

**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 IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO
COMPANY LIMITED

Applicants

**FACTUM OF THE FORMER GENSTAR
U.S. RETIREE GROUP COMMITTEE**

**(Motion on April 25, 2019 for a Representation Order and
Reinstatement of Benefits under the Genstar U.S. Plans)**

April 23, 2019

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FACTUM OF THE FORMER GENSTAR U.S. RETIREE GROUP COMMITTEE

PART I – OVERVIEW

1. The Former Genstar U.S. Retiree Group Committee (the “**Committee**”) moves to appoint Robert M. Brown and George A. Foster (the “**Proposed Representatives**”) to represent the interests of 59 former management employees of Genstar Corporation (“**Genstar**”), and their survivors (the “**Affected Members**”), who are beneficiaries entitled to vested benefits under three pension and deferred compensation plans (the “**Genstar U.S. Plans**”) guaranteed by the Applicant Imperial Tobacco Canada Ltd. (“**ITCAN**”) pursuant to an agreement dated April 2, 1986 (the “**Guarantee**”) between Genstar and Imasco Limited (“**Imasco**”), including:

- i. a “deferred income plan” for approximately 53 individuals who are either former senior management employees of Genstar or their surviving spouses (“**GCDIP**”);
- ii. a “supplemental executive retirement plan” for approximately 14 individuals who were either former Genstar employees or their surviving spouses (“**SERP**”); and
- iii. a “supplementary pension plan” for 3 individuals who were either former Genstar employees or their surviving spouses (“**SPEN**”).

2. Genstar is currently a dormant Canadian company and an “ITCAN Subsidiary” as defined at para. 4(f) and listed at Schedule “B” of the initial order dated March 12, 2019 (as amended on April 5) (the “**Initial Order**”). The Genstar U.S. Plans are administered by another ITCAN Subsidiary, Imasco Holdings Group, Inc. (“**IHGI**”), which is a largely dormant Delaware corporation that holds certain of ITCAN’s “legacy obligations”.

3. On April 1, ITCAN caused IHGI to fail to make required payments to Affected Members, on no notice – singling out the Genstar U.S. Plans for prejudicial treatment – the only plans targeted for cessation from amongst at least 11 pension plans covering thousands of pensioners for which ITCAN is responsible. Moreover, ITCAN and the Monitor, through their communications and statements, amounting to misinformation, caused massive and unnecessary confusion and distress to the 59 Affected Members, who are in their 70s and 80s and reliant on their pensions and retirement benefits for their financial security and psychological and physical well-being.

4. On April 5, this Court made an order extending the Stay Period (as defined in paragraph 18 of the Initial Order) “from April 11, 2019, until and including June 28, 2019”. With the express agreement of ITCAN’s counsel, this Court also made an order endorsed on the record that “the extension of the Stay Period is without prejudice to the rights of the Former Genstar U.S. Retiree Group Committee to bring and be heard for relief concerning the Genstar U.S. Plans on April 25 with all rights reserved and without regard to the passage of time until then”.

5. On April 17, the Monitor on behalf of ITCAN obtained an order from the United States Bankruptcy Court in the Southern District of New York (the “**U.S. Court**”) under Chapter 15 of the U.S. Bankruptcy Code (the “**Chapter 15 Proceeding**”) recognizing the Canadian Proceeding as the “foreign main proceeding”, and:

11. Nothing contained herein shall be deemed or construed to impair or otherwise adversely affect any rights of any group representative of the beneficiaries of the [Genstar U.S.] Plans appointed by the Canadian Court, if any, or any individual participant of the [Genstar U.S.] Plans from pursuing any rights, claims and remedies, collectively or individually, in the Canadian Proceeding or the Debtor’s or Monitor’s rights, claims, defenses and remedies in connection therewith.

6. Presently, the Committee and Proposed Representatives seek an urgent temporary order (a “**Reinstatement Order**”) prohibiting ITCAN from ceasing funding or causing the cessation, suspension or discontinuance of payments under the Genstar U.S Plans, or disclaiming or resiling from them, and directing ITCAN to reinstate all payments under these plans and continue making such payments during the pendency of these proceedings or until further order of this Court.

7. A Reinstatement Order is appropriate in the Court’s discretion on the facts of this case on grounds of equity, fairness and prejudice, and because ITCAN has failed to comply with Section 32 of the CCAA requiring it to obtain this Court’s consent to “disclaim or resiliate any agreement to which the company is a party”. Moreover, ITCAN’s very recent disclosures (yesterday) necessary for Affected Members to assess their rights, suggests probative evidence of unjust enrichment warranting the imposition of a constructive trust over Affected Members’ benefits on account of various “key man” insurance policies purchased by Genstar and Imasco (with Affected Members’ own money) to secure and fund the plans. Finally, the facts of this case engage Section 7 of the *Charter of Rights and Freedoms*; the terms of the Initial Order, and ITCAN’s and the

Monitors actions under the ostensible authority of that order, are subject to the *Charter* and *prima facie* deprived Affected Members of their right to life, liberty and security of person not in accordance with fundamental justice.

8. An order is appropriate appointing the Proposed Representatives as representatives to the Affected Members and Kaplan Law as their counsel the (“**Proposed Representation Order**”). There is no principled nor evidentiary reason to deny Affected Members their right to seek redress according to their common interests, which is routine and usually automatic in CCAA proceedings affecting vulnerable groups such as retirees.

PART II – FACTS

9. The Motion Record contains four sworn Affidavits from Affected Members:

A. Evidence of Richard D. Paterson¹

10. Mr. Paterson is the former Senior Vice President and Chief Financial Officer of Genstar Corporation and between 1967 and 1987 he worked for the company in Montreal, New York and San Francisco. He is 76 years old, lives in California, and entitled to vested benefits and payments under the GCDIP and the SERP. As a senior executive during the time that the Genstar U.S Plans were developed and implemented, as well as during Genstar’s growth and acquisition by Imasco, he has direct knowledge and recollection of the matters at issue on this motion².

11. In 1985, Genstar retained a consulting firm to design the GCDIP and SERP to be at least cost/revenue neutral to the company. This was accomplished by purchasing single-premium “key man” life insurance policies on participants’ lives, using the employee’s own deferred income on account of the GCDIP, or corporate funds on account of the SERP, to pay for the premiums. Genstar was the owner and beneficiary of the life insurance policies and they were purchased as security for the benefits and to fund the payments under the GCDIP and SERP³.

¹ Affidavit of Richard D. Paterson, sworn April 18, 2019 (the “**Paterson Affidavit**”) in Motion Record, Vol. 2, Tab 6, pp. 248-268, plus Exhibits “A” through “H” pp. 269-431.

² Paterson Affidavit, paras. 1-8.

³ Paterson Affidavit, paras. 9-12. See also Minutes of Meeting of the Chairman’s Office on September 9, 1992 re Corporate Owned Life Insurance Policies and SERP & DIP (Genstar Company) [“**1992 Minutes**”], in Supplementary Motion Record at Tab 2, pp. 5-7.

12. In 1986, Genstar was acquired by Imasco and divested itself of Genstar's non-trust company assets. Imasco provided a "safety net" for corporate employees by "guarantee[ing] in full all obligations of Genstar and its subsidiaries" under the Genstar U.S. Plans. The plans themselves provided that "in the event of a change in control prior to Employee vesting ... Employee will become fully vested in all rights hereunder". Affected Members received letters from the company confirming that they had been "awarded full vesting" under the Genstar U.S. Plans "by reason of the change of control of Genstar". As a result, and pursuant to the agreements with Imasco dated April 2, 1986 (i.e., the **Guarantee**, copies of which were provided yesterday)⁴, all benefits under the Genstar U.S. Plans were vested and guaranteed by Imasco. When Imasco was amalgamated with ITCAN in 2000, the latter became the guarantor of those vested benefits⁵.

13. Mr. Paterson retired under the GCDIP and SERP commencing in October 2007 and received monthly payments from both plans until ITCAN ceased payments on April 1⁶.

B. Evidence of Robert M. Brown⁷

14. Mr. Brown is the former Controller of Genstar's waste disposal services unit and worked at the company's Boston office from 1984 to 1986. He is 71 years old, lives in Florida, and is entitled to vested benefits and payments under the GCDIP, to which he contributed \$67,000 from his deferred income and from which the company purchased a "key man" life insurance policy to fund and secure those payments. Mr. Brown retired under the GCDIP and received \$5,781.07 in monthly payments from October 2012 through March 2019 when ITCAN discontinued the plan⁸.

C. Evidence of George A. Foster⁹

15. Mr. Foster is the former General Manager of Genstar Cement Company and worked at the company's Oakland office from 1984 to 1986. He is 76 years old, lives in California, and is entitled to vested benefits and payments under the GCDIP, to which he contributed \$10,000 from his

⁴ April 2, 1986 Agreements between Genstar and Imasco, Supplementary Motion Record, Tabs 3 and 4 at pp. 11-42.

⁵ Paterson Affidavit, paras. 13-18.

⁶ Paterson Affidavit, paras. 21, 32.

⁷ Affidavit of Robert M. Brown, sworn April 15, 2019 (the "**Brown Affidavit**") in Motion Record, Vol. 1, Tab 3, pp. 67-77, plus Exhibits "A" through "J" pp. 78-143.

⁸ Brown Affidavit, paras. 1-18.

⁹ Affidavit of George A. Foster, sworn April 15, 2019 (the "**Foster Affidavit**") in Motion Record, Vol. 1, Tab 4, pp. 145-154, plus Exhibits "A" through "G" pp. 155-189.

deferred income and from which the company purchased a “key man” life insurance policy to fund and secure those payments. Mr. Foster retired under the GCDIP and received \$1,267 in monthly payments from February 2008 through March 2019 when ITCAN discontinued the plan¹⁰.

D. Evidence of Vivian Brennan-Dolezar¹¹

16. Ms. Brennan-Dolezar’s 89-year old mother, Vivian M. Brennan is a surviving spouse entitled to vested lifetime benefits under both the GCDIP and SPEN. Ms. Brennan-Dolezar’s father Harold Brennan worked for Genstar’s payroll department in Texas starting in 1982, when the company acquired the Flintkote Company, and he retired in 1989 as director of administration. Mr. Brennan participated in the GCDIP, to which he contributed \$92,625 from his base salary, and from which the company purchased a “key man” life insurance policy to fund and secure the payments. He also participated in the SPEN as a supplement to his regular pension. He elected actuarial equivalent options to ensure that his wife would receive lifetime survivor benefits after he died. Commencing July 1, 1989, he received a pension from the Company Pension Plan equal to \$587.00 per month, plus \$600.00 per month from the SPEN and \$1,823.07 from the GCDIP, until his death in 2012. His survivor, Ms. Brennan, received monthly payments of \$293.50 from the Company Pension Plan (based on a 50% survivor benefit), \$600 from the SPEN and \$1,823.07 from the GCDIP until ITCAN ceased funding the GCDIP and SPEN in March 2019¹².

E. ITCAN Causes Payments to Stop Without Notice

17. On March 12, 2019, the Applicants initiated these CCAA Proceedings and obtained the Initial Order. On March 13, the Monitor on behalf of ITCAN as debtor filed a petition for relief initiating the Chapter 15 Proceeding in the U.S. Court. On March 14, the Monitor obtained from the U.S. Court an Order Granting Interim Motion to Seal (Docket 15) (the “**Seal Order**”) sealing the names and contact information of all 59 Affected Members¹³.

¹⁰ Foster Affidavit, paras. 1-13.

¹¹ Affidavit of Vivan Brennan-Dolezar, sworn April 15, 2019 (the “**Brennan-Dolezar Affidavit**”) in Motion Record, Vol. 2, Tab 5, pp. 196-204, plus Exhibits “A” through “K” pp. 205-245.

¹² Brennan-Dolezar Affidavit, paras. 1-14.

¹³ Paterson Affidavit, paras. 22, 48.

18. Commencing on March 14, 2019, Affected Members received voluminous court documents from the Monitor's U.S. counsel respecting the Chapter 15 Proceeding (the "**Initial U.S. Petition Documents**"). There was no personalized letter addressed to Affected Members nor any cover note explaining the content of the package or why they were receiving it¹⁴.

19. Buried in the voluminous Initial U.S. Petition Documents are two references to the Genstar U.S. Plans (in the "**First Thauvette Affidavit**"), specifically, that ITCAN:

- (a) "proposes that any further payments with respect to these obligations be stayed pursuant to the Initial Order"; and
- (b) "intends to continue to fund contributions [to IHGI so it] can make ordinary course payments in respect of their pension and retirement plan obligations, with the exception of" the Genstar U.S. Plans¹⁵.

20. Nowhere in the Initial U.S. Petition Documents does it state whether pension payments will actually cease, nor when or for how long, nor whether ITCAN intends to rely solely on the Initial Order or ask the court to give specific relief exempting ITCAN from funding these benefits. Rather, the Initial U.S. Petition Documents merely state that ITCAN is thinking about stopping payments ("proposing", "intending").

21. In the days and weeks following receipt of the Initial U.S. Court Documents, multiple Affected Members attempted, unsuccessfully, to obtain clear and credible information from the Monitor or ITCAN's U.S. subsidiaries concerning whether they will receive their Genstar U.S. Plan payments on April 1¹⁶. Four Affected Members filed objections in the U.S. Court¹⁷.

¹⁴ Paterson Affidavit, para. 23; Brown Affidavit, para. 17; Foster Affidavit, para. 14; Brennan-Dolezar Affidavit, para. 15.

¹⁵ Affidavit of Eric Thauvette Sworn March 12, 2019 at paras. 55-56. See also, Verified Chapter 15 Petition (Docket 2), para. 14, Motion Record Vol. 2, Exhibit "D" at p. 301.

¹⁶ Brennan-Dolezar Affidavit, paras. 16-20. Between March 15 and 27, Ms. Brennan-Dolezar made numerous calls to Bracewell LLP, FTI Consulting, Imasco, BNY Mellon and the Pension Benefits Guaranty Corporation and could not obtain a clear answer on whether her mother's pension will be paid on April 1. See also, Foster Affidavit, paras. 15-17. Between March 14 and 25, Mr. Foster called Bracewell LLP and Imasco and was not told that his pension will not be paid.

¹⁷ Brennan-Dolezar Affidavit, paras. 21, 24 and Exhibits "J" and "K", pp. 239-245; Foster Affidavit, para. 18 and Exhibits "E" and "F", pp. 175-187. See also the objections filed by Glen Jones and Alfred Mueller, in Book of Objections, Tab 2(C), pp. 28-31. These four objections are summarized in the Paterson Affidavit, paras. 49-50.

22. In late March, Mr. Paterson co-founded the Committee with former Genstar co-CEO and chairman Angus MacNaughton, former Genstar co-CEO and president Ross J. Turner, and former Senior Vice President and General Counsel J. Ernest Hartz. The purpose of the Committee is to protect the common interests of Affected Members in the CCAA and Chapter 15 Proceedings¹⁸.

23. On March 29, Mr. Paterson retained Kaplan Law to represent the Committee and Affected Members in the CCAA Proceedings. He and Mr. Hartz are co-instructing Kaplan Law on this matter. The Committee immediately sent a letter to ITCAN and the Monitor's counsel objecting to the company's proposal to stay payments. On April 1, the Committee filed its first Notice of Objection and, on April 3, a second Notice of Objection¹⁹. The Committee's counsel also made multiple requests for information concerning the plans²⁰.

24. On April 1, Affected Members did not receive their April payments. Between that date and April 5, various Affected Members received in the regular mail a "Notice to Participants in Non-Qualified Deferred Compensation Plans", from Bracewell LLP, dated March 27 (the "**Cessation Notice**") stating that ITCAN has "ceased funding" the Genstar U.S. Plans because "payment of these claims is not necessary to ITCAN's ongoing business". The Cessation Notice fails to mention that ITCAN is still funding the IHGI U.S. Pension Plan, which is similarly "not necessary to ITCAN's ongoing business". The Cessation Notice also does not advise Affected Members what it actually means to them that ITCAN has "ceased funding" their Genstar U.S. Plans as of the filing date, nor that they will not receive payment of their benefits from IHGI on April 1²¹.

25. On April 2, the Committee learned that ITCAN "made a determination to discontinue funding the plans during the pendency of the CCAA proceedings"²². Until last month, ITCAN made monthly payments to IHGI, totaling USD \$7.0 million per year. IHGI used \$6 million per

¹⁸ Paterson Affidavit, para. 26-27.

¹⁹ Paterson Affidavit, paras. 28, 30, 43. See also, Book of Objections, Tabs 2 and 3.

²⁰ Paterson Affidavit, paras. 29, 31, 36. Kaplan Law received a response to the Information request and an initial tranche of documents on April 22: see Letter from Craig Lockwood in Supplementary Motion Record, Tab 1.

²¹ Paterson Affidavit, paras. 36-37; Brown Affidavit, para. 18; Foster Affidavit, paras. 19-20; Brennan-Dolezar Affidavit, paras. 22, 25.

²² Affidavit of Eric Thauvette dated March 27, 2019 (the "**Second Thauvette Affidavit**") at para. 25.

year to make payments to Affected Members. ITCAN states in the “**Third Thauvette Affidavit**” that “transfers to IHGI will no longer be necessary going forward”.²³

26. The present value of the pension obligations to the Affected Members under the Genstar U.S. Plans, in the aggregate and as of December 31, 2017, is estimated to be approximately USD \$32 million (approximately CAD \$43 million)²⁴.

F. Prejudice, Hardship and Harmful Adverse Impact of ITCAN’s Actions

27. Mr. Brown testifies that “the loss of my GCDIP income will have a staggering and profoundly adverse effect on my financial and emotional security as well as peace of mind”. He and his wife live a modest retirement lifestyle. He stands to lose up to \$589,669.14 of retirement income, which he and his wife carefully planned for their retirement security in reliance on the GCDIP, including based on actuarial assumptions concerning their life expectancy and longevity. He does not have a defined benefit pension plan and his only other source of pension income is social security payments. He and his wife have no post-retirement health benefits plan and rely on the GCDIP for their expected age-related declining health. Mr. Brown has been treated for skin cancer and his wife has a very high risk of breast cancer: “The loss of my GCDIP will significantly increase our stress levels and undermine our security and peace of mind not knowing if we will be able to afford to deal with these unknowns”. Mr. Brown is “too old to look for a new job” and they are considering downsizing their home to a more affordable lower-cost housing alternative²⁵.

28. Ms. Brennan-Dolezar testifies that her mother is “quite confused about why this [is] happening” and that “this experience has been devastating to us. My Mother has become very anxious and distraught ... There has been no time to make new financial arrangements ... her savings will be fully depleted”. She states that:

The loss of the GCDIP and SPEN is already having a detrimental and adverse effect on my Mother’s sense of financial and emotional security. My Mother is 89 years old and her health is declining. She has become quite frail and does not tolerate stress well. Stress usually results in her becoming visibly nervous, and suffering from insomnia and a loss of appetite. She cannot afford to lose weight.²⁶

²³ Paterson Affidavit, paras. 39, 41.

²⁴ Paterson Affidavit, para. 42. First Thauvette Affidavit, para. 56.

²⁵ Brown Affidavit, paras. 19-24.

²⁶ Brennan-Dolezar Affidavit, paras. 26-27.

29. Mr. Foster testifies that “the loss of my GCDIP income will have a detrimental and adverse effect on my financial and emotional security ... After my social security, the GCDIP represents the largest single source of my outside retirement income”. He and his wife of 51 years carefully planned for their retirement security in reliance on the GCDIP. They stand to lose up to \$58,324, requiring additional withdrawals from their retirement savings “on a monthly basis for the foreseeable future ... to support our expected age-related declining health”²⁷.

PART III – ISSUES AND LAW

30. The issues on this motion are:

- i. Should this Court make the Proposed Representation Order; and
- ii. Should this Court make the Reinstatement Order.

31. This Court has jurisdiction to make both orders under section 11 of the CCAA:

[T]he court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

A. This Court Should Make the Proposed Representation Order

32. Section 11 of the CCAA, together with Rules 10.01 and 12.07, confer “wide discretion” on this Court to appoint representatives and representative counsel.²⁸

33. Courts in CCAA proceedings routinely appoint representatives and counsel for retirees, pension and employee interests²⁹. These appointments should be made early in the proceedings,

²⁷ Foster Affidavit, paras. 21-24.

²⁸ *Nortel Networks Corporation (Re)*, 2009 CanLII 26603 (ON SC) [“*Nortel*”] at paras. 10-12. See also, *Fraser Papers Inc. (Re)*, 2009 CanLII 55115 (ON SC) [“*Fraser Papers*”] at para. 7: “Section 11 of the CCAA and the Rules of Civil Procedure provide the Court with broad jurisdiction in this regard. No one challenges either of these propositions”. See also, *Target Canada Co. (Re)*, 2015 ONSC 303 [“*Target Canada*”] at para. 61: “I am satisfied that section 11 of the CCAA and the Rules of Civil Procedure confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employees or investors”.

²⁹ *Nortel* (former employees and pensioners); *Fraser Papers* (former unionized and non-unionized active and retired members); *Target Canada Co.* (terminated employees). See also, *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145 [“*U.S. Steel*”] at 34-42 (non-union active and retired employees); *Canwest Publishing Inc.*, 2010 ONSC 1328 [“*Canwest*”] (non-union salaried employees and retirees); *Catalyst Paper Corporation (Re)*, 2012 BCSC 451 [“*Catalyst Paper*”] (pension plan members, beneficiaries and survivors).

even if “the individuals in issue may be unsecured creditors whose recovery expectation may prove to be non-existent”, and where it is unrealistic to expect the Monitor to be “fully responsive to the needs and demands of all of these many individuals and do so in an efficient and timely manner”³⁰.

34. In addition, where a company is not in a position to protect its pension plan members or provide proper notice of adverse changes to its plans because its attention is diverted to other stakeholders, it ought to see itself in a potential conflict of interest vis-a-vis its pensioners and support the appointment of representative counsel³¹.

35. The factors to be applied in determining whether to appoint representatives include whether the individuals are a vulnerable and important stakeholder group deserving of meaningful representation, whether a social benefit is to be derived, an efficiency conferred and a multiplicity of legal retainers avoided, and whether the balance of convenience justifies such an order³².

36. In the present case, all of the factors strongly militate in favour of representation for the interests of Affected Members³³. Messrs. Brown and Foster are appropriate representatives whose interests do not conflict with the other Affected Members³⁴ and they have the full support of the Committee³⁵ and others³⁶. The reason that Committee members Messrs. Patterson and Hartz have not come forward as Proposed Representatives is because Mr. Paterson has been in and out of hospital over the past few weeks due to complications from knee surgery earlier this year, and Mr. Hartz has Parkinson’s Disease and is also caring for his ailing wife, limiting their ability to be active in these court proceedings³⁷.

37. Kaplan Law is an appropriate representative counsel. Mr. Kaplan has experience in pension law matters, has been previously appointed and has experience in CCAA proceedings³⁸.

³⁰ *Canwest* at 24.

³¹ *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 [“*Re Indalex*”] at 66, 68.

³² *Canwest* at 21. See also, *Nortel* at 7, 13-15, *Fraser Papers* at 12; *Target Canada* at 61, *U.S. Steel* at 36-42.

³³ Paterson Affidavit, paras. 46-48; Brown Affidavit, paras. 28-30; Foster Affidavit, paras. 29-31;

³⁴ Brown Affidavit, para. 27; Foster Affidavit, para. 28;

³⁵ Paterson Affidavit, para. 54.

³⁶ Brennan-Dolezar Affidavit, paras. 30-31.

³⁷ Paterson Affidavit, para. 55.

³⁸ Paterson Affidavit, para. 57 and Exhibit “H” at pp. 427-431.

38. The Proposed Representation Order has appropriate terms for carrying out the parties' respective obligations to Affected Members³⁹. Courts have ordered very similar terms in numerous other CCAA proceedings, addressing matters such as notice to Affected Members of the representation order, opting out by Affected Members who do not wish to be represented, and for the disclosure by the company of personal information and other relevant documentation⁴⁰.

B. This Court Should Make the Reinstatement Order

39. It is respectfully submitted that this Honourable Court should make the requested interim order directing ITCAN to continue funding the Genstar U.S. Plans during these proceedings, based on any one or more of the following grounds:

- i. fairness and equity justify the temporary reinstatement of benefits;
- ii. ITCAN has not complied with Section 32 of the CCAA;
- iii. there is probative evidence of a constructive trust; and
- iv. section 7 of the *Charter* has been engaged.

40. Each of the foregoing grounds is addressed below.

i. Fairness and Equity

41. In *Re United Air Lines Inc. (Bankruptcy)*,⁴¹ Justice Farley dismissed the company's motion to cease making contributions to its Canadian pension plans during the CCAA proceedings. First, the court reasoned that the company had "not run out of money nor of liquidity ... there is no evidence [that UAL] does not have sufficient funds to make the pension funding payments [or that lending] arrangements are such that it cannot make such payments"⁴².

³⁹ See Schedule "C" to this Factum.

⁴⁰ See Book of Representation Orders: **1.** *Re Bloom Lake General Partner Limited* QCSC File No. 500-11-048114-157, June 22, 2015 per Hamilton J.S.C.; **2.** *Re US Steel Canada Inc.* ONSC No. CV-14-10695-00CL, October 8, 2014 per Wilton-Siegel J.; **3.** *Re Nortel Networks Corp.* ONSC No. 09-CL-7950, May 27, 2009 per Morawetz J.; **4.** *Re Canwest Publishing Inc.* No. CV-10-8533-00CL, March 5, 2010, per Pepall, J.; **5.** *Re Fraser Papers Inc.* ONSC No. CV-09-8241-00CL, Sept. 17, 2009, per Pepall, J.; **6.** *Re Target Canada Co.* ONSC No. CV-15-10832-00CL, January 15, 2015 per Morawetz J. (excerpts). **7.** *Re Sears Canada Inc.* ONSC No. CV-17-11846-00CL, July 13, 2017 per Hainey J.; **8.** *Re Essar Steel Algoma Inc.* ONSC No. CV-15-000011169-00CL, November 9, 2015 per Newbould J.

⁴¹ 2005 CanLII 7258 (ON SC) ["*UAL*"].

⁴² *UAL*, para. 3.

42. Second, the court found that “the relative size of the Canadian problems vis-à-vis the U.S.A. problems is rather insignificant. It would not seem on the evidence before me that payment of funding obligations would in any way cause any particular stress or strain on the U.S. restructuring given their relatively insignificant amounts in question”⁴³.

43. Third, the court found that there is no regulatory “backstop” or “safety net” to protect these pensioners: “the workforce/pensioners are naked”⁴⁴.

44. Fourth, the court noted that “in all countries except for the U.S.A. and Canada [it has] kept up its pension funding commitments”⁴⁵ and, “pensioners in Canada continue to receive their pension cheques ... thereby weakening the pension fund to the detriment of future calls on it by existing pensioners and new pensioners”⁴⁶.

45. The court concluded as follows:

8. In the end result on the basis of fairness and equity, I find no reason to excuse UAL from its obligation to fund its pension funding commitments in Canada and I therefore direct it to resume such funding.

46. *UAL* is on all fours with the present circumstances involving the Genstar U.S. Plans. First, ITCAN is flush with cash and very profitable⁴⁷, and there are no lending arrangements that prohibit ITCAN from continuing to make its required payments under the Genstar U.S. Plans⁴⁸. Second,

⁴³ UAL, para. 7.

⁴⁴ UAL, paras. 6, 7.

⁴⁵ UAL, para. 4.

⁴⁶ UAL, para. 6.

⁴⁷ In its March 15 Endorsement giving reasons for granting the Initial Order, this Honourable Court held:

[23] ... The Applicants will be carrying on business during the CCAA proceedings. The filed materials demonstrate that the Applicants and their affiliated companies expect that the Applicants will continue to carry on their business in a profitable fashion and be able to meet both their pre-filing and post-filing obligations.

In addition, the Monitor states in its First Report (at p. 4) that for the 14 week period from March 25, 2019 through June 24, 2019, ITCAN’s “net cash flow is forecast to be approximately \$316 million” and in the two weeks prior that period its inflow was \$59.2 million, being \$20.1 million *more* than forecast.

⁴⁸ As noted in the Monitor’s Pre-Filing Report (at pp. 8-10), ITCAN has not availed itself of the \$30 million Revolving Credit Facility with BATIF (and, in fact, invested \$260 million in surplus funds with BATIF in March). The only restrictions on that facility concern the use of trademarks. The Monitor stated it did “not anticipate that Imperial will draw down on the Revolving Credit Facility before the Comeback Date”. In addition, there are no funds drawn on ITCAN’s \$25 million credit facility with Bank of Nova Scotia.

the relative amounts required to fund the Genstar U.S. Plans are truly insignificant and pose no material consequence to the Canadian restructuring process⁴⁹. Third, there is no regulatory agency available protect the Affected Members; the Genstar U.S. Plans are “non-qualified” (not registered under U.S. pension standards legislation), and thereby fall outside the jurisdiction of the Pension Benefits Guaranty Corporation. Neither is there a trade union to represent them, and they are excluded from the purview of the “Court-Appointed Mediator”⁵⁰. Fourth, the Genstar U.S. Plans are the *only* plans targeted for cessation by ITCAN. The company is making “ordinary course payments” for *all* of its remaining pension plans in Canada and the U.S., including under the “IHGI U.S. Pension Plan” which contains strictly “legacy obligations” owed to former employees⁵¹.

47. In another case on point, *Re U.S. Steel Canada Inc.*⁵², Wilton-Siegel J. exercised his discretion under section 11 of the CCAA and ordered the company to pay certain lump sum retention bonuses to three former employees under their severance agreements, “on the grounds that it would be fair and equitable to do so”⁵³. The initial order in that case was similar to the present circumstances in that it permitted “but does not mandate” payment of certain employment-related amounts where the expenses were “incurred prior to, on or after the date” of the Initial Order⁵⁴. Applying reasoning similar to *UAL*, the court rejected the Monitor’s argument that the employees “would obtain an unintended priority” if the payments were made⁵⁵. The court held that there was no “unfair priority” because, first, other employees were receiving working notice, and second, “the amounts are *de minimus* and accordingly payment will not affect the ability of USSC

⁴⁹ The Genstar U.S. Plans require \$6 million per year to fund the payments. This amounts to \$500,000 per month in disbursements. In context, between March 25 and June 24, ITCAN’s “total operating disbursements are forecast to be approximately \$1,143 million.” In other words, the Genstar U.S. Plans amount to 0.13% of its expected disbursements during this period.

⁵⁰ Brown Affidavit, para. 28(g); Foster Affidavit, para. 29(g). Initial Order (amended) at para. 39.

⁵¹ Paterson Affidavit, paras. 66-69. The IHGI U.S. Pension Plan is not needed for ITCAN’s ongoing business operations. See also the Summary Sheet of Pension/Benefits, in Book of Objections, Tab 1(B), pp. 24-26; and First Thauvette Affidavit at paras. 49-56; Second Thauvette Affidavit at paras. 14-18 whereby ITCAN states that it advised its Canadian retirees about these proceedings, “assuring them that these CCAA Proceedings will not have any impact on ... their Canadian pensions and benefits”.

⁵² 2015 ONSC 5990 [“*USSC*”].

⁵³ USSC at 23, 32.

⁵⁴ USSC at 15. See also, Initial Order at para. 7(a) in Motion Record, Vol. 2, Tab 6(D) at pp. 313.

⁵⁵ USSC at 33.

to propose a plan of arrangement or compromise”⁵⁶. The court also noted, as in *UAL*, that ordering the payments “would not breach the terms of the Current DIP Loan”⁵⁷.

48. In cases where CCAA courts declined to reinstate pensions or benefits during the proceedings, the court almost always relied on the facts in those cases whereby the company did not have the funds available to make the payments, or the terms of the lending agreements prohibited the activity or doing so would result in a default, or it would jeopardize the successful restructuring of the company were the payments to be made⁵⁸. Delay in bringing a motion for reinstatement has also been considered⁵⁹. None of those factors exists in the present case.

49. In addition, the balance of convenience favours the pre-filing *status quo* with respect to the Genstar U.S. Plans⁶⁰. All other pension plans are enjoying the pre-filing *status quo*. There is no prejudice to ITCAN nor to any other creditor or stakeholder for payments to continue to the Affected Members on an interim basis⁶¹. On the other hand, there is massive prejudice to the Affected Members were the payments not reinstated. The Affected Members are elderly (in their 70s and 80s), in declining health, and on fixed incomes; they rely on their pensions for ensuring their physical, mental, psychological and emotional security and stability, the aggravation of which has been exacerbated by the lack of notice of cessation of their benefits and massive confusion generated by ITCAN and the Monitor’s initial responses to those actions.

ii. ITCAN Has Not Complied with Section 32 of the CCAA

50. The Committee respectfully submits that ITCAN and the Monitor have acted in a manner that indirectly and effectively avoids the statutory notice and approval requirements of Section 32 of the CCAA. Section 32 provides for a mandatory process that must be followed where a debtor

⁵⁶ USSC at 35.

⁵⁷ USSC at 36.

⁵⁸ See, e.g. *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCA 1351 [“**Bloom Lake**”] at 48-56; *Sproule v. Nortel Networks Corporation*, 2009 ONCA 833 at 40-46; *Timminco Limited (Re)*, 2012 ONSC 4471 at 44, 55-56.

⁵⁹ *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à)*, 2013 QCCS 5762 at 88-94.

⁶⁰ This Honourable Court observed in its March 15 Endorsement (at para. 9) that, “the principal purpose of the CCAA is to maintain the status quo while a debtor company has the opportunity to consult with its creditors and stakeholders with a view to continue the company’s operations”.

⁶¹ With respect to the Tobacco Litigation Claimants, there is no prejudice to them were interim payments to Affected Members to continue. The Tobacco Litigation claims are worth \$600 billion. The Affected Members’ claim is limited *in the aggregate* to CAD \$42 million, which is 0.007% of that amount, or \$1 for every \$14,286.

company proposes to “disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act”⁶². Parties may not contract out from the application of this section⁶³. The Act requires the Monitor to decide whether to “approve the proposed disclaimer or resiliation”, for the company to give notice “in the prescribed form and manner to the other parties to the agreement”, and for the Court to order accordingly⁶⁴. Moreover:

(4) In deciding whether to make the order, the court is to consider, among other things,

- (a) whether the monitor approved the proposed disclaimer or resiliation;
- (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
- (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

51. ITCAN and the Monitor have characterized the company’s actions as one of “ceasing” and “discontinuing” the “funding” of the Genstar U.S. Plans with a corresponding “cessation of benefit payments”, on account of “business judgment”. The Cessation Notice further states:

As payment of these claims is not necessary to ITCAN's ongoing business, although ITCAN has honored its commitment to fund these plans for more than 30 years, it is not in a position to continue to do so given the hundreds of billions of dollars in other unsecured claims asserted.

52. In all but formally using the proper name, the Genstar U.S. Plans have been disclaimed and resiliated. There should be no doubt that ITCAN proposes to permanently wash its hands of these “legacy obligations”, and fully abandon and back off from honouring its commitments under them.

53. In *Bloom Lake*, the Quebec Court of Appeal acknowledged that semantic differences in word choice giving rise to the question of the application of Section 32 is important to the practice:

⁶² The exceptions to this rule are where an agreement being disclaimed or resiliated is (a) an eligible financial contract; (b) a collective agreement; (c) a financing agreement if the company is the borrower; or (d) a lease of real property or of an immovable if the company is the lessor: s. 32(9). The Genstar U.S. Plans are none of these.

⁶³ *Aveos Fleet Performance Inc./Aveos Fleet performance aéronautique inc. (Arrangement relatif à)*, 2012 QCCS 6796 at 62.

⁶⁴ CCAA, s. 32(1), (2), (3). No court order is required if no application is made under ss. (2): s. 32(5)(a).

38. ... the matter of the proper scope of section 32 in light of the kind of insurance contract that provided benefits here, and in particular of competing notions of suspension and termination of OPEBs, is one of importance to the practice.

54. The appeal court in *Bloom Lake* did not grant leave to appeal from the CCAA judge's decision that section 32 did not apply there. While acknowledging that the "arguments raised by counsel for the Salaried Members as to type of contract to which the rule applies and, in particular, to the distinction between the termination of a contract and the suspension of a contract, are not without some merit"⁶⁵, the appeal court agreed with the CCAA judge that the particular agreements being terminated were not as between the company and its employees, rather, the employees were *third-party beneficiaries* of a contract between the company and an insurer. As such, even though the CCAA judge and appeal court both expressly found that that the employees suffered significant hardship from the suspension and termination of the OPEBs⁶⁶, "It is not suggested that the insurer will suffer any significant financial hardship as a result of the termination of the contract."⁶⁷

55. In this case, the Genstar U.S. Plans are agreements directly with each Affected Member⁶⁸. Moreover, the benefits payable under the plans are "fully vested"⁶⁹ and thereby interminable⁷⁰.

56. The purpose of Section 32 is to provide a court-supervised statutory procedure to follow where a company under CCAA protection proposes to abrogate a contractual obligation owed to vulnerable counterparties. It is intended to prevent debtors from arbitrarily choosing – as ITCAN has done to the Affected Members – to single out one group of creditors for hardship and treating

⁶⁵ *Bloom Lake* at 46.

⁶⁶ *Bloom Lake* (appeal decision) at 42. *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 3064 at 126, 133.

⁶⁷ *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 3064 at 130.

⁶⁸ See, e.g., the Letters and Agreements contained in the Brown Affidavit, Motion Record Vol. 1, Exhibit "A" pp. 79-81, Exhibit "B" p. 83, Exhibit "C" pp. 85-94, Exhibit "D" pp. 96-111, Exhibit "G" pp. 126-127, Exhibit "J" pp. 140-143; Brennan-Dolezar Affidavit, Motion Record Vol. 2, Exhibit "A" pp. 206-208, Exhibit "B" pp. 210-215, Exhibit "E" p. 226, Exhibit "F" p. 228, Exhibit "H" pp. 235-236

⁶⁹ Brown Affidavit, Motion Record Vol. 1, Exhibit "H" pp. 129-30; Foster Affidavit, Motion Record Vol. 1, Exhibit "D" p. 174; Brennan-Dolezar Affidavit, Motion Record Vol. 2, Exhibit "D" pp. 221-224. See also, *IBM Canada Limited v. Waterman* 2013 SCC 70 at 84-84: "Vesting is the 'foundation stone' upon which pension regulation is based. ... The pension is therefore a form of retirement savings earned over the years of employment to which the employee acquires specific and enforceable rights".

⁷⁰ *USSC* at 22. Section 32 is "applicable only to contracts that are not otherwise terminable [and not to] contracts of indefinite duration that could be unilaterally terminated by the employer under ordinary rules of common law".

them inequitably relative to all other similarly-situated creditors, unless there is a rational restructuring purpose that “enhances the prospect of a viable compromise or arrangement”⁷¹.

57. In this case, as in *Bloom Lake*, Affected Members have suffered significant financial hardship, particularly, from the lack of notice provided to them by ITCAN and the Monitor. Moreover, even if ITCAN followed the correct procedure under Section 32, given the truly *de minimis* amounts at issue and massive cash flows available to it, ITCAN cannot demonstrate that it needs to save \$500,000 per month (equal to 0.13% of its disbursements) in order to “enhance the prospect of a viable compromise or arrangement being made” in these proceedings⁷².

iii. There is Probative Evidence of a Constructive Trust

58. Yet another reason to order ITCAN to continue making interim payments to the Affected Members is that there is probative evidence that their claims are not unsecured, rather, ought to be subject to a constructive trust. All four affiants have testified that the company purchased single-

⁷¹ *Timminco*, at 53. See also, at para. 55: “It is also noted ... that at the commencement of the CCAA proceedings, the Timminco Entities ceased making payments with respect to many of their pre-filing obligations in order to preserve their ability to continue operating and to implement a successful sale of their assets”. In the present case, ITCAN continues to make payments on all of its pre-filing obligations except for the Affected Members, inequitably singling them out for differential treatment, and which is not necessary for a successful restructuring.

⁷² In contrast to the circumstances in the present case, in *Timminco*, the CCAA court held (at 55):

The continued existence of the Agreement and of the requirement to make the payments thereunder would have further strained the Timminco Entities already severely constrained cash flows. Further, [a] disclaimer of the Agreement and the cessation of payments to Mr. Timmins thereunder improved the Timminco Entities’ cash flows and their ability to continue implementing a sales process with respect to their assets.

See also, *Target Canada Co. (Re)*, 2015 ONSC 1028, where the CCAA court approved the company’s disclaimer proposing to default on its contractual obligations to pharmacists operating pharmacies in the stores, recognizing (at paras. 11-12) the “reality that the Target stores will be closing [and] it is unrealistic for the Pharmacist to carry on the operation of the pharmacy”, and further, the company “may be filing a plan of arrangement” and (at para. 23):

... if the disclaimers are set aside it would delay this process because it would extend the time period for Target Canada to make payments to one group of creditors (the Pharmacists) to the detriment of the creditors generally. Further, in the absence of an effective disclaimer, the Target Entities will continue to incur significant ongoing administrative costs which would be detrimental to the estate and all stakeholders.

premium life insurance policies on the recipients' lives, using their own money, to fund and secure the payments under the GCDIP and SERP⁷³. The Plans were intended to be cost/revenue neutral.

59. ITCAN has confirmed that "Genstar purchased life insurance policies on the life of each member ... when the GCDIP and SERP were set up", however, "those policies were all cashed out decades ago"⁷⁴. ITCAN confirms that the policies "were put in place to support the funding" of the GCDIP and SERP program⁷⁵. In 1992, the company received \$50 million from the cash surrender value of the policies and invested the proceeds "to generate income that will be used to offset Genstar Company's expenses i.e. principally the [SERP] and [GCDIP] benefit payments"⁷⁶.

60. The Committee has repeatedly asserted that the company has obtained a windfall and unjust enrichment by retaining the benefits of the cashed-out insurance policies while cancelling their payments under the Genstar U.S. Plans⁷⁷.

61. In *Moore v. Sweet*⁷⁸, the Supreme Court of Canada imposed a remedial constructive trust over the proceeds of a deceased's life insurance policy in favour of his ex-wife who paid the premiums, even though the deceased lawfully designated his new common law spouse as the irrevocable beneficiary. The Court affirmed that the "principled approach to unjust enrichment is a flexible one that allows courts to identify circumstances where justice and fairness require one party to restore a benefit to another"⁷⁹.

62. As in *Moore*, "Justice and fairness are at the core of the dispute" in this case⁸⁰. Affected Members paid for the insurance policies on their own lives using their own deferred income, naming the company as beneficiary to secure the payments. The company was enriched by "cashing out" those policies, decades ago, without the Affected Members' knowledge. The

⁷³ Moreover, George Foster has produced a letter dated September 20, 1985 confirming, in conjunction with his election to participate in the GCDIP, that "Genstar Corporation would like to purchase a key man insurance policy on your life": Foster Affidavit, Exhibit "A" in Motion Record, Vol. 1, at 156.

⁷⁴ Paterson Affidavit at para. 63, quoting Third Thauvette Affidavit at para. 42.

⁷⁵ 1992 Minutes, in Supplementary Motion Record at Tab 2, p. 7.

⁷⁶ 1992 Minutes, in Supplementary Motion Record at Tab 2, p. 6.

⁷⁷ The Committee made these assertions in: (a) the first Notice of Objection at p.12; (b) second Notice of Objection at p. 10 (Book of Objections, Tab 2, p. 15; Tab 3, p. 43); (c) Notice of Motion at para. 57, Motion Record Vol. 1, Tab 1 at 34.

⁷⁸ 2018 SCC 52. [*Moore*]

⁷⁹ *Moore* at 38.

⁸⁰ *Moore* at 39.

Affected Members have suffered a corresponding deprivation by ITCAN ceasing their benefits. The enrichment and deprivations occurred in the absence of any juristic reason.

63. It would be unfair and unjust to permit ITCAN to cease payments to Affected Members pending a ruling on whether a constructive trust should be imposed to secure their benefits. Moreover, it is appropriate for this Court to impose the requested constructive trust remedy.

iv. Section 7 of the Charter of Rights and Freedoms is Engaged

64. Another reason this Court ought to make the Reinstatement Order is that the Committee has properly and in a timely fashion asserted the *Charter* rights of Affected Members⁸¹. The Committee has sought an interlocutory injunction staying the operation of para. 7(a) of the Initial Order, as it applies to them, pending this Court's hearing of the constitutional question.

65. The Committee satisfies the test in *RJR Macdonald Inc. v. Canada*⁸² for injunction relief pending resolution of a *Charter* claim.

66. First, the Committee has raised a serious constitutional issue for resolution. Orders made by judges under the CCAA are subject to the *Charter*⁸³. Moreover, these Affected Members enjoy the protections of the *Charter*, while in the United States of America⁸⁴. This is a cross-border insolvency proceeding in which the U.S. Court has recognized the Canadian Court as the "foreign main proceeding", has applied Canadian law, and has consented to the application of Canadian

⁸¹ The Affected Members' *Charter* rights are asserted in both the first and second Notices of Objection (see Book of Objections, Tab 2 at pp. 16-18, Tab 3 at pp. 43), as well as in the Notice of Constitutional Question (Motion Record, Vol. 1, Tab 2 at pp. 41-52).

⁸² 1994 CanLII 117 (SCC).

⁸³ *Re Nortel Networks Corporation et al*, 2017 ONSC 700 at para. 25: where "the proceedings are being taken under the CCAA and the discretionary power of a court to sanction a plan is contained in section 6 of that statute, ... I accept that any order I make to sanction the Plan may be subject to the Charter". See also Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. supplemented Thomson: Carswell, 2007 at § 37-22 cited at *Re Nortel*, *supra*, at para. 24: "Where, however a court order is issued ... in a purely private proceeding that is governed by statute law, then the *Charter* will apply to the court order".

⁸⁴ *Canada (Justice) v. Khadr*, 2008 SCC 28 at 19-20; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at 14-18. The *Charter* applies where Canadian law enforcement agencies participate in activities that are causally connected to the deprivation of liberty in the United States of America.

enforcement jurisdiction on its territory, all in accordance with both countries' international obligations and the UNCITRAL model law⁸⁵.

67. Also, the protections accorded under s. 7 of the *Charter* are engaged on these facts. Section 7 protects people from laws that deprive them of life, liberty and security of the person except in accordance with principles of fundamental justice. The Committee submits that state-sanctioned actions eliminating without notice the pension income of 89-year-olds who are in declining health, no longer work and on fixed incomes, and have budgeted accordingly, deprive them of financial certainty, security and their ability to provide for themselves. The constitutional question concerns the health and related harms which may flow from suddenly and unilaterally altering vested pension rights or shrouding those rights in uncertainty. The hearing on the merits will scope to what extent anxiety and uncertainty engage section 7 rights in the context of economically vulnerable groups such as elderly pensioners dependent on fixed incomes. As stated in *Canada (Attorney General) v. Bedford*⁸⁶, “the question is whether the impugned laws negatively impact or limit the applicants’ security of the person”.

68. Second, Affected Members will suffer irreparable harm without the Reinstatement Order⁸⁷.

⁸⁵ See *Caterpillar Financial Services Corporation v. Boale, Wood & Company Ltd.*, 2014 BCCA 419 at 51-58, including (at 55): “Consistent with the goals and objectives of the Model Law, Chapter 15 of the *United States’ Bankruptcy Code* includes mirror provisions to Part IV of the CCAA”, quoting 11 U.S.C. §§ 1501, 1508: “In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions”.

⁸⁶ 2013 SCC 72 at 58.

⁸⁷ In *Melanson v. N.B.*, 2006 NBQB 73, the court made an interlocutory order staying the force and effect of a Regulation reducing the applicants’ monthly pensions pending a s.7 *Charter* challenge, “until the final disposition of this action or until further order”. On irreparable harm, the court stated (at 25): “I do not really need much to conclude that if a family income was reduced by a substantial amount bills might not be paid and life styles would be drastically altered — all with respect to people in their late fifties, sixties and older. In my view, that is irreparable harm”. See also, *McNaughton v. Saskatchewan Government and General Employees’ Union*, 2010 SKQB 5 at 14. In that case, pension plan members sought and obtained an interim injunction restraining their union and pension administrator from implementing an increase in the rate of pension contributions pending the hearing. The court stated that “Irreparable harm refers to the inability to calculate or compensate for harm caused, not its size or quantum”. Finally, see *Fraser Paper Inc v Superintendent of Pensions*, 2007 NBQB 196, where the court dismissed a company’s motion for an interim injunction staying an order of the Superintendent of Pensions requiring the company to fund the pension plan’s solvency deficiencies pending a judicial review of that decision. The court held that it was the plan members, not the company, who would suffer harm from granting the stay (at para. 18): “If, in fact, the appellant is in serious financial difficulty (and there is no evidence of that) the plan members (the public) would be seriously affected if the stay is granted and the applicant does not survive.”

69. Third, the balance of convenience favours the Affected Members. As submitted above, the balance of convenience favours the pre-filing *status quo* with respect to the Genstar U.S. Plans, on par with all of ITCAN's other pension plans. There is no prejudice to ITCAN nor to any other creditor or stakeholder for payments to continue to the Affected Members on an interim basis, while there is significant prejudice to the Affected Members were the payments stayed.

PART IV – ORDERS REQUESTED

70. For the foregoing reasons, the Committee respectfully requests this Honourable Court to issue the Proposed Representation Order and Reinstatement Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:



Ari Kaplan

SCHEDULE “A”
LIST OF AUTHORITIES

1. *Aveos Fleet Performance Inc. (Arrangement relatif à)*, 2013 QCCS 5762
2. *Aveos Fleet Performance Inc. (Arrangement relatif à)*, 2012 QCCS 6796
3. *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCA 1351
4. *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 3064
5. *Canada (Attorney General) v. Bedford*, 2013 SCC 72
6. *Canada (Justice) v. Khadr*, 2008 SCC 28
7. *Canada (Prime Minister) v. Khadr*, 2010 SCC 3
8. *Caterpillar Financial Services Corp. v. Boale, Wood & Company Ltd.*, 2014 BCCA 419
9. *Fraser Paper Inc v Superintendent of Pensions*, 2007 NBQB 196
10. *IBM Canada Limited v. Waterman* 2013 SCC 70
11. *McNaughton v. Saskatchewan Government and General Employees’ Union*, 2010 SKQB 5
12. *Melanson v. N.B.*, 2006 NBQB 73
13. *Moore v. Sweet*, 2018 SCC 52
14. *Re Canwest Publishing Inc.*, 2010 ONSC 1328
15. *Re Catalyst Paper Corporation*, 2012 BCSC 451
16. *Re Fraser Papers Inc.*, 2009 CanLII 55115 (ON SC)
17. *Re Nortel Networks Corporation*, 2009 CanLII 26603 (ON SC)
18. *Re Nortel Networks Corporation et al*, 2017 ONSC 700
19. *Re Target Canada Co.*, 2015 ONSC 303
20. *Re Target Canada Co.*, 2015 ONSC 1028
21. *Re Timminco Limited*, 2012 ONSC 4471
22. *Re United Air Lines Inc. (Bankruptcy)*, 2005 CanLII 7258 (ON SC)

23. *Re U.S. Steel Canada Inc.*, 2014 ONSC 6145
24. *Re U.S. Steel Canada Inc.* 2015 ONSC 5990
25. *RJR Macdonald Inc. v. Canada*, 1994 CanLII 117 (SCC)
26. *Sproule v. Nortel Networks Corporation*, 2009 ONCA 833
27. *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6

LIST OF REPRESENTATION ORDERS

1. *Re Bloom Lake General Partner Limited* QCSC File No. 500-11-048114-157, June 22, 2015 per Hamilton J.S.C.;
2. *Re Canwest Publishing Inc.* No. CV-10-8533-00CL, March 5, 2010, per Pepall, J.;
3. *Re Essar Steel Algoma Inc.* ONSC No. CV-15-000011169-00CL, November 9, 2015 per Newbould J.
4. *Re Fraser Papers Inc.* ONSC No. CV-09-8241-00CL, Sept. 17, 2009, per Pepall, J.;
5. *Re Nortel Networks Corp.* ONSC No. 09-CL-7950, May 27, 2009 per Morawetz J.;
6. *Re Sears Canada Inc.* ONSC No. CV-17-11846-00CL, July 13, 2017 per Hainey J.;
7. *Re Target Canada Co.* ONSC No. CV-15-10832-00CL, January 15, 2015 per Morawetz J. (excerpts).
8. *Re US. Steel Canada Inc.* ONSC No. CV-14-10695-00CL, October 8, 2014 per Wilton-Siegel J.;

SCHEDULE “B”
STATUTORY EXCERPTS

COMPANIES’ CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

General power of court

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Agreements

Disclaimer or resiliation of agreements

32 (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

Court may prohibit disclaimer or resiliation

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Court-ordered disclaimer or resiliation

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered

- (4) In deciding whether to make the order, the court is to consider, among other things,
- (a) whether the monitor approved the proposed disclaimer or resiliation;
 - (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
 - (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Date of disclaimer or resiliation

(5) An agreement is disclaimed or resiliated

- (a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);
- (b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or
- (c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

Intellectual property

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Reasons for disclaimer or resiliation

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Exceptions

(9) This section does not apply in respect of

- (a) an eligible financial contract;
- (b) a collective agreement;
- (c) a financing agreement if the company is the borrower; or
- (d) a lease of real property or of an immovable if the company is the lessor.

THE CONSTITUTION ACT, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11

PART I – CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

RULES OF CIVIL PROCEDURE, R.R.O. 1990, Reg. 194

REPRESENTATION OF AN INTERESTED PERSON WHO CANNOT BE ASCERTAINED

Proceedings in which Order may be Made

10.01 (1) In a proceeding concerning,

- (a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
- (b) the determination of a question arising in the administration of an estate or trust;
- (c) the approval of a sale, purchase, settlement or other transaction;
- (d) the approval of an arrangement under the Variation of Trusts Act;
- (e) the administration of the estate of a deceased person; or
- (f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served.

Order Binds Represented Persons

(2) Where an appointment is made under subrule (1), an order in the proceeding is binding on a person or class so represented, subject to rule 10.03.

Settlement Affecting Persons who are not Parties

(3) Where in a proceeding referred to in subrule (1) a settlement is proposed and some of the persons interested in the settlement are not parties to the proceeding, but,

(a) those persons are represented by a person appointed under subrule (1) who assents to the settlement; or

(b) there are other persons having the same interest who are parties to the proceeding and assent to the settlement,

the judge, if satisfied that the settlement will be for the benefit of the interested persons who are not parties and that to require service on them would cause undue expense or delay, may approve the settlement on behalf of those persons.

(4) A settlement approved under subrule (3) binds the interested persons who are not parties, subject to rule 10.03.

PROCEEDING AGAINST REPRESENTATIVE DEFENDANT

12.07 Where numerous persons have the same interest, one or more of them may defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so.

SCHEDULE “C”

PROPOSED DRAFT REPRESENTATION ORDER

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.) THURSDAY THE 25TH
)
JUSTICE MCEWAN) DAY OF APRIL, 2019

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 IMPERIAL TOBACCO CANADA
LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

Applicants

ORDER
(Representation Order)

THIS MOTION, made by the Former Genstar U.S. Retiree Group Committee (the "**Committee**") and the proposed representatives, Robert M. Brown and George A. Foster, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an order appointing representatives and representative counsel and certain other relief, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion and the Affidavits in the Motion Record, and on hearing the submissions of respective counsel for the Committee and proposed representatives, the Applicants, Monitor and such other counsel as were present, no one else appearing although duly served as appears from the Affidavit of Service of Ari Kaplan affirmed April 18 2019, filed:

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that Ari Kaplan of Kaplan Law (the “**Representative Counsel**”) is hereby appointed as representative counsel to represent the interests of all persons in these CCAA proceedings (together, the “**Represented Parties**”) with respect to entitlements under the Genstar Corporation “deferred income plan”, “supplemental executive retirement plan” and “supplementary pension plan”, including survivors and beneficiaries of such persons and any other person claiming an interest under or on behalf of a Represented Party (the “**Purpose**”).
3. **THIS COURT ORDERS** that Robert M. Brown and George A. Foster (together, the “**Representatives**”) are hereby appointed as representatives of all Represented Parties (excluding the “**Opt-Out Individuals**”, as defined below, if any) to act in the overall best interests of the Represented Parties, and to advise and where appropriate instruct the Representative Counsel, in consultation with the Committee, in furtherance of the Purpose. The Representative Counsel may rely upon the advice, information and instructions received from the Representatives in carrying out the mandate of the Representative Counsel without further communications with or instructions from the Represented Parties, except as may be recommended by the Representative Counsel or ordered by this Court.
4. **THIS COURT ORDERS** that, with the exception of Opt-Out Individuals, (a) the Representatives and the Representative Counsel shall represent all Represented Parties in these CCAA proceedings; (b) the Represented Parties shall be bound by the actions of the Representatives and the Representative Counsel in these CCAA proceedings; and (c) the Representatives shall be entitled, on the advice of counsel, to reach any settlement agreements, advocate on behalf of the Represented Parties for the Purpose and compromise any rights, entitlements or claims of the Represented Parties, subject to approval of this Court.
5. **THIS COURT ORDERS** the Applicants to provide to the Representative Counsel, without charge, subject to satisfactory confidentiality arrangements, the following information,

documents and data (the “**Information**”), to be used strictly for the Purpose in the context of these CCAA proceedings,

- (a) the names, last known address, telephone number and email addresses (if any) of all the Represented Parties as well as particulars regarding their entitlements; and
- (b) such other documents and data as may be relevant to matters relating to the issues in these proceedings, including all relevant plan texts, agreements, particulars of insurance policies, communications, booklets, and other applicable documents and particulars of the Applicants’ financial obligations respecting the plans including with respect to funding or securing the obligations and any other relevant documents and data pertaining to the plans and the Applicants’ other pension plans and retirement arrangements, including up to date financial information regarding the funding and investments of any of these arrangements,

in so doing, the Applicants are not required to obtain express consent from any Represented Parties authorizing disclosure of the Information to the Representative Counsel and, further, in accordance with section 7(3) of the *Personal Information Protection and Electronic Documents Act* (Canada) or, if applicable, section 18(9) of *An Act respecting the Protection of Personal Information in the Private Sector*, CQLR c P-39.1, such an order will be sufficient to authorize the disclosure of the Information without the knowledge or consent of the Represented Parties.

6. **THIS COURT ORDERS** that notice of the granting of this Order shall be provided to the Represented Parties by way of first class mailing to their physical address or such electronic means as may be available, by the Applicants with the assistance of the Monitor, consisting of a letter prepared by Representative Counsel (the “**Representation Notice**”) explaining the terms of this Order, which shall include the Monitor's website address where a full copy of this Order can be reviewed and under such other terms as to be agreed upon by Representative Counsel, the Applicant and the Monitor.

7. **THIS COURT ORDERS** that any individual Represented Party who does not wish to be represented by the Representatives and the Representative Counsel in these CCAA proceedings shall, within 30 days of the date of the Representation Notice pursuant to paragraph 6, notify the

Monitor in writing that he or she is opting out of representation by the Representatives and the Representative Counsel by delivering to the Monitor an opt-out notice in the form attached as Schedule “A” hereto (each an “**Opt-Out Notice**”) and thereafter he or she shall not be represented by nor bound by the actions of the Representatives or the Representative Counsel in these CCAA proceedings (any such persons who deliver an Opt-Out Notice in compliance with the terms of this paragraph shall be “Opt-Out Individuals”) and may represent himself or herself, personally or through counsel that he or she may retain at his or her own expense and as an independent, individual party, to the extent that they wish to participate in these proceedings, and the Proposed Representatives and Proposed Representative Counsel shall have no obligation to represent them. The Monitor shall deliver copies of all Opt-Out Notices received to the Applicants and the Representative Counsel as soon as reasonably practicable.

8. **THIS COURT ORDERS** that the Representative Counsel shall be given notice of all motions to which the Represented Parties are entitled to receive notice in these CCAA proceedings and that it shall be entitled to represent those on whose behalf it is hereby appointed in all such proceedings.

9. **THIS COURT ORDERS** that the Representative Counsel is hereby authorized to take all steps and do all acts necessary or desirable in relation to the Purpose or to carry out the terms of this Order.

10. **THIS COURT ORDERS** that the Representative Counsel shall be at liberty, and is hereby authorized, at any time, to apply to this Court for advice and directions in respect of its appointment or the fulfillment or discharge of its powers or duties, in carrying out the provisions of this Order, or for any other relief, including on any matter raised in the Notice of Motion not yet adjudicated, which shall be brought on notice to all interested parties, unless this Court orders otherwise.

11. **THIS COURT ORDERS** that the Representative Counsel, the Representatives and the members of the Committee, or their delegates or agents, shall have no personal liability or obligations as a result of the performance of their duties in carrying out the provisions of this Order or any subsequent Orders in these CCAA proceedings, save and except for liability arising out of gross negligence or wilful misconduct.

12. **THIS COURT ORDERS** that no action or other proceeding may be commenced against the Representative Counsel, the Representatives or the members of the Committee in respect of the performance of their duties under this Order without leave of this Court on seven (7) days' notice to the Representative Counsel, the Representatives, or the Committee, as the case may be.

13. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order and in case, any which motion to be served within three (3) weeks of the date of this Order.

SCHEDULE "A" – FORM OF OPT-OUT NOTICE

TO: FTI CONSULTING CANADA INC., in
its capacity as Court-appointed Monitor
of the ITCAN Parties
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto ON CANADA M4K 1G8

Fax: 416-649-8101
Email: imperialtobacco@fticonsulting.com

Attention: •

I hereby provide written notice that I do not wish to be represented by Kaplan Law, representative counsel (the "Representative Counsel") with respect to my entitlements under the Genstar Corporation "deferred income plan", "supplemental executive retirement plan" or "supplementary pension plan", in the proceedings involving Imperial Tobacco Canada Limited and its affiliates and subsidiaries (the "ITCAN Parties") in their proceedings under the *Companies' Creditors Arrangement Act* (Court File No. CV-19-616077-00CL) (the "CCAA Proceedings"). I understand that by opting out of representation, if I wish to take part in the CCAA Proceedings, I would need to do so as an independent party. I am responsible for retaining my own legal counsel should I choose to do so, and that I would be personally liable for the costs of my own legal representation.

I understand that a copy of this Opt-Out Form will be provided to the Representative Counsel and to the ITCAN Parties.

Witness

Signature

Name [please print]: _____

Address: _____

Telephone: _____ Email: _____

Note: To opt out, this form must be completed and received at the above address on or before _____, 2019.

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 IMPERIAL TOBACCO CANADA LIMITED, *et al.*

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

ORDER
(April 25, 2019)

KAPLAN LAW
393 University Av., Suite 2000
Toronto ON M5G 1E6

Ari Kaplan (LSO #42042S)

Tel: 416 565.4656

Fax: 416 352.1544

Email: ari@kaplanlaw.ca

Counsel to the Former Genstar U.S.
Retiree Group Committee and the
Representatives

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 IMPERIAL TOBACCO CANADA LIMITED, *et al.*

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF THE FORMER
GENSTAR U.S. RETIREE
GROUP COMMITTEE**

(Motion returnable April 25, 2019)

KAPLAN LAW

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Proposed Representatives