Court File No. CV16-11452-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF H.B. WHITE CANADA CORP.

(the "**Applicant**")

FACTUM OF THE APPLICANT
(Meeting Order)

September 16, 2016

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

R. Shayne Kukulowicz LSUC #:30729S
Tel: 416.860.6463
Fax: 416.640.3176
skukulowicz@casselsbrock.com

Jane O. Dietrich LSUC #:49302U
Tel: 416.860.5223
Fax: 416.640.3144
jdietrich@casselsbrock.com

Natalie E. Levine LSUC #:64908K
Tel: 416.860.6568
Fax: 416.640.3207
nlevine@casselsbrock.com

Lawyers for H. B. White Canada Corp.

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PART I – OVERVIEW

1. H.B. White Canada Corp. ("**HBW**" or the "**Applicant**") obtained relief under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "**CCAA**") by an Initial Order dated July 7, 2016 (the "**Initial Order**"). Alvarez & Marsal Canada Inc. was appointed in the Initial Order to act as the monitor (the "**Monitor**") in this CCAA proceeding. The Initial Order granted a stay of proceedings until August 6, 2016. The Stay Period, as defined in the Initial Order, was extended to November 30, 2016 pursuant to an order granted on August 4, 2016.

2. This Factum is filed in support of HBW's motion to file its plan of compromise and arrangement, as may be amended from time to time in accordance with its terms,

(the "**Plan**") and to obtain an order of this Court (the "**Meeting Order**") authorizing the Applicant to hold a meeting of its Affected Creditors.[1]

3. HBW spent the 18 months prior to commencement of these proceedings engaged in disputes with one of its major customers, Northland Power Inc., and its affiliates (the "**Northland Parties**"). The Northland Parties asserted damages against HBW in excess of $170 million. Lien claims in excess of $26 million were registered against the project lands by HBW subcontractors and sub-subcontractors.

4. After protracted negotiations, the HBW Parties entered into the Settlement and Support Agreements with the Northland Parties. As contemplated by the Settlement and Support Agreements, HBW sought protection under the CCAA to propose a plan of compromise which would implement the settlement in the Settlement and Support Agreements, facilitate the pro rata payment of construction lien claims from "holdback" funds, compromise unsecured claims (including construction lien deficiency claims) against HBW and allow HBW to emerge from these proceedings to continue to provide warranty and repair services to certain existing customers.

5. In the absence of a settlement with the Northland Parties, HBW and its sole member, WCI, would be forced to file for bankruptcy. The Plan is being put forward by HBW in the expectation that all persons with an economic interest in HBW will derive a greater benefit from the implementation of the Plan than would result from a bankruptcy.

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[1] Capitalized terms not defined herein have the meanings ascribed to such terms in the Affidavit of Philip J. Gund, sworn September 12, 2016 at Tab 2 of the Applicant's Motion Record dated September 12, 2016 (the "**Gund Affidavit**") or the Plan (an updated version of which is expected to be filed prior to the hearing).

PART II – FACTS

6. The Plan contemplates that a single class of Affected Creditors will consider and vote on the Plan. The Applicant proposes that the Creditors' Meeting will be held at the offices of the Monitor's counsel on October 17, 2016 at 2:00 p.m.

7. If approved, sanctioned and implemented, the Plan will:

(a) implement the settlement negotiated with the Northland Parties pursuant to the Settlement and Support Agreements;

(b) provide a structured and efficient method to effect payment of the Proven Construction Lien Claims;

(c) affect a compromise, settlement and payment of all Affected Claims;

(d) allow the Applicant to reorganize and continue to provide certain ongoing warranty services to its remaining customers; and

(e) release all claims against the Plan Sponsors and certain other parties to permit WCI to continue operations, having limited its liability to HBW pursuant to the Wind-Up Claim.[2]

8. Under the Plan, upon implementation:

(a) the Convenience Class Creditors will be entitled to receive the lesser of: (a) 100% of their Proven Claims and (b) $10,000;[3]

(b) the Northland Parties (or their designee), excluding MMWF, will be entitled to receive $6,000,000, consistent with the BFW/CLLSP

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[2] Gund Affidavit at para 6.

[3] Affected Creditors with Proven Claims less than or equal to $10,000 in the aggregate will be treated as Convenience Class Creditors and will receive a cash distribution of 100% of their Proven Claims on the Implementation Date. Affected Creditors with Proven Claims in excess of $10,000 may elect to be treated for all purposes as Convenience Class Creditors, and, if they so elect, will each be entitled to a cash distribution of $10,000.

Settlement and Support Agreement, representing less than 4% of their asserted claims against HBW as found in the Claims Process;

(c) MMWF will waive any distribution pursuant to the Plan in respect of the MMWF Claim pursuant to the MMWF Settlement and Support Agreement;

(d) each General Unsecured Creditor with a Proven Claim who has complied with the terms of this Plan, will be entitled to receive such Creditor's Initial Pro Rata Share of the Unsecured Creditor Pool (being the amount of $2,500,000 less distributions made to Convenience Class Creditors) in respect of its Proven Claim;

(e) each Proven BFW Construction Lien Creditor will be entitled to receive 100% of its Proven BFW Construction Lien Claims from the BFW Holdback Pool;

(f) the Vetting Committee Fees will be entitled to be paid from the CLLSP Holdback Pool;

(g) subject to the payment of or reserve for CLLSP Sub Sub Contractor Construction Lien Claims, each Proven CLLSP Construction Lien Creditor will be entitled to receive its CLLSP Initial Pro Rata Construction Lien Share of the CLLSP Holdback Pool with any excess amount of such creditor's claim after distribution of the entire CLLSP Holdback Pool, being a CLLSP Construction Lien Deficiency Claim that is treated as a General Unsecured Claim;

(h) from any amounts payable to the applicable Proven CLLSP Sub Contractor Construction Lien Claim, each Proven CLLSP Sub Sub Contractor Construction Lien Claim shall be entitled to receive 100% of its Proven CLLSP Sub Sub Contractor Construction Lien Claim; and

(i) any amounts pertaining to Disputed Distribution Claims or Disputed Construction Lien Claims (including Disputed CLLSP Sub Sub Contractor Construction Lien Claims) will be held in separate reserve accounts, as

discussed in detail below, until such Claims are resolved and, when resolved, will be paid out in accordance with the Plan.[4]

9. On or before October 3, 2016, the Monitor will serve a separate report providing the Monitor's further analysis of the Plan on the service list, including an illustrative estimated range of recovery analysis for Affected Creditors. The recovery analysis will necessarily be preliminary and estimated as there remain numerous Claims that have not yet been finalized for distribution purposes.[5]

10. An essential component of the Plan is the involvement of WCI and IEA as Plan Sponsors. The Plan Sponsors will provide Cash necessary to make the distributions provided to Affected Creditors and will provide all the funding for the Unsecured Creditor Pool and the Northland Claims Pool. The Plan Sponsors (or HBW, to the extent there is available cash flow) will also provide the funding for the Administrative Reserve.[6] In addition, (i) unsecured Intercompany Claims will not share in the distributions with General Unsecured Creditors, thereby increasing the proportional share of the Unsecured Claims Pool available for General Unsecured Creditors; and (ii) the intercompany DIP Claim will be unaffected (and not receive any payment under the Plan).[7] Similarly, the Secured Claims of Wells Fargo and Oaktree (under which the Plan Sponsors are obligated with HBW) will be excluded under the Plan (and not receive any payment under the Plan), notwithstanding the lenders' security interests.[8]

11. In consideration for the financial and other contributions of the Plan Sponsors, the Plan provides that the HBW Released Parties, including the Plan Sponsors and

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[4] Gund Affidavit at para 8.
[5] Gund Affidavit at para 9.
[6] Gund Affidavit at para 10.
[7] Plan at sec 4.4 and 1.1.
[8] Plan at sec. 1.1.

Directors and Officers of HBW and the rest of the IEA Group (collectively, the "**HBW Released Parties**"), will receive a full and final release of all matters relating to the Applicant. The Applicant believes that it is appropriate to include the release in favour of the HBW Released Parties, since their contributions under the Plan will result in both materially higher and significantly accelerated recoveries for the Affected Creditors.[9] The Plan also provides for releases of the Northland Parties in connection with the Claims, Facilities, Plan, Contracts, CCAA Proceedings or any Claim that has been barred or extinguished by the Claims Procedure Order.

PART III – ISSUES

12. The key issues on this Motion are as follows:

(a) Should this Court grant the Meeting Order?

(b) Are creditors appropriately classified?

PART IV –LAW

I. THIS COURT SHOULD EXERCISE ITS DISCRETION TO GRANT THE MEETING ORDER

13. Section 4 of the CCAA expressly contemplates the calling of a meeting of the unsecured creditors of a company to consider and vote on a plan proposing a compromise of the claims of those creditors:

> 4. Compromise with unsecured creditors
>
> Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders or the company to be summoned in such manner as the court directs.[10]

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[9] Gund Affidavit at para 11.
[10] CCAA, s. 4.

The threshold to be satisfied in order to file a plan and call a meeting of creditors is low.[11] The Court should only decline to give preliminary approval and refuse to order a meeting "if it was of the view that there was no hope that the plan would be approved by the creditors or, if it was approved by the creditors, it would not, for some other reason, be approved by the Court."[12]

14. Sanction of a plan rests on well-established criteria:

> (1) There must be strict compliance with all statutory requirements...;
>
> (2) All material filed and procedures carried out must be examined to determine if anything has been done which is not authorized by the C.C.A.A.;
>
> (3) The plan must be fair and reasonable.[13]

If a plan is so flawed that it cannot meet these criteria, the Court will not exercise its discretion to order a meeting.[14] However an analysis of fairness and reasonableness is not necessary at this stage and granting the Meeting Order should be viewed as a "procedural step" in the CCAA process.[15]

15. Releases in a plan of compromise are permissible in certain circumstances and do not render a plan ineligible for sanction.[16] It is well established, however, that third

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[11] *Federal Gypsum Co., Re*, 2007 NSSC 384 [*Federal Gypsum*] at para 12 66-68, Tab 1 of the Book of Authorities of the Applicant dated September 16, 2016 ("**BOA**").
[12] *Re ScoZinc,* 2009 NSSC 163, at para 7, BOA Tab 2; *Target Canada Co. (Re)* 2016 ONSC 316 [*Target*], at paras 66-71, BOA Tab 3.
[13] *Clayton Construction Co., Re*, 2010 SKQB 429, 2010 CarswellSask 750 [*Clayton Construction*], at para 12, BOA Tab 4.
[14] *Target*, paras 69-71, BOA Tab 3.
[15] *Jaguar Mining Inc., Re*, 2014 ONSC 494, at para 48, BOA Tab 5.
[16] *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, at paras 71 and 113, BOA Tab 6.

party releases are appropriately considered in connection with the sanction of a plan of compromise rather than in connection with the meeting order.[17]

16. Moreover, this Court has recognized that all parties can benefit from a vote on a plan in which there is transparency as to who is voting and how such votes are cast. [18] A vote allows creditors to express their views.

17. HBW submits that there is no basis for concluding that the Plan has no hope of success. To the contrary, the Plan is supported by HBW's largest creditor, and the Plan complies with the statutory requirements and is consistent with the CCAA.

18. As set forth below and as will be demonstrated at the sanction hearing when the results of the creditor vote are known, the Plan, including the releases, is fair and reasonable. This Court should therefore exercise its discretion to order the Creditors' Meeting to consider the Plan.

II. CLASSIFICATION OF THE AFFECTED CREDITORS IS APPROPRIATE

19. If the Meeting Order is granted, all of the Affected Creditors will vote in the General Unsecured Creditors' Class at the Creditors' Meeting.

20. Section 22(1) of the CCAA provides that:

> 22(1) Company may establish classes
>
> A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the

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[17] *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 CarswellOnt 2653, [2008] O.J. No. 1819 [*ATB Financial*], at paras 17 and 18, BOA Tab 7.
[18] *ATB Financial,* para 9, BOA Tab 7.

> company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.[19]

21. Section 22(2) of the CCAA sets out the factors that are to be taken into account in placing creditors in the same class. Creditors may be included in the same class if their interests are sufficiently similar to give them a commonality of interest, taking into account (*inter alia*) (i) the nature of the debts, liabilities or obligations giving rise to their claims and any security in respect of their claims, (ii) the remedies available to those creditors in the absence of the compromise or arrangement and (iii) the extent to which those creditors would recover their claims by exercising those remedies.[20]

22. These criteria, which were added as part of the 2009 amendments to the CCAA, codify factors considered in case law pre-dating these amendments.[21] In *Canadian Airlines,* Paperny J., as she then was, summarized the principles applicable to the classification of creditors as follows:

> In summary, the cases establish the following principles applicable to assessing commonality of interest:
>
> 1. Commonality of interest should be viewed on the basis of the non-fragmentation test, not on an identity of interest test;
>
> 2. The interests to be considered are the legal interests the creditor holds *qua* creditor in relationship to the debtor company, prior to and under the plan as well as on liquidation;
>
> 3. The commonality of these interests are to be viewed purposively, bearing in mind the object of the C.C.A.A., namely to facilitate reorganizations if at all possible;
>
> 4. In placing a broad and purposive interpretation on the C.C.A.A., the court should be careful to resist classification approaches which would potentially jeopardize potentially viable plans.

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[19] CCAA, s. 22(1).
[20] CCAA, s. 22(2).
[21] L.W. Houlden, G.B. Morawetz and Janis Sarra, *The 2016 Annotated Bankruptcy and Insolvency Act*, (Toronto: Thomson Reuters, 2016), at N§149, pp 1405-1407, BOA Tab 12.

> 5. Absent bad faith, the motivations of the creditors to approve or disapprove are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.[22]

23. Classification is a fact-specific determination that must be evaluated in the unique circumstances of every case. The exercise must be approached with the flexible and remedial jurisdiction of the CCAA in mind.[23]

24. "Commonality of interest" does not mean "identity of interest".[24] "Commonality of interest" is based on the principle that a class consists of those persons whose interests are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.[25] It is a non-fragmentation test designed to further the objective of facilitating the restructuring. Where a secured creditor's security has no value, it may be properly classified as an unsecured creditor because it is, notwithstanding its security interest, an unsecured creditor.[26]

25. The fact that creditors within the same class may receive a different share of distributions does not necessitate a separate class.[27] As noted by the court in *Lutheran*

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[22] *Re Canadian Airlines Corp.,* (2000) CarswellAlta 19 C.B.R. (4th) 12 (Alta. Q.B.) [*Canadian Airlines*], at para 31, BOA Tab 8.
[23] *Canadian Airlines*, para 18, BOA Tab 8.
[24] *Canadian Airlines,* para 20, citing *Re Norcen Energy Resources Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.) at p. 29, BOA Tab 8.
[25] *Canadian Airlines*, para 17, citing *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q.B.573 (Eng. C.A.) at p. 583, BOA Tab 8.
[26] *Federal Gypsum*, para 22, BOA Tab 1.
[27] *Re SemCanada Crude Co.*, 2009 CarswellAlta 1269 (Q.B.) [*SemCanada Crude*], paras 26 and 47, BOA Tab 9.

Church, "equitable treatment of creditors is not necessary equal treatment."[28] Instead, the appropriate inquiry is whether the creditors have a common interest.[29]

26. The fact that all of the Affected Creditors under the Plan have unsecured claims against HBW favours the placement of such creditors in one class. As Farley J. noted in *Stelco:*

> ...absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class. Certainly that would avoid fragmentation - and in this respect multiplicity of classes does not mean that fragmentation starts only when there are many classes. Unless more than one class is necessary, fragmentation would start at two classes. Fragmentation if necessary, but not necessarily fragmentation. [30]

27. CLLSP Construction Lien Deficiency Claims are appropriately classified with unsecured claims under the Plan and permitted to vote with other unsecured creditors. While Construction Lien Claims are secured claims, those claims will be unaffected under the Plan and paid in full. The unsecured portion of claims held by Construction Lien Creditors, being the CLLSP Construction Lien Deficiency Claims, have a commonality of interest with other unsecured creditors.

28. It is also appropriate to classify the Northland Parties' claims with other unsecured claims because they are unsecured claims against HBW. The Northland Parties' interests "qua creditor" of HBW are unsecured claims that, while substantial in amount, have no priority as claims against HBW. In the event of a liquidation, the Northland Parties' rights against HBW would be indistinguishable from other unsecured

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[28] *Lutheran Church Canada, Re*, 2016 ABQB 419 [*Lutheran Church*], at paras 151-156, BOA Tab 10.
[29] *Canadian Airlines*, para 17, BOA Tab 8.
[30] *Re Stelco Inc.*, 2005 CarswellOnt 6483, at para 13, aff'd 2005 CarswellOnt 6818 (C.A.), BOA Tab 11.

creditors. Pursuant to the Settlement and Support Agreements, the Northland Parties have agreed to receive approximately 4% on account of certain claims and 0% on an additional claim.[31] Although the Monitor's initial report on recoveries has not yet been finalized, the HBW parties expect that distributions for other unsecured creditors will be higher. Therefore, the Northland Parties will be distinguished from other Unsecured Creditors only in that they will receive a smaller percentage of distributions on account of their claims.

29. Similarly, Convenience Class Creditors are appropriately classified with unsecured creditors. There are numerous examples within the case law where the Court has sanctioned a CCAA plan that provides for a convenience class.[32] The administrative efficiencies provided by the convenience class are kept in check by the Court's discretion at sanction of the Plan.[33] Should any Convenience Class Creditor (or other stakeholder) oppose its treatment under the Plan, it retains the right to oppose the sanction of the Plan. As such, a convenience class strikes an appropriate balance between the administrative burdens on small creditors and the Monitor, and the need to protect the voting rights of creditors.

30. The classification of creditors in the Plan is appropriate and should not prevent this Court from ordering a meeting of creditors to vote on the Plan.

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[31] Gund Affidavit at para 8.
[32] *Lutheran Church*, para 151-156, BOA Tab 10; *Clayton Construction Co.*, at paras 6-8, 13 and 14, BOA Tab 4.
[33] *Clayton Construction Co.*, paras 13 and 14, BOA Tab 4.

PART V –RELIEF SOUGHT

31. The Applicant requests that this Court grant relief by making an order substantially in the form of the Meeting Order included in the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of September, 2016.

Cassels Brock & Blackwell LLP
Lawyers for H.B. White Canada Corp.

SCHEDULE "A"

LIST OF AUTHORITIES

Case Law

1 *Federal Gypsum Co., Re*, 2007 NSSC 384

2 *Re ScoZinc,* 2009 NSSC 163

3 *Target Canada Co., Re*, 2016 ONSC 316

4 *Clayton Construction Co., Re*, 2010 SKQB 429, 2010 CarswellSask 750

5 *Jaguar Mining Inc., Re*, 2014 ONSC 494

6 *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp., 2008* ONCA *587*

7 *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 CarswellOnt 2653, [2008] O.J. No. 1819

8 *Re Canadian Airlines Corp.,* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.)

9 *Re SemCanada Crude Co.,* 2009 CarswellAlta 1269 (Q.B.)

10 *Lutheran Church Canada, Re*, 2016 ABQB 419

11 *Re Stelco Inc.*, 2005 CarswellOnt 6483, aff'd 2005 CarswellOnt 6818 (ONCA)

Secondary Source

12 L.W. Houlden, G.B. Morawetz and Janis Sarra, *The 2016 Annotated Bankruptcy and Insolvency Act*, (Toronto: Thomson Reuters, 2016)

SCHEDULE "B"

RELEVANT STATUTES

Compromise with unsecured creditors

4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

Companies' Creditors Arrangement Act, **R.S.C. 1985, c. C-36, as amended, s. 4**

Company may establish classes

22(1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

Companies' Creditors Arrangement Act, **R.S.C. 1985, c. C-36, as amended, s. 22(1)**

Factors

22(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

Companies' Creditors Arrangement Act, **R.S.C. 1985, c. C-36, as amended, s. 22(2)**

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FACTUM OF THE APPLICANT

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

R. Shayne Kukulowicz LSUC #:30729S
Tel: 416.860.6463
Fax: 416.640.3176
skukulowicz@casselsbrock.com

Jane O. Dietrich LSUC #:49302U
Tel: 416.860.5223
Fax: 416.640.3144
jdietrich@casselsbrock.com

Natalie E. Levine LSUC #:64908K
Tel: 416.860.6568
Fax: 416.640.3207
nlevine@casselsbrock.com

Lawyers for H. B. White Canada Corp.