

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**IN THE MATTER OF THE PROPOSAL TO CREDITORS  
PROCEEDINGS OF DREXLER CONSTRUCTION LIMITED  
AND FOLMUR CONSTRUCTION (2004) LIMITED,  
CORPORATIONS INCORPORATED UNDER THE  
ONTARIO *BUSINESS CORPORATIONS ACT***

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**MOVING PARTIES' FACTUM**  
**(approval of amended financing facilities)**  
**(returnable December 16, 2022)**

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December 7, 2022

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companies, Drexler Construction Limited and  
Folmur Construction (2004) Limited

## **I. INTRODUCTION**

1. This is a motion by Drexler Construction Ltd. (“**Drexler**”) and Folmur Construction (2004) Ltd. (together, the “**Companies**”) for an order authorizing the Companies to enter into amended financing facilities with Mitsubishi HC Capital Canada, Inc. (“**Mitsubishi**”) substantially on the terms contemplated in an amending agreement (the “**Amending Agreement**”) attached as Exhibit “A” to the affidavit filed in support of the motion. A draft order is provided at tab 3 (page 64) of the Companies’ motion record, filed.
2. Albert Gelman Inc. in its capacity as trustee to both Companies’ proposal (in such capacity, the “**Proposal Trustee**”) recommends the relief sought. Counsel are not aware of opposition.

## **II. OVERVIEW**

3. The Companies are in the midst of fulfilling their proposals. Transactions out of the ordinary course, like credit agreements, require Court approval in such circumstances.
4. The Amending Agreement is required in order to grant Mitsubishi further collateral security on two parcels of land held by Drexler.. Mitsubishi requires that security in order to lend a further \$250,000 against the Companies’ receivables.
5. If approved, the Amending Agreement would not increase the Companies’ overall borrowing, because to date they have only been able to borrow \$1.7 million out of the total \$2.5 million amount previously approved by the Court. The Amending Agreement would effectively only permit the Companies to borrow less than \$2 million.
6. There will be no prejudice to creditors. The test for approval is met.

### III. FACTS

7. Drexler Construction Ltd. and Folmur Construction (2004) Ltd. (together the “**Companies**”) are in the construction industry. Their proposals have been accepted by their creditors and approved by this court in orders respectively dated November 12, 2021 and February 16, 2022.<sup>1</sup>
8. The proposals are in good standing and payments are being made by the Companies to the Proposal Trustee on a monthly basis per the proposal terms.<sup>2</sup>
9. The Companies have an existing loan facility with Mitsubishi, which was approved by this Court on April 29, 2022.<sup>3</sup>
10. The existing loan facility with Mitsubishi as approved by the Court was for an upper limit of \$2.5 million. The Companies have only been permitted by Mitsubishi to borrow a maximum of \$1.7 million, because a valuation of the Companies’ equipment came in lower than expected.<sup>4</sup>
11. The lower actual borrowing limit under the Mitsubishi facility is negatively affecting the Companies’ cash flow. The Companies have large and healthy accounts receivable worth in excess of \$3.6 million, but the Companies’ business requires the expenditure of working capital to fund construction jobs and then receive net payment later. In the case of some of the construction jobs, the final payments can be considerably later on account of things like holdback requirements. This is normal in the construction industry.<sup>5</sup>

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<sup>1</sup> Affidavit of Rodeny Davis sworn December 7, 2022 (the “**Davis Affidavit**”), para. 4; Motion Record, tab 2, page 8.

<sup>2</sup> Davis Affidavit, para. 5; Motion Record, tab 2, page 8.

<sup>3</sup> David Affidavit, para. 3; Motion Record, tab 2, pages 7-8.

<sup>4</sup> Davis Affidavit, paras. 6-7; Motion Record, tab 2, pages 8-9.

<sup>5</sup> Davis Affidavit, para. 8; Motion Record, tab 2, page 9.

12. Under the existing Mitsubishi facility, the Companies are only permitted to borrow \$250,000 against the value of their accounts receivable, which has already been done and forms part of the \$1.7 million amount referred to above.<sup>6</sup>
13. In discussions with Mitsubishi, they are prepared to allow the Companies to borrow a further \$250,000 against the value of their accounts receivable, but only if Mitsubishi gets a collateral charge in that amount against the properties owned by Drexler at 5270 and 5274 Wellington Road in Rockwood, Ontario.<sup>7</sup>
14. If approved by the Court, the amendment to the Mitsubishi facility would grant that charge and would then permit the Companies to borrow a further \$250,000 and thereby increase the borrowing to the order of magnitude of \$1.85 million. Due to the restriction imposed by the appraisal of the Companies' equipment, the Companies will not be able to borrow more than that from Mitsubishi, which means that the overall borrowing will remain well under the \$2.5 million limit approved by the creditors in the proposals and by the Court in its April 29, 2022 order.<sup>8</sup>
15. The Companies' evidence is that no creditor is likely to be prejudiced by the amendment sought. Instead, the interests of creditors is likely to be aided because the going concern nature of the Companies is what is funding their proposals.<sup>9</sup>

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

16. The issue is whether the Court should approve the Amending Agreement.

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<sup>6</sup> Davis Affidavit, para. 9 Motion Record, tab 2, page 9.

<sup>7</sup> Davis Affidavit, para. 10; Motion Record, tab 2, page 9.

<sup>8</sup> Davis Affidavit, para. 11; Motion Record, tab 2, pages 9-10.

<sup>9</sup> Davis Affidavit, para. 12; Motion Record, tab 2, page 10.

17. Transactions outside of the ordinary course of business by companies subject to proposals is required under section 65.13 of the *Bankruptcy and Insolvency Act* (the “**BIA**”).
18. For avoidance of doubt, the relief sought does not include any form of vesting (such as under BIA s. 65.13(7)) or priority charge, which is not contemplated to be necessary at this time. The relief sought is only the court’s authorization for the Companies to enter the Amending Agreement. Any security interests contemplated by the New Facilities will then be created, dealt with and take rank under normal provincial law.
19. BIA s. 65.13(4) sets out non-limitative criteria guiding the court’s approval. Those criteria more obviously pertain to typical sales of assets and are not applicable to the approval of going concern, long-term financing facilities without adaptation. They are nevertheless reproduced below with comments as to how they apply to this motion, for completeness.
  - a. Whether the process leading to the proposed disposition was reasonable in the circumstances and whether the Proposal Trustee approved it – Yes. It was the continuation of the process, initiated by the Companies and supervised by the Proposal Trustee throughout, which led to locating the Mitsubishi facility, was approved by this court through the April 29, 2022 order.
  - b. Whether the trustee filed with the court a report stating that in their opinion the disposition would be more beneficial to the creditors than a disposition under a bankruptcy – This is inapplicable because going concern financing facilities such as the New Facilities would not be contemplated in a bankruptcy/liquidation scenario. As discussed below however, the Amending Agreement is intended to finance activities so as to fund the proposals and avoid bankruptcy, which is more

beneficial to all stakeholders than a bankruptcy – as evidenced by the creditors’ and the court’s approval of the proposals.

- c. The extent to which the creditors were consulted – The creditors have not been consulted about the Amending Agreement in the circumstances where the overall borrowing will still be less than previously approved by the Court.
- d. The effects of the proposed sale or disposition on the creditors and other interested parties – The Amending Agreement will not result in more borrowing by the Companies than previously approved. Approval of the Amending Agreement is in the interest of stakeholders because the it will provide the further working capital to allow the Companies to take jobs and generate returns, which will in turn fund the proposals and the Companies’ return to solvency.
- e. Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value – this is applicable to sales but largely not to financing facilities.

20. For those reasons, the sought approval of the Amending Agreement is within this court’s jurisdiction to make and is fair, reasonable, and in the interest of stakeholders.

**V. NATURE OF THE ORDER SOUGHT**

21. The Companies therefore seek an order in the form of the suggested draft order filed at tab 3 (pages 98-99) of their motion record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 7<sup>th</sup> day of December, 2022.

[6]

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**SCHEDULE A – LIST OF AUTHORITIES**

n/a

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## SCHEDULE B – RELEVANT STATUTORY PROVISIONS

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

### **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.

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Estate No. 35-2721716

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**Proceeding commenced in LONDON**

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