

**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., 9845488
CANADA 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.

Applicants

**FACTUM OF THE MONITOR
(Motion for Sanction Order returnable November 23, 2020)**

November 17, 2020

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TO: THE SERVICE LIST

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PART I - OVERVIEW

1 FTI Consulting Canada Inc., in its capacity as court-appointed Monitor of Sears Canada Inc. ("**Sears Canada**") and the other applicants listed above (collectively with Sears Canada and Sears Connect,¹ the "**Sears Canada Entities**") seeks an Order (the "**Plan Sanction Order**"), among other things, sanctioning the Sears Canada Entities' Joint Amended and Restated Plan of Compromise or Arrangement dated November 17, 2020 (the "**Plan**") pursuant to the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**").²

2 The Plan is intended to complete the orderly wind-down of the business and affairs of the Sears Canada Entities. It achieves a global resolution of these CCAA proceedings and is the

¹ The relief granted pursuant to the Initial Order was also extended to Sears Connect, a partnership forming part of the applicants former business and operations.

² Any capitalized terms used but not defined herein have the meanings given to them in the Plan, a copy of which is attached as Appendix "A" to the Plan Sanction Order, Monitor's Motion Record, Tab 5(a).

product of negotiations and consultation with key stakeholders. If sanctioned by this Court and implemented, the Plan would:

- (a) effect a compromise and settlement of all Affected Claims in exchange for distributions to Affected Unsecured Creditors with Proven Affected Unsecured Claims;
- (b) facilitate distributions to creditors in a timely and efficient manner;
- (c) implement the resolution of a number of significant claims against the Sears Canada Entities, including with respect to the quantum and priority of the claim for the wind-up deficiency for the Sears Pension Plan (the “**Pension Claim**”), and a class action claim by certain of the “Sears Hometown” dealers; and
- (d) provide a mechanism for the distribution of Sears Canada’s share of the proceeds of the settlement of litigation related to the 2013 Sears Canada dividend to those Affected Unsecured Creditors of Sears Canada who did not opt out of participation in the costs and benefits of that litigation.

3 The Monitor believes that the Plan is the best option to provide certainty of distributions to the Sears Canada Entities’ creditors and complete the final material steps in these CCAA Proceedings.

4 At the creditors’ meetings held on November 16, 2020 (the “**Meetings**”) substantially all creditors who voted at the Meetings voted in favour of the Plan. This included votes by Employee Representative Counsel, on behalf of the former employees they represent, Pension Representative Counsel, on behalf of the retirees they represent, and Morneau Shepell Ltd., as administrator of the Sears Pension Plan (the “**Pension Plan Administrator**”).

5 For the reasons set out herein, the Monitor submits that the Plan should be sanctioned pursuant to section 6 of the CCAA.

PART II - THE FACTS

6 The facts with respect to this motion are more fully set out in the Monitor's 29th Report dated February 6, 2019 (the "**Plan Report**") and Second Supplement to the 29th Report of the Monitor, dated October 22, 2020 (the "**Updated Plan Report**").³ Additional facts regarding the results of the Meetings are set out in the Monitor's 42nd Report dated November 17, 2020 (the "**Sanction Report**").⁴

A. Background

7 On June 22, 2017, the Sears Canada Entities obtained an Initial Order under the CCAA, and have since closed all of their stores, discontinued their operations, and liquidated their assets in an effort to maximize recoveries for their creditors.

8 In the summer of 2018, the Sears Canada Entities, with the assistance of Regional Senior Justice Morawetz, initiated a mediation process (the "**Mediation**") to facilitate a resolution of certain material disputed claims.

9 The Monitor reached an agreement with substantially all landlords for the valuation of their claims, subject to limited exceptions, and also reached an agreement with the Pension Parties on the terms of a resolution of the priority and quantum of the Pension Claim for the wind-up deficiency under the defined benefit component of the Sears Pension Plan (the "**Pension Resolution**").

³ A copy of the Plan Report, without appendices, is included in the Monitor's Motion Record at Tab 3, while a copy of the Updated Plan Report, without Appendices, is included in the Monitor's Motion Record at Tab 4.

⁴ The Sanction Report is included in the Monitor's Motion Record at Tab 5.

10 An agreement was also reached on the resolution of a class action claim by certain of the “Sears Hometown” store dealers, as made by the Dealer Representative Plaintiff on their behalf.⁵

11 On December 3, 2018, the Court authorized the Monitor and the court-appointed Litigation Trustee to pursue certain claims arising from a \$509 million dividend paid to Sears Canada’s shareholders in 2013 (the “**Estate 2013 Dividend Litigation**”), and the Court further lifted the stay of proceedings to allow claims by each of the Pension Plan Administrator and the Dealer Representative Plaintiff, each also arising from such 2013 dividend, to proceed (collectively with the Estate 2013 Dividend Litigation, the “**Dividend Litigation**”).⁶

12 All claims in the Dividend Litigation are now the subject of settlement agreements that were approved by the Court.⁷

13 The Monitor obtained an Amended and Restated Meetings Order on October 27, 2020 accepting the filing of the Plan on behalf of the Sears Canada Entities and authorizing the Monitor to proceed with the Meetings for creditors to vote upon the Plan.

B. The Plan

i. Overview

14 The purpose of the Plan is to provide for (a) the distribution of the Applicants’ remaining funds to their creditors in accordance with their legal entitlements and agreed upon settlements; (b) implement the terms of the settlements agreed to in connection with the Mediation described above; and (c) provide a mechanism for the distribution of Sears Canada’s share of the proceeds of the settlement of the Dividend Litigation for the benefit of Affected Unsecured Creditors of Sears Canada who did not opt out of sharing in the costs and benefits of the pursuit of such litigation,

⁵ Plan Report, paras. 8-11, Monitor’s Motion Record, Tab 3.

⁶ Plan Report, para. 12, Monitor’s Motion Record, Tab 3.

⁷ Updated Plan Report, para. 15(a), Monitor’s Motion Record, Tab 4.

all in the expectation that all persons with an economic interest in the Sears Canada Entities will derive a greater benefit from the implementation of the Plan than would result from any alternative, including and in particular, a bankruptcy.⁸

15 The Plan provides for the settlement of all proven Affected Claims in exchange for the consideration provided in the Plan. The Plan also provides for certain releases of the Released Parties described therein.

16 If approved and implemented, the Plan would enable distributions to be made to Affected Creditors efficiently and without delay, effect the settlement of numerous material claims, including the Pension Claim, and thereby substantially advance the important goal of bringing these proceedings, which affect the interests of a very large number of Affected Creditors (including many thousands of former employees and retirees), to completion.⁹

17 In general terms, the Plan contemplates that:

(a) For the purposes of voting on the Plan and receiving distributions thereunder, there would be two classes of Affected Unsecured Creditors, being:

(i) all Affected Unsecured Creditors of any of the Sears Canada Entities *other* than Former Corbeil and the SLH Parties; and

(ii) all Affected Unsecured Creditors of the SLH Parties;

with the creditors of Former Corbeil being paid in full.¹⁰

⁸ Updated Plan Report, para. 16, Monitor's Motion Record, Tab 4.

⁹ Sanction Report, para. 37, Monitor's Motion Record, Tab 2.

¹⁰ Updated Plan Report, paras. 18-23, Monitor's Motion Record, Tab 4.

- (b) The Pension Claim will be allowed as a single Affected Unsecured Claim for voting purposes in the amount of \$260.2 million (allocated 96% against Sears Canada and 4% against Former SLH) and allowed for distribution purposes at a value 2.5 times the value such claim as filed, subject to certain adjustments.¹¹
- (c) Affected Unsecured Creditors with proven claims will receive a *pro rata* share of the cash pool available to their respective Unsecured Creditor Class, after accounting for all costs of the CCAA Proceedings, priority payment amounts, reserves and intercompany distributions, subject to exceptions as follows:
- (i) Affected Unsecured Creditors of Sears Canada who did not opt out of sharing in the costs and benefits of the pursuit of the Estate 2013 Dividend Litigation will receive their *pro rata* share of the net recoveries to Sears Canada from the settlement of the Dividend Litigation.
 - (ii) Potential Claims arising from Warranties purchased on Sears Canada products prior to the commencement of these proceedings would be addressed under a separate process, described in greater detail in the Plan Report, that establishes a pool of funds for distribution on account of such claims and a process to solicit and review such claims.
 - (iii) The Plan provides for a payment of \$2,272.72 per leased store location to each Landlord that entered into a settlement agreement in respect of landlord claims, as a reimbursement of such landlord's costs incurred as a part of the negotiation of the Sears Canada Entities' global landlord claim settlement agreed to under the Mediation.

¹¹ Updated Plan Report, para. 26, Monitor's Motion Record, Tab 4.

- (iv) The Dealer Representative Plaintiff will receive a payment of \$334,495 and will share *pro rata* (based on an \$80 million claim value) in Sears Canada's net recoveries from the settlement of the Estate 2013 Dividend Litigation over \$10 million (and shall return the first \$334,495 received from such recoveries).¹²

18 The Plan provides for releases in favour of (a) the Sears Canada Entities' current and former directors, officers and employees, as well as certain counsel and advisors who have assisted in these CCAA Proceedings, and the Settling Defendants in the Dividend Litigation; (b) FTI Consulting Canada Inc., including in its capacity as Monitor and as receiver, its affiliates, and their respective directors, officers, employees, legal counsel and agents; and (c) Employee Representative Counsel, Pension Representative Counsel, and the Court-appointed pension and employee representatives.

19 The Plan does *not* release the Non-Released Claims, including claims in respect of any Released Party's obligations under the Plan, certain claims against employees of the Sears Canada Entities to the extent of available insurance, as well as liability for fraud or wilful misconduct, and other claims that are not permitted to be compromised or released under the CCAA, particularly claims under section 5.1(2) of the CCAA, other than claims released pursuant to the settlement of the Dividend Litigation.¹³

20 Claims not affected by the Plan also include claims against the Sears Canada Entities to the extent of available insurance.

¹² Updated Plan Report, paras. 28-36, Monitor's Motion Record, Tab 4.

¹³ Updated Plan Report, paras. 38, Monitor's Motion Record, Tab 4.

ii. Amendments to the Plan

21 Non-material amendments have been made to the Plan following the Meetings. The Plan, as amended, together with a blackline of the changes, was attached to the Monitor's Motion Record, which was posted on the Monitor's website, delivered to the Service List and filed with the Court. The Monitor seeks approval of the Plan including these additional amendments as permitted under Section 11.5 of the Plan.¹⁴

C. Meetings of Creditors

22 The Meetings were held on November 16, 2020. A quorum was present at each of the Meetings and they proceeded in accordance with the terms of the Amended and Restated Meetings Order granted on October 27, 2020.

23 At the Meetings, (a) 100% (by number) and 100% (by dollar value) of Affected Unsecured Creditors in the Sears Creditor Class and (b) 99.7% (by number) and 99.7% (by dollar value) of Affected Unsecured Creditors in the SLH Creditor Class, who voted at the Meetings by proxy cast their votes in favour of the resolution to approve the Plan.¹⁵

PART III - ISSUES AND THE LAW

24 The issues to be considered on this motion are whether:

- (a) the Court should sanction the Plan; and
- (b) approval of the releases is appropriate in the circumstances of the Plan.

¹⁴ Sanction Report, para. 38, Monitor's Motion Record, Tab 2.

¹⁵ Sanction Report, para. 23, Monitor's Motion Record, Tab 2.

A. The Requirements For Plan Approval Have Been Met

25 Section 6 of the CCAA provides that a compromise or arrangement is binding on all creditors if a majority in number representing two-thirds in value of the classes of creditors present and voting at a meeting of creditors approve the compromise or arrangement and the compromise or arrangement has been sanctioned by the Court.¹⁶

26 Each class of the Sears Canada Entities' Affected Unsecured Creditors, in both number and value, voted in favour of the Plan at the Meetings by majorities overwhelmingly in excess of the required threshold under the CCAA, thus satisfying the first requirement set out in Section 6 of the CCAA.

27 Having satisfied the voting criteria, the issue before the Court is whether it should approve and sanction the Plan.¹⁷

28 The exercise of the Court's authority to sanction a CCAA plan is a matter of discretion. The criteria to be satisfied in seeking the Court's approval of a plan of compromise or arrangement are well established:

- (a) there must be strict compliance with all statutory requirements;
- (b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the CCAA; and
- (c) the plan must be fair and reasonable.¹⁸

¹⁶ CCAA, s. 6

¹⁷ *Northland Properties Ltd. (Re)*, (1988), [73 C.B.R. \(N.S.\) 175](#) (B.C.S.C.) at para. 23, affirmed (1989) [73 C.B.R. \(N.S.\) 195](#) (B.C.C.A.).

¹⁸ *Canadian Airlines Corp. (Re)*, [2000 ABQB 442](#) at para 60 [*Canadian Airlines*], leave to appeal denied [2000 ABCA 238](#), affirmed [2001 ABCA 9](#), leave to appeal to SCC denied, [2001] S.C.C.A. No. 60; See also *SkyLink Aviation Inc. (Re)*, [2013 ONSC 2519](#) at para. 26 [*SkyLink*].

i. Strict Compliance With Statutory Requirements

29 Both the first and second requirements of the sanction test refer to compliance with the requirements of the CCAA and the various Orders granted in these CCAA proceedings.¹⁹

30 The Sears Canada Entities have complied with the requirements of the CCAA, the Amended and Restated Meetings Order and all other Orders granted by the Court in these proceedings. In particular:

- (a) in granting the Initial Order, this Court found that the Applicants qualified as “debtor companies” under the CCAA and that the Applicants’ liabilities far exceeded the CAD \$5 million threshold under the CCAA;
- (b) prescribed notices to creditors and other interested persons as required under the Amended and Restated Meetings Order were delivered and given within the timeframes and in the manner required thereby;²⁰
- (c) the classification of the Sears Canada Entities’ Affected Unsecured Creditors into two voting classes—namely the Sears Creditor Class and the SLH Creditor Class—with one additional class of creditors of Former Corbeil receiving distributions but not a vote as they will be paid in full—was approved by this Court under the Amended and Restated Meetings Order;²¹
- (d) the Meetings were properly constituted and the voting was properly carried out in accordance with the Amended and Restated Meetings Order; and

¹⁹ *Olympia & York Developments Ltd. v. Royal Trust Co.*, (1993), [17 C.B.R. \(3d\) 1](#) at para. 19 (ON. Gen. Div.) [*Olympia & York*].

²⁰ Sanction Report, para. 19, Monitor’s Motion Record, Tab 2.

²¹ Sanction Report, para. 9, Monitor’s Motion Record, Tab 2.

(e) the Plan was approved by the two classes of Affected Unsecured Creditors by all or nearly all creditors in each case, far exceeding the statutory “double” majority required for each class under section 6(1) of the CCAA.²²

31 In accordance with the provisions of the CCAA, the Plan provides for payment of any crown claims of the type described in section 6(3) and any employee claims of the type described in section 6(5) in accordance with those provisions of the CCAA.²³ Accordingly, the requirements in sections 6(3) and 6(5) are satisfied.

32 No amounts are payable pursuant to Section 6(6) of the CCAA.²⁴

33 In accordance with section 6(8) of the CCAA, the Plan provides that the holders of Equity Claims (other than in respect of Former Corbeil) will not receive any consideration or distributions under the Plan in respect of their Equity Claims as Affected Unsecured Creditors will not be paid in full.²⁵

34 The Monitor accordingly submits that the statutory requirements for the sanction of the Plan under section 6 of the CCAA have been satisfied.

ii. Nothing Has Been Done Or Purported To Be Done That Is Not Authorized By The CCAA

35 With respect to the second part of the test for sanction of a plan of compromise or arrangement under the CCAA, the Court may rely on the reports of the Monitor and on the parties

²² CCAA, s. 6(1). Sanction Report, para. 23, Monitor’s Motion Record, Tab 2.

²³ Plan Report, para. 94, Monitor’s Motion Record, Tab 3.

²⁴ Plan Report, paras. 95, Monitor’s Motion Record, Tab 3.

²⁵ Plan Report, para. 39, Monitor’s Motion Record, Tab 3.

and their stakeholders in assessing whether anything has been done or purported to have been done that is not authorized by the CCAA.²⁶

36 As described in the reports of the Monitor in these proceedings:

- (a) throughout the course of these proceedings, the Sears Canada Entities have acted in good faith and with due diligence; and
- (b) the Sears Canada Entities have complied with the requirements of the CCAA and the Orders of this Court in all material respects.²⁷

37 The Monitor therefore submits that the second part of the test for plan sanctioning has been met.

iii. The Plan Is Fair And Reasonable

38 With respect to the final part of the plan sanction test—whether the Plan is fair and reasonable—the Monitor submits that the Court is to consider the relative degrees of prejudice that would flow from granting or refusing the relief being sought under the CCAA and whether the plan represents a reasonable and fair balancing of interests, in light of the other commercial alternatives available (if any).²⁸

39 Further, and as noted by Justice Gascon in *Abitibi*,

“[c]onsidering that a plan is, first and foremost, a compromise and arrangement reached between a debtor company and its creditors, there is, indeed, a heavy onus on parties seeking to upset a plan where the required majorities have supported it. From that standpoint, a court should not lightly second-guess the business decisions reached by the creditors as a body.”²⁹

²⁶ [Canadian Airlines](#), *supra*, at para. 64 (citing [Olympia & York](#)) and *Canwest Global Communications Corp. (Re)*, [2010 ONSC 4209](#) at para. 17 [[Canwest Global](#)].

²⁷ Sanction Report, paras. 27-28, Monitor’s Motion Record, Tab 2.

²⁸ [Canadian Airlines](#), *supra*, at para. 3; [Canwest Global](#), *supra*, at para. 19; *Re AbitibiBowater Inc.*, [2010 QCCS 4450](#) at paras. 29-43 [[Abitibi](#)].

²⁹ [Abitibi](#), *supra*, at para. 34.

This principle should be given even greater weight where, as in this case, creditors have overwhelmingly voted to approve the Plan.

40 Factors considered by courts in assessing whether a plan is fair and reasonable in the circumstances include:

- (a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;
- (b) what creditors would receive on a bankruptcy or liquidation as compared to the plan;
- (c) other viable alternatives to the plan and bankruptcy;
- (d) whether there is any oppression of the rights of creditors;
- (e) whether there is any unfairness to shareholders; and
- (f) the public interest.³⁰

41 Each of these factors strongly supports approval of the Plan by this Court. In particular:

- (a) Classification: The classification of creditors and partial substantive consolidation provided for in the Plan has been approved by the Court pursuant to the Amended and Restated Meetings Order.
- (b) Creditor Approval: The Plan received overwhelming support at the Meetings. That the Plan was approved so strongly reflects the fact that it was the product of a

³⁰ [Canwest Global](#), *supra*, at para. 21. See also *Re Sino-Forest Corp.*, [2012 ONSC 7050](#) at para. 61 [*Sino-Forest*].

robust and extensive negotiation process amongst stakeholders, with the full and transparent participation of material creditor groups and their advisors.

- (c) Alternatives to the Plan and Estimated Recoveries on Bankruptcy: If the Plan is not implemented, various claims, including the Pension Claim, would remain unresolved and distributions may be extensively delayed while steps are taken to determine these claims and their relative priorities. The results of any process to resolve these claims would be uncertain and the amounts to be recovered by creditors could be materially impacted. Notably, a bankruptcy also may not resolve these issues.³¹ The Plan provides certainty regarding these issues and expedites the distribution process.
- (d) No Oppression of Creditors: The pre-insolvency rights and relative priorities of Affected Unsecured Creditors are respected under the Plan, and there is no oppression of creditors' rights. Case law makes clear that a plan does not need to necessarily provide equal treatment to all parties in order to be equitable, so long as there is a sufficient rational explanation for any differences in recovery for particular creditors or classes of creditors.³² In the present case, the Plan treats Affected Creditors fairly and provides for the same distribution among the creditors within each Unsecured Creditor Class, subject to limited exceptions. To the extent that certain Affected Unsecured Creditors will receive different levels of recovery on their claims, those differences can be explained by either: (i) the benefits of reaching a commercial resolution, such as in the case of the Pension Claim; or (ii)

³¹ Plan Report, paras.106-110, Monitor's Motion Record, Tab 3.

³² [Sino-Forest](#), *supra*, at paras. 65 and 66. See also [Canadian Airlines](#), *supra*, at para 179.

expediency, in the case of certain claims that are not material in the context of the overall size of the claims in these proceedings.³³

- (e) No Unfairness to Shareholders: Given that Affected Unsecured Creditors of the Sears Parties and SLH Parties are not being paid in full, there is no unfairness in equity claims against those parties receiving no recoveries under the Plan. Their treatment is consistent with the provisions of the CCAA.

In the case of Former Corbeil, amounts will be paid on account of Sears Canada's equity claim (and thereafter to Affected Unsecured Creditors of the Sears Parties) as a shareholder of Former Corbeil, but that is because all other claims against Former Corbeil will be paid in full.

- (f) The Plan is in the Public Interest: It is in the public interest for this insolvency to be resolved and distributions to be made to Affected Unsecured Creditors (including retirees and former employees) efficiently and as soon as practicable. The Plan achieves this objective.

B. The Releases are Appropriate in the Circumstances

42 It is now well established that courts have the jurisdiction to sanction plans containing releases in favour of third parties, subject to appropriate limitations.³⁴

43 Courts have approved third party releases in the context of plans of arrangement where the releases are rationally tied to a resolution of the debtors' claims, will benefit creditors generally,

³³ Updated Plan Report, paras.25-32 and 35-36, Monitor's Motion Record, Tab 4.

³⁴ *Muscletech Research and Development Inc. (Re)*, [2006] O.J. No. 4087 at para. 8 (S.C.J. [Commercial List]). See also *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 2265, at para. 66 (S.C.J. [Commercial List]) [*Metcalfe & Mansfield*], affirmed 2008 ONCA 587; *Cline Mining Corp. (Re)*, 2015 ONSC 622 at paras. 12-14, and 22-28; and *Sino-Forest*, *supra*, at para. 74.

and are not overly broad. In considering whether to approve such releases, courts have taken into account the following factors:

- (a) whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;
- (b) whether the claims to be released are rationally connected to the purpose of the plan and necessary for it;
- (c) whether the plan would fail without the releases;
- (d) whether the third parties being released were contributing in a tangible and realistic way to the plan;
- (e) whether the releases benefitted the debtors as well as the creditors generally;
- (f) whether the creditors voting on the plan had knowledge of the nature and effect of the releases; and
- (g) whether the releases were fair and reasonable and not overly broad.³⁵

44 In determining whether to approve a third party release, the Court will take into account the particular circumstances of the case and the objectives of the CCAA. No single factor set out above will be determinative.³⁶

45 The releases provided in the Plan are consistent with those frequently granted in CCAA plans of compromise or arrangement³⁷ and are provided to those parties who are:

³⁵ [Metcalfe & Mansfield](#), *supra*, at para. 143; *Nortel Networks Corp. (Re)*, [2010 ONSC 1708](#) at paras. 79-82, leave to appeal denied [2010 ONCA 402](#); [Canwest Global](#), *supra*, at para. 30.

³⁶ *Kitchener Frame Ltd.*, [2012 ONSC 234](#), at para. 82. [SkyLink](#), *supra*, at para. 30.

³⁷ See footnote 34, *supra*.

- (a) current or former representatives of the Sears Canada Entities, and advisors who assisted the Sears Canada Entities and their directors and officers in these CCAA proceedings;
- (b) FTI Consulting Canada Inc., as Monitor and as receiver, as well as parties associated with the Monitor;
- (c) Employee Representative Counsel, Pension Representative Counsel, and the Employee Representatives and Pension Representatives.

46 The releases of all of these parties are rationally connected to the purpose of the Plan, which is to resolve claims related to the Sears Canada Entities business and affairs, including any claims against former directors, officers and employees and any indemnity claims that may arise therefrom against the Sears Canada Entities. Many of the released parties in the categories above contributed directly and tangibly to the restructuring process in these proceedings.³⁸

47 The released parties also include the Settling Defendants further to and consistent with the court-approved settlements reached with those parties in the Dividend Litigation.³⁹

48 The releases are appropriately narrow and do *not* release the Non-Released Claims, including claims in respect of any released party's obligations under the Plan, certain claims against employees of the Sears Canada Entities to the extent of available insurance, as well as liability for fraud or wilful misconduct, and other claims that are not permitted to be compromised or released under the CCAA, particularly claims under section 5.1(2) of the CCAA. These releases are in addition to the releases previously granted in connection with the resolution of the Dividend Litigation.

³⁸ Plan Report, para. 102), Monitor's Motion Record, Tab 3. See also Updated Plan Report, para 15(c), Monitor's Motion Record, Tab 4.

³⁹ Plan Report, para. 101, Monitor's Motion Record, Tab 3.

49 The Releases were also well publicized. Full disclosure of them was made in the Updated Plan Report, in the version of the Plan that was filed with the Court on October 22, 2020 and, in various of the other Meeting Materials that were sent to all known Affected Unsecured Creditors and posted on the Monitor's website. The Monitor is not aware of any objections to the releases provided for in the Plan.

PART IV - ORDER REQUESTED

50 The Applicants submit that the Plan achieves the best possible outcome in the circumstances. The Plan will resolve numerous substantial claims against the Sears Canada Entities, preserve the Affected Unsecured Creditors' decisions to share, or not share, in the costs and benefits of the Estate 2013 Dividend Litigation, and generally provide a fair and efficient distribution of the Sears Canada Entities' remaining funds to their creditors.

51 Throughout the course of the CCAA Proceedings, the Sears Canada Entities have acted in good faith and with due diligence. The Sears Canada Entities have further complied with the requirements of the CCAA and the Orders of this Court.

52 The Plan is fair and reasonable, and was approved at the Meetings with overwhelming support from the Affected Unsecured Creditors that voted at the Meetings.

53 For all of the reasons above, the Monitor believes that the Plan represents the best option available to the Sears Canada Entities and their Affected Unsecured Creditors in the circumstances, and recommends and requests that this Honourable Court approve the Plan and grant the requested relief under the Sanction Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of November, 2020.

Norton Rose Fulbright Canada LLP
NORTON ROSE FULBRIGHT CANADA LLP

Lawyers for FTI Consulting Canada Inc., as Monitor

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Northland Properties Ltd. (Re)*, (1988), [73 C.B.R. \(N.S.\) 175](#) (B.C.S.C.); affirmed (1989) [73 C.B.R. \(N.S.\) 195](#) (B.C.C.A.)
2. *Canadian Airlines Corp. (Re)*, [2000 ABQB 442](#); leave to appeal denied [2000 ABCA 238](#); affirmed [2001 ABCA 9](#); leave to appeal to SCC denied [2001] S.C.C.A. No. 60
3. *SkyLink Aviation Inc. (Re)* , [2013 ONSC 2519](#)
4. *Olympia & York Developments Ltd., v. Royal Trust Co.*, (1993), [17 C.B.R. \(3d\) 1](#)
5. *Canwest Global Communications Corp. (Re)*, [2010 ONSC 4209](#)
6. *Re AbitibiBowater Inc.*, [2010 QCCS 4450](#)
7. *Re Sino-Forest Corp.*, [2012 ONSC 7050](#)
8. *Muscletech Research and Development Inc. (Re)*, [\[2006\] O.J. No. 4807](#)
9. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [\[2008\] O.J. No. 2265](#); affirmed [2008 ONCA 587](#)
10. *Cline Mining Corp. (Re)*, [2015 ONSC 622](#)
11. *Nortel Networks Corp. (Re)*, [2010 ONSC 1708](#); leave to appeal denied [2010 ONCA 402](#)
12. *Kitchener Frame Ltd.*, [2012 ONSC 234](#)

**SCHEDULE “B”
RELEVANT STATUTES**

COMPANIES’ CREDITORS ARRANGEMENT ACT (R.S.C., 1985, c. C-36)

PART I – COMPROMISES AND ARRANGEMENTS

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

- (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and
- (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor’s constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

- (a) subsection 224(1.2) of the Income Tax Act;
- (b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee’s premium, or employer’s premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or
- (c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum
 - (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

- (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a *provincial pension plan* as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

- (5) The court may sanction a compromise or an arrangement only if
 - (a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of
 - (i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and
 - (ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and
 - (b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

- (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).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

R.S., 1985, c. C-36, s. 6; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 123; 2004, c. 25, s. 194; 2005, c. 47, s. 126, 2007, c. 36, s. 106; 2009, c. 33, s. 27; 2012, c. 16, s. 82.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985,
c. C-36, AS AMENDED

Court File No.: CV-17-11846-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS
CANADA INC., ET AL.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at TORONTO

**FACTUM OF THE MONITOR
(Motion for Sanction Order
returnable November 23, 2020)**

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