

**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 SEARS
CANADA INC., 9370-2751 QUÉBEC INC., 191020 CANADA INC., THE CUT INC., SEARS
CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC. INITIUM COMMERCE
LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING
CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC.,
10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531
CANADA INC., 168886 CANADA INC., and 3339611 CANADA INC.

(each, an “**Applicant**”, and collectively, the “**Applicants**”)

**JOINT FACTUM OF THE PENSION PLAN ADMINISTRATOR,
THE SUPERINTENDENT OF FINANCIAL SERVICES AND
REPRESENTATIVE COUNSEL TO THE RETIREES
(re Pension Plan Deemed Trust)**

Dated: October 10, 2018

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TO: **SERVICE LIST**

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PART I - OVERVIEW

1. On July 20, 2018, Representative Counsel for the Non-Unionized Retirees and Non-Unionized Active and Former Employees of the Sears Canada Entities (as defined in the Initial Order defined below) (“**Representative Counsel to the Retirees**”) served a motion and on July 23, 2018, Morneau Shepell Ltd. (“**Morneau Shepell**” or the “**Plan Administrator**”), in its capacity as Administrator for the Sears Canada Inc. Registered Retirement Plan (the “**Pension Plan**”) jointly with the Ontario Superintendent of Financial Services as Administrator of the Ontario Pension Benefits Guarantee Fund (the “**Superintendent**”) served a motion, which was subsequently amended and served on August 24, 2018. The motions seek various relief relating to the Pension Plan, including:

- (a) A declaration that the entire amount of the Pension Plan wind up deficiency (the “**Wind Up Deficiency**”) is deemed to be held in trust for the benefit of the Pension Plan beneficiaries;
- (b) A declaration that the deemed trust for the Wind Up Deficiency has priority ahead of all claims of other creditors (other than CCAA court-ordered charges);
- (c) A declaration that the Plan Administrator has a lien and charge attached to the assets and proceeds of Sears Canada Inc. (“**Sears Canada**”) for the amount of the Wind Up Deficiency;
- (d) A declaration that the Superintendent has a lien and charge attached to the assets and proceeds of Sears Canada for any funds that are paid out of the Pension Benefits Guarantee Fund to the Pension Plan in respect of the Wind Up Deficiency; and

(e) Declarations that 9370-2751 Québec Inc. (formerly Corbeil Électrique Inc.) (“**Corbeil**”), 191020 Canada Inc. (formerly SLH Transport Inc.) and 168886 Canada Inc. (collectively, “**SLH**”) are jointly and severally liable for the Wind Up Deficiency and that the Plan Administrator has a lien and charge attached to the proceeds of sale of Corbeil and SLH for the amount of the Wind Up Deficiency.

2. This joint factum is delivered in respect of the above-noted motions by Morneau Shepell, the Superintendent, and Representative Counsel to the Retirees (collectively, the “**Pension Parties**”).

3. Morneau Shepell was appointed by the Superintendent to take over from Sears Canada as administrator of the Pension Plan effective October 16, 2017. As Plan Administrator, Morneau Shepell has a fiduciary duty to act in the best interests of Pension Plan beneficiaries across the country. Morneau Shepell’s focus in this CCAA proceeding is to protect the interests and benefits of these beneficiaries and to ensure that the claims of these beneficiaries against the Sears Canada Entities’ estate are fully and properly advanced. Morneau Shepell has been involved in many of the most significant pension cases in Canada. It takes its fiduciary obligation to assert the rights of pensioners very seriously.

4. The Superintendent is the Chief Executive Officer of the Financial Services Commission of Ontario (“**FSCO**”). FSCO is an arm’s length agency of the Ministry of Finance in Ontario. FSCO’s statutory mandate includes providing regulatory services that protect the public interest and enhance public confidence in the pension sector, making recommendations to the Minister on the pension sector, and providing resources for the Financial Services Tribunal. The

Superintendent is also responsible for administering the Pension Benefits Guarantee Fund (the “**PBGF**”), thus the Superintendent is a significant creditor in these proceedings.

5. In a comprehensive decision, the Supreme Court of Canada in *Indalex*¹ held that the deemed trust in section 57(4) of the *Pension Benefits Act* (the “**PBA**”)² in respect of a wind up deficiency continues to apply in favour of the pension plan beneficiaries in CCAA proceedings, subject only to the potential application of the doctrine of paramourncy. There is no issue of paramourncy in this case. Moreover, there is no issue of secured creditors challenging the deemed trust, making this case a straightforward application of *Indalex* for the PBA deemed trust. The amount of the Wind Up Deficiency should be paid to the Pension Plan from the estates of Sears Canada, Corbeil and SLH.

6. The Pension Parties bring these motions to give effect to the statutory protections afforded to pension plans and pension plan beneficiaries pursuant to remedial legislation designed to protect these interests. As set out in further detail below, these statutory protections apply in respect of the Pension Plan in this proceeding and should be recognized by this Court.

7. Additionally, the terms and the structure chosen for this particular Pension Plan imposed obligations on all participating employers with Pension Plan members, which included Corbeil and SLH. As a result, both Corbeil and SLH are jointly and severally liable for the obligations in respect of the Pension Plan, including the Wind Up Deficiency.

8. The assets and proceeds currently available for distribution to creditors of the Sears Canada Entities are significantly less than the amounts owed to creditors. While the relief sought

¹ *Sun Indalex Finance LLC v. United Steelworkers*, 2013 SCC 6 (“*Indalex*”) at para. 52.

² *Pension Benefits Act*, R.S.O. 1990, c. P. 8 (“**PBA**”).

by the Pension Parties would likely eliminate recoveries for unsecured creditors, that is the result of the priority pension entitlements prescribed by statute (in respect of the deemed trust and the liens and charges), just as in other cases secured creditors with properly perfected personal property security may leave little behind for unsecured creditors. Unlike the recently filed motion by employee representative counsel seeking to lift the CCAA stay to permit an application for a bankruptcy order, the relief sought on this motion arises as a matter of statutory application and is not subject to judicial discretion.

PART II - RELEVANT FACTS

A. Background

9. Simpsons-Sears Limited, the predecessor company of Sears Canada, was formed in 1953 as a partnership between Sears, Roebuck and Co. of Chicago and The Robert Simpson Company of Toronto.³

10. In its motion record, Representative Counsel to the Retirees filed supporting affidavits. As noted in the affidavit of one of those retirees, William Turner, sworn July 23, 2018, Sears Canada's course dramatically changed in 2005 when Edward Lampert ("**Lampert**") and his firm, ESL Investments ("**ESL**"), a U.S. hedge fund, became the majority shareholder.⁴ This was done through acquiring control of Kmart Holding Corporation ("**Kmart**") in 2003 and Kmart's acquisition of Sears, Roebuck and Co. in 2005 to subsequently form Sears Holding Corporation

³ Affidavit of William Turner, sworn July 23, 2018 ("**Turner Affidavit**"), at para. 7.

⁴ Turner Affidavit, at para. 8.

(“**Sears Holdings**”).⁵ This corporate structure gave Lampert and ESL effective control of Sears Canada. Lampert also eventually became the Chief Executive Officer of Sears Holdings.⁶

11. Since 2005, Sears Canada’s retail business has steadily deteriorated. In the ensuing years, Sears Canada sold off significant assets without making necessary investments to improve and grow the retail business.⁷ It was announced at several Sears Holdings’ shareholders’ meetings that Sears Holdings was exploring ways to “monetize” Sears Canada for Sears Holdings’ financial benefit.⁸ Despite the company’s financial deterioration, Sears Canada declared a series of dividends to its shareholders totalling approximately \$3 billion between 2005 and 2013.⁹

B. This CCAA proceeding

12. On June 22, 2017, Sears Canada and a number of its operating subsidiaries sought and obtained protection from their creditors under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the “**CCAA**”), pursuant to this Court’s Initial Order.¹⁰ The Initial Order created various super-priority charges in respect of the costs of administering these proceedings (the “**Administration Costs**”).

13. Also on June 22, 2017, this Court appointed Koskie Minsky LLP as Representative Counsel the Retirees, including the Pension Plan members who are the beneficiaries of the deemed trust, with respect to pension and other post-employment benefits entitlements. Further particulars

⁵ Turner Affidavit, at para. 8.

⁶ Turner Affidavit, at para. 8.

⁷ Turner Affidavit, at para. 9.

⁸ Turner Affidavit, at para. 9.

⁹ Turner Affidavit, at para. 10.

¹⁰ Initial Order dated June 22, 2017 (as amended and restated) (the “**Initial Order**”).

of the appointment were finalized in the Representative Counsel Order for Pensions and Post-Retirement Benefits dated July 13, 2017.¹¹

14. At the time of the Initial Order, there were two lenders who claimed to have secured loans to Sears Canada: Wells Fargo and GACP Finance Co. Under the pre-filing credit agreement with Wells Fargo, as of June 19, 2017, approximately \$42 million was owing on the revolving facility and approximately \$128 million of letters of credit were outstanding.¹² Sears Canada also received loans from GACP Finance Co. in the amount of \$93.9 million as of the date of the CCAA filing under a pre-filing term credit facility.¹³ Subsequent to the granting of the Initial Order and following negotiations among certain stakeholders, Sears Canada sought authorization from this Court to enter into arrangements with Wells Fargo and GACP Finance Co. as the DIP lenders, given that Sears Canada claimed it needed funds to continue to operate during the CCAA proceedings while it explored a going concern solution. The pre-CCAA filing secured loans were thus “rolled up” into the DIP financing, additional funds were loaned by the two pre-filing secured lenders, and the combined loans were given super priority status as a CCAA court-ordered DIP loan.¹⁴ In the ensuing months, Sears Canada paid off its DIP loan in its entirety.¹⁵ There are no other secured creditors of Sears Canada remaining in this proceeding.

15. In July 2017, this Court approved a two track process:

¹¹ Endorsement dated June 22, 2017; Representative Counsel Order for Pensions and Post-Retirement Benefits dated July 13, 2017.

¹² First Report of FTI Consulting Canada Inc., as Monitor, dated July 12, 2017, at paras. 101-102; Pre-Filing Report of FTI Consulting Canada Inc., as Monitor, dated June 22, 2017, at para. 30.

¹³ Pre-Filing Report of FTI Consulting Canada Inc., as Monitor, dated June 22, 2017, at para. 32.

¹⁴ Twenty Second Report of FTI Consulting Inc., as Monitor, dated September 7, 2018 (“**Twenty-Second Report of the Monitor**”), Appendix B - Affidavit of Billy Wong sworn June 22, 2017, at para. 229; Initial Order, at paras. 38-46.

¹⁵ Eighth Report of FTI Consulting Canada Inc., as Monitor, dated December 6, 2017, at paras. 38-39.

- (a) a sale and investment solicitation process having a bid deadline of August 31, 2017 (the “**SISP**”),¹⁶ and
- (b) a process for the liquidation of inventory and furniture, fixtures and equipment at 59 locations scheduled for closure (the “**Initial Liquidation**”).¹⁷

16. The SISP did not generate a comprehensive going-concern restructuring solution. On October 13, 2017, this Court issued a Liquidation Sale Approval Order for the liquidation of inventory and furniture, fixtures and equipment at all of the Sears Canada Entities’ remaining locations (together with the Initial Liquidation, the “**Liquidation**”).¹⁸

17. By the end of January 2018, the Liquidation was substantially complete, but for various real estate holdings of uncertain value.

C. Appointment of Morneau Shepell as Plan Administrator and the wind up of the Pension Plan

18. Effective October 16, 2017, the Superintendent appointed Morneau Shepell as Plan Administrator, as it was inevitable that the Pension Plan would need to be wound up given the Liquidation of the Sears Canada Entities.¹⁹

19. The Superintendent issued and served a Notice of Intended Decision dated November 10, 2017 (the “**NOID**”), indicating that the Pension Plan was to be wound up effective as of October 1, 2017, with such wind up including all Pension Plan members whose employment was

¹⁶ SISP Approval Order dated July 13, 2017.

¹⁷ Liquidation Sale Approval Order dated July 18, 2017.

¹⁸ Liquidation Sale Approval Order (Phase II Liquidation) dated October 13, 2017.

¹⁹ Affidavit of Hamish Dunlop, affirmed August 24, 2018 (“**Dunlop Affidavit**”), Exhibit “H”, Notice of Intended Decision dated November 10, 2017.

terminated on or after June 13, 2017.²⁰ All persons on the Service List were on notice of these dates and had an opportunity to object. Although one creditor constituency initially objected to the NOID and submitted a request for a hearing before the Financial Services Tribunal, the objection and request were subsequently withdrawn and the Superintendent issued an order dated March 29, 2018 (the “**Wind Up Order**”) that “the Plan is wound up, effective October 1, 2017”, which is now a final order.²¹

D. Sale of the Corbeil and SLH businesses

20. Corbeil and SLH were wholly-owned subsidiaries of Sears Canada with different creditor groups relative to Sears Canada and the other entities making up the Sears Canada Entities.²² Corbeil carried on a specialty retail business with Corbeil branded corporate and franchised stores.²³ SLH transported merchandise to and from stores and merchandise pick-up locations for Sears Canada²⁴. Employees of Corbeil and SLH were members of the same Pension Plan as Sears Canada employees, as set out in further detail below.

21. As part of the SISP, the assets of Corbeil and SLH were marketed separately and eventually sold as going-concerns in transactions that closed on November 24, 2017 and December 4, 2017, respectively.²⁵ After accounting for current cash on hand, forecasted net cash flows and post-filing intercompany adjustments, the Monitor estimates that there will be

²⁰ Dunlop Affidavit, Exhibit “H”, Notice of Intended Decision dated November 10, 2017.

²¹ Dunlop Affidavit, Exhibit “I”, Wind-up Order dated March 29, 2018.

²² Sixteenth Report of FTI Consulting Canada Inc., as Monitor, dated April 2, 2018, at para. 24.

²³ Twenty-Second Report of the Monitor, Appendix B - Affidavit of Billy Wong, sworn June 22, 2017, at para. 17(a).

²⁴ Twenty-Second Report of the Monitor, Appendix B - Affidavit of Billy Wong, sworn June 22, 2017, at para. 17(b).

²⁵ Twenty-Second Report of the Monitor at para. 24.

approximately \$29 million in proceeds from Corbeil and \$8 million in proceeds from SLH for distribution to their respective creditors.²⁶

E. Nature of the Pension Plan

22. Sears Canada established the Pension Plan in January 1976 for the purpose of providing defined benefit pensions to employees on their retirement (the **“DB Component”**).²⁷ The DB Component of the Pension Plan operates by establishing a formula pursuant to which a monthly pension benefit is calculated at the time of the retirement of an employee.²⁸ In addition, employees were also required to regularly contribute a portion of their pay to the Pension Plan.²⁹ This requirement had the effect of reducing the RRSP contribution room of employees, leaving employees dependent on the Pension Plan for their retirement income.³⁰

23. In June 2008, Sears Canada amended the Pension Plan to add a defined contribution component (the **“DC Component”**). The DC Component operates similarly to contributions to registered retirement savings plans, with employers and employees making fixed contributions for each employee as a percentage of employees’ pay to an account.³¹

24. As of June 30, 2008, pension benefit accruals for employees who had been accruing a benefit under the DB Component were frozen. These employees retained their defined benefit pension that they earned up to June 30, 2008, which would be paid to them as a monthly defined benefit pension when they retired from Sears Canada (in addition to any amount they earned under

²⁶ Twenty-Second Report of the Monitor, Appendix A.

²⁷ Turner Affidavit, at para. 13.

²⁸ Dunlop Affidavit, at para. 11.

²⁹ Turner Affidavit, at para. 13.

³⁰ Turner Affidavit, at para. 13.

³¹ Dunlop Affidavit, at para. 11.

the DC Component, if also applicable to them). After June 30, 2008, all Sears Canada employees could only accrue future Pension Plan benefits under the DC Component.³²

25. From its inception until Morneau Shepell's appointment in October 2017, Sears Canada was the administrator of the Pension Plan pursuant to the PBA. In that role, Sears Canada had oversight for the funding and management of the Pension Plan.³³

F. Funding of the Pension Plan

26. Since 2007, there has been a wind up funding deficit in the Pension Plan, meaning there were (and are at present) insufficient assets in the pension fund to pay all monthly pension benefits in the full amounts earned by each employee on retirement.³⁴ At present, the Wind Up Deficiency has been calculated as approximately \$260,200,000, but the exact Wind Up Deficiency cannot be known until the final actuarial analysis and deficit calculations are complete, and benefits are settled.³⁵ The Plan Administrator has asserted a claim for the entire Wind Up Deficiency against the Sears Canada Entities in this proceeding.³⁶

G. Participating Employers Responsible for the Pension Plan

27. The Pension Plan permits other employers designated by Sears Canada to participate in the Pension Plan.³⁷ Both Corbeil and SLH are participating employers under the Pension Plan.³⁸ Pay stubs sent to employees of Corbeil and SLH who participated in the Pension Plan showed

³² Turner Affidavit, at para. 16.

³³ Dunlop Affidavit, at para. 10.

³⁴ Dunlop Affidavit, at para. 13.

³⁵ Dunlop Affidavit, at para. 13. Morneau Shepell has discovered an issue with respect to the joint and survivor waiver forms that were used by Sears Canada (as previous administrator of the Pension Plan) in certain provinces over a period of many years. Morneau Shepell has brought a separate motion for advice and directions in respect of this issue. Depending on the outcome of that motion, the Wind Up Deficiency may increase to in excess of \$290,000,000.

³⁶ Dunlop Affidavit, Exhibit J, Morneau Shepell Proof of Claim Form dated April 5, 2018.

³⁷ Dunlop Affidavit, Exhibit C, Pension Plan, section I.2.13.

³⁸ Dunlop Affidavit, at para. 14.

Sears Canada as the payor.³⁹ Additionally, statements for both the DB Component and DC Component of the Pension Plan that were sent to employees, including those employed by Corbeil and SLH, named only Sears Canada.⁴⁰

28. As at September 30, 2017, 92 employees of Corbeil (in Ontario and Quebec) participated in the DC Component of the Pension Plan.⁴¹ As at September 30, 2017, employees of SLH participated in the Pension Plan as follows: at least 90 employees in the DB Component; at least 47 employees in the DC Component; and at least an additional 161 employees in both the DB Component and DC Component.⁴²

29. The employers participating in the Pension Plan took “contribution holidays” from 2008 to 2010 with respect to the DB Component of the Pension Plan and from 2008 to 2009 with respect to the DC Component of the Pension Plan.⁴³ The effect of the contribution holidays declared by Sears Canada in 2008 and 2009 was to benefit all participating employers of the Pension Plan, including those who participated only in the DC Component of the Pension Plan. The Pension Plan creates one fund and does not distinguish between employers in the DB Component or DC Component.⁴⁴ Surplus funds in the Pension Plan at the time of the contribution holidays were used to fund employer contributions to the DC Component notwithstanding that the employers in respect of the DC Component did not make any contribution to the surplus (as a defined contribution plan, by its very nature, cannot have a surplus).⁴⁵

³⁹ Dunlop Affidavit, at para. 17.

⁴⁰ Dunlop Affidavit, at para. 17.

⁴¹ Dunlop Affidavit, at para. 16.

⁴² Dunlop Affidavit, at para. 16.

⁴³ Dunlop Affidavit, at para. 20.

⁴⁴ Dunlop Affidavit, at para. 21.

⁴⁵ Dunlop Affidavit, at para. 21.

H. Pension Plan beneficiaries

30. There are approximately 19,591 members of the Pension Plan, which includes former employees of Sears Canada, Corbeil and SLH.⁴⁶ The average age of retirees and survivors is 77.92.⁴⁷ As at July 31, 2018 (prior to the reductions in benefits discussed further below), the average gross annual pension amount received by members of the Pension Plan was \$5,552.34.⁴⁸ At least 94% of retirees of all Sears Canada Entities receive a gross annual pension of less than \$20,000.⁴⁹

31. Approximately 58% of the Wind Up Deficiency relates to Ontario members and the remaining 42% relates to (and will be borne by) members in all other provinces.⁵⁰

32. The PBGF is a fund established under the PBA to ensure that a minimum pension benefit is paid to Ontario plan members of certain types of defined benefit pension plans, including the Pension Plan, if these plans are wound up with insufficient funds.⁵¹ The PBGF is funded by contributions from employers that sponsor eligible pension plans in Ontario based on prescribed assessments.⁵² On July 30, 2018, the Superintendent issued a Notice of Intended Decision proposing to order that the PBGF applies to the Pension Plan. No requests for hearing on the Notice of Intended Decision were delivered. On September 27, 2018, the Superintendent ordered

⁴⁶ Dunlop Affidavit, at para. 9.

⁴⁷ Dunlop Affidavit, at para. 23.

⁴⁸ Dunlop Affidavit, at para. 23.

⁴⁹ Dunlop Affidavit, at para. 23.

⁵⁰ Dunlop Affidavit, at para. 26.

⁵¹ Dunlop Affidavit, at para. 33; *PBA*, s. 84.

⁵² Affidavit of Brian Mills, sworn August 24, 2018 (“**Mills Affidavit**”), at para. 7.

that the PBGF applies to the Pension Plan.⁵³ Based on a Wind Up Deficiency of \$260,200,000, FSCO estimates that the PBGF will pay approximately \$125,000,000 into the Pension Plan.⁵⁴

33. While the PBGF provides some relief to Pension Plan members who reside in Ontario (where benefits are less than the PBGF limit), this only accounts for approximately 58% of the Pension Plan members.⁵⁵ Pension Plan members resident in other jurisdictions in Canada (or subject to federal jurisdiction) have no such fund to rely upon and will bear directly the shortfall in their pension benefits as a result of the Wind Up Deficiency not being paid in full.⁵⁶

34. The Wind Up Deficiency has caused financial hardship to the Pension Plan members.⁵⁷ Retirees with DB Component entitlements have experienced significant reductions to their monthly pension benefits as a result of the underfunding of the Pension Plan.⁵⁸ These reductions began with the August 2018 payments and resulted in an immediate 30% loss of monthly pension benefits for Pension Plan members outside of Ontario.⁵⁹ Pension benefits above \$1,500 per month (the PBGF limit) in respect of Ontario service were reduced by 30% as well.

35. Based on the current assets and proceeds available for distribution to creditors of Sears Canada, Corbeil and SLH, the Wind Up Deficiency will not be satisfied even if the relief sought on these Pension Motions is granted. Pension Plan beneficiaries will still incur losses to their monthly pension benefits.

⁵³ Order of the Superintendent of Financial Services dated September 27, 2018.

⁵⁴ Mills Affidavit, at para. 39.

⁵⁵ Dunlop Affidavit, at para. 34.

⁵⁶ Dunlop Affidavit, at para. 34.

⁵⁷ Affidavit of Ronald Husk, sworn October 10, 2018; Affidavit of Audrey Richardson, sworn September 20, 2018.

⁵⁸ Dunlop Affidavit, at para. 32.

⁵⁹ Dunlop Affidavit, at para. 32.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

36. There are five issues to be decided on the Pension Parties' motions:

- (a) Is there a deemed trust for the benefit of Pension Plan beneficiaries in respect of the Wind Up Deficiency?
- (b) Does the Plan Administrator have a valid lien and charge in respect of the Wind Up Deficiency?
- (c) Does the Superintendent have a valid lien and charge in respect of any amounts advanced?
- (d) Are the deemed trust and associated liens and charges valid and enforceable in this CCAA proceeding?
- (e) Are Corbeil and SLH jointly and severally liable for the Wind Up Deficiency?

37. For the reasons that follow, the Pension Parties submit that the answer to each of these questions is "yes".

38. In light of the motion brought by employee representative counsel to lift the CCAA stay to permit an application for a bankruptcy order in respect of Sears Canada, Corbeil and SLH, the Pension Parties will address issues regarding the impact of bankruptcy on the deemed trust and liens and charges as part of their response to that motion. To be clear, however, the Pension Parties oppose a conversion of these CCAA proceedings to a bankruptcy with the stated objective of attempting to defeat the deemed trust.

A. There is a deemed trust in favour of the Pension Plan beneficiaries for the Wind Up Deficiency

39. Pension benefits are deferred wages earned by employees for work they performed for their employer:

Pension benefits have consistently been viewed as an entitlement earned by the employee. As Lord Reid put it in *Perry [v. Cleaver]*, [1970] A.C. 1], at p. 16: "The products of the sums paid into the pension fund are in fact delayed remuneration for [the employee's] current work. That is why pensions are regarded as earned income." The pension is therefore a form of retirement savings earned over the years of employment to which the employee acquired specific and enforceable rights...⁶⁰

40. The PBA is remedial legislation which must be given "such fair, large and liberal interpretation as best ensures the attainment of its objects."⁶¹ The overall purpose of pension benefits legislation such as the PBA is to protect the social welfare of pension plan beneficiaries. In *Huus v. Ontario Superintendent of Pensions*, the Court of Appeal for Ontario summarized the importance of this minimum standards legislation as follows:

I start with this observation: pension plans are for the benefit of the employees, not the companies which create them. They are a particularly important component of the compensation employees receive in return for their labour. They are not a gift from the employer; they are earned by the employees. Indeed, in addition to their labour, employees usually agree to other trade-offs in order to obtain a pension. As explained by Cory J. in *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 at 646:

In the case of pension plans, employees not only contribute to the fund, in addition they almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour.

⁶⁰ *IBM Canada Limited v. Waterman*, 2013 SCC 70, at para. 85.

⁶¹ *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F, s. 64(1).

Similar statements have been expressed by this court in several cases. In *Gencorp Canada Inc. v. Ontario (Superintendent of Pensions)* (1998), 39 O.R. (3d) 38 at 43 (C.A.), Robins J.A. said:

[T]he Pension Benefit Act is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans. . . .⁶²

41. In furtherance of the legislative intent to protect the interests of pension plan members, when a pension plan is wound up, subsection 57(4) of the PBA establishes a deemed trust in respect of contributions owing to the pension plan:

57(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

42. The Supreme Court of Canada has confirmed that subsection 57(4) of the PBA operates to create a valid and enforceable statutory deemed trust over an amount equal to all amounts due and accrued upon wind up of a pension plan, including any wind up deficiency payment (i.e. amounts owing under subsection 75(1)(b) of the PBA).⁶³ Justice Deschamps, writing for the majority of the Supreme Court on this point, explained that a broad, liberal construction of the trust protection is necessary to give effect to the legislature's remedial intent:

The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. This purpose militates against adopting the limited scope proposed by Indalex and some of the interveners. In the case of competing priorities between creditors, the remedial purpose favours an approach that includes all wind up

⁶² *Huus v. Ontario Superintendent of Pensions* (2002), 58 O.R. (3d) 380 (C.A.), at paras. 25-26.

⁶³ *Indalex*, at paras. 44-45, 265.

payments in the value of the deemed trust in order to achieve a broad protection.⁶⁴

43. Since the Supreme Court's decision, *Indalex* has been applied or approved in CCAA and other proceedings:

- (a) In the *Timminco* CCAA proceedings with respect to the Ontario estate, the Monitor applying *Indalex* accepted the PBA deemed trust priority claim in respect of the Ontario Timminco pension plan and paid a distribution to the pension plan administrator in priority to other creditors;⁶⁵
- (b) the issue of the applicability of the pension deemed trusts in section 49 of the Quebec *Supplemental Pension Plans Act*, chapter R-15.1, ("**Quebec SPPA**") to the Quebec Timminco pension plan beneficiaries was referred by Mr. Justice Morawetz (as he then was) for determination by the Quebec Superior Court. Mr. Justice Mongeon held, applying *Indalex*, that the deemed trusts in section 49 of the Quebec SPPA operate as priority claims for the amounts owing to the Quebec pension plan by the employer in respect of unpaid current service payments and unpaid special payments;⁶⁶ and
- (c) as referred to in further detail below, the Court of Appeal of Newfoundland and Labrador recently applied *Indalex* in confirming the validity of the pension wind up

⁶⁴ *Indalex*, at para. 44.

⁶⁵ *Timminco Limited* (CV-12-9539-00CL), Twenty-Fifth Report of the Monitor dated June 9, 2014, at para. 60.

⁶⁶ *Timminco ltée (Arrangement relatif à)*, 2014 QCCS 174.

and deemed trust under Newfoundland's *Pension Benefits Act* ("NLPBA"), which is similar pension benefits legislation to the PBA.⁶⁷

44. Accordingly, there is a deemed trust in respect of the Wind Up Deficiency for the benefit of Pension Plan beneficiaries. In these proceedings, the deemed trust operates as a priority claim to be paid ahead of all other creditors, except the CCAA-court ordered charges.

B. The Plan Administrator has a lien and charge in respect of the Wind Up Deficiency

45. Subsection 57(5) of the PBA also creates a statutory lien in favour of the Plan Administrator. The Plan Administrator's lien and charge provides additional protection for pension plan beneficiaries of a wound up pension plan with a funding deficit.

46. The amount of the lien is equal to the amounts forming the subject of the deemed trust established by subsection 57(4) (as set out above) (i.e, the total of any unremitted current or special service payments, or, where the plan is being wound up, the wind up deficiency):

57(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under this section.

47. The lien and charge is over all of the assets of the employer, including all categories of personal property and all real property.

48. While an issue with respect to the priority of the lien and charge can arise in circumstances where there are creditors with pre-existing security interests, there are no remaining secured creditors in this case (other than the Plan Administrator).⁶⁸ Accordingly, the Plan

⁶⁷ Reference re Section 32 of the *Pension Benefits Act*, 1997, 2018 NLCA 1.

⁶⁸ While there are no remaining secured creditors in this case, other cases applying the deemed trust have also referenced subsection 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10, which states "A security

Administrator has a first-ranking lien and charge on the assets of the Sears Canada Entities and any proceeds therefrom (i.e. as a result of liquidation) in the amount of the deemed trust (i.e. the Wind Up Deficiency).

49. The 2016 Agreement Respecting Multi-Jurisdictional Plans, the 1968 Memoranda of Reciprocal Agreement, and the various provincial pension benefits statutes establish that the deemed trust and liens and charges provided under PBA are valid and enforceable across Canada.⁶⁹ These agreements and the other provincial benefits legislation also support the Plan Administrator's position with respect to joint and several liability.

50. The purposes and validity of the deemed trust and plan administrator's lien and charge were also recently confirmed by the Court of Appeal of Newfoundland and Labrador in respect of the deemed trust and the plan administrator's lien and charge provisions of the NLPBA for a wind up deficiency owing to a pension plan, which provisions are similar to the PBA.⁷⁰ The Court confirmed that (i) unpaid current service costs, unpaid special payments and any unpaid wind up deficiency fall within the scope of the deemed trust and (ii) the lien and charge create a valid secured claim in favour of the pension plan administrator.⁷¹ The lien and charge is engaged upon creation of the trust and attaches to the assets held by the employer regardless of their location.⁷²

51. The lien and charge creates a secured claim for the Administrator in respect of the same Wind Up Deficiency amount owing to the Pension Plan by the employer that is also protected by

interest in an account or inventory and its proceeds *is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the Employment Standards Act, 2000, the Pension Benefits Act or the Pooled Registered Pension Plans Act, 2015.*" [Emphasis added.] See, for example, *Indalex*, at para. 48.

⁶⁹ Dunlop Affidavit, Exhibits A and B; Twenty-Second Report, at paras. 54-56.

⁷⁰ *Reference re Section 32 of the Pension Benefits Act, 1997*, 2018 NLCA 1.

⁷¹ *Reference re Section 32 of the Pension Benefits Act, 1997*, 2018 NLCA 1, at paras. 27 and 51. See also paras. 45, 47 and 48.

⁷² *Reference re Section 32 of the Pension Benefits Act, 1997*, 2018 NLCA 1, at para. 52.

the deemed trust. The distinction between a statutory deemed trust and a statutory lien and charge has been described as follows:

Although many government claims are protected by both a “deemed trust” and a “statutory lien”, *they are fundamentally different in character. A lien is a form of security* in the sense that it provides the government with access to assets of the debtor to recover payment of a debt. A deemed trust attempts to redefine the property so as to exclude sufficient assets in its possession to satisfy the government claim and to 'deem' such assets to be the property of the government.⁷³

52. The definition of secured creditor in section 2 of the CCAA is very broad and includes “a *holder* of a... *charge, lien...for indebtedness of the debtor company...* in respect of, all or any property of the debtor company...” The Plan Administrator is a secured creditor in any CCAA proceeding.

C. The Superintendent has a valid lien and charge in respect of any funds that are paid out of the Pension Benefits Guarantee Fund to the Pension Plan in respect of the Wind Up Deficiency

53. Subsection 86(1) of the PBA creates a lien and charge in favour of the Superintendent:

86(1) Where money is paid out of the Guarantee Fund as a result of the wind up, in whole or in part, of a pension plan, the Superintendent has a lien and charge on the assets of the employer or employers who provided the pension plan.

54. The Superintendent’s lien and charge crystallizes when money is paid out of the PBGF. Although the payment has not yet occurred, the Superintendent has now ordered that the PBGF applies to the Pension Plan. The PBGF’s payment into the Pension Plan is inevitable. As a result, the Superintendent will hold a valid lien and charge over the Sears Canada Entities’ assets (i.e., the proceeds from the Liquidation) in the amount of the payment out of the PBGF, currently estimated

⁷³ McElcheran, K., *Commercial Insolvency in Canada* (Butterworths, 2015) at p. 165.

to be \$125,000,000. Like the Plan Administrator's lien and charge, the Superintendent's lien and charge is valid and enforceable, ranking ahead of all unsecured claims.

D. The deemed trust and liens and charges are valid and enforceable in this CCAA proceeding

The deemed trust and liens and charges are enforceable

55. As noted in paragraph 19 above, the Wind up Order was granted on March 29, 2018, ordering that "the Plan is wound up, effective October 1, 2017", triggering the deemed trust.

56. The Supreme Court of Canada has confirmed that the provincial deemed trust under the PBA continues to apply in CCAA proceedings, subject to the doctrine of federal paramountcy.⁷⁴ Provincial legislation, such as the PBA, "defines the priorities to which creditors are entitled until that legislation is ousted by Parliament."⁷⁵ In the CCAA context, the provincial property and priority scheme is a necessary complement to the CCAA, which is by design a skeletal, flexible statute that does not purport to comprehensively establish priorities and distribution rights between parties.⁷⁶

57. The doctrine of paramountcy is only triggered where (i) there is an operational conflict, such that it is impossible to comply with both statutory provisions, or (ii) the provincial law frustrates or thwarts the purpose of the federal law.⁷⁷ The Supreme Court of Canada has repeatedly warned that the doctrine of paramountcy should be construed narrowly.⁷⁸ Accordingly, where it is possible to interpret a federal statute as coexisting with a provincial statute, this interpretation

⁷⁴ *Indalex*, at para. 52, citing *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, at para 43.

⁷⁵ *Indalex*, at para. 51.

⁷⁶ *Indalex*, at para. 52.

⁷⁷ *Canadian Western Bank v Alberta*, 2007 SCC 22 ("*Canadian Western Bank*"), at para. 75.

⁷⁸ *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, at para. 21.

should be “applied in preference to another applicable construction which would bring about a conflict between the two statutes.”⁷⁹

The deemed trust and liens and charges apply even if the wind up occurs after the CCAA filing

58. There are no provisions in the CCAA that invalidate or displace the deemed trust created by the statute. Further, there is no provision in the CCAA or elsewhere that invalidates the statutory pension deemed trust if the pension plan wind up occurs after the commencement of the debtor company’s CCAA proceedings. There is no discernible reason, in law or policy, to require that a pension plan must be wound up prior to a debtor company’s CCAA filing in order to give effect to the protections prescribed by pension benefits legislation, particularly if a going-concern restructuring is the objective of the proceedings.

59. In *Indalex*, the CCAA court considered a priority dispute that arose in the context of a motion that was brought by the debtor company in the CCAA proceedings for an order: a) approving a sale of assets, and b) distributing all of the sales proceeds without paying anything toward the pension plan wind up deficiency (the “**Sale and Distribution Motion**”). The company sponsored two pension plans: a pension plan for salaried employees (the “**Salaried Plan**”) and another pension plan for executives (the “**Executive Plan**”). Both plans were underfunded. The pension plan members of both plans objected to the company’s Sale and Distribution Motion and sought an order for a priority distribution from the sale proceeds in the amount of the wind up deficiencies owing to both pension plans based on the PBA deemed trust.

⁷⁹ *Canadian Western Bank*, at para. 75, citing *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307, at p. 356.

60. At the time the motion was before the CCAA court, the Salaried Plan had been wound up, but the Executive Plan had not yet been wound up. The CCAA court held that the PBA deemed trust applied to the Salaried Plan since the plan was wound up at the time of the motion.⁸⁰ However, since the Executive Plan had not yet been wound up, the Court held that the PBA deemed trust for the wind up deficiency had not yet arisen for that plan. On appeal, the Supreme Court of Canada agreed with the CCAA court on this point:

The situation is different with respect to the Executive Plan. Unlike s. 57(3), which provides that the deemed trust protecting employer contributions exists while a plan is ongoing, *s. 57(4) provides that the wind up deemed trust comes into existence only when the plan is wound up*. This is a choice made by the Ontario legislature. I would not interfere with it. Thus, the deemed trust entitlement arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future. *At the time of the sale*, the Executive Plan was in the process of being, but had not yet been, wound up. Consequently, the deemed trust provision does not apply to the employer's wind up deficiency payments in respect of that plan. [Emphasis added.]⁸¹

The issue that arose in *Indalex* with respect to the Executive Plan does not exist in this case (as the Pension Plan has already been wound up).

61. In respect of the Salaried Plan, the Supreme Court of Canada held that there was a conflict between the CCAA court-ordered DIP loan priority and the priority of the deemed trust under the provincial PBA. Due to the conflict, paramouncy was invoked as the DIP charge was created by order of the CCAA court under the federal CCAA and thus subordinated the PBA

⁸⁰ With respect to the Salaried Plan, Justice Campbell held that since no contributions were overdue for payment by the company at the time of the Sale and Distribution Motion before him, there were no overdue amounts to which the deemed trust applied. This finding was overturned by the Ontario Court of Appeal and by the Supreme Court of Canada, which both held that the PBA deemed trust captures the entire wind up deficiency as soon as the plan is ordered to be wound up, even if a payment does not need to be made until a later date.

⁸¹ *Indalex*, at para. 46.

deemed trust. Such a conflict does not exist in this case, as the DIP lenders have been repaid in full and the super-priority DIP charge has been fully discharged. In the absence of a conflict, the validly enacted statutory deemed trust protections afforded to pension plan beneficiaries must be recognized. Unlike the situation in *Indalex*, the Pension Parties here seek to assert the deemed trust on all amounts *after* the payment of all CCAA court-ordered charges, and only in priority to unsecured creditors.

62. The same principles apply with respect to the Plan Administrator and Superintendent's statutory liens and charges. Like the deemed trust, the liens and charges exist within a carefully calibrated priority scheme established by the legislature under its property and civil rights power. There is nothing in the CCAA or elsewhere that invalidates or displaces these liens and charges as they relate to the otherwise unencumbered assets and proceeds in this case.

63. While the Supreme Court of Canada in *Indalex* did not need to address the circumstance in which a pension plan is wound up after the commencement of CCAA proceedings, the Court's reasoning implies that a PBA deemed trust for the wind up deficiency is indeed operative post-CCAA filing -- the *only* pre-condition is that the pension plan has been wound up.⁸²

64. From a public policy perspective, it makes sense that the deemed trust in respect of a pension plan wind up deficiency need not be triggered prior to a debtor company's CCAA filing in order to be effective. Courts should not encourage premature pension plan wind ups. The policy objective of restructuring legislation is to promote going-concern outcomes that avoid bankruptcy. In this case, had the wind up of the Pension Plan occurred prior to the CCAA filing, the Sears Canada Entities would immediately have become liable to pay the approximately \$260-million

⁸² *Indalex*, at para. 47.

wind up deficiency to the Pension Plan which would have likely foreclosed a going-concern sale outcome which could have seen the business and the Pension Plan continue for the benefit of the employees and the retirees. Requiring a wind up before the date that a company files for CCAA protection would also exacerbate the employer's conflict of interest when it is concurrently acting as the pension plan administrator.⁸³

65. Finally, the priority of statutory deemed trust pension claims should not be subject to a special rule requiring their applicability to be determined by reference to the circumstances that exist before a company's CCAA filing, in contrast to the claims of other creditors who are not limited in the same way and whose priorities can continue to evolve as a CCAA proceeding unfolds. For example, creditors who hold a security agreement are not prevented from filing PPSA registrations post-CCAA filing in order to perfect and enforce their security;⁸⁴ and, the courts routinely lift the CCAA stay of proceedings to permit lien claimants to take steps to give effect to their statutory liens.⁸⁵

Certain other decisions dealing with pension deemed trusts are not applicable to this case

66. While stakeholders opposing the Pension Parties' motions may attempt to rely on aspects of the decisions in *Grant Forest*⁸⁶ and *Bloom Lake*⁸⁷ in an attempt to undermine the deemed trust and/or statutory liens and charges applying post-CCAA filing, these decisions are not applicable to the circumstances of this case, as set out below.

⁸³ *Indalex*, at para. 66.

⁸⁴ Initial Order, at para. 17.

⁸⁵ See, for instance, *Veltri Metal Products Co., Re*, [2004] O.J. No. 2994 (Ont. S.C.J. [Commercial List]); *Anvil Range Mining Corp., Re*, [1998] O.J. No. 1088 (Ont. Gen. Div. [Commercial List]); and *Cansugar Inc., Re*, [2003] N.B.J. No. 473 (N.B. Q.B.).

⁸⁶ *Grant Forest Products Inc. (Re)*, 2013 ONSC 5933 ("**Grant Forest**"); *Grant Forest Products Inc. v. The Toronto-Dominion Bank*, 2015 ONCA 570 ("**Grant Forest (OCA)**").

⁸⁷ *Arrangement relatif à Bloom Lake*, 2017 QCCS 4057 ("**Bloom Lake**").

Grant Forest

67. In *Grant Forest*, Justice Campbell (at first instance) suggested in *obiter* that a pension plan must be wound up prior to a CCAA filing in order for the PBA wind up deemed trust to be effective.⁸⁸ However, Justice Campbell's conclusion was based on an erroneous interpretation of the Supreme Court of Canada's decision in *Indalex* in which no such finding was made. Rather, as set out above, *Indalex* confirmed that the wind up deemed trust exists as soon as a pension plan has been wound up (with no distinction as between whether such wind up takes place pre- or post-CCAA filing).

68. Additionally, the circumstances facing the court in *Grant Forest* were significantly different than the circumstances in this proceeding:

- (a) In *Grant Forest*, the court was concerned with the competing interests of ensuring certainty for secured creditors, whereas there are no other secured creditors at issue in this proceeding;⁸⁹ and
- (b) There was an outstanding petition for bankruptcy issued (though not proceeded with) years prior to the wind up of the pension plan and the motion in respect of the deemed trust, whereas in this case the pending bankruptcy motion was only brought after the wind up of the Pension Plan and the filing of the Pension Parties' motions asserting the deemed trust.

69. The Court of Appeal for Ontario subsequently held that Justice Campbell did not err in the exercise of his discretion to allow a bankruptcy application to proceed after all of the assets of

⁸⁸ *Grant Forest*, at para. 71.

⁸⁹ *Grant Forest*, at paras. 3 and 72.

the company had been liquidated based on the facts of that case. The Court of Appeal disposed of the appeal without addressing the deemed trust timing issue or the applicability of *Indalex*.⁹⁰ As such, the Court of Appeal did not affirm Justice Campbell's statement regarding the effect of the CCAA filing date on the effectiveness of the PBA deemed trust.

Bloom Lake

70. In a recent decision of the Quebec Superior Court, Justice Hamilton found that the deemed trust provisions of the federal *Pension Benefits Standards Act* (the “**PBSA**”)⁹¹ and the Newfoundland pension legislation were inoperative in CCAA proceedings.⁹² The Quebec Court of Appeal granted the pension plan beneficiaries and pension regulators leave to appeal this decision and an appeal hearing was scheduled.⁹³ Prior to the hearing of the appeal, the priority claim for the pension plan wind up deficiency was settled with an amount paid in respect of the pension plans⁹⁴.

71. The *Bloom Lake* decision, which is not binding in Ontario, is flawed in a number of critical respects and should not be followed:

- (a) In reaching his conclusions, Justice Hamilton relied on a Senate Recommendation which was ultimately not adopted by the House of Commons to establish

⁹⁰ *Grant Forest* (OCA).

⁹¹ *Pension Benefits Standards Act, 1985* (R.S.C., 1985, c. 32 (2nd Supp.)).

⁹² *Bloom Lake*, at paras 210 and 216.

⁹³ *Syndicat des métaux, section locale 6254 c. FTI Consulting Canada Inc.*, 2017 QCCA 1676.

⁹⁴ See *Arrangement relatif à Bloom Lake*, (No. 500-11-048114-157) Forty-Sixth Report to the Court submitted by FTI Consulting Canada Inc., in its capacity as Monitor, dated May 23, 2018 at paras. 12 and 18.

Parliament's intention that only normal-cost and employee contributions receive any priority in insolvency, leaving "no room for the provinces";⁹⁵

- (b) Justice Hamilton did not adequately address the validly enacted federal pension priorities under the PBSA, which by his interpretation would also necessarily conflict with the federal insolvency legislation. Instead of applying the well-established presumption of coherence which "requires that the two statutes be read together to avoid conflict",⁹⁶ Justice Hamilton relied on a factual error—that the insolvency amendments are operative because they came after the relevant PBSA amendments (they did not)⁹⁷—to resolve the conflict created by his interpretation of the CCAA;⁹⁸
- (c) Justice Hamilton did not acknowledge that the pension priority prescribed by sections 6(6) and 36(7) the CCAA supply minimum standards of pension protection but do not displace validly enacted pension benefits legislation; and
- (d) The decision collapses the CCAA and BIA schemes,⁹⁹ despite the Supreme Court of Canada cautioning that these are two distinct regimes.¹⁰⁰

⁹⁵ Hamilton J. relied on the report of the Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003) (the "Senate Report") in reaching this conclusion (*Bloom Lake* at paras. 189, 192). See Government of Canada, "Bill C-55: clause by clause analysis" (30 September 2011) online: <https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/h_cl00790.html>: "Senate recommendation #21 advised that priorities relating to pension obligations not be improved. For the reasons discussed in 'Rationale', the Senate recommendation was not followed."

⁹⁶ *Reference re Broadcasting Act*, S.C. 1991 (Canada), 2012 SCC 68, paras. 37-38.

⁹⁷ Hamilton J. reached this conclusion because he found that the PBSA pension priorities were added in June, 1986, while the federal government amended the pension provisions in the CCAA in December, 2007. In fact, the relevant PBSA pension protections were amended on July 12, 2010 (coming into force on April 1, 2011).

⁹⁸ *Bloom Lake*, at paras. 215-216.

⁹⁹ *Bloom Lake*, at para. 208.

¹⁰⁰ *Indalex*, at para. 51.

The effect of the deemed trust and liens and charges is consistent with the applicable legislation

72. The deemed trust and liens and charges rank ahead of all other creditors' claims against the Sears Canada Entities (all of which are unsecured). The economic realities of this case mean that granting the relief sought by the Pension Parties may eliminate recoveries for unsecured creditors from the Sears Canada Estate. Such an outcome is consistent with the clear intent of the legislature to protect and prioritize pension beneficiaries as set out in pension benefits legislation. Notably, even recognition of the deemed trust will not fully restore benefits for all Pension Plan beneficiaries as the current assets and proceeds of the Sears Canada Entities are insufficient to satisfy the entire Wind Up Deficiency.

73. These statutorily prescribed priorities provide certainty to all parties. Corporations, such as the Sears Canada Entities, may defer the performance of their pension promise prior to a CCAA filing, but their employees who rely on that promise have the certainty that it will be performed by the operation of the relevant pension priorities of the PBA.

E. Corbeil and SLH are jointly and severally liable for the Wind Up Deficiency

74. In the event this Court finds in favour of the Pension Parties regarding the deemed trust and liens then the joint and several liability of Corbeil and SLH is not expected to materially affect the recoveries in respect of the Pension Plan because the current available proceeds are less than the Wind Up Deficiency.¹⁰¹ However, if the Court does not grant the relief sought regarding the

¹⁰¹ Twenty-Second Report of the Monitor, Appendix A, Scenarios 3 and 4.

deemed trust and liens, it is estimated that the joint and several liability of Corbeil and SLH would result in a difference of over \$29 million in terms of projected recoveries for the Pension Plan.¹⁰²

Both Corbeil and SLH are participating employers under the Pension Plan

75. Pursuant to the terms of the Pension Plan, an “Employer” (as defined in the Pension Plan) is required to contribute to provide for the proper amortization of any unfunded liability or solvency deficiency in accordance with applicable pension benefits legislation.¹⁰³ Additionally, upon termination, employers under the Pension Plan are responsible for contributing the amount of the pension deficiency on wind up under the terms of any applicable pension benefits legislation which provide for guaranteed benefits in the event of termination.¹⁰⁴

76. The term “Employer” is defined in the Pension Plan to include “the Company [Sears Canada] and any other employer that is designated by the Company for participation in the Plan and that has agreed to be bound by the terms of the Plan”.¹⁰⁵

77. While the Plan Administrator has been unable to locate any formal written designation of Corbeil and SLH as an “Employer” for participation in the Pension Plan, it is clear that Sears Canada, Corbeil and SLH each operated as an “Employer” as defined in the Pension Plan. As more fully described at paragraphs 27 to 29 above, employees of Corbeil and SLH clearly participated in the Pension Plan and both Corbeil and SLH contributed to the Pension Plan.¹⁰⁶

¹⁰² Twenty-Second Report of the Monitor, Appendix A, Scenarios 1 and 2.

¹⁰³ Dunlop Affidavit, Exhibit C, Pension Plan, section I.6.1.

¹⁰⁴ Dunlop Affidavit, Exhibit C, Pension Plan, section I.12.4.

¹⁰⁵ Dunlop Affidavit, Exhibit C, Pension Plan, section I.2.13.

¹⁰⁶ See also Twenty-Second Report of the Monitor at paras. 45-46.

As participating employers, Corbeil and SLH are jointly and severally liable for the Wind Up Deficiency

78. As set out above, pursuant to the terms of the Pension Plan, the “Employer” (i.e. Sears Canada, Corbeil and SLH) is required to make contributions, including contributing the amount of the pension deficiency on wind up under the terms of any applicable pension benefits legislation which provide for guaranteed benefits in the event of termination.¹⁰⁷

79. Additionally, the relevant minimum standards statutes require contributions on wind up by “the employer” and each of the relevant interpretation statutes provide that words in the singular include the plural. For example, section 75 of the PBA imposes liability on the employer on wind up to pay into the pension fund, with no restrictions to amounts attributed only to individuals who work for that employer:

75 (1) Where a pension plan is wound up, *the employer* shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

¹⁰⁷ Dunlop Affidavit, Exhibit C, Pension Plan, section I.12.4.

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

(2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times.¹⁰⁸

80. Neither the Pension Plan nor the minimum standards pension benefits legislation limit the liability of an individual employer (such as Corbeil or SLH or Sears Canada) to the amounts which may be attributable to their individual employees. Rather, each employer is responsible for funding the Pension Plan. Consequently, Sears Canada, Corbeil and SLH, are all jointly and severally liable for the Wind Up Deficiency. As set out above, the Pension Plan creates one fund and does not distinguish between employers.¹⁰⁹ Accordingly, amounts distributed in respect of the DB Component or DC Component are provided to all applicable beneficiaries regardless of the specific entity that previously employed the Pension Plan member.

The VON decision is not applicable in this case

81. The only Canadian decision to consider the joint and several liability of participating employers in a pension plan is the Ontario Financial Services Tribunal's decision in *Victorian Order of Nurses for Canada v. Ontario (Superintendent Financial Services)* ("**VON**").¹¹⁰ That case largely dealt with whether VON was an employer under the applicable pension legislation or at common law.

¹⁰⁸ Emphasis added. Pursuant to subsection 1(1) of the PBA, "employer" means, in relation to a member, former member or retired member of a pension plan, the person or persons from whom or the organization from which the member, former member or retired member receives or received remuneration to which the pension plan is related, and "employed" and "employment" have a corresponding meaning.

¹⁰⁹ Dunlop Affidavit, at para. 21.

¹¹⁰ 2009 ONFST 11 ("**VON**").

82. In *VON*, the question of joint and several liability of participating employers in a pension plan was not fully considered as, in that case, the Superintendent argued that one employer was responsible for the deficit not that all employers were jointly and severally liable:

In fact the claim is only as against VON Canada... We think that reading the PBA so as to give the Superintendent the ability to “cherry pick” among participating employers under a SEPP as to which is responsible for funding the Plan on a partial wind up is an unreasonable and unsupportable interpretation of the legislation.¹¹¹

The Plan Administrator agrees that joint and several liability does not apply only to *some* of the participating employers, but rather to *all* of the employers who are jointly and severally liable for the Wind Up Deficiency.

83. In *VON*, the Tribunal was concerned that pension plan documents should not be permitted to prevail over the pension legislation; however such a concern is not relevant in the case of joint and several liability that applies to all employers in the pension plan. The Tribunal also appeared to be concerned with the pension legislation creating a “tonteen” approach that leaves the last employer standing holding the bag for all funding obligations. In the context of joint and several liability across all employers, it is not the legislation creating a tonteen but rather the contractual choices which were made by the respective employers that result in liability. In this case, the contractual choices made by Corbeil and SLH result in joint and several liability in respect of the Pension Plan.

¹¹¹ *VON*, at p. 34.

Joint and several liability for Corbeil and SLH accords with the public policy underlying single employer plans such as the Pension Plan

84. The existence of participating employers in a Canadian defined benefit pension plan is a prevalent model, often used to allow employers to access accumulated defined benefit surpluses for the benefit of affiliated employers where benefits are provided on either a defined benefit or defined contribution basis.¹¹² From a public policy perspective, the existence of joint and several liability for such employers is sensible as it avoids circumstances in which beneficiaries suffer pension losses while participating employers have available assets to contribute to the pension plan.

85. The legislation clearly provides alternative structures. An employer seeking to avoid joint and several liability can establish a separate pension plan or a multi-employer pension plan. Notably, in the context of multi-employer pension plans with limited liability, there is no PBGF coverage.¹¹³ PBGF coverage is only available to single employer pension plans (such as the Pension Plan in this case).

86. As discussed above, in the context of this single employer Pension Plan, there are no provisions in the Pension Plan or any of the various governing statutes that limit a participating employer's liability to fund the Pension Plan to amounts attributed only to individuals who work for that employer. This is in contrast to how the Canadian pension statutes permit limited liability in the context of multi-employer pension plans.

¹¹² Dunlop Affidavit, at para. 14.

¹¹³ PBA, s. 85.

The fact that Corbeil only had Pension Plan members with defined contribution entitlements is irrelevant to the issue of joint and several liability

87. Although Corbeil contributed to the Pension Plan on behalf of its employees who were beneficiaries under the DC component of the Plan, it also received the benefit of the DB component of the Plan during the “contribution holidays” in 2008 and 2009. As a result of the contribution holidays, Corbeil was relieved from having to make contributions to the plan as a result of surplus funds in the Pension Plan generated by the DB Component. These surplus funds were used to fund Corbeil’s contributions to the DC Component of the Pension Plan.

88. Having received the benefits of being a participating employer when the Pension Plan was in a surplus position, it is logically consistent that Corbeil must also bear the burdens in respect of its joint and several liability now that the Pension Plan has a wind up deficiency.

The proceeds of Corbeil and SLH should be distributed to satisfy the Wind Up Deficiency on a priority basis

89. Given the joint and several liability of Corbeil and SLH, the Plan Administrator has a valid claim in respect of the full Wind Up Deficiency against the combined \$37 million in proceeds relating to Corbeil and SLH. Such proceeds are also subject to the deemed trust and should be used in full to satisfy the Wind Up Deficiency.

PART IV - ORDER REQUESTED

90. For the reasons set out above, the Pension Parties seek an order granting the relief set out in paragraph 1.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of October, 2018.



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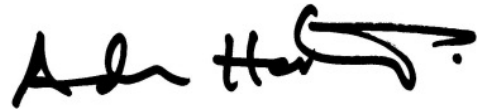
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SCHEDULE “A”

AUTHORITIES

Tab

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9. *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53
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19. *Reference re Broadcasting Act*, S.C. 1991 (Canada), 2012 SCC 68
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SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 1(1), 57, 75(1)-(2), 82-86.1

Interpretation

Definitions

1 (1) In this Act,

...

“employer” means, in relation to a member, former member or retired member of a pension plan, the person or persons from whom or the organization from which the member, former member or retired member receives or received remuneration to which the pension plan is related, and “employed” and “employment” have a corresponding meaning;

...

“Guarantee Fund” means the Pension Benefits Guarantee Fund continued by this Act; (“Fonds de garantie”)

...

Trust property

57 (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee’s contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

Money withheld

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

Accrued contributions

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

Wind up

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

Jointly sponsored pension plans

(4.1) An employer who transfers assets under section 80.4 from a single employer pension plan to a jointly sponsored pension plan and who is required to make a payment under subsection 80.4 (18) for the benefit of transferred members and other transferees shall be deemed to hold in trust for the transferred members and other transferees an amount of money equal to any payment due under subsection 80.4 (18) that has not been paid into the pension fund of the jointly sponsored pension plan.

Lien and charge

(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under this section.

Application of subss. (1, 3, 4, 4.1)

(6) Subsections (1), (3), (4) and (4.1) apply whether or not the money has been kept separate and apart from other money or property of the employer.

Money to be paid to insurance company

(7) Subsections (1) to (6) apply with necessary modifications in respect of money to be paid to an insurance company that guarantees pension benefits under a pension plan.

...

Liability of employer on wind up

75 (1) Where a pension plan is wound up, the employer shall pay into the pension fund,

- (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
- (b) an amount equal to the amount by which,
 - (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

- (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and
 - (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,
- exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

Payment

(2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times.

...

PENSION BENEFITS GUARANTEE FUND

Guarantee Fund continued

82 (1) The Pension Benefits Guarantee Fund is continued under the name Pension Benefits Guarantee Fund in English and Fonds de garantie des prestations de retraite in French.

Administration

(2) The Superintendent is responsible for the administration of the Guarantee Fund including the investment of the assets of the Guarantee Fund.

Expenses

(3) The Superintendent may charge to the Guarantee Fund the reasonable expenses incurred by the Superintendent in the administration of the Guarantee Fund.

Funding of the Guarantee Fund

(3.1) Subject to subsection 102.1 (10), the Guarantee Fund is to be funded by all employers required to make contributions under pension plans that provide defined benefits that are not exempt from the application of the Guarantee Fund by this Act or the regulations.

Same

(3.2) The amounts to be paid under subsection (3.1) by employers to the Guarantee Fund shall be determined in accordance with the prescribed rules.

Loans to Guarantee Fund

(4) If at any time the amount standing to the credit of the Guarantee Fund is insufficient for the purpose of paying claims, the Lieutenant Governor in Council may authorize the Minister of

Finance to make loans out of the Consolidated Revenue Fund to the Guarantee Fund on such terms and conditions as the Lieutenant Governor in Council directs.

Grant to Guarantee Fund

(5) If at any time the amount standing to the credit of the Guarantee Fund is insufficient for the purpose of paying claims, the Lieutenant Governor in Council may authorize the Minister of Finance to make a grant, on such terms and conditions as the Lieutenant Governor in Council directs, to the Guarantee Fund out of money appropriated for that purpose by the Legislature.

Loans and grants discretionary

(6) Nothing in this Act or the regulations requires the Lieutenant Governor in Council to authorize the Minister of Finance to make either a loan or a grant to the Guarantee Fund.

Liability of Guarantee Fund limited

(7) The total liability of the Guarantee Fund to guarantee pension benefits at any particular time is limited to the assets of the Guarantee Fund at that time, calculated after including any loan or grant that may have been made to the Guarantee Fund under subsection (4) or (5).

Guarantee Fund declaration

83 (1) Subject to section 89 (hearing and appeal), the Superintendent shall by order declare, in the circumstances mentioned in subsection (2), that the Guarantee Fund applies to a pension plan.

Conditions precedent

(2) The Superintendent shall make the declaration if,

- (a) the pension plan is registered under this Act or is registered in a designated jurisdiction to provide for the reciprocal application of this Act;
- (b) the pension plan provides defined benefits that are not exempt from the application of the Guarantee Fund by this Act or the regulations;
- (c) the pension plan is wound up in whole or in part; and
- (d) the Superintendent is of the opinion, upon reasonable and probable grounds, that the funding requirements of this Act and the regulations cannot be satisfied.

Guaranteed benefits

84 (1) If the Superintendent by order declares that the Guarantee Fund applies to a pension plan, the following are guaranteed by the Guarantee Fund, subject to the limitations and qualifications as are set out in this Act or are prescribed:

1. Any pension in respect of employment in Ontario.
2. Any deferred pension in respect of employment in Ontario to which a former member is entitled, if,
 - i. the former member's employment or membership was terminated before January 1, 1988,
 - ii. the date of the wind up of the pension plan is before May 19, 2017, and
 - iii. the former member was at least 45 years of age and had at least 10 years of continuous employment with the employer, or was a member of the pension plan for a continuous period of at least 10 years, at the date of termination of employment.
- 2.1 If a former member's employment or membership was terminated before January 1, 1988 and if the date of the wind up of the pension plan is on or after May 19, 2017, a deferred pension in respect of employment in Ontario to which the former member is entitled.
3. If a member or former member's employment or membership was terminated on or after January 1, 1988 and if the date of the wind up of the pension plan is before May 19, 2017, a percentage of any defined pension benefits in respect of employment in Ontario to which the member or former member is entitled under section 36 or 37 (deferred pension), or both, equal to 20 per cent if the combination of his or her age plus years of employment or membership in the pension plan equals 50, plus an additional two-thirds of 1 per cent for each additional one-twelfth credit of age and employment or membership to a maximum of 100 per cent.
- 3.1 If a member or former member's employment or membership was terminated on or after January 1, 1988 and if the date of the wind up of the pension plan is on or after May 19, 2017, a deferred pension in respect of employment in Ontario to which the member or former member is entitled under section 36 or 37 (deferred pension), or both.
4. All additional voluntary contributions, and the interest thereon, made by members, former members or retired members while employed in Ontario.
5. The minimum value of all required contributions made to the pension plan by a member, former member or retired member in respect of employment in Ontario plus interest.
6. That part of a pension or deferred pension guaranteed under this subsection to which a former spouse of a member, former member or retired member is entitled under an order under the *Family Law Act*, a family arbitration award or a domestic contract.
7. Any pension to which a survivor of a former member or retired member is entitled under subsection 48 (1) (death before commencement of payment).

Bridging benefits

(2) For the purpose of this section, if a member, former member or retired member has at least ten years of continuous employment with the employer, a deferred pension or a pension benefit includes bridging benefits.

Part year

(3) In determining the combination of age and membership or employment for subsection (1), one-twelfth credit shall be given for each full month of age and for each full month of continuous employment or membership as of the date of termination of employment.

Application

(3.1) This section applies if the effective date of the wind up of the pension plan is on or after April 1, 1987.

Payments not guaranteed

85 The following are not guaranteed by the Guarantee Fund:

1. The payment of a pension or pension benefit under a pension plan that has been established or maintained for less than five years at the date of the wind up, if the date of the wind up is on or after the date on which the *Securing Pension Benefits Now and for the Future Act, 2010* received Royal Assent.
 - 1.1 The payment of a pension or pension benefit under a pension plan that has been established or maintained for less than three years at the date of the wind up, if the date of the wind up is before the date on which the *Securing Pension Benefits Now and for the Future Act, 2010* received Royal Assent.
2. Any increase to a pension or pension benefit or increase to the value of a pension or pension benefit that became effective within five years before the date of the wind up, if the date of the wind up is on or after the date on which the *Securing Pension Benefits Now and for the Future Act, 2010* received Royal Assent.
 - 2.1 Any increase to a pension or pension benefit or increase to the value of a pension or pension benefit that became effective within three years before the date of the wind up, if the date of the wind up is before the date on which the *Securing Pension Benefits Now and for the Future Act, 2010* received Royal Assent.
3. The amount of any pension or pension benefit, including any bridging supplement,
 - i. in excess of \$1,000 per month or such greater amount as is prescribed, if the date of the wind up is before May 19, 2017, or
 - ii. in excess of \$1,500 per month or such greater amount as is prescribed, if the date of the wind up is on or after May 19, 2017.
4. Pension benefits provided under a multi-employer pension plan.
 - 4.1 Pension benefits provided under a designated multi-jurisdictional pension plan in respect of employment outside Ontario or in respect of included employment as defined in subsection 2 (1) of the *Pension Benefits Standards Act, 1985* (Canada).
5. Pension benefits provided under a pension plan that provides defined benefits, if the obligation of the employer to contribute to the pension fund is limited to a fixed amount set out in a collective agreement.

Lien for payment out of Guarantee Fund

86 (1) Where money is paid out of the Guarantee Fund as a result of the wind up, in whole or in part, of a pension plan, the Superintendent has a lien and charge on the assets of the employer or employers who provided the pension plan.

Amount of lien

(2) The lien and charge is in an amount equal to the amount of the payment out of the Guarantee Fund plus interest thereon calculated at the rate and in the manner prescribed by the regulations.

Real property

(3) The lien and charge does not affect assets that are real property until a notice of the lien and charge that includes a description of the real property is registered in the proper land registry office, and the Superintendent may so register notice of the lien and charge.

Subrogation

(4) The Superintendent is subrogated to the rights of the administrator of a pension plan in respect of which the Superintendent authorizes payment from the Guarantee Fund in satisfaction of a pension, deferred pension, pension benefit or contribution guaranteed under section 84 (guaranteed benefits).

Section Amendments with date in force (d/m/y)

Review of Guarantee Fund provisions

86.1 (1) The Minister shall periodically conduct a review of the provisions of this Act and the regulations related to the Guarantee Fund.

Period for review

(2) The first review shall be completed within three years after the day this section comes into force.

Subsequent reviews

(3) Each subsequent review shall be completed within five years after the day the previous review was completed.

Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, ss. 6(6)

Definitions

2(1) In this Act,

[...]

secured creditor means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds;

[...]

Restriction — pension plan

6(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

...

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

...

Restriction — employers

36(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Legislation Act, 2006, S.O. 2006, c. 21, Sch. F, ss. 64, 67

Rule of liberal interpretation

64 (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

Same

(2) Subsection (1) also applies to a regulation, in the context of the Act under which it is made and to the extent that the regulation is consistent with that Act.

...

Number

67 Words in the singular include the plural and words in the plural include the singular.

Personal Property Security Act, R.S.O. 1990, c. P.10, s. 30(7)

Deemed trusts

30(7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act, 2000*, the *Pension Benefits Act* or the *Pooled Registered Pension Plans Act, 2015*.

Exception

(8) Subsection (7) does not apply to a perfected purchase-money security interest in inventory or its proceeds.

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 SEARS CANADA INC., 9370-2751 QUÉBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC. INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding Commenced at Toronto

**JOINT FACTUM OF THE PENSION PLAN ADMINISTRATOR,
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