

**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 CONSTITUTIONAL QUESTION

The Former Genstar U.S. Retiree Group Committee (the "**Committee**") intends to question the constitutional validity, applicability or operability of the order of Justice T. McEwan dated March 12, 2019, as amended (the "**Initial Order**") made under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") to the extent it authorizes the Applicant Imperial Tobacco Canada Limited ("**ITCAN**") or the monitor appointed under the Initial Order, FTI Consulting Canada Inc. (the "**Monitor**"), to deprive persons entitled to payments under the "Genstar U.S Plans" (defined below) of the right to life, liberty or security of their person not in accordance with the principles of fundamental justice, contrary to section 7 of the *Canadian Charter of Rights and Freedoms*.

The question is to be argued on April 25, 2019 at 10:00 a.m. at 330 University Avenue, Toronto.

The following are the material facts giving rise to the constitutional question:

A. Overview

1. The Committee represents the interests of 59 former officers, executives and management employees of Genstar Corporation ("**Genstar**") and their survivors who are beneficiaries (the

“**Affected Members**”) entitled to benefits under three pension and deferred compensation plans (collectively, the “**Genstar U.S. 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**”).

2. 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.

3. 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 (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”.

4. Until last month, ITCAN has guaranteed the benefits to Affected Members by making monthly payments to another of its U.S. subsidiaries, 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.

5. 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

1. On March 12, 2019, the Applicants filed a Notice of Application under the CCAA (the “**CCAA Proceedings**”) and obtained the Initial Order.

2. Para. 7 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]: (a) all outstanding and future ... retiree pension and other benefits and related contributions and payments”.

3. 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”.

4. 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”.

5. 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”.

6. 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”.

7. 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”.

8. 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”.

9. 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

10. 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**”).

6. 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”.

11. On April 15, 2019, a recognition hearing for the requested relief is scheduled to take place in the U.S. Court.

D. ITCAN Ceases Funding of Payments Under Genstar U.S. Plans

12. On April 1, 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.

13. The Committee has alleged that ITCAN's cessation of funding the Genstar U.S. Plans is *inter alia* a breach of the Guarantee. The Affected Members are ITCAN's only pension beneficiaries whose pension payments were stopped because of the CCAA Proceedings.

E. Inadequate and Untimely Notice of Cessation of Benefits

14. Commencing on or about March 14, 2019, various Affected Members received voluminous court documents from the Bracewell LLP firm 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.

15. Buried in the voluminous Initial U.S. Petition Documents are two references to the Genstar U.S. Plans, 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.

16. 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”).

17. 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’ Genstar U.S. Plan benefits.

18. 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.

7. Late in the day on April 1, one of the Committee members received in the regular mail a “Notice to Participants in Non-Qualified Deferred Compensation Plans”, 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.

8. 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.

9. 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 proceeding:

(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.

10. On April 3, the Committee served its second Notice of Objection, and 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.

11. Also on April 3, the Monitor 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.

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.

12. To date, despite multiple requests for information, and the Monitor's intentions expressed at para. 24 of its First Report, ITCAN has not provided to the Committee nor its counsel any disclosure of information to assist them to assess their rights and those of the Affected Members.

F. Affected Member filings in the U.S. Chapter 15 Proceedings

13. 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. Brennan-Dolezar stated that news of the cessation “was devastating”, 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 “insure 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.

G. Additional Material Facts

14. Such further and other material facts that will be put forward in the Notice of Motion and affidavits filed in support of same and such other evidence as shall be adduced and accepted by the court. All court filings for the proceeding can be obtained from the Monitor’s website at: <http://cfcanada.fticonsulting.com/imperialtobacco/motions.htm>.

The following is the legal basis for the constitutional question: (Set out concisely the legal basis for each question, identifying the nature of the constitutional principles to be argued.)

15. Section 7 of the *Canadian Charter of Rights and Freedoms* states that “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”.

16. Orders made by judges under the CCAA are subject to the *Charter*. Where a court order is issued in a private proceeding governed by statute law, including the CCAA, then the *Charter* will apply to the terms of the order. Actions taken by private parties pursuant to or under the authority of that order, including by ITCAN or the Monitor, must comply with *Charter* values.

17. A court order made under the CCAA, or actions taken under that order, which operate to deprive people of their ability to provide for themselves engage the right to life, liberty and security of the person protected by Section 7 of the *Charter*. The ability to provide for one’s self is an interest that falls within the ambit of section 7 providing for the necessities of life. Those necessities include, for pensioners on fixed incomes, the need for as much financial certainty as possible as they budget for the end of their lives.

18. A court order made under the CCAA, or actions taken under that order, that have the effect of ceasing or discontinuing payment of people's vested retirement savings in their old age on very short notice prejudices their ability to provide for themselves and deprives them of their right to life, liberty and security of the person which are protected by Section 7.

19. Where Affected Members are very advanced in age, on fixed incomes and no longer able to actively work, and suffer from ill-health and, in some cases, incapacity, and rely on their vested pensions for ensuring their physical, mental, psychological and emotional security and stability and have budgeted accordingly, then ceasing or discontinuing those payments on very short notice pursuant to authority granted in an order under the CCAA will have a serious and profound effect on the person's psychological integrity and physical health and thereby deprive them of life, liberty and security of person not in accordance with fundamental justice.

20. A court making an order under the CCAA authorizing a debtor to stay vested pension payments and prescribing the manner and content of providing notice thereof must be mindful of whether that order, or the exercise of authority pursuant to that order, will result in depriving Affected Members of life, liberty or security of person in accordance with principles of fundamental justice and the court must be reasonably satisfied that such order will not in actual fact do so.

21. Affected Members residing in the United States of America are entitled to the protections accorded in section 7 of the *Charter* where, *inter alia*, they are prejudicially impacted by a Canadian court order made under the CCAA, the Canadian court making that order is recognized in the U.S. as the foreign main proceeding, and the Monitor acts as the foreign representative.

22. The terms of the Initial Order and the actions of ITCAN and the Monitor under that order, in these circumstances, do not accord with principles of fundamental justice and procedural fairness, are arbitrary, overbroad and disproportionate, and have mismatched the legislative objectives of the CCAA with the means chosen to achieve it. Their actions are:

- (a) arbitrary because they single out the Genstar U.S. Plans for differential treatment and there is no rational connection between the effect of singling out these plans and the object of the Initial Order;

- (b) overbroad because they are not necessary for the interim viability of the company's operations during the pendency of the CCAA proceedings nor for the successful restructuring of the company and therefore overreach in their effect; and
- (c) disproportionate because the immediacy and effect of the actions are grossly disproportionate to the purpose of the Initial Order and result in extreme prejudice, harm and hardship to the Affected Members,

whereas continuing the payments until a reasonable notice period has passed and full disclosure is made such that Affected Members' claims can be assessed will cause no prejudice to the company nor to the remaining stakeholders and creditors.

23. There is a pressing and substantial public policy interest in ensuring that people have an ability to provide for oneself in old age, and this includes the ability to fairly budget within expected means. Poverty amongst seniors is a social ill increasing in scope, due to a rapidly aging demographic and the increased costs which come with increased longevity.

24. The Initial Order or the actions taken under it affecting the Affected Members are not demonstrably justifiable in a free and democratic society within the meaning of section 1 of the *Charter*.

25. Such further and other legal principles that will be put forward in the Notice of Motion, Motion Record, Factum and Authorities, to be filed.

April 9, 2019

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

Ari Kaplan (LSO #42042S)
Tel: 416 565.4656
Fax: 416 352.1544
Email: ari@kaplanlaw.ca

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

TO: **THE ATTORNEY GENERAL OF ONTARIO**
Constitutional Law Branch
720 Bay Street, 4th floor
Toronto, Ontario M5G 2K1
fax: (416) 326-4015

AND TO: **THE ATTORNEY GENERAL OF CANADA**
Suite 3400, Exchange Tower
Box 36, First Canadian Place
Toronto, Ontario M5X 1K6
fax: (416) 973-3004

AND TO: **SERVICE LIST** (attached)

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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

Service List
(as of April 5, 2019)

TO:	OSLER, HOSKIN & HARCOURT LLP	AND TO :	DAVIES WARD PHILLIPS & VINEBERG LLP
	P.O. BOX 50, 1 First Canadian Place Toronto, ON M5X 1E2		155 Wellington Street West Toronto, ON M5V 3J7
	Deborah Glendinning dglendinning@osler.com Tel: 416.862.4714		Jay Swartz jswartz@dwpv.com Tel: 416.863.5520
	Marc Wasserman mwasserman@osler.com Tel: 416.862.4908		Robin Schwill rschwill@dwpv.com Tel: 416.863.5502
	John MacDonald jmacdonald@osler.com Tel: 416.862.5672		Natasha MacParland nmacparland@dwpv.com Tel: 416.863.5567
	Lawyers for the Applicants, Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited		Lawyers for the Monitor, FTI Consulting Canada Inc.
AND TO:	FTI CONSULTING CANADA INC.	AND TO:	STIKEMAN ELLIOTT LLP
	79 Wellington Street West Suite 2010, P.O. Box 104 Toronto, ON M4K 1G8		5300 Commerce Court West 199 Bay Street Toronto, ON M5L 1B9
	Greg Watson greg.watson@fticonsulting.com Tel: 416.649.8077		David Byers dbyers@stikeman.com Tel: 416.869.5697

Paul Bishop
paul.bishop@fticonsulting.com
Tel: 416.649.8053

Jeffrey Rosenberg
jeffrey.rosenberg@fticonsulting.com
Tel: 416.649.8073

Kamran Hamidi
kamran.hamidi@fticonsulting.com
Tel: 416.649.8068

Dilawar Azhar
dilawar.azhar@fticonsulting.com
Tel: 416.649.8133

The Monitor

Maria Konyukhova
mkonyukhova@stikeman.com
Tel: 416.869.5230

Lesley Mercer
lmercer@stikeman.com
Tel: 416.869.6859

Sanja Sopic
ssopic@stikeman.com
Tel: 416.869.6825

Lawyers for British American Tobacco
p.l.c., B.A.T Industries p.l.c., and British
American Tobacco (Investments)
Limited

**AND TO: LAX O'SULLIVAN LISUS
GOTTLIEB LLP**

Suite 2750, 145 King Street West
Toronto, ON M5H 1J8

Jonathan Lisus
jlisus@lolg.ca
Tel: 416.598.7873

Matthew Gottlieb
mgottlieb@lolg.ca
Tel: 416.644.5353

Andrew Winton
awinton@lolg.ca
Tel: 416.644.5342

Nadia Campion
ncampion@lolg.ca
Tel: 416.642.3134

Lawyers for the Interim Tobacco
Claimant Coordinator

AND TO: BENNETT JONES LLP

3400 One First Canadian Place
P.O. Box 130
Toronto ON M5X 1A4

Jeffrey Leon
leonj@bennettjones.com
Tel: 416.777.7472

Mike Eizenga
eizengam@bennettjones.com
Tel: 416.777.4879

Sean Zweig
zweigs@bennettjones.com
Tel: 416.777.6254

Lawyers for the Province of British
Columbia, Province of Manitoba,
Province of New Brunswick, Province of
Nova Scotia, Province of Prince Edward
Island and Province of Saskatchewan,
in their capacities as plaintiffs in the
Government Medicaid Actions (as
defined in the Application Record of the
Applicants)

AND TO: THORNTON GROUT FINNIGAN LLP

Toronto-Dominion Centre 100
Wellington Street West, Suite 3200 P.O.

**AND TO: FISHMAN FLANZ MELAND PAQUIN
LLP**

4100-1250 René-Lévesque Blvd. West

Box 329 Toronto, ON M5K 1K7

Robert I. Thornton
rthornton@tgf.ca
Tel: 416.304.0560

Leanne M. Williams
lwilliams@tgf.ca
Tel: 416.304.0060

Rebecca L. Kennedy
rkennedy@tgf.ca
Tel: 416.304.0603

Rachel A. Bengino
rbengino@tgf.ca
Tel: 416.304.1153

Mitch Grossell
mgrossell@tgf.ca
Tel: 416.304.7978

Lawyers for JTI-Macdonald Corp.

Montreal, Quebec H3A 3H3

Avram Fishman
afishman@ffmp.ca
Tel: 514.932.4100

Mark E. Meland
mmeland@ffmp.ca
Tel: 514.932.4100

Margo R. Siminovitch
msiminovitch@ffmp.ca

Jason Dolman
jdolman@ffmp.ca

Nicolas Brochu
nbrochu@ffmp.ca

CHAITONS LLP

5000 Yonge Street 10th Floor
Toronto, ON M2N 7E9

Harvey Chaiton
harvey@chaitons.com
Tel: 416.218.1129

Lawyers for Conseil québécois sur le
tabac et la santé, Jean-Yves Blais and
Cécilia Létourneau (Quebec Class
Action Plaintiffs)

AND TO: BLAKE, CASSELS & GRAYDON LLP

199 Bay Street
Suite 4000, Commerce Court West
Toronto, Ontario M5L 1A9

Pamela Huff
pamela.huff@blakes.com
Tel: 416.863.2958

Linc Rogers
linc.rogers@blakes.com
Tel: 416.863.4168

Chris Burr
chris.burr@blakes.com
Tel: 416.863.3261

**AND TO: MINISTRY OF THE ATTORNEY
GENERAL**

Crown Law Office – Civil
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9

Jacqueline L. Wall
jacqueline.wall@ontario.ca
Tel: 416.325.8435

Shahana Kar
shahana.kar@ontario.ca
Tel: 416.314.2080

Lawyers for Her Majesty the Queen in
right of Ontario

Aryo Shalviri

aryo.shalviri@blakes.com
Tel: 416.863.2962

Caitlin McIntyre

caitlin.mcintyre@blakes.com
Tel: 416.863.4174

Lawyers for Deloitte Restructuring Inc.,
in its capacity as Monitor of JTI-
Macdonald Corp.

AND TO: KSV ADVISORY INC.
150 King St W #2308,
Toronto, ON M5H 1J9

Bobby Kofman

bkofman@ksvadvisory.com
Tel: 416.932.6228

Noah Goldstein

ngoldstein@ksvadvisory.com
Tel: 416.932.6207

Financial Advisor for the Provinces of
British Columbia, Manitoba, New
Brunswick, Nova Scotia, Prince Edward
Island and Saskatchewan, in their
capacities as plaintiffs in the HCCR
Legislation claims

AND TO: KLEIN LAWYERS

100 King Street West, Suite 5600
Toronto, ON M5X 1C9

Douglas Lennox

dlennox@callkleinlawyers.com
Tel: 416.506.1944

Lawyers for the representative plaintiff,
Kenneth Knight, in the certified British
Columbia class action, *Knight v.*
Imperial Tobacco Canada Ltd, Supreme
Court of British Columbia, Vancouver
Registry No. L031300.

AND TO: STEWART MCKELVEY
1959 Upper Water Street, Suite 900
PO Box 997
Halifax, NS, B3J 2X2

Robert G. MacKeigan, Q.C.

robbie@stewartmckelvey.com
Tel: 902.444.1771

Lawyers for Sobey's Capital
Incorporated

**AND TO: JENSEN SHAWA SOLOMON DUGUID
HAWKES LLP**

800 - 304 8 Ave SW
Calgary, AB T2P 1C

Carsten Jensen

jensenc@jssbarristers.ca
Tel: 403.571.1526

Sabri Shawa

shawas@jssbarristers.ca
Tel: 403.571.1527

Stacy Petriuk

petriuks@jssbarristers.ca
Tel: 403.571.1523

**PALIARE ROLAND ROSENBERG
ROTHSTEIN LLP**

155 Wellington Street West, 35th Floor
Toronto, ON M5V 3H1

Kenneth T. Rosenberg
ken.rosenberg@paliareroland.com

Lily Harmer
lily.harmer@paliareroland.com

Massimo (Max) Starnino
max.starnino@paliareroland.com

Danielle Glatt
danielle.glatt@paliareroland.com

Elizabeth Rathbone
elizabeth.rathbone@paliareroland.com

Tel: 416.646.4300

Lawyers for Her Majesty in Right of
Alberta

AND TO: MILLER THOMSON LLP
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto, ON Canada M5H 3S1

Craig A. Mills
cmills@millerthomson.com
Tel: 416.595.8596

Lawyers for North Atlantic Operating
Company, Inc.

AND TO: BLUETREE ADVISORS
First Canada Place
100 King Street West, Suite 5600
Toronto, ON M5X 1C9

Bill Aziz
baziz@bluetreeadvisors.com
Tel: 416.640.7122

Chief Restructuring Officer of JTI-
Macdonald Corp.

AND TO: ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Ontario Regional Office, Tax Law
Section
120 Adelaide Street West, Suite 400
Toronto, Ontario, M5H 1T1

Diane Winters

**AND TO: CASSELS BROCK & BLACKWELL
LLP**
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Shayne Kukulowicz

diane.winters@justice.gc.ca
Tel: 647.256.7459

Lawyers for the Minister of National
Revenue

skukulowicz@casselsbrock.com
Tel: 416.860.6463

Jane Dietrich
jdietrich@casselsbrock.com
Tel: 416.860.5223

Joseph Bellissimo
jbellissimo@casselsbrock.com
Tel: 416.860.6572

Monique Sassi
msassi@casselsbrock.com
Tel: 416.860.6886

Lawyers for Ernst & Young Inc., in its
capacity as court-appointed monitor of
Rothmans, Benson & Hedges, Inc.

AND TO: ERNST & YOUNG INC.

Ernst & Young Tower
100 Adelaide Street West
P.O. Box 1
Toronto, ON M5H 0B3

Murray A. McDonald
Murray.A.McDonald@ca.ey.com
Tel: 416.943.3016

Brent Beekenkamp
Brent.R.Beekenkamp@ca.ey.com
Tel: 416.943.2652

Edmund Yau
Edmund.Yau@ca.ey.com
Tel: 416.943.2177

Monitor of Rothmans, Benson &
Hedges, Inc.

AND TO: WESTROCK COMPANY OF CANADA

A-15400, Sherbrooke Est
Montréal, Québec, H1A 3S2

Dean Jones
dean.jones@westrock.com
Tel: 514.642.9251

Senior Counsel, WestRock Company of
Canada

AND TO: MCCARTHY TÉTRAULT LLP

66 Wellington Street West, Suite 5300
TD Bank Tower, Box 48
Toronto, ON M5K 1E6

James Gage
jgage@mccarthy.ca
Tel: 416-601-7539

AND TO: BCF LLP

1100, René-Lévesque Blvd.
Suite 2500
Montréal (Québec) H3B 5C9

Me Bertrand Giroux
bertrand.giroux@bcf.ca
Tel: 514.397.6935

Heather Meredith
hmeredith@mccarthy.ca
Tel: 416-601-8342

Paul Steep
psteep@mccarthy.ca
Tel: 416.601.7998

Trevor Courtis
tcourtis@mccarthy.ca
Tel: 416.601.7643

Sharon Kour
skour@mccarthy.ca
Tel: 416.601.8305

Lawyers for Rothmans, Benson &
Hedges, Inc.

Me Mireille Fontaine
mireille.fontaine@bcf.ca
Tel: 514.397.4561

Lawyers for the Top Tube Company

AND TO: GOWLING WLG (CANADA) LLP

1 First Canadian Place
100 King Street West, Suite 1600
Toronto ON M5X 1G5

Derrick Tay
derrick.tay@gowlingwlg.com
Tel: 416.369.7330

Clifton Prophet
clifton.prophet@gowlingwlg.com
Tel: 416.862.3509

Steven Sofer
steven.sofer@gowlingwlg.com
Tel: 416.369.7240

Lawyers for Philip Morris International
Inc.

**AND TO: PALIARE ROLAND ROSENBERG
ROTHSTEIN LLP**

155 Wellington Street West, 35th Floor
Toronto, ON M5V 3H1

Kenneth T. Rosenberg
ken.rosenberg@paliareroland.com

Lily Harmer
lily.harmer@paliareroland.com

Massimo (Max) Starnino
max.starnino@paliareroland.com

Danielle Glatt
danielle.glatt@paliareroland.com

Elizabeth Rathbone
elizabeth.rathbone@paliareroland.com

Tel: 416.646.4300

ROEBOTHAN MCKAY MARSHALL

Paramount Building
34 Harvey Road, 5th Floor
St. John's, NL A1C 3Y7

Glenda Best

gbest@wrmmlaw.com
Tel: 1.705.576.2255

Lawyers for Her Majesty the Queen in
Right of Newfoundland

**AND TO: SUPERINTENDENT OF FINANCIAL
SERVICES**

Ministry of the Attorney General Civil
Law Division, FSCO Branch
5160 Yonge Street, 17th Floor, Toronto
ON M2N 6L9

Michael Scott
Michael.Scott@fsco.gov.on.ca
Tel: 416.226.7834

Counsel for the Superintendent of
Financial Service

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

Ari Kaplan
ari@kaplanlaw.ca
Tel: 416.565.4656

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

AND TO: MCMILLAN LLP

Brookfield Place
181 Bay St, Suite 4400
Toronto ON M5J 2T3

Wael Rostom
wael.rostom@mcmillan.ca
Tel: 416.865.7790

Michael J. Hanlon
michael.hanlon@mcmillan.ca
Tel: 416.987.5061

Lawyers for The Bank of Nova Scotia

AND TO: MERCHANT LAW GROUP LLP

c/o #400 - 333 Adelaide St. West
Toronto, Ontario M5V 1R5

Evatt Merchant, QC
emerchant@merchantlaw.com

Chris Simoes
csimoes@merchantlaw.com

Tel: 613.366.2795

Lawyers for Suzanne Jacklin,
Barbara Bourassa on behalf of the
Estate of Mitchell David Bourassa,
Roderick Dennis Mcdermid, Linda
Dorion, Thelma Adams, Ben
Semple, and Deborah Kunta, in
each of their capacities as
Representative Plaintiffs in the
relevant class action proceedings.

AND TO: LABSTAT INTERNATIONAL INC.

262 Manitou Drive
Kitchener, ON N2C 1L3

AND TO: CERNOS FLAHERTY SVONKIN LLP

220 Bay Street, Suite 700
Toronto, Ontario M5J 2W4

Kimberly Stevenson Chow (CFO)
kstevens@labstat.com

Jason Macintosh (Controller)
jmacintosh@labstat.com

Tel: 519.748.5409 x565

Patrick Flaherty
pflaherty@cfscounsel.com
Tel: 416.855.0403

Bryan D. McLeese
bmcleese@cfscounsel.com
Tel: 416.855.0414

STOCKWOODS LLP

77 King Street West, Suite 4130
TD North Tower, P.O. Box 140, TD
Centre, Toronto, ON M5K 1H1

Brian Gover
briang@stockwoods.ca
Tel: 416.593.2489

Justin Safayeni
justins@stockwoods.ca
Tel: 416.593.3494

Lawyers for R.J. Reynolds Tobacco
Company and R J. Reynolds Tobacco
International Inc.

AND TO: BRAUTI THORNING LLP

161 Bay Street, Suite 2900 Toronto, ON
M5J 2S1

Steven Weisz
sweisz@btlegal.ca
Tel:416.304.6522

**INCH HAMMOND PROFESSIONAL
CORPORATION**

1 King Street West, Suite 500
Hamilton, ON L8P 4X8

Amanda McInnis
amcinnis@inchlaw.com
Tel: 905.525.0031

Lawyers for Grand River Enterprises
Six Nations Ltd.

AND TO: MILLER THOMSON LLP

1000, rue De La Gauchetière Ouest,
bureau 3700, Montréal (Québec) H3B
4W5

Hubert Sibre
hsibre@millerthomson.com
Tel: 514.879.4088

Lawyer for AIG Insurance Canada

AND TO: STROSBERG SASSO SUTTS LLP

1561 Ouellette Avenue
Windsor, Ontario N8X 1K5

HARVEY T. STROSBERG, Q.C.

harvey@strosbergco.com
Tel: 519.561.6228

WILLIAM V. SASSO (LSO# 12134I)

wvs@strosbergco.com
Tel: 519.561.6222

DAVID ROBINS (LSO# 42332R)

drobins@strosbergco.com
Tel: 519.561.6215

Lawyers for The Ontario Flue-Cured
Tobacco Growers' Marketing Board,
plaintiff in Ontario
Superior Court of Justice Court File No.
1056/10CP (Class Proceedings)

E-Mail List

jswartz@dwpv.com; nmacparland@dwpv.com; rschwill@dwpv.com; nrenner@dwpv.com;
szaifman@dwpv.com; dglendinning@osler.com; mwasserman@osler.com;
jmacdonald@osler.com; greg.watson@fticonsulting.com; paul.bishop@fticonsulting.com;
jeffrey.rosenberg@fticonsulting.com; kamran.hamidi@fticonsulting.com;
dilawar.azhar@fticonsulting.com; dbyers@stikeman.com; mkonyukhova@stikeman.com;
jllisus@lolg.ca; mgottlieb@lolg.ca; awinton@lolg.ca; ncampion@lolg.ca;
leonj@bennettjones.com; eizengam@bennettjones.com; zweigs@bennettjones.com;
rthornton@tgf.ca; lwilliams@tgf.ca; rkennedy@tgf.ca; rbengino@tgf.ca; mgrossell@tgf.ca;
afishman@ffmp.ca; mmeland@ffmp.ca; harvey@chaitons.com; pamela.huff@blakes.com;
linc.rogers@blakes.com; chris.burr@blakes.com; jacqueline.wall@ontario.ca;
shahana.kar@ontario.ca; bkofman@ksvadvisory.com; ngoldstein@ksvadvisory.com;
robbie@stewartmckelvey.com; dlennox@callkleinlawyers.com; jensenc@jssbarristers.ca;
shawas@jssbarristers.ca; petriuks@jssbarristers.ca; baziz@bluetreeadvisors.com;
diane.winters@justice.gc.ca; cmills@millerthomson.com; skukulowicz@casselsbrock.com;
jdietch@casselsbrock.com; jbellissimo@casselsbrock.com; msassi@casselsbrock.com;
Murray.A.McDonald@ca.ey.com; Brent.R.Beekenkamp@ca.ey.com; Edmund.Yau@ca.ey.com;
dean.jones@westrock.com; psteep@mccarthy.ca; hmeredith@mccarthy.ca;
jgage@mccarthy.ca; bertrand.giroux@bcf.ca; mireille.fontaine@bcf.ca;
derrick.tay@gowlingwlg.com; clifton.prophet@gowlingwlg.com; steven.sofer@gowlingwlg.com;
lmercer@stikeman.com; ssopic@stikeman.com; aryo.shalviri@blakes.com;
caitlin.mcintyre@blakes.com; ken.rosenberg@paliareroland.com;
lily.harmer@paliareroland.com; max.starnino@paliareroland.com;
danielle.glatt@paliareroland.com; elizabeth.rathbone@paliareroland.com;
karen.lam@paliareroland.com; sarita.sanasie@paliareroland.com;
natalia.botelho@paliareroland.com; gbest@wrmmlaw.com; msiminovitch@ffmp.ca;
jdolman@ffmp.ca; nbrochu@ffmp.ca; ari@kaplanlaw.ca; Michael.Scott@fscsco.gov.on.ca;
WMalik@osler.com; wael.rostom@mcmillan.ca; michael.hanlon@mcmillan.ca;
emerchant@merchantlaw.com; csimoes@merchantlaw.com; kstevens@labstat.com;
jmacintosh@labstat.com; pflaherty@cfscounsel.com; bmcleese@cfscounsel.com;
briang@stockwoods.ca; justins@stockwoods.ca; skour@mccarthy.ca; tcourtis@mccarthy.ca;
kfick@mccarthy.ca; sweisz@btlegal.ca; amcinnis@inchlaw.com; hsibre@millerthomson.com;
tbarbiero@dwpv.com; harvey@strosbergco.com; wvs@strosbergco.com;
drobins@strosbergco.com

Courtesy Copy List

TO: DEBTWIRE

1501 Broadway, 8th Floor
New York, NY 10036

John Bringardner
John.Bringardner@acuris.com
Tel: 646.378.3143

Global Legal Editor

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 CONSTITUTIONAL
QUESTION**

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

Ari Kaplan (LSO #42042S)

Tel: 416 565.4656

Fax: 416 352.1544

Email: ari@kaplanlaw.ca

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