

ONTARIO  
SUPERIOR COURT OF JUSTICE  
IN BANKRUPTCY & INSOLVENCY

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

Court File No. BK-25-03175820-0032  
Estate No. 32-3175820

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. BK-25-03175819-0032  
Estate No. 32-3175819

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

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FACTUM OF BDO CANADA LIMITED,  
IN ITS CAPACITY AS PROPOSAL TRUSTEE

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May 7, 2025

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## PART I – OVERVIEW OF FACTS

1. On January 17, 2025, Upper Canada Growers Ltd. and UCG Land Inc. (collectively, the “**Companies**”) filed Notices of Intention to Make a Proposal (the “**NOI Proceedings**”) pursuant to Subsection 50.4(6) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 (the “**BIA**”). BDO Canada Limited (“**BDO**”) was appointed as the Licensed Insolvency Trustee under the NOI Filings (the “**Proposal Trustee**”).<sup>1</sup>
2. On the motion of the Companies, on February 6, 2025, the Court issued an order for certain first-day relief, including:
  - (a) administratively consolidating the two NOI proceedings, so that they could be administered jointly;
  - (b) approving a Sale and Investment Solicitation Process (the “**SISP**”), to be administered by the Proposal Trustee, and enhancing certain powers of the Proposal Trustee to facilitate the administration of the SISP; and
  - (c) approving the interim financing funded by the Companies’ secured lender, The Bank of Nova Scotia (“**BNS**”).<sup>2</sup>
3. The Proposal Trustee administered the SISP in accordance with the various Court-approved milestones.
4. The SISP opportunity was advertised to 174 companies, consisting of 68 strategic and 106 financial parties which the Proposal Trustee, in consultation with Management, identified as being

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<sup>1</sup> Third Report of BDO Canada Limited, in its capacity as Proposal Trustee of Upper Canada Growers Ltd. and UCG Land Inc., dated May 6, 2025 at [para 1](#) [“**Third Report**”].

<sup>2</sup> Third Report at [para 3](#).

possibly interested in the SISP.<sup>3</sup> Of those potential bidders, only five submitted non-binding expressions of interest.<sup>4</sup>

5. The Proposal Trustee, with input from BNS, evaluated the non-binding expressions of interest and selected three of the bidders to proceed to the next phase of the SISP, enabling them to submit binding letters of intent. All three qualified bidders exited the SISP prior to the bid deadline.<sup>5</sup>

6. The Proposal Trustee is of the view that re-running the SISP would be costly and unlikely to yield any better result than the SISP that was already administered.<sup>6</sup>

7. The stay of proceedings is set to expire on May 16, 2025.<sup>7</sup>

8. The Proposal Trustee does not expect the Companies to be in a position to file a proposal with the official receiver for the benefit of creditors.<sup>8</sup>

9. Accordingly, the Proposal Trustee seeks an order, *inter alia*:

- (a) discharging the Proposal Trustee upon the Proposal Trustee filing a Discharge Certificate certifying that the Proposal Trustee has completed the Remaining Activities (as defined in the Third Report); and
- (b) authorizing BDO to act as trustee-in-bankruptcy of the Companies upon the deemed bankruptcies of the Companies pursuant to the BIA.

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<sup>3</sup> Third Report at [para 23](#).

<sup>4</sup> Third Report at [para 24](#).

<sup>5</sup> Third Report at [para 24](#).

<sup>6</sup> Third Report at [para 26](#).

<sup>7</sup> Third Report at [para 6](#).

<sup>8</sup> Third Report at [para 41](#).

## PART II – ISSUES

10. The legal issues to be determined on this Motion are:

- (a) whether to terminate the NOI Proceedings and discharge the Proposal Trustee;
- (b) whether to approve the activities and fees of the Proposal Trustee and its independent counsel, Aird & Berlis LLP (“A&B”);
- (c) whether to seal the Confidential Supplement until further Order of the Court; and
- (d) authorizing and directing the Bankruptcy Trustee to administer the bankruptcies of the Companies on a consolidated basis.

## PART III – LAW & LEGAL AUTHORITIES

### A. The NOI Proceedings should be terminated:

11. Proposal proceedings may be terminated upon the application of the trustee where an insolvent person will not likely be able to make a viable proposal before the expiration of the period in question or where an insolvent person will not likely be able to make a proposal that will be accepted by its creditors.<sup>9</sup>

12. A controlling creditor's position that it will not support a proposal is sufficient to justify termination of the proposal proceedings, even if no proposal has been put forward:

It seems to me that [s. 50.4(11)(c)] deals specifically with the situation where there has been no proposal tabled. It provides that there is no absolute requirement that the creditors have to wait to see what the proposal is before they can indicate they will vote it down. I do not see anything in BIA which would affect a creditor (or group of creditors) with a veto position from reaching the conclusion that nothing the insolvent debtor does will persuade the creditor to vote in favour of whatever proposal may be forthcoming. I think that this view is strengthened when one considers that the court need only be satisfied that "the insolvent person will not likely be able to make a proposal, before the expiration of the period in

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<sup>9</sup> *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, [s. 50.4\(11\)](#).

question, that will be accepted by the creditors ..." (emphasis added). This implies that there need not be a certainty of turndown. The act of making the proposal is one that is still yet to come. I am of the view that Skyview's position as indicated above is satisfactory proof that Cumberland will not likely be able to make a proposal that will be accepted by the creditors of Cumberland.<sup>10</sup>

13. The Companies filed NOIs on January 17, 2025 and were granted an initial stay period up to and including April 1, 2025 to put forward a viable proposal. The Companies subsequently received an extension of the initial stay period, which is currently set to expire on May 16, 2025.

14. The extension was granted in order to facilitate the SISP, which was believed may result in a viable proposal. Given the results of the SISP, and the lack of ongoing interim financing, the Proposal Trustee is of the view that the Companies no longer have the ability to make a viable proposal within the NOI Proceedings.

15. The NOI Proceedings no longer serve a useful purpose as the Companies no longer require the stay of proceedings in order to formulate a proposal to their creditors. Accordingly, BNS seeks the appointment of BDO as receiver of the assets and undertakings of the Companies. There is no adequate reason for delaying the enforcement of BNS' legitimate contractual right.

#### **B. The Fees and Activities of the Proposal Trustee and its Counsel Should Be Approved:**

16. Pursuant to section 47.2 of the BIA, the Court has authority to make any order respecting fees and disbursements of the Proposal Trustee.<sup>11</sup>

17. The approval of a court officer's activities and reports is relief that is "routinely granted".<sup>12</sup> The Proposal Trustee seeks this Court's approval of its activities and conduct, as set out in the Third Report.

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<sup>10</sup> *Cumberland Trading Inc., Re* (1994), 1994 CarswellOnt 255 at [para 9](#) (ONSC Comm List).

<sup>11</sup> *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, [s. 47.2](#).

<sup>12</sup> *Target Canada Co. (Re)*, [2015 ONSC 7574](#) at [paras 2](#) and [23](#).

18. The activities of the Proposal Trustee described in the Third Report were all necessary and undertaken in good faith pursuant to the Proposal Trustee's duties and powers, and were, in each case, in the best interests of the Companies and their stakeholders generally.

19. The approval language in the proposed draft Order makes clear that the approval is only for the Proposal Trustee personally and is not intended to create rights or impose obligations for any other party.

20. In considering whether to approve fees and disbursements, the Court has regard to the "overriding principle of reasonableness", focusing on the overall value contributed by the Proposal Trustee and its counsel.<sup>13</sup> The Court does not engage in a docket-by-docket or line-by-line assessment of the accounts as minute details of each element of a professional's services may not be instructive when looked at in isolation.<sup>14</sup>

21. The Proposal Trustee and its counsel have charged standard hourly rates that are consistent with market rates for insolvency services of this nature rendered by other firms in Toronto and the Greater Toronto and Hamilton Area. Those rates have been approved by the Court in numerous other matters.

### **C. The Confidential Supplement should be sealed:**

22. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order.<sup>15</sup> The test for a sealing order was established by the Supreme Court in *Sierra Club of Canada v. Canada (Minister of Finance)*,<sup>16</sup> and subsequently recast in *Sherman Estate v Donovan*.<sup>17</sup> The test requires the court to consider whether:

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<sup>13</sup> *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#) at paras 44-45.

<sup>14</sup> *Nortel Networks Inc.*, [2022 ONSC 6680](#) at para 10.

<sup>15</sup> *Courts of Justice Act*, [R.S.O. 1990, c. C.43, s. 137\(2\)](#).

<sup>16</sup> *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#).

<sup>17</sup> *Sherman Estate v. Donovan*, [2021 SCC 25](#).

- (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 reasonable alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.<sup>18</sup>

23. All three elements are prerequisites for a sealing order to be granted.<sup>19</sup>

24. At the second step of the test, courts must consider whether any alternative measures, short of a sealing order, can reasonably protect the interest at stake and, if not, how the court may limit the scope of the sealing order to only the specific information that is necessary to be sealed.<sup>20</sup>

25. The impact on public interest in the open-court system and public confidence in the administration of justice must be weighed against the commercial benefits of sealing the information.<sup>21</sup> Where the sealing order is restricted to a few technical documents that the public is unlikely to be interested in, the negative effects regarding the open-court system will be reduced.<sup>22</sup>

26. It is common practice in the insolvency context for information in relation to the sale of the assets of an insolvent corporation to be kept confidential until after the sale is completed pursuant to a Court order. In *Look Communications Inc v Look Mobile Corporation*,<sup>23</sup> Justice Newbould explained the reasons for such confidentiality:

It is common when assets are being sold pursuant to a court process to seal the Monitor's report disclosing all of the various bids in case a further bidding process is required if the transaction being approved falls through. Invariably, no one comes back asking that the sealing order be set aside. That is because ordinarily all of the assets that were bid on during the court sale process end up being sold and approved by court order, and so long

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<sup>18</sup> *Sherman Estate v. Donovan*, [2021 SCC 25](#) at para [38](#).

<sup>19</sup> *Sherman Estate v. Donovan*, [2021 SCC 25](#) at para [38](#).

<sup>20</sup> *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#) at para [62](#).

<sup>21</sup> *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#) at paras [74-76](#).

<sup>22</sup> *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#) at para [78](#).

<sup>23</sup> *Look Communications Inc. v. Look Mobile Corporation* (2009), [2009 CanLII 71005](#) (Ont Sup Ct J).

as the sale transaction or transactions closed, no one has any further interest in the information. In 8857574 Ontario Inc. v. Pizza Pizza Ltd, (1994), 23 B.L.R. (2nd) 239, Farley J. discussed the fact that valuations submitted by a Receiver for the purpose of obtaining court approval are normally sealed. He pointed out that the purpose of that was to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources. In that context, he stated that he thought the most appropriate sealing order in a court approval sale situation would be that the supporting valuation materials remain sealed until such time as the sale transaction had closed.<sup>24</sup>

27. The Proposal Trustee seeks a sealing order in respect of the Confidential Supplement, which contains the summary of expressions of interest received during the SISP, the unredacted expressions of interest, and the unredacted sale proposals from four real estate agencies.

28. The Confidential Supplement contain commercially sensitive information that, if revealed to the public, could have a material and negative impact on any future efforts to market and sell the assets and property of the Companies in a manner that maximizes realization for stakeholders.

29. The proposed sealing order is the least restrictive and prejudicial alternative to prevent the dissemination of commercially sensitive information. There is no reasonable alternative to the sealing order that would adequately protect the confidentiality of the information that is sought to be kept confidential.

30. Overall, the salutary effects of the sealing order, which will maintain confidentiality over a party's legitimate commercial interests, outweigh the deleterious effects of restricting the accessibility of court proceedings.

31. The Proposal Trustee submits that the sealing order is appropriate in the circumstances and ought to be granted.

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<sup>24</sup> *Look Communications Inc. v. Look Mobile Corporation* (2009), [2009 CanLII 71005](#) at [para 17](#) (Ont Sup Ct J).

**D. Administrative Consolidation Should be Granted:**

32. It is a generally accepted principle of this Court that the litigation process for bankruptcy proceedings should “secure the just, most expeditious and least expensive determination of every proceeding on its merits”.<sup>25</sup> Procedural consolidation is a practical application of this general principle aimed at preventing a multiplicity of proceedings for related proposals (without substantively merging the bankruptcy estates), thus avoiding unnecessary costs and administrative burden.<sup>26</sup>

33. Given that the Companies’ are intrinsically linked, it is appropriate to administratively consolidate the two bankruptcy proceedings. Doing so will ensure that the bankruptcy proceedings are conducted expeditiously and cost-effectively.

34. There is no benefit to maintaining separate court proceedings and no prejudice to procedurally consolidating the bankruptcy proceedings.

**PART IV – RELIEF SOUGHT**

35. In light of the foregoing, the Proposal Trustee respectfully requests that this Court grant the aforementioned relief in the form of the draft Order appended at Tab 3 of the Proposal Trustee’s Motion Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 6<sup>th</sup> day of May 2025.

I certify the authenticity of every authority cited in this Factum.

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**AIRD & BERLIS LLP**

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<sup>25</sup> *Electro Sonic Inc. (Re)*, [2014 ONSC 942](#) at [para 4](#).

<sup>26</sup> *Mustang GP Ltd. (Re)*, [2015 ONSC 6562](#) at [para 25](#).

**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#)
2. *Electro Sonic Inc. (Re)*, [2014 ONSC 942](#)
3. *Look Communications Inc. v. Look Mobile Corporation* (2009), [2009 CanLII 71005](#) (Ont Sup Ct J)
4. *Mustang GP Ltd. (Re)*, [2015 ONSC 6562](#)
5. *Nortel Networks Inc.*, [2022 ONSC 6680](#)
6. *Sherman Estate v. Donovan*, [2021 SCC 25](#)
7. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#)
8. *Target Canada Co. (Re)*, [2015 ONSC 7574](#)
9. *Cumberland Trading Inc., Re* (1994), [1994 CarswellOnt 255](#) (ONSC Comm List).

**SCHEDULE “B”  
RELEVANT STATUTES**

**Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3)**

**Orders respecting fees and expenses**

**47.2 (1)** If an appointment of an interim receiver is made under section 47 or 47.1, the court may make any order respecting the payment of fees and disbursements of the interim receiver that it considers proper, including an order giving the interim receiver security, ranking ahead of any or all secured creditors, over any or all of the assets of the debtor in respect of the interim receiver's claim for fees or disbursements, but the court shall not make such an order unless it is satisfied that all secured creditors who would be materially affected by the order were given reasonable advance notification and an opportunity to make representations to the court.

**Court may terminate period for making proposal**

**50.4 (11)** The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

- (a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
- (b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
- (c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
- (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

**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

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Proceedings commenced at Hamilton

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