

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

MOTION RECORD OF THE FORMER GENSTAR
U.S. RETIREE GROUP COMMITTEE

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

April 17, 2019

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**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
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**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

TABLE OF CONTENTS

<u>TAB</u>	<u>DOCUMENT</u>	<u>PAGE</u>
1.	Notice of Motion, dated April 17, 2019	1
2.	Notice of Constitutional Question, dated April 9, 2019	*
3.	Affidavit of Robert M. Brown, sworn April 15, 2015	*
	A. Exhibit A – March 7, 1986 Letters	*
	B. Exhibit B – March 27, 1986 Beneficiary Designation	*
	C. Exhibit C – March 28, 1986 Deferred Income Plan Executive Agreement	*
	D. Exhibit D – May 8, 1986 Letter and GCDIP Plan Document	*
	E. Exhibit E – Plan Summary	*
	F. Exhibit F – Questions and Answers	*
	G. Exhibit G – 1985 and 1986 Plan Year Benefit Statements	*
	H. Exhibit H – December 19, 1986 Vesting Letter	*
	I. Exhibit I – Various Letters, 1987-1994	*
	J. Exhibit J – August 1, 2012 Letter and Forms	*
4.	Affidavit of George A. Foster, sworn April 15, 2019	*
	A. Exhibit A – September 20, 1985 Letter	*

- B. Exhibit B – Plan Summary *
- C. Exhibit C – Plan Text *
- D. Exhibit D – December 19, 1986 Vesting Letter *
- E. Exhibit E – March 28, 2019 Objection (Docket 29) *
- F. Exhibit F – March 29, 2019 Objection (Docket 31) *
- G. Exhibit G – March 27, 2019 Notice to Participants in Non-Qualified Plans *
- 5. Affidavit of Vivian Brennan-Dolezar, sworn April 15, 2019 *
- A. Exhibit A – March 23, 1987 Employment Contract *
- B. Exhibit B – March 26, 1987 Deferred Income Plan Executive Agreement *
- C. Exhibit C – March 27, 1987 Actuarial Equivalent Options Agreement *
- D. Exhibit D – March 27, 1987 Vesting Letter *
- E. Exhibit E – July 13, 1988 SPEN Letter *
- F. Exhibit F – June 6, 1989 Memorandum *
- G. Exhibit G – June 26, 1989 Memorandum *
- H. Exhibit H – December 19 and 21, 2003 Internal Audit Control Forms *
- I. Exhibit I – December 15, 2003 Notice of Plan Merger *
- J. Exhibit J – March 27, 2019 Objection (Docket 26) *
- K. Exhibit K – April 1, 2019 Objection (Docket 32) *
- 6. Affidavit of Richard Vivian Brennan-Dolezar, sworn April 15, 2019 *
- A. Exhibit A – April 11, 1986 Memorandum *
- B. Exhibit B – April 16, 1986 Memorandum and Employee Severance Policy *
- C. Exhibit C – June 17, 1986 Program for Corporate Personnel *
- D. Exhibit D – March 14, 2019 Initial U.S. Petition Documents *
- E. Exhibit E – April 12, 2019 Monitor Omnibus Reply *
- F. Exhibit F – April 12, 2019 Bishop Supplemental Declaration *
- G. Exhibit G – Kaplan Law website excerpts *

TAB 1

NOTICE OF MOTION

(APRIL 17, 2019)

**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

NOTICE OF MOTION

The Former Genstar U.S. Retiree Group Committee and the proposed representatives, Robert M. Brown and George A. Foster, will make a motion to Justice T. McEwen or to such other judge presiding over the Commercial List on Thursday, April 25, 2019 at 10:00 a.m., or as soon thereafter as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. an order, if necessary, abridging the time for service and filing of this Notice of Motion and Motion Record, dispensing with service on any person other than those served, and declaring that the motion is properly returnable on April 25, 2019.
2. an order prohibiting the Applicants from ceasing funding or causing the cessation, suspension or discontinuance of payments under the Genstar deferred income plan, supplemental executive retirement plan and supplementary pension plan (the "**Genstar U.S. Plans**"), or disclaiming or resiling from them, and directing the Applicants to reinstate all payments under these plans and continue making such payments during the pendency of these proceedings or until further order of this Court.

3. an order staying paragraph 7(a) of order of Justice McEwan dated March 12, 2019, as amended on April 5, 2019 (the “**Initial Order**”) as it applies to the Genstar U.S Plans, or varying the Initial Order by adding the following underlined language to that paragraph:

7. THIS COURT ORDERS that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to, on or after the date of this Order:

- (a) all outstanding and future wages, salaries, commissions, compensation, vacation pay, bonuses, incentive and share compensation plan payments, employee and retiree pension and other benefits and related contributions and payments (including, without limitation, expenses related to the Applicants’ employee and retiree medical, dental, disability, life insurance and similar benefit plans or arrangements, employee assistance programs and contributions to or any payments in respect of the Applicants’ other retirement programs, excluding expenses and benefits payable under the Genstar deferred income plan, supplemental executive retirement plan and supplementary pension plan), reimbursement expenses (including, without limitation, amounts charged to corporate credit cards), termination pay, salary continuance and severance pay payable to employees, independent contractors and other personnel, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements or with Monitor approval;

4. an order that the agreements with the Affected Members related to the Genstar U.S Plans are not to be disclaimed or resiliated by the Applicants.

5. an order appointing Robert M. Brown and George A. Foster (the “**Proposed Representatives**”) as representatives of all beneficiaries entitled to pensions or benefits under the Genstar U.S. Plans or any person claiming an interest under or on behalf of such persons and their surviving spouses (excluding individuals who opt-out of such representation, if any) (the “**Affected Members**”), for the purpose of representing the Affected Members in these proceedings including with respect to facilitating the production of Information (defined below) that is necessary for Affected Members to be informed about their rights, assess their claims and make reasonable decisions about how to proceed in this proceeding, and were the event to arise, proving, settling or compromising their rights and claims, in which case the Affected Members shall be bound by the actions of the Proposed Representatives and Representative Counsel (as defined below) in these proceedings.

6. an order appointing Ari Kaplan of Kaplan Law (the “**Proposed Representative Counsel**”) as legal counsel to the Proposed Representatives in their capacity as representatives for the Affected Members, with the mandate to provide assistance to the Affected Members so that they are able to participate in the proceedings and the restructuring process in a more efficient manner, including assisting the Affected Members in the assessment and evaluation of their entitlements and claims in a cost-effective and timely manner.

7. an order that notice of the appointment of the Proposed Representatives and Proposed Representative Counsel be provided to the Affected Members by the Monitor by way of first class mailing and under such other terms and conditions as to be agreed upon by the Proposed Representatives, the Applicant and the Monitor and approved by the Court, such terms to include that any Affected Member who does not wish to be represented by the Proposed Representatives and Proposed Representative Counsel and thereby bound by their subsequent actions and decisions be entitled to notify the Monitor that he or she wishes to opt out of representation by the Proposed Representatives or Proposed Representative Counsel and thereafter he or she shall not be represented by the Proposed Representatives or Proposed Representative Counsel in these proceedings and may represent himself or herself, personally or through counsel that he or she may retain at his or her own expense and as an independent, individual party, to the extent that they wish to participate in these proceedings and the Proposed Representatives and Proposed Representative Counsel shall have no obligation to represent them.

8. an order directing the Applicants to provide to the Proposed Representatives and Proposed Representative Counsel, without charge, the following information, documents and data (the “**Information**”):

- (a) the names, last known address, telephone number and email addresses (if any) of all the Affected Members as well as particulars regarding their entitlements, subject to a confidentiality agreement as applicable and to only be used for the purposes of these proceedings, and that, in so doing, the Applicants are not required to obtain express consent from such Affected Members authorizing disclosure of the Information to the Proposed Representatives and Proposed Representative Counsel and, further, in accordance with section 7(3) of the *Personal Information Protection*

and Electronic Documents Act (Canada) or, if applicable, section 18(9) of *An Act respecting the Protection of Personal Information in the Private Sector*, CQLR c P-39.1, such an order will be sufficient to authorize the disclosure of the Information without the knowledge or consent of the Affected Members; and

- (b) such other documents and data as may be relevant to matters relating to the issues in these proceedings, including all relevant plan texts, agreements, particulars of insurance policies, communications, booklets, and other applicable documents and particulars of the Applicants' financial obligations respecting the plans including with respect to funding or securing the obligations and any other relevant documents and data pertaining to the plans and the Applicants' other pension plans and retirement arrangements, including up to date financial information regarding the funding and investments of any of these arrangements.

9. an order reserving the Proposed Representatives' rights to apply to this Honourable Court for advice and directions in respect of any matter relating to the discharge or variation of their respective powers and duties, or for any other relief, including if necessary to seek further variation of the Initial Order, as amended from time to time, an order for funding the activities and professional fees of the Proposed Representatives and Proposed Representative Counsel in this proceeding, or for declarations and remedies under the *Canadian Charter of Rights and Freedoms*; and

10. such further and other relief as counsel to the Committee and Proposed Representatives may advise and this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

A. Overview

11. The Former Genstar U.S. Retiree Group Committee (the "**Committee**") together with the Proposed Representatives propose to represent the interests of 59 former officers, executives and management employees of Genstar Corporation or related entities, and their survivors, who are beneficiaries entitled to benefits under the three Genstar U.S. Plans (the "**Affected Members**"), which are supplementary retirement plans and deferred compensation plans, including:

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

12. Historically, various senior employees, executives and other management employees of Genstar and related entities in the United States earned benefits including supplementary pensions and deferred compensation benefits under the Genstar U.S. Plans. The plans were expected to be revenue- and cost-neutral to the employer, who secured the benefits with insurance policies on the lives of the participants. In addition, Affected Members of the GCDIP contributed their own funds and deferred their own income to secure these benefits.

13. Pursuant to an agreement dated April 2, 1986 and as a result of the historical acquisition and restructuring of various companies and businesses in the U.S., ITCAN became the guarantor of benefits payable under the Genstar U.S. Plans, all of which became vested (the “**Guarantee**”). Genstar Corporation is currently a wholly-owned Canadian subsidiary of ITCAN and a dormant Canadian company. ITCAN considers the Genstar U.S. Plans to be “legacy obligations”.

14. Until last month, ITCAN has guaranteed the benefits to Affected Members by making monthly payments to its U.S. subsidiary, Imasco Holdings Group, Inc. (“**IHGI**”). IHGI is a largely dormant Delaware corporation that holds certain of ITCAN’s legacy obligations. ITCAN has made capital contributions to IHGI totaling approximately USD \$7.0 million per year and then writes off these amounts. Of this amount, IHGI used approximately \$6 million per year to make payments to Affected Members under the Genstar U.S. Plans.

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

B. CCAA Proceedings

16. On March 12, 2019, the Applicants filed a Notice of Application under the CCAA (the “**CCAA Proceedings**”) and obtained the Initial Order. Schedule “B” to the Initial Order lists all “ITCAN Subsidiaries” (defined at para. 4(f) of the Initial Order), which includes Genstar and IHGI.

17. Para. 7(a) of the Initial Order provides that the Applicants are “entitled but not required to pay the following expenses whether incurred prior to, on or after the date of [the Initial Order]: all outstanding and future ... retiree pension and other benefits and related contributions and payments”.

18. Para. 14 of the Initial Order provides that “except as specifically permitted herein, the Applicants are hereby directed, until further Order of this Court: ... to make no payments ... on account of amounts owing by the Applicants or claims to which they are subject to any of their creditors”.

19. Para. 18 of the Initial Order provides that “until and including April 11, 2019, or such later date as this Court may order (the “**Stay Period**”), no proceeding or enforcement process in any court or tribunal ... shall be commenced, continued or take place against or in respect of the Applicants, the ITCAN Subsidiaries, the Monitor, any of their respective employees and representatives acting in that capacity, ... except with the written consent of the Applicants and the Monitor, or with leave of this Court”.

20. Para. 21 of the Initial Order provides that “during the Stay Period, all rights and remedies of any individual ... against or in respect of the Applicants, the ITCAN Subsidiaries or the Monitor ... are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court”.

21. Para. 51 of the Initial Order requires the Monitor to provide for notice of the CCAA Proceedings by way of Canadian newspaper publications, and for the Monitor to send “a notice ... to every known creditor who has a claim (contingent, disputed or otherwise) against the Applicants of more than \$5,000, except ... in the case of beneficiaries of the ... pension plans, in which case the Monitor shall only send a notice to the trustees of each of the ... pension plans”.

22. Para. 51 of the Initial Order also provides that the Monitor shall "...prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner ... not includ[ing] the names, addresses or estimated amounts of the claims of those creditors who are individuals or any personal information in respect of an individual".

23. Para. 63 of the Initial Order provides that "any interested party ... may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order".

24. On April 5, 2019, the Court made orders: (a) amending and restating the Initial Order; and (b) extending the Stay Period as defined in paragraph 18 of the Initial Order "from April 11, 2019, until and including June 28, 2019". The Court also made an order endorsed on the record that "the extension of the Stay Period is without prejudice to the rights of the Former Genstar U.S. Retiree Group Committee to bring and be heard for relief concerning the Genstar U.S. Plans on April 25 with all rights reserved and without regard to the passage of time until then".

C. U.S Chapter 15 Proceedings

25. On March 13, 2019, the Monitor on behalf of ITCAN as debtor filed a petition for relief under Chapter 15 of the U.S. Bankruptcy Code (the "**Chapter 15 Proceeding**") in the United States Bankruptcy Court in the Southern District of New York (the "**U.S. Court**").

26. On March 14, the Monitor on behalf of ITCAN filed an interim motion in the U.S. Court (Docket 10) (the "**Seal Motion**") and obtained an Order Granting Interim Motion to Seal (Docket 15) (the "**Seal Order**") sealing the names and contact information of all 59 Affected Members, the U.S. Court "having found and determined that the relief sought in the Motion is in the best interests of the Monitor in its capacity as foreign representative for the Debtor and all parties in interest and that the legal and factual bases set forth in the Motion establish just cause for the relief granted". In support of the Seal Order, the Monitor represented as follows:

2. The Debtor is the direct or indirect corporate parent of several subsidiaries in the United States. These include Imasco Holdings Group, Inc. ("Imasco"), Imasco Holdings, Inc., ITL (USA) Limited, and Genstar Pacific Corporation (collectively, the "U.S. Subsidiaries"). The U.S.

Subsidiaries are dormant but administer various legacy liabilities related to their former business operations, including worker's compensation claims and pension and retirement benefit plan liabilities. Pursuant to an agreement dated April 2, 1986, the Debtor guaranteed certain of these pension and retirement obligations and over the years, the Debtor has provided funding for the U.S. Subsidiaries on a monthly basis in the form of a capital contribution to Imasco for these obligations. While the Debtor intends to continue to fund Imasco so that the U.S. Subsidiaries can make ordinary course payments in respect of many of the pension and retirement plan obligations, it will no longer be funding several of the executive-level retirement and pension plans. In light of the Debtor guarantee, out of an abundance of caution, the individual members of these plans are included in the parties against whom the Debtor is seeking provisional relief.

3. ... in the instant case, the Monitor is constrained by the Canadian Order for Relief and federal and provincial statutes in Canada from publicly disclosing the names and addresses of creditors who are individuals or any personal information in respect of such individuals. Specifically the Canadian Order for Relief provides that, with respect to any creditor list, the Monitor "shall not include the names, addresses or estimated amounts of the claims of those creditors who are individuals or any personal information in respect of an individual." See Canadian Order for Relief ¶ 51. ... Given these prohibitions, the Monitor seeks limited relief and authority to file and maintain only the Individual Provisional Relief List under seal. Notably, other parties against whom the Debtor is seeking provisional relief are included on the *List Pursuant To Bankruptcy Rule 1007(a)(4)* [Dkt. No. 2, Ex. C].

27. On March 25, the Monitor obtained an Order Granting Preliminary Injunction from the U.S. Court in the Chapter 15 Proceeding in which the court found that ITCAN is likely the "subject of a pending foreign main proceeding" in Ontario, established the Monitor as the "foreign representative" of ITCAN and stayed proceedings in the U.S. "until such a time as an order adjudicating the Monitor's request for recognition of the Canadian Proceeding is entered, or as otherwise ordered by this Court" (the "**Recognition Hearing**").

28. On April 15, 2019, the Recognition Hearing for the requested relief was scheduled to take place in the U.S. Court. This hearing was rescheduled for April 17, 2019.

D. ITCAN Ceases Funding Payments for Genstar U.S. Plans without Proper Notice

29. On April 1, 2019, with no prior notice to the Affected Members nor their counsel except as described below, ITCAN ceased funding Affected Members' pensions under the Genstar U.S. Plans and effectively caused IHGI to fail to make the required payments under those plans. This

action caused confusion and distress to Affected Members, many of whom noticed that their Genstar U.S. Plan benefits had not been deposited into their bank accounts that day, as was the case on the first day of every prior month, for some people, for up to 30 years.

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

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

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

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

33. In the days and weeks following receipt of the Initial U.S. Court Documents, multiple Affected Members attempted, unsuccessfully, to obtain clear and credible information from the Monitor or ITCAN's U.S. subsidiaries concerning whether they will receive their Genstar U.S. Plan payments on April 1.

34. On March 29, the Committee retained Canadian counsel. The Committee's counsel immediately sent a letter to ITCAN's counsel and the Monitor's counsel objecting to the "proposal" to stay payments under the Genstar U.S. Plans. Neither ITCAN's counsel nor the

Monitor's counsel advised the Committee's counsel on March 29 nor over the weekend that, in fact, ITCAN had already stopped the Affected Members' benefits.

35. On April 1, the Committee served a Notice of Appearance and a Notice of Objection to the service list and applied to the Monitor to join the service list. Counsel also requested copies of all court materials served prior to then that were not yet available on the Monitor's website.

36. Between April 1 and 5, various Affected Members received in the regular mail a "Notice to Participants in Non-Qualified Deferred Compensation Plans", from Bracewell LLP, dated March 27 (the "**Cessation Notice**"), stating:

As part of its restructuring efforts, ITCAN has ceased funding the following legacy qualified deferred compensation plans (the "Affected Plans") as of the Filing Date:

- (i) the "deferred income plan" for individuals who are either former senior management employees of Genstar or their beneficiaries ("GCDIP"),
- (ii) the "supplemental executive retirement Plan" for individuals who were either former Genstar employees or their beneficiaries ("SERP"), and
- (iii) the "supplementary pension plan" for individuals who were either former Genstar employees or their beneficiaries ("SPEN").

ITCAN has represented that its decision to cease funding of the Affected Plans was based largely on the fact that the liabilities under these plans constitute unsecured claims. As payment of these claims is not necessary to ITCAN's ongoing business, although ITCAN has honored its commitment to fund these plans for more than 30 years, it is not in a position to continue to do so given the hundreds of billions of dollars in other unsecured claims asserted.

37. The Cessation Notice does not advise Affected Members what it means to them that ITCAN has "ceased funding" their Genstar U.S. Plans as of the filing date, nor that they will not receive payment of their benefits from IHGI on April 1. Moreover, the Cessation Notice was received by Affected Members after many of them discovered they did not receive their pension income that they expected to be deposited in their accounts for the month of April, on April 1.

38. On April 2, the Committee's counsel obtained additional court materials (the "**Second Thauvette Affidavit**") from the Monitor's case website that were posted for the first time that day

and previously not provided nor made available to counsel despite his March 29 letter and him requesting copies of same on April 1. In the Second Thauvette Affidavit, ITCAN made the following statement in reference to the Cessation Notice:

25. On March 27, 2019, Bracewell, in its capacity as U.S. counsel to the Monitor, also sent a notice to participants in the following non-qualified deferred compensation plans, advising the participants that ITCAN had made a determination to discontinue funding such plans during the pendency of the CCAA proceedings:

(a) the "deferred income plan" for individuals who are either former senior management employees of Genstar or their beneficiaries;

(b) the "supplemental executive retirement Plan" for individuals who were either former Genstar employees or their beneficiaries; and

(c) the "supplementary pension plan" for individuals who were either former Genstar employees or their beneficiaries.

39. Also on April 2, ITCAN served a further affidavit (the “**Third Thauvette Affidavit**”) advising as follows with respect to the Genstar U.S Plans:

35. ITCAN makes payments to a U.S. subsidiary Imasco Holdings Group, Inc. ("IHGI"). IHGI is a largely dormant Delaware corporation that holds certain legacy obligations as a result of the historical acquisition and restructuring of various companies and businesses in the U.S. ITCAN makes capital contributions as necessary to IHGI on a monthly basis and then writes off these amounts (approximately USD \$7.0 million a year). These transfers permit IHGI to make necessary payments like pension plan contributions, workers compensation, and expenses such as rent, fees for professional advisors and banking fees.

36. The vast majority of the amounts transferred to IHGI (approximately \$6 million) were used to make payments under certain non-qualified deferred compensation plans for former employees of Genstar Corporation ("Genstar"), an ITCAN subsidiary, or their beneficiaries. ITCAN has decided to discontinue funding these plans during the pendency of the CCAA proceeding and therefore the corresponding transfers to IHGI will no longer be necessary going forward.

40. On April 3, the Committee served its second Notice of Objection. The Monitor also issued its First Report, which states as follows with respect to the Genstar U.S. Plans:

Communications with the Beneficiaries of the Genstar Plans

23. Prior to the commencement of these CCAA Proceedings, Imperial has, for several decades, funded payments to beneficiaries of the Genstar Plans established by Imasco Holdings Group, Inc., a now largely dormant Imperial subsidiary. As a result of these CCAA Proceedings, these payments are no longer being made. Bracewell and the Monitor have received a number of enquiries from beneficiaries of the Genstar Plans regarding the cessation of benefit payments. The Monitor understands that certain beneficiaries of the Genstar Plans have established the Committee and have retained Canadian and U.S. counsel who are seeking to represent the interests of the beneficiaries of the Genstar Plans.

E. The Need for the Appointment of Representatives and Representative Counsel

41. The Committee has formed the Former Genstar U.S. Retiree Group to protect the common interests of Affected Members and is instructing Kaplan Law in this proceeding. The Committee has also retained U.S. counsel in connection with the Chapter 15 Proceeding.

42. The Committee is a steering committee currently comprised of the following former Genstar executives and officers:

- (a) Angus A. MacNaughton, former co-CEO;
- (b) Ross J. Turner, former co-CEO;
- (c) J. Ernest Hartz, former Senior Vice President and General Counsel; and
- (d) Richard D. Paterson, former Senior Vice President and CFO.

43. The Committee's mandate and activities include communicating with Affected Members, instructing counsel, appearing in court, making submissions and bringing motions for the benefit and protection of the Affected Members, including the within motion, and as may further come to its attention.

44. The Committee has been in contact with other Affected Members and are organizing themselves according to their common interests in these proceedings, in which they are significant stakeholders. The Committee continues its efforts to locate and communicate with Affected Members. However, given the length of time that has passed since Genstar was acquired by Imasco and later ITCAN, and the fact that these individuals are elderly and live all over the United States and beyond, it has proved to be a difficult task.

45. The Affected Members are a significant and vulnerable stakeholder group in these proceedings and they require representation. The Affected Members are not yet represented in the proceeding as an organized group and they are exposed to significant losses to their pension benefits. Of urgent importance, the Applicants caused IHGI to fail to make expected payments to the Affected Members on April 1, without proper notice, which has directly and immediately caused confusion, distress, losses and hardship to Affected Members.

46. Separately from the Notices of Objection filed by the Committee in the CCAA Proceedings, a number of Affected Members have filed statements in the U.S. Chapter 15 Proceeding claiming hardship and prejudice from the cessation of funding and discontinuation of payments under the Genstar U.S. Plans, and confusion regarding the inadequate notice thereof. For example,

- (a) Vivian Brennan-Dolezar of Mesa, Arizona objected on behalf of her 89-year-old mother, V.M. Brennan, who was receiving survivor benefits under the GCDIP and SERP following the death of her father in 2012. Ms. Bennan-Dolezar stated that news of the cessation “was devastating” and will “cause extreme financial hardship” to her mother, who is “financially dependent on her pension”. The “very short notice gave no time for preparation for loss of income” and the Imasco retiree center “never returned calls”. She states that “as of April 1, 2019, I have not received any written correspondence from Imperial Tobacco Canada Limited or their Representatives informing retirees of their decision to discontinue pension payments”.
- (b) George Foster of Alamo, California objected on his own behalf and for all Affected Members. Mr. Foster is a member of the GCDIP and states that the agreement supporting those benefits have “binding effect” and “inure to the benefit of the employee [and] heirs and representatives as the case may be and the Company and its successors and assigns”. The agreement requires the company to “have the financial ability to discharge obligations assumed under this plan [and] perform all of the terms and conditions herein contained”. He states that his own funds were “voluntarily deducted from [his] paychecks and contributed” to the GCDIP as “a

significant part of retirement planning”. He states most Affected Members “are retired and unable to return to work” and submits that these court proceedings should not “financially harm any retired employees”.

- (c) Glen Jones of Los Gatos, California states that he is “77 years of age and fully retired” and it is not feasible for him to attend court personally. He states that he “participated voluntarily” in the GCDIP and “made salary deduction contributions” to the plan “in return for stipulated monthly retirement payments”. He states that “the failure to continue contributions to the Plan will inflict significant financial harm to the participants all of whom are of advanced retirement age and who have been relying in receipt of these payments”. He submits that the discontinuance of the payments constitutes an “immediate breach of the contractual obligations” provided in the Guarantee; and
- (d) Alfred Mueller of Fremont, California is a former President of the Genstar Cement division and also a member of the GCDIP. Mr. Mueller also states that attendance in court is not feasible for him. He makes similar objections and statements as Mr. Jones.

47. Two Affected Members, Robert M. Brown and George A. Foster, have come forward as Proposed Representatives. The Proposed Representatives have agreed to act accordingly and are appropriate representatives for the Affected Members. They have specific knowledge of the Genstar U.S. Plans and worked for the company in management capacities at the relevant time.

48. A representation order will provide all Affected Members, who have common interests and are directly affected by the proceedings and the Applicants’ actions, with an organized voice before this Court, avoid a multiplicity of retainers, and benefit the Court, the Applicants and the Monitor.

49. Mr. Kaplan of Kaplan Law is appropriately appointed as Proposed Representative Counsel. He is an experienced lawyer and capable of adequately taking instructions from the Committee and Proposed Representatives and providing assistance to the Affected Members so that they are able to meaningfully participate in the proceedings and the restructuring process.

F. Disclosure of Information and Assessment of Entitlements

50. The Monitor states as follows in its First Report:

24. The Monitor has spoken to proposed Canadian counsel for the beneficiaries of the Genstar Plans and understands that a motion will be brought to determine the entitlement to payments under the Genstar Plans before the end of April (and before the date of the next payments due under the Genstar Plans). The Monitor is also working with Imperial and its Canadian and US counsel to address certain information requests made by proposed counsel for the beneficiaries of the Genstar Plans, and by the Pension Benefit Guaranty Corporation.

51. To date, and despite multiple requests for disclosure of all Information (as defined in para. 8 above), ITCAN has not provided to the Committee nor its counsel with any documentation to assist them to properly assess their rights and those of the Affected Members including for the purpose of having a full and proper record for this Motion.

52. The requested Information is reasonably sought and necessary for the Committee and Proposed Representatives to carry out their activities for the benefit of the Affected Members in these proceedings, and is properly required as part of any advance notice required to be given to Affected Members before implementing a proposed cessation of their benefits under the Genstar U.S. Plans. In particular and without limitation:

a. Plan Documents and Agreements

53. The Committee and Proposed Representatives require copies of documents confirming the applicable Genstar U.S. Plan documents, texts, agreements or booklets, which are the starting point for ascertaining Affected Members' rights.

54. The Committee and Proposed Representatives do not have copies of the Guarantee or related documents including the April 2, 1986 agreement involving Genstar and Imasco that vested Affected Members' benefits and is the source of the Applicants' obligation to fund the Genstar U.S. Plans.

b. Insurance Policies

55. The Committee and Proposed Representative do not have any information or details of the paid-up life insurance premiums purchased to fund and secure the benefits under the Genstar U.S. Plans. In the Third Thauvette Affidavit, ITCAN states as follows:

42. I understand that a proposed Former Genstar U.S. Retiree Group Committee (the "Committee") has filed a Notice of Objection for the Comeback Hearing in this matter. The Committee has asserted that Genstar purchased life insurance policies on the life of each member of a deferred income plan ("GCDIP") and a supplemental executive retirement plan ("SERP") for certain former Genstar employees and their beneficiaries. While Genstar did purchase life insurance policies when the GCDIP and SERP were set up, those policies were all cashed out decades ago. There are no current insurance policies in place related to the GCDIP or SERP.

56. The Committee and Proposed Representatives request full particulars of these life insurance policies, their redemption value, the decisions to "cash out" and to whom the proceeds were paid. The GCDIP and SERP were designed by an independent firm, Clark/Bardes Organization, Inc., to be at least cost/revenue neutral to Genstar. In the case of the GCDIP, a Member could defer as much as 50% of their annual compensation. In the case of the SERP, Genstar offered this as an incentive to senior executives to stay with the company and to attract new hires of senior executives to the company. Under both the GCDIP and SERP, Genstar purchased single-premium life insurance policies on each Member's life, using the Member's own deferred income on account of the GCDIP, or corporate funds on account of the SERP, to pay for the premiums. Genstar was the owner of the life insurance policies used to secure the benefits and fund the payments under the GCDIP and SERP.

57. The information currently thought to be known about the insurance policies is probative evidence of the existence of a constructive trust securing the benefits owed to Affected Members under the Genstar U.S. Plans. The Applicants will receive an unjust enrichment and windfall were they to cease funding the Genstar U.S. Plans and the Affected Members have suffered a corresponding deprivation with no juridical reason. Full disclosure will allow Affected Members to assess these claims and the scope of their rights.

c. Other Pension Plans

58. The Applicants have stated that they are responsible for 11 pension plans in Canada and the United States. It appears that the Applicants intend to treat the Affected Members of the Genstar U.S. Plans differently and prejudicially relative to all other pension obligations. ITCAN has stated that during these proceedings, it “intends to continue to make ordinary course payments” in respect of its Canadian pension plans as well as to the “IHGI U.S. Pension Plan”.

59. However, with respect to the Genstar U.S. Plans, the Affected Members appear to be ITCAN’s only pension beneficiaries whose pension payments have stopped. No information or explanation has been provided respecting the reason for singling out the Genstar U.S. Plans for differential treatment nor about the lack of advance notice of ITCAN’s intention to cease its obligation to pay those pensions.

60. In the Cessation Notice, the Monitor advised Affected Members that a reason for the Applicants’ ceasing funding of their benefits is because “payment of these claims is not necessary to ITCAN’s ongoing business”. However, the Applicants are continuing to fund the IHGI Pension Plan which is not needed for ITCAN’s ongoing business. “IHGI is a largely dormant Delaware corporation that holds certain legacy obligations” and the IHGI Pension Plan covers strictly former employees.

61. Moreover, in support of the relief requested at the Recognition Hearing, the Monitor has stated as follows, offering yet a another, brand new rationale, for singling out the Genstar U.S. Plans for differential treatment vis-à-vis the IHGI Pension Plan:

The IHGI Plan, however, is a defined benefit plan subject to Title IV of the U.S. *Employee Retirement Income Security Act of 1974* [“ERISA”] and has different rights and regulations than the Top-Hat Plans. As contributions under the IHGI Plan are a fraction of the annual contributions required under the Top-Hat Plans and cover more than 50 times the number of participants, the Debtor determined, in its business judgment, that continued payment of that plan was warranted to avoid the significant penalties and legal costs associated with termination.

62. The Committee and Proposed Representatives require details of the Applicants’ other pension plans in order to assess the accuracy of the Monitor’s statement and whether those plans are necessary for ITCAN’s ongoing business. Moreover, some of the Affected Members are also

members of the IHGI Pension Plan and the Committee and Proposed Representatives accordingly seek particulars of those interests.

63. By unnecessarily singling out the Genstar U.S. Plans for differential treatment, and in light of the confusing and contradictory explanations given, the Applicants and Monitor have not acted evenhandedly to treat all similarly situated pension beneficiaries equitably.

64. Moreover, the Pension Benefits Guaranty Corporation, which regulates interests under ERISA-qualified plans, appears to be of the belief that the Applicants sponsor two other pension plans in the U.S. that have not been disclosed in the CCAA Proceedings. It is appropriate for particulars of these plans to be disclosed.

d. Identities of Affected Members

65. The Committee and Proposed Representatives require disclosure of the identity and contact information of the 59 Affected Members so that Proposed Representative Counsel can communicate and inform them as a whole and with regard to each person's particular situation, be a source of reliable information, assist them in evaluating their claims, and advise and represent them on their rights respecting decisions taken during the proceedings, including for a plan of compromise, and bring any concerns to the Court's attention.

66. Of all the pension beneficiaries affected by these proceedings, only the Affected Members are subject to the Seal Order, compounding their difficulty to locate and find one another for the purpose of obtaining information and advancing their common interests.

G. Reinstatement of Payments

67. The Committee states that ITCAN has improperly ceased funding the Genstar U.S. Plans which is *inter alia* a breach of the Guarantee and has *de facto* disclaimed or resiliated the agreements relating to these plans, contrary to the requirements set out in section 32 of the CCAA.

68. It is in the interests of justice and fairness that the Applicants reinstate payments under the Genstar U.S. Plans to Affected Members pending further order of this Court. First, the Applicants and Monitor have not followed the CCAA criteria when a debtor proposes to disclaim or resiliate an agreement, which are applicable in the within circumstances. Second, all other pension

payments are continuing and there is no issue of an unfair priority in favour of the Affected Members. Third, there is nothing prohibiting the Applicants from continuing to fund the Genstar U.S. Plans. Fourth, the Applicants are profitable and liquid, and the amounts are *de minimis* and will not affect the ability of the Applicants to meet their ongoing operations nor propose a plan of arrangement or compromise.

69. In addition:

- (a) there are serious questions to be determined in assessing the Affected Members' claims pending full disclosure from the Applicants and Monitor, including whether a constructive trust arises from the insurance policies purchased to secure the benefits and the serious question raised in the Notice of Constitutional Question, both of which are probative and have *prima facie* merit;
- (b) there will be irreparable harm to Affected Members to deny them an interim continuation of their pensions, not least of which because:
 - i. of the inadequate notice of the cessation of their benefits; it is equitable and necessary to mitigate the effects of those actions; and
 - ii. the Affected members are elderly (in their 70s and 80s), in ill-health, and on fixed incomes; they rely on their pensions for ensuring their physical, mental, psychological and emotional security and stability; and
- (c) the balance of convenience favours the pre-filing *status quo* with respect to the Genstar U.S. Plans; there is no prejudice to the Applicants nor any other creditor or stakeholder for payments to continue to the Affected Members, whereas there is massive prejudice to the Affected Members were the payments not reinstated.

70. Sections 11, 11.52(1)(c), and 32(1), (2), (3) and (4) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended.

71. Rules 2.03, 3.02, 10.01, 14.05(3)(g.1), 37.14(1)(a), (2), and (4), and 39.01(1) and (6) of the *Rules of Civil Procedure*.

72. Section 109(1) of the *Courts of Justice Act*, R.S.O. 1990, c C.43, as amended.
73. Sections 1 and 7 of the *Canadian Charter of Rights and Freedoms*.
74. Such further and other grounds as counsel may advise and this Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The affidavit of Robert M. Brown, sworn April 15, 2019, and the exhibits attached thereto;
2. The affidavit of George A. Foster, sworn April 15, 2019, and the exhibits attached thereto;
3. The affidavit of Vivian Brennan-Dolezar, sworn April 15, 2019, and the exhibits attached thereto;
4. The affidavit of Richard D. Paterson, to be sworn, and the exhibits attached thereto;
5. Such further and other evidence as counsel may advise and this court may permit.

Date: April 17, 2019

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U.S. Retiree Group Committee
and Proposed Representatives

TO: **SERVICE 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, *et al.*

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

(Motion returnable April 25, 2019)

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TAB 2

NOTICE OF CONSTITUTIONAL QUESTION

(APRIL 9, 2019)

TAB 3

AFFIDAVIT OF ROBERT M. BROWN

(APRIL 15, 2019)

TAB 4

AFFIDAVIT OF GEORGE A. FOSTER

(APRIL 15, 2019)

TAB 5

AFFIDAVIT OF VIVIAN
BRENNAN-DOLEZAR

(APRIL 15, 2019)

TAB 6

AFFIDAVIT OF
RICHARD D. PATERSON

(APRIL __, 2019)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IMPERIAL TOBACCO CANADA LIMITED, *et al.*

**ONTARIO
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PROCEEDING COMMENCED AT
TORONTO

MOTION RECORD
(Motion returnable April 25, 2019)

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