Court File No. CV-19-616077-00CL

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 IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

Applicants

FACTUM OF THE APPLICANTS
(Response to Motion of Genstar US Pension Plan Beneficiaries)

April 25, 2019

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TO: THE SERVICE LIST

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FACTUM OF THE APPLICANTS

PART I - OVERVIEW

1. Imperial Tobacco Canada Limited ("**ITCAN**") and its subsidiary Imperial Tobacco Company Limited ("**ITCO**") (together, the "**Applicants**") obtained an Initial Order and related relief under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**") on March 12, 2019. The Applicants obtained a stay of proceedings (the "**CCAA Stay**") for the primary purpose of effecting a global resolution of multiple claims in Canada that have been brought or could be brought against them in relation to the development, production, marketing, advertising of, any representations made in respect of, the purchase, sale and use of or exposure to Tobacco Products[1] (the "**Tobacco Claims**"). FTI Consulting Canada Inc. was appointed as monitor (the "**Monitor**") in this proceeding.

2. This factum is filed by the Applicants in response to a motion by certain proposed representatives (the "**Proposed Representatives**") of the beneficiaries (referred to below as the "**Beneficiaries**" or "**Affected Members**") of three US pension plans – the Genstar deferred

[1] As defined in the Initial Order.

income plan, supplemental executive retirement plan and supplementary pension plan (the "**Genstar US Plans**").

3. The Applicants submit that the obligations under the Genstar US Plans represent pre-filing, unsecured obligations under decades-old unregistered supplemental pension or deferred income arrangements. The Applicants are guarantors of funding obligations owed under these plans by dormant affiliates. Neither of the Applicants is or ever was the employer under these arrangements. None of the Beneficiaries or their survivors are active employees of the Applicants or their subsidiaries. None of the Beneficiaries provides post-filing services to the Applicants. The Genstar US Plans are legacy contractual obligations that confer no priority of payment on the Beneficiaries or their survivors either by virtue of life insurance policies or constructive trust.

4. There is no unfair treatment of the Beneficiaries relative to the other pension and similar plan beneficiaries that are being funded during this CCAA proceeding. In relation to the majority of other pension and similar plans, the Applicants are making ordinary course pension and similar plan payments that correspond with their obligations to pay for post-filing services provided during the CCAA proceeding. A number of these plans are registered plans to which statutory funding obligations apply. The IHGI Plan (described further below) is a registered US plan that is subject to statutory funding obligations under US pension legislation.

5. The appropriate comparison is not to the beneficiaries of other pension and similar plans, but rather to the other major "legacy" stakeholders in this proceeding. These are the Tobacco Claimants, all of whom have pre-filing claims against the Applicants based on alleged acts or wrongs occurring in the pre-filing period. Many of those Claimants – for example, the Quebec Class Action plaintiffs – have claims arising from tobacco-related diseases. The CCAA Stay

maintains a level playing field in relation to these Claimants and the Proposed Representatives' Reinstatement Order is contrary to this principle.

6. The Applicants have merely suspended their capital contributions that were being made to IHGI to fund the Genstar US Plans. There has been no disclaimer of their guarantee obligation. It would be highly prejudicial – and unprecedented – at this stage for this Court to make a determination that the Applicants are precluded from seeking to disclaim these pre-filing contractual arrangements in due course. If the Applicants determine to disclaim their funding obligations as guarantor under the Genstar US Plans in future, both parties will have the opportunity to make submissions in support of or in opposition to the proposed disclaimer.

7. The Charter relief that the Proposed Representatives signal that they will seek in future is unsustainable. The Applicants should not be allowed to "split their case" by seeking a mandatory injunction requiring funding of the Genstar US Plans for an indefinite period while they pursue an unfounded future motion seeking the Charter Relief. The chances of success of a future Charter motion are so remote that the prospect of such motion cannot be a basis for the requested Reinstatement Order.

8. The Applicants do not object to the appointment of the Proposed Representatives or to the Representative Counsel Relief, provided that no order is made at this stage regarding the funding of the fees of such Proposed Representatives or Representative Counsel. The Applicants reserve their rights to object to any future motion seeking the funding of professional fees for the Proposed Representatives or Representative Counsel.

PART II - FACTS

9. The Proposed Representatives delivered their Motion Record on April 17, 2019, followed by their factum and Supplementary Motion Record on April 25, 2019. These materials contain

numerous factual assertions by way of Affidavits and other documentation that underpin the Proposed Representatives' case for the relief requested in these proceedings. The Applicants have not yet had an opportunity to meaningfully test this evidence, if desired, including by way of cross-examinations. The references below to evidence that is contained in the motion materials of the Proposed Representatives do not constitute an admission that the Applicants accept all or any such evidence to be true or complete.

10. Much of the relevant evidence dates back to a brief period in the mid-1980s when Genstar Corporation was the employer of the Beneficiaries, all of whom are US residents. Despite the challenges associated with the historic nature of these obligations, the Applicants have been diligently seeking to gather the documentation requested by the Proposed Representatives in their motion materials and have provided relevant documentation to the Proposed Representative Counsel in as timely a manner as is possible in these circumstances.

A. ITCAN's Obligations Under Genstar US Plans

11. ITCAN was not the employer under the Genstar US Plans. The employer was Genstar Corporation ("**Genstar**").

12. Pursuant to an agreement dated April 2, 1986 among Genstar, Imasco Limited, and Imasco Enterprises Inc., and as a result of the historical acquisition and restructuring of various companies and businesses in the US, the "Purchaser" under the agreement became the guarantor of the funding obligations owed to the Genstar US Plans. "Purchaser" is defined to mean Imasco Limited. Under the guarantee (the "**Guarantee**"), "Purchaser" agrees to guarantee in full all

obligations of "the Company and its subsidiaries" (i.e. Genstar) under the "Supplemental Plans" and the "Deferred Income Plan" (i.e. the Genstar US Plans).[2]

13. Until the CCAA filing date, ITCAN made monthly capital contributions to IHGI to allow it to (among other things) fund the Genstar US Plans. IHGI is a largely dormant Delaware corporation that holds certain of ITCAN's legacy obligations.[3]

14. The funding provided by ITCAN to IHGI totals approximately USD $6.0 million per year.[4] The Proposed Representative assert that the present value of the Genstar US Plans as of December 31, 2017 is approximately USD $32 million (approximately CDN $43 million).[5]

B. Nature of Genstar US Plans

15. The Genstar US Plans consist of three supplementary retirement and deferred compensation plans:

(a) A "deferred income plan" (the "**GCDIP**"), which benefits approximately 53 US resident individuals who are either former senior management employees of Genstar Corporation ("**Genstar**") or their surviving spouses;

(b) A "supplemental executive retirement plan" ("**SERP**"), which benefits approximately 14 US resident individuals who were either former Genstar employees or their surviving spouses; and

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2 Agreement under Paragraph 5 of the Agreement, dated April 2, 1986 among Imasco Ltd., Imaso Enterprises Inc. and Genstar Corporation, clause 1(h): Supplementary Motion Record of the Proposed Representatives, Tab 4. Imasco Ltd. was later amalgamated with ITCAN.

3 Notice of Motion of The Former Genstar US Retiree Group Committee, filed April 17, 2019 [Notice of Motion] at paras. 13 and 14: Motion Record, Tab 1.

4 Notice of Motion, para. 14.

5 Notice of Motion, para. 15.

(c) A "supplementary pension plan" ("**SPEN**") for 3 US resident individuals who were either former Genstar employees or their surviving spouses.[6]

16. The Genstar US Plans are described as "supplementary" plans. None of these is a registered pension plan that is subject to statutory funding obligations in the US or in Canada. Contrary to the submissions of the Proposed Representatives, and as explained further below, all funding obligations under the Genstar US Plans are, by their express terms, not secured. ITCAN's obligations under the Guarantee are also unsecured and not subject to any form of trust in favour of the Genstar US Plan beneficiaries.

(a) The GCDIP

17. The beneficiaries of the GCDIP were employees who constituted a "select group" of officers, key management and other key employees of Genstar who had been designated by the Chief Executive Officer of Genstar to receive benefits.[7] The GCDIP is described in Plan documentation as being "designed to provide participants with an opportunity to supplement their retirement income through deferral of pre-tax income."[8] (emphasis added)

18. The beneficiaries contributed their own money to the GCDIP as a form of "deferred income." However, the contributions were modest relative to the resulting benefits. The Proposed Representatives, for example, have each received benefits under the GCDIP well in excess of the amounts of income that they deferred, even assuming an average investment return.

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6 Notice of Motion, para. 11.

7 Summary of Genstar Corporation and Its Affiliates Deferred Income Plan [GCDIP Plan Summary], p. 2 "Eligibility": Exhibit E to Affidavit of Robert M Brown, sworn April 15, 2019 [Brown Affidavit], Motion Record of the Proposed Representatives [Motion Record], Tab 3E.

8 GCDIP Plan Summary, Brown Affidavit, Exhibit E, p. 1 "Introduction".

19. For example, Mr. Brown, one of the Proposed Representatives, worked at Genstar for a short period of slightly over two years (between August 1984 and October 1986). At the time he elected to defer US $67,000 of his income.[9] Under the GCDIP, he is entitled to receive approximately $5,781.07 per month for 15 years[10], beginning in October 2012. Based on simple math, the total amount he has received to date under the GCDIP is in the neighbourhood of USD $450,000. His total supplemental pension entitlement under the GCDIP exceeds USD $1 million.

20. Similarly, in Mr. Foster's case, he worked at Genstar for a short period of slightly over two years (starting in 1984 and ending in September 1986).[11] He deferred $10,000 of his income and received approximately US $15,215 per year for 15 years, beginning in 2008[12] for a total entitlement under the GCDIP in the amount of over US $200,000. Based on simple math, he has received close to $150,000 of such entitlement to date.

21. The GCDIP was subject to amendment or cancellation upon changes in US tax laws.[13] In both Mr. Brown's and Mr. Foster's cases, their benefits became vested upon a change of control affecting Genstar in 1986.[14]

(b) The SERP

22. The SERP is also described as a supplementary plan, designed "overcome the maximum benefit limitations imposed on career executives by tax legislation and to provide competitive

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9 Brown Affidavit, paras. 6 and 7.

10 Brown Affidavit, para. 14.

11 Affidavit of George A. Foster, sworn April 15, 2019 [Foster Affidavit], para. 6.

12 Foster Affidavit, para. 13.

13 GCDIP Plan Summary, p. 5.

14 Foster Affidavit, para. 10; Brown Affidavit, para. 10.

pension for short service executives who join the company at 'mid-career'".[15] By its terms the SERP could be amended, suspended, discontinued or terminated at the sole discretion of the Chief Executive Officers of Genstar or its Board of Directors.[16]

(c) The SPEN

23. Neither ITCAN nor the Proposed Representatives have been able to locate any Plan documentation in relation to the SPEN.[17] However, only three of the Affected Members are beneficiaries under this plan.

C. Evidence of Prejudice is Unclear

24. As is evident even from the evidence filed by the Proposed Representatives on this motion, the Affected Members are all differently situated. While three members have filed evidence alleging prejudice (which evidence ITCAN has not yet had the opportunity to test), it is clear that a great number of the Beneficiaries have received significant sums from the Genstar US Plans over the last 30 years,[18] and cannot reasonably assert prejudice in a manner or to a degree that would be sufficient to ground the relief sought.

25. Given the insufficient evidentiary record, ITCAN is not in a position to comment on the relative financial position or the particular circumstances of each of the Affected Members. However, it is clear from the record that at least some of the Affected Members have additional

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15 Supplementary Executive Retirement Plan [SERP], "Introduction & Purposes", Supplementary Motion Record of the Proposed Representatives, Tab 5.

16 SERP, clause 6.02.

17 It is also not clear whether the Guarantee covers the SPEN.

18 For example, ITCAN's records indicate that Mr. Paterson, whose (unsworn) Affidavit notably does not set out his payments under the Plan, receives approximately $500,000 / year from the GCDIP and the SERP.

pension entitlements, including under the IHGI Plan that continues to be funded in accordance with statutory requirements.[19]

D. Suspension of Funding of the Genstar US Plans in Accordance with Initial Order

26. Pursuant to clause 7(a) of the Initial Order, and in view of the objectives and requirements of the CCAA, ITCAN has, in consultation with the Monitor, determined to continue making contributions to certain pension plans or other retirement compensation arrangements. However, the obligations to the Genstar US Plans remain suspended by virtue of the CCAA Stay and the Applicants have determined not to pay these pre-filing amounts. The authority for and rationale for this decision is set out in greater detail below.

E. Relief Requested by the Proposed Representatives

27. The Proposed Representatives seek several forms of relief, including:

(a) an order prohibiting the Applicants from ceasing to fund or suspending the funding of the Genstar US Plans and directing the Applicants to reinstate all payments under these Plans during the CCAA proceeding (the "**Reinstatement Order**");[20]

(b) an order that the agreements with the Affected Members of the Genstar US Plans are not to be disclaimed or resiliated by the Applicants (the "**Disclaimer Relief**");[21]

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19 Notice of Motion, para. 62.

20 Notice of Motion, paras. 2 and 3.

21 Notice of Motion, para. 4.

(c) an order appointing Mr. Brown and Mr. Foster as representatives of the Affected Members (and their survivors) of the Genstar US Plans (the "**Representation Order**") and appointing representative counsel for these Proposed Representatives (the "**Representative Counsel Relief**"); and

(d) an order preserving the Proposed Representatives' right to apply to this Court (*inter alia*) for an order providing for the funding of professional fees of the Proposed Representatives and the Proposed Representative Counsel and/or for declarations or remedies under the *Canadian Charter of Rights and Freedoms* (the latter is referred to below as the "**Charter Relief**").

PART III - ISSUES AND THE LAW

A. Issues

28. Should this Court grant the relief requested by the Proposed Representatives?

B. The Reinstatement Order Should Be Denied

(a) The Initial Order Permits ITCAN to Cease Funding the Genstar US Plans

29. Clause 14 of the Initial Order provides that, except as specifically permitted in the Initial Order, the Applicants are precluded from making payments of pre-filing amounts owing on the filing date.[22]

30. The Amended and Restated Initial Order provides in clause 7(a) that the Applicants "shall be entitled but not required" to pay certain employment-related expenses, whether incurred prior to, on or after the date of the Initial Order. Under this clause, the Applicants are entitled to but not required to pay "all outstanding and future … incentive and share

[22] Amended and Restated Initial Order, clause 14.

compensation plan payments, employee and retiree pension and other benefits and related contributions and payments". Such payment shall be "in the ordinary course of business and consistent with existing compensation policies and arrangements or with Monitor approval."[23]

31. Clause 7(a) of the Initial Order provides the Applicants with the discretion to determine, in consultation with or with the approval of the Monitor, which of the listed types of employment-related payments, including pre-filing payments, should be made following the imposition of the CCAA Stay. This decision must be made in compliance with the CCAA, in the reasonable business judgment of the Applicants, and in light of the nature and type of the legal obligations owed to particular stakeholders.

32. Section 11.01(a) of the CCAA provides that no order under section 11 or 11.02 of the CCAA (e.g. the CCAA Stay) can have the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made.[24] Essentially, this provision requires a debtor company to pay for services provided during the post-filing period.

33. The continued funding during the post-filing period of a number of ITCAN's pension and other retirement plans is a function of this provision. CCAA cases have recognized that "normal course" funding of pension plans for active employees during the post-filing period reflects the fact that this is a key part of the compensation for their post-filing service. By contrast, CCAA debtors have been permitted to cease making "special payments" (i.e. payments to resolve a historic funding deficiency) during the post-filing period because (among other factors) these

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[23] Amended and Restated Initial Order, clauses 7(a).

[24] CCAA, s. 11.01(a). See also Amended and Restated Initial Order, para. 24.

special payments do not relate to post-filing service.[25] The same rationale justifies payment under unregistered retirement or similar arrangements in relation to active employees who are providing post-filing services.

34. It is not inequitable for the Applicants to continue to fund certain Plans that must be funded in order to comply with the CCAA requirement to pay for post-filing services and to cease funding other Plans (i.e. the Genstar US Plans) that are not subject to the same requirement. In such instance, there is an objective distinguishing factor that justifies the difference in treatment. More specifically:

(a) The two defined benefit plans – the Imasco Pension Fund Society and the Imperial Tobacco Corporate Pension Plan – and the Imperial Tobacco Canada Limited Defined Contribution Pension Plan all have active employees. As required by statute, the Applicants are continuing to fund "normal cost" payments in relation to those Plans during the CCAA period. These Plans do not currently have any actuarial deficit that is statutorily required to be funded during the CCAA period.[26]

(b) Similarly, ITCAN is making ordinary course payments under the US tax-qualified defined benefit plan known as the IHGI US Pension Plan (the "**IHGI Plan**")

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[25] See, for example, *Re Bloom Lake General Partner Ltd.*, 2015 QCCS 3064 at paras. 106 to 108, in which the Court recognized that the normal "current service" pension contributions required to be made by the employer relate to the current employees and must be made based on the requirement for the CCAA debtor to pay for post-filing services. By contrast, special payments are unsecured payments in the CCAA context. As a result, paying the special payments would constitute "payments to an unsecured pre-filing creditor, which could be qualified as preferential in the sense that no other unsecured pre-filing creditor is being paid" (para. 109). See also *Re Fraser Papers Inc.*, 2009 CarswellOnt 4469 at paras. 16 to 18.

[26] Affidavit of Eric Thauvette, sworn March 12, 2019 [First Thauvette Affidavit], paras. 49 and 50. The Applicants' obligations under the two DB plans are also secured by letters of credit that can be drawn upon by the pension administrator to satisfy unpaid contributions. If such draw occurs, it triggers an immediate reimbursement obligation by ITCAN to the Bank of Nova Scotia or HBSC, as the case may be: see First Thauvette Affidavit, paras. 51 to 53.

pursuant to the requirements of Title IV of the *U.S. Employee Retirement Income Security Act of 1974*.[27] Although the Proposed Representatives describe this as a "legacy" Plan, it is subject to statutory funding requirements, unlike the Genstar US Plans.

(c) Finally, ITCAN is making ordinary course payments in respect of certain other additional pension and retirement savings obligations during the CCAA,[28]

35. By contrast, the obligations under the Genstar US Plans are unsecured, "legacy" obligations. They are owed under unregistered contractual arrangements to inactive former employees of Genstar, which is not an Applicant in this proceeding. Those former employees are not providing any post-filing services to the Applicants. There is no basis on which to justify payment of such pre-filing amounts on the basis of the importance of these arrangements to the ongoing business or the restructuring of the Applicants. It would be inequitable to continue making such pre-filing payments at the same time that other unsecured creditors are not being paid – including the Quebec Class Action Plaintiffs and other Tobacco Claimants.

36. The *United Airlines* decision relied upon by the Proposed Representatives in support of their entitlement to the Reinstatement Order does not stand for the principle that the payment of pre-filing pension amounts is necessarily required in all circumstances where the CCAA debtor can allegedly "afford" to make pre-filing retirement compensation payments.[29] This Court expressly rejected this proposition in *Collins and Aikman*, stating that "*United Airlines* does not appear to stand for the proposition that all pension contributions, including special payments,

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[27] First Thauvette Affidavit, para. 54.

[28] First Thauvette Affidavit, para. 55.

[29] *Re United Air Lines Inc.*, 2005 CarswellOnt 1078; Book of Authorities of the Proposed Representatives at Tab 22; Proposed Representatives Factum, para. 41

must in all cases be paid by a CCAA debtor." As the Court further stated, the *United Airlines* decision was based on "a consideration of the facts and circumstances existing in that case."[30]

37. Moreover, the *US Steel* decision which is also relied upon by the Proposed Representatives, is factually distinguishable.[31] In that case, the issue involved certain lump sum retention bonuses contemplated under employee severance agreements. The Court ordered the CCAA debtor to pay these amounts on the basis that they were properly characterized as compensation for post-filing services and were therefore not subject to the CCAA stay.[32]

38. The Proposed Representatives complain about the lack of notice of the suspension of the funding for the Genstar US Plans. However, it is customary to seek an initial order under the CCAA on an *ex parte* basis. In many cases, providing advance notice of an initial CCAA filing would cause prejudice to the debtor's ability to preserve the *status quo,* as it would provide a window for manoeuvres from creditors seeking to get a "leg up" on other creditors.

39. Stakeholders who are affected by an *ex parte* initial order have the opportunity to return to the CCAA Court on the "come-back" hearing to demonstrate that aspects of the order should be modified or eliminated, as has occurred here.

40. The Proposed Representatives have provided no compelling evidence that the provision of additional notice before the Genstar US Plan funding ceased would have made any material difference to the Beneficiaries. Nor is there any evidence of steps that those Beneficiaries could have taken during any such notice period to alleviate the effects of cessation of the funding.

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30 *Re Collins and Aikman Automotive Canada Inc.*, 2007 CarswellOnt 7014 (SCJ) at para. 84.

31 *Re US Steel Inc.*, 2015 ONSC 5990 [*US Steel*]; Book of Authorities of the Proposed Representatives at Tab 24; Proposed Representatives Factum at para. 47.

32 *US Steel*, above, at para. 25.

41. Despite the above, the Proposed Representatives seek this Court's assistance in compelling ITCAN to make the Genstar US Plan payments, arguing that (i) the amounts owing under the Guarantee are secured obligations because they are subject to a constructive trust;[33] (ii) the suspension of payments is a disguised disclaimer of the Genstar US Plans, in violation of section 32 of the CCAA; or (iii) clause 7(a) of the Amended and Restated Order violates the *Charter*. None of these positions represents a tenable basis on which this Court could or should grant the Reinstatement Order.

(b) The Obligations under the Genstar US Plans Are Unsecured

(i) Plans Expressly State that Funding Obligations Are Unsecured

42. The obligations to the Beneficiaries under the Genstar US Plans are, by their terms, unsecured, contractual obligations. Similarly, there is no language in the Guarantee creating any form of security in favour of the Beneficiaries.

43. With respect to the GCDIP, the Plan documents provide that "It is expressly agreed by the Employee and the Employer that the Employer's obligation to make payments to any person under this Agreement is purely contractual and that the parties do not intend that the amounts payable hereunder be held by the Employer in trust or as a segregated fund for the Employee, the Beneficiary or other person entitled to payments hereunder."[34] (emphasis added)

44. The GCIP Executive Agreement further provides that "The benefits provided under this Agreement shall be payable solely from the general assets of the Employer, and neither the Employee, the Beneficiary or other person entitled to payments hereunder shall have any interest

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[33] Factum of the Proposed Representatives, paras. 58-63.

[34] Genstar Corporation Deferred Compensation Income Program Executive Agreement, dated March 1986 [GCDIP Agreement], clause 10; Brown Affidavit, Exhibit C:,Motion Record, Tab 3C.

in any assets of the Employer by virtue of this Agreement. The Agreement merely grants the Employee, the Beneficiary or other person entitled to payments hereunder the contractual right to receive future benefits. Employer's obligation under the Plan shall be merely that of an unfunded and unsecured promise of Employer to pay money in the future."[35]

45. Other Plan documents are consistent, stating that "the Employee or Director, the Beneficiary, or other person entitled to payments stands in the same position as any general creditor of the Company".[36]

46. The concept of "vesting" is relevant only to the extent that it refers to the conditions under which the Employee becomes entitled to begin receiving his or her full payments under the GCDIP.[37] It does not confer any priority on the Beneficiaries. The express language of the GCDIP documentation is to the contrary.

47. Like the GCDIP, the SERP contained clear language characterizing the liabilities of Genstar under the SERP as unsecured. Based on the wording of the relevant provision, this appears to have been driven, in part, by US tax regulations:

> Genstar may not under current tax regulations, pre-fund the eventual payment of benefits. The participants' claim against the Employer for all benefits accrued hereunder or projected for future payment, is in the position of an unsecured creditor. (emphasis added).[38]

48. The above language could not be clearer.

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35 GCDIP Agreement, clause 10.

36 See Genstar Corporation 1986 Deferred Income Plan for Senior Officers, Division Presidents and Key Corporate and Division Managers, dated December 1, 1985 [GCDIP Plan Document], clause 14; Brown Affidavit, Exhibit D: Motion Record, Tab 3D. See also "Questions and Answers: Executive Plan", Q4, Brown Affidavit, Exhibit F: Motion Record, Tab 3F.

37 GCDIP Agreement, clause 11. See GCDIP Plan Document, at para. 15. Note that slightly different versions of this language are found in other Plan documents attached to the other affidavits filed by the Proposed Representatives. However, the different language does not change the substance of the provision.

38 SERP, clause 6.03.

(ii) Insurance Policies Did Not Create Security in Favour of Beneficiaries

49. There is no reference in any of the Plan documents or in the Guarantee to the purchase of life insurance policies as security for the amounts owing to the Beneficiaries. Any such implied obligation would directly contradict the express language of the Plan documents.

50. Based on the record before this Court, the life insurance policies – which were cashed out decades ago[39] – named the Employer as beneficiary, not the Beneficiaries.[40] They were an internal mechanism employed by Genstar to offset the funding obligations under the Genstar US Plans, such that the Genstar US Plans were "cost-neutral" to Genstar.[41] In other words, had this mechanism not been discontinued on the instructions of the Board of Imasco because of tax considerations,[42] it would have provided Genstar with additional funds with which to offset funding obligations, but would not have created any enhanced rights in favour of the Beneficiaries.

51. None of the Plan documents (a) required Genstar to purchase the life insurance policies; (b) provided that the proceeds of those policies would be segregated and/or applied to the Beneficiaries' entitlements; or (c) precluded Genstar from cashing out those policies when it became apparent that tax considerations dictated that they should no longer be used to offset Genstar's funding obligations. There is no basis on which the purchase of the life insurance policies as an internal funding mechanism could legally affect the nature, extent or priority of the entitlement of the Beneficiaries under the Genstar US Plans.

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39 Affidavit of Eric Thauvette, sworn April 2, 2019, para. 42 [Thauvette Responding Affidavit].

40 Factum of Proposed Representatives, para. 59.

41 In their Factum, the Proposed Representatives themselves describe them as a funding mechanism adopted by the Employer

42 Minutes of Meeting of the Chairman's Office, September 9, 1992 [Imasco Minutes], Supplementary Motion Record of the Proposed Representatives, Tab 2.

52. The entitlement of the Beneficiaries was at all times governed by the terms of the Genstar US Plans, which clearly stated that the obligations to the Beneficiaries under the Plans were unsecured and not backstopped by any segregated fund or by any specific assets. The Guarantee of those obligations carried no higher rights in favour of the Beneficiaries.

(c) No Constructive Trust Arises

53. The Proposed Representatives argue that there is a reasonable basis for imposing a constructive trust.[43] The Applicants submit that such an argument has no reasonable prospect of success.

54. Courts have held on a number of occasions that the test for granting a constructive trust in an insolvency is especially high and that the discretion to grant such a remedy (assuming the elements can be made out) must take into consideration the interests of other stakeholders.[44] This is because such this discretionary remedy confers an effective priority on the beneficiary of such a constructive trust, at the expense of other stakeholders.

55. The argument of the Proposed Representatives is fundamentally flawed in a number of respects. A constructive trust based on unjust enrichment requires the claimant to show that: (a) the defendant was enriched; (b) the claimant suffered a corresponding deprivation; and (c) the absence of any juristic reason for the enrichment and corresponding deprivation.[45]

56. The Affected Members fail at the first hurdle. The Applicants have not been enriched. The evidence in the record is abundantly clear that the deferred income contributions were made

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43 Factum of the Proposed Representatives, para. 58 and following.

44 See, for example, *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2004 BCSC 1066, aff'd 2007 BCCA 14 at para. 68.

45 *Moore v Sweet*, 2018 SCC 52 at para. 37.

by the Beneficiaries to Genstar, a separate corporation, in its capacity as employer of those Beneficiaries. The Applicants have never received any such contributions.

57. Nor did the Applicants purchase the life insurance policies with the deferred income contributions made by the Beneficiaries or receive the proceeds of the life insurance policies when they were cashed out. Those policies were purchased by Genstar, a separate corporate entity, and cashed out by Genstar decades ago following a decision by the Board of Directors of Imasco Limited.[46]

58. The Applicants are guarantors of the obligations owed by the party that received the deferred income contributions and that cashed out the life insurance policies. The Applicants are not and never have been the employer under the Genstar US Plans. They do not administer those Plans and owe no fiduciary duties to the Beneficiaries. Even if the Proposed Representatives could establish a proprietary link between their deferred income contributions, the purchase of the life insurance policies and the monies obtained from cashing out those policies, neither of the Applicants received those monies.

59. There is simply no factual or legal basis on which to impose a constructive trust over the assets of the Applicants. Such a remedy is contrary to the express wording of the Genstar US plans. The Beneficiaries were executives and managers of Genstar who were clearly capable of understanding what they were agreeing to when they chose to contribute their deferred income amounts to the unregistered, unsecured Genstar US Plans.

C. The Disclaimer Relief is Misconceived and Should Be Denied

[46] Thauvette Responding Affidavit, para. 42;

60. The Proposed Representatives argue that the decision of the Applicants to suspend their monthly capital contributions to IHGI to fund the Genstar US Plans is effectively a "disclaimer" of those arrangements that improperly did not follow the procedure for such disclaimer required under section 32 of the CCAA.

61. This argument is also without merit. As a factual matter, the Applicants are not parties to the Genstar US Plans and could not disclaim them even if they wished to do so.

62. The Applicants have merely suspended their monthly capital contributions to IHGI made pursuant to the Guarantee that permitted IHGI to make required payments under the Genstar US Plans. The Applicants have not disclaimed either the Guarantee or the agreement establishing the Guarantee.

63. The Applicants appear to be advancing the position that any suspension of payments owing under a pre-filing contractual arrangement constitutes an effective "disclaimer" of that arrangement that requires notice under section 32 of the CCAA. However, this is not the law and would generate absurd and unworkable results.

64. This Court expressly rejected a similar argument in *US Steel*. As the Court stated, "the Applicants' argument assumes that non-performance of any provision of a contract for any reason whatsoever constitutes a 'resiliation' or a 'repudiation' of a contract requiring compliance with s. 32 of the CCAA to be effective. I think this interpretation of s. 32 implies a scope of operation that was not intended by Parliament."[47]

65. The Quebec Superior Court in *Bloom Lake* similarly concluded that, while the suspension of payments under a contract pursuant to a CCAA order may result in a default under that

[47] *US Steel*, above at para. 21.

contract by the debtor, the suspension does not constitute a disclaimer or resiliation of the contract that triggers the debtor's obligations under section 32 of the CCAA.[48]

66. The Proposed Representatives seek to avoid the "death blow" to their disclaimer argument represented by the reasons of the Quebec Superior Court in *Bloom Lake* by relying on certain statements made by the Quebec Court of Appeal in denying leave to appeal from the Superior Court's decision in *Bloom Lake* that the issue of the applicability of section 32 was of "importance to the practice".[49] However, since leave to appeal was denied, there was no determination on the merits that a suspension of payments under a contract pursuant to the CCAA is equivalent to a disclaimer.

67. The Proposed Representatives also omit to reproduce language that significantly qualifies the Quebec Court of Appeal's statement upon which they purport to rely. In particular, in concluding that the issue was of importance to the practice, Kasirer J.A. stated that "the merits of this argument are less strong" (relative to other issues raised by the applicants), further explaining that the CCAA judge's interpretation of the CCAA showed no "prima facie weakness" and simply did not entirely preclude "an arguable case for the other side."[50]

68. Section 32 of the CCAA has no relevance at this time. To the extent that the Applicants are subject to contractual obligations under the Guarantee and determine as part of their restructuring that such obligations should be finally disclaimed, the Applicants will comply with

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48 *Re Bloom Lake*, 2005 QCCS 3064 at paras. 128 and 132: "…the Wabush CCAA Parties are not disclaiming or resiliating the [insurance] contract. The Wabush CCAA Parties are seeking authorization to stop paying under a contract, just as they have undoubtedly stopped paying under a number of other contracts. Even if termination by the counter-party is the likely result, as in this case, it does not mean that the debtor has disclaimed or resiliated the contract. Otherwise the debtor would have to follow the formalities and pass the test in Section 32 CCAA every time it defaulted under a contract."

49 *Re Bloom Lake*, 2015 QCCA 1351 at para. 38 [*Bloom Lake (Leave to Appeal)*]; Factum of the Proposed Representatives at para. 53.

50 *Bloom Lake (Leave to Appeal)*, at paras. 38 and 43.

section 32 when that decision is made. The Proposed Representatives will have a full opportunity at that time to make representations to this Court opposing the disclaimer, as contemplated by section 32 of the CCAA.

69. Moreover, it would be unprecedented for this Court to grant the injunctive portion of the Disclaimer Relief and to enjoin the Applicants from disclaiming their obligations in relation to the Genstar US Plans in future. The Proposed Representatives cite no authority supporting such relief and granting such an order would represent an unjustified interference at this stage with the Applicants' ability to determine how best to restructure their affairs in the interests of all stakeholders.

D. Charter Relief Has No Reasonable Chance of Success

70. By way of alternative argument, the Proposed Representatives attempt to support their proposed Reinstatement Order by alleging that the Initial Order constituted a breach of section 7 of the Charter. While the Proposed Representatives do not propose to argue their case for obtaining the Charter Relief in this motion, they assert an entitlement to injunctive relief pending resolution of their eventual Charter application.

71. This argument is fundamentally flawed. As a purely procedural matter, it is improper for the Proposed Representatives to effectively "split their case" by arguing that the Reinstatement Order can be justified on the basis of an inchoate constitutional challenge, which will be argued only in the event that its other arguments in support of the Reinstatement Order fail. The same underlying facts – including evidence of alleged hardship – underpin the request for the Reinstatement Order on all of the potential grounds advanced by the Proposed Representatives, including the alleged Charter breach.

72. Granting the requested injunction in order to allow the Proposed Representatives to present their argument at a later date would, essentially, grant the requested Reinstatement Order without requiring the Proposed Representatives to satisfy the Court of the Affected Members' entitlement to such relief.

73. The alleged Charter challenge is also wholly without legal merit. ITCAN does not propose to fully argue the its response to this constitutional challenge in this hearing, given the Proposed Representatives' stated intention not to advance the challenge at this time. However, it is evident that there is no serious issue that can satisfy the high threshold for injunctive relief (which in this case, would constitute a mandatory injunction), let alone a finding that the Initial Order was unconstitutional.

74. ITCAN submits that the claim for Charter Relief cannot succeed for the following reasons (*inter alia*):

(a) As a threshold matter, section 7 of the Charter is not available to the Proposed Representatives because it does not protect economic rights such as the ones at issue in this proceeding.[51] This Court has echoed this finding in the context of prior *CCAA* proceedings. In *Nortel*,[52] for example, Newbould J. held that while the Charter could theoretically apply to a *CCAA* order, the claims of long-term disability beneficiaries – who were arguably in analogous circumstances to the

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[51] See *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123 at paras 48-72; *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at para 179 ("It is also to be observed that the Charter, with the possible exception of s. 6(2)(b) (right to earn a livelihood in any province) and s. 6(4), does not concern itself with economic rights"); *Siemens v Manitoba (Attorney General)*, 2003 SCC 3 at para 45 ("The right to life, liberty and security of the person encompasses fundamental life choices, not pure economic interests").

[52] *Re Nortel Networks Corp*, 2017 ONSC 700 [Nortel].

Beneficiaries in this case – were ultimately grounded in economic interests and therefore were not protected by section 7.

(b) Even if the Proposed Representatives could somehow establish that section 7 applies to the economic claims of the Beneficiaries and that the Initial Order deprived the Affected Members of their right to life, liberty or security of the person, the Proposed Representatives would also need to demonstrate that such deprivation was "contrary to the principles of fundamental justice". None of the arguments advanced by the Proposed Representatives – even if they could satisfy the threshold question of "deprivation" – support the assertion that any deprivation of rights flowing from the Initial Order was contrary to the principles of fundamental justice.

(c) As a general proposition, Charter rights do not apply extraterritorially to non-residents and non-citizens. While there are certain exceptions to this rule, grounded primarily in the jurisprudence surrounding criminal enforcement proceedings and refugee claimants, the circumstances of this dispute do not engage any principled exception to this general rule of application.

75. In short, the future constitutional challenge alluded to by the Proposed Representatives simply cannot ground the relief sought. The Proposed Representatives should not be permitted to sidestep their evidentiary and legal burdens for obtaining their Reinstatement Order by sheltering behind the spectre of a future constitutional challenge. Nor should the Applicants be required to continue funding the Genstar US Plans during the potentially lengthy time period that would be necessary to mount a novel constitutional challenge that has little or no hope of success.

E. Applicants Do Not Oppose Representation Relief

76. The Applicants do not object to the appointment of the Proposed Representatives or to the Representative Counsel Relief, provided that no order is made at this stage regarding the funding of the professional fees of such Proposed Representatives or Representative Counsel.

77. The Applicants reserve their rights in future to object to any motion seeking the funding of professional fees for the Proposed Representatives or Representative Counsel. The Applicants' agreement to the appointment of the Proposed Representatives and to the Representative Counsel Relief should not be interpreted as a concession that any facts exist that would support the payment of such professional fees by the Applicants.

PART IV -NATURE OF THE ORDER SOUGHT

78. The Applicants therefore request that the relief requested by the Proposed Representatives be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

Deborah Glendinning

Marc Wasserman

John A. MacDonald

Craig Lockwood

Schedule "A"

LIST OF AUTHORITIES

Case Law

1. *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCA 1351
2. *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 3064
3. *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2004 BCSC 1066, aff'd 2007 BCCA 14
4. *Moore v Sweet*, 2018 SCC 52
5. *Re Collins and Aikman Automotive Canada Inc.*, 2007 CarswellOnt 7014
6. *Re Fraser Papers Inc.*, 2009 CarswellOnt 4469 (Sup Ct [Comm List])
7. *Re Nortel Networks Corp*, 2017 ONSC 700
8. *Re United Air Lines Inc.*, 2005 CarswellOnt 1078 (Sup Ct [Comm List])
9. *Re US Steel Inc.*, 2015 ONSC 5990
10. *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123
11. *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313
12. *Siemens v Manitoba (Attorney General)*, 2003 SCC 3

Schedule "B"

COMPANIES' CREDITORS ARRANGEMENT ACT

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

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

11.02 (1) A court may on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
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> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) The court shall not make the order unless

> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

…

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.

(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.

(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.

(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.

(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.

(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.

(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.

(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.

(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.

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) c 11

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.

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.*

Applicants

Court File No. CV-19-616077-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
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