

**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

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**FACTUM OF THE APPLICANTS**  
**(Genstar Settlement Approval Motion**  
**returnable June 26, 2019)**

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June 20, 2019

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**TO: THE SERVICE LIST**

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LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

APPLICANTS

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**FACTUM OF THE APPLICANTS**

**PART I - OVERVIEW**

1. The Applicants seek an order under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**") giving effect to the terms of a settlement (the "**Settlement**") between the Applicants and Robert M. Brown, George A. Foster and Vivian Brennan-Dolezar, personally and as court-appointed representatives (the "**Representatives**") of the Genstar Beneficiaries (defined below).

2. The Settlement relates to three non-registered deferred compensation plans (the "**Genstar Plans**") established by Genstar Corporation ("**Genstar**"), a dormant subsidiary of the Applicant Imperial Tobacco Canada Limited ("**ITCAN**"). ITCAN funded all payments under the Genstar Plans (the "**Payments**") until March 2019. However, after filing for CCAA protection, ITCAN ceased funding the Payments as they were unsecured, pre-filing obligations.<sup>1</sup>

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<sup>1</sup> Affidavit of Eric Thauvette sworn June 18, 2019 ("**Thauvette Affidavit**") at paras. 3 – 5 and 10, Motion Record of the Applicants (Motion for Genstar Settlement Approval) dated June 18, 2019 ("**Motion Record**") at Tab 2.

3. In response, the Former Genstar U.S. Retiree Group Committee (the “**Committee**”) filed a motion to reinstate the Payments (the “**Reinstatement Motion**”). Before the motion was heard, the Applicants and the Representatives, supported by the Committee, negotiated at arms’ length and agreed to the Settlement resolving the Reinstatement Motion.<sup>2</sup>

4. The principal features of the Settlement include the following:<sup>3</sup>

(a) The Applicants will pay (i) USD \$1.44 million (the “**Notice Amount**”) on account of three months’ notice in accordance with a distribution formula determined by court-appointed representative counsel for the Genstar Beneficiaries (“**Representative Counsel**”), and (ii) USD \$160,000 on account of legal fees (with the Notice Amount, the “**Genstar Settlement Payments**”).

(b) The Genstar Beneficiaries retain an unsecured claim for remaining unpaid amounts under the Genstar Plans, less the Notice Amount (the “**Unsecured Claim**”).

(c) The Applicants and Representatives will seek a Settlement Approval Order: (i) releasing the Applicants from any further liabilities in respect of the Genstar Plans except for the Unsecured Claim, and (ii) releasing and discharging the Representatives, Representative Counsel and the Committee in respect of the Settlement (collectively, the “**Releases**”).

5. The Settlement Approval Order gives effect to the terms of the Settlement and binds all Genstar Beneficiaries, including optouts and objectors (if any).

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<sup>2</sup> Thauvette Affidavit at paras. 13 and 15, Motion Record at Tab 2.

<sup>3</sup> Thauvette Affidavit at para. 16, Motion Record at Tab 2.

6. The Applicants have provided notice of the Settlement (including the fact that it will bind all Genstar Beneficiaries) and the settlement approval hearing to the Genstar Beneficiaries in accordance with the Notice Procedure Order dated May 14, 2019. As part of this notice process, the Genstar Beneficiaries were given an opportunity to opt-out of representation or object to the Settlement. As of the date hereof, no opt-out forms or objection forms have been received from any Genstar Beneficiary.

7. It is well-established that a CCAA court has the jurisdiction to approve a settlement reached by a debtor provided that the settlement is beneficial to the debtor and its stakeholders, is fair and reasonable, and is consistent with the purpose and spirit of the CCAA.<sup>4</sup> This jurisdiction includes the authority to approve settlements reached by court-appointed representatives binding all of the represented parties,<sup>5</sup> and the authority to make a settlement binding on a class of claimants (including any objectors and anyone wishing to opt-out of the settlement).<sup>6</sup>

8. As described more fully herein, the Applicants – with the support of the Representatives – submit that the Settlement Approval Order should be approved for the following reasons:

- (a) The Settlement benefits the Applicants and their stakeholders by removing the distraction of significant parallel proceedings relating to the Payments and permitting the Applicants to focus on this CCAA restructuring;

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<sup>4</sup> *Robertson v ProQuest Information and Learning Company*, 2011 ONSC 1647 at para. 22, Book of Authorities of the Applicants dated June 20, 2019 (“BOA”) at Tab 24.

<sup>5</sup> *Re Nortel Networks Corporation*, 2010 ONSC 1708 (“*Nortel (Settlement Agreement)*”) at paras. 59 – 60, BOA at Tab 13; *Re Grace Canada Inc.*, 2008 CarswellOnt 6284 (Supt Ct) at paras. 22 – 23 and 32 – 33, BOA at Tab 6.

<sup>6</sup> *Labourers’ Pension Fund of Central and Eastern Canada v Sino-Forest Corporation*, 2013 ONSC 1078 (“*Sino-Forest*”) at para. 41, leave to appeal to CA dismissed, 2013 ONCA 456, leave to appeal to SCC dismissed, 2013 CarswellOnt 15064, BOA at Tab 3.

- (b) The Settlement is fair and reasonable because: (i) the Representatives' decision to settle was reasonable given the litigation risk they faced if the Reinstatement Motion went ahead, (ii) the Settlement is consistent with the treatment of pension obligations like the Payments in prior CCAA proceedings, and (iii) the Notice Amount will be allocated in an equitable manner; and
- (c) The Settlement is consistent with the spirit and purpose of the CCAA because it benefits the Applicants' stakeholders and this restructuring process generally, is fair and reasonable, and was achieved through negotiations rather than litigation.

## **PART II - FACTS**

### **A. Applicants applied for CCAA protection to resolve significant Tobacco Claims**

9. The Applicants sought CCAA protection in the face of an existential threat from Tobacco Claims totalling well over \$600 billion. Although they dispute these claims, the Applicants concluded it was in the best interests of their stakeholders to engage in a restructuring process with the overriding objective of preserving the value of their business and resolving all Tobacco Claims in an orderly process under Court supervision.<sup>7</sup>

10. When granting the Initial Order dated March 12, 2019, this Court found that CCAA protection (and, by implication, a resolution of the Tobacco Claims) was necessary to avoid significant negative consequences, including the loss of significant tax revenue, undermining the legal tobacco trade, and losses to the Applicants' stakeholders such as employees, retirees,

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<sup>7</sup> Thauvette Affidavit at paras. 8 – 9, Motion Record at Tab 2.

customers, landlords, suppliers, the provincial and federal governments, and contingent litigation creditors.<sup>8</sup>

**B. The Genstar Plans: Unfunded legacy obligations of a dormant ITCAN subsidiary**

11. Genstar is a dormant subsidiary of ITCAN that was acquired by a predecessor in 1986.<sup>9</sup> Before that acquisition, Genstar established the Genstar Plans, which consists of a deferred income plan (the “**GCDIP**”), a supplemental executive retirement plan (the “**SERP**”), and a supplementary pension plan.<sup>10</sup>

12. ITCAN is a guarantor of Genstar’s obligations under the Genstar Plans.<sup>11</sup>

13. The Genstar Plans are all unfunded plans.<sup>12</sup> As Genstar is dormant, it does not have the ability to make the Payments. Until March 2019, ITCAN funded the Payments by making monthly capital contributions to Imasco Holdings Group, Inc. (“**IHGI**”), a largely dormant U.S. subsidiary of ITCAN. IHGI would then make the Payments to the Genstar Plans’ beneficiaries (the “**Genstar Beneficiaries**”).<sup>13</sup>

14. As at December 31, 2017, the present value of the obligations under the Genstar Plans was estimated to be approximately USD \$32 million (CDN \$43 million). There are currently 59 Genstar Beneficiaries.<sup>14</sup>

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<sup>8</sup> *Re Imperial Tobacco Canada Limited et al*, 2019 ONSC 1684 at para. 9, BOA at Tab 8.

<sup>9</sup> Thauvette Affidavit at para. 4, Motion Record at Tab 2.

<sup>10</sup> Thauvette Affidavit at paras. 3 – 4, Motion Record at Tab 2.

<sup>11</sup> Thauvette Affidavit at para. 4, Motion Record at Tab 2.

<sup>12</sup> Thauvette Affidavit at para. 3, Motion Record at Tab 2.

<sup>13</sup> Thauvette Affidavit at para. 5, Motion Record at Tab 2.

<sup>14</sup> Thauvette Affidavit at para. 6, Motion Record at Tab 2.

**C. Cessation of Payments and resulting motions by Committee**

15. ITCAN ceased funding the Payments after obtaining the Initial Order because the Payments were pre-filing, unsecured obligations stayed by the Initial Order.<sup>15</sup>

16. In response, the Former Genstar U.S. Retiree Group Committee (the “**Committee**”) filed: (a) a motion seeking an order appointing representatives and representative counsel for the Genstar Beneficiaries (the “**Representation Order**”); and (b) the Reinstatement Motion.<sup>16</sup>

17. On April 25, 2019, the Court granted the Representation Order appointing Ari Kaplan as Representative Counsel, and appointing Mr. Brown and Mr. Foster as Representatives. On May 14, 2019, Vivian Brennan-Dolezar was appointed as a third Representative.<sup>17</sup>

18. The Reinstatement Motion raised complex issues that would have required significant time and resources to fully litigate. Among other things, the Committee argued that: (a) the Payments may be secured by a constructive trust because Genstar had purchased single-premium life insurance policies on the recipients’ lives under the DIP and SERP; and (b) ceasing the Payments violated section 7 of the *Charter of Rights and Freedoms*.<sup>18</sup> In addition, the Reinstatement Motion was interlocutory and would not have finally resolved these issues.<sup>19</sup>

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<sup>15</sup> Thauvette Affidavit at para. 10, Motion Record at Tab 2.

<sup>16</sup> Thauvette Affidavit at paras. 11 – 13, Motion Record at Tab 2.

<sup>17</sup> Thauvette Affidavit at para. 12, Motion Record at Tab 2.

<sup>18</sup> Thauvette Affidavit at para. 13, Motion Record at Tab 2.

<sup>19</sup> Thauvette Affidavit at para. 14, Motion Record at Tab 2.



**D. The Settlement between the Applicants and Representatives**

19. The Reinstatement Motion was to be argued on April 26, 2019. On April 25, the Applicants and the Representatives, supported by the Committee, negotiated at arms' length and agreed to resolve the Reinstatement Motion.<sup>20</sup>

20. Subsequently, the Applicants and the Representatives entered into a formal agreement setting out the terms of the Settlement. As noted above, the principal terms of the Settlement include, among others, (a) the Applicants making the Genstar Settlement Payments; (b) the Genstar Beneficiaries retaining the Unsecured Claim; and (c) the parties seeking a Settlement Approval Order that includes the Releases.<sup>21</sup>

**E. The Applicants provided notice of the Settlement to the Genstar Beneficiaries in accordance with Notice Procedure Order**

21. On May 14, 2019, the Court granted the Notice Procedure Order approving the form of notice and a notice plan for giving notice of the settlement approval hearing to the Genstar Beneficiaries. All steps required by Notice Procedure Order have been completed:<sup>22</sup>

(a) A Notice Package (as defined in the Notice Procedure Order) was sent to each Genstar Beneficiary by regular, first class U.S. mail on May 15, 2019 by Kurtzman Carson Consultants LLC, the noticing agent for the Chapter 15 recognition proceedings.

(b) The Notice Package was posted to the Monitor's website for these proceedings on May 14, 2019 and the website for the Chapter 15 proceedings on May 15, 2019.

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<sup>20</sup> Thauvette Affidavit at para. 15, Motion Record at Tab 2.

<sup>21</sup> Thauvette Affidavit at para. 16, Motion Record at Tab 2.

<sup>22</sup> Thauvette Affidavit at paras. 22 – 23, Motion Record at Tab 2.

22. The Notice Package informed the Genstar Beneficiaries that they would be bound by the Settlement Approval Order even if they opted out. It also included an objection form and an opt-out form and explained the deadline and procedure for submitting both documents. As of the date hereof, no objection or opt-out forms have been received.<sup>23</sup>

**F. The Distribution Formula developed by Representative Counsel for allocating the Notice Amount**

23. The Settlement contemplates that the Notice Amount will be distributed using a formula determined by Representative Counsel and the Representatives, who have concluded that the Notice Amount should be allocated in proportion to each beneficiary's projected future Payments, with a minimum payment of USD \$5,000 (the "**Distribution Formula**").<sup>24</sup> The Distribution Formula was developed after consideration of several allocation scenarios, and with input from the Committee. Based on this review, Representative Counsel and the Representatives believe that the Distribution Formula is a fair and reasonable methodology for distributing the Notice Amount.<sup>25</sup>

24. The Applicants provided projections of future Payments to Representative Counsel for the purposes of developing and applying the Distribution Formula. These projections were business records maintained in the usual course of the Applicants' business, for the purposes of quantifying the ongoing liabilities under the Genstar Plans. They were calculated using appropriate individual benefit formulas reflecting entitlements under the applicable plan

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<sup>23</sup> Thauvette Affidavit at paras. 24 – 25, Motion Record at Tab 2.

<sup>24</sup> Affidavit of Vivian Brennan-Dolezar sworn June 13, 2019 (the "**Dolezar Affidavit**") at para. 9, Motion Record at Tab 3.

<sup>25</sup> Dolezar Affidavit at p. 4 and para. 14, Motion Record at Tab 3.

documents and updated over time, as needed, with mortality assumptions provided by the Applicants' professional actuaries.<sup>26</sup>

### **PART III - ISSUES & SUBMISSIONS**

25. The sole issue on this motion is whether this Court should grant the Settlement Approval Order.

26. The Applicants, with the support of the Representatives, submit that the requested Order should be granted for the reasons set out below.

#### **A. This Court has jurisdiction to grant the Settlement Approval Order**

27. CCAA courts have the jurisdiction to approve agreements by a debtor company, including settlements.<sup>27</sup> This jurisdiction derives from section 11 of the Act, which provides the Court with broad powers to make any order that it considers appropriate, and section 11.02(2), which provides specific authority to vary a stay of proceedings.<sup>28</sup>

28. As noted, the Settlement Approval Order binds all Genstar Beneficiaries. This Court has clear jurisdiction to grant such an Order. More specifically, this Court has previously confirmed that court-appointed representatives can enter into settlements that bind all represented parties, and has granted orders similar to the Settlement Approval Order in prior CCAA proceedings.<sup>29</sup>

29. The Genstar Beneficiaries are represented by the Representatives and Representative Counsel pursuant to the Representation Order, which provides that the Representatives can, on

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<sup>26</sup> Thauvette Affidavit at paras. 26 – 27, Motion Record at Tab 2.

<sup>27</sup> *Robertson* at para. 22, BOA at Tab 24.

<sup>28</sup> *Re US Steel Canada Inc*, 2016 ONSC 7899 at para. 39, BOA at Tab 21.

<sup>29</sup> *Nortel (Settlement Agreement)* at paras. 59 – 60, BOA at Tab 13; *Grace* at paras. 22 – 23 and 32 – 33, BOA at Tab 6.

the advice of counsel, reach any settlement on behalf of the Genstar Beneficiaries and can compromise any rights, entitlements or claims of the Genstar Beneficiaries, subject to court approval.<sup>30</sup> The Settlement Approval Order is a product of this very form of settlement compromise authorized by the Representation Order.

30. Moreover, this Court has approved settlements negotiated by representative counsel that binds opt-outs. In *Sino-Forest*, Morawetz J. approved a settlement that included a release of all securities claims against Ernst & Young LLP related to the collapse of Sino-Forest,<sup>31</sup> which included the claims of any opt-outs. Significantly, Morawetz J. approved the settlement even though six parties who had opted out of representation in the relevant class action claim objected to the settlement, and argued that the settlement improperly released all claims against Ernst & Young without giving them an opportunity to opt out.<sup>32</sup> He found that the objectors' argument failed because "it is not possible to ignore the CCAA proceedings."<sup>33</sup> The claims at issue arose in the context of an ongoing CCAA process and were therefore necessarily subject to compromise. It followed that the claims could also "be the subject of a settlement and, if settled, the claims of all creditors in the class can also be settled."<sup>34</sup>

31. The Genstar Beneficiaries' entitlement to the Payments are claims subject to the CCAA. Therefore, this Court has the jurisdiction to approve the Settlement that compromises the claims of all Genstar Beneficiaries, including any objectors or opt-outs.

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<sup>30</sup> Representation Order at para. 4, Motion Record at Tab 3-B.

<sup>31</sup> *Re Sino-Forest Corporation* (March 20, 2013), Ont Sup Ct, CV-12-9667-00CL (Ernst & Young Settlement Approval Order) ("***Sino-Forest Order***") at para. 9, BOA at Tab 15.

<sup>32</sup> *Sino-Forest* at para 2, BOA at Tab 3.

<sup>33</sup> *Sino-Forest* at para. 40, BOA at Tab 3.

<sup>34</sup> *Sino-Forest* at para. 41, BOA at Tab 3.

**B. This Court Should Approve and Give Effect to the Settlement**

32. The test for approving a settlement under the CCAA is oriented around three considerations:<sup>35</sup>

- (a) Does the settlement provide substantial benefit to the debtor and its stakeholders?
- (b) Is the settlement fair and reasonable?
- (c) Is the settlement consistent with the purpose and spirit of the CCAA?

**(a) The Settlement benefits the Applicants and their stakeholders by avoiding protracted litigation that would distract from this restructuring**

33. The Applicants concluded that the Settlement was in their best interests and the best interests of their stakeholders because it avoided potentially protracted, costly, and distracting litigation.<sup>36</sup>

34. The Reinstatement Motion raised many complex issues, including a novel constitutional argument and a constructive trust argument that hinged on decades-old facts. Irrespective of the merits, litigating these issues to a conclusion would have consumed significant time and resources. It would also have distracted the Applicants' management while the Applicants are engaged in a complex restructuring, undermining the ability of these CCAA proceedings to facilitate a global resolution of the Tobacco Claims.<sup>37</sup>

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<sup>35</sup> *Robertson* at para. 22, BOA at Tab 24; *Sino-Forest* at para. 49, BOA at Tab 3; *Re 1511419 Ontario Inc*, 2015 ONSC 7538 (“*Cash Store*”) at para. 14, BOA at Tab 4.

<sup>36</sup> Thauvette Affidavit at para. 20, Motion Record at Tab 2.

<sup>37</sup> Thauvette Affidavit at paras. 18 – 19, Motion Record at Tab 2.

35. This Court has already affirmed the importance of avoiding distracting parallel proceedings in the context of this CCAA proceeding:

- (a) In its reasons for staying applications seeking leave to appeal to the Supreme Court, this Court said that not staying the leave application would “allow for a significant parallel proceeding to commence” that would “no doubt greatly distract the Applicants and the Quebec Plaintiffs from the important purposes of the CCAA. Enormous resources would be diverted to the litigation. This would cause delay and lessen the chances of achieving a global resolution.”<sup>38</sup>
- (b) In its reasons for dismissing Ontario’s lift stay motion, this Court said that permitting Ontario’s action to proceed would “add an enormous impediment to resolution” by “significantly distract[ing] Ontario and the Applicants from the CCAA proceedings. There is no doubt that the pre-trial and trial processes would be very expensive exercises which would divert significant time and resources away from settlement discussions.”<sup>39</sup>

36. In both cases, this Court concluded that it was in the best interests of the Applicants’ stakeholders to prevent parallel proceedings and to ensure that all parties can focus on this CCAA restructuring. The Settlement serves the same purpose: it avoids protracted costly litigation related to the Genstar Plans and permits the Applicants to focus on achieving a global compromise of the Tobacco Claims, which benefits the Applicants’ stakeholders generally.

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<sup>38</sup> *Re Imperial Tobacco Canada Limited et al*, 2019 ONSC 2222 at para. 33, BOA at Tab 9.

<sup>39</sup> *Re Imperial Tobacco Canada Limited et al*, 2019 ONSC 2611 at paras. 13 and 14, BOA at Tab 10.

**(b) The Settlement is fair and reasonable as it benefits creditors generally and is a fair compromise of the Genstar Beneficiaries' claims**

37. In *Nortel*, Morawetz J. explained what makes a settlement fair and reasonable:<sup>40</sup>

What makes a settlement agreement fair and reasonable is its balancing of the interests of all parties; its equitable treatment of the [parties], including creditors who are not signatories to a settlement agreement; and its benefit to the Applicant and its stakeholders generally.

38. As noted in the previous section, the Settlement benefits the Applicants and its stakeholders generally by avoiding potentially lengthy and protracted litigation. As described in more detail below, the Settlement is also fair and reasonable from the perspectives of the Genstar Beneficiaries for three reasons:

- (a) the Genstar Beneficiaries faced considerable litigation risk if they continued with the Reinstatement Motion and therefore it was reasonable to settle;
- (b) the Settlement is consistent with the treatment of pension claims in prior CCAA proceedings; and
- (c) the Distribution Formula developed by Representative Counsel is an equitable methodology for distributing the Notice Amount.

39. Therefore, the Settlement serves the interests of all relevant parties, and is fair and reasonable.

**(i) The decision to settle was reasonable because Reinstatement Motion faced significant litigation risk**

40. In a letter sent to all Genstar Beneficiaries as part of the Notice Package (the “**Representative Counsel Letter**”), Representative Counsel provided a detailed explanation for

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<sup>40</sup> *Nortel (Settlement Agreement)* at para. 73, BOA at Tab 13.

the Settlement recommendation.<sup>41</sup> The crux of the recommendation was the fact that the Genstar Beneficiaries faced considerable litigation risk, such that it was uncertain if they could obtain more than the three months' notice provided by the terms of the Settlement. Accordingly, Representative Counsel concluded as follows:<sup>42</sup>

... I have no hesitation in recommending this settlement. Your Individual Settlement Share is a proverbial "bird in the hand" early in the proceedings, your rights as unsecured claimants are preserved, your legal fees have been covered and you will continue to have representation available to you during the remainder of the proceedings. I believe that you have been heard and are receiving access to justice and a redress for an unfortunate event.

41. In support of its Reinstatement Motion the Committee advanced two primary legal arguments, but both arguments faced significant hurdles:

- (a) First, the Committee argued that the Payments were secured by a constructive trust. However, as acknowledged by Representative Counsel, this argument faced significant risks because the plan documents clearly stated that the beneficiaries' entitlement were unsecured and not subject to a trust.<sup>43</sup> In addition, this argument rested on establishing facts about events that occurred a long time ago and in respect of which the parties have limited (if any) evidence. Therefore, there was significant doubt that the Committee could discharge its onerous evidentiary burden.
- (b) Second, the Committee argued that staying the Payments infringed section 7 of the *Charter*. This argument also faced significant challenges. The Supreme Court has confirmed on multiple occasions that section 7 does not protect economic

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<sup>41</sup> Dolezar Affidavit at paras. 15 – 16, Motion Record at Tab 3.

<sup>42</sup> Dolezar Affidavit at p. 6, Motion Record at Tab 3.

<sup>43</sup> Dolezar Affidavit at p. 6, Motion Record at Tab 3.



rights,<sup>44</sup> even if the impugned actions result in a complainants' financial resources being depleted and physical or psychological suffering.<sup>45</sup> Significantly, in *Nortel*, Newbould J. applied these principles in the CCAA context and held that section 7 did not protect long-term disability payments – similar in kind to the Payments insofar as they were also post-retirement benefits provided to former employees – which had ceased as a result of Nortel's CCAA filing.<sup>46</sup>

42. As a result, the Payments would likely have been treated as unsecured, pre-filing claims. That classification is consistent with the case law relating to post-retirement claims; as noted by Morawetz J. in *Timminco*, “[t]he law in this area is clear. The courts have repeatedly found that termination and/or retirement benefits are pre-filing unsecured obligations of debtor companies undergoing CCAA proceedings.”<sup>47</sup> As a result, courts have consistently concluded that the broad CCAA stay applies to post-retirement benefits, including supplementary pension benefits like the Payments, and routinely halted such benefits after a debtor company files for CCAA protection.<sup>48</sup>

43. Considering the significant risk of an adverse outcome, it was reasonable for the Representatives to enter into the Settlement rather than proceeding with potentially lengthy and complex litigation with an uncertain outcome.

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<sup>44</sup> *Siemens v Manitoba (Attorney General)*, 2003 SCC 3 at paras. 45 – 46, BOA at Tab 25.

<sup>45</sup> *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para. 86, BOA at Tab 2.

<sup>46</sup> *Re Nortel Networks Corp*, 2017 ONSC 700 at paras. 27 – 30, BOA at Tab 16.

<sup>47</sup> *Re Timminco Ltd*, 2012 ONSC 4471 at para. 41, BOA at Tab 20.

<sup>48</sup> *Re Indalex*, 2009 CarswellOnt 4465 (Sup Ct), BOA at Tab 11; *Re Nortel Networks Corp*, 2009 CarswellOnt 3583 (Sup Ct), aff'd on appeal, 2009 ONCA 833, BOA at Tab 12; *Re US Steel Canada Inc.*, (October 9, 2015), Ont Sup Ct, CV-14-10695-00CL (Cash Conservation and Business Preservation Order) at para. 14, BOA at Tab 22.

**(ii) CCAA courts have approved compromises for pension payments like the Settlement**

44. The central element of the Settlement is that the Applicants will pay an aggregated amount equal to three months of Payments, effectively as a proxy for reasonable notice of termination, after which the Payments will be stayed going forward. This Court has granted orders approving similar outcomes in prior CCAA proceedings.

45. In the *Nortel* proceeding, for example, this Court approved a settlement relating to certain Nortel-sponsored pension plans and a health and welfare trust in which the debtors agreed to continue making payments to the plans and trust for a limited amount of time, following which the payments would stop and all claims related to the pension plans and trust would rank as unsecured claim.<sup>49</sup> More recently, in the *Sears* proceeding, this Court granted an order providing that the debtors would continue making post-retirement payments for a few months, following which such payments would be stayed.<sup>50</sup>

**(iii) The Distribution Formula is a fair and reasonable methodology for allocating the Notice Amount**

46. As noted above, the Distribution Formula allocates the Notice Amount in proportion to the projected future Payments while providing a \$5,000 minimum payment in recognition of the baseline impact the cessation of the Payments had on every beneficiary.<sup>51</sup>

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<sup>49</sup> *Re Nortel Networks Corporation et al.* (March 31, 2010), Ont Sup Ct, CV-09-7950 (Settlement Approval Order) (“*Nortel Amendment Settlement Approval Order*”) at paras. 4 – 5 and 9 – 11, BOA at Tab 15. Initially, the Court found that the proposed settlement was fair and reasonable except for one clause, as a result of which it dismissed the motion seeking approval of the settlement: *Nortel (Settlement Agreement)*, BOA at Tab 13. However, a few days later, the parties sought approval for an amended settlement agreement without the offending clause and the court granted the motion: *Re Nortel Networks Corp*, 2010 ONSC 1977, BOA at Tab 14.

<sup>50</sup> *Re Sears Canada Inc et al* (July 13, 2017), Ont Sup Ct, CV-17-11846-00CL (Suspension of Special Payments, Supplemental Plan Payments and PRB Plan Payments, Approval of Term Sheet and Stay Extension Order), at paras. 7 and 9 – 10, BOA at Tab 18.

<sup>51</sup> Dolezar Affidavit at pp. 4 -5, Motion Record at Tab 3.

47. This formula was developed by Representative Counsel, in consultation with the Representatives and the Committee, after a considered review of several allocation scenarios. The Representatives and the Committee support the formula.

48. The Notice Package sent to the Genstar Beneficiaries explained the Distribution Formula and informed the recipient Genstar Beneficiary what amount they would be receiving if the Settlement Approval Order is granted. None of the Genstar Beneficiaries have objected to the Distribution Formula.<sup>52</sup> Accordingly, in all of the circumstances, the evidence confirms that the Distribution Formula is a reasonable methodology for allocating the Notice Amount and treats the Genstar Beneficiaries equitably.

**(c) The Settlement is consistent with the spirit and purpose of the CCAA**

49. As set out above, the Settlement benefits the Applicants and its stakeholders as it removes a distraction that would prevent the Applicants focussing on this CCAA restructuring, and is fair and reasonable to the Genstar Beneficiaries. It represents a reasonable compromise in all of the circumstances, which is consistent with fundamental principles underlying the CCAA.

50. As noted by Fitzpatrick J. in *Great Basin*, “[s]ettlement agreements between the parties in these types of proceedings [*i.e.*, CCAA proceedings] are very much encouraged where resolutions take place in the boardroom, as opposed to the courtroom. There is every reason to encourage such settlements, with approval and implementation subject to appropriate judicial oversight.”<sup>53</sup>

51. The Settlement is entirely consistent with animating principles of the CCAA insofar as it resolves the Reinstatement Motion consensually – rather than through protracted litigation – and

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<sup>52</sup> Thauvette Affidavit at para. 25, Motion Record at Tab 2; Dolezar Affidavit at p. 4, Motion Record at Tab 3.

<sup>53</sup> *Re Great Basin Gold Ltd*, 2012 BCSC 1773 at para. 15, BOA at Tab 7.

achieves a principled outcome that benefits all affected parties (*i.e.*, the Applicants, its stakeholders and the Genstar Beneficiaries).

**C. The Imperial-Affiliate Release and Representative Release should be granted as they are reasonably connected with the Settlement**

52. In addition to releasing the Applicants and their Monitor,<sup>54</sup> the Settlement Approval Order contains two third-party releases: (a) a release in favour of corporate and other affiliates of the Applicants from any claims related to the Genstar Plans and the Payments (the “**Imperial-Affiliate Release**”); and (b) a release in favour of the Representatives, Representative Counsel and the Committee in respect of the Settlement (the “**Representative Release**”).

53. CCAA courts routinely approve settlements containing similar third-party releases.<sup>55</sup> When granting third-party releases in a settlement, courts apply the test articulated by the Court of Appeal in *ATB Financial*:<sup>56</sup>

The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan.

54. Both the Imperial-Affiliate Release and the Representative Release satisfy this test.

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<sup>54</sup> The Court has routinely granted Monitors the protections of a release: see, *e.g.*, *Re Walter Energy Canada Holdings, Inc.*, 2018 BCSC 1135 at para. 33(a), BOA at Tab 23; *Re Cline Mining Corporation*, 2015 ONSC 622 at paras 12 and 28, BOA at Tab 5.

<sup>55</sup> *Re Nortel Networks Corporation*, 2018 ONSC 6257 at para. 30, BOA at Tab 17; *Sino-Forest*, BOA at Tab 3; *Cash Store* at para. 20, BOA at Tab 4.

<sup>56</sup> *ATB Financial v Metcalf and Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at para. 70, BOA at Tab 1.

**(a) The Imperial-Affiliate Release is connected to the Settlement, will benefit creditors generally and is consistent with public policy**

55. In *Nortel*, Morawetz J. approved a third-party release akin to the Imperial-Affiliate Release on the basis that the releases were necessary and connected to a resolution of claims against the debtor, would benefit creditors generally, and were not overly broad or offensive to public policy.<sup>57</sup> The same principles apply in the context of this case.

56. First, the Imperial-Affiliate Release is reasonably connected to the Settlement because it releases claims connected with the Payments and the Genstar Plans. If such claims were made, they would necessarily require the Applicants' involvement to litigate, may result in contribution and indemnity claims against the Applicants, and would undermine the finality of the Settlement. By extension, these distractions would inevitably interfere with the over-arching goal of the CCAA proceedings.

57. Second, like the third-party release in *Nortel*,<sup>58</sup> the Imperial-Affiliate Release benefits creditors generally because avoids the costs and delay associated with litigation that may involve or result in claims against the Applicants.

58. Third, and again like the releases in *Nortel*,<sup>59</sup> the Imperial-Affiliate Release is not overly broad or offensive to public policy because the claims being released specifically relate to the subject matter of the Settlement, and the parties granting the release receive consideration in the form of both direct compensation and the preservation of their residual Unsecured Claim.

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<sup>57</sup> *Nortel (Settlement Agreement)* at paras. 79 – 82, BOA at Tab 13.

<sup>58</sup> *Nortel (Settlement Agreement)* at para. 81, BOA at Tab 13.

<sup>59</sup> *Nortel (Settlement Agreement)* at para. 82, BOA at Tab 13.

**(b) The Representative Release reflects the contributions made by Representative Counsel, the Representatives and the Committee**

59. The Representative Release is reasonably connected with the Settlement because it bars any actions against the Representatives, Representative Counsel and the Committee in respect thereof. The Representative Release reflects these parties' contribution to achieving the Settlement and is reasonable in the circumstances.

60. Courts, including the Court of Appeal in *ATB Financial*, has previously acknowledged that a party's contribution to the resolution of a claim provides a reasonable basis for granting a corresponding release.<sup>60</sup> In *Walter*, Justice Fitzpatrick noted that courts have "routinely sanctioned releases in favour of third parties such as the monitor, legal counsel, financial advisors, and other parties retained to advise the petitioner(s) or the Court throughout the conduct of a CCAA proceeding and who, by doing so, contribute to the success of a CCAA proceeding."<sup>61</sup> Representative Counsel, the Representatives and the Committee played an analogous role and contributed to the successful resolution of the Reinstatement Motion. Therefore, the Representative Release should be granted.

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<sup>60</sup> *ATB Financial* at para. 72, BOA at Tab 1.


<sup>61</sup> *Walter* at para. 33(a), BOA at Tab 23.

**PART IV - NATURE OF THE ORDER SOUGHT**

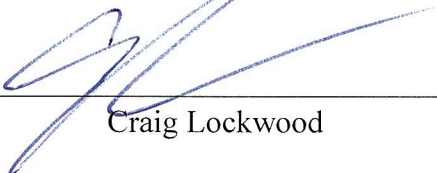
61. For all of the reasons set out above, the Applicants request that the Settlement Approval Order should be granted substantially in the form included at Tab 4 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

  
\_\_\_\_\_  
Deborah Glendinning

  
\_\_\_\_\_  
Marc Wasserman

  
\_\_\_\_\_  
John A. MacDonald

  
\_\_\_\_\_  
Craig Lockwood

# **TAB A**



## Schedule "A"

### LIST OF AUTHORITIES

1. *ATB Financial v Metcalf and Mansfield Alternative Investments II Corp*, 2008 ONCA 587
2. *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44
3. *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation*, 2013 ONSC 1078
4. *Re 1511419 Ontario Inc*, 2015 ONSC 7538
5. *Re Cline Mining Corporation*, 2015 ONSC 622
6. *Re Grace Canada Inc*, 2008 CarswellOnt 6284 (Supt Ct)
7. *Re Great Basin Gold Ltd*, 2012 BCSC 1773
8. *Re Imperial Tobacco Canada Limited et al*, 2019 ONSC 1684
9. *Re Imperial Tobacco Canada Limited et al*, 2019 ONSC 2222
10. *Re Imperial Tobacco Canada Limited et al*, 2019 ONSC 2611
11. *Re Indalex*, 2009 CarswellOnt 4465 (Sup Ct)
12. *Re Nortel Networks Corp*, 2009 CarswellOnt 3583 (Sup Ct)
13. *Re Nortel Networks Corporation*, 2010 ONSC 1708
14. *Re Nortel Networks Corp*, 2010 ONSC 1977
15. *Re Nortel Networks Corporation et al* (March 31, 2010), Ont Sup Ct, CV-09-7950 (Settlement Approval Order)
16. *Re Nortel Networks Corp*, 2017 ONSC 700
17. *Re Nortel Networks Corporation*, 2018 ONSC 6257
18. *Re Sears Canada Inc et al* (July 13, 2017), Ont Sup Ct, CV-17-11846-00CL (Suspension of Special Payments, Supplemental Plan Payments and PRB Plan Payments, Approval of Term Sheet and Stay Extension Order)
19. *Re Sino-Forest Corporation* (March 20, 2013), Ont Sup Ct, CV-12-9667-00CL (Ernst & Young Settlement Approval Order)
20. *Re Timminco Ltd*, 2012 ONSC 4471
21. *Re US Steel Canada Inc*, 2016 ONSC 7899
22. *Re US Steel Canada Inc* (October 9, 2015), Ont Sup Ct, CV-14-10695-00CL (Cash Conservation and Business Preservation Order)
23. *Re Walter Energy Canada Holdings, Inc*, 2018 BCSC 1135
24. *Robertson v ProQuest Information and Learning Company*, 2011 ONSC 1647
25. *Siemens v Manitoba (Attorney General)*, 2003 SCC 3

**TAB B**

## Schedule “B”

### *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.

[...]

#### **Stays, etc. — initial application**

**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

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

#### **Stays, etc. — other than initial application**

(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.

**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  
TORONTO

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Matter No: 1144377