

**ONTARIO
SUPERIOR COURT OF JUSTICE**

**IN THE MATTER OF THE NOTICES OF INTENTION TO
MAKE A PROPOSAL PROCEEDINGS OF DREXLER
CONSTRUCTION LIMITED, FOLMUR CONSTRUCTION
(2004) LIMITED, AND DOWN UNDER PIPE AND CABLE
LOCATING LIMITED, CORPORATIONS INCORPORATED
UNDER THE ONTARIO *BUSINESS CORPORATIONS ACT***

MOVING PARTIES' FACTUM

**(extension of time to file a proposal, approval of proposal trustee's fees and activities)
(returnable July 16, 2021)**

July 13, 2021

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I. OVERVIEW

1. This is a motion by Drexler Construction Ltd., Folmur Construction (2004) Ltd. and Down Under Pipe and Cable Locating Ltd. (together, the “**Companies**”) for orders extending to Monday, August 30, 2021, the time to file a proposal and approving the third report (the “**Third Report**”) of Albert Gelman Inc. as proposal trustee (the “**Proposal Trustee**”) as well as the Proposal Trustee’s fees and activities set out therein.
2. The Companies have each filed a notice of intention (“**NOI**”) on March 18, 2021 to which the Proposal Trustee acts as such. The NOI proceedings were administratively consolidated in this court file by order dated April 16, 2021 (the “**April 16 Order**”). This is the third motion in the NOI proceedings. The Proposal Trustee recommends the relief sought. Counsel are not aware of any opposition.
3. The current extension expires at the end of the day this motion is returnable, July 16, 2021. The 45-day extension sought is to allow the Companies to work further on their restructuring path primarily consisting in locating replacement financing to repay their priming secured creditor, Royal Bank of Canada (“**RBC**”), on towards a viable proposal. The test for extension is met.
4. The Proposal Trustee’s Third Report as well as the activities and fees described therein are, from the Companies’ perspective, proper. Fee affidavits are provided as required. The court may make the approval orders sought.

II. FACTS

A. The Companies and their business

5. Drexler Construction Ltd. (“**Drexler**”) owns all the shares of Folmur Construction (2004) Ltd. (“**Folmur**”) and Down Under Pipe and Cable Locating Ltd. (“**Down Under**”).

The Companies operate in the construction industry and attract clients including municipalities and townships across Ontario. For reference, Drexler made a gross profit of approximately \$4,483,355 in 2018 and \$5,113,471 in 2019, and employs between 50 and 110 non-unionized employees depending on the season. Folmur made a gross profit of approximately \$1,689,684 in 2018 and \$2,233,232 in 2019, and has 25 non-unionized employees. Down Under made a gross profit of approximately \$316,813 in 2018 and \$217,259 in 2019, and has 2 non-unionized employees.¹

B. Insolvency and restructuring approach

6. The Companies are all indebted to RBC, as borrowers and guarantors of the others, for approximately \$2,087,000. RBC is the largest creditor and holds valid and enforceable security interests based on an independent opinion obtained by the Proposal Trustee.²
7. Each of the Companies is insolvent primarily because of being unable to repay RBC when it made demand on March 8, 2021. However, their assets greatly exceed their liabilities, including based on the equity owned in real estate properties and other assets. This allows a restructuring approach centered around locating new financing to repay RBC, making a viable proposal to creditors, and returning to solvency. Such would benefit the Companies' stakeholders including creditors, clients, suppliers, employees and equity holders.³

C. State of file

8. The April 16 Order *inter alia*:
 - a. administratively consolidated the Companies' NOI proceedings in this court file,

¹ Affidavit of J. Drexler sworn July 12, 2021 (the "**Drexler July Affidavit**"), tab 2 (p. 7) of the motion record of the Companies for this motion (the "**MR**"), para. 5.

² Drexler July Affidavit, tab 2 (p. 7) of the MR, paras. 6, 7.

³ Drexler July Affidavit, tab 2 (p. 7) of the MR, paras. 8-10.

- b. extended the time to file a proposal to June 1, 2021,
 - c. approved a debtor-in-possession (DIP) financing facility and created a \$1,500,000 DIP charge on the Properties (as defined in the April 16 Order), subordinate to RBC's position,
 - d. created a \$100,000 administration charge on the same properties, subordinate to the DIP charge,
 - e. approved the sale of any or all of the Redundant Equipment (as defined in the April 16 Order), and
 - f. approved the Proposal Trustee's first report and supplemental report thereto along with the activities described therein.⁴
9. On May 28, 2021, this court granted the "**May 28 Order**", which, *inter alia*:
- a. extended the time to file a proposal to July 16, 2021,
 - b. augmented the April 16 Order with respect to sales of Redundant Equipment to provide for a "vesting-upon-sale" mechanism, and
 - c. approved the Proposal Trustee's second report as well as the activities and fees described therein.⁵

⁴ A copy of the April 16 Order is at tab 2B (p. 40) of the MR.

⁵ A copy of the May 28 Order is at tab 2C (p. 54) of the MR.

10. As more fully appears from the affidavit of Jerome Drexler sworn July 12, 2021, filed in support of this motion (the “**Drexler July Affidavit**”), the Companies’ restructuring efforts since the May 28 Order to today include:⁶
- a. terminating the Companies’ internal accountant/controller whose function is now fulfilled by the Companies’ new external chief financial officer and advisor, GreySuits Advisors Inc. (the “**Advisor**”).
 - b. continuing efforts towards locating alternative financing to repay RBC, leveraging the involvement of the Proposal Trustee, the Companies’ counsel, the Advisor, and a mortgage broker retained for this purpose (the “**Broker**”).
 - c. obtaining audited financial statements for the fiscal year ended March 31, 2021.
 - d. as to sales of Redundant Equipment, retaining Canam Appraisz Inc. and assisting with an auction completed on June 28, 2021, of which the proceeds are in the process of being distributed, in accordance with the applicable priorities and the procedure set out in the April 16 Order, to CRA and RBC on account of the Companies’ prior-ranking and pre-filing obligations to them.
 - e. generally, continuing to work, including with the Proposal Trustee and counsel, with transparency and good faith, in providing information to and responding to inquiries from stakeholders, evaluating restructuring options and working towards a proposal.

D. Next steps

11. The principal next step in the restructuring, such as through the extension period sought, is to continue efforts towards locating alternative financing to repay RBC. The Companies

⁶ Drexler July Affidavit, tab 2 (p. 7) of the MR, paras. 15-17.

and the Proposal Trustee are confident they can obtain financing offers during the sought extension period, or at least, make substantial progress towards the same. Once this is achieved, the Companies will work with the Proposal Trustee on a viable proposal.⁷

12. Looking forward, Drexler also has plans to invest in and develop the Vacant Development Land (term defined in the Third Report) once it obtains site plan approval from the municipality, so as to enhance the long-term value of that asset.⁸
13. The Companies currently contemplate no need to sell any more assets. The Companies have so far had no need to draw on the DIP facility. The DIP facility will be available should any draw be required during the sought extension period. Therefore, the Companies will have access to sufficient funds to operate throughout.⁹

III. ISSUES AND LAW

14. The issues are whether the court should extend the time to file a proposal and approve the Proposal Trustee's Third Report, fees and activities.

A. Extension of time to file a proposal

15. The sought extension is in respect of all three of the Companies' NOI proceedings. s. 50.4(9) of the *Bankruptcy and Insolvency Act*¹⁰ sets out mandatory criteria, reproduced below with comments as to their satisfaction.
 - a. good faith and due diligence – the above demonstrates that this criterion is satisfied.

The Companies are working with the Proposal Trustee and stakeholders with transparency, good faith and due diligence, and will continue to do the same.

⁷ Drexler July Affidavit, tab 2 (p. 7) of the MR, para. 18.

⁸ Drexler July Affidavit, tab 2 (p. 7) of the MR, para. 19.

⁹ Drexler July Affidavit, tab 2 (p. 7) of the MR, para. 20.

¹⁰ [R.S.C., 1985, c. B-3](#) (the "BIA").

- b. likelihood to make a viable proposal – the restructuring path outlined above is being acted upon towards a viable proposal. Considering the book and appraised value of the Companies’ assets, lending opportunities can likely be located with the involvement of the Proposal Trustee, the Companies’ counsel, the Advisor and the Broker. It is reasonably anticipable that substantial progress may be achieved in the extension period sought, particularly in consideration of having obtained audited financial statements for the most recent fiscal year, which is indeed material for potential lenders. In the meantime, stability is ensured, as the Companies will have access to sufficient funds to operate, with any reasonable contingency being covered through draws available under the court-approved DIP facility.¹¹
- c. any material prejudice to creditors – 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.”¹² Given that the value of the Companies’ assets appears to greatly exceed their liabilities, it seems unlikely that any creditor will suffer any prejudice if the Companies are permitted time to continue restructuring efforts. 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 Companies an opportunity to act on their defined path to a viable proposal.¹³ The Companies are not aware of any opposition and the Proposal Trustee recommends the extension.

¹¹ Drexler May Affidavit, tab 2 (p. 7) of the MR, para. 18-21.

¹² 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.

¹³ See *In the Matter of the Proposal of Cantrail Coach Lines Ltd.*, [2005 BCSC 351](#).

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

B. Approval of Third Report and Proposal Trustee's fees and activities

17. For the reasons noted by Chief Justice Morawetz in *Target*, the approval of a court officer's activities and reports is a relief "routinely granted."¹⁴ As to the approval of the Proposal Trustee's and its independent counsel's fees, those are payable in priority both in a proposal¹⁵ and in bankruptcy,¹⁶ so the issue is whether they are fair, reasonable, and verified by affidavits of the main professionals involved disclosing details sufficient to allow a reasonable appreciation.¹⁷

18. Here, this court approved the Proposal Trustee's reports, activities and fees up to the May 28 Order. The Proposal Trustee's activities and fees since then were reported to the court and stakeholders in the Third Report and are, from the Companies' perspective, proper. Fee affidavits are provided with the Third Report as is required by the caselaw. The approval language sought makes clear that the approval is only for the Proposal Trustee personally and is not intended to create rights or impose obligations for any other party. The court may therefore make the approval orders sought.

IV. NATURE OF THE ORDER SOUGHT

19. The Companies therefore seek an order in the form of the suggested draft order filed at tab 3 (page 75) of their motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of July, 2021.

¹⁴ *Target Canada Co. (Re)*, [2015 ONSC 7574](#), paras. 2 and 23.

¹⁵ BIA, s. 60(1).

¹⁶ BIA, s. 136(1)(b).

¹⁷ See *Confectionately Yours Inc. (Re)*, [2002 CanLII 45059 \(ON CA\)](#), paras. 42-54.

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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](#)
- 4 *Target Canada Co. (Re)*, [2015 ONSC 7574](#)
- 5 *Confectionately Yours Inc. (Re)*, [2002 CanLII 45059 \(ON CA\)](#)

SCHEDULE B – RELEVANT STATUTORY PROVISIONS

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).

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.

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;

[...]

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Estate No. 35-2721716

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