

**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
AND THE SUPERINTENDENT
(re Litigation Trustee motion returnable February 15, 2018)**

February 13, 2018

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TO: **SERVICE LIST**

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

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PART I - OVERVIEW

1. Morneau Shepell Ltd., in its capacity as Administrator for the Sears Canada Inc. Registered Retirement Plan (the “**Pension Plan Administrator**”) and the Superintendent of Financial Services as Administrator of the Pension Benefits Guarantee Fund (the “**Superintendent**”) have independently identified issues relating to the motion brought by Representative Counsel for the Non-Unionized Retirees and Non-Unionized Active and Former Employees of the Sears Canada Entities (“**Pension Representative Counsel**”) for an order appointing a Litigation Trustee (the “**Proposed Litigation Trustee Order**”). For efficiency purposes, the Pension Plan Administrator and the Superintendent deliver this joint factum summarizing their respective positions.

2. There are a number of issues with the structure contemplated by the Proposed Litigation Trustee Order, including those relating to the independence of the proposed litigation trustee, the implementation of a formal governance structure prior to any investigation or consultation, the proposed role of the Monitor and the attempt to pre-determine the scope of the claims that will fall within the mandate of a litigation trustee. These issues are discussed in further detail below.

3. Although the Pension Plan Administrator and the Superintendent support the appointment of a court officer to investigate and coordinate potential litigation claims, such an appointment should proceed on a consensual basis and involve all stakeholders in order to achieve the desired efficiencies and coordination. As such, the Pension Plan Administrator and Superintendent support an incremental and staged approach whereby an independent litigation inspector is appointed to consult with stakeholders prior to developing recommendations regarding the governance, coordination and identification of claims that may be pursued for the benefit of all creditors of the Sears Canada Entities' estate (the "**Estate**"). Following this initial stage, the Court and all stakeholders will be better positioned to determine whether the appointment of a litigation trustee is appropriate and, if so, how to efficiently and effectively implement such a process in this proceeding.

PART II - RELEVANT FACTS

4. The Sears Canada Entities 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 order dated June 22, 2017 (the "**Initial Order**").¹

¹ Eleventh Report of FTI Consulting Canada Inc., as Monitor, dated January 15, 2018 ("**Eleventh Report of the Monitor**"), para. 1.

5. On October 13, 2017, following a sale and investor solicitation process that did not result in the approval of any going concern transactions for a restructured full-line retail business of the Sears Canada Entities, 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.²

6. Effective October 16, 2017, the Superintendent appointed the Pension Plan Administrator, as it was inevitable that the Sears Canada Inc. Registered Retirement Plan (the "**Pension Plan**") would need to be wound up given the liquidation of the Sears Canada Entities.³

7. The latest filed actuarial report for the Pension Plan as at December 31, 2015, indicated that the defined benefit component of the Pension Plan was underfunded by approximately \$267 million on a wind up basis.⁴

8. On November 10, 2017, the Superintendent issued notice of its intention to wind up the Pension Plan effective October 1, 2017.⁵ On December 7, 2017, 1291079 Ontario Limited, one of the creditors of Sears Canada Inc., delivered a Request for Hearing Form challenging the Superintendent's authority to order the proposed wind up of the Pension Plan.⁶ A pre-hearing conference before the Financial Services Tribunal is currently scheduled for March 21, 2018. The Pension Plan Administrator and the Monitor have both requested party status in this proceeding.

9. On December 8, 2017, this Court approved a Claims Procedure Order for the identification and quantification of claims against the Sears Canada Entities and the current and

² Eleventh Report of the Monitor, para. 6.

³ Ninth Report of FTI Consulting Canada Inc., as Monitor, dated December 20, 2017 ("**Ninth Report of the Monitor**"), Appendix B.

⁴ Ninth Report of the Monitor, Appendix B.

⁵ Ninth Report of the Monitor, Appendix B.

⁶ Ninth Report of the Monitor, Appendix C.

former directors and officers of the Sears Canada Entities.⁷ Employee Claims, Sears Pension Claims and Other Pensioner Claims (as defined in the Claims Procedure Order) were excluded from the Claims Procedure Order.

10. Pursuant to s. 36.1(1) of the CCAA, the Monitor has conducted a review of certain material transactions, payments and dividends entered into, made or declared by the Sears Canada Entities in the period prior to their filing for protection under the CCAA and has identified the following potential transactions of interest (the “**Transactions of Interest**”):

- (a) A dividend paid to certain Sears Canada shareholders on December 31, 2012 in the amount of approximately \$102 million;
- (b) A dividend paid to certain Sears Canada shareholders on December 6, 2013 in the amount of approximately \$509 million;
- (c) The surrender by Sears Canada of its exclusive right to use the Craftsman trademark in Canada in connection with the sale by Sears Holdings Corporation of the Craftsman business to Stanley Black & Decker in March 2017.⁸

11. The Monitor is of the view that further review of the Transactions of Interest is appropriate.⁹

12. There may be additional claims and causes of action arising out of the Transactions of Interest that could be brought by the Sears Canada Entities and/or their creditors. There may also

⁷ Claims Procedure Order, dated December 8, 2017.

⁸ Eleventh Report of the Monitor, paras. 50-52.

⁹ Eleventh Report of the Monitor, para. 53.

be additional claims and causes of action that could be brought on behalf of the Sears Canada Entities and/or their creditors.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

13. The Pension Plan Administrator and Superintendent submit there are four major issues that must be addressed prior to the appointment of a litigation inspector or trustee:

- (a) Whether the litigation inspector/trustee should be independent of and supported by all stakeholders;
- (b) Whether a formal governance structure should be put in place initially or deferred until after the litigation inspector/trustee has an opportunity to consult with all stakeholders and consider all potential claims;
- (c) The role of the Monitor in assisting the litigation inspector/trustee; and
- (d) The scope of the claims that the litigation inspector/trustee should be appointed to investigate.

Independence and consensus

14. While creditors of the Sears Canada Entities are aligned on some issues, there are and will continue to be a number of issues on which the interests of specific creditors diverge or directly conflict.

15. As an example, pensioners may be the beneficiaries of a statutory deemed trust for the amounts owing by Sears Canada Inc. to the Pension Plan and, as such, they are entitled to first priority for recovery ahead of the claims of all other creditors immediately after the CCAA court

ordered charges.¹⁰ Similarly, the Pension Plan Administrator and the Superintendent may have statutory liens and other claims in respect of such amounts.¹¹ While these issues have yet to be determined by this Court in this proceeding, it is anticipated that a number of other creditors may oppose such priority. Notably, the Pension Plan Administrator and the Superintendent are the only creditors who represent interests relating to the Pension Plan and solely those interests. It is expected that Pension Representative Counsel will also assert unsecured claims for other post-employment benefits.

16. Claims processes are currently underway, with claims bar dates anticipated in March, April and May 2018. Given that claims have yet to be filed and reviewed, it is not possible to identify all of the issues that may divide creditors or how such divisions may affect potential creditor claims or the manner in which such claims are pursued (including, for example, identification of the proper plaintiffs and the appropriate remedies).

17. If a litigation inspector/trustee is appointed, it will be important for him or her to familiarize himself/herself with all of the potential claims of creditors both within and outside the CCAA process. There may be claims arising out of the same facts that give rise to independent claims of individual creditors to the exclusion of other creditors.

18. Given the potential for inter-creditor conflict, the Pension Plan Administrator and the Superintendent submit that it is important that any individual appointed to investigate claims that may be of interest to creditors in this proceeding is (i) independent from all stakeholders in this

¹⁰ Exhibit C to the Affidavit of William Turner, sworn February 12, 2018 [Motion Record, pp. 41-42]; Ontario *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the “PBA”), s. 57.

¹¹ PBA, ss. 57(5), 86.

proceeding and (ii) supported by consensus of all stakeholders in this proceeding including the Monitor.

19. There are as many as 18,000 Sears Canada pensioners and nine other provincial pension regulators who have an interest in the Estate. It is critical that the process undertaken is a fair process, free of conflicts, and reasonably appears to be so. With litigation of this complexity it is important that all parties find the most efficient and proportional method of advancing their claims.

20. The Proposed Litigation Trustee Order contemplates the Honourable Frank J.C. Newbould, Q.C. as litigation trustee in these CCAA proceedings for the benefit of the creditors of the Sears Canada Entities. The Pension Plan Administrator and the Superintendent do not dispute Mr. Newbould's qualifications for a litigation inspector or trustee role. However, Mr. Newbould is currently Counsel at Thornton Grout Finnigan LLP ("TGF"), the same law firm that acts for Oxford Properties Group Inc., one of the landlord creditors in this proceeding. TGF also acts for Whirlpool Canada Inc. and Mattel, Inc. in this proceeding. It is conceivable that landlord and trade creditors may have a legitimately divergent position from other groups of creditors with respect to certain issues in this CCAA proceeding including the collective prosecution of claims both within and outside this CCAA proceeding. Similarly, there may be disagreements among the creditors regarding litigation strategy and settlement discussions. Given Mr. Newbould's proximity to counsel for one of the active landlord creditors in this proceeding and the potential conflict or perception of bias, the Pension Plan Administrator and Superintendent do not support the appointment of the proposed litigation trustee.

21. Rather, the Pension Plan Administrator and the Superintendent submit that the Court should appoint a similarly qualified candidate who is independent of all stakeholders in this

proceeding and supported by all stakeholders on consensus. A list of ten potential individuals has been previously provided to the Monitor and certain other creditors. The Pension Plan Administrator and Superintendent remain willing to work with other stakeholders to identify other viable candidates.

Governance

22. As the universe of claims and potential claims is not known, the Pension Plan Administrator and Superintendent submit that a litigation inspector should be afforded the opportunity to consult with all stakeholders prior to the implementation of a more formal governance or reporting structure. A staged approach would enable the litigation inspector to make recommendations regarding governance that are informed by the nature of the potential claims. The litigation inspector could also make recommendations regarding how the pursuit of such potential claims should be funded going forward.

23. The Proposed Litigation Trustee Order contemplates the establishment of a “Committee” comprised of certain creditors as well as the Monitor. It is unclear how the specific creditors forming the proposed “Committee” were selected or why other major creditors such as the Pension Plan Administrator and the Superintendent were excluded.

24. In the event that any committee is put in place at the outset of any appointment, the Pension Plan Administrator and the Superintendent submit that they should each have a representative on the committee given their respective statuses as significant creditors in this proceeding (specifically, the Pension Plan Administrator’s claim for approximately \$267 million and the Superintendent’s subrogated portion of that claim).

Role of the Monitor

25. The nature of the Monitor's involvement on the proposed Committee as contemplated by the Proposed Litigation Trustee Order is not consistent with the independence of the Monitor. While it will be important that the Monitor is comfortable working with any appointee, the Monitor should not be responsible for the governance of a litigation inspector or trustee who is appointed on behalf of creditors. Rather, the Pension Plan Administrator and Superintendent submit that the litigation inspector or trustee should be assisted by the Monitor in conducting the initial investigation of the matters falling within his or her mandate including making recommendations regarding how the Monitor's investigations can be further leveraged for the benefit of the Estate (including the appropriate involvement of the Monitor in the pursuit of any claims).

Scope

26. The Proposed Litigation Trustee Order contemplates appointing a litigation trustee for the following mandate (at para. 2):

The Litigation Trustee shall be an officer of this Court, and is appointed for the purpose of investigating, considering, and reporting to the Court and the Committee (defined below) regarding any rights or claims (whether legal, equitable, statutory or otherwise) that the Sears Canada Entities, ***or any Litigation Trustee acting on behalf of creditors of any of the Sears Canada Entities, may have against any parties*** including but not limited to, current and former directors, officers, shareholders and advisors of any of the Sears Canada Entities (the "**Mandate**"). For greater certainty, the Mandate shall not include, and the Litigation Trustee shall have no role in determining, advising on, opposing, supporting, or articulating any claim of any creditor or stakeholder filed in this proceeding as part of any claims process or for distribution purposes from the estates of the Sears Canada Entities. [Emphasis added.]

27. There are a number of issues with the “Mandate” prescribed by the Proposed Litigation Trustee Order.

28. First, there is no basis for the Litigation Trustee to report or act “on behalf of creditors of any of the Sears Canada Entities”. As currently drafted, the Proposed Litigation Trustee Order presupposes that a litigation trustee may be empowered to act on independent claims of any creditor, including creditors who are not supportive of the appointment and/or having a litigation trustee pursue their independent claims. No individual creditor has authorized a litigation trustee to act in respect of their claims. Caution will have to be exercised before a litigation inspector or trustee reports on independent creditor claims that may not be assigned or delegated to a litigation trustee.

29. Second, it is unclear how the proposed Mandate integrates with the independent claims that creditors may have against directors and officers of the Sears Canada Entities that are currently captured by the Claims Procedure Order. The Proposed Litigation Trustee Order contemplates having the litigation inspector act on behalf of creditors in respect of claims against current and former directors and officers of the Sears Canada Entities despite the fact that such claims are part of the current claims process.

30. Third, it is unclear how the proposed Mandate integrates with independent claims that creditors may have against third parties other than the Sears Canada Entities and the directors and officers of the Sears Canada Entities (i.e. claims that are not currently within the scope of the Claims Procedure Order), particularly claims that may be held by only a subset of creditors. Again, there is no basis for a litigation trustee to act on behalf of such creditor claims absent consent from the affected creditor.

31. The Pension Plan Administrator and the Superintendent submit that all of these issues can be addressed through a more incremental approach whereby the litigation inspector is initially appointed solely for the purpose of consulting with stakeholders, investigating potential claims and developing a proposed litigation plan. In order to fulfil this initial mandate, the litigation inspector need not act on behalf of any other party or report to a formal committee.

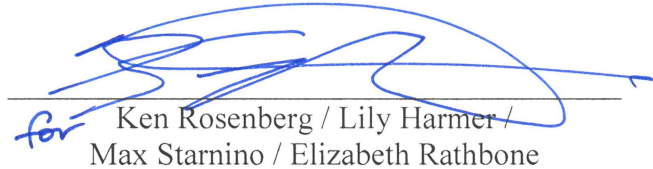
PART IV - ORDER REQUESTED

32. The Pension Plan Administrator and Superintendent respectfully request that the Court grant an Order appointing a litigation inspector, substantially in the form attached hereto as Schedule "A".

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of February, 2018.



Michael Barrack / Kiran Patel



for Ken Rosenberg / Lily Harmer /
Max Starnino / Elizabeth Rathbone

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SCHEDULE “A”

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

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

THE HONOURABLE MR.) THURSDAY, THE 15TH
)
JUSTICE HAINEY) DAY OF FEBRUARY, 2018

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
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4201531 CANADA INC., 168886 CANADA INC., AND 3339611
CANADA INC.

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

LITIGATION INSPECTOR ORDER

THIS MOTION, made by Representative Counsel for the Non-Unionized Retirees and Non-Unionized Active and Former Employees of the Sears Canada Entities (“**Pension Representative Counsel**”), pursuant to the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the “**CCAA**”), for an order appointing a litigation inspector to identify and report on certain rights and claims of the Applicants and SearsConnect (collectively, the “**Sears Canada Entities**”) was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion of Pension Representative Counsel, the affidavits of William Turner sworn on August 11, 2017 and February 12, 2018 including the exhibits thereto, the Joint Factum of Morneau Shepell Ltd. in its capacity as Administrator for the Sears Canada Inc. Registered Retirement Plan (the “**Pension Plan Administrator**”) and the Ontario Superintendent of Financial Services as Administrator of the Pension Benefits Guarantee Fund (the “**Superintendent**”), the • Report of FTI Consulting Canada Inc., in its capacity as monitor (the “**Monitor**”), filed, and on hearing the submissions of respective counsel for Pension Representative Counsel, the Pension Plan Administrator, the Superintendent, the Monitor, and such other counsel as were present, no one else appearing although duly served as appears from the Affidavit of Service of Veronica de Leoz, sworn February 12, 2018:

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that _____
[insert consensus candidate who is independent of all stakeholders] is hereby appointed as litigation inspector (the “**Litigation Inspector**”) in these CCAA proceedings. The Litigation Inspector shall be an officer of this Court, and is appointed for the purpose of investigating, considering and reporting to the Court regarding any rights or claims (whether legal, equitable, statutory or otherwise) that the Sears Canada Entities may have as against any parties, including but not limited to current and former directors, officers, shareholders and advisors of any of the Sears Canada Entities (the “**Mandate**”).

3. **THIS COURT ORDERS** that the Litigation Inspector's Mandate shall include preparing and delivering as soon as practicable a report (the "**Report**") to this Court, with such details as the Litigation Inspector considers advisable, taking into account privilege and confidentiality, and subject to any request that may be made to the Court by the Litigation Inspector for a sealing order as to any aspects of its Report, that includes but is not limited to recommendations regarding:

- (a) Which potential rights or claims of the Sears Canada Entities should be pursued (if any); and
- (b) A proposed litigation plan detailing how such rights or claims can be pursued, including, but not limited to:
 - (i) How to efficiently and effectively coordinate the prosecution of such rights or claims with similar or related rights or claims that may be asserted by different parties;
 - (ii) A proposed governance structure for the prosecution of such rights or claims; and
 - (iii) Alternatives for funding the prosecution of such rights or claims.

4. **THIS COURT ORDERS** that following the delivery of the Report, the Litigation Inspector shall not take any further steps without a subsequent Order of the Court.

5. **THIS COURT ORDERS** that the Litigation Inspector shall fulfil its Mandate in consultation with the Monitor, Employee Representative Counsel, Pension Representative

Counsel, the Pension Plan Administrator, the Superintendent, the landlord creditors, Dealer Representative Counsel and such other stakeholders as the Litigation Inspector sees fit or as otherwise directed by the Court.

6. **THIS COURT ORDERS** that the Litigation Inspector will be subject to the supervision of this Court and may recommend a formal stakeholder advisory structure to be approved by the Court.

7. **THIS COURT ORDERS** that the Monitor is hereby directed to provide such assistance as the Litigation Inspector requires in discharging its Mandate. The Monitor shall disclose to the Litigation Inspector the results of the Monitor's investigations that may be relevant to the rights or claims being investigated by the Litigation Inspector, including the investigations relating to the "Transactions of Interest" as defined and reported in the Eleventh Report of FTI Consulting Canada Inc., as Monitor, dated January 15, 2018 (paras. 50-54), subject to appropriate arrangements for privileged communications and confidential information, and to cooperate with the Litigation Inspector in its review of such information.

8. **THIS COURT ORDERS** that the Monitor and the Sears Canada Entities and all persons acting on behalf of the Sears Canada Entities at any time shall cooperate fully with the Litigation Inspector in the fulfillment of the Mandate.

9. **THIS COURT ORDERS** that, for greater certainty, any right or claim identified by the Litigation Inspector is an "Excluded Claim" under the Claim Procedure Order issued by this Court dated December 8, 2017 (the "**Claims Procedure Order**").

10. **THIS COURT ORDERS** that the Litigation Inspector shall be paid its reasonable fees and disbursements at its standard rates and charges, by the Sears Canada Entities on a monthly basis, forthwith upon rendering its accounts to the Sears Canada Entities for fulfilling its Mandate in accordance with this Order, and subject to such redactions to the invoices as are necessary to maintain privilege and protect confidentiality. In the event of any disagreements with respect to the Litigation Inspector's fees and disbursements, such disagreement may be remitted to this Court for determination.

11. **THIS COURT ORDERS** that the Litigation Inspector shall be entitled to the benefit of the Administrative Charge (as defined in the Initial Order issued by the Court dated June 22, 2017, as amended), as security for its professional fees and disbursements incurred at its standard rates and charges.

12. **THIS COURT ORDERS** that payments made by the Sears Canada Entities pursuant to this Order do not and will not constitute preferences, fraudulent conveyances, transfers of undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable laws.

13. **THIS COURT ORDERS** that the Litigation Inspector is hereby authorized to take all steps and do all acts necessary or desirable to carry out the terms of this Order.

14. **THIS COURT ORDERS** that the Litigation Inspector shall be at liberty, and is hereby authorized, at any time, to apply to this Court for advice and directions in respect of its appointment or the fulfillment of its duties in carrying out the provisions of this Order or any variation of the powers and duties of the Litigation Inspector, which shall be brought on notice to the Service List in these CCAA proceedings, unless this Court orders otherwise.

15. **THIS COURT ORDERS** that the Litigation Inspector shall have no personal liability or obligations as a result of the performance of its duties in carrying out the provisions of this Order or any subsequent Orders in these CCAA proceedings, save and except for liability arising out of gross negligence or wilful misconduct.

16. **THIS COURT ORDERS** that no action or proceeding may be commenced against the Litigation Inspector in respect of the performance of its duties under this Order without leave of this Court on seven (7) days' notice to the Litigation Inspector.

17. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative bodies, having jurisdiction in Canada or in the United States of America, to give effect to this Order and to assist the Sears Canada Entities, the Monitor, the Litigation Inspector and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Sears Canada Entities and to the Monitor and Litigation Inspector, as officers of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Sears Canada Entities, the Monitor, the Litigation Inspector and their respective agents in carrying out the terms of this Order.

HAINES J.

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.

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ONTARIO
SUPERIOR COURT OF JUSTICE
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Proceeding commenced at Toronto

LITIGATION INSPECTOR ORDER

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Lawyers for the Superintendent of Financial Services
as Administrator of the Pension Benefits Guarantee
Fund

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57 & 86

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. R.S.O. 1990, c. P.8, s. 57 (1).

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. R.S.O. 1990, c. P.8, s. 57 (2).

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. R.S.O. 1990, c. P.8, s. 57 (3).

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. R.S.O. 1990, c. P.8, s. 57 (4).

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. 2014, c. 7, Sched. 26, s. 6 (1).

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. R.S.O. 1990, c. P.8, s. 57 (5); 2014, c. 7, Sched. 26, s. 6 (2).

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. R.S.O. 1990, c. P.8, s. 57 (6); 2014, c. 7, Sched. 26, s. 6 (3).

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. R.S.O. 1990, c. P.8, s. 57 (7).

...

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. R.S.O. 1990, c. P.8, s. 86 (1); 1997, c. 28, s. 206.

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. R.S.O. 1990, c. P.8, s. 86 (2).

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. R.S.O. 1990, c. P.8, s. 86 (3); 1997, c. 28, s. 206.

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). R.S.O. 1990, c. P.8, s. 86 (4); 1997, c. 28, s. 206.

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")

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

JOINT FACTUM OF THE PENSION PLAN ADMINISTRATOR
AND THE SUPERINTENDENT
(re Litigation Trustee motion returnable February 15, 2018)

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