

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.

Applicants

NOTICE OF MOTION

(re Pension Plan Deemed Trust)

TAKE NOTICE that Morneau Shepell Ltd., in its capacity as Administrator for the Sears Canada Inc. Registered Retirement Plan (“**Morneau Shepell**” or the “**Plan Administrator**”) and the Superintendent of Financial Services in his capacity as Administrator of the Pension Benefits Guarantee Fund (the “**Superintendent**”), will make a motion to a Judge of the Commercial List on a date to be scheduled with the Court at 330 University Avenue, 8th Floor, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. An Order substantially in the form attached to the Motion Record, *inter alia*:
 - (a) if necessary, abridging the time for service of this Notice of Motion and the Motion Record, validating the manner of service and dispensing with any further service thereof;
 - (b) declaring that subject to the allocation and application of the charges imposed by this Court by the terms of the Initial Order dated June 22, 2017, as amended (the “**Initial Order**”) and any other Orders in this proceeding:
 - (i) Sears Canada Inc. (“**SCI**”) is deemed to hold all assets and proceeds therefrom up to the amount due by it in respect of the wind-up of the Sears Canada Inc. Registered Retirement Pension Plan (the “**Pension Plan**”) as determined in the actuarial wind up report, in trust for the beneficiaries of the Pension Plan (hereinafter, such amount shall be referred to as the “**Wind-Up Deficiency**”, and such assets and proceeds therefrom shall be referred to as the “**Proceeds**”);
 - (ii) Morneau Shepell has a lien and charge attached to the Proceeds as security for the amounts due to the Pension Plan by SCI;

- (iii) the Superintendent has a lien and charge attached to the Proceeds as security for any funds that are paid out of Ontario's Pension Benefit Guarantee Fund (the "**PBGF**") in respect of the Wind-Up Deficiency; and
 - (iv) declaring that such claims in respect of the Wind-Up Deficiency have priority to the claims of all other creditors of SCI, and that the Proceeds up to the amounts due to the Pension Plan by SCI are not distributable to such other creditors;
- (c) directing SCI to hold the Proceeds in escrow pending the determination of the Wind-Up Deficiency, free from any encumbrances, and, upon such determination, to remit the Proceeds to the Plan Administrator, in trust, for deposit into the Pension Plan subject to the payment of such costs and expenses to complete these CCAA proceedings to be approved by the Court;
- (d) declaring that the granting of the relief sought does not preclude the moving parties from asserting a similar deemed trust and related statutory liens and charges as against assets and proceeds held by other Applicants in the event any such Applicants are determined to be jointly and severally or otherwise liable to the Pension Plan in respect of the Wind-Up Deficiency or any part thereof;
- (e) lifting the stay of proceedings, if necessary, to allow any of the foregoing relief to be granted; and

- (f) declaring that the foregoing relief will survive any future bankruptcy or receivership of SCI; and
2. Such further and other relief as counsel may request and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

A. *The CCAA Restructuring Attempt and Subsequent Liquidation*

1. On June 22, 2017, this Court issued the Notice of Application and Initial Order commencing these proceedings.
2. The Initial Order created various super-priority charges in respect of the cost of administering these proceedings (the “**Administration Costs**”).
3. The Initial Order did not stay regulatory action by the Superintendent.
4. In mid-July, this Court approved a two track process:
 - (a) a sale and investment solicitation process having a bid deadline of August 31, 2017 (the “**SISP**”); and
 - (b) a process for the liquidation of inventory and furniture, fixtures and equipment at 59 locations scheduled for closure (the “**Initial Liquidation**”).
5. The SISP did not generate a comprehensive going concern restructuring solution, and by October 2017, SCI and the Monitor publicly repositioned these

proceedings as a liquidation of SCI's assets through several lease monetization transactions, the sale of certain owned real estate, and the liquidation of inventory, furniture, fixtures and equipment at its retail locations (together with the Initial Liquidation, the "**Liquidation**").

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

7. As a result of the Liquidation, SCI had a cash balance of \$134.7 million as of July 14, 2018. There are no other secured creditors.

B. The Wind-Up of the Pension Plan

8. The Superintendent is the Chief Executive Officer of the Financial Services Commission of Ontario ("**FSCO**"), responsible for the general supervision of pension plans in Ontario. The Superintendent exercises the powers and duties conferred upon him under the *Financial Services Commission of Ontario Act, 1997*, S.O. 1887, c. 28, as amended ("**FSCO Act**") and under the *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended ("**PBA**"). By virtue of the PBA, the FSCO Act and various inter-provincial accords, the Superintendent has principal regulatory jurisdiction for the Pension Plan for the benefit of all Pension Plan members, including those residing in other parts of Canada.

9. The PBGF is a fund continued under the PBA. Payments are made from the PBGF to certain wound up pension plans to fund certain pension benefit entitlements where an employer is unable to satisfy the funding requirements of the PBA and its

regulations. Under section 82(2) of the PBA, the Superintendent is responsible for the administration of the PBGF.

10. Following the failure of the SISF and the commencement of the Liquidation, the Superintendent, as the principal regulator of the Pension Plan, took the following regulatory actions:

- (a) on or about October 17, 2017, the Superintendent appointed Morneau Shepell as the replacement Plan Administrator; and,
- (b) on November 10, 2017, the Superintendent issued and served a Notice of Intended Decision indicating that the Pension Plan was to be wound-up effective October 1, 2017, but with such wind-up to include all members of the Plan whose employment was terminated on or after June 13, 2017 (the "**NOID**").

11. All key creditor constituencies in these proceedings were on notice of the NOID and were given an opportunity to object.

12. A group of creditors objected to the NOID on various grounds, including that the regulation of the wind-up of the Pension Plan should be subject to the CCAA stay of proceedings (the "**Objection**").

13. The Objection was subsequently withdrawn and, on March 29, 2018, the Superintendent issued an order directing the wind-up of the Pension Plan on the terms contemplated by the NOID (the "**Wind-Up Order**").

14. The Wind-Up Order is a final order.

C. The Pension Claims Process

15. This Court has made orders providing for the treatment of claims in these CCAA proceedings. On February 22, 2018, this Court approved a process for the proof of claims in respect of the Pension Plan (the “**Pension Claim Procedure**”), including the following claims in respect of the Wind-Up Deficiency in the Pension Plan, in whole or in part (collectively, “**Sears Pension Claims**”):

- (a) a claim by the Plan Administrator;
- (b) a claim by the Court-appointed representatives of the beneficiaries of the Pension Plan (the “**Pensioner Representatives**”); and,
- (c) a claim by the Superintendent in respect of amounts to be paid by the PBGF.

16. In accordance with the Pension Claim Procedure:

- (a) the Plan Administrator filed a claim in respect of the Wind-Up Deficiency in the Pension Plan in the estimated amount of approximately \$260 million, in respect of which the Plan Administrator claimed a lien pursuant to s. 57(5) of the PBA, and a deemed trust pursuant to s. 57(4) of the PBA;
- (b) the Pensioner Representatives also filed a claim in respect of the Wind-Up Deficiency in the Pension Plan in the estimated amount of approximately \$260 million, in respect of which the Pensioner Representatives claimed a deemed trust pursuant to s. 57(4) of the PBA; and,

- (c) the Superintendent filed a subrogated claim in respect of the liability of the PBGF, in the estimated amount of approximately \$125 million, in respect of which the Superintendent claimed a lien pursuant to s. 86 of the PBA, as well as subrogated rights under ss. 57(5) and 57(4) of the PBA.

17. The deemed trust and lien provisions of the PBA and other applicable provincial pension legislation remain valid in CCAA proceedings and in bankruptcy.

18. The Pension Claim Procedure contemplates that the Monitor will give written notice to each of the Plan Administrator, counsel to the Pensioner Representatives, and the Superintendent, of any determination by the Monitor, including as to quantum and/or priority, of any Sears Pension Claim.

19. The Pension Claim Procedure does not specify a time within which disallowances in respect of the Sears Pension Claims must be given, or to whom appeals from disallowances are to be taken.

20. To date, the Monitor has not issued a disallowance in respect of the Sears Pension Claims.

21. With each passing day, the costs associated with administration of the Sears Canada estate are mounting, and eroding the interests of the Plan Administrator, Pensioner Representatives and Superintendent in the Proceeds.

22. It is just and equitable that the claim to the Proceeds in respect of the Sears Pension Claims be determined at this time.

23. PBA, ss. 55, 56, 57, 58, 66, 69, 75, 82, 83, 84 and 86.
24. FSCO Act, s. 5.
25. CCAA, s. 11.
26. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, ss. 2, 30(1), 40, 67(1)(a),(b),(2),(3), 69(3), 71, 72(1).
27. *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp), as amended, ss. 8, 29(6).
28. *Rules of Civil Procedure*, Rules 2.03, 3.02, 16.08 and 37.
29. The 2016 Agreement Respecting Multi-Jurisdictional Pension Plans between British Columbia, Nova Scotia, Ontario, Quebec and Saskatchewan, the 1968 Memorandum of Reciprocal Agreement (as between the pension regulatory authorities for all provinces except PEI), the 1968 Memorandum of Reciprocal Agreement (as between the Pension Commission of Ontario and the Minister of Finance of Canada), together with mirroring deemed trust and lien provisions in the pension statutes of the other provinces.
30. Such further and other grounds to which counsel for the moving parties may refer and of which this Court will take notice.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used on the hearing of the motion:

1. affidavit evidence, to be filed;

2. the Orders previously granted by the Court in these proceedings;
3. the Reports of FTI Consulting Canada Inc., as Monitor, delivered in these CCAA proceedings; and
4. such further or other material as counsel may advise and this Honourable Court permit.

July 23, 2018

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PROCEEDING COMMENCED AT
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