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
(Sanction Hearing)

October 31, 2016

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FACTUM OF THE APPLICANT
(Sanction Order)

PART I - NATURE OF THIS MOTION

1. This factum is filed in support of the Applicant's motion for this Court's sanction of its Amended Plan of Compromise and Arrangement dated October 13, 2016 (the "**Plan**").[1]

2. The Applicant, HBW, is an engineering, procurement, and construction ("**EPC**") contractor which provides a range of services for the renewable energy market. HBW is the Canadian subsidiary of a North American renewable energy enterprise with its indirect U.S. parent being Infrastructure and Energy Alternatives, LLC ("**IEA**"). Prior to this CCAA proceeding, HBW was involved in approximately 25 renewable energy projects located primarily in Ontario.

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[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.

3. As described in further detail below, there were three projects undertaken by HBW for the Northland Parties which led to significant losses and litigation between HBW, the Northland Parties, and various subcontractors.

4. Given the significant litigation with the Northland Parties, HBW negotiated Settlement and Support Agreements with these parties prior to commencing the CCAA Proceedings. The Plan, for which sanction of the Court is now sought, contains the terms contemplated by those Settlement and Support Agreements.

5. In summary, the Plan involves related parties, IEA and WCI (collectively, the "**Plan Sponsors**"): (i) funding $8.5 million plus additional amounts for the expenses of the CCAA Proceeding; (ii) subordinating their intercompany claims; and (iii) convincing the secured lenders of the Applicant to permit and support this restructuring. The Plan proposes a significantly better recovery for unsecured creditors than the only other alternative — a bankruptcy. In a bankruptcy proceeding, the proceeds of a liquidation of the Applicant's assets would be insufficient to satisfy the claims of its secured lenders, and unsecured creditors would receive no recovery or distribution. Moreover, the Plan provides an efficient method for ascertaining and distributing construction "holdback" funds, which would otherwise continue to be held pending the outcome of continuing litigation among the HBW Parties, the Northland Parties and the applicable Construction Lien Creditors.

6. HBW's creditors have voted to approve the Plan by an overwhelming majority. HBW has complied with the provisions of the CCAA and all orders made in this CCAA Proceeding. The Monitor recommends approval of the Plan. The Plan is a fair and reasonable compromise of claims and resolution of litigious issues. Accordingly, the Applicant submits that the Plan should be sanctioned by this Court.

PART II - FACTS[2]

Background

7. HBW is a Nova Scotia unlimited liability company and its sole member is White Construction, Inc. ("**WCI**"), an Indiana corporation. Both HBW and WCI are indirect subsidiaries of IEA, a Delaware limited liability company. IEA, through its subsidiaries (collectively with IEA, the "**IEA Group**"), owns an integrated portfolio of companies focused on the development, construction and maintenance of energy and other infrastructure projects.[3]

8. At one point HBW had approximately 25 renewable energy projects in Canada, primarily in Ontario. However, as a result of certain unprofitable project contracts and protracted litigation with the Northland Parties, HBW suffered substantial losses. Currently, HBW only provides warranty and repair services and has no other operations in Canada.

9. HBW's projects with the Northland Parties have given rise to disputes in connection with the termination of a significant contract and matters involving two other contracts. The Northland Parties asserted damages against HBW in excess of $170 million. Prior to these proceedings, the parties were engaged in mandatory arbitration under the applicable contracts. In addition, lien claims in excess of $26 million were registered against the project lands by HBW's subcontractors and sub-subcontractors.[4]

10. After protracted negotiations, on July 6, 2016, the HBW Parties and the Northland Parties entered into the Settlement and Support Agreements which contemplated that HBW

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[2] The facts with respect to this motion are more fully set out in the Affidavit of Philip J. Gund sworn October 18, 2016 (the "**Sanction Affidavit**"), at Tab 2 of the Applicant's Motion Record dated October 18, 2016. Additional facts, including the background to and mechanics of the Plan are described in the Affidavit of Philip J. Gund, sworn September 12, 2016 (the "**Meeting Order Affidavit**"), attached as Exhibit "A" to the Sanction Affidavit and the Third Report of the Monitor, dated October 3, 2016 ("**Monitor's Third Report**").
[3] Affidavit of Philip J. Gund sworn July 6, 2016 (the "**Application Affidavit**"), at Tab 2 of the Applicant's Application Record dated July 6, 2016 at para 4.
[4] Application Affidavit at para 7.

would commence these proceedings and propose a plan of compromise which would (i) implement the settlement set out in the Settlement and Support Agreements (ii) facilitate the payment of construction lien claims from "holdback" funds (iii) compromise unsecured claims (including construction lien deficiency claims) (iv) resolve the ongoing construction lien litigation and (v) allow HBW to emerge from these proceedings to continue to provide warranty and repair services to certain existing customers.[5]

11. In the absence of a settlement with the Northland Parties, HBW would be forced to file for bankruptcy. Moreover, because HBW is an unlimited liability company, upon a winding up of HBW, HBW would have an unsecured claim against WCI in respect of any debts HBW could not pay (the "**Wind-up Claim**"). If such a claim were made against WCI, it would likely cause WCI to file for bankruptcy protection in the United States and cause ripple effects for the IEA Group's lenders and other shared contract counterparties.[6] HBW has proposed the Plan 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.[7]

CCAA Proceedings

12. On July 7, 2016, Justice Newbould granted the Initial Order in these proceedings. At the same hearing, Justice Newbould granted the Claims Procedure Order, establishing a process for the filing and reconciliation of proofs of claim against HBW and its Directors and Officers. The Claims Procedure Order was tailored to address the claims arising under the *Construction Lien Act*, R.S.O. 1990, c. C.30, including claims against "holdback" funds still in the possession of the Northland Parties. In addition, the Claims Procedure Order permitted

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[5] Sanction Affidavit at para 5.
[6] Sanction Affidavit at para 13.
[7] Sanction Affidavit at para 3; Monitor's Third Report at para 9.2.

the Monitor to build on the work of the Vetting Committee[8] to review and reconcile lien claims and related unsecured claims. The Claims Bar Date for pre-filing claims (as defined in the Claims Procedure Order) was August 22, 2016.[9] The Monitor and the Applicant have worked closely since the Claims Bar Date to review the filed proofs of claim and reconcile the information against the Applicant's books and records.

13. On September 19, 2016, Justice Newbould granted the Meeting Order, among other things, (i) accepting the Plan[10] (in the form attached thereto) for filing and (ii) authorizing the Applicant to call a meeting of its creditors.

Key Terms of the Plan

14. The primary features of the Plan are summarized as follows:[11]

(a) Three business days prior to the Implementation Date, the Plan Sponsors will transfer sufficient Cash to the Monitor to establish the Northland Claims Pool ($6 million) and the Unsecured Creditor Pool ($2.5 million);

(b) Within one day of the entry of the Sanction Order, the Northland Parties will transfer certain Lien Holdback Amounts to the Monitor to establish the BFW Holdback Pool (approximately $532,000) and the CLLSP Holdback Pool (approximately $8.3 million);[12]

(c) General Unsecured Creditors with Proven Claims of less than $10,000 will be deemed to be "Convenience Class Creditors". General Unsecured Creditors

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[8] A lien vetting committee (the "**Vetting Committee**") was established pursuant to an order of Justice Tremblay to prepare a report and vet the liens registered on title to the CLLSP Facility for lienability, timeliness and quantum; Application Affidavit at para 99.
[9] Meeting Order Affidavit at para 16.
[10] On October 13, 2016, consistent with the Meeting Order and the Plan, the Applicant made certain non-material amendments to the Plan.
[11] Sanction Affidavit at para 8.
[12] Fifth Report of the Monitor, dated October 31, 2016 (the "**Monitor's Fifth Report**") at para 4.25.

with Proven Claims in excess of $10,000 may elect to be treated for all purposes as Convenience Class Creditors;

(d) General Unsecured Creditors with Proven Claims will receive their *pro rata* share of $2.5 million (less amounts necessary to pay Convenience Class Creditors);

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

(f) Subject to the payment or reserve for CLLSP Sub Sub Contractor Construction Lien Claims, and the payment of Vetting Committee Fees up to a maximum amount of $195,000, distributions will be made to each Proven CLLSP Construction Lien Creditor in the amount of its *pro rata* share of the CLLSP Holdback Pool with any deficiency being treated as a General Unsecured Claim;

(g) Equity interests in HBW shall receive no distribution and shall be cancelled under the Plan. New membership interests in HBW shall be issued to White Construction Energy Services, LLC;

(h) The Directors' Charge and Administration Charge will be discharged against all property other than the Administrative Reserve;

(i) Crown Priority Claims and Employee Priority Claims,[13] including but not limited to source deductions, and wages/employees amounts shall be paid from the Administrative Reserve;

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[13] The Applicant does not participate in a prescribed pension plan.

(j) Members of the IEA Group, including the respective Officers and Directors of HBW, as well as, the Northland Parties, the Monitor and others, will be released and discharged from all claims, including any liability for all claims based on any occurrence taking place before the Implementation Date and the ongoing litigation under the Provincial Lien Legislation will be dismissed.

Creditors Approve the Plan

15. The Creditors' Meeting was held on October 17, 2016. The quorum requirement was satisfied and the Chair declared that the meeting was properly constituted.[14] The Required Majority[15] voted in favour of the Plan Resolution (as defined in the Meeting Order) and therefore approved the Plan. According to the Monitor's tabulation, the following votes were recorded:[16]

VOTING SUMMARY	Number Voting in Favour	Dollar Amount Voting in Favour	Number Voting Against	Dollar Amount Voting Against
Voting Claims	50 (96.2%)	$176,521,506 (99.8%)	2 (3.8%)	$411,853 (0.2%)
Disputed Voting Claims	26 (81.3%)	$15,293,504 (90.7%)	6 (18.8%)	$1,571,521 (9.3%)
Eligible Voting Claims (i.e. Total)	76 (90.5%)	$191,815,010 (99.0%)	8 (9.5%)	$1,983,374 (1.0%)

[14] Sanction Affidavit at para 21.
[15] Consistent with the CCAA, the Meeting Order required the Plan Resolution be approved by that number of Affected Creditors representing at least a majority in number of Voting Claims, whose Affected Claims represent at least two-thirds in value of the Voting Claims of Affected Creditors who validly vote (in person or by Proxy) on the Plan Resolution at the Creditors' Meeting or were deemed to vote on the Plan Resolution as provided for in the Meeting Order.
[16] Sanction Affidavit at para 22; Fourth Report of the Monitor, dated October 20, 2016 (the "**Monitor's Fourth Report**") at para 4.3.

Projected Plan Recoveries

16. Based on the most up-to-date information from the Monitor, the Applicant expects that, the General Unsecured Creditors will be paid approximately 7.5% to 8.2% of their Proven Claims.[17]

17. Creditors with recoveries different from the those set out above include:

(a) Convenience Class Creditors, who will be paid the lesser of: (a) 100% of their Proven Claims; and (b) $10,000 on the Initial Distribution Date;[18]

(b) the Northland Parties (or their designee) excluding MMWF, will receive $6,000,000, consistent with the BFW/CLLSP Settlement and Support Agreement, representing 3.4% of their asserted claims against HBW;[19]

(c) each Proven BFW Construction Lien Creditor will receive 100% of its Proven BFW Construction Lien Claim from the BFW Holdback Pool;[20] and

(d) Proven CLLSP Construction Lien Creditors, are expected to receive between approximately 36.8% to7.9% with respect to the portion of their claim secured by the Lien Holdback Amount. The related Construction Lien Deficiency Claims will be treated like General Unsecured Creditors.[21]

PART III - ISSUES AND THE LAW

18. The issue on this motion is:

(a) Whether this Court should sanction the Plan?

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[17] Monitor's Fifth Report at para 4.26(v).
[18] Monitor's Fifth Report at para 4.26(iv).
[19] Pursuant to the Settlement and Support Agreements, MMWF has waived any distribution on account of its Claim. Monitor's Third Report at para 3.9(iii) and (iv); Monitor's Fifth Report at para 4.26(iii).
[20] Monitor's Third Report at para 3.9(i); Monitor's Fifth Report at para 4.26(i).
[21] Monitor's Third Report at para 3.9(ii) and (vi); Monitor's Fifth Report at para 4.26(ii) and (v).

PART IV - LAW

Test for Sanctioning a Plan

19. Section 6(1) of the CCAA provides that the Court has discretion to sanction a plan of compromise or arrangement if it has achieved the requisite "double majority" vote.

20. The criteria that a debtor company must satisfy in seeking the Court's approval for a plan of compromise or arrangement under the CCAA are well established:

(a) there must be strict compliance with all statutory requirements;

(b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and

(c) the plan must be fair and reasonable.[22]

(a) Compliance with all Statutory Requirements

21. Under the first branch of the test for sanctioning a CCAA plan, the Court typically considers whether: (a) the applicant comes within the definition of "debtor company" under section 2 of the CCAA; (b) the applicant or affiliated debtor companies have total claims in excess of $5 million; (c) the creditors were properly classified; (d) the notice of meeting was sent in accordance with the Court's Order; (e) the creditors' meeting was properly constituted; (f) the voting was properly carried out; and (g) the plan was approved by the requisite majority.[23]

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[22] *Re Canadian Airlines Corp.*, 2000 ABQB 442 [*Canadian Airlines*] at para 60, Tab 2 of the Book of Authorities of the Applicant dated October 31, 2016 ("**BOA**") leave to appeal denied 2000 ABCA 238, affirmed 2001 ABCA 9, leave to appeal to SCC refused July 12, 2001; *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. S.C.J.) [*Sammi Atlas*] at para 2, BOA Tab 7.; *Re Canwest Global Communications Corp.*, 2010 ONSC 4209 [*Canwest Global*] at para 14, BOA Tab 3; Re *Skylink Aviation*, 2013 ONSC 2519 [*Skylink*] at para 26, BOA Tab 9.

[23] *Canadian Airlines, supra* note 22 at para 62, BOA Tab 2; *Canwest Global, supra* note 22 at para 15, BOA Tab 3.

22. In this case, the Applicant submits that it has satisfied all of these requirements. In particular,[24]

(a) in granting the Initial Order, this Honourable Court determined that the Applicant qualified as a "debtor company" under section 2 of the CCAA and that the Applicant was insolvent;

(b) Affected Creditors were classified for the purposes of voting and receiving distributions under the Plan and they voted on the Plan as a single class. This Court approved the classification of Affected Creditors in granting the Meeting Order. The classification of Affected Creditors was not opposed at that time, nor was the Meeting Order appealed;

(c) in accordance with the Meeting Order, the Monitor provided copies of the Meeting Materials to Eligible Voting Creditors, and an electronic copy of the Meeting Materials was posted on the Monitor's website maintained for this CCAA proceeding. In addition, the Monitor published notice of the Creditors' Meeting in *The Globe and Mail* (National Edition) and *The Daily Commercial News*;[25]

(d) the Creditors' Meeting was properly constituted and the voting was carried out in accordance with the Meeting Order;[26] and

(e) 96.2% of the Creditors voting at the Creditors' Meeting with Voting Claims representing 99.8% in dollar value of the Voting Claims and 90.5% of the Eligible Voting Creditors representing 99.0% in dollar value of the Eligible

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[24] Initial Order at para 2, attached as Exhibit "B" to the Meeting Order Affidavit.
[25] Monitor's Third Report at para 6.1 (iv).
[26] Sanction Affidavit at paras 21 and 23.

Voting Claims voted in favour of the Plan[27] — this fulfills the required statutory "double" majority under section 6(1) of the CCAA.

23. The Plan complies with the requirements of the CCAA and there have been no allegations to the contrary.[28]

(b) No Unauthorized Steps taken by the Applicant

24. In making a determination as to whether anything has been done — or is purported to have been done — that is not authorized by the CCAA, the Court should rely on the parties, the stakeholders and the reports of the Monitor.[29]

25. No unauthorized steps have been taken in this CCAA Proceeding and this Court has been kept apprised of all of the key issues facing the Applicant throughout the restructuring.

26. The Applicant has acted in good faith and with due diligence in complying with all Court Orders. No person has alleged that the Applicant has taken steps not authorized in this proceeding. Accordingly, this Court has the jurisdiction to approve the Plan.[30]

(c) The Plan is Fair and Reasonable

27. Canadian courts have repeatedly emphasized that when considering whether a plan is fair and reasonable, the Court should consider the relative degrees of prejudice that would flow from granting or refusing to grant relief sought under the CCAA and whether the plan represents a reasonable and fair balancing of interests, in light of the other commercial

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[27] Sanction Affidavit at para 22; Monitor's Fourth Report at paras 4.3, 4.4 and 4.6.
[28] Monitor's Third Report at para 9.1; Fifth Report at para 6.1 (ii) and (iv).
[29] *Canadian Airlines*, *supra* note 22 at para 64, BOA Tab 2; *Canwest Global, supra* note 22 at para 17, BOA Tab 3.
[30] Fifth Report at para. 6.1(iv).

alternatives available.[31] The meaning of "fairness" and "reasonableness" are "necessarily shaped by the unique circumstances of each case, within the context of the CCAA ..."[32]

28. Where creditors have signalled their support of a plan by means of the vote, the court will be very reluctant to second-guess the business decisions made by the stakeholders as a body.[33]

29. In assessing whether a proposed plan is fair and reasonable, the Court will consider the following:[34]

(a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;

(b) what creditors would receive on bankruptcy or liquidation as compared to the plan;

(c) alternatives available to the plan and bankruptcy;

(d) oppression of the rights of creditors;

(e) unfairness to shareholders; and

(f) the public interest.

30. Each of these factors strongly supports sanction of the Plan by this Court:

(a) Classification of Creditors and Approval: Affected Creditors voted as a single class on the basis of commonality of interest vis-à-vis the debtor company—

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[31] *Canadian Airlines, supra* note 22 at para 3, BOA Tab 2; *Canwest Global, supra* note 22 at para 19, BOA Tab 3.
[32] *Canadian Airlines, supra* note 22 at para 94, BOA Tab 2.
[33] *Sammi Atlas, supra* note 22 at para 5, BOA Tab 7; *Canadian Airlines, supra* note 22 at para 97, BOA Tab 2; *Re AbitibiBowater Inc.*, 2010 QCCS 4450 at para 34, BOA Tab 1.
[34] *Canwest Global, supra* note 22 at para 21, BOA Tab 3.

namely, that all such creditors have unsecured Claims against the Applicant.[35] Over 90% in number and dollar value of the Eligible Voting Creditors voted in favour of the Plan. As Paperny J. noted in *Canadian Airlines*, creditor support creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan.[36] The approval of the Plan reflects the fact that it is a product of negotiation and communication among stakeholders and is a strong indicator that the Plan is fair and reasonable;[37]

(b) Greater Recovery than Bankruptcy: The only alternative to a Plan would be a bankruptcy.[38] As illustrated in the Third Report, the recoveries under the Plan are significantly higher than under a bankruptcy where unsecured creditors would receive no distribution. This material improvement in creditor recovery under the Plan is primarily due to the very significant financial contribution of the Plan Sponsors and the Settlement and Support Agreements with the Northland Parties.[39] Furthermore, the Plan will allow for timely recoveries to Construction Lien Creditors without costly litigation and delay. The Applicant believes that all stakeholders will benefit more from the implementation of the Plan than from a bankruptcy;

(c) No Oppression of Creditors: The Plan is the result of the Applicant's extensive negotiation and consultation with various stakeholders, including the Monitor, the Northland Parties and the Plan Sponsors. The pre-insolvency rights and priorities of Affected Creditors are respected under the Plan and there is no

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[35] *Re Sino-Forest Corp.*, 2012 ONSC 7050 [*Sino-Forest*] at paras 55-58, BOA Tab 8.
[36] *Canadian Airlines, supra* note 22 at para 97, BOA Tab 2.
[37] Sanction Affidavit at para 24(a) and (d); See, for example, *Skylink, supra* note 22 at para 29, BOA Tab 9.
[38] Sanction Affidavit at para 3; Monitor's Third Report at para 3.14.
[39] Monitor's Third Report, para 3.16.

oppression of any creditor rights. Case law makes it clear that a plan can be fair and reasonable even if it does not provide exactly the same recoveries for all creditors, as long as there is a sufficient rationale for any differences in recovery for particular creditors or classes of creditors.[40] The Northland Parties will receive less than half of the proportionate recovery compared to other unsecured creditors. This differential treatment reflects the provisions of the Settlement and Support Agreements and is supported by the Northland Parties. These arrangements were clearly disclosed to Affected Creditors and to this Court throughout these proceedings including when the Meeting Order was granted;[41]

(d) No Unfairness to Shareholders: The Plan Sponsors, who are the shareholders of the Applicant, support the Plan including the cancellation of their equity interest in the Applicant and the issuance of new membership interests in HBW to White Construction Energy Services, LLC; and

(e) Public Interest: The Plan will allow HBW to continue to service warranty and repair obligations to its existing customers. Moreover, preventing a bankruptcy of HBW and the related bankruptcy of WCI preserves jobs and provides for ongoing work for certain suppliers.

(d) The Releases are Fair and Reasonable

31. As detailed in the Sanction Affidavit,[42] Article 9 of the Plan provides releases (the "**Releases**") for two groups of parties namely: the HBW Released Parties (including the officers and directors of the IEA Group) and the Third Party Released Parties (collectively, the "**Released Parties**").

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[40] *Canwest Global, supra* note 22 at paras 22-24, BOA Tab 3.
[41] Meeting Order Affidavit at paras 18-21; Monitor's Third Report at para 5.2(iii).
[42] Sanction Affidavit at paras 11-19.

32. It is accepted that Canadian courts have jurisdiction to sanction plans containing releases in favour of third parties if the release was negotiated in favour of a third party as part of the "compromise" or "arrangement" where the release reasonably relates to the proposed restructuring and is not overly broad.[43] There must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan.[44]

33. In considering whether to approve releases in favour of third parties, the Court will take into account the particular circumstances of the case and the objectives of the CCAA.[45] While no single factor will be determinative,[46] the courts have considered the following factors:[47]

(a) whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

(b) whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

(c) whether the plan could succeed without the releases;

(d) whether the parties being released were contributing to the plan;

(e) whether the release benefitted the debtors as well as the creditors generally; and

(f) whether the creditors voting on the plan had knowledge of the nature and effect of the releases.

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[43] *Re Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, [*Metcalfe*] at para 61, BOA Tab 6; *Re Kitchener Frame Ltd.*, 2012 ONSC 234 [*Kitchener Frame*] at para 85, BOA Tab 5.
[44] *Metcalfe, ibid* at para 70, BOA Tab 6.
[45] *Skylink, supra* note 22 at para 30, BOA Tab 9.
[46] *Kitchener Frame*, *supra* note 5 at para 82, BOA Tab 5.
[47] *Metcalfe, supra* note 43 at para 71, BOA Tab 6; *Re Cline Mining Corp.*, 2015 ONSC 622 [*Cline Mining*] at paras 22-28, BOA Tab 4; *Kitchener Frame, supra* note 43 at para 80, BOA Tab 5.

34. Courts have approved releases that benefit affiliates of the debtor company where the above criteria are satisfied, including affiliates of the debtor company where such affiliates were contributing their assets to satisfy the obligations of the debtor company for the benefit of affected creditors.[48]

35. It is also common for CCAA courts to approve third party releases in favour of persons, such as directors or officers or other third parties, where:[49] (a) the release in favour of the director or officer was negotiated as part of the overall compromise in the plan; (b) the released director or officer would have claims for indemnification against the debtor company in the absence of the release in the plan; (c) the inclusion of certain parties to be released under the plan was an essential component of the settlement of certain claims; (d) full disclosure was made to creditors of the content of the release; and (e) the monitor considers the scope of the release reasonable in the circumstances.

The Applicant and the IEA Group

36. The release in favour of the HBW Released Parties (which includes, among others, the Plan Sponsors), set forth in section 9.1(a) of the Plan was a key component of HBW and the IEA Group's decision to participate in and support this CCAA Proceeding and avoid a bankruptcy of HBW. As detailed in the Sanction Affidavit, the HBW Released Parties have made significant contributions throughout the CCAA Proceedings including, making post-filing financing available in the CCAA proceeding, agreeing to subordinate their intercompany claims, and making significant contributions upon Plan Implementation including funding the Unsecured Creditor Pool and the Northland Claims Pool.

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[48] *Sino-Forest, supra* note 35 at paras 72 and 73, BOA Tab 8; *Skylink, supra* note 22 at para 21, BOA Tab 9; *Kitchener Frame, supra* note 43 at paras 83-85, BOA Tab 5.
[49] *Skylink, supra* note 22 at para 33, BOA Tab 9; *Cline Mining, supra* note 47 at para 26, BOA Tab 4.

Directors and Officers

37. The Release in favour of the officers and directors was a key condition to the Plan Sponsors' support of the Plan. The directors and officers who will be released pursuant to the Plan have an indemnity from HBW[50] which could also be asserted against WCI as part of the Wind-Up Claim. The Plan Sponsors would not have funded or supported the CCAA proceeding without the release in favour of the directors and officers in the Plan. Full disclosure of the release was made to all creditors in the CCAA Proceeding.

The Northland Parties, the Monitor and Others

38. Section 9.1(b) of the Plan provides a release in favour of certain third parties including the Northland Parties. The Applicant believes that it is appropriate to include the Release in favour of the Northland Parties, because: (a) the release is a condition to the Settlement and Support Agreements; (b) the Northland Parties are transferring approximately $8.8 million in total to fund the Lien Holdback Pools for distribution to the Construction Lien Creditors thereby facilitating an expeditious distribution of holdback funds without extensive litigation; and (c) the Northland Parties hold, by far, the largest Unsecured Claims against HBW but will only receive approximately 3.4% of their asserted claims against HBW which is less than half of the proportionate recovery compared to other unsecured creditors.

39. The Applicant believes that the releases in favour of the Monitor contemplated under article 9.1(b) of the Plan are necessary and appropriate in the circumstances. The Monitor, a Court-appointed officer, has: (i) carried out its mandate with respect to the Claims Process; (ii) been integrally involved in the development of the Plan and all aspects of the CCAA proceeding; and (iii) will be administering the creditor distributions contemplated under the Plan on behalf of and for the benefit of HBW.

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[50] These directors and officers have filed a proof of claim against the Applicant in respect of the Applicant's indemnification obligations; Monitor's Fifth Report at paras 4.6(iv).

40. The scope of the Releases are fair and reasonable under the circumstances. The Releases apply to the extent permitted by law[51] and full disclosure of the Releases was made to Affected Creditors in the Meeting Order Affidavit and in the Plan.

(e) Conclusion

41. The Monitor is of the view that the Plan as a whole is fair and reasonable.[52] Moreover, the Affected Creditors voting on the Plan overwhelmingly support this resolution of otherwise litigious issues. Accordingly, the Applicant submits that this Court should approve the clear decision of the Affected Creditors and sanction the Plan.

PART V - NATURE OF THE ORDER SOUGHT

42. For all of the reasons above, the Applicant submits that this Court should grant the requested Sanction Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31th day of October, 2016

Cassels Brock & Blackwell LLP

Cassels Brock & Blackwell LLP

Lawyers for H.B. White Canada Corp.

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[51] The Releases do not apply to liability for criminal, fraudulent or other wilful misconduct, or to other claims that are not permitted to be compromised or released under the CCAA, particularly claims under section 5.1(2) of the CCAA in respect of the directors and officers or section 19.2 of the CCAA in respect of the Applicant.

[52] Monitor's Third Report at para 9.3; Monitor's Fifth Report at para. 6.1(iii).

SCHEDULE "A"
LIST OF AUTHORITIES

Case Law

1. *Re AbitibiBowater Inc.*, 2010 QCCS 4450
2. *Re Canadian Airlines Corp.*, 2000 ABQB 442
3. *Re Canwest Global Communications Corp.*, 2010 ONSC 4209
4. *Re Cline Mining Corp.*, 2015 ONSC 622
5. *Re Kitchener Frame Ltd.,* 2012 ONSC 234
6. *Re Metcalfe & Mansfield Alternative Investments II Corp.* 2008 ONCA 587
7. *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. S.C.J.)
8. *Re Sino-Forest Corp.*, 2012 ONSC 7050
9. *Re Skylink Aviation*, 2013 ONSC 2519

SCHEDULE "B"
COMPANIES' CREDITORS ARRANGEMENT ACT

R.S.C. 1985, c. C-36, as amended

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Definitions

2 (1) In this Act...

...debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent; (*compagnie débitrice*)

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or
(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the

business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

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Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the Income Tax Act;

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a provincial pension plan as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

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Claims

Claims that may be dealt with by a compromise or arrangement

19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and
(ii) if the company filed a notice of intention under section 50.4 of the Bankruptcy and Insolvency Act or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the Bankruptcy and Insolvency Act, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

Exception

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;

(b) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting from an act referred to in subparagraph (i);

(c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;

(d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or
(e) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d).

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Court File No: CV-16-11452-00CL

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.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

FACTUM OF THE APPLICANT
(SANCTION)

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