Estate No. 35-2721716

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE PROPOSAL TO CREDITORS 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

(increased DIP facility, approval of long-term financing, approval of proposal trustee's fees and activities, withdrawal of one notice of intention and proposal)

(returnable September 10, 2021)

September 1, 2021

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[1]

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 order filed at tab 3 of the motion record:

   a. approving an additional $1,000,000 debtor-in-possession (DIP) facility (the "**Increased DIP Facility**") with the same lender and collateral as the existing, $1,500,000 DIP facility (the "**Initial DIP Facility**") approved by this court by order dated April 16, 2021 (the "**April 16 Order**").

   b. allowing Down Under to withdraw its notice of intention to make a proposal to creditors ("**NOI**") filed on March 18, 2021 and its proposal to creditors filed on August 30, 2021 or alternatively, allowing parties related to Down Under to vote, if they so choose, in favour of Down Under's proposal.

   c. approving a long-term refinancing that the Companies propose to enter into (the "**CEFL Facility**") with a new lender, Canadian Equipment Finance & Leasing ("**CEFL**").

   d. approving the fourth report (the "**Fourth Report**") of Albert Gelman Inc. in its capacity as proposal trustee (in such capacity, the "**Proposal Trustee**") and the Proposal Trustee's fees and activities described therein.

2. The Proposal Trustee recommends the relief sought. Counsel are not aware of opposition.

I. FACTS

3. Folmur and Down Under are fully-owned subsidiaries of Drexler. The sole shareholders of Drexler are 4 brothers.[1]

4. Each of the Companies filed an NOI under the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") on March 18, 2021. The Companies have now each filed a proposal to creditors as of August 30, 2021.[2] The Proposal Trustee is the proposal trustee to each NOI and proposal. The proceedings have been administratively consolidated in this court file through the April 16 Order.[3]

5. The causes of the Companies' insolvency chiefly include having been unable to repay their indebtedness, each as borrower under a number of credit facilities and as guarantor of the other two Companies' obligations, to RBC, the Companies' first-ranking secured creditor.[4]

6. The restructuring approach undertaken by the Companies was centered around locating a new source of financing to repay RBC, make a viable proposal to creditors, and return to solvency.[5]

7. The first step of this plan has been completed:

    a. the Companies located CEFL as their new long-term financier and have agreed to enter into the CEFL Facility,[6] and

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[1] Affidavit of J. Drexler sworn September 1, 2021 (the "**Drexler September Affidavit**"), tab 2 (page 8) of the moving parties' motion record (the "**MR**"), para. 7.
[2] A copy of the proposals of Drexler, Folmur and Down Under, along with attendant form 78 documentation, is at tabs 2B (page 44), 2C (page 68) and 2D (page 85) of the MR, respectively.
[3] Drexler September Affidavit, tab 2 (page 8) of the MR, para. 8; a copy of the April 16 Order is at tab 2E (page 100) of the MR.
[4] Drexler September Affidavit, tab 2 (page 8) of the MR, para. 9.
[5] Drexler September Affidavit, tab 2 (page 8) of the MR, para. 14.
[6] A copy of the CEFL Facility is at tab 2H (page 138) of the MR.

b. the Companies and RBC have agreed on RBC's repayment on the terms set out in a payout letter dated August 24, 2021.[7]

8. In order to repay RBC, the Companies used most of their available working capital and drew down the full amount of the Initial DIP Facility, being $1.5 million. The latter was done with RBC's consent, as required in the April 16 Order.[8]

9. As a result, the Companies' cash flow until the proposed financing with CEFL closes is expected to require an additional $1 million. The Companies approached their existing DIP lender under the Initial DIP Facility, Corwin Mortgage Capital Inc. ("**Corwin**"), who arranged for the required financing by way of the Increased DIP Facility.[9]

10. With the repayment of RBC:

a. Down Under is solvent (i.e., no longer insolvent),[10] and

b. the only known remaining creditor of Down Under is 2602763 Ontario Ltd. ("**260' Inc.**"), who holds an unsecured claim for $47,058.40.[11]

11. 260' Inc. is "related" to Down Under within the meaning of the BIA because its sole shareholder, Mr. Peter Drexler, is the brother of the sole shareholders in Down Under's parent company, Drexler.[12]

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[7] Drexler September Affidavit, tab 2 (page 8) of the MR, para. 15; a copy of the payout letter is at tab 2I (page 144) of the MR.
[8] Drexler September Affidavit, tab 2 (page 8) of the MR, para. 16.
[9] Drexler September Affidavit, tab 2 (page 8) of the MR, para. 17; a copy of the Corwin financing commitment letter is at tab 2J (page 161) of the MR.
[10] Drexler September Affidavit, tab 2 (page 8) of the MR, paras. 32-36; see also the form 78 documents appended to Down Under's proposal, exhibit "D" (page 85) of the MR, which show greater assets than liabilities.
[11] Drexler September Affidavit, tab 2 (page 8) of the MR, paras. 12, 20.
[12] Drexler September Affidavit, tab 2 (page 8) of the MR, para. 12, 20. In technical terms, the consensus analysis among the professionals is that **(i)** all Drexler shareholders are a "related group" since each member of that group is related to all the others by "blood relationship" [BIA s. 4(1), 4(2)(a), 4(3)(e)]; and **(ii)** 260' Inc. and Down Under may likely be considered "related persons" because they are two entities one of which (260' Inc.) is controlled by one

12. Mr. Peter Drexler, on behalf of 260' Inc., has advised Down Under and the Proposal Trustee in writing that 260' Inc. consents to both forms of relief sought as set out in paragraph 1.b. above. On one hand, 260' Inc. consents to the withdrawal, if allowed by the court, of Down Under's proposal and NOI because Down Under is solvent, and because 260' Inc. can reach an arrangement with Down Under for payment of its claim outside of the proposal process. On the other hand, Mr. Peter Drexler finds the Down Under proposal fair and reasonable and, if allowed by the court, would cause 260' Inc. to vote in favour of the proposal. Therefore, 260' Inc. has no particular preference as to the form of the relief sought, consents to both, and depending on which (if any) is ordered by the court, will be caused to act accordingly by Mr. Peter Drexler.[13]

13. Further facts particular to each head of relief sought are set out below.

II. ISSUES AND LAW

14. The issues are whether the court should make the orders sought in respect of **(i)** the Increased DIP Facility, **(ii)** the approval of the CEFL Facility, **(iii)** the withdrawal of Down Under's NOI and proposal or, alternatively, allowing persons related to Down Under to vote, if they so choose, in favour of Down Under's proposal, and **(iv)** the approval of the Proposal Trustee's fees and activities.

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person (Peter Drexler) that is related to the members of a related group (the Drexler shareholders) that controls the other entity (Down Under, through Drexler's sole shareholding) [BIA s. 4(2)(c)(iii)].

[13] Drexler September Affidavit, tab 2 (page 8) of the MR, para. 2; a copy of the letter is at tab 2K (page 171) of the MR.

A. Increased DIP Facility

15. The orders sought are largely on the same terms as those present in the April 16 Order, including with respect to the collateral of the DIP charge, i.e. the "Properties" as defined in the April 16 Order.

16. Drexler and Folmur are the sole borrowers under the Increased DIP Facility. The Increased DIP Facility contemplates a mortgage on the Properties. The Properties are real estate assets owned by Drexler in fee simple. They are unencumbered save an RBC charge (which will be vacated following the RBC payout) on one of the Properties and the initial DIP charge.[14]

17. The DIP orders sought do not affect the Initial DIP Facility which remains in accordance with its terms. The Increased DIP Facility would be in addition, albeit with the same lender and with the same collateral. The Increased DIP Facility's $1,000,000 is subject to a slightly higher interest rate of 10% per annum and provides for $10,000 in brokerage fees and all lender's legal fees being payable to Corwin.

18. 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 may still include RBC but only technically as it has been fully repaid. Section 50.6 also sets out the following non-limitative criteria for the charge, which are satisfied for the reasons set out above:

    a. Drexler and Folmur (i.e., the borrowers)'s proposal proceedings are at their final stage, being the vote on and implementation of the proposals.

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[14] A copy of recent parcel registers for the Properties is at tab 2L (page 174) of the MR.

b. with the Increased DIP Facility in place, Drexler and Folmur 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. Their business and financial affairs will be managed with the Proposal Trustee's supervision under the proposals.

c. there is no indication that the Companies lack the confidence of any major creditor (assuming any "major" creditor remains after repayment of RBC). To the contrary, their proposal proceedings have been without opposition to any motion, and the Companies know of no opposition to the herein motion.

d. the Increased DIP Facility would enhance the prospects of viable proposals. It is necessary to bridge with the Companies' new long-term financing with CEFL.

e. Corwin accepts the Properties as appropriate collateral and the sought DIP orders displace no registered security interests (except, technically and as the case may be, RBC's, but as discussed RBC has been repaid and its mortgage will be vacated).

f. in light of the above, there appears to be no plausible prejudice to creditors resulting from the DIP orders sought, much less any "material" prejudice.

g. the Proposal Trustee recommends this court's granting the DIP orders sought including for the reasons above and the additional ones set out in the Fourth Report.

19. The court may therefore make the DIP orders sought.

B. Approval of the CEFL Facility

20. Approval of the CEFL Facility is necessary because it involves the granting of security interests over Drexler's assets and due to the Companies remaining under proposal protection.

21. The main terms of the CEFL Facility are as follows:

    a. borrower/mortgagor: Drexler (not any of the other two Companies).

    b. security: mortgages over three properties owned by Drexler and a general security agreement from Drexler.[15]

    c. loan amount: contemplated to be up to the total of 75% loan-to-value for two mortgaged properties and 50% loan-to-value for the third mortgaged property.

    d. loan rate: contemplated to be between 4.5% and 6.25%, subject to further review from the lender.

    e. administration fee: $50,000, plus a 0.5% fee upon closing of each mortgage, and lender's legal expenses.

22. The terms of the CEFL Facility are "market" and are fair and reasonable in the circumstances. The approval of the CEFL Facility and the implementation of the same will be a significant landmark in the Companies' return to "normal" operations, as was part of their restructuring plan from the outset of these proceedings.[16] This court may approve the CEFL Facility.

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[15] No prior-ranking, court-ordered charge is sought. The security contemplated in the CEFL Facility will rank in accordance with applicable provincial law. To the extent the CEFL Facility contemplates a first-ranking security that is not possible to obtain under provincial law, the Companies may make a later motion to court, but that is not something before the court at this time, nor is it anticipated to ever constitute an issue requiring relief from the court: Drexler September Affidavit, tab 2 (page 8) of the MR, para. 29, footnote 1.

[16] Drexler September Affidavit, tab 2 (page 8) of the MR, para. 30.

C. Withdrawal of Down Under's NOI and proposal or, alternatively, allowing persons related to Down Under to vote, if they so choose, in favour of Down Under's proposal[17]

a. Why those orders are necessary

23. Those orders are being sought due to the unique circumstances in which Down Under finds itself now that RBC has been repaid.

24. First, Down Under was for all intents and purposes insolvent only because of the RBC demands covering its guarantee of Drexler's and Folmur's loans to RBC. With RBC having been repaid, Down Under is no longer insolvent, as confirmed by the affidavit evidence filed[18] and by the Proposal Trustee in the Fourth Report. However, a proposal[19] may only be made under the BIA by persons named in s. 50(1) and (1.1), with the common thread being insolvency or bankruptcy. Down Under is no longer insolvent, yet no provision of the BIA expressly provides for the withdrawal of a proposal even in such an exceptional case.

25. Second, Down Under's sole remaining creditor, 290' Inc., is "related" to Down Under within the meaning of the BIA, as seen above. Under BIA s. 54(3), a creditor who is a related party may vote against but not in favour of the proposal. This dooms the proposal to fail with the result that Down Under would be bankrupt under BIA s. 57, notwithstanding that it is now solvent. The bankruptcy of a solvent company would be inappropriate; yet

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[17] The draft order included at tab 3 (page 181) provides for orders allowing the withdrawal of the notice of intention and NOI, because that is the alternative relief that (i) requires the most words for the court's review, and (ii) is the most expeditious and least costly option among the alternative reliefs sought.
[18] Drexler September Affidavit, tab 2 (page 8) of the MR, paras. 32-36; see also the form 78 documents appended to Down Under's proposal, exhibit "D" (page 85) of the MR, which show greater assets than liabilities.
[19] Defined in BIA s. 2 to include "a composition, an extension of time or a scheme or arrangement".

no provision of the BIA expressly provides for allowing related parties to vote in favour of a proposal even in such an exceptional case.

26. The bankruptcy of Down Under would cause substantial prejudice, including:

a. to employees, suppliers, customers, shareholders, and related companies (i.e. Drexler and Down Under).

b. because Down Under's services are an integral part of the group's services generally, and a Down Under bankruptcy would effectively "cut" this "arm" of the Companies' business, to the detriment of their existing clients and their ability to attract new ones.

c. because a Down Under bankruptcy would reflect negatively on Drexler and Folmur as well as Drexler's shareholders, who are also the business's principals "on the ground". This could further negatively affect the entire group's credit, ability to attract clients, and ability to negotiate with suppliers and contractors. the Companies' clients typically include sophisticated parties such as municipalities who answer to a broad range of stakeholders and operate within stringent guidelines. The bankruptcy of a company closely related to Drexler and Folmur is likely to represent a negative factor in such a sophisticated party's choice of with whom to do business.[20]

27. The orders sought remedy those technical impasses and contradictions, do not prejudice any person, and are within this court's jurisdiction to make, as will be seen.

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[20] Drexler September Affidavit, tab 2 (page 8) of the MR, paras. 31-38.

b. The Supreme Court of Canada's jurisprudence on the jurisdiction of courts supervising financial restructuring in insolvency proceedings

28. The oft-cited jurisprudence of the Supreme Court is that the primary purposes of financial restructuring statutes (such as the *Companies' Creditors Arrangement Act*[21] (the "**CCAA**") and the proposal scheme under the BIA) is "to permit the debtor to carry on business, and, where possible, avoid the social and economic costs of liquidating its assets."[22]

29. To this end, the restructuring statutes provide for "a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the [statute]'s objectives."[23] Supervising courts are often "called upon to innovate accordingly in exercising their jurisdiction".[24] The "baseline considerations" in using such jurisdiction are "appropriateness, good faith and due diligence".[25]

30. As to the requirement of appropriateness, the assessment is "whether the order sought advances the policy objectives" underlying the statute and "whether the order will usefully further efforts to achieve the remedial purpose" of the Act.[26] "When an order is sought that does realistically advance the [statute]'s purpose, the ability to make it is within the discretion of [the] court."[27]

31. The Supreme Court's jurisprudence referred to above stems from restructurings under the CCAA. The CCAA indisputably grants the supervising court a broader jurisdiction than

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[21] R.S.C., 1985, c. C-36.
[22] *Century Services Inc. v Canada (A.G.)*, 2010 SCC 60 ("***Century Services***"), para. 15 (emphasis added); see also *9354-9186 Québec inc. v Callidus Capital Corp*., 2020 SCC 10 ("***Bluberi***"), para. 41.
[23] *Century Services*, para. 19 (emphasis added); see also *Bluberi*, para. 48.
[24] *Century Services*, para. 61; *Bluberi*, para. 49.
[25] *Century Services*, para. 70; *Bluberi*, para. 70.
[26] *Century Services*, para. 70.
[27] *Century Services*, para. 71, see also para. 75; *Bluberi*, para. 50.

the BIA does, due *inter alia* to the CCAA's skeletal nature and its s. 11 which has no direct parallel under the BIA.

32. However, it is trite, including from the Supreme Court's jurisprudence noted above, that all the insolvency regimes, including those pertaining to liquidations and restructurings, be it under the BIA, the CCAA or the *Winding-Up and Restructuring Act*, must be interpreted as a cohesive, harmonious whole.

33. Moreover, it is recognized, as discussed below, that the Superior Court of Justice exercising its jurisdiction under the BIA (the "**BIA Court**") is invested with the jurisdiction to make "gap-filling" orders in cases appropriate by virtue of BIA s. 183(1).

c. BIA s. 183(1)

34. BIA s. 183(1) *in limine* provides that the BIA Court is "invested with such jurisdiction at law and in equity as will enable [it] to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act".

35. BIA s. 183(1) is a general provision applicable in respect of the entire BIA, but if required, reference may be made to BIA s. 66(1) which makes s. 183(1) firmly applicable in proposal proceedings.

36. The caselaw and authors have frequently observed that BIA s. 183(1) grants the BIA Court the jurisdiction to make "gap-filling" orders in appropriate circumstances. For example, in the oft-cited *Annotated Bankruptcy and Insolvency Act*, the authors write, citing numerous cases:

> For carrying out the purposes of the BIA, there is deemed to be vested in the court sitting in bankruptcy the necessary power and jurisdiction to authorize and sanction acts required to be done for the due administration and protection of the bankrupt estate, even though there is no specific provision in the BIA expressly conferring such power and jurisdiction. This power flows from the words "auxiliary and

> ancillary jurisdiction" in s. 183(1). The statute grants powers to give effect to the statute.[28]
>
> [References omitted.]

37. While those comments apparently refer to bankruptcy, it is submitted that they are equally applicable to proposal proceedings, for the reasons seen above and those explored below.

38. There are examples of the BIA Court using the s. 183(1) jurisdiction to effect orders similar to those sought on this motion. Those are explored below.

d. *Laserworks* and progeny cases: the BIA's court recognized jurisdiction to alter creditor votes on proposals and plans of arrangements

39. *Laserworks*[29] is a landmark decision of the Nova Scotia Court of Appeal that initiated a line of jurisprudence throughout Canada wherein the courts invalided certain creditors' vote on BIA proposals and plans of arrangement under the CCAA due to such votes having been cast for "improper purposes".

40. While there appears to be no specific example in the caselaw of a BIA Court allowing related parties to vote in favour of proposals notwithstanding BIA s. 54(3), the *Laserworks* line of cases recognizes the jurisdiction to alter creditor votes without there being an express grant of jurisdiction to do so in the BIA. This is analogous to the orders sought. The *Laserworks* line of cases culminated in 2020 with the Supreme Court of Canada's recognition of such jurisdiction in *Bluberi*.[30]

41. The Court of Appeal in *Laserworks* described the issue before it as involving "the court's inherent supervisory jurisdiction" over BIA proposals in situations "not contemplated by

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[28] Lloyd W. HOULDEN, Geoffrey B. MORAWETZ and Janis P. SARRA, *The 2020 Annotated Bankruptcy and Insolvency Act*, 2020, Toronto, Thomson Reuters, at I2, p. 1022.
[29] *3004876 Nova Scotia Ltd v Laserworks Computer Services Inc*., 1998 NSCA 42 ("***Laserworks***").
[30] *Bluberi*, paras. 70-76. Other cases having applied *Laserworks* include *West Coast Logistics Ltd. (Re)*, 2017 BCSC 1503 ("***West Coast***").

Parliament".[31] The court recognized "a discretionary power inherent in the scheme of the BIA" which could be properly used to remedy "substantial injustice".[32]

42. The Court of Appeal mentioned that proposal proceedings are "just as subject to the supervision of the court exercising an equitable jurisdiction under the statute, as petitions and assignments."[33] Citing BIA s. 54(3) as part of a series of exceptions to the general proposal voting scheme, the Court of Appeal mentioned that such exceptions were "coupled with a discretionary power in the courts to remedy substantial injustice."[34]

43. In light of the impasses and contradictions highlighted above, it is submitted that the orders sought are an appropriate use of the BIA Court's jurisdiction and discretion to remedy "substantial injustice" under s. 183(1), in accordance with the *Laserworks* line of cases. It is submitted that the bankruptcy of Down Under, which is solvent, by reason only of a vacuum in the BIA, would constitute a remediable substantial injustice.

e. *Residential Warranty* and progeny cases: recognized factors informing the use of the BIA Court's residual jurisdiction to remedy a statutory vacuum under s. 183(1)

44. *Residential Warranty*[35] is an oft-cited decision of the Court of Appeal of Alberta on a BIA Court's residual jurisdiction to remedy a statutory vacuum under s. 183(1).

45. The issue in *Residential Warranty* was the BIA Court's jurisdiction to order a charge securing the fees of a trustee-in-bankruptcy against property subject to conflicting and

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[31] *Laserworks*, p. 2.
[32] *Laserworks*, p. 11. It is possible to interpret the use of the phrase "substantial injustice" in this context as stemming from BIA s. 187(9), although it is respectfully submitted that the Court of Appeal's comments go beyond that provision.
[33] *Laserworks*, p. 12.
[34] *Laserworks*, p. 18.
[35] *Kingsway General Insurance Company v Residential Warranty Company of Canada Inc. (Trustee of)*, 2006 ABCA 293 ("***Residential Warranty***").

undetermined trust claims. The Court of Appeal upheld the lower court's decision to grant the charge, finding that the BIA had no provision expressly authorizing the same, but that the jurisdiction to do so existed under s. 183(1).[36]

46. The Court of Appeal commented as follows on the existence of the residual jurisdiction:

> [20] Inherent jurisdiction is not without limits, however. It cannot be used to negate the unambiguous expression of legislative will and moreover, because it is a special and extraordinary power, should be exercised only sparingly and in a clear case.
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> [21] …inherent jurisdiction has been used where it is necessary to promote the objects of the BIA. It has also been used where there is no other alternative available and to accomplish what justice and practicality require.

47. Having found that the jurisdiction to grant the order sought existed, the Court of Appeal then identified, at paragraph 37, several criteria guiding the discretion to do so. While some of these criteria pertained specifically to the discretion to order a charge over trust property, those reproduced below were broader and capable of informing the BIA s. 183(1) discretion in all instances:

a. the need to maintain the integrity of the process. "[T]he court should assess the extent to which the determination is necessary to administer the bankruptcy and discourage academic or potentially unrewarding litigation".

b. the realistic alternatives in the circumstances.

c. the anticipated time and costs involved. "The court should contemplate whether the proposed determination represents an efficient and effective means of resolving the issue to the benefit of all stakeholders. Consideration should be given to expediting the process."

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[36] See *Residential Warranty*, para. 41.

48. While *Residential Warranty* was a bankruptcy case, causing the court to refer to bankruptcy rather than proposals or, more generally, restructurings, it is submitted that the reasoning in *Residential Warranty* may be applied in the proposal context, in application of the recognized interpretative principles noted above, including the Court of Appeal's comment in *Laserworks* that proposal proceedings are "just as subject to the supervision of the court exercising an equitable jurisdiction under the statute, as petitions and assignments."[37]

49. It is submitted that the orders sought are within the BIA Court's jurisdiction to make under s. 183(1) and meet the *Residential Warranty* criteria so as to be reasonable and appropriate in the present instance.

f. *Poly Innovation*: a direct precedent for the withdrawal of an NOI after the debtor company returns to solvency

50. Building on the above is the recent decision of Justice D. M. Brown of the Toronto Commercial List (as he then was) in *Poly Innovation.*[38]

51. Setting out the context of the case, Justice Brown wrote "This motion raised an interesting question about how a court should proceed in the face of a 'gap' in the legislative scheme contained in the Notice of Intention to Make Proposal provisions of the *Bankruptcy and Insolvency Act*."

52. In that case, a sale process in respect of the debtor company's assets generated an offer sufficient to repay all known creditor claims, such that the company was not insolvent

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[37] *Laserworks*, p. 12.
[38] *Poly Innovation Inc. (Re)*, 2013 ONSC 2782.

anymore. For that reason, the company could not make a proposal under the BIA (as seen above) and so it sought to withdraw its NOI. Brown J. dealt with the issue as follows:

> [8] In the present case I informed counsel that I would be prepared to follow an approach analogous to that used under BIA s. 43(14) on the withdrawal of an application for a bankruptcy order – i.e. I would be prepared to consider a request by Poly Innovation, following the approval of the sale, to withdraw its NOI upon the filing by it of an affidavit attesting to the solvency of the company following the sale.
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> [9] Poly Innovation filed such an affidavit from its President, Daniel McKenzie. Mr. McKenzie deposed that after the distribution of the sales proceeds, "Poly will have no creditors and thus no creditors will be prejudiced by the withdrawal of the NOI. Accordingly, Poly will be solvent."
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> [10] On the basis of that affidavit, and the Third Report of the Proposal Trustee, last Friday I granted orders approving the sale to Die-Mold, sealing the confidential sales process information, authorizing the distribution of the sale proceeds, and granting Poly Innovation leave to withdraw its NOI "upon the filing of the Withdrawal Certificate…with the Court certifying that the Distribution has been made and further certifying that all claims of the creditors of Poly have been paid in full and that Poly is solvent". When performed, that order will remove Poly Innovation from the NOI scheme contained in BIA s. 50.4 and the withdrawal of the NOI will not have caused Poly Innovation to have made a deemed assignment.

53. *Poly Innovation* involved a situation highly analogous to the one currently faced by Down Under, which was resolved in the same manner as sought on the present motion.

54. One difference in the context of the two cases is that the debtor company in *Poly Innovation* had seemingly not yet filed a proposal, whereas Down Under has. However, this appears curable through circumspect drafting of the orders sought, rather than an insurmountable obstacle, considering that the applicable consequences and rationale – avoiding the bankruptcy of a solvent company for the benefit of its stakeholders – are the same.

g. Other potentially applicable sections

55. BIA s. 107 provides as follows:

> **107.** Every class of creditors may express its views and wishes separately from every other class and the effect to be given to those views and wishes shall, in case of any dispute and subject to this Act, be in the discretion of the court.

56. This section is placed in Part V, "Administration of Estates" of the BIA and is applicable to proposal proceedings through BIA s. 66. There is only one creditor and therefore only one class of creditors remaining in Down Under: unsecureds. This class, by its only member, 260' Inc., has in writing[39] expressed its view and wish to either vote in favour of Down Under's proposal if allowed, or reach an agreement with Down Under outside of the proposal process if Down Under is allowed to withdraw its proposal and NOI. The reference to "dispute" in s. 107 is capable of encompassing a vacuum in the BIA scheme causing unintended and undesirable consequences. Therefore, under s. 107, "the effect to be given to those views and wishes shall… subject to this Act, be in the discretion of the court".

57. Section 115.1 of the BIA provides as follows:

> **115.1** In an application to revoke or vary a decision that affects or could affect the outcome of a vote, the court may make any order that it considers appropriate, including one that suspends the effect of the vote until the application is determined and one that redetermines the outcome of the vote.

58. This section is also set out in Part V, "Administration of Estates" of the BIA and is also applicable to proposal proceedings in application of BIA s. 66. The jurisprudence on s. 115.1 is scarce but the section has been applied to proposals.[40] Here, "the decision that affects or could affect the outcome of a vote" was a necessary one, i.e. to file a proposal, notwithstanding that RBC would be repaid, because otherwise the time limit to file a proposal would have expired, resulting in bankruptcy. The "effect" of this decision "on the outcome of a vote" is to doom the proposal to fail, since without the orders sought no

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[39] A copy of the letter from 260' Inc. is at tab 2K (page 171) of the MR.
[40] See *West Coast*.

creditor could vote in favour of it. This BIA Court could therefore "make any order that it considers appropriate".

59. It is thus submitted that the above two provisions are additional grounds of jurisdiction to make the orders sought.

h. Conclusion

60. In light of the above, it is submitted that:

a. the court has jurisdiction to make orders allowing the withdrawal of Down Under's NOI and proposal or, alternatively, allowing persons related to Down Under (e.g., 260' Inc.) to vote, if they so choose, in favour of Down Under's proposal, and

b. in the particular facts of this case, those orders are necessary, fair and reasonable,

such that this court may grant the relief sought

D. Approval of Fourth Report and Proposal Trustee's fees and activities

61. 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."[41] As to the approval of the Proposal Trustee's and its independent counsel's fees, those are payable in priority both in a proposal[42] and in bankruptcy,[43] 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.[44]

62. Here, this court approved all the Proposal Trustee's reports, activities and fees up to July 16, 2021. The Proposal Trustee's activities and fees since then were reported to the

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[41] *Target Canada Co. (Re)*, 2015 ONSC 7574, paras. 2 and 23.
[42] BIA, s. 60(1).
[43] BIA, s. 136(1)(b).
[44] See *Confectionately Yours Inc. (Re)*, 2002 CanLII 45059 (ON CA), paras. 42-54.

court and stakeholders in the Fourth Report and are, from the Companies' perspective, proper. Fee affidavits are provided with the Fourth 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.

III. NATURE OF THE ORDER SOUGHT

63. The Companies therefore seek an order in the form of the suggested draft order filed at tab 3 (page 180) of their motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of September, 2021.

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SCHEDULE A – LIST OF AUTHORITIES

1 *Century Services Inc. v Canada (A.G.)*, 2010 SCC 60

2 *9354-9186 Québec inc. v Callidus Capital Corp.*, 2020 SCC 10

3 *3004876 Nova Scotia Ltd v Laserworks Computer Services Inc.*, 1998 NSCA 42

4 *West Coast Logistics Ltd. (Re)*, 2017 BCSC 1503

5 *Kingsway General Insurance Company v Residential Warranty Company of Canada Inc. (Trustee of)*, 2006 ABCA 293

6 *Poly Innovation Inc. (Re)*, 2013 ONSC 2782

7 *Target Canada Co. (Re)*, 2015 ONSC 7574

8 *Confectionately Yours Inc. (Re)*, 2002 CanLII 45059 (ON CA)

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SCHEDULE B – RELEVANT STATUTORY PROVISIONS

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3

Definitions

2 In this Act,

proposal means

(a) in any provision of Division I of Part III, a proposal made under that Division, and

(b) in any other provision, a proposal made under Division I of Part III or a consumer proposal made under Division II of Part III

and includes a proposal or consumer proposal, as the case may be, for a composition, for an extension of time or for a scheme or arrangement;

Definitions

4 (1) In this section,

entity means a person other than an individual;

related group means a group of persons each member of which is related to every other member of the group;

unrelated group means a group of persons that is not a related group.

Definition of *related persons*

(2) For the purposes of this Act, persons are related to each other and are *related persons* if they are

(a) individuals connected by blood relationship, marriage, common-law partnership or adoption;

(b) an entity and

(i) a person who controls the entity, if it is controlled by one person,

(ii) a person who is a member of a related group that controls the entity, or

g any person connected in the manner set out in paragraph (a) to a person described in subparagraph (i) or (ii); or

(c) two entities

(i) both controlled by the same person or group of persons,

(ii) each of which is controlled by one person and the person who controls one of the entities is related to the person who controls the other entity,

(iii) one of which is controlled by one person and that person is related to any member of a related group that controls the other entity,

(iv) one of which is controlled by one person and that person is related to each member of an unrelated group that controls the other entity,

(v) one of which is controlled by a related group a member of which is related to each member of an unrelated group that controls the other entity, or

(vi) one of which is controlled by an unrelated group each member of which is related to at least one member of an unrelated group that controls the other entity.

Relationships

(3) For the purposes of this section,

(a) if two entities are related to the same entity within the meaning of subsection (2), they are deemed to be related to each other;

(b) if a related group is in a position to control an entity, it is deemed to be a related group that controls the entity whether or not it is part of a larger group by whom the entity is in fact controlled;

(c) a person who has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently, to, or to acquire, ownership interests, however designated, in an entity, or to control the voting rights in an entity, is, except when the contract provides that the right is not exercisable until the death of an individual designated in the contract, deemed to have the same position in relation to the control of the entity as if the person owned the ownership interests;

(d) if a person has ownership interests in two or more entities, the person is, as holder of any ownership interest in one of the entities, deemed to be related to himself or herself as holder of any ownership interest in each of the other entities;

(e) persons are connected by blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other;

(f) persons are connected by marriage if one is married to the other or to a person who is connected by blood relationship or adoption to the other;

(f.1) persons are connected by common-law partnership if one is in a common-law partnership with the other or with a person who is connected by blood relationship or adoption to the other; and

(g) persons are connected by adoption if one has been adopted, either legally or in fact, as the child of the other or as the child of a person who is connected by blood relationship, otherwise than as a brother or sister, to the other.

Question of fact

(4) It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length.

Presumptions

(5) Persons who are related to each other are deemed not to deal with each other at arm's length while so related. For the purpose of paragraph 95(1)(b) or 96(1)(b), the persons are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length.

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.

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.

Vote on proposal by creditors

54 (1) The creditors may, in accordance with this section, resolve to accept or may refuse the proposal as made or as altered at the meeting or any adjournment thereof.

Voting system

(2) For the purpose of subsection (1),

(a) the following creditors with proven claims are entitled to vote:

(i) all unsecured creditors, and

(ii) those secured creditors in respect of whose secured claims the proposal was made;

(b) the creditors shall vote by class, according to the class of their respective claims, and for that purpose

(i) all unsecured claims constitute one class, unless the proposal provides for more than one class of unsecured claim, and

(ii) the classes of secured claims shall be determined as provided by subsection 50(1.4);

(c) the votes of the secured creditors do not count for the purpose of this section, but are relevant only for the purpose of subsection 62(2); and

(d) the proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors — other than, unless the court orders otherwise, a class of creditors having equity claims — vote for the acceptance of the proposal by a majority in number and two thirds in value of the unsecured creditors of each class present, personally or by proxy, at the meeting and voting on the resolution.

Related creditor

(3) A creditor who is related to the debtor may vote against but not for the acceptance of the proposal.

Voting by trustee

(4) The trustee, as a creditor, may not vote on the proposal.

Result of refusal of proposal

57 Where the creditors refuse a proposal in respect of an insolvent person,

(a) the insolvent person is 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 either

(i) forthwith call a meeting of creditors present at that time, which meeting shall be deemed to be a meeting called under section 102, or

(ii) if no quorum exists for the purpose of subparagraph (i), send notice, within five days after the day the certificate mentioned in paragraph (b.1) is issued, of the meeting of creditors under section 102,

and at either 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.

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.

Act to apply

66 (1) All the provisions of this Act, except Division II of this Part, in so far as they are applicable, apply, with such modifications as the circumstances require, to proposals made under this Division.

How creditors shall vote

107 Every class of creditors may express its views and wishes separately from every other class and the effect to be given to those views and wishes shall, in case of any dispute and subject to this Act, be in the discretion of the court.

Court order — interlocutory or permanent

115.1 In an application to revoke or vary a decision that affects or could affect the outcome of a vote, the court may make any order that it considers appropriate, including one that suspends the effect of the vote until the application is determined and one that redetermines the outcome of the vote.

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;

Courts vested with jurisdiction

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;

IN THE MATTER OF THE PROPOSAL TO CREDITORS 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*

Estate No. 35-2721716

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced in LONDON

MOVING PARTIES' FACTUM

(increased DIP facility, approval of long-term financing, approval of proposal trustee's fees and activities, withdrawal of one notice of intention and proposal)

(returnable September 10, 2021)

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