

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

**SEARS CANADA INC.,  
AND RELATED APPLICANTS**

**THIRTY-SEVENTH REPORT OF FTI CONSULTING CANADA INC., AS MONITOR**

**July 29, 2020**

**Contents**

<b>Section</b>	<b>Page</b>
A. INTRODUCTION .....	2
B. PURPOSE .....	5
C. TERMS OF REFERENCE .....	6
D. RELEASE AND SETTLEMENT AGREEMENT AND RELEASE OF RESERVE AMOUNT.....	7

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

**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

**THIRTY-SEVENTH REPORT TO THE COURT  
SUBMITTED BY FTI CONSULTING CANADA INC.,  
IN ITS CAPACITY AS MONITOR**

**A. INTRODUCTION**

1. On June 22, 2017, Sears Canada Inc. (“**Sears Canada**”) and a number of its operating subsidiaries (collectively, with Sears Canada, the “**Applicants**”) sought and obtained an initial order (as amended and restated on July 13, 2017, the “**Initial Order**”), under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”). The relief granted pursuant to the Initial Order was also extended to Sears Connect, a partnership forming part of the operations of the Applicants (and together with the Applicants, the “**Sears Canada Entities**”). The proceedings commenced under the CCAA by the Applicants are referred to herein as the “**CCAA Proceedings**”.

2. The Initial Order, among other things:
  - (a) appointed FTI Consulting Canada Inc. as monitor of the Sears Canada Entities (the “**Monitor**”) in the CCAA Proceedings;
  - (b) granted an initial stay of proceedings against the Sears Canada Entities until July 22, 2017 (the “**Stay Period**”); and
  - (c) scheduled a comeback motion for July 13, 2017 (the “**Comeback Motion**”).
3. Following the Comeback Motion, the Court extended the Stay Period. In addition, the following orders were issued:
  - (a) an order setting out the terms of the appointment of Ursel Phillips Fellows Hopkinson LLP as representative counsel for the non-unionized active and former employees of the Sears Canada Entities (“**Employee Representative Counsel**”);
  - (b) an order setting out the terms of the appointment of Koskie Minsky LLP as representative counsel to the non-unionized retirees and non-unionized active and former employees of the Sears Canada Entities with respect to pension and post-employment benefit matters (“**Pension Representative Counsel**”);
  - (c) an order authorizing the eventual suspension of special payments under the Sears Canada Pension Plan (the “**Pension Plan**”), certain payments in connection with supplemental pension plans, and certain payments under post-retirement benefit plans pursuant to a term sheet agreed to by the Ontario Superintendent of Financial Services, as Administrator of the Pension Benefits Guarantee Fund (the “**Superintendent**”), Employee Representative Counsel, Pension Representative Counsel, each of their respective representatives, and the Sears Canada Entities; and
  - (d) an order approving a sale and investor solicitation process to solicit interest in potential transactions, including investment and liquidation proposals, involving the business, property, assets and/or leases of the Applicants.

4. On July 18, 2017, the Court issued an order approving an agreement and a process for the liquidation of inventory and FF&E at certain initial closing Sears Canada locations.
5. On October 13, 2017, the Court issued, among other orders, an order approving an agreement and a process for the liquidation of the inventory and FF&E at all remaining Sears Canada retail locations.
6. The liquidation of all inventory and FF&E is now completed and all Sears Canada retail locations are closed.
7. On December 8, 2017, the Court issued an Order (the “**Claims Procedure Order**”) approving a claims process for the identification, determination, and adjudication of claims of creditors against the Sears Canada Entities and their Officers and Directors.
8. On February 22, 2018, the Court issued an Employee and Retiree Claims Procedure Order (the “**E&R Claims Procedure Order**” and, together with the Claims Procedure Order, the “**Claims Procedure Orders**”) approving a process for the identification, determination, and adjudication of claims of employees and retirees of the Sears Canada Entities.
9. On March 2, 2018, the Court issued an Order appointing Lax O’Sullivan Lisus Gottlieb LLP as Litigation Investigator (as amended on April 26, 2018, the “**Litigation Investigator Order**”), with a mandate to identify and report on certain rights and claims that the Sears Canada Entities or any creditors of the Sears Canada Entities may have against any parties.
10. On March 29, 2018, the Superintendent issued an order winding-up the Pension Plan effective October 1, 2017.
11. On May 9, 2018, the Court issued an Order approving a process for a mediation among stakeholders with the goal of achieving a resolution of significant claim and distribution matters (the “**Mediation**”) as a preliminary step toward a global resolution of material estate matters. The Mediation commenced on June 13, 2018 with Regional Senior Justice Morawetz as mediator and resulted in settlements with major creditors as further described in Prior Reports (as defined below).

12. On December 3, 2018, the Monitor and the Honourable J. Douglas Cunningham, Q.C. as Court-appointed litigation trustee (the “**Litigation Trustee**”), were authorized by the Court to pursue litigation against certain third parties on behalf of Sears Canada and its creditors, in connection with the payment of certain dividends (the “**2013 Dividend**”) by Sears Canada to its shareholders in 2013 (the “**Estate 2013 Dividend Litigation**”). The Court also lifted the stay of proceedings in the Initial Order to allow the Estate 2013 Dividend Litigation, as well as a claim by Morneau Shepell Ltd., as administrator of the Pension Plan (the “**Pension Plan Administrator**”) and class action claims (collectively, the “**Dealer Class Action**”) by certain “Sears Hometown” store dealers, each also arising from the 2013 Dividend, to be commenced or continued.
13. On February 15, 2019, the Court issued an Order (the “**Meetings Order**”) authorizing the Monitor to file a joint plan of compromise and arrangement in respect of the Sears Canada Entities (the “**Plan**”) and to convene meetings of Affected Unsecured Creditors (the “**Meetings**”) for the purpose of considering and voting on the Plan.
14. The Stay Period was most recently extended to September 30, 2020 by Order of the Court granted on March 31, 2020.
15. In connection with the CCAA Proceedings, the Monitor has provided thirty-six reports and twenty-three supplemental reports (collectively, the “**Prior Reports**”), and prior to its appointment as Monitor, FTI also provided to this Court a pre-filing report of the proposed Monitor dated June 22, 2017 (the “**Pre-Filing Report**”). The Pre-Filing Report, the Prior Reports, and other Court-filed documents and notices in these CCAA Proceedings are, or will be made, available on the Monitor’s website at [cfcanada.fticonsulting.com/searscanada/](http://cfcanada.fticonsulting.com/searscanada/).

## **B. PURPOSE**

16. The purpose of this thirty-seventh report of the Monitor (the “**Thirty-Seventh Report**”) is to provide the Monitor's recommendation for the approval of a settlement between Sears, Suncor Energy Inc. (“**Suncor**”) and Her Majesty the Queen in Right of Alberta, as represented by the Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks (“**AEP**”)(“**Release and Settlement Agreement**”) and to provide

for the release of the Reserve Amount (as defined below) associated with this issue, as previously set out in the Thirty-Sixth and Thirty-Third Reports.

### C. TERMS OF REFERENCE

17. In preparing this Thirty-Seventh Report, the Monitor has relied upon audited and unaudited financial information of the Sears Canada Entities, the Sears Canada Entities' books and records, and discussions and correspondence with, among others, advisors to the Sears Canada Entities' stakeholders (collectively, the "**Information**").
18. Except as otherwise described in this Thirty-Seventh Report:
  - (a) the Monitor has not audited, reviewed, or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would comply with Generally Accepted Assurance Standards pursuant to the *Chartered Professional Accountants of Canada Handbook*; and
  - (b) the Monitor has not examined or reviewed the financial forecasts or projections referred to in this Thirty-Seventh Report in a manner that would comply with the procedures described in the *Chartered Professional Accountants of Canada Handbook*.
19. Future-oriented financial information reported in or relied on in preparing this Thirty-Seventh Report is based on assumptions regarding future events. Actual results will vary from these forecasts and such variations may be material.
20. The Monitor has prepared this Thirty-Seventh Report in connection with its request for an order approving the Release and Settlement Agreement and releasing the Reserve Amount. The Thirty-Seventh Report should not be relied on for any other purpose.
21. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars.

Capitalized terms not otherwise defined herein have the meanings ascribed to them in the following documents filed as part of the CCAA Proceedings: (i) the affidavits of Mr. Billy

Wong, the former Chief Financial Officer of Sears Canada; (ii) the affidavit of Ms. Becky Penrice, the former Executive Vice-President and Chief Operating Officer of Sears Canada; (iii) the affidavits of Mr. Philip Mohtadi, the former General Counsel and Corporate Secretary of Sears Canada; (iv) the Plan; and (v) the Prior Reports..

**D. RELEASE AND SETTLEMENT AGREEMENT AND RELEASE OF RESERVE AMOUNT**

22. The events giving rise to the Release and Settlement Agreement and Reserve Amount have previously been set out in the Thirty-Third and Thirty-Sixth Reports. Copies of those reports, without appendices, are attached as Appendices A and B for reference.
23. The Release and Settlement Agreement arises from environmental remediation activities at the location of a former full-line store of Sears Canada at the North Hill Centre shopping mall in Calgary. Among the historical operations of the store was a retail gas bar. Following the discovery of an accidental leak of gasoline from underground storage tanks, Sears Canada commenced and continued remediation activities from the early 1990s to the present.
24. As a result of the environmental remediation requirements and Sears Canada's insolvency, AEP issued an environmental protection order ("EPO") on February 28, 2018, with various amendments thereto on March 29, 2018, and October 11, 2018, and ultimately consolidated by Amendment No. 3 on November 15, 2019.
25. Sears Canada, Suncor and Concord North Hill G.P. ("Concord") were each named as persons responsible under the EPO. Concord is the current landowner/developer of the former Sears Canada full-line store property. Suncor is a prior operator of a gas bar on the contaminated property.
26. An appeal of the EPO was taken to the Alberta Environmental Appeals Board ("EAB") on December 3-5, 2019. At issue on the appeal, among other things, were the appropriate persons responsible under the EPO. Also at issue were the parameters of the EPO and remediation plan to be established pursuant and responsive to the EPO.



27. The EAB released a report and recommendations dated February 3, 2020. Those recommendations were implemented into a ministerial order dated February 5, 2020, by the Alberta Minister of Environment and Parks. In brief, the effects of those recommendations and order are to:
- (a) Maintain the general parameters of the remediation plan under the EPO, subject to enhanced reporting and monitoring requirements;
  - (b) Remove Concord as a party to the EPO; and
  - (c) Maintain Suncor as a party to the EPO, with equal obligations for conduct of the remediation plan.
28. The EPO is now final. Concord is no longer a person responsible under the EPO and the parameters of the EPO have been set.
29. Prior to the EAB hearing, Concord and Suncor had alleged that the Supreme Court of Canada decision in *Orphan Well Association v. Grant Thornton Ltd* (“**Redwater**”) had the effect of precluding the distribution of funds that would otherwise be required for the conduct of the EPO. AEP also expressed a similar position. The Monitor and the Applicants disagreed.
30. As a result of these allegations, the Monitor brought a motion to set a reserve amount (the “**Reserve Amount**”) for the EPO activities (the “**Reserve Motion**”), to allow for a distribution from the estate, which was adjourned to a date to be scheduled following the hearing and determination of the EPO appeal proceedings described above, which could have an impact on the appropriate reserve amount for the EPO activities.
31. As a result of the conclusion of the EAB proceedings, the Monitor, in consultation with Sears Canada’s environmental consultant, updated and finalized the Reserve Amount. The final amount was fixed by order of the Court on March 31, 2020, in the amount of \$8,433,000.
32. Following the conclusion of the EAB proceedings, the Monitor entered into negotiations with Suncor and AEP to resolve the Redwater dispute. Those negotiations were successful

and resulted in the Release and Settlement Agreement. A copy of the Release and Settlement Agreement is attached at Appendix C.

33. In brief, the Release and Settlement Agreement provides for payment to Suncor of half of the Reserve Amount by Sears Canada. In return, Suncor takes over the obligations of Sears Canada under the EPO, and Suncor and AEP release any CCAA claims and do not oppose the distribution or any other use of the remainder of the Reserve Amount, after payment to Suncor.
34. Litigation over the Reserve amount and the Redwater dispute would have been complex, time-consuming and unpredictable. Given the evolving nature of environmental insolvency issues, it could also have entailed one or even two rounds of further appeals. In the circumstances, the Monitor regards entry into the Release and Settlement Agreement as an appropriate resolution of the Redwater dispute. It accordingly recommends approval of the Release and Settlement Agreement.
35. Correspondingly, upon the approval of the Release and Settlement Agreement, there is no longer any purpose for the Reserve Amount, as it existed only to permit future distributions while securing the Redwater claim. While there are other persons or parties such as Concord who have or had asserted CCAA claims emanating from the historical environmental contamination at the Calgary North Hill Shopping Centre location, those are claims based in either contract or tort (nuisance). The Monitor has disallowed, or is in the process of disallowing, such claims for reasons unrelated to Redwater and they are, in the case of Concord, currently proceeding through the claims adjudication process.
36. The Monitor therefore also seeks an order permitting the release of the remainder of the Reserve Amount, to be available for any other estate purpose, including distribution to the creditors.

The Monitor respectfully submits to the Court this, its Thirty-Seventh Report.

Dated this 29th day of July, 2020.

FTI Consulting Canada Inc.  
in its capacity as Monitor of  
the Sears Canada Entities

A handwritten signature in black ink that reads "Paul Bishop". The signature is written in a cursive style with a large initial "P".

Paul Bishop  
Senior Managing Director

A handwritten signature in blue ink that reads "Greg Watson". The signature is written in a cursive style with a large initial "G".

Greg Watson  
Senior Managing Director