecast, conditional on Court approval of the term sheet and the granting of the DIP Charge.¹³

21. The terms of the DIP Term Sheet are reasonable and in line with prevailing insolvency practices, and the proposed borrowings thereunder are appropriate in the circumstances and sufficient to fund the Companies' cash flow needs through to the end of the extension period sought on the within motion.¹⁴

¹¹ Haynes Affidavit at para 52, MR, A43.

¹² First Report at paras 65-68, D16; Appendix C, First Report, D80.

¹³ Ex. X, Haynes Affidavit, MR, A254.

¹⁴ Haynes Affidavit at para 45, MR, A40; First Report at para 89, D20.

22. The availability of financing under the DIP Term Sheet is conditional on the Court establishing a priority charge against the assets of the Companies to secure the indebtedness thereunder, ranking behind only the Administration Charge.¹⁵

23. The ability to access funding under the DIP Term Sheet is critical to the implementation of these proceedings, the SISP and the Companies' operations during the NOI period.¹⁶

(iv) Granting of the Directors' Charge

24. The Companies request the granting of a third-ranking Directors' Charge in the amount of \$150,000, to secure the Companies' obligations to indemnify their directors in respect of claims arising subsequent to the filing of the notices of intention under the BIA.

25. The Companies do not have private directors and officers insurance.¹⁷ Moreover, the Companies' directors will also play a critical role in its restructuring and have identified a need for the granting of the Directors' Charge as security for the Companies' indemnification for possible liabilities which they may incur in their capacity as directors.¹⁸

26. The granting of the Directors' Charge is in line with prevailing insolvency practices, and the proposed amount thereof is appropriate in the circumstances.¹⁹

¹⁵ Ex. X at s. 15, Haynes Affidavit, MR, A257.

¹⁶ First Report at para 89, D20.

¹⁷ Haynes Affidavit at para 47, MR, A40.

¹⁸ First Report at paras 91-92, D21.

¹⁹ First Report at para 93, D21.

(v) Granting of the Administrative Charge

27. The Companies request the granting of a first-ranking Administration Charge in the amount of \$500,000.

28. Each of the proposed beneficiaries of the Administration Charge will play a critical role in the Companies' proposal proceedings and restructuring steps and it is unlikely that they will participate in these proposal proceedings unless the Administration Charge is granted to secure their fees and disbursements.²⁰

29. The granting of the Administration Charge is in line with prevailing insolvency practices and the proposed amount thereof is appropriate in the circumstances.²¹

(vi) Extension of Time to File a Proposal

30. The stay of proceedings imposed on the filing of the Companies notices of intention to make a proposal will expire February 15, 2025.

31. In order to provide stability to the Companies' business while the Proposal Trustee implements the proposed SISP, the Companies seek an extension of time to file a proposal to and including April 1, 2025.

32. The Companies have, with the assistance of the Proposal Trustee, prepared an extended cash flow forecast which demonstrates that the Companies will have (with the DIP financing) sufficient funding to continue operating through to the end of requested extension period.²²

²⁰ Haynes Affidavit at para 46, MR, A40.

²¹ First Report at para 83, D19.

²² Appendix C, First Report, D80.

33. If the requested extension, together with subsequent extensions, are granted the Companies will not only be able to implement the SISP but will be able to explore options for making viable proposals to its creditors in conjunction therewith.²³

34. Without the extension, the Companies will not be in a position to make viable proposals to their creditors before February 15, 2025 and will likely become bankrupt, to the detriment of their creditors and stakeholders.²⁴

35. None of the Companies' creditors will be materially prejudiced if the requested extension is granted.²⁵

36. The Companies have acted, and are acting, in good faith and with due diligence.²⁶

(vii) Approval of the KERP

37. The KERP is designed to retain and incentivize certain key employees and independent contractors who are part of the management of UCG (collectively, the "**KERP Participants**"). The KERP Participants perform important management or business functions and the institutional knowledge and skills possessed by them are irreplaceable, making their continued engagement vital to UCG's operations during the proposal proceedings.²⁷

38. The aggregate amount which may become payable to the KERP Participants under the KERP is approximately \$168,000.²⁸

²³ Haynes Affidavit at paras 53-56, MR, A43-A44.

²⁴ Haynes Affidavit at paras 53-56, MR, A43-A44.

²⁵ Haynes Affidavit at para 55, MR, A44.

²⁶ Haynes Affidavit at para 53, MR, A43.

²⁷ Haynes Affidavit at paras 58-60, MR, A45.

²⁸ Haynes Affidavit at paras 58-60, MR, A45.

39. The Companies are seeking an order sealing the Confidential Appendix 1, as the KERP contains sensitive personal and compensation information, which may cause harm to the KERP Participants and could lead to disruption to the Companies if such information became public.²⁹

PART III - ISSUE

40. The issues on this motion are whether to grant the Initial Order and the SISP Order, including more particularly as follows:

- (a) Whether to administratively consolidate the Proposal Proceedings;
- (b) Whether to approve the SISP and enhanced powers of the Proposal Trustee;
- (c) Whether to authorize the DIP Term Sheet and grant the DIP Charge;
- (d) Whether to grant the Directors' Charge;
- (e) Whether to grant the Administration Charge;
- (f) Whether to grant the extension of time to file a proposal; and
- (g) Whether to approve the KERP.

PART IV - LAW AND ARGUMENT

A. Administrative Consolidation Should be Granted

41. Given that the Companies' are intrinsically linked, as described above and in paragraphs 4-15 of the affidavit of Robert Haynes sworn January 29, 2025 in support of this motion, it is appropriate to administratively consolidate the two proceedings, subject to and in accordance with the terms set out in paragraphs 4-8 of the draft Initial Order.

²⁹ Haynes Affidavit at para 60, MR, A45.

Doing so will ensure that the Proposal Proceedings are conducted expeditiously and cost-effectively.

B. The SISP Should be Approved

42. The SISP was developed with the assistance of the Proposal Trustee and with input from the Companies' shareholders and BNS.

43. The Court has the authority to approve any proposed sale under s. 65.13(1) of the BIA subject to consideration of the factors in s. 65.13(4).

44. At this time, the Companies' seek approval of the proposed SISP. The SISP should be approved for the following reasons:

- (a) the SISP is necessary to determine whether a sale or investment transaction is available that would be more advantageous to the Companies and its stakeholders compared to other alternatives. The SISP is also a condition of the DIP Term Sheet. In these circumstances, a sales process is not only reasonable but also necessary;
- (b) as set out in paragraph 10 of the draft SISP Order, the Court is not approving any bid at this time. The successful bid will require court approval, and the proposed SISP Order is expressly made without prejudice to any interested person's ability to oppose the approval of a successful bid; and
- (c) the Proposal Trustee supports the proposed SISP.

45. In *Colossus Minerals Inc. (Re)*, Wilton-Siegel J. approved a SISP in a proposal proceeding under the BIA, citing similar considerations as those noted above.³⁰

46. The enhanced authority and powers of the Proposal Trustee as set out in paragraph 14 of the draft Initial Order will ensure the impartial administration of the SISP.

³⁰ *Colossus Minerals Inc. (Re)*, 2014 ONSC 514 at [para 22](#); see also Endorsement of Justice Kaufman at Appendix A in In the Matter of the Notice of Intention to Make a Proposal of OEM Automotive Solutions Inc. et al, court file no. BK-33-03025642 ("OEM").

Moreover, the BNS and the Companies agree that granting the Proposal Trustee certain enhanced authority and powers, as set out in the draft order enclosed herewith, will assist the Proposal Trustee to more efficiently administer the SISP and monitor the Companies' business operations during the course of the Proposal Proceedings, all for the general benefit of stakeholders. The Proposal Trustee consents to and supports the enhancement of its authority as set out in the draft Initial Order.

C. The DIP Term Sheet and DIP Charge Should be Approved

47. The Court has authority under section 50.6(1) of the BIA to authorize the DIP Term Sheet and DIP Charge, subject to a consideration of the factors in section 50.6(5) of the BIA.³¹ Having regard to those factors, The DIP Term Sheet and the DIP Charge should be approved for the following reasons:

- (a) the loan under the DIP Term Sheet is set to last during the currency SISP discussed below and the applicant has sought an extension of the stay of proceedings under the BIA until April 1, 2025. The Companies' cash flow statements show that the loan under the DIP Term Sheet is necessary and sufficient to fund the Companies' cash requirements until that time;
- (b) the terms of the DIP Loan are consistent with the terms of DIP financing facilities in similar proceedings;
- (c) the Companies are facing an imminent liquidity crisis. They will need to cease operations if they does not receive funding. In those circumstances, there would be little likelihood of a viable proposal;
- (d) the loan under the DIP Term Sheet is required to permit the SISP to proceed; and
- (e) the Proposal Trustee has recommended that the Court approve the relief sought and supports the DIP Loan and DIP Charge.

³¹ BIA, ss. 50.6(1) and (5); *Colossus Minerals Inc. (Re)*, 2014 ONSC 514 at [para 3](#).

D. The Administration Charge Should be Granted

48. Section 64.2 of the BIA provides jurisdiction to grant a super-priority charge for the purpose of securing the fees and expenses of a trustee, its legal advisors and the Companies' legal advisors. The Administration Charge should be granted for the following reasons:

- (a) the proposed services by the beneficiaries of the Administration Charge are essential both to a successful proceeding under the BIA as well as for the conduct of the SISP; and
- (b) the quantum of the proposed charge is appropriate given the complexity of the applicant's business and of the SISP, both of which will require the supervision of the Proposal Trustee.

E. The Directors' Charge Should be Granted

49. The Court has authority to grant a charge under s. 64.1 of the BIA relating to indemnification of directors. The Directors' Charge should be granted for the following reasons:

- (a) There is no existing coverage for directors and officers under the existing insurance policies;
- (b) the continued involvement of the remaining directors and officers is critical to a successful SISP or any proposal under the BIA; and
- (c) the Proposal Trustee has stated that the D&O Charge is reasonable and supports the Directors' Charge.

F. Extension of Time for the Companies to File a Proposal Should be Granted

50. The Court has authority to grant such relief under section 50.4(9) of the BIA. The Companies' request for an extension of the stay until April 1, 2025 to file a proposal should be granted for the following reasons:

- (a) the applicant is acting in good faith and with due diligence, with a view to maximizing value for the stakeholders, in seeking authorization for the SISP;

- (b) the extension of the stay is necessary for the Companies to undertake the SISP;
- (c) There is no material prejudice likely to result to creditors from the extension of the stay;
- (d) The Companies' cash flows, with the support of the loan under the DIP Term Sheet, will enable the Companies to meet their financial obligations; and
- (e) the Proposal Trustee supports the requested relief.

G. The KERP Should be Approved and the Unredacted KERP Sealed

51. KERPs have been approved time and time again in proposal proceedings under the BIA.³² The KERP should be approved for the following reasons:

- (a) the Proposal Trustee supports the granting of the KERP and the KERP Charge;
- (b) absent approval of the KERP and the KERP Charge, the key employees who are the subject of the KERP will have no incentive to remain with the Companies throughout the SISP and are therefore likely to pursue other employment opportunities;
- (c) the employees who are the subject of the KERP are critical to the implementation of the SISP and a completion of a successful sale or investment transaction; and
- (d) the Proposal Trustee is of the view that the KERP and the quantum of the proposed retention payments is reasonable.

52. The sealing of the unredacted KERP satisfies the *Sherman Estate* test, which has been applied repeatedly by the courts in the insolvency context to authorize the sealing of confidential documents, including KERPs.

53. It would be detrimental to the operations of UCG to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other

³² See *In the Matter of The Body Shop Canada Limited*, 2024 ONSC 3882 [para 24](#); *Danier Leather Inc. (Re)*, 2016 ONSC 1044 at [paras 72-78](#).

employees requesting such payments or feeling underappreciated. Further, the KERP evidence involves matters of a private, personal nature.

PART V - ORDER REQUESTED

54. For the reasons set out above, the Companies respectfully request that the Court grant the Initial Order and the SISP Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of February, 2025.

Per: 

John Leslie and David Seifer

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Colossus Minerals Inc. (Re)*, 2014 ONSC 514
2. Endorsement of Justice Kaufman at Appendix A in *In the Matter of the Notice of Intention to Make a Proposal of OEM Automotive Solutions Inc. et al.*, Court File No. BK-33-03025642
3. *In the Matter of The Body Shop Canada Limited*, 2024 ONSC 3882
4. *Danier Leather Inc. (Re)*, 2016 ONSC 1044
5. *Sherman Estate v. Donovan*, 2021 SCC 25

**SCHEDULE “B”
RELEVANT STATUTES**

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Extension of time for filing proposal

50.4 (9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) 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 debtor’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 debtor an amount approved by the court as being required by the debtor, having regard to the debtor’s cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

Factors to be considered

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

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

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

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

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

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

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

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

Security or charge relating to director's indemnification

64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Priority

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

Restriction — indemnification insurance

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

Negligence, misconduct or fault

64.1 (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

64.2 (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 person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
- (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; 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 the effective participation of that person in proceedings under this Division.

Priority

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

Individual

64.2 (3) In the case of an individual,

- (a) the court may not make the order unless the individual is carrying on a business; and
- (b) only property acquired for or used in relation to the business may be subject to a security or charge.

Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or

provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Factors to be considered

65.13 (4) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

APPENDIX A

THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C., 1985, C. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF OEM AUTOMOTIVE SOLUTIONS INC., OEM AUTOMOTIVE CORNWALL INC. AND OEM AUTOMOTIVE HOLDINGS INC.

Court File No. BK-33-03025642
Bankruptcy Estate File No. 33-3025642

January 17, 2024

ENDORSEMENT

On December 22, 2023, OEM Automotive Solutions Inc., OEM Automotive Cornwall Inc., and OEM Automotive Holdings Inc. (collectively “the Companies”) initiated proceedings by filing a notice of intention (NOI) to file a proposal under section 50.4 of the *Bankruptcy and Insolvency Act*. Operating a Volkswagen dealership in Cornwall, ON, the Companies faced financial strain in late 2023 due to a shareholder dispute, resulting in liquidity constraints. BMO, the primary creditor, formally demanded repayment on December 13, 2023. Unable to settle their debts, the Companies deemed these proceedings as the optimal means to preserve and realize value for all stakeholders. BMO proposed to act as the interim lender, offering additional funds to sustain the Companies' operations during the restructuring.

The Companies seek relief under six different headings, each warranting individual consideration. Submissions were made by BMO, the proposal trustee, and the companies' supportive shareholders, without opposition from any creditors.

1. Administrative consolidation of the Companies' NOI proceedings under a single title of proceeding.

The court acknowledges the high integration of the companies' operations and concurs that consolidating the proceedings secures the most expeditious and cost-effective determination of the matter on its merits.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY & INSOLVENCY)**

Proceedings commenced at Ottawa

**MOTION RECORD OF
OEM AUTOMOTIVE CORNWALL INC.,
OEM AUTOMOTIVE SOLUTIONS INC.,
AND OEM AUTOMOTIVE HOLDINGS INC.
(returnable January 17, 2024 @ 2:00pm)**

LOOPSTRA NIXON LLP
130 Adelaide Street West – Suite 2800
Toronto, ON M5H 3P5

R. Graham Phoenix / Shahrzad Hamraz
Tel: (416) 748 4776 / (416) 748 5116
Fax: (416) 746 8319
Email: gphoenix@LN.law / shamraz@LN.law

Lawyers for OEM Automotive Cornwall Inc. OEM Automotive Solutions Inc., and OEM Automotive Holdings Inc.

ENDORSEMENT (continued) page 2/3

2. Approval of the sale and investment solicitation process (SISP).

A SISP, developed with the assistance of the proposal trustee, BDO Canada, and with input from the shareholders and BMO, envisages engaging a sales agent for identification and solicitation of potential buyers. The Companies also seek approval to enhance the authority of the proposal trustee, arguing that such powers are necessary given potential bids from both shareholders. Granting enhanced powers, they contend, ensures impartial administration of the SISP and aims to maximize value for all stakeholders. The court deems the SISP necessary to evaluate the advantages of selling the business as a going concern compared to other options and hereby approves it.

3. Approval of interim financing term sheet and granting of interim financing charge.

BMO has offered a debtor-in-possession loan of \$500,000 to the Companies, and they seek approval of the interim financing term sheet. In addition, an interim financing charge is requested, ranking ahead of all other claims except the administration charge, pursuant to section 50.6 of the BIA. The court, considering section 50.6(5) factors, deems the charge necessary for financing the SISP and sustaining business operations during restructuring.

4. Administrative charge.

A \$400,000 administrative charge is sought to secure professionals' fees and disbursements engaged by the proposal trustee during proceedings. Section 64.2 of the BIA provides jurisdiction for such a charge. The court agrees that these professionals are essential to successful restructuring, and the charge ensures their participation.

5. Directors' charge.

A \$100,000 director's charge is sought to secure indemnification for possible liabilities incurred by directors and officers under section 64.1 of the BIA. The court agrees that directors' involvement is critical, and the charge is deemed fair and reasonable.

6. Extension of time for the companies to file a proposal.

The Companies request an extension until March 5, 2024, to file a proposal, with the current stay of proceedings expiring on January 20, 2024.

ENDORSEMENT (continued) page 3/3

Section 50.4(9) of the BIA allows the court to extend this time. The court deems the extension necessary for the Companies to execute the SISP and make a viable proposal, and considers that the extension would not cause material prejudice to any creditors.

Based on the foregoing reasons, the Companies' motion is granted.



Justice A. Kaufman

**IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C., 1985, C. B-3, AS AMENDED
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**

Court File No. 32-3175819
Estate No. 32-3175819
Court No. BK-25-03175820-0032

**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**

Court File No. 32-3175820
Estate No. 32-3175820
Court No. BK-25-03175819-0032

**ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)**

PROCEEDING COMMENCED AT
HAMILTON

**FACTUM OF UCG LAND INC. AND UPPER CANADA
GROWERS LTD.**

DICKINSON WRIGHT LLP
Barristers & Solicitors
199 Bay Street, Suite 2200
Toronto, ON M5L 1G4

JOHN D. LESLIE (29956P)
Tel: (416) 646-3801
Email: jleslie@dickinsonwright.com

DAVID Z. SEIFER (77474F)
Tel: (416) 646-6867
Email: dseifer@dickinsonwright.com

Lawyers for Upper Canada Growers Ltd. and UCG
Land Inc.