Estate No. 31-2693094

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF 33 LAIRD INC. AND 33 LAIRD GP INC., CORPORATIONS INCORPORATED UNDER THE ONTARIO *BUSINESS CORPORATIONS ACT*, AND 33 LAIRD LIMITED PARTNERSHIP, A LIMITED PARTNERSHIP FORMED UNDER THE ONTARIO *LIMITED PARTNERSHIPS ACT*

FACTUM OF 33 LAIRD INC., 33 LAIRD GP INC., AND 33 LAIRD LIMITED PARNTERSHIP

(extension of time to file a proposal, sealing orders)
(motion returnable March 26, 2021)

March 21, 2021

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I. NATURE OF THIS MOTION

1. This is a motion by 33 Laird Inc., 33 Laird GP Inc., and 33 Laird Limited Partnership Inc. (together, the "**Laird Entities**") to extend their notice of intention ("**NOI**") proceedings.

II. OVERVIEW

2. This is the third NOI extension motion in this proceeding. The sought extension is to bring to completion the ongoing sale process conducted in respect of the Property (defined below) by Jones Lang Lasalle Real Estate Services Inc. ("**JLL**"). MNP Ltd. in its capacity as proposal trustee (the "**Proposal Trustee**") supports the motion.

3. The sale process was approved by this court on February 10, 2021, along with an extension of time to file a proposal, despite the objections of DUCA Financial Services Credit Union Ltd. ("**DUCA**"), the first ranking secured creditor. DUCA advises that it renews its objections on this motion on what appear to be the same grounds as were argued before the Court on February 10.

4. DUCA's arguments about having an effective veto on the proposal proceedings because of their position as ranking creditor, or that any sale of the Laird Entities' assets should not be done through such proceedings, are not supported by the scheme of the *Bankruptcy and Insolvency Act* (the "**BIA**") nor by the case law.

5. There is no reason to doubt of the integrity and quality of the ongoing sale process, nor any reason to question the Laird Entities' good faith or due diligence. Since the February 10 approval order, the Property has been listed on MLS and as of March 15, there were 21 interested parties who signed confidentiality agreements to review the data room materials. JLL reports substantial market engagement.

6. In accordance with the February 10 approval order, the selection of a successful bid is expected in mid April. The extension of time and completion of the sale process is in the best interest of stakeholders. In contrast, a bankruptcy and halt to the sale process has an obvious detrimental impact on all stakeholders, including DUCA, by prolonging a sale and increasing professional costs to complete one. The extension should be granted.

III. FACTS

A. Background

7. The Laird Entities were set up into a conventional limited partnership and nominee structure to pursue a real estate development project at 33 Laird Drive in Toronto (the "**Project**").[1]

8. At the time of the filing of the NOIs on November 28, the Project was at an early stage of construction. It was insolvent for reasons including the non-extension of secured loans facilities with DUCA and Centurion Asset Management Inc. notably premised on cost overruns and the impact of COVID-19 on costs, timelines and viability of proposed tenants.[2]

9. Given the limited partnership and nominee structure, the debts of the Laird Entities are essentially the same. The Proposal Trustee acts in each NOI proceeding, which were administratively consolidated in this court file by order of this court dated December 16, 2020.[3]

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[1] Affidavit of Jason L.S. Birnboim sworn March 20, 2021 (the "**Birnboim March Affidavit**"), tab 2 (page 8) of the Laird Entities' motion record returnable March 26, 2021 (the "**MR**"), para. 4.
[2] Affidavit of Jason L. S. Birnboim sworn December 10, 2020, (the "**Birnboim December Affidavit**"), tab 2A (page 17) of the MR, paras. 17-19.
[3] Birnboim March Affidavit, tab 2 (page 8) of the MR, para. 5; order of Conway J. dated December 16, 2020, tab 2B (page 26) of the MR.

10. The main asset of the Project is the real property and unfinished project at 33 Laird Drive (the "**Property**"). The planned development and existing approvals also represent possible value to third parties, as do leases or potential leases with proposed commercial tenants.[4]

11. The mortgage held by DUCA, in which Centurion is a participant, is the first ranking mortgage on the Property. DUCA also has personal guarantees from the principals of the Laird Entities for a combined amount of $10,500,00.[5]

B. Restructuring approach: sale process

12. A sale process was considered from the outset of these proceedings as a likely restructuring option.[6] In early February, the Laird Entities, in consultation with the Proposal Trustee, legal counsel and key stakeholders, concluded that a listing and sale process was necessary to realize on the value of the Project and hopefully allow a viable proposal to creditors. On February 10, 2021, this court granted the Laird Entities' motion for a listing and sale process to be conducted by JLL in respect of the Property. [7]

C. Activities since last extension and status of sale process

13. The Laird Entities' activities since the last extension of the NOI period are more fully set out in the Birnboim March Affidavit.[8]

14. Notably, the Laird Entities have answered all inquiries made by DUCA, and have proactively provided DUCA with information including with respect to the listing

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[4] Birnboim March Affidavit, tab 2 (page 8) of the MR, para. 7.
[5] Birnboim March Affidavit, tab 2 (page 8) of the MR, para. 31.
[6] See the Birnboim December Affidavit, tab 2A (page 17) of the MR, paras. 20-26.
[7] Birnboim March Affidavit, tab 2 (page 8) of the MR, paras. 8, 9; order of Cavanagh J. dated February 10, 2021, tab 2D (page 44) of the MR.
[8] Birnboim March Affidavit, tab 2 (page 8) of the MR, para. 10.

proposals, the sale process, the Possible Transaction, ongoing restructuring efforts generally, and attendant matters.[9]

15. The Laird Entities' Laird Entities and the Proposal Trustee have also been involved in the sale process being conducted by JLL, the status of which is set out in detail in the Birnboim March Affidavit. In short, since the February 10 approval order, the Property has been listed on MLS, and JLL reported that as of March 15 there were 21 interested parties who have signed confidentiality agreements to review the data room materials. According to JLL, the market response is positive and reflective of the Property's value and potential.[10]

16. The upcoming material steps in the sale process, in accordance with the February 10 approval order, are as follows:

    a. week of March 22: re-launch of the offering to the JLL client database.

    b. week of March 22 and March 29: Globe & Mail advertisements.

    c. April 14, 2pm: deadline for reception of letters of intent (first bid deadline).

    d. Approximately one week following the first bid deadline (April 21): deadline for reception of draft agreements of purchase and sale (second bid deadline).

    e. Five days following the second bid deadline (April 26): final negotiations and selection of successful bid, as the case may be.[11]

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[9] Birnboim March Affidavit, tab 2 (page 8) of the MR, paras. 10, 28-29.
[10] Birnboim March Affidavit, tab 2 (page 8) of the MR, paras. 11-16.
[11] Birnboim March Affidavit, tab 2 (page 8) of the MR, para. 17.

IV. ISSUES AND LAW

17. The issues are whether the court should **(A)** extend the time for the Laird Entities to file a proposal, **(B)** make the sealing orders sought, and **(C)** direct that DUCA be disentitled from seeking its costs on this motion under the security it holds.

A. Extension of time

i. The statutory requirements

18. BIA s. 50.4(9) sets out the following mandatory criteria for an extension of the time to file a proposal:

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

19. The courts' interpretation of each of the criteria is explored below. Their satisfaction in the present case is then discussed.

ii. The "good faith and due diligence" requirement

20. Good faith is a duty that must govern the behavior of "any interested person in any proceedings under the [BIA]."[12] In the context of NOI extensions, the cases confirm that a demonstration of bad faith must be grounded on solid evidence and go beyond mere allegations or suspicions, for instance.[13] Moreover, the caselaw is clear that "it is the

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[12] BIA, s. 4.2; see also the parallel provision in s. 18.6 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.
[13] *Quality Meat Packers Limited (Re)*, 2014 ONSC 2296 ("***Quality Meat***"), para. 17.

conduct of [the debtor company] following the notice of intention… rather than its conduct before then, that is to be considered."[14]

iii. The "likelihood of a viable proposal" criterion

21. Three overarching principles govern how this component of the statutory test is applied: **(i)** an objective standard, **(ii)** the rehabilitative objective of the BIA's NOI process, and **(iii)** the interests of all stakeholders.

22. The "we will never support a proposal" or "veto" type of argument being advanced by DUCA here has been made several times and rejected by courts across the country.

23. *Cantrail*[15] is a landmark case from 2005 that is often referred to with approval by the insolvency courts throughout Canada. There, the debtor moved for an extension of time to file a proposal, and the secured creditor, Volvo, opposed the extension and cross-motioned under s. 50.4(11) for termination of the NOI proceeding. The court rejected the cross-motion and extended the time. On the correct approach to s. 50.4(11), the BC Supreme Court said:

> [11] I am satisfied on reading the case law provided by counsel that in considering this type of application an objective standard must be applied. In other words, what would a reasonable person or creditor do in the circumstances. The case of *Re: N.T.W. Management Group Ltd.*,[16] a decision of the Ontario Court of Justice, is authority for the proposition that the intent of the Act and these specific sections is rehabilitation, and that matters considered under these sections are to be judged on a rehabilitation basis rather than on a liquidation basis.
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> [12] I am also satisfied that it would be important in considering the various applications before me to take a broad approach and look at a number of interested and potentially affected parties, including employees, unsecured creditors, as well as the secured creditor that is present before the Court.

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[14] *Andover Mining Corp. (Re)*, 2013 BCSC 1833 ("***Andover***"), para. 64 (emphasis added), citing *N.T.W. Management Group Ltd., Re*, [1993] O.J. No. 621 (ON SC) ("***NTW***").
[15] *In the Matter of the Proposal of Cantrail Coach Lines Ltd.*, 2005 BCSC 351 ("***Cantrail***").
[16] *NTW*, cited above, note 10.

24. That case included extensive commentary on the merit of a ranking creditor's veto argument. In *Cantrail*, Volvo as the secured creditor stated it had lost all confidence in the debtor company and would vote against any proposal.[17] The court did not consider the position of a secured or veto creditor to be determinative in appreciating the likelihood of a viable proposal, holding:

> [14] If that was simply the test to be applied then one wonders why Parliament would have gone to the trouble, and creativity perhaps, of setting out proposals as an option in the *Bankruptcy and Insolvency Act*. Secured creditors or major creditors not uncommonly, in light of general security agreements and other type of security available, are in a position to claim to be over 50 percent of the indebtedness. Thus they will be the determining creditor or, I should say, are likely to be the determining creditor in any vote on any proposal.
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> [15] If a creditor with over 50 percent of the indebtedness could take the position that it would vote no, prior to seeing any proposal, and thus terminate all efforts under the proposal provisions, one wonders why Parliament would not simply set up the legislation that way. One wonders what the point would be of the proposal sections in the *Bankruptcy and Insolvency Act* if that were the case.
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> [16] If the test to be applied was simply one of majority rules then in my view Parliament would not have set the test as it did in s. 50.4(9). They would simply set a test that if 50 percent of the creditors object at any point the proposal would be over. That is not the test that has been set.
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> [Emphasis added.]

25. In the earlier 1994 case of *Cumberland*,[18] a different conclusion about such veto-type arguments was reached. The *Cumberland* approach has since been rejected, notably in the 2013 case of *Andover*.[19] There, the BC Supreme Court considered both *Cumberland* and *Cantrail* as polarly opposed precedents, and expressly preferred *Cantrail*, both in that it presented a more satisfactory analysis that avoided the conflation of the s. 50.4(9) and

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[17] *Cantrail*, para. 13.
[18] *Cumberland Trading Inc., Re*, 1994 CanLII 7458 (ON SC).
[19] *Andover*, cited above, note 13.

50.4(11) reliefs,[20] and in that the objective of the BIA NOI process must be considered to be "rehabilitation rather than liquidation", in the interest of all stakeholders.[21]

26. This last year, in *Nautican*,[22] the Supreme Court of Prince Edward Island extended the time to file a proposal despite a veto creditor's opposition, firmly reaffirming the correctness of an objective standard over a creditor's veto argument:

> [16] I refer again to *Convergix Inc., Re* wherein Glennie J. states as follows: "The test for whether insolvent persons would likely be able to make a viable proposal if granted an extension is whether the insolvent person would likely (as opposed to certainly) be able to present a proposal that seems reasonable on its face to a reasonable creditor. The test is not whether or not a specific creditor would be prepared to support the proposal. In *Re Baldwin Valley Investors Inc.*, Justice Farley was of the opinion that "viable" means reasonable on its face to a reasonable creditor and that "likely" does not require certainty but means "might well happen" and "probable" "to be reasonably expected". See also *Scotia Rainbow Inc. v. Bank of Montreal*.
>
> [17] Clearly, this creates an objective standard for the court to consider, which is not tied to a specific creditor and particularly in this case, the creditor opposing the request for an extension.
>
> [18] The test requires me to consider what a reasonable creditor might expect to happen or what might reasonably be expected to occur. This test requires a dispassionate evaluation, not the position of an advocate of a specific creditor.
>
> [Emphasis added.]

27. In *Quality Meat*,[23] D M. Brown J. (as he then was) dismissed a motion to terminate an NOI under s. 50.4(11). In assessing statements that the moving party would never support a proposal, the Court noted that:

> "It is conceivable that some of the unsecured creditors who now are taking an 'all or nothing' approach to the companies' plans might well modify their views once they actually see the details of a plan."[24]

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[20] *Andover*, paras. 54-62.
[21] *Andover*, para. 77.
[22] *Nautican v Dumont*, 2020 PESC 15, paras. 11, 12.
[23] *Quality Meat*, cited above, note 12.
[24] *Quality Meat*, para. 41.

28. The rationale of an incremental approach as illustrated by the case law is there is always a chance that the situation may evolve between the time a creditor takes a "hard ball" position and the time when the proposal is made, and a vote held. A striking example of this is the case of *Kocken*.[25]

29. In *Kocken*, the Nova Scotia Supreme Court granted an extension of time to file a proposal despite the objection of the major secured creditor, Bank of Montreal. At that time, BMO said it had "lost all confidence and trust in current management and ownership", that it would "not engage in negotiations" and that "any proposal is doomed to fail".[26] The Court rejected that argument, holding:

> [21] Such statements by a secured creditor with a veto are not determinative. They are forecasts rather than evidence of present fact. We must not assume intransigence in a world in which misunderstandings occur, they are sometimes corrected, and trust is sometimes restored in whole or in part. Nor may we, in this case, assume that the proposed terms will require a restoration of confidence or trust or a continuing relationship with the Bank of Montreal.
>
> [22] I have some difficulty with the decision of Justice Penny in *NS United Kaiun Kaisha Ltd. v. Cogent Fibre Inc*. 2015 ONSC 5139, which suggests that s. 50.4(9)(b) requires at least a hint of what the insolvent will offer to the secured creditor and what the proposal will contain. It is in the nature of proposals that they are developed and, if an extension is needed, the proposal is developing.
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> [23] The requirement is "would likely be able to make a viable proposal", not "has settled on terms likely to be accepted". I think that is the point made by Justice Goodfellow in *H & H Fisheries Ltd. (Re)*, 2005 NSSC 346, when he says that s. 50.4(9)(b) means "that a reasonable level of effort dictated by the circumstances must have been made that gives some indication of the likelihood a viable proposal will be advanced within the time frame of the extension applied for."
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> [24] The affidavits prove the cash flow projections, the preparation of other documents or reports, arrangements for appraisals, the trustee's investigation of accounts receivable, and the trustee's opinion that time is required for analysis of revenue and expense. Further, terms for a proposal are being discussed and need more development. In the meantime, Kocken has remained in operation. I am told that one appraisal has been delivered and another is close. All of this has been done

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[25] *Kocken Energy Systems Inc. (Re)*, 2017 NSSC 80 ("***Kocken***").
[26] *Kocken*, para. 20.

> over the holiday season. This evidence satisfies me that there is a better than even chance of a viable proposal being developed.
>
> [Emphasis added.]

30. That court's statement proved premonitory. Later in those same proceedings, the court approved the debtor's proposal which had been *unanimously* upvoted by creditors, obviously therefore including BMO. The court made a particular point of commenting on that, as follows:

> Also, we have here an example of something seldom written about but relevant in early challenges to a reorganization effort. A secured creditor who is able to veto a proposal, or a plan of arrangement, vehemently opposes the effort from the beginning and says it is doomed because the creditor will exercise its veto when the time comes. That forecast does not always come true.[27]

31. Three overarching, guiding principles therefore appear from the law on the "likelihood of a viable proposal" criterion: **(i)** an objective standard, **(ii)** the rehabilitative objective of the BIA's NOI process, and **(iii)** the interests of all stakeholders.

iv. The "material prejudice" criterion

32. In *Cantrail*, the court emphasized the use of the word "materially" in s. 50.4(9) about when the extension of an NOI is appropriate:

> [21] …That aspect of the test uses the term "materially prejudiced." There is a difference, in my view, between being prejudiced and being materially prejudiced…
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> [22] There is no doubt that Volvo has been prejudiced by the circumstances which have befallen Cantrail and befallen Volvo as a secured creditor. The Act in and of itself, and the possibility of a proposal, does create simple prejudice by staying the obligations of a person attempting to make a proposal during the period of time in which the proposal is being formulated. There is no evidence before me of anything other than normal or perhaps average prejudice to Volvo. There is no evidence of substantial prejudice or considerable prejudice. There is no evidence that in not being allowed to realize their security at this time that there is, for example reduced security or, for example, that there are buyers out there for these assets they wish to seize under their security who will not be around once the

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[27] *Kocken Energy Systems Inc. (Re)*, 2017 NSSC 215, para. 5; see also para. 11.

> proposal has had its opportunity to succeed or fail, once it has been completely formulated and presented to creditors. There is no worse case scenario for Volvo if the proposal is allowed to run a reasonable course. In my view, there is no evidence on which Volvo can rely to show that it has been materially prejudiced.
>
> [Emphasis added.]

33. In *Entegrity*,[28] the largest creditor opposed the debtor's motion for an extension of time to file a proposal, and "made it quite clear that short of being paid out in full, it is not interested in any proposals forthcoming from Entegrity", because the creditor had "simply lost faith in Heath who is the principal of Entegrity and no longer wishes to do business with him".[29] On whether the debtor company was likely to make a viable proposal, the Supreme Court of PEI referenced in approval and applied *Cantrail*.[30] Then, on material prejudice, the court said:

> [28] The BIA allows for proposals to be advanced by companies like Entegrity found in circumstances like the present. If Parliament did not wish to provide a window of hope for companies like Entegrity, it would not have enacted the provisions of the BIA which allow for the advancement of proposals to creditors short of immediately bankrupting the company. Likewise, Parliament chose the wording in subsection 50.4(9) carefully and in the third prong of the test was concerned about a creditor who would be materially prejudiced upon the granting of an extension, not a creditor who would be simply prejudiced. Again, on the balance of probabilities, I am satisfied Entegrity has met the burden placed on it and the third part of the test has been met.
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> [Emphasis added.]

34. In *Nautican*, the court explained why a strict interpretation of the notion of "material prejudice" was necessary to effect the scheme of the BIA NOI process, going back to its rehabilitative purpose:

> [21] I note the decision of *H & H Fisheries Ltd., Re*, wherein Goodfellow J. stated as follows: "This section of the Act contemplates some prejudice to creditors and I am of the view that the prejudice must be of a degree that raises significant

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[28] *In Re Entegrity Wind Systems Inc*., 2009 PESC 25 ("***Entegrity***").
[29] *Entegrity,* para. 16.
[30] *Entegrity*, paras. 23, 24.

> concern to a level that it would be unreasonable for a creditor or creditors to accept. Overall, I am satisfied that HHFL has met the requirement of establishing on the balance of probabilities that the granting of an extension will not materially prejudice any of the creditors and in particular BNS.
>
> [22] I agree that the term "material prejudice" must be interpreted on an objective basis as Goodfellow J. describes. If it were not so interpreted, it would be inconsistent with the other objective portions of the same statutory provision. It would also allow a major creditor to thwart the provisions, which are to be interpreted in a remedial fashion.
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> [Emphasis added.]

35. It therefore appears clear that the word "materially" must be given meaning and interpreted in consideration of the letter, scheme, object, intention and equity[31] of the BIA proposal process, with two material concerns being, as seen above, the rehabilitative objective of the BIA's NOI process, and the interests of all stakeholders.

v. Application

36. **Good faith and due diligence –** Here, the Laird Entities have acted and are acting in good faith and with due diligence, and in accordance with this court's orders. The 45-day extension sought is to complete the ongoing sale process in accordance with the timeline set out in the approval order.

37. The Laird Entities are pursuing the most commercially reasonable avenue available in the circumstances to maximize value for stakeholders – including creditors, DUCA, suppliers, future tenants, and equity holders. There is a reasonable basis for stakeholders to be confident with the integrity and quality of the ongoing sale process, and no reason to doubt of the Laird Entities' good faith or due diligence.

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[31] See Pr. Elmer A. DRIEDGER, *The Construction of Statutes*, Toronto, Butterworths, 1974, at 67, first endorsed by the Supreme Court in *Stubart Investments Ltd. v The Queen*, [1984] 1 S.C.R. 536, remaining the "one principle or approach" to statutory interpretation in Canadian law.

38. As to DUCA specifically, the Laird Entities have responded to all its inquiries with diligence, as set out above. DUCA was contemporaneously asked to comment *inter alia* on the planned sale process, but provided none. DUCA has made no complaints about the substance of the process. The Laird Entities always acted with good faith and diligence towards DUCA.

39. **Likelihood of a viable proposal –** The early market interest in the sale process is objectively encouraging for proposal options. DUCA's predictions that it will not accept any proposal is not determinative.

40. There is good reason to believe that the sale process may yield enough proceeds to pay out DUCA. If so, then the Laird Entities' will be well placed to make a proposal to the rest of their creditors without seeking to comprise any of DUCA's claims. Those other creditors have little, if any, ways to recover the amounts owing other than the proceeds of the Property, unlike DUCA with the guarantees it holds. Moreover, the Laird Entities have already been in discussion with those other creditors about resolving the amounts claimed.[32]

41. There is good reason to think that a viable proposal can be made as the NOI process unfolds.

42. **Material prejudice –** The extension would not cause prejudice to DUCA or any other stakeholder, let alone any material prejudice.

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[32] See the affidavit of Jason L. S. Birnboim sworn February 6, 2021 (the "**Birnboim February Affidavit**"), tab 2C (page 36) of the MR, para. 8.c., and the Birnboim March Affidavit, para. 10.c.

43. The sale process underway is entirely conventional. There has been no complaint about its substance, including from DUCA. One wonders how any other form of realization process would be an improvement.

44. Even if there were any prejudice to DUCA, it is questionable how it could be material considering that DUCA also holds personal guarantees against the Laird Entities' principals for $10,500,000.

45. Insolvency courts often consider the interest of the "fulcrum" creditors, being those who stand to gain or lose by the decisions being made. The interests of stakeholders other than DUCA merit consideration. In that regard, no other party opposes, and in fact the evidence before the Court is that the other creditors are engaging in productive discussions with the Laird Entities about resolving their claims.[33]

46. The immediate bankruptcy that would result if the NOI were not extended would have obvious prejudice to all parties (even DUCA). The JLL sale process would stop. Potential bidders would be confused, which never helps achieve good value in a sale process. Costs of sale would only increase. Time to achieve a sale would be extended.

47. To the extent that DUCA contends that a sale of the Property is not a proper use of the NOI or proposal proceedings, that is unsupported by the scheme of the BIA. The proposal provisions in Division I of Part III of that Act expressly contemplate that an entity in NOI proceedings may make a sale of assets out of the ordinary course, provided that Court approval is granted in section 65.13. That section does not require that creditors agree in a proposal that such a sale be made, nor even that there be any proposal at the time of a sale.

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[33] Birnboim February Affidavit, tab 2C (page 36) of the MR, para. 8.c.; Birnboim March Affidavit, para. 10.c.

Instead, the focus is on whether a prudent sale has been achieved under the statutory criteria and the conventional *Soundair* principles.

48. Also, the Proposal Trustee recommends the extension as will appear from its report to be filed in support of this motion.

49. The court may order the extension.

B. Sealing

50. The Laird Entities seek an order that Confidential Exhibits "1" to the Birnboim March Affidavit, being a copy of a JLL marketing update memorandum dated March 15, 2021, be sealed from the public record pending the conclusion of a transaction, as the case may be, or further court order. This is because it contains confidential information, including the identity of interested parties, which may affect the integrity of the sale process.

51. This court has jurisdiction to make the sealing orders sought, including under s. 137(2) of the *Courts of Justice Act*.[34] It is a typical attendant relief in sale processes. "There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case."[35] The rationale here is to protect the integrity of the sale process. The sealing orders sought are appropriate in the circumstances.

C. DUCA should not be entitled to claim costs of this motion under its security

52. The law is clear that while there may be contractual provisions entitling a party to seek its costs from another, that does not oust the jurisdiction of the court to direct otherwise.

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[34] See *Danier Leather Inc. (Re)*, 2016 ONSC 1044 ("***Danier Leather***"), paras. 79-86, and *Nortel Networks Corporation (Re)*, [2009] O.J. No. 3169 (ON SC) [2009 CanLII 39492], paras. 3, 57.
[35] *Danier Leather*, para. 84.

53. The Alberta Court of Appeal held in *Abacus Cities*[36] that:

> Also, no rule of law forbids simpliciter the enforcement, for costs incurred by the creditor after bankruptcy, of a pre-bankruptcy cost indemnity given by the bankrupt. But a Bankruptcy Court may refuse to enforce that indemnity by a creditor who incurred costs other than in a commercially reasonable fashion or whose position otherwise amounts to an abuse of the bankruptcy process.[37]
>
> [Emphasis added.]

54. Similarly, our Court of Appeal has confirmed that:

> As a general proposition, where there is a contractual right to costs, the court will exercise its discretion so as to reflect that right. However, the agreement of the parties cannot exclude the court's discretion; it is open to the court to exercise its discretion contrary to the agreement. The court may refuse to enforce the contractual right where there is good reason for so doing - where, for instance, the successful mortgagee has engaged in inequitable conduct or where the case presents special circumstances which render the imposition of solicitor and client costs unfair or unduly onerous in the particular circumstances.[38]

55. The Commercial List in applying those principles has disentitled a successful secured party from full indemnity costs where there have been questions about its dealings with the borrower.[39]

56. In this case, DUCA's opposition to the NOI proceedings continuing is made on substantially the same, if not identical, grounds as what was already argued on February 10, 2021. That position was rejected then. A secured creditor should not be entitled to take multiple "kicks at the can" on the same issue and expect to be able to recover the costs for that from the borrower.

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[36] *AMIC Mortgage Investment Corporation v Abacus Cities Ltd.*, 1992 ABCA 57 ("***Abacus Cities***").
[37] *Abacus Cities*, para. 1.
[38] *Bossé v Mastercraft Group Inc.*, 1995 CanLII 931 (ON CA), para. 66.
[39] *8527504 Canada Inc. v Liquibrands Inc.*, 2015 ONSC 891.

V. NATURE OF THE ORDER SOUGHT

57. The Laird Entities therefore seek orders in suggested accordance with draft order filed at tab 3 of their motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of March, 2021.

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SCHEDULE A – LIST OF AUTHORITIES

1. *Quality Meat Packers Limited (Re)*, 2014 ONSC 2296
2. *Andover Mining Corp. (Re)*, 2013 BCSC 1833
3. *N.T.W. Management Group Ltd., Re*, [1993] O.J. No. 621 (ON SC)
4. *In the Matter of the Proposal of Cantrail Coach Lines Ltd*., 2005 BCSC 351
5. *Cumberland Trading Inc., Re*, 1994 CanLII 7458 (ON SC)
6. *Nautican v Dumont*, 2020 PESC 15
7. *Kocken Energy Systems Inc. (Re)*, 2017 NSSC 80
8. *Kocken Energy Systems Inc. (Re)*, 2017 NSSC 215
9. *In Re Entegrity Wind Systems Inc*., 2009 PESC 25
10. *Stubart Investments Ltd. v The Queen*, [1984] 1 S.C.R. 536
11. *Danier Leather Inc. (Re)*, 2016 ONSC 1044
12. *Nortel Networks Corporation (Re)*, [2009] O.J. No. 3169 (ON SC) [2009 CanLII 39492]
13. *AMIC Mortgage Investment Corporation v Abacus Cities Ltd*., 1992 ABCA 57
14. *Bossé v Mastercraft Group Inc*., 1995 CanLII 931 (ON CA)
15. *8527504 Canada Inc. v Liquibrands Inc*., 2015 ONSC 891

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SCHEDULE B – RELEVANT STATUTES

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

Notice of intention

50.4 (8) 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),

(a) 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;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(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

(c) 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.

Extension of time for filing proposal

(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.

Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Court may terminate period for making proposal

(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.

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.

Individuals

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(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.

Courts of Justice Act, R.S.O. 1990, c. C.43

Documents public

137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(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.

Court lists public

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

Copies

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

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IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF 33 LAIRD INC. AND 33 LAIRD GP INC., CORPORATIONS INCORPORATED UNDER THE ONTARIO *BUSINESS CORPORATIONS ACT*, AND 33 LAIRD LIMITED PARTNERSHIP, A LIMITED PARTNERSHIP FORMED UNDER THE ONTARIO *LIMITED PARTNERSHIPS ACT*

Estate No. 31-2693094

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced in TORONTO

FACTUM OF 33 LAIRD INC., 33 LAIRD GP INC., AND 33 LAIRD LIMITED PARNTERSHIP

(extension of time to file a proposal, sealing order)

(motion returnable March 26, 2021)

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