

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**IN THE MATTER OF THE NOTICE OF INTENTION TO  
MAKE A PROPOSAL PROCEEDING OF DREXLER  
CONSTRUCTION LIMITED, A CORPORATION  
INCORPORATED UNDER THE ONTARIO *BUSINESS  
CORPORATIONS ACT***

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**MOVING PARTIES' FACTUM**

**(procedural consolidation, extension of time to file a proposal, debtor-in-possession  
approval and charge, administration charge, sale of redundant equipment, approval  
of activities, sealing)**

**(returnable April 16, 2021)**

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April 14, 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](mailto:bissell@gsnh.com)

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

Lawyers for the moving parties and debtor  
companies, Drexler Construction Limited,  
Folmur Construction (2004) Limited, and Down  
Under Pipe and Cable Locating Limited

**I. NATURE OF THIS MOTION**

1. This is a motion by Drexler Construction Ltd. (“**Drexler**”), Folmur Construction (2004) Ltd. (“**Folmur**”) and Down Under Pipe and Cable Locating Ltd. (“**Down Under**”, and together with Drexler and Folmur, the “**Companies**”) for orders in suggested accordance with the draft filed with the motion record:<sup>1</sup>
  - a. administratively consolidating the Companies’ notice of intention (“**NOI**”) to make a proposal proceedings (the “**NOI Proceedings**”).
  - b. extending to Tuesday, June 1, 2021, the time for the Companies to file a proposal.
  - c. approving the Companies’ entering into a debtor-in-possession (“**DIP**”) lending facility (the “**DIP Facility**”) with Corwin Mortgage Capital Inc. (the “**DIP Lender**”).
  - d. creating a “**DIP Charge**” on the Companies’ interest in and to the real estate properties municipally known as 5274 Wellington Road 27, Rockwood, Ontario (PIN #71180-0203 (LT)) (the “**HQ Property**”) and 183 Catherine Street, Rockwood, Ontario (PIN #71180-0052(LT)) (the “**Catherine Property**”), to rank in priority to any “**Encumbrance**” (as defined in the draft order) save any Encumbrance in favour of RBC or that primes the same.
  - e. directing the Companies to pay the reasonable invoices of Albert Gelman Inc. in its capacity as trustee to the NOI Proceedings (in such capacity, the “**Proposal**”).

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<sup>1</sup> The draft order is at tab 3 of the motion record of the Companies (the “**MR**”).

This draft preceded two things: (i) the revised DIP term sheet which has since been finalized as discussed below, and (ii) discussions, which at the time of writing this factum were still ongoing, for broadening the sale of equipment provisions of the draft order beyond the Redundant Equipment (as defined below).

Since the amended draft order was not finalized yet, and in order to provide the court with a factum as complete as possible, as soon as possible, this factum reflects item (i) above but not item (ii). If any changes are made to the order in respect of the latter, this will be brought to the attention of the court and fully addressed at the hearing.

**Trustee**”), counsel to Proposal Trustee and counsel to the Companies, as they become due, and creating an “**Administration Charge**” on the HQ and Catherine Properties limited to \$100,000 to rank in priority to any Encumbrance save any Encumbrance in favour of RBC, any Encumbrance ranking in priority to RBC’s Encumbrance, and the DIP Charge.

- f. authorizing the Companies to sell out of the ordinary course of business the “**Redundant Equipment**” (defined in the draft order).
- g. approving the first report of the Proposal Trustee dated April 13, 2021 (the “**First Report**”) and the Proposal Trustee’s supplementary to the First Report dated April 14, 2021 (the “**Supplementary Report**”), and the Proposal Trustee’s activities.
- h. sealing certain exhibits to the affidavit of Jerome Drexler sworn April 12, 2021, filed (the “**Drexler April Affidavit**”).

## **II. OVERVIEW**

- 2. This is the first motion in the NOI Proceedings. The Proposal Trustee recommends the relief sought. RBC, which is the ranking secured creditor, has been consulted and does not oppose. Counsel are not aware of any opposition.
- 3. Administrative consolidation is to allow economies of scale on costs and facilitate the handling of this restructuring as a unified case, which it factually is, as described below. The Companies will still maintain their separate financial affairs, because substantive consolidation is not being sought.
- 4. The extension of time is to further explore the viable restructuring path (i.e., locating replacement financing to fully repay RBC) described below. The Companies have acted,

and are acting, in good faith and with due diligence and no creditor would be materially prejudiced if the extension being applied for were granted.

5. The revised DIP term sheet with the DIP Lender is fair and reasonable. The orders sought limit the available DIP loan amount to the current best estimate of the financing needs of the Companies over the next 15-week period. The priority scheme of the DIP Charge was designed so as not to “prime” any existing secured parties, and as such it is not opposed by RBC.
6. The amount, collateral and rank of the Administration Charge sought are fair and reasonable. The attendant orders for payment of the professionals’ reasonable accounts are appropriate.
7. The Redundant Equipment is not being efficiently used and it is more economical for the Companies to monetize it than to retain it. The orders sought provide that each sale must be for no less than the appraised amount pursuant to an appraisal already obtained. The proceeds will then either be paid to reduce the obligations owing to RBC where the Proposal Trustee is of the opinion that it is the sole secured party, or will be held pending resolution of any priority issues.
8. The Proposal Trustee’s activities have been reported to stakeholders in the First Report and the Supplementary Report and approval would be appropriate.
9. The sealing orders sought are to seal appraisals in order to protect the integrity of any potential future sale, which is a common basis for sealing under the applicable case law.

### III. FACTS

#### A. Background of Companies and stakeholders

10. The Companies were set up by 8 brothers of which 4 remain involved in the management and as the sole shareholders of Drexler, who owns all the shares of Folmur and Down Under. The Companies operate in the construction industry and attract clients including municipalities and townships across Ontario.<sup>2</sup>
11. Drexler employs between 50 and 110 employees on average depending on the season, Folmur has approximately 25 employees, and Down Under has 2. None of the Companies' employees are unionized.<sup>3</sup>

#### B. Main assets

##### *i. Drexler*

12. Drexler's most valuable assets are its unencumbered fee simple interest in the HQ Property and the property municipally known as 5278 Wellington County Road 27, Rockwood, Ontario (PIN #71180-0204 (LT)) (the "**Duplex Property**") and, together with the Catherine Property and the HQ Property, the "**Properties**"). But for the RBC Charges (defined below), Drexler would also hold an unencumbered fee simple interest in the Catherine Property.<sup>4</sup>
13. Drexler's other notable assets include (all amounts are net of accumulated amortization as applicable and current as of March 31, 2021):
  - a. inventories, including construction materials, with a book value of \$806,416.

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<sup>2</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, paras. 4, 8.

<sup>3</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, paras. 7, 12, 17.

<sup>4</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, paras. 35, 37; First Report, para. 16.

- b. machinery and other construction equipment (the “**Drexler M&E**”) with a book value of \$1,936,220.
- c. vehicles with a book value of \$650,800.
- d. related company loans due and payable totaling approximately \$536,500.
- e. accounts receivable of \$2,826,440.<sup>5</sup>

*ii. Folmur*

14. Folmur’s notable assets include (all amounts are net of accumulated amortization as applicable and current as of March 31, 2021):

- a. client accounts receivable of \$1,523,947.
- b. machinery and other equipment (the “**Folmur M&E**”) with a book value of \$373,367.
- c. vehicles with a book value of \$180,707.
- d. inventories mostly including construction supplies with a book value of \$222,793.
- e. a loan due and payable from Drexler in the amount of approximately \$3.8 million.<sup>6</sup>

*iii. Down Under*

15. Down Under’s notable assets include client accounts receivable of \$22,516 and equipment with a book value of \$81,848 net of accumulated amortization, as of March 31, 2021.<sup>7</sup>

*iv. Appraisals*

16. Confidential Exhibit “1” to the Drexler April Affidavit contains appraisals for the Properties. Confidential Exhibit “2” and “3” are respectively a complete copy of the appraisal for the Drexler and Folmur M&E and a portion of the same with the Redundant

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<sup>5</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, para. 39; First Report, para. 16.

<sup>6</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, para. 41; First Report, para. 25.

<sup>7</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, para. 43; First Report, para. 30.

Equipment marked.<sup>8</sup> Those confidential exhibits are the subject of the sealing orders sought, for the reasons expressed below. They were excluded from the motion record served and filed. Should the court wish to consult those exhibits, counsel for the Companies will be available to communicate the same forthwith.

**C. Causes of insolvency and NOI filings**

17. While the Companies managed substantial gross profits in 2018 and 2019,<sup>9</sup> the times between 2020 and today have been more difficult for the following reasons.
18. First, the COVID-19 has had a general adverse impact on the Companies' costs, timelines to complete projects, and viability of actual and potential jobs. In addition, many municipal jobs were delayed or deferred, causing lower earnings.<sup>10</sup>
19. Second, the Companies suffered the following two isolated setbacks in 2020:
  - a. a \$324,000 loss on a job due to an estimator's error which resulted in Drexler having to honour an erroneously low listed price for a tender.
  - b. due to cashflow issues in the summer of 2020, sufficient revenues could not be generated in time to avoid the Canada Revenue Agency calculating interest charges of \$299,000.<sup>11</sup>
20. Third, RBC declared the Companies in default under their secured loan and issued demands and notices to enforce security on March 8, 2021. For context:
  - a. each of the Companies is obligated to RBC both as borrower under a number of credit facilities and as guarantor of the other two Companies.

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<sup>8</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, paras. 38, 40, 42, 52; First Report, paras. 18, 19.

<sup>9</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, paras. 6, 11, 16.

<sup>10</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, para. 25.

<sup>11</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, para. 26.

- b. the Companies' obligations to RBC are secured by two collateral charges/mortgages over the Catherine Property totalling \$435,000 (the "**RBC Charges**"), and general security agreements from each of the Companies (the "**RBC GSAs**").
  - c. the Proposal Trustee has obtained an independent legal opinion confirming the validity and enforceability of the RBC Charges and the RBC GSAs.<sup>12</sup>
  - d. the debt RBC claims against each of the Companies as borrowers and guarantors totals approximately \$2,086,300, which the Companies are unable to pay at this time.
  - e. before filing the NOIs, the Companies were in discussions (through counsel) with RBC about possible arrangements to forbear on the demands, but, despite significant effort by both the Companies and the bank, a mutually agreeable arrangement was not possible.<sup>13</sup>
21. Although their assets appear to exceed their liabilities by a significant margin, as discussed below, due to the above, the Companies are insolvent on a cashflow basis. Each of the Companies therefore filed an NOI under the *Bankruptcy and Insolvency Act*<sup>14</sup> ("**BIA**") on March 18, 2021, in estate/court file number 35-2721716 for Drexler, in estate/court file number 35-2721875 for Folmur, and in estate/court file number 35-2721896 for Down Under. The Proposal Trustee is the proposal trustee in each of the NOI Proceedings.<sup>15</sup>

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<sup>12</sup> See the First Report, para. 34 and Appendix "E".

<sup>13</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, paras. 20-24.

<sup>14</sup> [R.S.C., 1985, c. B-3](#).

<sup>15</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, paras. 24, 27, 28.



**D. Creditors**

*i. RBC*

22. Apart from the brothers' equity investments, the Companies' business operations and other capital needs were principally financed through intercompany loans as well as the RBC loan facilities mentioned above.<sup>16</sup>

23. As discussed above, the debt RBC claims against the Companies, as borrowers and guarantors, totals approximately \$2,086,300, and the Proposal Trustee has obtained an independent legal opinion confirming the validity and enforceability of the RBC Charges and the RBC GSAs, constituting RBC as the ranking and most sizeable creditor of the Companies.

*ii. Other potentially secured creditors*

24. The Drexler April Affidavit sets out in detail the chattel security registrations disclosed by recent *Personal Property Security Act* (“PPSA”) reports in respect of the Companies.<sup>17</sup> All the PPSA registrants are included on the service list.<sup>18</sup>

25. All PPSA registrations save two include motor vehicles in the collateral classification and most include vehicle identification numbers. Those may indicate purchase-money security interests (PMSIs) under the PPSA, but no legal opinion has yet been obtained in that regard.<sup>19</sup>

*iii. Other creditors*

26. The balance of the Companies' known creditors, including related corporations, are unsecured and set out in Exhibits “G”, “H” and “I” to the Drexler April Affidavit, being

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<sup>16</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, para. 29.

<sup>17</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, para. 31; see also the First Report, paras. 31, 36, 40.

<sup>18</sup> Tab 4 of the MR.

<sup>19</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, para. 32; First Report, paras. 35, 39.

the BIA Form 33 creditor listings for each of the Companies. Drexler lists approximately \$1,000,000 arms' length unsecured claims, Folmur approximately \$400,000, and Down Under approximately \$47,000. According to the Proposal Trustee's initial review of Drexler and Folmur's book and records, Drexler and Folmur could be indebted to the Canada Revenue Agency for HST and unremitted source deductions, although any such debt and its quantum have yet to be fully assessed.<sup>20</sup>

**E. Cashflows and DIP term sheet**

27. As shown in the Companies' 15-week cashflow forecasts,<sup>21</sup> Drexler expects to require \$600,000, and Folmur \$400,000 over that period of time due to greater expected expenses than expected income. The projections suggest that the majority of that amount would be required after the next NOI extension period of June 1, but variances of revenue or expenses, or their timing, could accelerate that.<sup>22</sup>
28. The principal reason for this funding requirement is timing. The nature of the Companies' construction work is such that a larger proportion of the costs of a job are incurred earlier in the process. From a cashflow perspective, the Companies operate "at a loss" during this earlier stage, with revenues and monetization conceptually being achieved later and on completion. The present timing is such that the Companies are involved in many jobs that are in the initial, cost-intensive phase. The Companies are also incurring professional costs in the NOI Proceedings, which are additional expenses.<sup>23</sup>

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<sup>20</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, paras. 33, 34; First Report, paras. 43-49.

<sup>21</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, Exhibit "M".

<sup>22</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, paras. 44, 47; First Report, para. 53.

<sup>23</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, para. 44; First Report, para. 54.

29. To fund the required amounts, the Companies negotiated a DIP term sheet with the DIP Lender, the material terms of which are:
- a. Loan amount: up to \$1,500,000.
  - b. Interest: 6.99% per annum, calculated and payable monthly.
  - c. Term: 1 year. Right to repay in full at any time upon 45 days' notice.
  - d. Fees: \$15,000 brokerage fee and \$1,200 administration fee, plus lender's legal fees.
  - e. Security: DIP Charge as sought on this motion.
  - f. Conditions: the only condition of materiality is this court's granting the relief sought on this motion.<sup>24</sup>
30. To reflect the Companies' estimated financing needs during the extension applied for, i.e. until June 1, 2021, and after discussion with RBC, it was agreed that the DIP orders sought would allow draws on the DIP Facility of up (i) \$750,000, (ii) a further \$250,000 with the written consent of the Proposal Trustee in consultation with RBC, and (iii) any further amounts with the written consent of RBC or further court order.<sup>25</sup>
31. Further to certain concerns expressed by RBC following the issuance of the First Report which included details of the manner by which the DIP Facility would be advanced by the DIP Lender to Drexler and subsequently to Folmur, the parties entered into a revised DIP term sheet which notably adds Folmur as a borrower alongside Drexler, such that funds would be advanced by the DIP Lender to Folmur directly. Drexler will then guarantee Folmur's obligations to the DIP Lender, which guarantee is in turn secured by the DIP

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<sup>24</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, paras. 45, 46, and Exhibit "N".

<sup>25</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, para. 47.

Charge sought. Counsel for RBC has advised that the revised DIP term sheet addressed its concerns and that RBC will not oppose the order sought in respect of the same.<sup>26</sup>

**F. Restructuring approach and activities since filing the NOIs**

32. The Companies intend to preserve their business as going concerns, in the best interest of their stakeholders including clients, suppliers, employees, equity holders, and creditors.<sup>27</sup>
33. Other than the Redundant Equipment, as discussed below, no sale of assets is currently contemplated. At present, the Companies' restructuring plan is to locate, with the assistance of counsel and the Proposal Trustee, alternative financing to fully repay RBC. Efforts towards this commenced prior to the NOI Proceedings and are ongoing. After repayment of RBC, the Companies plan to make a proposal to the balance of their creditors and exit restructuring proceedings as going concerns with substantively the same assets and business.<sup>28</sup>
34. The Companies are reasonably optimistic on the prospects to realize the above, considering among other things the value of their assets including the equity held in the Properties.<sup>29</sup>
35. As to the sale of the Redundant Equipment, this is not a core component of the restructuring plans. The Companies have determined that the Redundant Equipment is not being productively used and could be sold to generate cash to repay debt, which is more economical.<sup>30</sup>

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<sup>26</sup> Trustee's supplementary report to the First Report dated April 14, 2021, filed (the "**Supplementary Report**").

<sup>27</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, para. 49.

<sup>28</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, paras. 49, 50.

<sup>29</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, paras. 51, 56.

<sup>30</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, para. 52; First Report, paras. 20, 21.

36. Otherwise, since the filing of the NOIs, the Companies have worked with the Proposal Trustee with transparency, diligence and good faith, including towards the cashflow forecasts, discussions with stakeholders, and defining restructuring options.<sup>31</sup>

#### **IV. ISSUES AND LAW**

37. The issues are whether the court should grant the relief sought, of which each head is discussed below.

##### **A. Administrative consolidation**

38. The orders sought in this respect are at paras. 2 to 5 of the draft order.<sup>32</sup> 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.

39. 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. 4), and
- c. mention that the legal status of any entity or obligation is not altered (para. 5).

40. The orders sought provide for avoidance of doubt that this motion and the order sought itself are deemed respectively made and granted in each of the NOI Proceedings, which ensures structural integrity from the outset.

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<sup>31</sup> Drexler April Affidavit, tab 2 (p. 10) of the MR, paras. 53, 55; First Report, para. 50.

<sup>32</sup> Tab 3 of the MR.

41. 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>33</sup> Here, the Companies are largely integrated, including at the management and shareholder level, and have the same major creditor, RBC, which holds intersecting claims against all the Companies. The restructuring is principally in respect of the RBC debt, at least in the initial stages. Administrative consolidation is intended to allow economies of scale on costs, including with respect to court attendances, creditor reporting and general file administration. It would facilitate the handling of this restructuring as a unified case, which it factually is. The Trustee recommends the consolidation.<sup>34</sup> This court may therefore make the consolidation orders sought.

**B. Extension of time to file a proposal**

42. The sought extension is in respect of all three of the Companies' 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 Companies' proactiveness and consideration for the interests of all stakeholders. As recounted above, the Companies have so far and among other things obtained appraisals, defined the causes of their insolvency, built cashflows, located and negotiated the DIP Facility, identified the Redundant Equipment, and outlined a viable restructuring path. Throughout, the Companies

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<sup>33</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>34</sup> First Report, para. 72.

have worked with the Proposal Trustee and RBC with transparency, good faith and due diligence, and will continue to do the same.

- 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, the Companies have defined a viable restructuring path that may allow, on a balance, greater recovery for the constituency of stakeholders as a whole – including each of the Companies as well as their clients, employees, suppliers, equity holders, and creditors – than a liquidation scenario. There is reasonable ground to be optimistic about the Companies’ ability to locate alternative financing to repay RBC and the Companies’ ability to finance a viable proposal considering the value of their assets and the fact that they are continuing in operations so as to generate revenues during the NOI Proceedings.
- 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>35</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 Companies an opportunity to define their path to a proposal.<sup>36</sup> In this case, the evidence before the Court is that the assets of the Companies exceed their liabilities, which suggests that there will be no prejudice, to say nothing of anything “material” within the meaning of the case law.

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<sup>35</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>36</sup> See *In the Matter of the Proposal of Canrail Coach Lines Ltd.*, [2005 BCSC 351](#).

The Companies are not aware of any opposition, including from RBC who was consulted throughout, and the Trustee recommends the extension.<sup>37</sup>

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

**C. DIP financing and DIP Charge**

44. The orders sought in this respect are at paragraphs 7 to 17 of the draft order<sup>38</sup> and are based on the Toronto Commercial List model orders. They primarily provide for (i) approval of the Companies entering into the DIP Facility on the terms of the revised DIP term sheet highlighted above, (ii) approval of the Companies borrowing under the DIP Facility up to \$750,000 and more subject to the conditions explored above, and (iii) creation of the DIP Charge, which is to encumber only the HQ and Catherine Properties and rank first on those save any Encumbrance in favour of RBC or that primes the same. This collateralization and priority scheme was discussed among and is acceptable to the Companies, the DIP Lender and RBC. The DIP Charge does not secure obligations that existed before the DIP order.

45. This court has jurisdiction to make the DIP orders sought, including under BIA s. 50.6. The section requires notice to potentially affected secured creditors, which in this case is RBC, who does not oppose. 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.

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<sup>37</sup> First Report, paras. 69-71.

<sup>38</sup> Tab 3 of the MR.



- b. how the debtor's business and financial affairs are to be managed during the proceedings – details on the viable restructuring approach considered at this stage (i.e., refinancing) are set out above. Otherwise, the Companies will remain in operation and will continue working on ongoing projects so that things remain as much as possible “business as usual” from a client’s perspective, for example.
- c. whether the debtor's management has the confidence of its major creditors – no responding materials were filed as of the date hereof, RBC does not oppose and the Companies are not aware of any other opposition. Any other interested “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, the Companies’ cashflows are expected to be negative over the next 15-week period. Business and restructuring costs require additional financing for the restructuring to occur in order to preserve the going concern nature of the Companies’ business, which is expected to yield a better result for stakeholders than a liquidation. The DIP term sheet with the DIP Lender provides for a sufficient amount to cover the Companies’ expected needs.
- e. the nature and value of the debtor's property – valuations of the Properties and the Drexler/Fulmor M&E were obtained and are the subject of the sought sealing orders. Without disclosing their content, the evidence is that the DIP Lender accepted that the DIP Charge rank second to the RBC Charges, which suggests confidence that the value of the Catherine and HQ Properties is at least sufficient to support both security interests.

- f. whether any creditor would be materially prejudiced as a result of the security or charge – RBC is sure to suffer no prejudice to its rank because the DIP Charge is to rank after any interest of RBC in the properties affected by the DIP Charge. As more fully appears from parcel registers, but for the RBC Charges, the Properties are otherwise unencumbered. Moreover, the revised DIP term sheet addresses all of RBC’s possible concerns on the flow of funds. For the same reasons as noted above in connection with the extension of the NOI period, the evidence before the Court suggests an absence of any prejudice, let alone anything material.
- g. the trustee’s report referred to in paragraph 50(6)(b) or 50.4(2)(b) – the Proposal Trustee recommends this court’s granting the DIP Charge for the reasons set out in the First Report and the Supplementary Report, including the need for financing, that no creditor appears materially prejudiced, and that the terms appear reasonable in the circumstances.<sup>39</sup>
46. The court may therefore make the DIP orders sought.

**D. Administration Charge and professional costs**

47. This is provided in paragraphs 18, 19, and 24 of the draft order.<sup>40</sup> The Administration Charge sought is to secure the Companies’ payment of the fees and disbursements of the Proposal Trustee, its counsel, and counsel to the Companies. It is limited to \$100,000, will only encumber the Catherine and HQ Properties (like the DIP Charge), and is to rank immediately below the DIP Charge (and hence, below the RBC Charges too). This amount,

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<sup>39</sup> First Report, paras. 55, 60-65; Supplementary Report, para. 10.

<sup>40</sup> Tab 3 of the MR.

collateralization and priority scheme was discussed among and is acceptable to the Companies, the professionals and RBC.

48. The Companies' restructuring is complex and entirely dependent on the involvement of the Proposal Trustee and professional assistance from legal counsel, including for court appearances. The professionals' roles are not duplicative. The suggested quantum of the Administration Charge is reasonable, including in consideration of the equity Drexler holds, based on the discussion above, in the Catherine and HQ Properties, and is intended to operate as a "backstop" in case the primary plan of paying the professionals out of cash flow runs into difficulties. As appears from recent parcel registers, there is no affected secured creditor as the RBC Charges are not displaced. The Proposal Trustee recommends the charge.<sup>41</sup> For those reasons, the court may order the Administration Charge sought.<sup>42</sup>
49. As to paragraph 24 of the order, this is language becoming usual practice on the Commercial List. The rationale includes the following:
- a. the invoices for the Companies' counsel rendered during the restructuring are post-filing obligations that are payable in accordance with their terms (i.e. are not stayed). The order makes this transparent for third parties, e.g. stakeholders.
  - b. the order includes safeguards such as being limited to "reasonable" accounts, fees and disbursements, and, in the case of the Proposal Trustee and its counsel, it provides that the payment of their invoices constitutes advances applicable on account "of such reasonable accounts, fees and disbursements as may be approved

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<sup>41</sup> First Report, paras. 66-68.

<sup>42</sup> BIA s. 64.2; see *Canwest Publishing Inc.*, [2010 ONSC 222](#), paras. 52-55, and *Target Canada Co. (Re)*, [2015 ONSC 303](#), paras. 73-79.

by this court or through taxation under the BIA”. This reflects the modern practice of proposal trustees having their fees approved by court order during the course of the restructuring, considering those are payable in priority both in a proposal<sup>43</sup> and in bankruptcy.<sup>44</sup>

c. overall, such order provides transparency and streamlines administration.

50. Thus the court may grant the orders sought for this head of relief.

**E. Sale of Redundant Equipment**

*Note: at the time of writing this factum, discussions were ongoing regarding a revision to the draft order as to the sale of equipment provisions. The below reflects the order as included at tab 3 of the Companies’ motion record. Any changes to the draft order will be brought to the attention of the court and addressed at the hearing.*

51. The Companies have determined that it is more economical for them to sell the Redundant Equipment than to keep it. Hence, this relief is provided at paragraphs 20 and 21 of the draft order.<sup>45</sup> It is, in effect, an authorization for the Companies to sell assets outside of the ordinary course of business pursuant to BIA s. 65.13.

52. In *Nortel*,<sup>46</sup> the court set out the following non-exhaustive list of guiding factors: whether a sale is warranted at this time, whether the sale is to benefit the whole “economic community”, whether any of the debtors’ creditors have a *bona fide* reason to object to the sale of the business, and whether there is a better viable alternative.<sup>47</sup> These factors have been used in NOI proceedings as well. A notable precedent is *Mustang*.<sup>48</sup> There the court

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<sup>43</sup> BIA, s. 60.

<sup>44</sup> BIA, s. 136.

<sup>45</sup> Tab 3 of the MR.

<sup>46</sup> *Nortel Networks Corporation (Re)*, [2009] O.J. No. 3169 (ON SC) [[2009 CanLII 39492](#)] (“*Nortel*”).

<sup>47</sup> *Nortel*, para. 49.

<sup>48</sup> *Mustang GP Ltd. (Re)*, [2015 ONSC 6562](#) (“*Mustang*”).

referenced *CCM*<sup>49</sup> (a receivership) and the *Soundair*<sup>50</sup> principles to propose the following additional factors: the fairness, transparency and integrity of the proposed process, the commercial efficacy of the proposed process in light of the specific circumstances of the case, and whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.<sup>51</sup>

53. Those cases involved sale processes, but here, no formal and costly sale process is being sought, because (i) the Redundant Equipment has already and recently been independently appraised, (ii) the order expressly provides any sale must be for at least the appraised amount, and (iii) the Redundant Equipment is but a minor portion of the Drexler/Folmur M&E, which is itself overall a minor portion of the Companies' assets. Nevertheless, the criteria noted above would be satisfied including for the preceding reasons, and also that the order provides for a mechanism allowing the resolution of any priority issues. In short:
- a. RBC is anticipated to possibly be the only creditor with security on most of the Redundant Equipment by virtue of the RBC GSAs, which are confirmed as a valid and enforceable security based on an independent legal opinion obtained by the Proposal Trustee. The order provides that the sale proceeds for items that are subject only to RBC's security will be remitted to RBC in payment of the Companies obligations, which is simple, economical, and in line with the intent of the restructuring as well as the necessary waterfall of claims in any proposal or bankruptcy scenario.

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<sup>49</sup> *CCM Master Qualified Fund v blutip Power Technologies*, [2012 ONSC 1750](#), paras. 6, 7; *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#) ("*Danier Leather*"), paras. 23-25.

<sup>50</sup> *Royal Bank of Canada v Soundair Corp.*, [1991] O.J. No. 1137 (ON CA) [[1991 CanLII 2727](#)].

<sup>51</sup> *Mustang*, para. 39.

b. if there are two or more possible secured claims on any piece of the Redundant Equipment as determined by the Proposal Trustee, then the order provides that the Proposal Trustee will obtain an independent opinion on the validity, enforceability and rank of the claims and provide the same to the claimants. The order then provides that either the claimants will agree on payment of the sale proceeds, or the Proposal Trustee/Companies will make a motion to the court for advice and directions on the same. The whole process is therefore mostly out-of-court to save on costs and is generally multipartite, fair and practical.

54. The statutory test to grant this relief is therefore met.

**F. Approval of First and Supplementary Reports and Proposal Trustee's activities**

55. As mentioned by Chief Justice Morawetz in *Target*,<sup>52</sup> which was s CCAA case, approval of a court officer's activities and reports is a relief "routinely granted." This is because court approval allows the Proposal Trustee to move forward with the next steps in the proceeding, brings the Proposal Trustee's activities before the court, allows an opportunity for the concerns of the stakeholders to be addressed and any problems to be rectified, enables the court to satisfy itself that the Proposal Trustee's activities have been conducted in a prudent and diligent manner, provides protection for the Proposal Trustee not otherwise provided in the BIA, and protects the creditors from the delay in distribution that would be caused by re-litigation of steps taken and potential indemnity claims by the Proposal Trustee.<sup>53</sup> The approval language makes it clear, however, that such approval is

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<sup>52</sup> *Target Canada Co. (Re)*, [2015 ONSC 7574](#) ("*Target 7574*").

<sup>53</sup> *Target 7574*, paras. 2 and 23.

only for the Proposal Trustee personally and is not intended to create rights or impose obligations for any other party.

56. The activities of the Proposal Trustee since the beginning of the NOI Proceedings were reported to the court and stakeholders in the First and Supplementary Reports.<sup>54</sup> Approval of the same would have the constructive effects noted in *Target*, which also benefits the Companies and the administration of the NOI Proceedings generally. The court may therefore make the orders sought.

### **G. Sealing**

57. The Companies seek an order that Confidential Exhibits “1”, “2” and “3” to the Drexler April Affidavit, being appraisals as discussed above, be sealed from the public record pending the earlier of either court approval of a proposal in respect of all the Companies or further court order.
58. This court has jurisdiction to make the sealing orders sought, including under s. 137(2) of the *Courts of Justice Act*.<sup>55</sup> The Proposal Trustee recommends the sealing orders be made.<sup>56</sup> It is a typical attendant relief to protect the integrity of any future sale of the assets appraised (including, for example, in bankruptcy). “There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.”<sup>57</sup> Simply put, if the market had access to the appraised amounts, it would, among other issues, disincentivize higher bidding. Therefore, the sealing orders sought are appropriate in the circumstances.

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<sup>54</sup> See para. 52 of the First Report.

<sup>55</sup> See *Danier Leather*, paras. 79-86, and *Nortel*, paras. 3, 57.

<sup>56</sup> First Report, para. 57.

<sup>57</sup> *Danier Leather*, para. 84.

**V. NATURE OF THE ORDER SOUGHT**

59. The Companies therefore seek orders in the form of the suggested draft order, filed at tab 3 of their motion record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 14<sup>th</sup> day of April, 2021.

*R. Brendan Bissell*

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

*Joël Turgeon*

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

Lawyers for the moving parties and debtor companies, Drexler Construction Limited, Folmur Construction (2004) Limited, and Down Under Pipe and Cable Locating Limited



**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 *Canwest Publishing Inc.*, [2010 ONSC 222](#)
- 5 *Target Canada Co. (Re)*, [2015 ONSC 303](#)
- 6 *Nortel Networks Corporation (Re)*, [2009] O.J. No. 3169 (ON SC) [[2009 CanLII 39492](#)]
- 7 *Mustang GP Ltd. (Re)*, [2015 ONSC 6562](#)
- 8 *CCM Master Qualified Fund v blutip Power Technologies*, [2012 ONSC 1750](#)
- 9 *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#)
- 10 *Royal Bank of Canada v Soundair Corp.*, [1991] O.J. No. 1137 (ON CA) [[1991 CanLII 2727](#)]
- 11 *Target Canada Co. (Re)*, [2015 ONSC 7574](#)

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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.

### **Court may order security or charge to cover certain costs**

**64.2 (1)** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

### **Priority**

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

### **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.

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

### **Notice to secured creditors**

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

### **Factors to be considered**

(4) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the trustee approved the process leading to the proposed sale or disposition;
- (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

**Additional factors — related persons**

(5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

**Related persons**

(6) For the purpose of subsection (5), a person who is related to the insolvent person includes

- (a) a director or officer of the insolvent person;
- (b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and
- (c) a person who is related to a person described in paragraph (a) or (b).

**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.

### **Restriction — employers**

(8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

### **Restriction — intellectual property**

(9) If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

*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.

### **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.

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**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A  
PROPOSAL PROCEEDING OF DREXLER CONSTRUCTION LIMITED, A  
CORPORATION INCORPORATED UNDER THE ONTARIO *BUSINESS  
CORPORATIONS ACT***

Estate No. 35-2721716

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
Proceeding commenced in LONDON**

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**MOVING PARTIES' FACTUM  
(motion returnable April 16, 2021)**

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

**R. Brendan Bissell** (LSO# 40354V)  
Tel: (416) 597-6489  
Fax: (416) 597-3370  
Email: [bissell@gsnh.com](mailto:bissell@gsnh.com)

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

Lawyers for the moving parties and debtor companies, Drexler Construction Limited, Folmur Construction (2004) Limited, and Down Under Pipe and Cable Locating Limited