

**ONTARIO
SUPERIOR COURT OF JUSTICE**

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

MOVING PARTIES' FACTUM

**(extension of time to file a proposal, vesting-upon-sale,
approval of fees and activities, sealing)**

(returnable May 28, 2021)

May 22, 2021

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I. NATURE OF THIS MOTION

1. This is a motion by Drexler Construction Ltd., Folmur Construction (2004) Ltd. and Down Under Pipe and Cable Locating Ltd. (together, the “**Companies**”) for orders:¹
 - a. extending to Friday, July 16, 2021 the time to file a proposal,
 - b. augmenting the sale approval orders set out in this court’s order dated April 16, 2021 (the “**April 16 Order**”) to provide for vesting-upon-sale,
 - c. approving the second report of the Proposal Trustee (the “**Second Report**”) and the Proposal Trustee’s fees and activities, and
 - d. sealing Confidential Exhibit “1” to the affidavit of Jerome Drexler sworn May 22, 2021² (the “**Drexler May Affidavit**”).

II. OVERVIEW

2. The Companies have each filed a notice of intention (“**NOI**”) on March 18, 2021. The Proposal Trustee acts as such in each of the NOI proceedings, which have been administratively consolidated in this court file by the April 16 Order.
3. This is the second motion in the NOI proceedings. The Proposal Trustee recommends the relief sought. Royal Bank of Canada (“**RBC**”), which is the senior ranking secured creditor, has been consulted and does not oppose. Counsel are not aware of any opposition.
4. The current extension expires on June 1, 2021. The sought extension is to allow the Companies to work further on the viable restructuring path (primarily, locating replacement financing to repay RBC) further discussed below towards a proposal. The Companies have acted, and are acting, in good faith and with due diligence and no creditor

¹ The draft order is at tab 3 (page 73) of the motion record of the Companies (the “**MR**”).

² Tab 2 (page 7) of the MR.

would be materially prejudiced if the extension being applied for were granted. The test for extension is met.

5. The April 16 Order provides for approval of the Companies selling Redundant Equipment (as defined in the April 16 Order). The vesting-upon-sale orders sought are substantially per the Commercial List model vesting orders. Otherwise, the April 16 Order remains unchanged. This relief is appropriate to incentivize sales and make the auction sale process practicable and attractive, while maintaining proportionate administration costs.
6. The Proposal Trustee's fees and activities have been reported to stakeholders, including in the Second Report. The court may make the approval orders sought.
7. Confidential Exhibit "1" to the Drexler May Affidavit, being a full copy of the Auction Agreement (defined below), contains an appraiser's valuation of the items to be sold in its Schedule A. A sealing order is appropriate to safeguard the integrity of the sale process.

III. FACTS

A. The Companies and their Business

8. The Companies were set up by 8 brothers of which 4 remain involved in the management and as the sole shareholders of Drexler Construction Ltd. ("**Drexler**"), who owns all the shares of Folmur Construction (2004) Ltd. ("**Folmur**") and Down Under Pipe and Cable Locating Ltd. ("**Down Under**"). The Companies operate in the construction industry and attract clients including municipalities and townships across Ontario. For reference, Drexler made a gross profit of approximately \$4,483,355 in 2018 and \$5,113,471 in 2019, and employs between 50 and 110 non-unionized employees depending on the season. Folmur made a gross profit of approximately \$1,689,684 in 2018 and \$2,233,232 in 2019,

and has 25 non-unionized employees. Down Under made a gross profit of approximately \$316,813 in 2018 and \$217,259 in 2019, and has 2 non-unionized employees.³

B. Insolvency and restructuring approach

9. The Companies are all indebted to RBC, as borrowers and guarantors of the others, for approximately \$2,087,000. RBC is the largest creditor and holds valid and enforceable security interests based on an independent opinion obtained by the Proposal Trustee.⁴
10. Each of the Companies is insolvent primarily because of being unable to repay RBC when it made demand on March 8, 2021. However, their assets greatly exceed their liabilities, including based on the equity owned in real estate properties and other assets. This allows a restructuring approach centered around locating new financing to repay RBC, making a viable proposal to creditors, and returning to solvency. Such would benefit the Companies' stakeholders including clients, suppliers, employees, equity holders, and creditors.⁵

C. Restructuring efforts since the April 16 Order and state of file

11. On April 16, 2021, this court granted the April 16 Order on an unopposed basis:
 - a. extending the time to file a proposal to June 1, 2021,
 - b. creating a \$1,500,000 debtor-in-possession (DIP) financing charge on the Properties (as defined in the April 16 Order), subordinate to RBC's position,
 - c. creating a \$100,000 administration charge on the same properties, subordinate to the DIP charge,
 - d. approving the sale of Redundant Equipment, and

³ Drexler May Affidavit, tab 2 (p. 7) of the MR, para. 4.

⁴ Drexler May Affidavit, tab 2 (p. 7) of the MR, paras. 6, 7.

⁵ Drexler May Affidavit, tab 2 (p. 7) of the MR, paras. 8-10.

- e. approving the Proposal Trustee’s first report and supplemental report thereto as well as the activities described therein.⁶
12. As more fully set out in the Drexler May Affidavit, since the April 16 Order, the Companies have, among other things:
- a. retained GreySuits Advisors Inc. (the “**Advisor**”) as external chief financial officer and advisor,
 - b. finalized the documentation for the DIP financing facility approved in the April 16 Order,
 - c. retained a mortgage broker (the “**Broker**”) to *inter alia* assist in locating financing,
 - d. as authorized in the April 16 Order, entered into an agreement with Canam Apprais Inc. (“**Canam**”) dated May 21, 2021 (the “**Auction Agreement**”) for auctioning services in respect of the Redundant Equipment,
 - e. generally, continued to work with the Proposal Trustee with transparency and good faith.⁷
13. The next steps in the restructuring, such as through the extension period sought, are:
- a. to continue efforts towards locating alternative financing to repay RBC, leveraging the involvement of the Proposal Trustee, the Companies’ counsel, the Advisor and the Broker, and
 - b. to assist Canam in conducting auctions under the Auction Agreement with respect to Redundant Equipment, provided the relief sought in this regard is granted.⁸

⁶ April 16 Order, tab 2B (p. 41) of the MR.

⁷ Drexler May Affidavit, tab 2 (p. 7) of the MR, para. 13.

⁸ Drexler May Affidavit, tab 2 (p. 7) of the MR, para. 14.

14. Looking forward, Drexler is also working on plans to invest in and develop the Vacant Development Land (defined in the Second Report) to increase value.⁹ Other than the sale of Redundant Equipment, the Companies currently contemplate no liquidation of assets.¹⁰

IV. ISSUES AND LAW

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

A. Extension of time to file a proposal

16. The sought extension is in respect of all three of the Companies' NOI proceedings. s. 50.4(9) of the *Bankruptcy and Insolvency Act*¹¹ (the "BIA") sets out mandatory criteria, reproduced below with comments as to their satisfaction.
- a. good faith and due diligence – the above demonstrates that this criterion is satisfied. The Companies are working with the Proposal Trustee and RBC with transparency, good faith and due diligence, and will continue to do the same.
- b. likelihood to make a viable proposal – the restructuring path outlined above is being acted upon towards a viable proposal. For example, at least one potential lender is at an advanced stage of formulating an offer on lending arrangements.¹² More such opportunities can likely be located with the involvement of the Proposal Trustee, the Companies' counsel, the Advisor and the Broker. It is reasonably anticipable that substantial progress may be achieved in the extension period sought. In the meantime, stability is ensured, as the Companies will have access to sufficient funds

⁹ Drexler May Affidavit, tab 2 (p. 7) of the MR, para. 16.

¹⁰ Drexler May Affidavit, tab 2 (p. 7) of the MR, para. 12.

¹¹ [R.S.C., 1985, c. B-3](#).

¹² Drexler May Affidavit, tab 2 (p. 7) of the MR, para. 15.

to operate, with any reasonable contingency being covered through draws available under the approved DIP facility.¹³

- c. any material prejudice to creditors – the primary purpose of financial restructurings is “to permit the debtor to carry on business, and, where possible, avoid the social and economic costs of liquidating its assets.”¹⁴ Given that the value of the Companies’ assets appears to greatly exceed their liabilities, it seems unlikely that any creditor will suffer any prejudice if the Companies are permitted time to continue restructuring efforts. To the extent a creditor suffers any prejudice from the extension, then this would be, on a balance, outweighed by the benefits of allowing the Companies an opportunity to act on their defined path to a viable proposal.¹⁵ The Companies are not aware of any opposition, including from RBC who was consulted throughout, and the Trustee recommends the extension.

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

B. Vesting-upon-sale of Redundant Equipment

18. The orders sought on this topic do not alter the April 16 Order in the material respects it provides for, including the definition of what assets can be sold (i.e. the Redundant Equipment), how and by whom those assets can be sold (i.e., by the Companies themselves or Canam, and by auction or otherwise), for what price they can be sold (i.e. the sealed

¹³ Drexler May Affidavit, tab 2 (p. 7) of the MR, para. 17.

¹⁴ 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.

¹⁵ See *In the Matter of the Proposal of Cantrail Coach Lines Ltd.*, [2005 BCSC 351](#).

appraised value), the mechanism provided for resolving any priority dispute on the proceeds, or the provided payment scheme for proceeds in accordance with priorities.¹⁶

19. The sought orders are substantially per the Commercial List model vesting orders¹⁷ and provide for a vesting-upon-sale mechanism, whereby upon delivery of a Bill of Sale by Canam to a Purchaser of Purchased Assets, the Purchaser obtains the Purchased Assets free of all Encumbrances (capitalized terms defined in the draft order), which are reported onto the proceeds. At the occasion of the April 16 Order, this court was satisfied the BIA s. 65.13 and *Soundair*¹⁸ criteria had been met,¹⁹ and made the approval orders sought. The Auction Agreement has since been entered into. Vesting orders are sought here to incentivize sales and make the auction process practicable and attractive, while maintaining proportionate administration costs. Vesting orders are a “normal relief given in an asset sale” in insolvency proceedings.²⁰ As drafted, the orders sought would harmoniously complete the approval orders made in the April 16 Order. This court may grant them.

C. Sealing

20. The Companies seek an order that Confidential Exhibit “1” to the Drexler May Affidavit, being an unredacted copy of the Auction Agreement, be sealed. This court has jurisdiction to make the sealing orders sought, including under s. 137(2) of the *Courts of Justice Act*.²¹
- The Proposal Trustee recommends the sealing orders be made. It is typical relief to seal

¹⁶ See the April 16 Order, tab 2B (page 41) of the MR, paras. 20, 21.

¹⁷ See [ontariocourts.ca/scj/files/forms/com/approval-and-vesting-order-EN.doc].

¹⁸ *Royal Bank of Canada v Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#), p. 9.

¹⁹ For reference, those are: (i) whether a sufficient effort is made to get the best price and has not acted improvidently, (ii) the efficacy and integrity of the process by which offers are obtained, (iii) whether there has been unfairness in the working out of the process, and (iv) the interests of all parties

²⁰ *Nelson Education Limited (Re)*, [2015 ONSC 5557](#), para. 40.

²¹ See *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#) (“*Danier Leather*”), paras. 79-86, and *Nortel Networks Corporation (Re)*, [2009 CanLII 39492 \(ON SC\)](#), paras. 3, 57.

valuation information pending the conclusion of a sale process in order to make sure that a restructuring entity and its creditors are not prejudiced by disclosure beforehand. “There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.”²² Simply put, if the market had access to the appraised amounts, it would, among other issues, disincentivize higher bidding. A full copy of the Auction Agreement, with redaction only for the valuation amounts, is provided for the public record.²³ The sealing orders sought are appropriate in the circumstances.

D. Approval of Second Report and Proposal Trustee’s activities

21. 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.”²⁴ As to the approval of the Proposal Trustee’s and its independent counsel’s fees, 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.²⁵ Here, this court approved the Proposal Trustee’s activities and reports up to the April 16 Order. Its activities since then were reported to the court and stakeholders in the Second Report and are, from the Companies’ perspective, proper. Fee affidavits are provided with the Second Report. 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. Their granting would have the constructive effects noted in

²² *Danier Leather*, para. 84.

²³ Tab 2C (page 55) of the MR.

²⁴ *Target Canada Co. (Re)*, [2015 ONSC 7574](#), paras. 2 and 23.

²⁵ See *Confectionately Yours Inc. (Re)*, [2002 CanLII 45059 \(ON CA\)](#), paras. 42-54.

Target, which also benefits the Companies and the administration of the NOI proceedings generally.

V. NATURE OF THE ORDER SOUGHT

22. The Companies therefore seek an order in the form of the suggested draft order filed at tab 3 of their motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of May, 2021.

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SCHEDULE A – LIST OF AUTHORITIES

- 1 *Century Services Inc. v Canada (Attorney General)*, [2010 SCC 60](#)
- 2 *9354-9186 Québec inc. v Callidus Capital Corp.*, [2020 SCC 10](#)
- 3 *In the Matter of the Proposal of Cantrail Coach Lines Ltd.*, [2005 BCSC 351](#)
- 4 *Royal Bank of Canada v Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#)
- 5 *Nelson Education Limited (Re)*, [2015 ONSC 5557](#)
- 6 *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#)
- 7 *Nortel Networks Corporation (Re)*, [2009 CanLII 39492 \(ON SC\)](#)
- 8 *Target Canada Co. (Re)*, [2015 ONSC 7574](#)
- 9 *Confectionately Yours Inc. (Re)*, [2002 CanLII 45059 \(ON CA\)](#)

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).

Assets may be disposed of free and clear

65.13 (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.

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.

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Estate No. 35-2721716

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

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