

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

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

**FOURTEENTH REPORT OF FTI CONSULTING CANADA INC., AS MONITOR**

**March 1, 2018**

## Contents

Section	Page
A. INTRODUCTION.....	2
B. PURPOSE .....	4
C. LITIGATION TRUSTEE MOTION.....	4
D. EXTENSION OF PERIOD TO FILE INTERCOMPANY CLAIMS REPORT .....	9
E. UPDATES ON THE CCAA PROCEEDINGS.....	10
F. RECEIPTS AND DISBURSEMENTS FOR THE SIX WEEK PERIOD ENDING FEBRUARY 17, 2018.....	17

**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

**FOURTEENTH 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; and
  - (c) scheduled a comeback motion for July 13, 2017 (the “**Comeback Motion**”).
3. Following the Comeback Motion, the Court extended the stay of proceedings to October 4, 2017. In addition, the following orders, among others, 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**”); and
  - (c) an order approving a sale and investor solicitation process (the “**SISP**”) to solicit interest in potential transactions involving the business, property and assets and/or leases of the Applicants.
4. Since the date of the Comeback Motion, the stay period has been extended a number of times, most recently to April 27, 2018.
5. 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 current and former officers and directors. The Claims Procedure Order also directed the Monitor to assess in detail, with reasonably sufficient particulars and analysis, the validity and

quantum of all intercompany claims, and to serve on the Service List and file with the Court a report detailing the work performed (the “**Intercompany Claims Report**”) by the General Creditor Claims Bar Date.

6. On February 22, 2018, the Court issued an Employee and Retiree Claims Procedure Order (the “**E&R Claims Procedure Order**”) approving a process for the identification, determination and adjudication of claims of employees and retirees of the Sears Canada Entities.
7. The liquidation of assets at Sears Canada’s retail locations is now complete and all of Sears Canada’s retail locations are now closed.
8. In connection with the CCAA Proceedings, the Monitor has provided thirteen reports and five 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 available on the Monitor’s website at [cfcanada.fticonsulting.com/searscanada/](http://cfcanada.fticonsulting.com/searscanada/) (the “**Monitor's Website**”).

## **B. PURPOSE**

9. The purpose of this Fourteenth Report is to provide the Court with information and the Monitor’s recommendations on the proposed order to be sought in connection with the Litigation Trustee Motion (as defined below) that was the subject of the Monitor’s Twelfth Report dated February 13, 2018 and on the Monitor’s motion to extend the date for delivery of the Monitor’s Intercompany Claims Report pursuant to the Claims Procedure Order, and to provide an update on other developments in the CCAA Proceedings.

## **C. LITIGATION TRUSTEE MOTION**

10. On February 13, 2018, FTI Consulting Canada Inc., as Court-appointed Monitor, filed its Twelfth Report to the Court in these CCAA Proceedings (the “**Twelfth Report**”) in

connection with a motion by Pension Representative Counsel for the appointment of a Litigation Trustee (the “**Litigation Trustee Motion**”).

11. Capitalized terms used in this section of the Fourteenth Report and not otherwise defined have the meanings given to them in the Twelfth Report.

Background

12. As described in the Twelfth Report, earlier in these proceedings, various stakeholders began to have discussions about possible recoveries from various potential claims against parties connected with the Applicants. Those stakeholders were: Employee Representative Counsel, counsel to the Superintendent of Financial Institutions (the “**Superintendent**”), counsel to Morneau Shepell, as administrator of the Sears Canada Pension Plan (the “**Plan Administrator**”), Pension Representative Counsel, various landlord counsel, and counsel to the Sears Hometown Dealers (collectively, the “**Participating Stakeholders**”).
13. The need to coordinate various streams of potentially overlapping litigation was initially identified by certain Participating Stakeholders earlier in these proceedings. There was initial support from Participating Stakeholders for a ‘litigation inspector’ or a ‘litigation trustee’.
14. The Litigation Trustee Motion, originally returnable on February 15, 2018, was brought forward by Pension Representative Counsel for the purpose of appointing a Litigation Trustee.
15. As of February 15, 2018, the Participating Stakeholders were not in agreement on the identity of the Litigation Trustee or the proposed mandate of the Litigation Trustee.
16. The Monitor recommended that, prior to advancing the Litigation Trustee Motion, further efforts should be made among stakeholders to arrive at a consensus on:
  - (a) the selected litigation inspector/trustee;

- (b) the scope of the litigation inspector/trustee’s mandate, and in particular the types of claims to be investigated, reported upon and potentially pursued, including the terms of any appointment order;
- (c) the composition of the consultative committee that would work with the litigation inspector/trustee and the exact process by which the committee would grant approvals and make recommendations; and
- (d) appropriate funding mechanisms for the litigation inspector/trustee and its counsel

(the “**Preliminary Outstanding Matters**”).

17. The Court did not hear the Litigation Trustee Motion and directed the Participating Stakeholders and the Monitor to work toward consensus on the Preliminary Outstanding Matters.

Status Update

18. Following the Court’s direction, the Monitor worked with the Participating Stakeholders to attempt to resolve the Preliminary Outstanding Matters. The Monitor can report that significant progress has been made:
  - (a) Parties acceptable to the Participating Stakeholders have been identified to undertake the role of “Litigation Investigator”; and
  - (b) A form of order has been substantially negotiated and agreed among the Participating Stakeholders setting out the scope of the proposed mandate of the Litigation Investigator and other relevant terms including a funding mechanism for the Litigation Investigator.

A copy of the proposed form of order is attached hereto as **Appendix “A”**.

19. The Material terms of the proposed form of order are as follows:

- (a) Litigation Investigator: Lax O'Sullivan Lissus Gottlieb LLP (represented by Jonathan Lissus and Matthew Gottlieb) are proposed to be appointed to the role of Litigation Investigator.
- (b) Mandate: The Litigation Investigator is proposed to be an officer of the Court appointed for the purpose of investigation, consideration of, and reporting to the Creditors' Committee (defined below), regarding any rights or claims, whether legal, equitable, statutory or otherwise, that the Sears Canada Entities and/or any creditors of any of 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 does not include determining, advising on, opposing or articulating any claim filed in the claims process established under the Claims Procedure Order or the E&R Claims Procedure Order. The Litigation Investigator will have no role in the distribution or allocation of estate funds.
- (c) Reporting: The Litigation Investigator will report to the Creditors' Committee. The report will include, among other things, recommendations regarding a proposed litigation plan.
- (d) Creditors' Committee: A committee of creditors will be established to consult with the Litigation Investigator (the "**Creditors' Committee**"). The Creditors' Committee will be comprised of members appointed by, or on behalf of various creditor groups.
- (e) Monitor Briefing: The Monitor shall provide to the Litigation Investigator (and, upon execution of appropriate confidentiality agreements, the Creditors' Committee) a confidential briefing regarding the "Transactions of Interest" as identified in the Monitor's Eleventh Report to the Court. The Monitor may not be in a position to share all information in its possession regarding the Transactions of Interest due to privilege or confidentiality concerns. The proposed form of order includes a mechanism to deal with any such confidentiality or privilege concerns that may arise. The Monitor notes that the

information received by the Monitor and the research and analysis undertaken by the Monitor in connection with the Transactions of Interest were in some cases received and undertaken for very specific purposes in fulfilling the Monitor's statutory mandate, and information was shared by the Sears Canada Entities and others with the Monitor for those specific purposes and on specific understandings regarding the uses of such information.

- (f) Claims Procedure Issues: Rights, claims or causes of action identified by the Litigation Investigator as capable of being advanced and that are advanced with approval of the Court, whether by the Litigation Investigator or otherwise, are removed from the claims process established under the Claims Procedure Order or the E&R Claims Procedure Order and, if so removed, would not be subject to the bar dates and procedures contained therein.
- (g) Costs: The Litigation Investigator shall be paid from the funds of the Applicants its reasonable fees and disbursements, the amount of which is not to exceed a budget approved by the Creditors' Committee in consultation with the Monitor. The Litigation Investigator shall be entitled to the benefit of the Administrative Charge, as defined in the Initial Order for the Litigation Investigator's costs, as security for its professional fees, taxes, and disbursements reasonably incurred.

- 20. A copy of the proposed form of order was shared with counsel to the Applicants, counsel to the directors, counsel to Sears Holdings Corporation and counsel to Edward Lampert and ESL Investments Inc.

← →

Monitor's Comments and Recommendation

- 21. The Monitor is pleased to report that consensus has been achieved among the Participating Stakeholders on the Litigation Investigator's appointment and the matters described in the draft form of Order.
- 22. The Monitor is supportive of the form of order appointing a Litigation Investigator that has been circulated and the Monitor believes this form of order is the product of

constructive negotiation and compromise among the Participating Stakeholders as directed by the Court.

23. Certain other parties, including the directors of Sears Canada, ESL Investments Inc. and its affiliates and Sears Holdings Corporation have raised issues regarding the proposed form of Order appointing the Litigation Investigator. These issues include: (i) the Litigation Investigator's role as a 'court officer'; and (ii) the Litigation Investigator's role with respect to claims beyond any claims of the Sears Canada Entities or any claims that are derivative of the estates of the Sears Canada Entities. The Monitor has not had the opportunity to fully discuss these issues with the aforementioned parties, the Applicants, or the Participating Stakeholders, and accordingly takes no position at this time. However, these issues may be the subject of submissions at the March 2<sup>nd</sup> hearing if they cannot be resolved in advance of that hearing.

**D. EXTENSION OF PERIOD TO FILE INTERCOMPANY CLAIMS REPORT**

24. The Claims Procedure Order provided that the Monitor would prepare a report to be served on the Service List and filed with the Court for its consideration, that would detail the Monitor's review of all Intercompany Claims (as defined in the Claims Procedure Order) and assess the validity and quantum of such Claims (the "**Intercompany Claims Report**"), with any Intercompany Claim identified thereby to be deemed to have been properly submitted via a proof of claim.
25. The Claims Procedure Order required that the Intercompany Claims Report be served on or before March 2, 2018, unless otherwise ordered by this Court on application by the Monitor.
26. Although progress has been made by the Monitor with the support of the Applicants towards completion of this task, the Monitor requires additional time to complete its review of all Intercompany Claims, analyze and assess the validity and quantum of all intercompany claims, and document its findings in the Intercompany Claims Report.

27. The Monitor requires a substantial amount of assistance from the Applicants and their employees in order to complete the Intercompany Claims Report. There have been significant demands on the Applicants' limited remaining employees, including in connection with negotiating and preparing for the employee and retiree claims process ordered in the E&R Claims Procedure Order, which the Monitor was also heavily involved in. As a result, additional time is required for completion of the Intercompany Claims Report.
28. The Monitor is proposing to extend the deadline for completion of the Intercompany Claims Report by one month to April 2, 2018 (the "**Proposed Intercompany Claims Report Extension**"). This date is subsequent to the General Creditor Claims Bar Date of March 2, 2018; however, the Monitor will require time to review and adjudicate proofs of claim received by the General Creditor Claims Bar Date and the Proposed Intercompany Claims Report Extension aligns with this timeline. The claims bar date for other potential unsecured claimants, such as Litigation Claims (as such term is defined in the Endorsement (as defined below)) and certain landlord claims, are also on or subsequent to the Proposed Intercompany Claims Report Extension.
29. In conclusion, the Monitor believes that there is no prejudice to stakeholders should the Court agree to the Proposed Intercompany Claims Report Extension, and grant the Intercompany Claims Report Extension Order.

## **E. UPDATES ON THE CCAA PROCEEDINGS**

### *Claims Process*

30. As of the date of this Report, the Monitor has received proofs of claim in amounts totalling not less than \$162 million.
31. The Monitor is continuing to receive proofs of claim at this time. The Claims Procedure Order set a General Creditor Claims Bar Date of March 2, 2018. The Claims Procedure Order establishes later bar dates for certain claims, such as certain claims by landlords. Pursuant to the endorsement (the "**Endorsement**") of Justice Haaney made on February 22, 2018, the claims bar date for certain Litigation Claims

(as such term is defined in the Endorsement) has been extended to April 2, 2018. A copy of the Endorsement is attached as **Appendix “B”** to this Fourteenth Report.

32. In accordance with the E&R Claims Procedure Order, the Monitor is currently taking steps required to cause the Notice to Claimants to be published in The Globe and Mail (National Edition) and in the electronic edition of La Presse and to deliver Proof of Claim Packages to Claimants to the extent required by the E&R Claims Procedure Order. The Monitor has also caused the Notice to Claimants and blank copies of the Claims Packages (excluding any blank Termination Claim Statement or Retiree Benefit Claim Statement) to be posted on the Monitor’s website.

*Disclaimer of Contracts / Craftsman License*

33. The Applicants, with the assistance of the Monitor, continue to review their remaining contractual arrangements to determine if, in the circumstances, disclaimers of such contractual arrangements would be appropriate.
34. As of the date of this Fourteenth Report, all retail store leases have been disclaimed by the Applicants and the Applicants no longer occupy any such retail store locations.
35. In the Eleventh Report, dated January 15, 2018, the Monitor described its review of various Transactions of Interest, including 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 Inc. in March 2017.
36. In connection with the surrender of its exclusive license, Sears Canada received a non-exclusive royalty free license to use the Craftsman trademark in Canada (the “**Replacement License**”).
37. Stanley Black & Decker Inc. has proposed the consensual termination of the Replacement License in view of the termination of Sears Canada’s operations.

38. Sears Canada, in consultation with the Monitor, has determined that it no longer has a need to use the Craftsman trademark and, subject to agreeing upon acceptable terms, neither Sears Canada nor the Monitor have any opposition to the consensual termination of the Replacement License. The Monitor does not believe that termination of the Replacement License would affect any claim that the Monitor may have in connection with the Transactions of Interest and the results of the sale and investment solicitation process indicate that no opportunities to monetize the Replacement License are available. Sears Canada, with the assistance of the Monitor, intends to negotiate the requested consensual termination with Stanley Black & Decker Inc.

#### *Tax Losses*

39. The Monitor was recently contacted by a party potentially interested in completing a transaction that would, among other things, utilize some of Sears Canada's remaining tax losses. That transaction, if successfully completed, could potentially result in proceeds in the range of \$3 million to \$4.5 million.
40. The Applicants, the Monitor, and counsel reviewed the terms of the proposed transaction including:
- (a) the level of risk and uncertainty as to closing involved;
  - (b) the near certainty that such a proposed sale would result in Canada Revenue Agency audits of net operating losses and other tax accounts, and likely result in delays in distributions and completion of the winding-up of the estate; and
  - (c) the time and costs required to implement a transaction of this type.
41. The Applicants, in consultation with the Monitor, determined that they do not support the pursuit of the proposed transaction in the circumstances. The Board of Directors and the Monitor agree with this decision and the Monitor intends to advise the proposed counterparty accordingly.

### *Second Liquidation Process*

42. On October 13, 2017, the Court issued, among other orders, an order approving an agreement and a process (the “**Second Liquidation Process**”) for the liquidation of inventory and furniture, fixtures and equipment at all remaining Sears Canada locations.
43. The Second Liquidation Process is now complete at all locations.
44. Sears Canada, the Monitor and the agent under the Second Liquidation Process are now undertaking a final reconciliation process to determine any additional amounts payable by or to the agent or Sears Canada under the Second Liquidation Process.
45. The Monitor understands that upon completion of the Second Liquidation Process and the disclaimer of Sears Canada’s remaining retail leases, as described above, certain landlords raised concerns that furniture, fixtures and equipment remained on the leased premises and should have been removed by Sears Canada or the agent in the Second Liquidation Process. Sears Canada’s counsel advised that to the extent any furniture, fixtures and equipment remained on the premises, Sears Canada believed this was done only in circumstances where the applicable lease did not require Sears Canada to remove such furniture, fixtures and equipment.
46. The obligation, if any, of Sears Canada to remove such furniture, fixtures and equipment, or to reimburse landlords for the cost of such removal, pursuant to the applicable leases and the sale guidelines approved by the Court in connection with the Second Liquidation Process remains an unresolved issue. In the Monitor’s view, this matter can be resolved in connection with the Claims Process.

### *Real Estate Sale Process*

47. As part of the SISP, Sears Canada, with the assistance of BMO Nesbitt Burns Inc., as financial advisor, (“**BMO**”) sought offers for the purchase of Sears Canada’s remaining owned real property.

48. Expressions of interest were received for Sears Canada's owned real property by the August 31<sup>st</sup> bid deadline under the SISP.
49. Subsequent to the bid deadline, two transactions for real estate owned by Sears Canada were approved by the Court and completed. These transactions were for the sale of the Winnipeg Garden City location and the Upper Canada Home Store location.
50. While expressions of interest were received for certain of Sears Canada's remaining real estate assets, Sears Canada determined, in consultation with BMO and the Monitor, that the best opportunities to monetize the remaining real estate assets would be available only after additional due diligence materials, including environmental studies, were completed and were made available to potential purchasers.
51. Sears Canada continues to own the following real estate assets:
  - (a) Upper Canada Mall full-line store (Newmarket, ON)
  - (b) Distribution center (Belleville, ON)
  - (c) Fleur de Lys full-line store (Quebec City, QC)
  - (d) Windsor full-line store (Windsor, ON)
  - (e) Peterborough full-line store (Peterborough, ON)
  - (f) Barrie full-line store (Barrie, ON)
  - (g) Trois-Rivières full-line store (Trois-Rivières, QC)
  - (h) Place Vertu liquidation store (Montréal, QC)
  - (i) Lévis full-line store (Lévis, QC);
  - (j) Charlottetown store (Charlottetown, PEI)

- (k) Chicoutimi residual land (Chicoutimi, QC); and
- (l) Edmonton residual land (Edmonton, AB)

(collectively, the “**Remaining Real Estate Assets**”).

- 52. As of February 7, 2018, the additional required due diligence information had been obtained and Sears Canada, in consultation with BMO and the Monitor, determined that the sale process for the Remaining Real Estate Assets should continue.
- 53. On February 7, 2018, BMO delivered an updated sale process letter (the “**Updated Sale Process Letter**”) to those parties who previously expressed an interest in the Remaining Real Estate Assets under the SISP. BMO also delivered the Updated Sale Process Letter to potentially interested parties identified by the real estate advisor to the Superintendent. The Updated Sale Process Letter solicits bids for all of the Remaining Real Estate Assets other than the assets located in Charlottetown, Edmonton and Chicoutimi. The Updated Sale Process Letter provides a bid deadline of March 7, 2018 at 5:00 p.m. (Eastern).
- 54. A separate sale process has been commenced for the assets located at Charlottetown, Edmonton and Chicoutimi. The assets at these locations will be marketed under an Exclusive Sales Listing Agreement with CBRE Limited pursuant to which CBRE Limited would act as sale advisor. This alternative structure was selected for the Charlottetown, Edmonton and Chicoutimi assets as Sears Canada determined, in consultation with BMO, the Monitor, Pension Representative Counsel, Employee Representative Counsel, the Superintendent and the Plan Administrator, and their respective financial and/or real estate advisors, that these assets could be sold separately and likely in a more expedited manner without affecting bids for the other Remaining Real Estate Assets. CBRE Limited was selected as the appropriate agent following a competitive bid process.
- 55. As noted above, Employee Representative Counsel, Pension Representative Counsel, the Superintendent, the Plan Administrator and their respective advisors have been consulted extensively in the development of the updated process to market

the Remaining Real Estate Assets. These parties were identified as appropriate consultation parties by Sears Canada and the Monitor as they represent a large and coordinated portion of the unsecured creditor class and would not have conflicting interests as they would have no interest in acquiring any of the Remaining Real Estate Assets for their own benefit. All of these consultation parties have entered into non-disclosure agreements with Sears Canada.

#### *Residual Asset Sales*

56. The Applicants have now completed sales of a substantial portion of the residual assets located at their premises, including transactions approved pursuant to the Omnibus Approval and Vesting Order granted on December 8, 2017. However, in many cases purchasers must still collect their purchased assets from Sears Canada's locations.

#### *Employee Matters*

57. Following the completion of the Second Liquidation Process, the remaining number of employees of Sears Canada was significantly reduced. As of the date of this Fourteenth Report, the Applicants have 82 remaining employees. The Monitor expects that the number of employees will continue to decrease in the near future.
58. Payments have been made under the amended Key Employee Retention Plan (“KERP”) approved by the Court on October 18, 2017 to the extent applicable and where performance and other approved thresholds were achieved.
59. In addition to payments under the amended KERP, on or about January 19, 2018, Sears Canada identified five additional employees whose services were necessary for the completion of data retention, archiving, server migration and certain human resources and other aspects of the wind down of the Sears Canada business. Sears Canada offered those employees retention and incentive payments in an aggregate amount of \$80,000. The Monitor reviewed the proposed payments and the contributions and circumstances of the proposed recipients of those payments. The Monitor supported the payment of these incentive and retention amounts. The

Monitor notes that the Applicants did not seek to include these individuals in the key employee retention program previously approved by the Court and did not seek to have the obligations to these employees secured by the Court-ordered charge established in connection with the KERP.

*Pension Wind-Up*

60. The Monitor has previously reported that on November 10, 2017, the Superintendent issued a Notice of Intended Decision advising that it intended to make an order for the wind up of the Sears Canada Pension Plan, effective October 1, 2017 unless a request for hearing with the Financial Services Tribunal (the “FST”) was submitted within 30 days of the Notice of Intended Decision.
  61. On December 7, 2017, counsel to 1291079 Ontario Limited (“129”), a creditor of Sears Canada Inc., delivered a letter to the Service List identifying a concern that the proposed wind-up of the Sears Canada Pension Plan may have the effect of altering priorities among creditors. The Monitor understands 129 delivered a Request for Hearing Form to the FST requesting a hearing to challenge the intended decision to wind up the Sears Canada Pension Plan. On or about February 6, 2018, 129 delivered its pre-hearing conference brief in the FST proceeding. A copy of the brief, without attachments, is attached as **Appendix “C”**.
  62. Both Sears Canada and the Monitor have applied for party status in connection with the proposed hearing on the Notice of Intended Decision.
  63. A pre-hearing conference has been scheduled by the FST for March 21, 2018 in connection with 129’s request for hearing.
- F. RECEIPTS AND DISBURSEMENTS FOR THE SIX WEEK PERIOD ENDING FEBRUARY 17, 2018**
64. The Sears Canada Group’s actual net cash inflow on a consolidated basis for the six-week period ended February 17, 2018 was approximately \$29.1 million, compared to a forecast net cash outflow of \$60.3 million resulting in a positive variance of approximately \$89.4 million as indicated in the table below:

<b>VARIANCE REPORT</b>		<b>Actual</b>	<b>Forecast</b>	<b>Variance</b>
(CAD in Millions)		<b>For the 6 Week Period Ending February 17, 2018</b>		
<b>Receipts</b>		<b>67.7</b>	<b>5.4</b>	<b>62.3</b>
<b>Operating Disbursements</b>				
Payroll and Employee Related Costs		(14.5)	(15.9)	1.4
Merchandise Vendors		7.2	-	7.2
Non-Merchandise Vendors		(6.2)	(13.9)	7.7
Rent and Property Taxes		(2.6)	(4.7)	2.1
Sales Taxes		(17.9)	(17.9)	-
IT Costs		(7.5)	(8.1)	0.6
Recovery of Expenses from Agent		9.7	3.8	5.9
<b>Total Operating Disbursements</b>		<b>(31.8)</b>	<b>(56.7)</b>	<b>24.9</b>
<b>Net Operating Cash Inflows / (Outflows)</b>		<b>35.9</b>	<b>(51.3)</b>	<b>87.2</b>
Professional Fees		(6.8)	(9.0)	2.2
<b>Net Cash Inflows / (Outflows)</b>		<b>29.1</b>	<b>(60.3)</b>	<b>89.4</b>
<b>Cash</b>				
Beginning Balance		84.2	84.2	-
Net Cash Inflows / (Outflows)		29.1	(60.3)	89.4
<b>Ending Balance</b>		<b>113.3</b>	<b>23.9</b>	<b>89.4</b>

65. Explanations for the key variances are as follows:

- (a) the positive variance of \$62.3 million in receipts consists of: (i) a positive timing difference of \$45.3 million primarily due to earlier-than-forecast receipt of the undisputed portion of the remaining guaranteed amount from the third-party liquidator agent and certain working capital adjustments relating to asset sales pending final reconciliation; and (ii) a positive permanent difference of \$17.0 million primarily due to the final reconciliation of liquidation sales receipts, miscellaneous asset sales, and FF&E sales not contemplated in the forecast;
- (b) the positive variance in Payroll and Employee Related Costs of \$1.4 million consists primarily of a timing difference that is expected to reverse in a future period;

- (c) the positive variance in Merchandise Vendor disbursements of \$7.2 million consists of a permanent difference due to refunds received from vendor deposits and partial recovery of cash collateral held by the lenders relating to LCs which was not contemplated in the forecast;
  - (d) the positive variance in Non-Merchandise Vendor disbursements of \$7.7 million consists of a timing difference of \$5.4 million that is expected to reverse in a future period, and a permanent difference of \$2.3 million primarily due to lower-than-forecast vendor payments and refunds received from vendor deposits;
  - (e) the positive variance in Rent and Property Taxes of \$2.1 million consists of a timing difference of \$1.8 million that is expected to reverse in a future period and a permanent difference of \$0.3 million due to lower-than-forecast rent and property tax payments;
  - (f) the positive variance in IT Costs of \$0.6 million is primarily a timing difference that is expected to reverse in a future period;
  - (g) the positive variance in Recovery of Expenses from Agent of approximately \$5.9 million consists of a permanent difference primarily due to higher-than-forecast reimbursements from the Agent after the final reconciliation of expenses in respect of the Second Liquidation Process; and
  - (h) the positive variance in Professional Fees of \$2.2 million is primarily a timing variance that is expected to reverse in a future period.
66. The Sears Canada Group's cumulative receipts and disbursements since the commencement of CCAA proceedings until the week ended February 17, 2018 are reflected in the table below:

<b>CUMULATIVE RECEIPTS AND DISBURSEMENTS</b>	
(CAD in Millions)	
<b>For the 35 Week Period Ending February 17, 2018</b>	
<b>Receipts</b>	<b>1,207.4</b>
<b>Operating Disbursements</b>	
Payroll and Employee Related Costs	(255.1)
Merchandise Vendors	(295.4)
Non-Merchandise Vendors	(170.3)
Rent and Property Taxes	(82.1)
Sales Taxes	(68.3)
Pension	(14.7)
IT Costs	(24.4)
Recovery of Expenses from Agent	83.6
Capital Expenditures	(0.8)
<b>Total Operating Disbursements</b>	<b>(827.5)</b>
<b>Net Operating Cash Inflows / (Outflows)</b>	<b>379.9</b>
Professional Fees	(55.2)
Repayments of Existing Credit Facilities	(283.3)
DIP Fees and Interest Paid	(19.7)
<b>Net Cash Inflows / (Outflows)</b>	<b>21.7</b>
<b>Cash</b>	
Beginning Balance	126.5
Net Cash Inflows / (Outflows)	21.7
DIP Draws / (Repayments)	(32.0)
Others incl. FX Valuation	(2.9)
<b>Ending Balance</b>	<b>113.3</b>

67. The Initial Order allowed the Sears Canada Group to continue to utilize their existing Cash Management System as described in the First Wong Affidavit and the pre-filing report of the Monitor. After the commencement of the CCAA Proceedings, the Sears Canada Group has continued to utilize its Cash Management System in a manner consistent with past practice.

The Monitor respectfully submits to the Court this, its Fourteenth Report.

Dated this 1st day of March, 2018.

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

**Appendix "A"**

**Draft Form Of Litigation Investigator Order**

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

THE HONOURABLE MR. ) FRIDAY, THE 2<sup>nd</sup>  
 )  
JUSTICE HAINEY ) DAY OF MARCH, 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  
INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD.,  
4201531 CANADA INC., 168886 CANADA INC., AND 3339611  
CANADA INC.

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

**LITIGATION INVESTIGATOR ORDER**

**THIS MOTION**, made by Representative Counsel to the court-appointed Representatives of employees and retirees with respect to pension and post-retirement benefits of the Applicants (“**Retiree Representative Counsel**”) pursuant to the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, (the “**CCAA**”) for an order appointing a Litigation Investigator to identify and report on certain rights and claims of the Applicants and SearsConnect (collectively, the “**Sears Canada Entities**”) and/or any creditors of the Sears Canada Entities, was heard this day at 330 University Avenue, Toronto, Ontario.

**ON READING** the Affidavit of William Turner sworn on February 12, 2018 including the exhibits thereto, the Affidavit of William Turner sworn on August 11, 2017, including the exhibits thereto, the Monitor's Fourteenth Report to the Court dated March 1, 2018, and on hearing the submissions of Retiree Representative Counsel, Representative Counsel for the employees of the Sears Canada Entities ("**Employee Representative Counsel**"), counsel for the Applicants, counsel for the Monitor, and such other counsel for various creditors and stakeholders 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 Lax O'Sullivan Lisus Gottlieb LLP is hereby appointed as Litigation Investigator (the "**Litigation Investigator**") in these CCAA proceedings for the benefit of the estates of the Sears Canada Entities and its creditors. The Litigation Investigator shall be an officer of this Court, and is appointed for the purpose of investigating, considering, and reporting to the Creditors' Committee (defined below), regarding any rights or claims, whether legal, equitable, statutory or otherwise, that the Sears Canada Entities and/or any creditors of any of 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**"). For greater certainty, the Litigation Investigator may investigate any and all claims regardless of whether such claims have been included by creditors' proofs of claims filed pursuant to the Claims Procedure Order and E&R Claims Procedure Order (defined below), however, the Litigation Investigator shall have no role in determining, advising

on, opposing, supporting, or articulating any claim of any creditor or stakeholder in the Claims Process, as defined in the Order of this Court dated December 8, 2017 as amended by Order dated February 22, 2018 or as further amended by Order of the Court (as amended, the “**Claims Procedure Order**”) or any Claim as defined in the Employee and Retiree Claims Procedure Order dated February 22, 2018 (the “**E&R Claims Procedure Order**”) and shall have no role in the distribution or allocation of estate funds.

**Litigation Investigator Reporting**

3. **THIS COURT ORDERS** that the Litigation Investigator’s Mandate shall include reporting to the Creditors’ Committee with such details as the Litigation Investigator considers advisable (all such reporting being collectively defined herein as the “**Report**”), taking into account any concerns of privilege and confidentiality. All Reports by the Litigation Investigator and all communications among the Creditors’ Committee members and the Litigation Investigator shall be subject to common interest privilege. A Report by the Litigation Investigator will include recommendations regarding a proposed litigation plan that includes, but is not limited to:

- (a) those potential rights or claims of the Sears Canada Entities or any creditors of the Sears Canada Entities that should be pursued (if any); and
- (b) describing how and by whom such rights or claims (if any) can best be pursued or continued, including, but not limited to:

- (i) the coordination of the prosecution of such rights or claims with similar or related facts, rights or other claims that may be asserted by different parties;
- (ii) if necessary or desirable, a proposed governance structure for the Creditors' Committee created pursuant to this Order (or as same may be amended, expanded or reconstituted in future, in accordance with the terms of this Order) for the purpose of providing input to the Litigation Investigator in the prosecution of such rights, claims or causes of action; and
- (iii) consideration as to the various options available for funding the prosecution of such rights, claims or causes of action.

A confidential briefing ("**Investigator Briefing**") regarding all Reports prepared by the Litigation Investigator shall be given to the Monitor; provided that such Investigator Briefing shall be kept confidential by the Monitor and shall remain subject to privilege.

4. **THIS COURT ORDERS** that following delivery of a Report to the Creditors' Committee in accordance with its Mandate, the Litigation Investigator shall not take any further steps without a further Order of the Court. For greater certainty, nothing herein shall prevent the Litigation Investigator from seeking an Order of the Court authorizing it to pursue any claims identified pursuant to the Mandate.

**The Committee**

5. **THIS COURT ORDERS** that the Litigation Investigator shall fulfil his Mandate in consultation with a creditors' committee (the "**Creditors' Committee**") comprised of no more than seven (7) members at any one time appointed by, or on behalf of the following creditor groups of the Sears Canada Entities: (i) Retiree Representative Counsel; (ii) Employee Representative Counsel; (iii) landlords; (iv) Hometown Dealers Class Action plaintiff counsel; (v) Morneau Shepell Ltd. in its capacity as Administrator for the Sears Canada Inc. Registered Retirement Plan; (vi) the Ontario Superintendent of Financial Services as Administrator of the Pension Benefits Guarantee Fund; and (vii) such other unsecured creditors of the Sears Canada Entities not represented in (i) through (vi) above as the majority of the Creditors' Committee may agree be included, in consultation with the Monitor, or as may be directed by the Court. The Creditors' Committee and the Litigation Investigator shall cooperate with the Monitor, and the Monitor shall cooperate with the Litigation Investigator and the Creditors' Committee in connection with the Mandate. The Creditors' Committee shall consult with and provide input to the Litigation Investigator with respect to the Mandate.

6. **THIS COURT ORDERS** that each member of the Creditors' Committee (including any alternates or replacements from the same stakeholder group as may be appointed by an existing member) may be a creditor itself or counsel/advisor representing that stakeholder interest, but in either case each member shall execute a Confidentiality Agreement in a form acceptable to the Litigation Investigator, the Sears Canada Entities and the Monitor prior to being entitled to participate in any discussions or meetings of the Creditors' Committee, receive any information from the Monitor, the Litigation Investigator or any other member of the Creditors' Committee, or to receive the Report. The Litigation Investigator will meet with the Creditors' Committee at least monthly, or such other times as may be agreed by the Litigation Investigator and the

Creditors' Committee. Meetings will only be conducted in person, to ensure the confidentiality of all discussions.

7. **THIS COURT ORDERS** that the Monitor shall provide to the Litigation Investigator (and, upon execution of appropriate Confidentiality Agreements, for delivery by the Litigation Investigator to the Creditors' Committee) a confidential briefing regarding the "Transactions of Interest" as identified in the Monitor's 11<sup>th</sup> Report to the Court (the "**Monitor Briefing**"). The Monitor's delivery of the Monitor Briefing pursuant to the terms of this Order shall be subject to common interest privilege and strict confidentiality, and the Monitor is protected for so doing pursuant to section 142 of the *Courts of Justice Act* (Ontario). In the event of any concerns being raised regarding the delivery by the Monitor of any particular aspect of the Monitor Briefing that cannot be resolved without breaching the underlying basis for the concern, such concerns shall be resolved following a review by an independent party appointed by the Monitor and the Litigation Investigator (or, absent agreement on the identity of such party, by the Court).

8. **THIS COURT ORDERS** that, for greater certainty, any right, claim or cause of action identified by the Litigation Investigator as capable of being advanced and that is advanced with approval of the Court, whether by the Litigation Investigator or otherwise, may be removed from the claims process established under the Claims Procedure Order or the E&R Claims Procedure Order.

9. **THIS COURT ORDERS** that the Claims Procedure Order is hereby amended as follows:

- (i) subparagraph (vii) in the definition of "Excluded Claim" is hereby amended to read as follows: "Claim that may be asserted by any of the Sears Canada Entities or that

are advanced by the Litigation Investigator or any creditors, in each case, as may be permitted or directed by further Order of the Court, against the Sears Canada Entities or any Directors and/or Officers, which for greater certainty shall include any Claim that may be identified, reviewed or investigated as part of the Litigation Investigator's Mandate (as defined in an Order of the Court dated March 2, 2018)".

10. **THIS COURT ORDERS** that the E&R Claims Procedure Order is hereby amended as follows:

- (i) the definition of "Excluded Claim" is hereby amended to add a new subparagraph (vi) that shall read as follows: "Claim that is advanced by the Litigation Investigator or any creditors, in each case, as may be permitted or directed by further Order of the Court, against the Sears Canada Entities or any Directors and/or Officers, which for greater certainty shall include any Claim that may be identified, reviewed or investigated as part of the Litigation Investigator's Mandate (as defined in an Order of the Court dated March 2, 2018)".

**Litigation Investigator Costs**

11. **THIS COURT ORDERS** that the Litigation Investigator shall be paid from the funds of the Applicants its reasonable fees and disbursements, including the fees of any counsel retained by the Litigation Investigator in respect of the Mandate, the amount of which is not to exceed a budget approved by the Creditors' Committee in consultation with the Monitor prior to the Litigation Investigator commencing work in respect of fulfilling its Mandate in accordance with this Order. The Litigation Investigator and any counsel it retains shall be paid forthwith upon rendering fully-redacted versions of their accounts to the Applicants and the Monitor. Un-

redacted versions of accounts rendered by the Litigation Investigator shall be made available to the Creditors' Committee and, upon request of the Court and subject to a sealing order to protect privilege and confidentiality, to the Court. In the event of any disagreement with respect to a proposed budget, any requested increased to such budget, or any accounts rendered by the Litigation Investigator, such disagreement may be remitted to this Court for determination.

12. **THIS COURT ORDERS** that the Litigation Investigator 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, for the Litigation Investigator's costs, as security for its professional fees, taxes, and disbursements reasonably incurred.

13. **THIS COURT ORDERS** that the Litigation Investigator is hereby authorized to take all appropriate steps and do all appropriate acts necessary or desirable to carry out its Mandate in accordance with the terms of this Order.

14. **THIS COURT ORDERS** that the Litigation Investigator shall be at liberty, and is hereby authorized, at any time, to apply to this Court for advice and directions in respect of its Mandate or any variation or expansion of the powers and duties of the Litigation Investigator, which shall be brought on at least seven (7) business days' notice to the Service List in these CCAA proceedings, unless this Court orders otherwise.

15. **THIS COURT ORDERS** that the Litigation Investigator shall have no personal liability or obligations as a result of the performance of its duties in carrying out the provisions of this Order, save and except for liability arising out of gross negligence or wilful misconduct. The Creditors' Committee members shall have no liability or obligations as a result of their

participation on the Creditors' Committee or in providing input to the Litigation Investigator, 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 Investigator or any Creditors' Committee member in respect of the performance of its or their duties under this Order without leave of this Court on seven (7) business days' notice to the Litigation Investigator and the Creditors' Committee.

17. **THIS COURT ORDERS** that notwithstanding:

- (a) the pendency of these proceedings;
- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") in respect of any of the Applicants and any bankruptcy order issued pursuant to such applications; or
- (c) any assignment in bankruptcy made in respect of any of the Applicants;

the provisions of this Order shall be binding on any Investigator in bankruptcy or receiver that may be appointed in respect of any of the Applicants and any payments of fees and disbursements made to the Litigation Investigator in accordance with this Order shall not be void or voidable by creditors of any of the Applicants, nor shall any such payments constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or any reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

18. **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 Litigation Investigator 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 Litigation Investigator as may be necessary or desirable to give effect to this Order, or to assist the Litigation Investigator in carrying out the terms of this Order.

---

**HAINY, J.**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., CORBEIL ÉLECTRIQUE INC., S.L.H. TRANSPORT 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

**LITIGATION INVESTIGATOR ORDER**

**KOSKIE MINSKY LLP**

20 Queen Street West, Suite 900, Box 52  
Toronto, ON M5H 3R3

**Andrew J. Hatnay – LSUC No. 31885W**

Tel: 416-595-2083 / Fax: 416-204-2872  
Email: ahatnay@kmlaw.ca

**Mark Zigler – LSUC No. 19757B**

Tel: 416-595-2090 / Fax: 416-204-2877  
Email: mzigler@kmlaw.ca

Representative Counsel for the Non-Unionized Retirees  
and Non-Unionized Active and Former Employees of the  
Sears Canada Entities

## **Appendix “B”**

### **Endorsement**

# Endorsement

**THIS COURT ORDERS** that the Claims Procedure Order issued by this Court on December 8, 2017 shall be and is hereby amended by adding the following after paragraph 47:

47A. Notwithstanding anything else in this Order, the claims bar date in respect of any litigation claims against any of the Sears Canada Entities and/or the Directors or Officers, save and except and expressly excluding any claim in respect of which a statement of claim or similar originating process has been issued prior to the Filing Date other than the two claims issued by Sotos LLP bearing court file numbers 3769/13 CP and 4114/15 (collectively, the "**Litigation Claims**") that may be asserted by a Claimant or by any litigation officer appointed by this Court for the benefit of any creditors of the Sears Canada Entities ("**Litigation Officer**"), shall be April 2, 2018.

OR  
TRUSTEE

47A

Hainley J

February 27, 2018

**Appendix “C”**

**Pre-hearing Conference Brief**

**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., CORBEIL  
ELECTRIQUE INC., S.L.H. TRANSPORT 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 LIMTIED, 955041 ALBERTA LTD., 4201531 CANADA  
INC., 168886 CANADA INC. and 3339611 CANADA INC.**

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

**PRE-HEARING CONFERENCE BRIEF  
OF 1291079 ONTARIO LIMITED  
(Scheduled for March 21, 2018)**

February 6, 2018

**BLANEY McMURTRY LLP**  
Barristers and Solicitors  
Suite 1500 - 2 Queen Street East  
Toronto, ON M5C 3G5

**Lou Brzezinski** LSUC #19794M  
Tel: (416) 593-2952  
Fax: (416) 594-5084  
Email: [lbrzezinski@blaney.com](mailto:lbrzezinski@blaney.com)

**Alexandra Teodorescu** LSUC #63889D  
Tel: (416) 596-4279  
Fax: (416) 593-5437  
Email: [ateodorescu@blaney.com](mailto:ateodorescu@blaney.com)

**SOTOS LLP**

Barristers and Solicitors  
Suite 1200 - 180 Dundas St. W.  
Toronto, ON M5G 1Z8

**David Sterns** LSUC #36274J

**Andy Seretis** LSUC #57259D

**Rory McGovern** LSUC #65633H

Tel: (416) 977-0007

Fax: (416) 977-0717

Lawyers for 1291079 Ontario Limited

## INTRODUCTION

1. The applicant, 1291079 Ontario Limited (“**129**”), is filing this pre-hearing conference brief in response to a notice of pre-hearing conference dated January 16, 2018.

2. 129 is a representative of a class comprised of Sears Home Dealers in a claim brought under the provisions of the *Class Proceedings Act*, S.O. 1992, c. 6. This class was certified by Order of the Honourable Mr. Justice Gray dated September 8, 2014. The class claims \$100 million in damages against Sears Canada Inc. (“**Sears**”).

3. The hearing requested in this proceeding relates to a Notice of Intended Decision dated November 10, 2017 (“**Notice**”) issued by the Superintendent of Financial Services (“**Superintendent**”). The Superintendent intended to make an order in respect of the Sears Canada Inc. Registered Retirement Plan Registration No. 0360065 (the “**Plan**”) under Section 69 of the Pension Benefits Act (the “**PBA**”), and in particular, sought to make an order:

- (a) Winding up the Plan effective October 1, 2017, which would include all members of the Plan whose employment was terminated on or after June 13, 2017, pursuant to Section 69(1)(b) of the PBA; and
- (b) Requiring the contributions towards the defined contribution component of the Plan to continue until all or substantially all of the members of the Plan cease employment with Sears, despite the wind-up of the Plan.

### **Notice of Intended Decision - Tab 1**

4. On June 22, 2017, Sears was granted protection under the *Companies’ Creditors’ Arrangement Act* (the “**CCAA**”) pursuant to the Order of the Honourable Mr. Justice Hainey

(“**Initial Order**”). The Initial Order contains the usual provisions staying any actions, claims or proceedings as against Sears and its related entities (“**Applicants**”).

**Initial Order dated June 22, 2017 - Tab 2**

5. The stay of proceedings in the Initial Order was extended by further Order of the CCAA Court from time to time. Most recently, Justice Hailey extended the stay period to and including April 27, 2018.

6. Representative counsel to the court-appointed representatives of employees and retirees with respect to pensions and post-retirement benefits of the Applicants brought a motion to the CCAA Court, initially returnable on August 18, 2017. This motion sought an order directing Sears to wind-up the Plan either in its entirety or with respect to the defined benefit component effective as of October 1, 2017, and to take all necessary steps for the orderly wind-up of the Plan, including the continuation of payment of pension benefits without interruptions during the wind-up process.

**Notice of Motion re Wind-up returnable August 18, 2017 - Tab 3**

7. On September 12, 2017, the CCAA Judge, Mr. Justice Hailey, adjourned the retirees’ pension plan wind-up motion, *sine die*, returnable by any party on two days’ notice, to be heard not earlier than November 30, 2017, but otherwise to proceed as expeditiously as possible.

**Endorsement of Mr. Justice Hailey dated September 12, 2017 - Tab 4**

8. On December 7, 2017, 129 requested a hearing before the Financial Services Tribunal.

**Request for Hearing dated December 7, 2017 - Tab 5**

## **MATTERS IN ISSUE**

(A) Does the CCAA Court have exclusive jurisdiction to deal with the pension wind-up? Yes. The “single proceeding” principle dictates that all issues relating to a debtor company should be resolved in a single forum under the supervision of the CCAA Court.

(B) Are the proceedings headed to be instituted by the Superintendent before the Financial Services Tribunal stayed by the Initial Order in the CCAA process? Yes. The Notice issued by the Superintendent is a proceeding that is caught and stayed by the CCAA process.

### **Single Proceeding is Preferred**

9. A central and essential feature of insolvency proceedings is the single proceeding model, which is premised on the “public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse.”<sup>1</sup>

10. The “single proceeding” principle provides that all issues relating to a debtor’s insolvency should be decided in a single forum by the presiding CCAA judge. This principle has been endorsed by the Supreme Court of Canada on more than one occasion.

11. In *Eagle River International Ltd., Re*, the issue before the Supreme Court was whether a claim by a bankruptcy trustee for recovery of assets under a contract governed by British Columbia law should be transferred to British Columbia, or be dealt with by the Quebec bankruptcy court.

---

<sup>1</sup> *Eagle River International Ltd., Re*, 2001 SCC 92 (“**Eagle River**”), para. 27 - **Tab 6**.

12. In finding that the Quebec bankruptcy court had jurisdiction over the matter, the Supreme Court stated:

In the present case, we are confronted with a federal statute that *prima facie* establishes one command centre or “single control”...for all proceedings related to the bankruptcy (s. 183(1)). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a “stranger to the bankruptcy” has the burden of demonstrating “sufficient cause” to send the trustee scurrying to multiple jurisdictions...The [BIA] is concerned with the economy of winding up the bankrupt estate, even at the price of inflicting additional cost on its creditors and debtors.<sup>2</sup>

13. In *Century Services*, the Supreme Court of Canada reiterated the importance of resolving all issues before a single proceeding in the CCAA context:

While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors’ remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor’s assets, they will be beat out by other creditors.

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor’s limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the CCAA and the BIA allow a court to order all actions against a debtor be stayed while a compromise is sought.<sup>3</sup>

---

<sup>2</sup> Eagle River, *ibid.*, para. 77.

<sup>3</sup> *Ted Leroy Trucking Ltd.*, 2010 SCC 60, para. 22 - **Tab 7**.

14. Representative counsel for the pensioners has already brought a motion before the CCAA Court seeking an Order effectuating the orderly wind-up of the Plan, which is still pending before the Court. Justice Hainey has already asserted jurisdiction over issues relating to the Plan, and the single proceeding model favours an approach that would see these issues being determined before the supervising judge.

### **Superintendent's actions are stayed**

15. Additionally, the CCAA stay of proceedings has been described as “the engine that drives a broad and flexible statutory scheme.”<sup>4</sup>

16. In *Nortel Networks Corp., Re*, the Court considered whether the pensions regulator under the Pensions Act 2004 (U.K.) violated the stay of proceeding by issuing a warning notice to the debtor companies. The notice had the effect of initiating a process that would result in a financial support direction (“**FSD**”) from the regulator, which requires a party to put financial supports in place for an underfunded pension scheme. In finding that the warning notice breached the stay of proceedings under the Initial Order, Justice Morawetz emphasized that the CCAA Court retains “...the ability to control its own process including litigation against CCAA debtors and claims procedures within a CCAA process.”<sup>5</sup>

17. The Court in *Nortel* held that the actions taken by the pension regulator were null and void because it did not comply with the Initial Order by obtaining the consent of the parties or leave of the Court to issue the warning notice.

---

<sup>4</sup> *Nortel Networks Corp. Re*, 2010 ONSC 1304, para. 34, quoting *Stelco Inc., Re*, 2005 CarswellOnt 1188, para. 36 – **Tab 8**.

<sup>5</sup> *Ibid.*, para. 36 – **Tab 8**.

18. Justice Morawetz made the following comments with respect to the regulator's actions, which are equally applicable to the present circumstances:

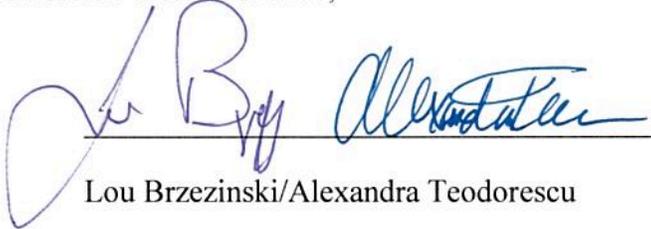
It seems to be that, even though the Notice may be described as a warning shot across the bow, the effect of the Notice in this case is something far more significant. It clearly puts the Applicants and the Monitor on notice that there is a substantial claim that is being considered in the CCAA proceedings.

...

The issuance of an FSD is a remedy by a statute of the United Kingdom...[T]he Notice, naming the Applicants...as "target companies" affects these entities which are clearly within the jurisdiction of this Court...In my view, the Pensions Regulator took steps in Canada in respect of a proceeding. In this context, the Pensions Regulator is, in my view, a person affected by the Initial Order, with which it must comply when it takes any proceedings in Canada.

19. The Superintendent's Notice will impact all creditors in the Applicants' estate and is, therefore, a proceeding that is stayed by the Initial Order. The Superintendent has not obtained the consent of the Applicants or the Monitor, nor has it been granted leave of the Court to issue the Notice. Consequently, the proceedings under the Financial Services Tribunal are stayed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED,**

  
Lou Brzezinski/Alexandra Teodorescu

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

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

**NORTON ROSE FULBRIGHT CANADA LLP**  
Royal Bank Plaza, South Tower, Suite 3800  
200 Bay Street, P.O. Box 84  
Toronto, Ontario M5J 2Z4 CANADA

**Orestes Pasparakis, LSUC#: 36851T**

Tel: +1 416.216.4815

**Virginie Gauthier, LSUC#: 41097D**

Tel: +1 416.216.4853

**Alan Merskey, LSUC#: 41377I**

Tel: +1 416.216.4805

**Evan Cobb, LSUC#: 55787N**

Tel: +1 416.216.1929

Fax: +1 416.216.3930

orestes.pasparakis@nortonrosefulbright.com

virginie.gauthier@nortonrosefulbright.com

alan.merskey@nortonrosefulbright.com

evan.cobb@nortonrosefulbright.com

Lawyers for FTI Consulting Canada Inc., in its capacity as  
Monitor