

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**IN THE MATTER OF THE NOTICE OF INTENTION TO  
MAKE A PROPOSAL OF 33 LAIRD INC. A CORPORATION  
INCORPORATED UNDER THE ONTARIO *BUSINESS  
CORPORATIONS ACT***

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**FACTUM OF 33 LAIRD INC.  
(administrative consolidation, extension of time to file a proposal, debtor-in-possession  
financing charge)  
(returnable December 16, 2020)**

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December 15, 2020

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## **I. NATURE OF THIS MOTION**

1. This is a motion by 33 Laird Inc. (the “**Nominee**”), for orders per the draft order, filed at tab 3 of its motion record:
  - a. administratively and not substantively consolidating the herein estate/court file with estate/court file numbers 31-2693092, being the notice of intention to make a proposal (“**NOI**”) proceeding of 33 Laird GP Inc. (“**GP**”) under the *Bankruptcy and Insolvency Act*, (the “**BIA**”), and 31-2693095, being the NOI proceeding of the 33 Laird Limited Partnership (the “**Partnership**”, and together with the Nominee and GP, the “**Laird Entities**”) (such proceedings being together the “**NOI Proceedings**”), and authorizing MNP Ltd., in its capacity as proposal trustee in each of the NOI Proceeding (in such capacity, the “**Trustee**”) to administer the NOI Proceedings on a consolidated basis,
  - b. extending from December 28, 2020 to February 11, 2021 the time for the Trustee to file, on behalf of the Laird Entities (individually or collectively, as the case may be), a proposal to creditors under the BIA,
  - c. approving a debtor-in-possession (DIP) financing facility and creating a \$250,000 DIP charge to rank first on all of the Laird Entities’ assets, properties and undertakings (“**Property**”) except Property in which DUCA Financial Services Credit Union Ltd. (“**DUCA**”) has a security interest where the charge would rank immediately after such DUCA’s interest (the “**DIP Charge**”), and
  - d. an order allowing payments on account of the reasonable fees and disbursements of the Trustee, its counsel, and counsel for the Laird Entities as advances against the amount approved by the court following taxation of accounts.

## **II. OVERVIEW**

2. This is the first motion in the proceeding. It is made early to accommodate for the holiday season. The Trustee recommends the relief sought. Counsel are not aware of opposition.

3. The Laird Entities were set up to pursue a real estate development project at 33 Laird Drive in Toronto (the “**Project**”). The Project is insolvent. The main secured creditor, DUCA, made demand on November 19.
4. The intended restructuring is in respect of the Project as a whole. Administrative consolidation would allow economies of scale and simplify the administration.
5. The Laird Entities have acted and are acting in good faith. More time is required to finalize the restructuring approach. The test for extension is met.
6. The Project is cashflow negative and is expected to require about \$231,000 over the period of the extension sought. Beaux Properties International Inc. (“**Beaux**”), a limited partner in the Partnership, arranged, through its affiliate BP Capital Inc. (“**BP**”), a DIP facility. The DIP Charge sought is to rank second to any DUCA security interest and otherwise first. It would not be enforceable without a court order. The test for a DIP charge is met.

### **III. FACTS**

#### **A. Business and assets**

7. The Laird Entities were set up into a conventional limited partnership as the legal vehicle for the development of the Project. Monetization is projected through commercial tenancies. The Project remains at an early stage, with part of the structural work, little mechanical and electrical work, and no finishing work, completed.<sup>1</sup>
8. The Project’s main asset is the underlying land at 33 Laird Drive (the “**Land**”). Other assets include equipment, existing approvals, leases, and development potential.<sup>2</sup>

#### **B. Creditors**

9. The Project’s non-equity financing came from DUCA through secured loan facilities. In its demand, DUCA demands payment of approximately \$13,856,000. DUCA holds *Personal Property Security Act* (“**PPSA**”) registrations against the Nominee and the

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<sup>1</sup> Affidavit of Jason L. S. Birnboim sworn December 10, 2020 (the “**Birnboim Affidavit**”), tab 2 of the Laird Entities’ motion record for this motion (the “**MR**”), paras. 3-6.

<sup>2</sup> Birnboim Affidavit, tab 2 of the MR, paras. 15, 16.

Partnership and a \$22,000,000 charge on title to the Land. DUCA is the only PPSA registrant. It is understood that part of the DUCA loan is held by Centurion Mortgage Capital Corporation.<sup>3</sup>

10. Beaux and Sealink JV Ltd., limited partners in the Partnership, registered a \$5,200,000 charge on title to the Land. The claims underlying the registration, as well as the unsecured claim of 2344011 Ontario Inc. who is another limited partner, are not admitted at this time. This may require determination later.<sup>4</sup>
11. Maxwell & Co Inc. registered a construction lien on the Land on November 12, 2020 for \$113,336.92.<sup>5</sup>
12. The Laird Entities have no employees, so there are no claims for unremitted source deductions. Other (unsecured) potential claimants appearing on the NOI Proceedings' lists of creditors mostly include construction participants.<sup>6</sup>

### **C. Causes of insolvency**

13. Around the spring of 2020, DUCA communicated it may not wish to continue financing the Project, including due to cost overruns and the effect of COVID-19 notably on costs, timelines, and leasing potential. The initial maturity date of September 2020 under the facility was extended, including to seek alternate financing. This did not materialize, leading to DUCA's demand, which crystallized the Project's insolvency.<sup>7</sup>

### **D. Restructuring approach**

14. The restructuring plan is yet to be finalized at this early stage. However, two approaches already appear viable. One is locating alternate financing to DUCA's. Efforts in that sense began prior to the filing and are ongoing. The other is a sale of assets in a competitive

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<sup>3</sup> Birboim Affidavit, tab 2 of the MR, paras. 9, 10, 13.

<sup>4</sup> Birboim Affidavit, tab 2 of the MR, paras. 11, 14.

<sup>5</sup> Birboim Affidavit, tab 2 of the MR, para. 11 and exhibit "L" (p. 167-169 of the MR).

<sup>6</sup> Birboim Affidavit, tab 2 of the MR, para. 12 and exhibits "D", "E" and "F" (p. 37-51 of the MR).

<sup>7</sup> Birboim Affidavit, tab 2 of the MR, paras. 17-19.

process. The Laird Entities have already received expressions of interest from several potentially interested parties.<sup>8</sup>

15. Both those approaches are initially being pursued at the same time. The Laird Entities are working with commercial real estate agency firms to obtain proposals on marketing strategies and commissions for a sale process. The Laird Entities anticipate moving for court approval of a sale process in early 2021. In the meantime, efforts to locate refinancing will continue.<sup>9</sup>

**E. Steps since filing and need for relief sought**

16. Following the filing of the NOIs, the Laird Entities have arranged for DIP financing and worked with the Trustee to evaluate their financial position and restructuring options, including to build a 13-week cashflow and other financial models.<sup>10</sup>
17. Administrative consolidation is sought for costs-saving. An extension of time is sought to finalize the path to a proposal.
18. As to DIP financing, the Project is currently cashflow negative. This is normal for a real estate development project where substantial costs are incurred before monetization is achieved. The Project is expected to need \$230,837 for payment of business and restructuring costs over the time of the extension sought. The material terms of the DIP term sheet extended by BP, filed, are a \$250,000 maximum loan amount, 10% interest per annum, a 6-month term, and a condition for a satisfactory court approval and charging order – such as the draft order, filed.<sup>11</sup>

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<sup>8</sup> Birboim Affidavit, tab 2 of the MR, paras. 20-26.

<sup>9</sup> Birboim Affidavit, tab 2 of the MR, paras. 20-26.

<sup>10</sup> Birboim Affidavit, tab 2 of the MR, para. 28.

<sup>11</sup> Birboim Affidavit, tab 2 of the MR, paras. 27-34 and exhibit “P” (p. 194-197 of the MR).

#### IV. ISSUES AND LAW

19. The issues are whether the court should (A) order the administrative consolidation, (B) extend the time to file a proposal, and (C) make the DIP financing orders sought.

##### A. Administrative consolidation

20. The orders sought in this respect are at paras. 2 to 6 of the draft order. In essence, it is for administrative acts (e.g. the service and filing of court materials, creditor distributions, etc.) to be done once in one court file and be deemed done in the other NOI Proceedings.

21. The sought consolidation is administrative only. It affects no substantive rights. Safeguards include:

- a. the express reservation of any right to oppose substantive consolidation (para. 2 *in limine*),
- b. no prejudice to any applicable rules of civil procedure or otherwise save in accordance with the order (para. 5), and
- c. mention that the legal status of any entity or obligation is not altered (para. 6).

22. The court has jurisdiction to make the consolidation orders sought, including under rule 6 of the *Rules of Civil Procedure* and its general control over its own process.<sup>12</sup> Here, the Laird Entities operate a single Project. The restructuring is in respect of the Project as a whole, in which each Laird Entities is a stakeholder along with their own stakeholders. Consolidation would allow economies of scale with respect to court, administration and professional costs, and facilitate the handling of this restructuring as a unified case.<sup>13</sup> The Trustee recommends the consolidation.<sup>14</sup> This court may therefore make the consolidation orders sought.

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<sup>12</sup> See the *Courts of Justice Act*, [R.S.O. 1990, c. C.43](#), s. 138, and rule 1.04 of the *Rules of Civil Procedure*, [R.R.O.1990, Reg. 194](#).

<sup>13</sup> Birnboim Affidavit, tab 2 of the MR, para. 27.

<sup>14</sup> First report of the Trustee dated December 11, 2020, filed (the “**First Report**”), paras. 37-39.

**B. Extension of time**

23. The sought extension is in respect of all the NOI Proceedings. BIA s. 50.4(9) sets out mandatory criteria for an extension of the time to file a proposal, reproduced below with comments as to their satisfaction.
- a. that the insolvent person has acted, and is acting, in good faith and with due diligence – the above demonstrates the Laird Entities’ proactiveness and consideration for the interests of all stakeholders. Ultimately, the Laird Entities remain at the earliest stage of the NOI Proceedings. An extension is sought now, merely a couple of weeks in, rather than closer to the end of the first 30-day stay period ending on December 28, 2020, to accommodate for the holiday season.
  - b. that the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted – as recounted above, restructuring approaches are considered that may allow, on a balance, greater recovery for the constituency of stakeholders as a whole – including each of the Laird Entities as well as their clients, suppliers, equity holders, and creditors – than a liquidation scenario. Regarding refinancing, the DIP facility was arranged for and efforts are ongoing. As to a sale, expressions of interest were received and proposals are being obtained for a sale process.
  - c. That no creditor would be materially prejudiced if the extension being applied for were granted – the primary purpose of financial restructurings is “to permit the debtor to carry on business, and, where possible, avoid the social and economic costs of liquidating its assets.”<sup>15</sup> Similar to the prior paragraphs, to the extent a creditor suffers any prejudice from the extension, then this would be, on a balance, outweighed by the benefits of allowing the Laird Entities an opportunity to define their path to a proposal.<sup>16</sup> The Laird Entities are not aware of any opposition and the Trustee recommends the extension.<sup>17</sup>

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<sup>15</sup> See *Century Services Inc. v Canada (Attorney General)*, [2010 SCC 60](#), para. 15, and *9354-9186 Québec inc. v Callidus Capital Corp.*, [2020 SCC 10](#), para. 41.

<sup>16</sup> See *In the Matter of the Proposal of Canrail Coach Lines Ltd.*, [2005 BCSC 351](#).

<sup>17</sup> First Report, paras. 34-36, 39.

24. The court may therefore make the extension order sought.

**C. DIP financing**

25. The orders sought in this respect are at paragraphs 8 to 18 of the draft order. They primarily provide for (i) approval of the Laird Entities entering into and using a DIP financing facility with BP to a maximum of \$250,000 further to the term sheet, filed, and (ii) the DIP Charge which would rank first on all the Laird Entities' Property except Property in which DUCA has a security interest where the DIP Charge would rank immediately after such DUCA's interest. The DIP Charge does not secure obligations that existed before the DIP order. The orders sought are per the Commercial List DIP language in its model *Companies' Creditors Arrangement Act* initial order, *mutatis mutandis*.

26. This court has jurisdiction to make the orders sought, including under BIA s. 50.6. The section requires notice to potentially affected secured creditors. This motion was on notice to all PPSA and land registrants.<sup>18</sup> Section 50.6 also sets out non-limitative criteria for the charge, reproduced below with added comments.

- a. the period during which the debtor is expected to be subject to proceedings under this Act – this cannot be evaluated precisely at this early stage but may be assessed within the time extension sought.
- b. how the debtor's business and financial affairs are to be managed during the proceedings – details on the potential restructuring approaches considered at this early stage (i.e., refinancing and sale) are set out above.
- c. whether the debtor's management has the confidence of its major creditors – no responding materials were filed and the Laird Entities are not aware of any opposition, so any "major creditor" would have to address this topic at the hearing.
- d. whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor – as set out above, at this stage of the Project, the cashflow is negative. Business and restructuring costs require additional financing for the

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<sup>18</sup> See the service list, tab 4 of the MR (p. 207-211), the PPSA reports, tab 2M of the MR (p. 170-180), and the parcel register for the Land, tab 2C of the MR (p. 33-36).



restructuring to occur. In that regard, the DIP facility offered by BP is reasonable and satisfactory. Additional financing needs may be explored in time, if necessary.

- e. the nature and value of the debtor's property – a valuation of the Project may be obtained in time, if necessary. At this stage, the evidence is that DUCA registered a \$22,000,000 charge on the Land before development and has made demand for approximately \$13,856,000, which suggests that the Land and its development potential may at least support DUCA's interest and the DIP Charge. Presumably, BP would not have proposed those terms otherwise.
- f. whether any creditor would be materially prejudiced as a result of the security or charge – DUCA is sure to suffer no prejudice to its rank because the DIP Charge is to rank after any interest of DUCA in the Property. As to other secured parties, the word “materially” matters and the absence of contestation is notable, which may tie into the above paragraph.
- g. the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b) – the Trustee recommends this court's granting the DIP Charge for reasons set out in the report, including the need for financing, that no creditor appears materially prejudiced, and that the terms appear reasonable in the circumstances and consistent with the terms of DIP financing facilities in similar proceedings.<sup>19</sup>

**D. Order allowing advances on professional accounts**

- 27. This is paragraph 19 of the draft order. As explained in the Trustee report filed in support of this motion, the order is to allow payments on account of the reasonable fees and disbursements of the Trustee, its counsel, and counsel for the Laird Entities as advances against the amount approved by the court following taxation of accounts.<sup>20</sup>

**V. NATURE OF THE ORDER SOUGHT**

- 28. The Laird Entities therefore seek orders in the form of the suggested draft order, filed at tab 3 of their motion record.

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<sup>19</sup> First Report, paras. 28, 31, 39.

<sup>20</sup> First Report, paras. 32, 33.

[9]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of December, 2020.

RBB / T.

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**SCHEDULE A – LIST OF AUTHORITIES**

1. *Century Services Inc. v Canada (Attorney General)*, [2010 SCC 60](#)
2. *9354-9186 Québec inc. v Callidus Capital Corp.*, [2020 SCC 10](#)
3. *In the Matter of the Proposal of Cantrail Coach Lines Ltd.*, [2005 BCSC 351](#)

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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).

### **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.

### **Individuals**

**(2)** In the case of an individual,

**(a)** they may not make an application under subsection (1) unless they are 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.

### **Priority**

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

### **Priority — previous orders**

**(4)** The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

### **Factors to be considered**

**(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.

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

### **Multiplicity of proceedings**

**138** As far as possible, multiplicity of legal proceedings shall be avoided.

*Rules of Civil Procedure*, [R.R.O. 1990, Reg. 194](#):

### **Consolidation or Hearing Together**

#### **Where Order May Be Made**

**6.01 (1)** Where two or more proceedings are pending in the court and it appears to the court that,

- (a) they have a question of law or fact in common;
- (b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or
- (c) for any other reason an order ought to be made under this rule,

the court may order that,

- (d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or
- (e) any of the proceedings be,
  - (i) stayed until after the determination of any other of them, or
  - (ii) asserted by way of counterclaim in any other of them.

(2) In the order, the court may give such directions as are just to avoid unnecessary costs or delay and, for that purpose, the court may dispense with service of a notice of listing for trial and abridge the time for placing an action on the trial list.

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A  
PROPOSAL OF 33 LAIRD INC. A CORPORATION  
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Estate No. 31-2693094

***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**  
**COMMERCIAL LIST**  
**Proceeding commenced in TORONTO**

**FACTUM OF 33 LAIRD INC.**  
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