

**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 PARTNERSHIP**
(approval and vesting order, approval of proposal trustee's fees and activities, sealing)
(motion returnable June 11, 2021)

June 7, 2021

GOLDMAN SLOAN NASH & HABER LLP
480 University Avenue, Suite 1600
Toronto, Ontario M5G 1V2
Fax: 416-597-6477

R. Brendan Bissell (LSO #40354V)
Tel: 416-597-6489
Email: bissell@gsnh.com

Joël Turgeon (LSO #80984R)
Tel: (416) 597-6486
Email: turgeon@gsnh.com

Lawyers for 33 Laird Inc., 33 Laird GP Inc. and
33 Laird Limited Partnership

I. INTRODUCTION

1. This is a motion by 33 Laird Inc., 33 Laird GP Inc., and 33 Laird Limited Partnership Inc. (together, the “**Laird Entities**”) for an approval and vesting order in respect of an agreement of purchase and sale for land, a sealing order for the unredacted copy of agreement, and approval of the trustee’s reports, fees and activities.

II. OVERVIEW

2. The transaction for which approval is sought was the preferred bid at the conclusion of a court-approved sale process, which included an MLS listing by a broker, and two rounds of bidding through letters of intent from interested parties. There was robust market participation in the sale process throughout. The test for approval of a sale is met.
3. A condition of the agreement is that the current site plan agreement for the property be vested out. This is because the purchaser has determined that it does not want to construct the development approved in that site plan.
4. The City of Toronto has voiced objection to removal of the site plan. This appears to be the only contested issue on this motion. It is unclear that the City would be prejudiced if the sought vesting order issued, considering that any development on the site will require another site plan, which the City admits is normal and the purchaser acknowledges. In any event, an analysis of the site plan shows that is a set of financial commitments by the Laird Entities in exchange for permission to build a specified development. If that development is not going to proceed then the financial commitments should be vested out or ended like any other debt obligation of a debtor on a sale. A vesting order is therefore appropriate.

III. FACTS

A. Background

5. The Laird Entities were set up into a limited partnership structure to pursue a real estate development project at 33 Laird Drive in Toronto. They each filed a notice of intention to make a proposal (“**NOI**”) under the *Bankruptcy and Insolvency Act*¹ (the “**BIA**”) on November 28, 2020. MNP Ltd. acts as proposal trustee (in such capacity, the “**Proposal Trustee**”) in each NOI proceeding, which were administratively consolidated by order dated December 16, 2020.² The main asset is the real property and unfinished project at 33 Laird Drive (the “**Property**”), on which DUCA Financial Services Credit Union Ltd and Centurion Asset Management Inc. (together, “**DUCA**”) hold a first ranking mortgage.³
6. The status of construction on the Property is quite early, with the heritage portion of the building fronting on Laird Drive having been substantially gutted, some foundation and mechanical work being done, and structural steel having been erected for the new portions of the building that the Laird Entities had planned.⁴

B. Restructuring approach: sale process

7. A sale process was considered from the outset to realize on the value of the Property and 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 Jones Lang Lasalle Real Estate Services Inc. (“**JLL**”).⁵ The solicitation of offers portion of the sale process concluded on April 21, 2021, with JLL having received a number of offers. One

¹ [R.S.C., 1985, c. B-3](#).

² A copy of the order is at tab 2B (page 27) of the Laird Entities’ motion record returnable June 11, 2021 (the “**MR**”).

³ Affidavit of Jason L.S. Birnboim sworn June 4, 2021 (the “**Birnboim June Affidavit**”), tab 2 (page 8) of the MR, paras. 3-7.

⁴ Birnboim June Affidavit, tab 2 (page 8) of the MR, para. 7.

⁵ A copy of the order is at tab 2D (page 45) of the MR.

opportunity was selected as preferred (the “**Transaction**”), including after consultation with DUCA. The parties negotiated a sale agreement executed May 10, 2021 (the “**Sale Agreement**”) among 33 Laird Inc. (the “**Vendor**”) and 33 Laird Development Inc. *qua* general partner of 33 Laird Development Limited Partnership (in such capacity, the “**Purchaser**”). Despite similar names, the Purchaser and the Laird Entities are not related parties.⁶

8. Each of the Laird Entities filed a proposal to creditors on May 28, 2021.⁷ Considering the Laird Entities operate one business with virtually the same stakeholders, the proposal is global (*ref. s. 1.10* of the proposals). Its substance will be addressed on a future motion for approval, as the case may be. At this stage, it suffices to say the proposal is premised upon and dependent on the Laird Entities’ receiving the consideration for the Transaction (*ref., e.g., s. 2.7*), and it does seek to compromise secured and potentially secured claims, including DUCA’s secured claim (*ref. s. 2.2*).

C. Sale Agreement

9. The salient terms of the Sale Agreement include (capitalized terms defined in the Sale Agreement):⁸
 - a. Purchased Assets (s. 3, 14) – primarily, the land and buildings constituting the Property on an “as is, where is” and “without recourse” basis. Also includes all of the Laird Entities’ right, title and interest in the Chattels pertaining to the Property,

⁶ Birboim June Affidavit, tab 2 (page 8) of the MR, paras. 8-10 and footnote 1.

⁷ Birboim June Affidavit, tab 2 (page 8) of the MR, paras. 22-24. Copies of the proposals are at tab 2L (page 204) of the MR.

⁸ A copy of the Sale Agreement is included at tab 2I (page 88) of the MR, with redactions as to the purchase price and deposit payable.

as well as Assigned Contracts, Assigned Permits, and Assigned Warranties (being those the Purchaser identifies as such).

- b. Purchase price (s. 4, 5) – this would be subject to the sealing order sought, but would allow full repayment to DUCA and a viable proposal to the remaining creditors. A deposit was paid to JLL with the balance payable at Closing.
- c. Closing (s. 11) – 11th Business Day following the approval and vesting order, or such other date as may be agreed.
- d. Conditions – the only external condition of materiality is this court granting the sought approval and vesting orders (s. 9), which includes vesting out the site plan as well as the interest of prospective tenants – considering the development is not complete and will not be completed. Otherwise, the Purchaser acknowledges being satisfied with the Property and all matters and things connected therewith or in any way related thereto (s. 17), and the Transaction is not subject to financing conditions, limiting the risks of the Transaction not closing after approval.

D. Communications with the City prior to this motion

- 10. The City has advised that it opposes the removal of the site plan from title. However, lawyers for the City also wrote to the Purchaser’s counsel that “*of course the City will be happy to work with your [sic] on a new site plan application in the future*”, and that “*Property owners, including successors in title, apply for new site plan agreements on a regular basis as their development intentions change.*” The lawyers for the City further commented that: “*The site plan agreement does not contain an obligation to proceed with*

construction of the approved building, and your client would be free to apply for a new site plan approval for a different development.”⁹

IV. ISSUES AND LAW

11. The issues are whether the court should **(A)** make the approval and vesting orders sought, **(B)** make the sealing order sought, and **(C)** approve the Proposal Trustee’s reports, fees and activities.

A. Approval and vesting orders

i. Approval of the Transaction

12. This court has jurisdiction to make the approval and vesting orders sought, including under s. 100 of the *Courts of Justice Act*¹⁰ (the “CJA”), BIA s. 65.13, and its equitable jurisdiction. The approval and vesting order sought is in the form of the Commercial List model order with no change of terms.

13. BIA s. 65.13(4) sets out the following non-limitative criteria for approval, reproduced below as applied to this case with comments as to their satisfaction.

a. whether the process leading to the Transaction was reasonable in the circumstances, and whether the Proposal Trustee approved it – as stated above, the Transaction is the preferred opportunity located following performance of a court-approved sale process. It is trite that the pre-approval of a sale process is intended to reflect, and conditional on proper alignment with, the BIA s. 65.13 and *Soundair*¹¹ criteria.¹²

⁹ A copy of the referenced emails is at tab 2K (page 193) of the MR.

¹⁰ [R.S.O. 1990, c. C.43](#).

¹¹ *Royal Bank of Canada v Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#), p. 9.

¹² For reference, those are **(i)** whether the receiver has made a sufficient effort to get the best price and has not acted improvidently, **(ii)** the efficacy and integrity of the process by which offers are obtained, **(iii)** whether there has been unfairness in the working out of the process, and **(iv)** the interests of all parties. See *CCM Master Qualified Fund v blutip Power Technologies*, [2012 ONSC 1750](#) (Brown J., as he then was), para. 6; see also *West End Motors v 189*

Here, the approval of the sale process was obtained with the Proposal Trustee's support. The process followed the typical sequence developed by the insolvency practice and bench to maximize market exposition as well as fairness, transparency and integrity, while allowing desirable competition (advertisement, confidentiality, due diligence, letters of intent, final bids, and distinct motion for approval and vesting). The sale process provided a commercially reasonable amount of time in the circumstances for prospective purchasers and investors to complete due diligence and submit offers in respect of a large real estate asset such as the Property (approximately 6 weeks to first bid deadline and one more week to final bids). The process has been conducted in accordance with this court's order. These criteria are satisfied.

- b. whether the Fifth Report states that in the Proposal Trustee's opinion, the Transaction would be more beneficial to the creditors than a sale or disposition under a bankruptcy – yes.
- c. the extent to which the creditors were consulted – as recounted above and more fully appears from the affidavit of Jason L. S. Birnboim sworn June 4, 2021 filed in support of this motion (the "**Birnboim June Affidavit**"), as well as Mr. Birnboim's prior affidavits communicated as exhibits thereto, the Laird Entities, working with the Proposal Trustee and counsel, have been proactive, transparent and responsive in their communications with all creditor at all stages of the sale process, including at the time of defining the terms of the process, during the process, and following

the selection of the winning bid. DUCA in particular has been consulted throughout, including, for example, to secure its support of the Laird Entities' selecting the Transaction as the preferred opportunity. This criterion is satisfied.

- d. the effects of the Transaction on the creditors and other interested parties – the effect on all creditors is plain and desirable: it allows full repayment of DUCA and a viable proposal to the balance of creditors. As to the effect of the *vesting* orders on the City of Toronto (the “**City**”), this will be discussed below.
 - e. whether the consideration to be received for the assets is reasonable and fair, taking into account their market value – the sale process and the substantial interest received, including multiple final bids, is independent evidence of the market- and circumstances-correct valuation of the Transaction. The Transaction was the preferred bid because overall it was the opportunity with the most value for stakeholders. This criterion is met.
14. The conclusion of such a sale as the Transaction was the aim of the sale process, and the dominant overarching strategy of these NOI proceedings generally, from the outset. The Transaction is, on a balance, the best available option to maximize the interests of stakeholders, including customers, suppliers, creditors and employees, in the circumstances. The court may approve the Transaction.

ii. Vesting orders

15. The Transaction is subject to this court vesting the Purchased Assets in the Purchaser free and clear. This is a “normal relief given in an asset sale” in insolvency proceedings and it

is appropriate here for the reasons highlighted above; indeed, section 65.13(7) does not impose criteria for vesting additional to the criteria respecting approval.¹³

16. The City's stated opposition to the vesting out of the site plan agreement appears to be the only contested issue in whether a vesting order is appropriate in this case.

The site plan agreement: an overview

17. Registered on title to the Property is a site plan agreement dated July 23, 2019 among the Vendor, as owner, and the City (the "SPA").¹⁴
18. It is not in dispute all of the land in the City of Toronto is under site plan control, such that any development of it requires that a site plan be in place in accordance with the *City of Toronto Act*,¹⁵ which site plan control provisions are analogous to those of s. 41 of the *Planning Act*, applicable outside Toronto.
19. Under the SPA, the Vendor was granted approval to construct the development contemplated by a set of drawings. In exchange, the Laird Entities agreed to, *inter alia*:¹⁶
 - a. to provide an irrevocable letter of credit in the amount of \$206,965 for obligations in respect of landscaping set out in the approved drawings (Schedule "C", s. 1).
 - b. to widen the road abutting the Property (Schedule "C", s. 7-13), create facilities to provide vehicle access to and from the Property in connection with the intended retail tenants, and provide a \$106,208 irrevocable letter of credit of as guarantee (Schedule "C", s. 14-16).

¹³ *Nelson Education Limited (Re)*, [2015 ONSC 5557](#), para. 40.

¹⁴ A copy of the APA is at tab 2J (p. 175) of the MR.

¹⁵ See the *City of Toronto Act, 2006*, [S.O. 2006, c. 11](#) (the "CTA"), s. 114. Note that s. 41 of the *Planning Act*, [R.S.O. 1990, c. P.13](#), is similar to CTA s. 114 but does not apply to the City of Toronto: subs. (16).

¹⁶ Attaching to most of these requirements are obligations to provide letters of credit as guarantee. Only those which are required to be in an amount exceeding \$100,000 are noted.

- c. to provide a \$500,000 irrevocable letter of credit for the safety of the existing sewer infrastructure during the intended construction (Schedule “C”, s. 23, 48).
 - d. to complete the Project (as defined in the SPA) within a 2-year timeframe which likely expires around July, 2021 (s. 4).
 - e. that in case of default such as non-completion in accordance with the above, the City may, on notice and at the owner’s cost plus a 15% management fee, employ labour and purchase materials to complete the project (s. 10-12).
 - f. that all letters of credit are returned upon completion (s. 7).
20. The SPA also requires the Laird Entities to maintain the permitted building in accordance with the permission granted, including various terms as to insurance,¹⁷ indemnity,¹⁸ and access to the City sewers beneath the building.
21. The Purchaser does not wish to develop the Property in the manner set out in the SPA,¹⁹ and its offer made in the sale process is conditional on removal of the SPA from title to the Property, as is provided in section 8 of the Sale Agreement. In order to attempt to satisfy that condition, the Laird Entities bring this motion for removal of the SPA from title through a vesting order.
22. As another means to the same end, the Laird Entities have sent the City a notice to disclaim the SPA on June 4, 2021, with the Proposal Trustee’s approval, under BIA s. 65.11. Unless an objection to the disclaimer were upheld by the court, a vesting order would be appropriate in that circumstance as well to convey proper title to the Purchaser.

¹⁷ See Schedule “C”, s. 34, 35.

¹⁸ See Schedule “C”, s. 39.

¹⁹ Birnboim June Affidavit, tab 2 (page 8) of the MR, para. 15. The CTA provides that if properly registered, the City may enforce certain provisions of the SPA against “any subsequent owner”: s. 114(14).

This court’s jurisdiction to make vesting orders under BIA s. 67.13(7)

23. The Laird Entities rely on BIA s. 65.13(7), which provides that “*The court may authorize a sale or disposition free and clear of any security, charge or other restriction.*” (emphasis added)
24. It is trite that in matters of legislative interpretation, “there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”²⁰
25. The Cambridge English dictionary defines “restriction” as “*an official limit or control on what people or companies are allowed to do, or on what can happen.*” The Oxford English dictionary defines “restriction” as “*a limiting condition or measure, especially a legal one*”, or “*the limitation or control of someone or something, or the state of being limited or restricted.*” It would therefore seem that the plain and ordinary meaning of the word “restriction” in s. 65.13(7) is capable of encompassing site plan agreements and planning restrictions.

Existing case law recognizes this court’s jurisdiction to make orders inconsistent with planning legislation and restrictions – even in cases not involving the broad discretion in the BIA or CCAA

26. While there currently seems to be no reported cases having considered the interaction of site plan agreements with BIA s. 65.13 or the equivalent s. 36 of the *Companies’ Creditors Arrangement Act* (the “CCAA”), the Ontario Superior Court has repeatedly found that it has jurisdiction to vest out *Planning Act* and like restrictions, even in cases not involving

²⁰ As endorsed by the Supreme Court on numerous occasions including *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 21.

the broad discretion in the BIA or CCAA, by virtue of its jurisdiction under the common law and CJA s. 100.

27. An early such case is *Kuz*, where the court was seized with an application for partition of a joint tenancy. The court made the order, relying on its common law jurisdiction to override planning legislation, saying:

It is my opinion that planning considerations must now be taken to be a relevant factor to be taken into account with all of the other facts and circumstances, in determining whether or not the court ought to exercise its discretion in favour of granting partition. In my opinion the mere fact that partition may lead to violation of the provisions and intent of s. 29, by itself, need not necessarily prevent the court from exercising that discretion. In my opinion it is merely one factor to be taken into account along with others.

It is not my intention to lay down any rules as to when violation of the provisions and intent of s. 29 of the *Planning Act* ought to prevent a court from exercising its discretion in favour of granting partition. It seems to me that each case will have to be decided on its particular facts.²¹

[Emphasis added.]

28. *Kuz* was cited with approval and applied in more recent cases including *Merol*²² and *Nobrega*,²³ where the court held, at para. 18 and in reference to CJA s. 100:

A court has jurisdiction to make a vesting order even if such an order will contravene the *Planning Act*. That said, whether a vesting order will conflict with the *Planning Act* is a relevant factor to consider in determining if the court should exercise its discretion. If the vesting order will contravene the *Planning Act*, the court should use caution in exercising its discretion.

[References omitted.]

29. While those cases dealt with subdividing a property without approval, which is a different aspect of planning control under the *Planning Act*, it remains that they are clear authority

²¹ *Kuz v Kuz*, [1980 CanLII 1695 \(ON SC\)](#), paras. 10, 11.

²² *724597 Ontario Inc. v Merol Power Corporation*, [2005 CanLII 41537 \(ON SC\)](#), paras. 13, 14.

²³ *Nobrega and Elder v Trustees of the Estate of M. Gasparovich*, [2018 ONSC 2901](#).

for the proposition that this court has jurisdiction under provincial law to make vesting orders contradicting the *Planning Act* or similar legislation, such as the *City of Toronto Act*, if the order is appropriate in the circumstances.

30. The lack of immutability in planning matters was also specifically noted by the Court of Appeal in the seminal case of *Hi-Rise*, when considering the jurisdiction of the (then) Ontario Municipal Board to make changes to a site plan agreement without the consent of the City:

[P]lanning cannot be done at one time, for all time and the Act is therefore structured to contemplate amendments to official plans and zoning by-laws. To hold that a site plan agreement cannot be changed without the consent of the municipality would alter the entire philosophy of the planning process. Every property developed under a site plan agreement (we were told, most of the property in Scarborough) would be frozen in place for all time, subject to the arbitrary decision of council.

Therefore, it is my conclusion that, in terms of the broad purposes of the statute and its development over the years, a site plan agreement must be viewed primarily as a planning instrument, remaining a contract for enforcement purposes from time to time, but amenable to the change which is inherent in all planning.²⁴

Recent appellate authority on vesting orders: Dianor

31. The *Dianor* decisions²⁵ of the Ontario Court of Appeal are recent authority on the scope of vesting order and therefore merit review. The question in that case was whether the court had jurisdiction in a receivership to vest out a third party's royalty entitlement to a mine upon its sale pursuant to s. 243 and CJA s. 100.

²⁴ *Hi-Rise Structures Inc. v Scarborough (City)*, [1992 CanLII 7739 \(ON CA\)](#), p. 8-9, most recently cited and applied in *Dominus/Cityzen Brampton SWQRP Inc. v The Corporation of the City of Brampton*, [2020 ONSC 5806](#).

²⁵ *Third Eye Capital Corporation v Ressources Dianor Inc.*, [2018 ONCA 253](#) ("*Dianor 2018*"), and *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#) ("*Dianor 2019*").

32. It must first be noted that *Dianor* does not discuss nor concern the court’s vesting jurisdiction under BIA s. 65.13(7) (nor the CCAA equivalent, s. 36), which did not apply. In fact, the Court of Appeal says so expressly at least 10 times,²⁶ including mention that “the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA.”²⁷ This is as an indication that the decision might have been influenced by other considerations had BIA s. 65.13(7) been applicable (such as by its wording that includes “restrictions”).
33. With this caveat in mind, the *Dianor* principles may be of guidance by analogy, as they favour granting a vesting order in this case with respect to the SPA.
34. The Court of Appeal began its analysis by noting the importance of vesting orders for the insolvency law and practice, both in the context of liquidations and receiverships than in that of debtor-in-possession financial restructurings, and for all stakeholders including purchasers and vendors.²⁸
35. The Court of Appeal then notes that the BIA “is remedial legislation and should be given a liberal interpretation to facilitate its objectives”.²⁹ Though this is not mentioned in *Dianor* since that case did not involve a restructuring, the Supreme Court held on several occasions that salient objectives of the financial restructuring legislation in Canada including rehabilitation and “to permit the debtor to carry on business, and, where possible, avoid the social and economic costs of liquidating its assets.”³⁰

²⁶ See *Dianor 2018*, paras. 1, 104, 118, 121, and *Dianor 2019*, paras. 18 and 59-71.

²⁷ *Dianor 2019*, para. 71.

²⁸ See *Dianor 2019*, paras. 27, 28; see also paras. 70, 81.

²⁹ *Dianor 2019*, para. 43.

³⁰ *Century Services Inc. v Canada (Attorney General)*, [2010 SCC 60](#) (“*Century Services*”), para. 15 and *9354-9186 Québec inc. v Callidus Capital Corp.*, [2020 SCC 10](#) (“*Callidus*”), para. 41.

36. In reviewing when vesting orders had been granted in prior case law the Court of Appeal commented that:

Generally speaking, outcomes have turned on the particular circumstances of a case accounting for factors such as the nature of the property interest, the dealings between the parties, and the relative priority of the competing interests. It is also clear from this review that many cases have considered the equities to determine whether a third-party interest should be extinguished.

[Emphasis added.]

37. The Court then went on to provide an analytical framework for whether to grant a vesting order that serves to extinguish rights, which it called the “rigorous cascade analysis”:

[A] court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.

If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.³¹

[Emphasis added.]

38. On the “nature of the interest in land” criterion, the court noted:

[I]n my view, a key inquiry is whether the interest in land is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale (such as a mortgage or a lien for municipal taxes), or whether the interest is more akin to a fee simple that is in substance an ownership interest in some ascertainable feature of the property itself. This latter type of interest is tied to the inherent characteristics of the property itself; it is not a fixed sum of money that is extinguished when the monetary obligation is fulfilled. Put differently, the reasonable expectation of the owner of such an

³¹ *Dianor 2019*, paras. 109, 110.

interest is that its interest is of a continuing nature and, absent consent, cannot be involuntarily extinguished in the ordinary course through a payment in lieu.³²

[Emphasis added.]

39. Applying this analysis to this motion yields the following.
40. **Nature of the City’s “interest” in the Property** – The City’s “interest” in the Property – which may not be an “interest in land” as was central to the analysis in *Dianor* – is in the nature of commitments by the Laird Entities provided in exchange for the City’s permission to develop the Property according to specific drawings. The obligations of the Laird Entities are secured by letters of credit much like other financial obligations such as guarantees or secured interests that are routinely vested out in an insolvency sale.
41. **The City’s “prejudice”** – This is likely the court’s main concern. Fortunately, in terms of “prejudice”, there is little if any, such that the balance of convenience favours granting the vesting order. This is because any development of the Property by the Purchaser must be done under another site plan agreement with the City. Nothing in the vesting out of the SPA from title to the Property allows the Purchaser to develop or deal with the Property in a way that is otherwise not permitted.
42. Put succinctly, the issue is whether this SPA should be removed from title, not whether a site plan agreement is required, because that is inevitable. As evidenced by the emails from its lawyers, the City expects this to happen in the normal course.

³² *Dianor 2019*, para. 105.

43. In circumstances where the development contemplated by the SPA will not proceed, the commitments made by the Laird Entities to the City in the SPA should not bind the Property and frustrate the sale that was the preferred outcome of a rigorous sale process.
44. **Good faith and the equities** – Considering any City’s prejudice from the transfer of the Property free of the SPA is likely marginal if existing, it bears recognizing that a financial restructuring is at its core a compromise requiring some good faith give-and-take from all stakeholders.³³ The good faith of the Laird Entities and the Purchaser is visible given, *inter alia*, the sale process and the oversight of the Proposal Trustee throughout. Furthermore, in terms of equities, the Purchaser’s and Laird Entities’ concerns with the SPA remaining on title are grounds supporting, on a balance, this court’s granting the relief sought.
45. For those reasons, this court may make the vesting orders sought, which are appropriate in the circumstances.

B. Sealing

46. Confidential Exhibits “1” to the Birnboim June Affidavit contains sensitive information, i.e. the purchase price and deposit amount under the Sale Agreement. A copy of the Sale Agreement with only that information redacted is provided for the public record. This court has jurisdiction to make the sealing order sought, including under CJA s. 137(2). It is typical attendant relief in sales processes as a matter of “public interest”,³⁴ to protect the integrity of any future sale efforts should the Transaction fails to close for any reason. The sealing orders sought are appropriate.

³³ BIA, s. 4.2; CCAA, s. 18.6; *Century Services*, para. 70; *Callidus*, para. 70.

³⁴ *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#), para. 84; see also *Nortel Networks Corporation (Re)*, [2009 CanLII 39492 \(ON SC\)](#), paras. 3, 57.

C. Approval of Proposal Trustee's fees and activities

47. On February 10, 2021, this court approved the Proposal Trustee's two first reports and the activities and fees described therein. The Proposal Trustee's activities since then were reported in the third and fourth reports of the Proposal Trustee respectively dated March 23, 2021 and May 10, 2021, as well as the Fifth Report. As to the approval of the Proposal Trustee's and its counsel's fees, fee affidavits are provided as is required.³⁵ Those fees are payable in priority both in a proposal³⁶ and in bankruptcy.³⁷ The sought approvals would have the constructive effects noted in *Target*.³⁸ This court may make the approval orders sought.

V. NATURE OF THE ORDER SOUGHT

48. The Laird Entities therefore seek orders in suggested accordance with draft orders filed at tabs 3 and 5 of their motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of June, 2021.

R. Brendan Bissell

Brendan Bissell (LSO# 40354V)
Tel: 416-597-6489
Email: bissell@gsnh.com

Joël Turgeon

Joël Turgeon (LSO #80984R)
Tel: (416) 597-6486
Email: turgeon@gsnh.com

Lawyers for 33 Laird Inc., 33 Laird GP Inc. and
33 Laird Limited Partnership

³⁵ See *Confectionately Yours Inc. (Re)*, [2002 CanLII 45059 \(ON CA\)](#), paras. 42-54, and the cases cited there.

³⁶ BIA, s. 60(1).

³⁷ BIA, s. 136(1)(b).

³⁸ *Target Canada Co. (Re)*, [2015 ONSC 7574](#), paras. 2, 23.

SCHEDULE A – LIST OF AUTHORITIES

1. *Royal Bank of Canada v Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#)
2. *CCM Master Qualified Fund v blutip Power Technologies*, [2012 ONSC 1750](#)
3. *West End Motors v 189 Dundas Street West Inc.*, [2019 ONSC 5124](#)
4. *Choice Properties Limited Partnership v Penady (Barrie) Ltd.*, [2020 ONSC 3517](#)
5. *Nelson Education Limited (Re)*, [2015 ONSC 5557](#)
6. *Rizzo & Rizzo Shoes Ltd. (Re)*, [\[1998\] 1 S.C.R. 27](#)
7. *Kuz v Kuz*, [1980 CanLII 1695 \(ON SC\)](#)
8. *724597 Ontario Inc. v Merol Power Corporation*, [2005 CanLII 41537 \(ON SC\)](#)
9. *Nobrega and Elder v Trustees of the Estate of M. Gasparovich*, [2018 ONSC 2901](#)
10. *Hi-Rise Structures Inc. v Scarborough (City)*, [1992 CanLII 7739 \(ON CA\)](#)
11. *Third Eye Capital Corporation v Ressources Dianor Inc.*, [2018 ONCA 253](#)
12. *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#)
13. *Century Services Inc. v Canada (Attorney General)*, [2010 SCC 60](#)
14. *9354-9186 Québec inc. v Callidus Capital Corp.*, [2020 SCC 10](#)
15. *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#)
16. *Nortel Networks Corporation (Re)*, [2009 CanLII 39492 \(ON SC\)](#)
17. *Confectionately Yours Inc. (Re)*, [2002 CanLII 45059 \(ON CA\)](#)
18. *Target Canada Co. (Re)*, [2015 ONSC 7574](#)

SCHEDULE B – RELEVANT STATUTES

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

Priority of claims

60 (1) No proposal shall be approved by the court that does not provide for the payment in priority to other claims of all claims directed to be so paid in the distribution of the property of a debtor and for the payment of all proper fees and expenses of the trustee on and incidental to the proceedings arising out of the proposal or in the bankruptcy.

Disclaimer or resiliation of agreements

65.11 (1) Subject to subsections (3) and (4), 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) may — on notice given in the prescribed form and manner to the other parties to the agreement and the trustee — disclaim or resiliate any agreement to which the debtor is a party on the day on which the notice of intention or proposal was filed. The debtor may not give notice unless the trustee approves the proposed disclaimer or resiliation.

Court may prohibit disclaimer or resiliation

(3) Within 15 days after the day on which the debtor gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the trustee, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Court ordered disclaimer or resiliation

(4) If the trustee does not approve the proposed disclaimer or resiliation, the debtor may, on notice to the other parties to the agreement and the trustee, apply to a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered

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

(a) whether the trustee approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable proposal being made in respect of the debtor; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Date of disclaimer or resiliation

(6) An agreement is disclaimed or resiliated

(a) if no application is made under subsection (3), on the day that is 30 days after the day on which the debtor gives notice under subsection (1);

(b) if the court dismisses the application made under subsection (3), on the day that is 30 days after the day on which the debtor gives notice under subsection (1) or any later day fixed by the court; or

(c) if the court orders that the agreement is disclaimed or resiliated under subsection (4), on the day that is 30 days after the day on which the debtor gives notice or any later day fixed by the court.

Loss related to disclaimer or resiliation

(8) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Reasons for disclaimer or resiliation

(9) A debtor shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Exceptions

(10) This section does not apply in respect of

(a) an eligible financial contract;

(b) a lease referred to in subsection 65.2(1);

(c) a collective agreement;

(d) a financing agreement if the debtor is the borrower; or

(e) a lease of real property or of an immovable if the debtor is the lessor.

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.

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.

Assets may be disposed of free and clear

(7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Scheme of distribution – priority of claims

136 (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

- (a) in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the legal representative or, in the Province of Quebec, the successors or heirs of the deceased bankrupt;
- (b) the costs of administration, in the following order,
 - (i) the expenses and fees of any person acting under a direction made under paragraph 14.03(1)(a),
 - (ii) the expenses and fees of the trustee, and
 - (iii) legal costs;

[...]

Site plan control area

Definition

114 (1) In this section,

“development” means the construction, erection or placing of one or more buildings or structures on land or the making of an addition or alteration to a building or structure that has the effect of substantially increasing the size or usability thereof, or the laying out and establishment of a commercial parking lot or of sites for the location of three or more trailers or of sites for the location of three or more mobile homes as defined in subsection 46 (1) of the Planning Act or of sites for the construction, erection or location of three or more land lease community homes as defined in subsection 46 (1) of the Planning Act.

Exception

(1.1) The definition of “development” in subsection (1) does not include the placement of a portable classroom on a school site of a district school board if the school site was in existence on January 1, 2007.

Establishment of site plan control area

(2) Where in an official plan an area is shown or described as a proposed site plan control area, the City may, by by-law, designate the whole or any part of such area as a site plan control area.

Designation of site plan control area

(3) A by-law passed under subsection (2) may designate a site plan control area by reference to one or more land use designations contained in a by-law passed under section 34 of the Planning Act.

Consultation

(4) The City,

(a) shall permit applicants to consult with the City before submitting plans and drawings for approval under subsection (5); and

(b) may, by by-law, require applicants to consult with the City as described in clause (a).

Approval of plans or drawings

(5) No person shall undertake any development in an area designated under subsection (2) unless the City or, where a referral has been made under subsection (15), the Local Planning Appeal Tribunal has approved one or both, as the City may determine, of the following:

1. Plans showing the location of all buildings and structures to be erected and showing the location of all facilities and works to be provided in conjunction therewith and of all facilities and works required under clause (11) (a), including facilities designed to have regard for accessibility for persons with disabilities.

2. Drawings showing plan, elevation and cross-section views for each building to be erected, except a building to be used for residential purposes containing fewer than 25 dwelling units, which drawings are sufficient to display,

i. the massing and conceptual design of the proposed building,

ii. the relationship of the proposed building to adjacent buildings, streets, and exterior areas to which members of the public have access,

iii. the provision of interior walkways, stairs, elevators and escalators to which members of the public have access from streets, open spaces and interior walkways in adjacent buildings,

iv. matters relating to exterior design, including without limitation the character, scale, appearance and design features of buildings, and their sustainable design, but only to the extent that it is a matter of exterior design, if an official plan and a by-law passed under subsection (2) that both contain provisions relating to such matters are in effect in the City,

v. the sustainable design elements on any adjoining highway under the City's jurisdiction, including without limitation trees, shrubs, hedges, plantings or other ground cover, permeable paving materials, street furniture, curb ramps, waste and recycling containers and bicycle parking facilities, if an official plan and a by-law passed under subsection (2) that both contain provisions relating to such matters are in effect in the City, and

vi. facilities designed to have regard for accessibility for persons with disabilities.

Exclusions from site plan control

(6) The following matters are not subject to site plan control:

1. The interior design.

2. The layout of interior areas, excluding interior walkways, stairs, elevators and escalators referred to in subparagraph 2 iii of subsection (5).

3. The manner of construction and construction standards.

Dispute about scope of site plan control

(7) The owner of land or the City may make a motion for directions to have the Local Planning Appeal Tribunal determine a dispute about whether a matter referred to in paragraph 1 or 2 of subsection (5) is subject to site plan control.

Final determination

(8) The Local Planning Appeal Tribunal's determination under subsection (7) is not subject to appeal or review.

Drawings for residential buildings

(9) Despite the exception provided in paragraph 2 of subsection (5), city council may require the drawings mentioned in that paragraph for a building to be used for residential purposes containing less than 25 dwelling units if the proposed building is to be located in an area specifically designated in the official plan mentioned in subsection (2) as an area in which such drawings may be required.

Proviso

(10) Nothing in this section is deemed to confer on the City power to limit the height or density of buildings to be erected on the land.

Conditions to approval of plans

(11) As a condition to the approval of the plans and drawings referred to in subsection (5), the City may require the owner of the land to,

- (a) provide to the satisfaction of and at no expense to the City any or all of the following:
 - (i) subject to subsection (12), widenings of highways that abut on the land,
 - (ii) facilities to provide access to and from the land such as access ramps and curbs and traffic direction signs,
 - (iii) off-street vehicular loading and parking facilities, either covered or uncovered, access driveways, including driveways for emergency vehicles, and the surfacing of such areas and driveways,
 - (iv) walkways and walkway ramps, including the surfacing thereof, and all other means of pedestrian access,
 - (iv.1) facilities designed to have regard for accessibility for persons with disabilities;
 - (v) facilities for the lighting, including floodlighting, of the land or of any buildings or structures thereon,

(vi) walls, fences, hedges, trees, shrubs or other groundcover or facilities for the landscaping of the lands or the protection of adjoining lands,

(vii) vaults, central storage and collection areas and other facilities and enclosures for the storage of garbage and other waste material,

(viii) easements conveyed to the City for the construction, maintenance or improvement of watercourses, ditches, land drainage works, sanitary sewage facilities and other public utilities of the City on the land,

(ix) grading or alteration in elevation or contour of the land and provision for the disposal of storm, surface and waste water from the land and from any buildings or structures thereon;

(b) maintain to the satisfaction of the City and at the sole risk and expense of the owner any or all of the facilities or works mentioned in subclauses (a) (ii) to (ix), including the removal of snow from access ramps and driveways, parking and loading areas and walkways;

(c) enter into one or more agreements with the City dealing with and ensuring the provision of any or all of the facilities, works or matters mentioned in clause (a) or (e) and the maintenance thereof as mentioned in clause (b) or with the provision and approval of the plans and drawings referred to in subsection (5);

(d) enter into one or more agreements with the City ensuring that development proceeds in accordance with the plans and drawings approved under subsection (5);

(e) subject to subsection (13), convey part of the land to the City to the satisfaction of and at no expense to the City for a public transit right of way.

Widening must be described in official plan

(12) An owner may not be required to provide a highway widening under subclause (11) (a) (i) unless the highway to be widened is shown on or described in an official plan as a highway to be widened and the extent of the proposed widening is likewise shown or described.

Limitation

(13) An owner of land may not be required to convey land under clause (11) (e) unless the public transit right of way to be provided is shown on or described in an official plan.

Registration of agreements

(14) Any agreement entered into under clause (11) (c) or (d) may be registered against the land to which it applies and the City is entitled to enforce the provisions thereof against the owner and, subject to the provisions of the Registry Act and the Land Titles Act, any and all subsequent owners of the land.

Appeal to L.P.A.T. re approval of plans or drawings

(15) If the City fails to approve the plans or drawings referred to in subsection (5) within 30 days after they are submitted to the City, the owner may appeal the failure to approve the plans or drawings to the Local Planning Appeal Tribunal by filing with the city clerk a notice of appeal accompanied by the fee charged under the Local Planning Appeal Tribunal Act, 2017.

Appeal to L.P.A.T. re requirement under subs. (11)

(15.1) If the owner of the land is not satisfied with any requirement made by the City under subsection (11) or with any part thereof, including the terms of any agreement required, the owner may appeal the unsatisfactory requirements, or parts thereof, including the terms of any agreement required, to the Local Planning Appeal Tribunal by filing with the city clerk a notice of appeal accompanied by the fee charged under the Local Planning Appeal Tribunal Act, 2017.

City clerk to forward plans and drawings, etc. to L.P.A.T.

(15.2) If the city clerk receives a notice of appeal under subsection (15) or (15.1), the city clerk shall ensure that the following are forwarded to the Local Planning Appeal Tribunal within 15 days after the notice is filed:

1. The notice of appeal.
2. The fee.
3. The plans and drawings submitted for approval under subsection (5).
4. In the case of an appeal under subsection (15.1), documents that set out the requirements made by the municipality under subsection (11).

Hearing

(16) The Local Planning Appeal Tribunal shall hear and determine the matter in issue and determine the details of the plans or drawings and determine the requirements, including the provisions of any agreement required.

Classes of development, delegation

(17) Where the City has designated a site plan control area under this section, the City may, by by-law,

- (a) define any class or classes of development that may be undertaken without the approval of plans and drawings otherwise required under subsection (5); and
- (b) delegate to either a committee of city council or to an appointed officer of the City identified in the by-law either by name or position occupied, any of the City's powers or authority under this section, except the authority to define any class or classes of development as mentioned in clause (a).

➤ *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.

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 PARTNERSHIP**
**(approval and vesting order, approval of proposal trustee's
fees and activities, sealing)**
(motion returnable June 11, 2021)

GOLDMAN SLOAN NASH & HABER LLP
480 University Avenue, Suite 1600
Toronto (ON) M5G 1V2

Brendan Bissell (LSO# 40354V)
Tel: 416-597-6489
Email: bissell@gsnh.com

Joël Turgeon (LSO #80984R)
Tel: (416) 597-6486
Email: turgeon@gsnh.com

Lawyers for 33 Laird Inc., 33 Laird GP Inc. and 33 Laird
Limited Partnership