

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

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 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**”)

**FACTUM OF THE PLAN ADMINISTRATOR
(Advice and Directions re Spousal Waivers)**

Dated: October 26, 2018

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TO: **SERVICE LIST**

AND TO: **SUPPLEMENTARY E-SERVICE LIST [See Schedule "C"]**

PART I - OVERVIEW

1. 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**”), brings this motion seeking advice and directions as to whether it may accept as valid certain joint and survivor waiver forms (the “**Spousal Waivers**”). The Spousal Waivers were completed by spouses of Pension Plan members employed in British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick and Nova Scotia (the “**Plan Spouses**”) while Sears Canada Inc. (“**Sears Canada**”) was acting as administrator of the Pension Plan. Rather than using the forms prescribed by the applicable pension legislation in each of the provinces, the Plan Spouses executed the Spousal Waivers on the Ontario form. The Spousal Waivers do not comply, in all respects, with the prescribed forms in the provinces listed above.

2. If it is not able to rely on the Spousal Waivers, the Plan Administrator will incur significant professional and administrative fees to administer the entire process regarding non-compliant Spousal Waivers. Such a process could take many years as it would involve (i) attempting to identify and locate Plan Spouses or their estates if they are deceased, (ii) attempting to obtain compliant Spousal Waivers from Plan Spouses, (iii) attempting to recover any overpayments which were made to Pension Plan members in reliance on non-compliant Spousal Waivers, and (iv) requiring additional joint and survivor pension payments in circumstances where compliant spousal waivers cannot be obtained. It is estimated that \$32,000,000 in increased liabilities and costs would be incurred, which would increase the estimated Pension Plan wind up deficiency (the “**Wind Up Deficiency**”) to in excess of \$290,000,000.

3. It is reasonable and appropriate for the Court to provide advice and direction with respect to this issue given the implications for the Wind Up Deficiency, the Plan Administrator's claim in these CCAA proceedings and any potential distributions to creditors.

PART II - RELEVANT FACTS

Background regarding Spousal Waivers

4. Prior to Morneau Shepell's appointment as Plan Administrator in October 2017, Sears Canada was the administrator of the Pension Plan, as required by the *Pension Benefits Act* (Ontario).¹ In that role, Sears Canada had oversight for the funding and management of the Pension Plan.²

5. When members were ready to commence receiving benefits under the Pension Plan, Sears Canada provided Pension Plan members with the ability to elect the form of pension they were entitled to receive.³

6. The normal form of pension for Pension Plan members without a spouse at the time of pension commencement was a single life pension with a 10-year guarantee ("**SL10**"). Pension Plan members with a spouse were required by the Pension Plan, unless a spousal waiver was completed as described in paragraph 9 below, to take a joint and survivor pension, which would provide the surviving spouse of the member with an entitlement to receive 66.67% of the pension the member was receiving prior to his or her death with a 10-year guarantee ("**J&S67**").⁴

¹ *Pension Benefits Act*, R.S.O. 1990, c. P-18 (the "**PBA**").

² Affidavit of Hamish Dunlop, affirmed August 24, 2018 [**"Dunlop Affidavit"**], at para. 9 [Motion Record, Tab 2, pp. 11-12].

³ Dunlop Affidavit, at para. 10 [Motion Record, Tab 2, p. 12].

⁴ Dunlop Affidavit, at para. 10 [Motion Record, Tab 2, p. 12].

7. The value of the benefits received by a member with a spouse is reduced to ensure that the total J&S67 benefits received by the member and his or her surviving spouse are the actuarial equivalent of the SL10 benefits.⁵ In other words, the member with a spouse would receive a lower monthly benefit during his or her lifetime than a member with an SL10 pension to account for the fact that the member's surviving spouse would continue to receive benefits after the member's death.

8. By electing an alternative form of pension, which could provide less than the J&S67 entitlement to the member's surviving spouse (a "**sub-J&S67**"), the member received increased monthly pension benefits during his or her lifetime, up to the amount that would be received by a pensioner without a spouse (i.e. as would be provided under a SL10).⁶

9. Applicable provincial pension legislation provides that where a member with a spouse wishes to elect an alternative form of pension which would provide the spouse, if he or she survives the member, with less than a statutory minimum 60% joint and survivor benefit, a waiver in the form prescribed by the relevant provincial pension legislation must be signed by the spouse.⁷

Morneau Shepell discovers issues with Spousal Waivers

10. Following its appointment as Plan Administrator in October 2017, Morneau Shepell discovered that Sears Canada provided the waiver approved by the Ontario Superintendent of Financial Services (the "**Superintendent**") under Ontario pension legislation (the "**Ontario Form**") to all Plan Spouses, regardless of the province in which the Pension Plan member was employed.

⁵ Dunlop Affidavit, at para. 11 [Motion Record, Tab 2, p. 12].

⁶ Dunlop Affidavit, at para. 12 [Motion Record, Tab 2, p. 12].

⁷ Dunlop Affidavit, at para. 12 [Motion Record, Tab 2, p. 12]. In Ontario, the waiver of the joint and survivor benefit is set out in section 46 of the PBA.

11. Morneau Shepell has reviewed the waiver form approved in provinces other than Ontario and has determined that there are differences between the Spousal Waivers used by Sears Canada (i.e. the Ontario Form) and those required by pension legislation in other provinces.⁸

12. Copies of the relevant current provincial forms have been filed on this motion.⁹ The main differences between the Ontario Form and the current forms of the other relevant provinces are summarized in the table below:¹⁰

British Columbia	<ul style="list-style-type: none">• Plan Spouse must confirm that the spousal waiver was signed not in presence of the Pension Plan member• Plan Spouse must also confirm that the Plan Spouse has reviewed a current statement of the Pension Plan member's benefits• Spousal waiver contains additional details regarding what the waiver means and must be signed closer to the date of retirement than the Ontario Form
Alberta	<ul style="list-style-type: none">• Plan Spouse must certify that the spousal waiver was signed not in presence of Pension Plan member• Plan Spouse must also certify that the Plan Spouse has seen the Pension Plan member's retirement statement and is signing of his or her own free will• Spousal waiver must be signed closer to the date of retirement than the Ontario Form
Saskatchewan	<ul style="list-style-type: none">• Plan Spouse must certify that the spousal waiver was signed not in presence of the Pension Plan member• Plan Spouse must also certify that the spousal waiver is being signed of his or her own free will without any compulsion on the part of the Pension Plan member• Spousal waiver must be signed closer to the date of retirement than the Ontario Form

⁸ Dunlop Affidavit, at para. 14 [Motion Record, Tab 2, p. 13].

⁹ The relevant forms for British Columbia, Saskatchewan, Manitoba, New Brunswick and Nova Scotia are included at Exhibit B to the Dunlop Affidavit. The Alberta form is attached as Appendix C to the Twenty-Second Report of FTI Consulting Canada Inc., as Monitor, dated September 7, 2018 [**"Twenty-Second Report of the Monitor"**].

¹⁰ Dunlop Affidavit, at para. 18 [Motion Record, Tab 2, pp. 15-16].

Manitoba	<ul style="list-style-type: none">• Plan Spouse must certify that the spousal waiver was signed not in presence of the Pension Plan member• Plan Spouse must also certify that the Plan Spouse has seen the Pension Plan member's retirement statement and is signing of his or her own free will without duress, coercion or compulsion of any kind• Spousal waiver must be signed closer to the date of retirement than the Ontario Form
New Brunswick	<ul style="list-style-type: none">• Spousal waiver must be notarized or commissioned• Plan Spouse must acknowledge that he or she has signed freely and voluntarily
Nova Scotia	<ul style="list-style-type: none">• Spousal waiver must be witnessed

13. As at December 31, 2016, Morneau Shepell has identified a total of 1,214 Pension Plan members employed in the provinces of British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick and Nova Scotia at the time of their employment termination, who had a spouse at the time they commenced receiving benefits and who elected a sub-J&S67 benefit.¹¹

14. Of the 1,214 Pension Plan members referred to above, the vast majority (1,142) are receiving benefits equivalent to the SL10 entitlement, with no spousal benefit payable.¹² As the SL10 entitlement was selected by the member, Sears Canada's records do not contain any information with respect to the Plan Spouse who signed the Spousal Waiver or where that person may be contacted.¹³ Additionally, the data available to Morneau Shepell does not include Pension Plan members with spouses at the time of termination of their employment who have now died but

¹¹ Dunlop Affidavit, at para. 16 [Motion Record, Tab 2, p. 14].

¹² Dunlop Affidavit, at para. 17 [Motion Record, Tab 2, p. 14].

¹³ Dunlop Affidavit, at para. 17 [Motion Record, Tab 2, p. 14].

previously received SL10 or sub-J&S67 entitlements.¹⁴ Morneau Shepell continues to investigate and may uncover additional non-compliant Spousal Waivers.¹⁵

Potential impact if the Spousal Waivers are deemed invalid

15. If Morneau Shepell is unable to accept as valid the non-compliant Spousal Waivers, all Plan Spouses would have to be contacted and given an opportunity to elect to sign a compliant Spousal Waiver.¹⁶ Attempting to identify and locate the relevant individuals would involve considerable expense and effort, which may include having to hire private investigators.¹⁷ Additionally, given that some Pension Plan members and/or Plan Spouses have passed away since the Spousal Waivers were signed, the Plan Administrator would need to attempt to identify and locate the relevant estates and seek the execution of new compliant Spousal Waivers from the estates.

16. If Plan Spouses who are located decline to sign a compliant Spousal Waiver, there will be an increase in the Wind Up Deficiency as a result of additional benefits which will be payable to those Plan Spouses from the Pension Plan.¹⁸ The Pension Plan members whose spouses would have such survivor entitlements will have received something more than the J&S67 benefits as a result of Sears Canada's recognition of the non-complaint Spousal Waiver.¹⁹ The Plan Administrator may seek to recover the overpayments from the member; for example, where the member is still alive, or the member's estate is not settled and has sufficient assets to repay such

¹⁴ Dunlop Affidavit, at para. 21 [Motion Record, Tab 2, p. 17].

¹⁵ Dunlop Affidavit, at para. 17 [Motion Record, Tab 2, p. 14].

¹⁶ Dunlop Affidavit, at para. 19 [Motion Record, Tab 2, p. 16].

¹⁷ Dunlop Affidavit, at para. 19 [Motion Record, Tab 2, p. 16].

¹⁸ Dunlop Affidavit, at para. 20 [Motion Record, Tab 2, p. 16].

¹⁹ Dunlop Affidavit, at para. 20 [Motion Record, Tab 2, p. 16].

overpayments.²⁰ Efforts to recover such overpayments will likely cause hardship to the affected Pension Plan members.

17. In addition, a Pension Plan member who worked in one of the relevant provinces may have elected a sub-J&S67 benefit and both the Pension Plan member and the Plan Spouse may have died.²¹ If the Pension Plan member predeceased the Plan Spouse, and if the Spousal Waiver is not enforceable, then the Plan Spouse's estate would be entitled to survivor pension payments that would have been made between the Pension Plan member's date of death and the date of death of the Plan Spouse.²²

18. If it is not able to rely on the Spousal Waivers, the Plan Administrator will incur significant professional and administrative fees to administer the entire process regarding non-compliant Spousal Waivers, which could take many years.²³ The Plan Administrator's actuaries have estimated an additional \$32,000,000 in liabilities in respect of the Pension Plan if (a) all non-complaint Spousal Waivers are not accepted as valid, and (b) compliant Spousal Waivers are not executed by the applicable Plan Spouse and no recovery is made from Pension Plan members for overpayments, including the additional professional and administrative costs to administer the process to locate Plan Spouses and to attempt to recover any overpayments which were made to Pension Plan members in reliance on the non-compliant Spousal Waivers.²⁴

19. Further, it is likely that many Plan Spouses may never be located, leaving the Plan Administrator with no choice but to seek further direction from the Court in order to administer the Pension Plan or to withhold a significant contingency reserve to ensure funds are available in the

²⁰ Dunlop Affidavit, at para. 20 [Motion Record, Tab 2, p. 16].

²¹ Dunlop Affidavit, at para. 22 [Motion Record, Tab 2, p. 17].

²² Dunlop Affidavit, at para. 22 [Motion Record, Tab 2, p. 17].

²³ Dunlop Affidavit, at paras. 24 and 26 [Motion Record, Tab 2, p. 18].

²⁴ Dunlop Affidavit, para. 25 [Motion Record, Tab 2, p. 18].

Pension Plan if these Plan Spouses come forward and are not prepared to execute a compliant Spousal Waiver.²⁵

Notice of this motion

20. The Plan Administrator has been in contact with the Superintendent, as the major authority responsible for the regulation of the Pension Plan, and has advised the Superintendent of the issues related to the Spousal Waivers and of the Plan Administrator's intention to bring this motion.²⁶

21. In addition to bringing this motion on notice to the service list, the Plan Administrator has also notified the pension regulators and superintendents in each of British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick and Nova Scotia.²⁷ To date, neither the Plan Administrator nor its counsel has been contacted by any of these parties regarding this motion for advice and directions.

22. Given that it is impractical to identify and contact the Plan Spouses, the Plan Administrator published advertisements regarding this motion in two national newspapers (one in English and one in French) on October 16, 2018, thereby effecting service on Plan Spouses pursuant to this Court's Substituted Service Order dated October 10, 2018.²⁸

²⁵ Dunlop Affidavit, at para. 26 [Motion Record, Tab 2, p. 18].

²⁶ Dunlop Affidavit, at para. 27 [Motion Record, Tab 2, pp. 18-19].

²⁷ Affidavit of Service of Wanda Marshall, sworn September 19, 2018.

²⁸ Affidavit of Service of Margaret Carmichael, sworn October 25, 2018.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

23. The sole issue for the Court to determine on this motion is whether to permit the Plan Administrator to accept as valid the non-compliant Spousal Waivers given the circumstances of this case.

This Court has jurisdiction to provide advice and directions to the Plan Administrator regarding the Spousal Waivers

24. This Court has jurisdiction to provide advice and direction to the Plan Administrator pursuant to the *Companies' Creditors Arrangement Act* (“**CCAA**”)²⁹ and the terms of the Employee and Retiree Claims Procedure Order dated February 22, 2018 (the “**Employee and Retiree Claims Procedure Order**”).

25. The CCAA grants broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the CCAA’s remedial objectives.³⁰ One of these objectives is to protect the interests of creditors and to enable an orderly distribution of the debtor company’s affairs.³¹

26. As the Supreme Court of Canada has explained, CCAA courts are often confronted with issues that require court intervention beyond the initial stay of proceedings:

When large companies encounter difficulty, reorganizations become increasingly complex. CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing

²⁹ R.S.C. 1985, c. C-36.

³⁰ *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 [“*Century Services*”], at para. 19 [Book of Authorities, Tab 1].

³¹ *Lehndorff General Partner Ltd., Re*, [1993] O.J. No. 14 (Gen. Div.), at para. 7 [Book of Authorities, Tab 2].

room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA.³²

27. Section 11 of the CCAA provides the Court with a general power to make any order that it considers appropriate in the circumstances:

General power of court

Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, ***the court***, on the application of any person interested in the matter, ***may***, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, ***make any order that it considers appropriate in the circumstances***. [Emphasis added.]

28. Section 11 confers broad jurisdiction on the Court to grant orders necessary to “fill in gaps” within the context of a CCAA proceeding.³³ The Court has the flexibility to make appropriate orders that advance the remedial objectives of the CCAA:

The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy... orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation.³⁴

29. Similarly, CCAA claims procedures are designed to move the restructuring process along in an efficient and cost effective manner.³⁵

30. Pursuant to the Employee and Retiree Claims Procedure Order, this Court authorized the Plan Administrator to submit a claim in respect of the Pension Plan in this CCAA proceeding

³² *Century Services*, at para. 61 [Book of Authorities, Tab 1].

³³ *Stelco Inc., Re* (2005), 75 O.R. (3d) 5, at para. 32 [Book of Authorities, Tab 3].

³⁴ *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re*, 1998 CanLII 14907 (ON SC), at para. 45 [Book of Authorities, Tab 4].

³⁵ *Canwest Global Communications Corp., Re*, 2011 ONSC 2215, at para. 33 [Book of Authorities, Tab 5].

(the “**Sears Pension Claim**”). In preparing and submitting the Sears Pension Claim, the Plan Administrator is “entitled, without independent investigation, to rely on the books and records of the Sears Canada Entities and any information provided by the Sears Canada Entities”.³⁶ The Employee and Retiree Claims Procedure Order also authorizes the Plan Administrator to apply to this Court for advice and directions concerning the discharge of its powers and duties under the Employee and Retiree Claims Procedure Order.³⁷

31. Following the delivery of its Proof of Claim in respect of the Wind Up Deficiency for the Pension Plan, the Plan Administrator discovered the issue regarding the Spousal Waivers used by Sears Canada which may materially affect the Sears Pension Claim submitted pursuant to the Employee and Retiree Claims Procedure Order.

32. It is reasonable and appropriate for this Court to provide advice and directions regarding the Plan Administrator’s ability to accept the Spousal Waivers as valid notwithstanding that they are not, in all respects, compliant with the applicable provincial pension legislation, given that:

- (a) The validity of the Spousal Waivers may have a material impact on the amount of the Sears Pension Claim; and
- (b) Treatment of the Sears Pension Claim will need to be resolved prior to any distribution to creditors in this CCAA proceeding (through a proposed plan of arrangement and compromise or otherwise).

³⁶ Employee and Retiree Claims Procedure Order, para. 20.

³⁷ Employee and Retiree Claims Procedure Order, para. 82.

Relevant considerations to the advice and directions sought with respect to the Spousal Waivers

33. As set out in paragraphs 15 to 19 above, permitting the Plan Administrator to rely on the Spousal Waivers as valid will enable the Plan Administrator to avoid the significant professional and administrative costs to the Pension Plan as well as the delays in completing the Pension Plan wind up that would be associated with attempting to (i) identify and locate Plan Spouses, and (ii) address any underpayments or overpayments stemming from the prior use of the non-compliant Spousal Waivers, if possible.

34. Representative Counsel for the Retirees has confirmed support for enabling the Plan Administrator to accept the Spousal Waivers as valid.

35. For fairness reasons and due to the practical considerations relating to this issue, the Monitor has indicated that it also supports a resolution that permits the acceptance of Spousal Waivers as valid.³⁸

PART IV - ORDER REQUESTED

36. For the reasons set out above, the Plan Administrator seeks this Court's advice and direction regarding whether the Plan Administrator can rely on the Spousal Waivers as valid.

³⁸ Twenty-Second Report of the Monitor, para. 58.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of October, 2018.

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SCHEDULE "A"

AUTHORITIES

Tab

1. *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60
2. *Lehndorff General Partner Ltd., Re*, [1993] O.J. No. 14 (Gen. Div.)
3. *Stelco Inc., Re* (2005), 75 O.R. (3d) 5
4. *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re*, 1998 CanLII 14907 (ON SC)
5. *Canwest Global Communications Corp., Re*, 2011 ONSC 2215

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Pension Benefit Act, R.S.C., 1985, c. C-36, s. 46

Waiver of joint and survivor pension benefit

46 (1) The persons entitled to a joint and survivor pension benefit may waive the entitlement to receive payment of pension benefits in the form of a joint and survivor pension by delivering to the administrator of the pension plan or, in the case of a deferred life annuity, to the insurance company a written waiver in the form approved by the Superintendent or a certified copy of a domestic contract containing the waiver.

Time

(2) The waiver is not effective unless the following condition is satisfied:

1. For a written waiver in the form approved by the Superintendent, the form is dated and signed within the 12 months preceding commencement of payment of the pension benefit and is delivered to the administrator or insurance company within that 12-month period.
2. For a certified copy of a domestic contract, the certified copy is delivered to the administrator or insurance company within the 12 months preceding commencement of payment of the pension benefit.

Cancellation of waiver

(3) Persons who have delivered a waiver may jointly cancel it by delivering a written and signed notice of cancellation to the administrator or the insurance company, as the case may be, before the commencement of payment of the pension benefit.

Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, s. 11

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

SCHEDULE "C"

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Proceeding Commenced at Toronto

**FACTUM OF THE PLAN ADMINISTRATOR
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