Court File No. CV-18-00611219-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

FTI CONSULTING CANADA INC.,
in its capacity as Court-appointed monitor in proceedings
pursuant to the Companies' Creditors Arrangement Act, RSC 1985, c. c-36

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL
INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, SEARS HOLDINGS CORPORATION, WILLIAM R. HARKER and WILLIAM C. CROWLEY

Defendants

Court File No. CV-18-00611214-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

SEARS CANADA INC., by its Court-appointed Litigation Trustee, J. Douglas Cunningham, Q.C.

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS LP, SPE MASTER I LP, ESL INSTITUTIONAL PARTNERS LP, EDWARD LAMPERT, EPHRAIM J. BIRD, DOUGLAS CAMPBELL, WILLIAM CROWLEY, WILLIAM HARKER, R. RAJA KHANNA, JAMES MCBURNEY, DEBORAH ROSATI, DONALD ROSS and SEARS HOLDINGS CORPORATION

Defendants

JOINT BOOK OF AUTHORITIES OF THE MONITOR, THE LITIGATION TRUSTEE, AND THE PENSION ADMINISTRATOR
(TIMETABLE MOTION)
(RETURNABLE SEPTEMBER 19, 2019)

September 17, 2019

Court File No. CV-18-00611217-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

MORNEAU SHEPELL LTD., in its capacity as administrator of the Sears Canada Inc. Registered Retirement Plan

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, WILLIAM HARKER, WILLIAM CROWLEY, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH ROSATI, R. RAJA KHANNA, JAMES MCBURNEY, DOUGLAS CAMPBELL and SEARS HOLDINGS CORPORATION

Defendants

NORTON ROSE FULBRIGHT CANADA LLP
222 Bay Street, Suite 3000,
P.O. Box 53
Toronto ON M5K 1E7

Orestes Pasparakis LSO#: 36851T
orestes.pasparakis@nortonrosefulbright.com
Tel: 416 216 4815
Robert Frank LSO#: 35456F
robert.frank@nortonrosefulbright.com
Tel: 416 202 6741
Evan Cobb LSO#: 55787N
evan.cobb@nortonrosefulbright.com
Tel: 416 216 1929
Fax: 416 216 3930

Lawyers for FTI Consulting Canada Inc., in its capacity as Court-appointed monitor

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Matthew P. Gottlieb LSO#: 32268B
mgottlieb@lolg.ca
Tel: 416 644 5353
Andrew Winton LSO#: 54473I
awinton@lolg.ca
Tel: 416 644 5342
Philip Underwood LSO#: 73637W
punderwood@lolg.ca
Tel: 416 645 5078
Fax: 416 598 3730

Lawyers for Sears Canada Inc., by its Court-appointed Litigation Trustee, J. Douglas Cunningham, Q.C.

BLAKE, CASSELS & GRAYDON LLP
199 Bay Street, Suite 4000
Commerce Court West
Toronto, ON M5L 1A9

Michael Barrack LSO #21941W
michael.barrack@blakes.com
Tel: 416 863 5280
Kathryn Bush LSO #23636O
kathryn.bush@blakes.com
Tel: 416 863 2633
Kiran Patel LSO #58398H
kiran.patel@blakes.com
Tel: 416 863 2205
Fax: 416 863 2653
Lawyers for Morneau Shepell Ltd., in its capacity as administrator of the Sears Canada Inc. Registered Retirement Plan

TO: LITIGATION SERVICE LIST

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TAB 1

2013 ONSC 1780
Ontario Superior Court of Justice [Commercial List]

Northstar Aerospace Inc., Re

2013 CarswellOnt 4056, 2013 ONSC 1780, 227 A.C.W.S. (3d) 929

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C 36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Northstar Aerospace, Inc., Northstar Aerospace (Canada) Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company Applicants

Morawetz J.

Judgment: April 9, 2013
Docket: CV-12-9761-00CL

Counsel: C.J. Hill, J. Szumski for Court-Appointed Monitor, Ernst & Young Inc.
J. Wall for Her Majesty the Queen in Right of Ontario, as Represented by the Ministry of the Environment
P. Guy, K. Montpetit for Former Directors and Officers Group
Steven Weisz for Fifth Third Bank

***Morawetz J.*:**

Motion Overview

1 This is a motion brought by Ernst & Young Inc., in its capacity as court-appointed Monitor (the "Monitor") of Northstar Aerospace, Inc. ("Northstar Inc."), Northstar Aerospace (Canada) Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company (collectively, the "Applicants"), for approval of an adjudication process and for a final determination with respect to whether two claims submitted in the claims procedure (the "Claims Procedure") authorized by order of August 2, 2012 (the "Claims Procedure Order") are valid claims for which the former directors and officers of the Applicants (the "D&Os") are indemnified pursuant to the indemnity (the "Directors' Indemnity") contained in paragraph 23 of the Initial Order dated June 14, 2012 [2012 CarswellOnt 8605 (Ont. S.C.J. [Commercial List])] (the "Initial Order").

2 If they are so indemnified, the D&Os may be entitled to the benefit of certain funds held in a reserve by the Monitor (the "D&O Charge Reserve") to satisfy such claims. If they are not, then there are no claims against the D&O Charge Reserve and the funds can be released to Fifth Third Bank, in its capacity as agent for itself, First Merit Bank, N.A. and North Shore Community Bank & Trust Company (in such capacity, the "Pre-Filing Agent").

3 For the following reasons, I have determined that the adjudication process should be approved and that the D&Os are not entitled to the benefit of the D&O Charge Reserve.

4 In my view, for the purposes of determining this motion, it is not necessary to determine whether the claims filed by the MOE and the D&Os are pre-filing or post-filing claims. References in this endorsement to "MOE Pre-Filing D&O Claim", "MOE Post-Filing D&O Claim" and "WeirFoulds Post-Filing D&O Claim" have been taken from the materials filed by the parties. This endorsement includes references to those terms for identification purposes, but no determination is being made as to whether these claims are pre-filing or post-filing claims.

5 The two claims at issue are described in proofs of claim (collectively, "the Proofs of Claim") filed by Her Majesty the Queen in Right of the Province of Ontario as Represented by the Ministry of the Environment (the "MOE") and by WeirFoulds LLP ("WeirFoulds") on behalf of certain of the D&Os ("WeirFoulds D&Os").

6 The MOE proof of claim (the "MOE Proof of Claim") asserts, among other things, a "Pre-Filing D&O Claim" (the "MOE Pre-Filing D&O Claim") and a "Post-Filing D&O Claim" (the "MOE Post-Filing D&O Claim") (collectively, the "MOE D&O Claims"), for costs incurred and to be incurred by the MOE in carrying out certain remediation activities originally imposed on the Applicants in an Ontario MOE Director's Order issued under the *Environmental Protection Act*, R.S.O. 1990, c. E. 19 (the "EPA") on March 15, 2012 (the "March 15 Order"). The basis for the D&Os' purported liability is a future Ontario MOE Director's Order (the "Future Director's Order"), which the MOE intends to issue against the D&Os. According to the Monitor's counsel, the Future Director's Order will require the D&Os to conduct the same remediation activities previously required of the Applicants.

7 The WeirFoulds proof of claim (the "WeirFoulds Proof of Claim") responds to the threat of the Future Director's Order. It asserts a Post-Filing D&O Claim (the "WeirFoulds Post-Filing D&O Claim") by the individual WeirFoulds D&Os for contribution and indemnity against each other, and against the former directors and officers of the predecessors of Northstar Inc., in respect of any liability that they may incur under the Future Director's Order.

8 Neither the MOE nor the D&Os object to the Monitor's proposed adjudication procedure.

Background to the CCAA Proceedings

9 On May 14, 2012, the Applicants obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C. 36 ("CCAA"); Ernst & Young Inc. was subsequently appointed as the Monitor (the "CCAA Proceedings").

10 A number of background facts have been set out in *Northstar Aerospace Inc., Re*, 2012 ONSC 4423 (Ont. S.C.J. [Commercial List]) (*Northstar*) and *Northstar Aerospace Inc., Re*, 2012 ONSC 6362 (Ont. S.C.J. [Commercial List]). A number of the issues with respect to MOE's claims against the Applicants have been covered in a previous decision. See *Northstar*, *supra.*

Directors' Indemnification and Directors' Charge

11 The Initial Order provided that the Applicants would grant the Directors' Indemnity, indemnifying the D&Os against obligations and liabilities that they may incur as directors and officers of the Applicants after the commencement of the CCAA Proceedings.

12 Paragraph 23 of the Initial Order provides:

> 23. This court orders that the CCAA Entities shall indemnify their directors and officers against obligations and liabilities that they may incur as directors and officers of the CCAA entities after the commencement of the within proceedings, except to the extent that, with respect to any director or officer the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

13 Paragraph 24 of the Initial Order further provides that the D&Os and the chief restructuring officer would have the benefit of a charge, in the amount of US$1,750,000, on the Applicants' current and future assets, undertakings and properties, to secure the Directors' Indemnity (the "Directors' Charge").

14 The Directors' Charge, as established in the Initial Order, was fixed ahead of all security interests in favour of any person, other than the "Administration Charge", "Critical Suppliers' Charge" and the "DIP Lenders' Charge".

15 The statutory basis for the Directors' Charge is set out in section 11.51 of the CCAA, which reads as follows:

11.51(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge - in an amount that the court considers appropriate - in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

11.51(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

16 Any order under this provision affects, or potentially affects, the priority status of creditors. It is through this lens that the court considers motions. The order is discretionary in nature, is extraordinary in nature and should be, in my view, applied restrictively as it alters the general priority regime affecting secured creditors. In this case, the order was made and it has priority over Fifth Third Bank.

D&O Claims

17 On August 2, 2012, the Claims Procedure Order was issued to solicit the submissions of Proofs of Claim by the claims bar date of October 23, 2012 (the "Claims Bar Date") in respect of all "D&O Claim[s]".

18 As indicated by the Monitor's counsel, the definition of a "D&O Claim" is very broad. It includes both claims that arose prior to June 14, 2012 (pre-filing D&O claims) and claims that arose from and after June 14, 2012 (post-filing D&O claims). It also potentially includes both post-filing D&O claims which are secured by the Directors' Charge and post-filing D&O claims which are not secured by the Directors' Charge.

19 Paragraph 25 of the Claims Procedure Order specifically recognizes this distinction:

25. This court orders that no Post-Filing D&O Claim shall be paid by the Monitor from the D&O Charge Reserve without the consent of the Pre-Filing Agent and the CRO Counsel and D&O Counsel or further Order of the court and the determination that a claim is a Post-Filing D&O Claim does not create a presumption that such D&O Claim is entitled to be paid by the Monitor from the D&O Charge Reserve.

20 The MOE D&O Claims concurrently asserts the MOE Pre-Filing D&O Claim and the MOE Post-Filing D&O Claim for the same amounts, namely:

(a) $66,240.36 for costs incurred by the MOE to carry out the remediation activities described in the March 15 Order up to the date when the MOE Proof of Claim was filed;

(b) $15 million for future costs to be incurred by the MOE to carry out the remediation activities described in the March 15 Order; and

(c) a presently unknown amount required to conduct additional environmental remediation work necessary to decontaminate the Site and the Bishop Street Community.

21 As there are no funds available for distribution to unsecured pre-filing creditors in the CCAA Proceedings, the Monitor appropriately has not considered the validity of the MOE Pre- Filing D&O Claim. This motion, from the Monitor's standpoint, therefore only addresses the MOE Post-Filing D&O Claim.

22 The WeirFoulds Proof of Claim provides that:

This proof of claim is filed in order to preserve the right to commence:

(1) any and all claims over that any of the [WeirFoulds D&Os] may have against each other; and

(2) any and all claims that any of the [WeirFoulds D&Os] may have against any former director or officer of Northstar Aerospace, Inc., or predecessor companies, for contribution or indemnity, based upon any applicable cause of action in law or in equity, in relation to any liability that may be found to exist against any of the [WeirFoulds D&Os] in connection with the proofs of claim filed in the within proceedings by the Ontario Ministry of the Environment, dated October 19, 2012.

23 For the purpose of resolving the entitlement of any claimant to the D&O Charge Reserve, paragraph 22 of the Claims Procedure Order allows the Monitor and certain other parties to bring a motion seeking approval of an adjudication procedure for determination as to whether any claim asserted in the Claims Procedure is a post-filing D&O claim which constitutes a claim for which the D&Os are indemnified under the Directors' Indemnity.

Issues to Consider

24 The D&Os are bringing a motion on April 18, 2013 to determine the proper venue for the adjudication of the Post-Filing D&O Claims. There is considerable overlap between the issues raised on this motion and the issues raised on the pending motion.

25 In my view, it is appropriate for this endorsement to exclusively address the narrow issue raised in this motion, namely, whether the Proofs of Claims are valid claims for which the D&Os are indemnified pursuant to the Directors' Indemnity contained in the Initial Order. A consideration of whether the claims are pre-filing claims or post-filing claims, with respect to the D&Os, is better addressed in the motion returnable on April 18, 2013.

26 The Monitor's counsel appropriately sets out the issues of this motion, as follows:

(a) Whether the court should approve the proposed adjudication process and issue a determination as to whether the disputed post-filing D&O claims constitute valid claims for which the D&Os are indemnified under the Directors' Indemnity;

(b) Whether the MOE Post-Filing D&O Claim is a valid claim for which the D&Os are indemnified under the Directors' Indemnity;

(c) Whether the WeirFoulds Post-Filing D&O Claim is a valid claim for which the D&Os are indemnified under the Directors' Indemnity; and

(d) Whether the D&O Charge Reserve should be released and paid over to the Pre-Filing Agent.

Analysis and Conclusion

27 I conclude, for the following reasons, that (a) the adjudication process should be approved; (b) the MOE Post-Filing D&O Claims are not claims for which the D&Os are indemnified under paragraph 23 of the Initial Order; (c) the WeirFoulds Post-Filing D&O Claims are not claims for which the D&Os are indemnified under paragraph 23 of the Initial Order; and (d) the D&O Charge Reserve should be paid over to the Pre-Filing Agent.

28 The Directors' Charge, as contemplated by section 11.51 of the CCAA, is appropriate in the current circumstances (notwithstanding it being a discretionary and extraordinary provision, as outlined above) because it is directly tailored to the purposes of creating a charge, and its impact is limited.

29 The purpose of a section 11.51 charge is twofold: (1) to keep the directors and officers in place during the restructuring to avoid a potential destabilization of the business; and (2) to enable the CCAA applicants to benefit from experienced board of directors and experienced senior management. Courts have accepted that, without certain protections, officers and directors will often discontinue their service in CCAA restructurings. See *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) and *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]).

30 In this case, the Applicants' basis for seeking the Directors' Charge is set out in the affidavit of Mr. Yuen, sworn June 13, 2012, which was filed in support of the Initial Order application. He described the purpose of the Directors' Charge as:

> To ensure the ongoing stability of the CCAA Entities' business during the CCAA period, the CCAA Entities require the continued participation of the CRO and the CCAA Entities' officers and executives who manage the business and commercial activities of the CCAA Entities.

31 The Yuen affidavit goes on to identify the specific obligations and liabilities for which the Directors' Charge was requested, including liability for unpaid wages, pension amounts, vacation pay, statutory employee deductions and HST. At paragraph 143 of his affidavit, Mr. Yuen states:

> I am advised by Daniel Murdoch of Stikeman Elliott LLP, counsel to the CCAA Entities, and do verily believe, that in certain circumstances directors can be held liable for certain obligations of a company owing to employees and government entities. As at May 18, 2012, the CCAA Entities were potentially liable for some or all of unpaid wages, pension amounts, vacation pay, statutory employee deductions, and HST (Harmonized Sales Tax) of approximately CDN $1.65 million ...

32 The Monitor's counsel submits that the quantum of the Directors' Charge was tailored to the Applicants' existing liability for such amounts.

33 The scope of a section 11.51 charge is limited in several ways:

> (a) section 11.51 does not authorize the creation of a charge in favour of any party other than a director or officer (or chief restructuring officer) of the companies under CCAA protection;
>
> (b) section 11.51 does not authorize the creation of a charge for purposes other than to indemnify the directors and officers against obligations and liabilities that they may incur as a director or officer of the company after the commencement of its CCAA Proceedings; and
>
> (c) section 11.51(4) requires the court to exclude from the section 11.51 charge the obligations and liabilities of directors and officers incurred through their own gross negligence or wilful misconduct.

34 In my view, it would be inappropriate to determine that the Proofs of Claim are claims for which the D&Os are entitled to be indemnified under the Directors' Indemnity, as doing so would wrongly and inequitably affect the priority of claims as between the MOE and the Fifth Third Bank.

35 In the context of the MOE claims against the Applicants in these CCAA proceedings, it has already been determined, in *Northstar*, *supra*, that the MOE claims are unsecured and subordinate to the position of Fifth Third Bank. It would be a strange outcome, and invariably lead to inconsistent results, if the MOE could, in the CCAA Proceedings, improve its unsecured position against Fifth Third Bank by issuing a Director's Order after the commencement of CCAA Proceedings, based on an environmental condition which occurred long before the CCAA Proceedings. This would result in the MOE achieving indirectly in these CCAA Proceedings that which it could not achieve directly.

36 Simply put, the activity that gave rise to the MOE claims occurred prior to the CCAA proceedings. It is not the type of claim to which the Directors' Charge under section 11.51 responds. Rather, in the CCAA proceedings, it is an unsecured claim and does not entitle the MOE to obtain the remedy sought on this motion. The fact that the MOE seeks this remedy through the D&Os does not change the substance of the position.

37 The situation facing the Applicants, the Monitor, Fifth Third Bank, and others affected by the Directors' Charge, has to be considered as part of the CCAA Proceedings. In my view, it would be highly inequitable to create a parallel universe, wherein certain MOE claims as against the Applicants are treated as unsecured claims and MOE D&O Claims and the WeirFoulds Post-Filing D&O Claim are treated as secured claims with respect to the Directors' Charge.

38 It could be that the MOE has a remedy against the D&Os; however, any remedy they may have does not provide recourse against the D&O Charge in these CCAA Proceedings. Nevertheless, it remains open for the MOE to pursue its claims against the D&Os on the motion returnable on April 18, 2013.

Order

39 In the result, I grant the Monitor's motion, approve the aforementioned adjudication process, and approve the activities of the Monitor as described in the Seventh Report of the Monitor dated November 7, 2012. I also direct the following:

> (1) The MOE Post-Filing D&O Claim is not a claim for which the D&Os are indemnified under the Directors' Indemnity;
>
> (2) The WeirFoulds Post-Filing D&O Claim is not a claim for which the D&Os are indemnified under the Directors' Indemnity; and
>
> (3) The US$1,750,000 held by the Monitor in respect of the D&O Charge Reserve be paid to the Pre-Filing Agent.

Motion granted.

TAB 2

See paras. 6, 8

2009 ABQB 78
Alberta Court of Queen's Bench

EarthFirst Canada Inc., Re

2009 CarswellAlta 142, 2009 ABQB 78, [2009] A.W.L.D. 984, 174 A.C.W.S. (3d) 618, 1 Alta. L.R. (5th) 311

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 EarthFirst Canada Inc.

B.E.C. Romaine J.

Heard: January 28, 2009
Judgment: February 3, 2009
Docket: Calgary 0801-13559

Counsel: Howard A. Gorman, Randal Van de Mosselaer for EarthFirst Canada Inc.
A. Robert Anderson, Q.C. for Monitor, Ernst & Young Inc.
Brian P. O'Leary, Q.C., Doug S. Nishimura, Trevor A. Batty for WestLB AG
Jeffrey Thom, Q.C. for IDL Projects Ltd.
Susan Robinson-Burns for Synergy Engineering Ltd.
Benjamin La Borie for Gisborne Industrial Construction Ltd.
V. Philippe (Phil) Lalonde for Interoute Construction Ltd.

***B.E.C. Romaine J.*:**

Introduction

1 EarthFirst Canada Inc., a corporation under the protection of an initial order granted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended, sought to establish a "hardship fund" that would be used to allow it to pay pre-filing obligations owing to certain suppliers and contractors operating in the community near which EarthFirst is developing a wind farm project. I authorized the establishment of this fund, and these are the reasons for my decision.

Background

2 EarthFirst is a publicly-traded developer of renewable wind energy in Canada. It has several projects under development and the most advanced is a wind farm under construction at Dokie Ridge in northeast British Columbia. This project is to be developed in two phases, with the first involving the construction of eight turbines and the second involving a further 40 turbines.

3 EarthFirst's financial difficulties arose primarily from cost overruns on the Dokie Project, combined with difficulties in completing re-financing and/or restructuring initiatives, exacerbated by the general tightening of credit markets.

4 The Dokie Project is located in a remote area of British Columbia close to three first nations' communities. The development has involved local contractors and suppliers whose viability is significantly dependant on this project. Some of these local contractors and suppliers have significant account receivable balances owing from EarthFirst, and some have not received payment from EarthFirst for several months. Certain creditors face immediate financial difficulty, including the inability to fund payroll and purchase critical supplies to continue operations. If some relief is not available, these local operations face bankruptcy.

5 EarthFirst, with the aid and support of the Monitor, proposed the establishment of a fund of $1.5 million to be disbursed in payment of some pre-filing claims of certain local suppliers who are in significant financial difficulty. Payments from the hardship fund are to be at the discretion of EarthFirst's Chief Restructuring Officer and subject to the approval of the Monitor. Such payments are to be considered an interim distribution under a future plan of arrangement and will be reflected in any final distribution to creditors.

6 The amount of the hardship fund was arrived at following discussions among EarthFirst, the Monitor, the local suppliers and contractors. The proposal recognizes the potential domino effect of a failure to fund small, local businesses that are dependant on the continued development of the Dokie Project and are essential to future construction activities and the preservation of the project's value, and the dire and harsh consequences in the surrounding communities of the inability of such businesses to meet payroll obligations. The company and the Monitor submit that payments from the fund would contribute to necessary goodwill in the area and that cooperation and support of the local community is required to ensure that the value of the project is maximized. EarthFirst also notes that, while a CCAA stay of proceedings affects many creditors, the proposed recipients of the hardship fund in this isolated community are particularly vulnerable and at risk.

7 While the nature of payments from the hardship fund is different from the issue that was before Farley, J. in *Air Canada, Re*, 2003 CarswellOnt 5296 (Ont. S.C.J. [Commercial List]) (at para. 4), and while EarthFirst is not suggesting that recipients of the fund are "critical suppliers" in the usual sense of the term, it appears to be the case that, as in Air Canada, the potential future benefit to the company of these relatively modest payments of pre-filing debt is considerable and of value to the estate as a whole. The decision to allow the hardship fund thus outweighs the prejudice to other creditors, justifying a departure from the usual rule.

8 Counsel for the Monitor noted that the payments are likely necessary in order to preserve the opportunity to complete the Dokie Project, if that option appears to be the best way to maximize recovery for creditors. It was likely the recognition of this factor that led to little opposition to the application, including from the primary secured creditor. The opposition that was expressed related to a lack of certainty over which unsecured creditors would benefit. While the Monitor would not commit to full public disclosure of the recipients of the hardship fund, which might provoke the precise financial embarrassment and consequential business failure that payments from the fund are intended to prevent, the company and the Monitor were clear that payments would be limited to bare-bone payments "essential to keeping the lights of the recipient company on": *Smoky River Coal Ltd., Re*, 2000 CarswellAlta 830 (Alta. Q.B.) at para. 40.

9 I am satisfied that the payment of these case-specific pre-filing debts in a limited amount in order to preserve the value of this CCAA-debtor's primary asset and the option of continuing its development for the benefit of all creditors is fair and reasonable in the circumstances and in accordance with the purpose and objectives of the *Companies' Creditors Arrangement Act*.

Application granted.

TAB 3

2009 CarswellOnt 3583
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 3583, [2009] O.J. No. 2558, 178 A.C.W.S. (3d) 305, 55 C.B.R. (5th) 68, 75 C.C.P.B. 233

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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Morawetz J.

Heard: April 21, 2009
Judgment: June 18, 2009
Docket: 09-CL-7950

Counsel: Barry Wadsworth for CAW, George Borosh et al
Susan Philpott, Mark Zigler for Nortel Networks Former Employees
Lyndon Barnes, Adam Hirsh for Nortel Networks Board of Directors
Alan Mersky, Mario Forte for Nortel Networks et al
Gavin H. Finlayson for Informal Nortel Noteholders Group
Leanne Williams for Flextronics Inc.
Joseph Pasquariello, Chris Armstrong for Monitor, Ernst & Young Inc.
Janice Payne for Recently Severed Canadian Nortel Employees ("RSCNE")
Gail Misra for CEP Union
J. Davis-Sydor for Brookfield Lepage Johnson Controls Facility Management Services
Henry Juroviesky for Nortel Terminated Canadian Employees Steering Committee
Alex MacFarlane for Official Unsecured Creditors Committee
M. Starnino for Superintendent of Financial Services

***Morawetz J.*:**

1 The process by which claims of employees, both unionized and non-unionized, have been addressed in restructurings initiated under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") has been the subject of debate for a number of years. There is uncertainty and strong divergent views have been expressed. Notwithstanding that employee claims are ultimately addressed in many CCAA proceedings, there are few reported decisions which address a number of the issues being raised in these two motions. This lack of jurisprudence may reflect that the issues, for the most part, have been resolved through negotiation, as opposed to being determined by the court in the CCAA process - which includes motions for directions, the classification of creditors' claims, the holding and conduct of creditors' meetings and motions to sanction a plan of compromise or arrangement.

2 In this case, both unionized and non-unionized employee groups have brought motions for directions. This endorsement addresses both motions.

Union Motion

3 The first motion is brought by the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905, and/or 1915 (the "Union") and by George Borosh on his own behalf and on behalf of all retirees of the Applicants who were formerly represented by the Union.

4 The Union requests an order directing the Applicants (also referred to as "Nortel") to recommence certain periodic and lump sum payments which the Applicants, or any of them, are obligated to make pursuant to the CAW collective agreement (the "Collective Agreement"). The Union also seeks an order requiring the Applicants to pay to those entitled persons the payments which should have been made to them under the Collective Agreement since January 14, 2009, the date of the CCAA filing and the date of the Initial Order.

5 The Union seeks continued payment of certain of these benefits including:

(a) retirement allowance payments ("RAP");

(b) voluntary retirement options ("VRO"); and

(c) termination and severance payments.

6 The amounts claimed by the Union are contractual entitlements under the Collective Agreement, which the Union submits are payable only after an individual's employment with the Applicants has ceased.

7 There are approximately 101 former Union members with claims to RAP. The current value of these RAP is approximately $2.3 million. There are approximately 180 former unionized retirees who claim similar benefits under other collective agreements.

8 There are approximately 7 persons who may assert claims to VRO as of the date of the Initial Order. These claims amount to approximately $202,000.

9 There are also approximately 600 persons who may claim termination and severance pay amounts. Five of those persons are former union members.

Former Employee Motion

10 The second motion is brought by Mr. Donald Sproule, Mr. David Archibald and Mr. Michael Campbell (collectively, the "Representatives") on behalf of former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in receipt of a Nortel pension, or group or class of them (collectively, the "Former Employees"). The Representatives seek an order varying the Initial Order by requiring the Applicants to pay termination pay, severance pay, vacation pay and an amount equivalent to the continuation of the benefit plans during the notice period, which are required to be paid to affected Former Employees in accordance with the *Employment Standards Act*, *2000* S.O. 2000 c.41 ("ESA") or any other relevant provincial employment legislation. The Representatives also seek an order varying the Initial Order by requiring the Applicants to recommence certain periodic and lump sum payments and to make payment of all periodic and lump sum payments which should have been paid since the Initial Order, which the Applicants are obligated to pay Former Employees in accordance with the statutory and contractual obligations entered into by Nortel and affected Former Employees, including the Transitional Retirement Allowance ("TRA") and any pension benefit payments Former Employees are entitled to receive in excess of the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan"). TRA is similar to RAP, but is for non-unionized retirees. There are approximately 442 individuals who may claim the TRA. The current value of TRA obligations is approximately $18 million.

11 The TRA and the RAP are both unregistered benefits that run concurrently with other pension entitlements and operate as time-limited supplements.

12 In many respects, the motion of the Former Employees is not dissimilar to the CAW motion, such that the motion of the Former Employees can almost be described as a "Me too motion".

Background

13 On January 14, 2009, the Applicants were granted protection under the CCAA, pursuant to the Initial Order.

14 Upon commencement of the CCAA proceedings, the Applicants ceased making payments of amounts that constituted or would constitute unsecured claims against the Applicants. Included were payments for termination and severance, as well as amounts under various retirement and retirement transitioning programs.

15 The Initial Order provides:

(a) that Nortel is entitled but not required to pay, among other things, outstanding and future wages, salaries, vacation pay, employee benefits and pension plan payments;

(b) that Nortel is entitled to terminate the employment of or lay off any of its employees and deal with the consequences under a future plan of arrangement;

(c) that Nortel is entitled to vacate, abandon or quit the whole but not part of any lease agreement and repudiate agreements relating to leased properties (paragraph 11);

(d) for a stay of proceedings against Nortel;

(e) for a suspension of rights and remedies vis-à-vis Nortel;

(f) that during the stay period no person shall discontinue, repudiate, cease to perform any contract, agreement held by the company (paragraph 16);

(g) that those having agreements with Nortel for the supply of goods and/or services are restrained from, among other things, discontinuing, altering or terminating the supply of such goods or services. The proviso is that the goods or services supplied are to be paid for by Nortel in accordance with the normal payment practices.

Position of Union

16 The position of the CAW is that the Applicants' obligations to make the payments is to the CAW pursuant to the Collective Agreement. The obligation is not to the individual beneficiaries.

17 The Union also submits that the difference between the moving parties is that RAP, VRO and other payments are made pursuant to the Collective Agreement as between the Union and the Applicants and not as an outstanding debt payable to former employees.

18 The Union further submits that the Applicants are obligated to maintain the full measure of compensation under the Collective Agreement in exchange for the provision of services provided by the Union's members subsequent to the issuance of the Initial Order. As such, the failure to abide by the terms of the Collective Agreement, the Union submits, runs directly contrary to Section 11.3 of the CCAA as compensation paid to employees under a collective agreement can reasonably be interpreted as being payment for services within the meaning of this section.

19 Section 11.3 of the CCAA provides:

No order made under section 11 shall have the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

20 In order to fit within Section 11.3, services have to be provided after the date of the Initial Order.

21 The Union submits that persons owed severance pay are post-petition trade creditors in a bankruptcy, albeit in relation to specific circumstances. Thus, by analogy, persons owed severance pay are post-petition trade creditors in a CCAA proceeding. The Union relies on *Smoky River Coal Ltd., Re*, 2001 ABCA 209 (Alta. C.A.) to support its proposition.

22 The Union further submits that when interpreting "compensation" for services performed under the Collective Agreement, it must include all of the monetary aspects of the Collective Agreement and not those specifically made to those actively employed on any particular given day.

23 The Union takes the position that Section 11.3 of the CCAA specifically contemplates that a supplier is entitled to payment for post-filing goods and services provided, and would undoubtedly refuse to continue supply in the event of receiving only partial payment. However, the Union contends that it does not have the ability to cease providing services due to the *Labour Relations Act, 1995*, S.O. 1995, c. 1. As such, the only alternative open to the Union is to seek an order to recommence the payments halted by the Initial Order.

24 The Union contends that Section 11.3 of the CCAA precludes the court from authorizing the Applicants to make selective determinations as to which parts of the Collective Agreement it will abide by. By failing to abide by the terms of the Collective Agreement, the Union contends that the Applicants have acted as if the contract has been amended to the extent that it is no longer bound by all of its terms and need merely address any loss through the plan of arrangement.

25 The Union submits that, with the exception of rectification to clarify the intent of the parties, the court has no jurisdiction at common law or in equity to alter the terms of the contract between parties and as the court cannot amend the terms of the Collective Agreement, the employer should not be allowed to act as though it had done so.

26 The Union submits that no other supplier of services would countenance, and the court does not have the jurisdiction to authorize, the recipient party to a contract unilaterally determining which provisions of the agreement it will or will not abide by while the contract is in operation.

27 The Union concludes that the Applicants must pay for the full measure of its bargain with the Union while the Collective Agreement remains in force and the court should direct the recommencement and repayment of those benefits that arise out of the Collective Agreement and which were suspended subsequently to the filing of the CCAA application on January 14, 2009.

Position of the Former Employees

28 Counsel to the Former Employees submits that the court has the discretion pursuant to Section 11 of the CCAA to order Nortel to recommence periodic and lump-sum payments to Former Employees in accordance with Nortel's statutory and contractual obligations. Further, the RAP payments which the Union seeks to enforce are not meaningfully different from those RAP benefits payable to other unionized retirees who belong to other unions nor from the TRA payable to non-unionized former employees. Accordingly, counsel submits that it would be inequitable to restore payments to one group of retirees and not others. Hence, the reference to the "Me too motion".

29 Counsel further submits that all employers and employees are bound by the minimum standards in the ESA and other applicable provincial employment legislation. Section 5 of the ESA expressly states that no employer can contract out or waive an employment standard in the ESA and that any such contracting out or waiver is void.

30 Counsel submits that each province has minimum standards employment legislation and regulations which govern employment relationships at the provincial level and that provincial laws such as the ESA continue to apply during CCAA proceedings.

31 Further, the Supreme Court of Canada has held that provincial laws in federally-regulated bankruptcy and insolvency proceedings continue to apply so long as the doctrine of paramountcy is not triggered: See *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60 (S.C.C.).

32 In this case, counsel further submits that there is no conflict between the provisions of the ESA and the CCAA and that paramountcy is not triggered and it follows that the ESA and other applicable employment legislation continues to apply during the Applicants' CCAA proceedings. As a result counsel submits that the Applicants are required to make payment to Former Employees for monies owing pursuant to the minimum employment standards as outlined in the ESA and other applicable provincial legislation.

Position of the Applicants

33 Counsel to the Applicants sets out the central purpose of the CCAA as being: "to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business". (*Pacific National Lease Holding Corp., Re*, [1992] B.C.J. No. 3070 (B.C. S.C.), aff'd by (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers])), and that the stay is the primary procedural instrument used to achieve the purpose of the CCAA:

> ...if the attempt at a compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay. Hence the powers vested in the court under Section 11 (*Pacific National Lease Holding Corp. (Re)*, *supra*).

34 The Applicants go on to submit that the powers vested in the court under Section 11 to achieve these goals of the CCAA include:

> (a) the ability to stay past debts; and
>
> (b) the ability to require the continuance of present obligations to the debtor.

35 The corresponding protection extended to persons doing business with the debtor is that such persons (including employees) are not required to extend credit to the debtor corporation in the course of the CCAA proceedings. The protection afforded by Section 11.3 extends only to services provided after the Initial Order. Post-filing payments are only made for the purpose of ensuring the continued supply of services and that obligations in connection with past services are stayed. (See *Mirant Canada Energy Marketing Ltd., Re*, [2004] A.J. No. 331 (Alta. Q.B.)).

36 Furthermore, counsel to the Applicants submits that contractual obligations respecting post employment are obligations in respect of past services and are accordingly stayed.

37 Counsel to the Applicants also relies on the following statement from *Mirant*, *supra*, at paragraph 28:

> Thus, for me to find the decision of the Court of Appeal in Smokey River Coal analogous to Schaefer's situation, I would need to find that the obligation to pay severance pay to Schaefer was a clear contractual obligation that was necessary for Schaefer to continue his employment and not an obligation that arose from the cessation or termination of services. In my view, to find it to be the former would be to stretch the meaning of the obligation in the Letter Agreement to pay severance pay. It is an obligation that arises on the termination of services. It does not fall within a commercially reasonable contractual obligation essential for the continued supply of services. Only is his salary which he has been paid falls within that definition.

38 Counsel to the Applicants states that post-employment benefits have been consistently stayed under the CCAA and that post-employment benefits are properly regarded as pre-filing debts, which receive the same treatment as other unsecured

creditors. The Applicants rely on *Mine Jeffrey inc., Re*, [2003] Q.J. No. 264 (Que. C.A.) ("*Jeffrey Mine*") for the proposition that "the fact that these benefits are provided for in the collective agreement changes nothing".

39 Counsel to the Applicants submits that the Union seeks an order directing the Applicants to make payment of various post-employment benefits to former Nortel employees and that the Former Employees claim entitlement to similar treatment for all post-employment benefits, under the Collective Agreement or otherwise.

40 The Applicants take the position the Union's continuing collective representation role does not clothe unpaid benefits with any higher status, relying on the following from *Jeffrey Mine* at paras. 57 - 58:

> Within the framework of the restructuring plan, arrangements can be made respecting the amounts owing in this regard.
>
> The same is true in the case of the loss of certain fringe benefits sustained by persons who have not provided services to the debtor since the initial order. These persons became creditors of the debtor for the monetary value of the benefits lost further to Jeffrey Mines Inc.'s having ceased to pay premiums. The fact that these benefits are provided for in the collective agreements changes nothing.

41 In addition, the Applicants point to the following statement of the Quebec Court of Appeal in *TQS inc., Re*, 2008 QCCA 1429 (Que. C.A.) at paras. 26-27:

> [Unofficial translation] Employees' rights are defined by the collective agreement that governs them and by certain legislative provisions. However, the resulting claims are just as much [at] risk as those of other creditors, in this case suppliers whose livelihood is also threatened by the financial precariousness of their debtor.
>
> The arguments of counsel for the Applicants are based on the erroneous premise that the employees are entitled to a privileged status. That is not what the CCAA provides nor is it what this court decided in *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey inc.*

42 Collectively, RAP payment and TRA payments entail obligations of over $22 million. Counsel to the Applicants submits that there is no basis in principle to treat them differently. They are all stayed and there is no basis to treat any of these two unsecured obligations differently. The Applicants are attempting to restructure for the final benefit of all stakeholders and counsel submits that its collective resources must be used for such purposes.

Report of the Monitor

43 In its Seventh Report, the Monitor notes that at the time of the Initial Order, the Applicants employed approximately 6,000 employees and had approximately 11,700 retirees or their survivors receiving pension and/or benefits from retirement plans sponsored by the Applicants.

44 The Monitor goes on to report that the Applicants have continued to honour substantially all of the obligations to active employees. The Applicants have continued to make current service and special funding payments to their registered pension plans. All the health and welfare benefits for both active employees and retirees have been continued to be paid since the commencement of the CCAA proceedings.

45 The Monitor further reports that at the filing date, payments to former employees for termination and severance as well as the provisions of the health and dental benefits ceased. In addition, non-registered and unfunded retirement plan payments ceased.

46 More importantly, the Monitor reports that, as noted in previous Monitor's Reports, the Applicants' financial position is under pressure.

Discussion and Analysis

47 The acknowledged purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. (See *Pacific National Lease Holding Corp., Re*, [1992] B.C.J. No. 3070 (B.C. S.C.), aff'd by (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]), at para. 18 citing *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at 315). The primary procedural instrument used to achieve that goal is the ability of the court to issue a broad stay of proceedings under Section 11 of the CCAA.

48 The powers vested in the court under Section 11 of the CCAA to achieve these goals include the ability to stay past debts; and the ability to require the continuance of present obligations to the debtor. (*Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.).

49 The Applicants acknowledged that they were insolvent in affidavit material filed on the Initial Hearing. This position was accepted and is referenced in my endorsement of January 14, 2009. The Applicants are in the process of restructuring but no plan of compromise or arrangement has yet to be put forward.

50 The Monitor has reported that the Applicants are under financial pressure. Previous reports filed by the Monitor have provided considerable detail as to how the Applicants carry on operations and have provided specific information as to the interdependent relationship between Nortel entities in Canada, the United States, Europe, the Middle East and Asia.

51 In my view, in considering the impact of these motions, it is both necessary and appropriate to take into account the overall financial position of the Applicants. There are several reasons for doing so:

(a) The Applicants are not in a position to honour their obligations to all creditors.

(b) The Applicants are in default of contractual obligations to a number of creditors, including with respect to significant bond issues. The obligations owed to bondholders are unsecured.

(c) The Applicants are in default of certain obligations under the Collective Agreements.

(d) The Applicants are in default of certain obligations owed to the Former Employees.

52 It is also necessary to take into account that these motions have been brought prior to any determination of any creditor classifications. No claims procedure has been proposed. No meeting of creditors has been called and no plan of arrangement has been presented to the creditors for their consideration.

53 There is no doubt that the views of the Union and the Former Employees differ from that of the Applicants. The Union insists that the Applicants honour the Collective Agreement. The Former Employees want treatment that is consistent with that being provided to the Union. The record also establishes that the financial predicament faced by retirees and Former Employees is, in many cases, serious. The record references examples where individuals are largely dependent upon the employee benefits that, until recently, they were receiving.

54 However, the Applicants contend that since all of the employee obligations are unsecured it is improper to prefer retirees and the Former Employees over the other unsecured creditors of the Applicants and furthermore, the financial pressure facing the Applicants precludes them from paying all of these outstanding obligations.

55 Counsel to the Union contends that the Applicants must pay for the full measure of its bargain with the Union while the Collective Agreement remains in force and further that the court does not have the jurisdiction to authorize a party, in this case the Applicants, to unilaterally determine which provisions of the Collective Agreement they will abide by while the contract is in operation. Counsel further contends that Section 11.3 of the CCAA precludes the court from authorizing the Applicants to make selective determinations as to which parts of the Collective Agreement they will abide by and that by failing to abide by the terms of the Collective Agreement, the Applicants acted as if the Collective Agreement between themselves and the Union has been amended to the extent that the Applicants are no longer bound by all of its terms and need merely address any loss through the plan of arrangement.

56 The Union specifically contends that the court has no jurisdiction to alter the terms of the Collective Agreement.

57 In addressing these points, it is necessary to keep in mind that these CCAA proceedings are at a relatively early stage. It also must be kept in mind that the economic circumstances at Nortel are such that it cannot be considered to be carrying on "business as usual". As a result of the Applicants' insolvency, difficult choices will have to be made. These choices have to be made by all stakeholders.

58 The Applicants have breached the Collective Agreement and, as a consequence, the Union has certain claims.

59 However, the Applicants have also breached contractual agreements they have with Former Employees and other parties. These parties will also have claims as against the Applicants.

60 An overriding consideration is that the employee claims whether put forth by the Union or the Former Employees, are unsecured claims. These claims do not have any statutory priority.

61 In addition, there is nothing on the record which addresses the issue of how the claims of various parties will be treated in any plan of arrangement, nor is there any indication as to how the creditors will be classified. These issues are not before the court at this time.

62 What is before the court is whether the Applicants should be directed to recommence certain periodic and lump sum payments that they are obligated to make under the Collective Agreement as well as similar or equivalent payments to Former Employees.

63 It is necessary to consider the meaning of Section 11.3 and, in particular, whether the Section should be interpreted in the manner suggested by the Union.

64 Counsel to the Union submits that the ordinary meaning of "services" in section 11.3 includes work performed by employees subject to a collective agreement. Further, even if the ordinary meaning is plain, courts must consider the purpose and scheme of the legislation, and relevant legal norms. Counsel submits that the courts must consider the entire context. As a result, when interpreting "compensation" for services performed under a collective agreement, counsel to the Union submits it must include all of the monetary aspects of the agreement and not those made specifically to those actively employed on any particular given day.

65 No cases were cited in support of this interpretation.

66 I am unable to agree with the Union's argument. In my view, section 11.3 is an exception to the general stay provision authorized by section 11 provided for in the Initial Order. As such, it seems to me that section 11.3 should be narrowly construed. (See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis Canada Inc., 2008) at 483-485.) Section 11.3 applies to services provided after the date of the Initial Order. The ordinary meaning of "services" must be considered in the context of the phrase "services,...provided after the order is made". On a plain reading, it contemplates, in my view, some activity on behalf of the service provider which is performed after the date of the Initial Order. The CCAA contemplates that during the reorganization process, pre-filing debts are not paid, absent exceptional circumstances and services provided after the date of the Initial Order will be paid for the purpose of ensuring the continued supply of services.

67 The flaw in the argument of the Union is that it equates the crystallization of a payment obligation under the Collective Agreement to a provision of a service within the meaning of s. 11.3. The triggering of the payment obligation may have arisen after the Initial Order but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view, some current activity by a service provider post-filing that gives rise to a payment obligation post-filing. The distinction being that the claims of the Union for termination and severance pay are based, for the most part, on services that were provided pre-filing. Likewise, obligations for benefits arising from RAP and VRO are again based, for the most part, on services provided pre-filing. The exact time of when the payment obligation crystallized is not, in my view, the determining

factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

68 The interpretation urged by counsel to the Union with respect to this section is not warranted. In my view, section 11.3 does not require the Applicants to make payment, at this time, of the outstanding obligations under the Collective Agreement.

69 The Union also raised the issue as to whether the court has the jurisdiction to order a stay of the outstanding obligations under Section 11 of the CCAA.

70 The Union takes the position that, with the exception of rectification to clarify the intent of the parties, the court has no jurisdiction at common law or in equity to alter the terms of a contract between parties. The Union relies on *Bilodeau v. McLean*, [1924] 3 D.L.R. 410 (Man. C.A.); *Dusener v. Myles*, [1963] S.J. No. 31 (Sask. Q.B.); *Hiesinger v. Bonice*, [1984] A.J. No. 281 (Alta. Q.B.); *Werchola v. KC5 Amusement Holdings Ltd.*, 2002 SKQB 339 (Sask. Q.B.) to support its position.

71 The Union extends this argument and submits that as the court cannot amend the terms of a collective agreement, the employer should not be allowed to act as though it had been.

72 As a general rule, counsel to the Union submits, there is in place a comprehensive regime for the regulation of labour relations with specialized labour-relations tribunals having exclusive jurisdiction to deal with legal and factual matters arising under labour legislation and no court should restrain any tribunal from proceeding to deal with such matters.

73 However, as is clear from the context, these cases referenced at [70] are dealing with the ordinary situation in which there is no issue of insolvency. In this case, we are dealing with a group of companies which are insolvent and which have been accorded the protection of the CCAA. In my view, this insolvency context is an important distinguishing factor. The insolvency context requires that the stay provisions provided in the CCAA and the Initial Order must be given meaningful interpretation.

74 There is authority for the proposition that, when exercising their authority under insolvency legislation, the courts may make, at the initial stage of a CCAA proceeding, orders regarding matters, but for the insolvent condition of the employer, would be dealt with pursuant to provincial labour legislation, and in most circumstances, by labour tribunals. In *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]), the issue involved the question whether a CCAA debtor company had to make statutory severance payments as was mandatory under the provincial employment standards legislation. MacFarlane J.A. stated at pp. 271-2:

> It appears to me that an order which treats creditors alike is in accord with the purpose of the CCAA. Without the provisions of that statute the petitioner companies might soon be in bankruptcy, and the priority which the employees now have would be lost. The process provided by the CCAA is an interim one. Generally, it suspends but does not determine the ultimate rights of any creditor. In the end it may result in the rights of employees being protected, but in the meantime it preserves the status quo and protects all creditors while a reorganization is being attempted.
>
> . . . . .
>
> This case is not so much about the rights of employees as creditors, but the right of the court under the CCAA to serve not only the special interests of the directors and officers of the company but the broader constituency referred to in *Chef Ready Foods Ltd.*, *supra*. Such a decision may invariably conflict with provincial legislation, but the broad purpose of the CCAA must be served.

75 The *Jeffrey Mine* decision is also relevant. In my view, the *Jeffrey Mine* case does not appear to support the argument that the Collective Agreement is to be treated as being completely unaffected by CCAA proceedings. It seems to me that it is contemplated that rights under a collective agreement may be suspended during the CCAA proceedings. At paragraphs 60 - 62, the court said under the heading Recapitulation (in translation):

> The collective agreements continue to apply like any contract of successive performance not modified by mutual agreement after the initial order or not disclaimed (assuming that to be possible in the case of collective agreements). Neither the

monitor nor the court can amend them unilaterally. That said, distinctions need to be made with regard to the prospect of the resulting debts.

Thus, unionized employees kept on or recalled are entitled to be paid immediately by the monitor for any service provided after the date of the order (s. 11.3), in accordance with the terms of the original version of the applicable collective agreement by the union concerned. However, the obligations not honoured by Jeffrey Mine Inc. with regard to services provided prior to the order constitute debts of Jeffrey Mine Inc. for which the monitor cannot be held liable (s. 11.8 CCAA) and which the employees cannot demand to be paid immediately (s. 11.3 CCAA).

Obligations that have not been met with regard to employees who were laid off permanently on October 7, 2002, or with regard to persons who were former employees of Jeffrey Mine Inc. on that date and that stem from the collective agreements or other commitments constitute debts of the debtor to be disposed of in the restructuring plan or, failing that, upon the bankruptcy of Jeffrey Mine Inc.

76 The issue of severance pay benefits was also referenced in *Printwest Communications Ltd. v. Saskatchewan Cooperative Financial Services Ltd.*, 2005 SKQB 331 (Sask. Q.B.) at paras. 11 and 15. The application of the Union was rejected:

> ...The claims for severance pay arise from the collective bargaining agreement. But severance pay does not fall into the category of essential services provided during the organization period in order to enable Printwest to function.
>
> . . . . .
>
> If the Union's request should be accepted, with the result that the claims for severance pay be dealt with outside the plan of compromise - and thereby be paid in full - such a result could not possibly be viewed as fair and reasonable with respect to other unsecured creditors, who will possibly receive only a small fraction of the amounts owing to them for goods and services provided to Printwest in good faith. Thus, the application of the Union in this respect must be rejected.

Disposition

77 At the commencement of an insolvency process, the situation is oftentimes fluid. An insolvent debtor is faced with many uncertainties. The statute is aimed at facilitating a plan of compromise or arrangement. This may require adjustments to the operations in a number of areas, one of which may be a downsizing of operations which may involve a reduction in the workforce. These adjustments may be painful but at the same time may be unavoidable. The alternative could very well be a bankruptcy which would leave former employees, both unionized and non-unionized, in the position of having unsecured claims against a bankrupt debtor. Depending on the status of secured claims, these unsecured claims may, subject to benefits arising from the recently enacted *Wage Earner Protection Program Act*, be worth next to nothing.

78 In the days ahead, the Applicants, former employees, both unionized and non-unionized may very well have arguments to make on issues involving claims processes (including the ability of the Applicants to compromise claims), classification, meeting of creditors and plan sanction. Nothing in this endorsement is intended to restrict the rights of any party to raise these issues.

79 The reorganization process under the CCAA can be both long and painful. Ultimately, however, for a plan to be sanctioned by the court, the application must meet the following three tests:

(i) there has to be strict compliance with all statutory requirements and adherence to previous orders of the court;

(ii) nothing has been done or purported to be done that is not authorized by the CCAA;

(iii) the plan is fair and reasonable. *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List])

80 At this stage of the Applicants' CCAA process, I see no basis in principle to treat either unionized or non-unionized employees differently than other unsecured creditors of the Applicants. Their claims are all stayed. The Applicants are attempting to restructure for the benefit of all stakeholders and their resources should be used for such a purpose.

81 It follows that the motion of the Union is dismissed.

82 The Applicants also raised the issue that the Union consistently requested the right to bargain on behalf of retirees who were once part of the Union and that the concession had not been granted. Consequently, the retirees' substantive rights are not part of the bargain between the unionized employees and the employer. Counsel to the Applicants submitted that the union may collectively alter the existing rights of any employee but it cannot negatively do so with respect to retirees' rights.

83 The Union countered that the rights gained by a member of the bargaining unit vest upon retirement, despite the fact that a collective agreement expires, and are enforceable through the grievance procedure.

84 Both parties cited *Dayco (Canada) Ltd. v. C.A.W.*, [1993] 2 S.C.R. 230 (S.C.C.) in support of their respective positions.

85 In view of the fact that this motion has been dismissed for other reasons, it is not necessary for me to determine this specific issue arising out of the *Dayco* decision.

86 The motion of the Former Employees was characterized, as noted above, as a "Me too motion". It was based on the premise that, if the Union's motion was successful, it would only be equitable if the Former Employees also received benefits. The Former Employees do not have the benefit of any enhanced argument based on the Collective Agreement. Rather, the argument of the Former Employees is based on the position that the Applicants cannot contract out of the ESA or any other provincial equivalent. In my view, this is not a case of contracting out of the ESA. Rather, it is a case of whether immediate payout resulting from a breach of the ESA is required to be made. In my view, the analysis is not dissimilar from the Collective Agreement scenario. There is an acknowledgment of the applicability of the ESA, but during the stay period, the Former Employees cannot enforce the payment obligation. In the result, it follows that the motion of the Former Employees is also dismissed.

87 However, I am also mindful that the record, as I have previously noted, makes reference to a number of individuals that are severely impacted by the cessation of payments. There are no significant secured creditors of the Applicants, outside of certain charges provided for in the CCAA proceedings, and in view of the Applicants' declared assets, it is reasonable to expect that there will be a meaningful distribution to unsecured creditors, including retirees and Former Employees. The timing of such distribution may be extremely important to a number of retirees and Former Employees who have been severely impacted by the cessation of payments. In my view, it would be both helpful and equitable if a partial distribution could be made to affected employees on a timely basis.

88 In recognition of the circumstances that face certain retirees and Former Employees, the Monitor is directed to review the current financial circumstances of the Applicants and report back as to whether it is feasible to establish a process by which certain creditors, upon demonstrating hardship, could qualify for an unspecified partial distribution in advance of a general distribution to creditors. I would ask that the Monitor consider and report back to this court on this issue within 30 days.

89 This decision may very well have an incidental effect on the Collective Agreement and the provisions of the ESA, but it is one which arises from the stay. It does not, in my view, result from a repudiation of the Collective Agreement or a contracting out of the ESA. The stay which is being recognized is, in my view, necessary in the circumstances. To hold otherwise, would have the effect of frustrating the objectives of the CCAA to the detriment of all stakeholders.

Motions dismissed.

TAB 4

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	FRIDAY, THE 18TH
	)	
JUSTICE HAINEY	)	DAY OF AUGUST, 2017

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 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**")

EMPLOYEE HARDSHIP FUND ORDER

THIS MOTION, made by the Employee Representative Counsel, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion of Employee Representative Counsel and the Affidavit of Saneliso Moyo, Affirmed August 15, 2017 (the "**Moyo Affidavit**"), and on hearing the submissions of Employee Representative Counsel, counsel for the Applicants (and together with SearsConnect, the "**Sears Canada Entities**"), counsel to the Monitor, and those other parties present:

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 capitalized terms used herein and not otherwise defined shall have the meaning given to them in the Moyo Affidavit.

3. **THIS COURT ORDERS** that the Sears Canada Entities are hereby authorized and directed to establish and create an "Employee Hardship Fund" pursuant to and in accordance with the terms of the Employee Hardship Fund Term Sheet dated August 11, 2017, attached as Schedule "A" to this Order which is hereby approved (the "**Employee Hardship Fund Term Sheet**").

4. **THIS COURT ORDERS** that the employee hardship application process, as described in the Employee Hardship Fund Term Sheet, and utilizing the forms and procedures contained therein, is hereby approved.

5. **THIS COURT ORDERS** that the Sears Canada Entities, the Monitor, Employee Representative Counsel and the Employee Representatives are hereby authorized and directed to implement the Employee Hardship Fund Term Sheet and to take all steps and do all acts necessary or desirable pursuant to and in accordance with the terms of the Employee Hardship Fund Term Sheet.

6. **THIS COURT ORDERS** that the Sears Canada Entities, the Monitor, Employee Representative Counsel and the Employee Representatives shall incur no personal liability or obligation as a result of the performance of their duties in carrying out the provisions of the Employee Hardship Fund Term Sheet or this Order, save and except for liability arising out of

gross negligence or wilful misconduct and, for greater certainty, none of the Monitor or the Hardship Committee (as defined in the Employee Hardship Fund Term Sheet) shall have any personal liability under any circumstances in connection with any assessment or determination on an application by a Former Employee to receive Hardship Payments (as defined in the Employee Hardship Fund Term Sheet).

7. **THIS COURT ORDERS** that, to the extent that payment entitlements under the KERP are directed to the Employee Hardship Fund, the entitlements under the KERP and the KERP Priority Charge (as defined in the Amended and Restated Initial Order) shall be reduced accordingly.

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

Hainey J.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

AUG 2 1 2017

PER / PAR:

SCHEDULE A

August 11, 2017

SEARS CANADA / EMPLOYEE REPRESENTATIVES AND COUNSEL

EMPLOYEE HARDSHIP FUND TERM SHEET

Subject to the terms and conditions set out below, Ursel Phillips Fellows Hopkinson LLP, as employee representative counsel ("**Employee Representative Counsel**") and the Employee Representatives (as defined in the Employee Representative Counsel Order issued by the Ontario Superior Court of Justice (Commercial List) (the "**Court**") on July 13, 2017 in the proceedings (the "**CCAA Proceedings**") of Sears Canada Inc. ("**SCI**") and certain of its subsidiaries (collectively, and together with SCI, the "**Sears Canada Entities**") under the *Companies' Creditors Arrangement Act*) agree not to oppose: (i) the Key Employee Retention Plan (the "**KERP**") approved by the Court in the CCAA Proceedings pursuant to the Amended and Restated Initial Order dated June 22, 2017 (the "**Initial Order**"), and to withdraw with prejudice their responding motion record returnable July 13, 2017, including the Notice of Motion contained therein dated July 12, 2017, to the extent that it deals with the KERP; and (ii) the stay of payment of termination and severance to any former employees of the Sears Canada Entities.[1]

1.	Creation of an Employee Hardship Fund	The Sears Canada Entities, in consultation with FTI Consulting Canada Inc. in its capacity as Court-appointed monitor of the Sears Canada Entities (the "**Monitor**") and Employee Representative Counsel, and with the approval of the Court, shall establish and fund the creation of an "Employee Hardship Fund", in accordance with the terms and conditions set out below.
2.	Notice	Notice of the "Eligibility Criteria" and the "Application Process" set forth below shall be posted on the Monitor's website and the website of Employee Representative Counsel, in the form attached as Appendix "A" to this Term Sheet, subject to any modifications approved by the Court.
3.	Eligibility Criteria	A former employee of any of the Sears Canada Entities (including, for greater certainty, an employee of any of the Sears Canada Entities whose employment is terminated after the date of this Term Sheet) whose entitlement to receive a payment from a Sears Canada Entity has been stayed or suspended pursuant to the CCAA Proceedings may be eligible to receive hardship payments from the Employee Hardship Fund (the "**Hardship Payments**") if: (a) he or she is resident in Canada; (b) he or she has no available source of income, being all monies receivable by the former employee, including, without limitation, employment income such as wages, salary or bonuses, consulting income, or pension income, or unless otherwise determined by the Monitor or, if applicable, the Hardship Committee (as defined below), disability payments or income replacement payments (other than employment insurance ("**EI**") and limited disability payments) (collectively, "**Income**"), as of the date of their application to the Employee

[1] Notwithstanding (ii), Employee Representative Counsel shall be permitted, with the consent of the Sears Canada Entities, to pursue recoveries for former employees of the Sears Canada Entities under the *Wage Earner Protection Program Act*, and nothing in this Term Sheet shall prevent Employee Representative Counsel and/or individual active and former employees of the Sears Canada Entities from making claims for termination and severance in any claims process which may be instituted in the CCAA Proceedings.

Hardship Fund;

(c) he or she has no reasonable expectation of being in receipt of Income during the "Application Period" set forth below; and

(d) he or she:

(i) is unable to work due to illness and is incurring costs in excess of 20% of his or her limited disability payments where he or she has no access to any program which would cover such costs, or is incurring costs in excess of 20% of his or her EI, such costs, in either case, being incurred as a result of treatment for illness or healthcare costs, or as a result of the illness of a family member who is dependent on the former employee for support; or

(ii) is not receiving EI as a result of ineligibility for EI or exhaustion of EI benefits, and demonstrates some other significant hardship in dealing with financial obligations.

In all cases, the former employee must demonstrate urgent or immediate hardship in dealing with their financial obligations and funds must not be available to such former employee from any alternative sources to satisfy the obligations for which the Employee Hardship Fund has been established.

4. Application Process

In order to receive Hardship Payments from the Employee Hardship Fund, a former employee shall be required to complete an application form in the form attached as Appendix "B" to this Term Sheet, subject to any modifications approved by the Court (the "**Application Form**"), and shall be required to submit such Application Form to the Monitor.

The Monitor shall assess completed applications within 14 calendar days and make an initial determination to approve or reject each such application. If approved, the first Hardship Payment will proceed within seven (7) business days following the date of such approval, subject to the payment parameters set out below. If not approved, the application is to be reviewed by an informal committee (the "**Hardship Committee**") and the applicant will be given the right to be heard by such committee. The Hardship Committee shall be composed of one appointee of the Sears Canada Entities, one appointee of Employee Representative Counsel and one appointee of the Monitor, and shall convene meetings (whether in person, by phone or other means) as necessary, but no more than weekly, to review and determine any applications not approved by the Monitor. All decisions of the Hardship Committee shall be final and binding and there shall be no right of appeal, review or recourse to the Court from any of the Hardship Committee's decisions.

5. Payment Parameters

Any successful applicant may be approved for a maximum payment of up to eight (8) weeks' of the applicant's regular wages (as determined by applicable employment standards legislation) up to a

maximum weekly amount of $1,200 per week, payable in monthly installments. The Hardship Committee shall have the discretion to approve additional amounts in cases of medical and other emergencies in an amount up to $2,500.

In determining the amount to be paid, the Monitor and, if applicable, the Hardship Committee, shall consider the amount payable to the applicant from a Sears Canada Entity which has been stayed or suspended under the CCAA Proceedings (the "**Stayed Amount Owing**"). Payment to an applicant shall only exceed the Stayed Amount Owing in exceptional circumstances.

All Hardship Payments are subject to all applicable tax and other withholdings, which shall not be incremental obligations of the Sears Canada Entities.

6. Maximum Employee Hardship Fund Amount

The Sears Canada Entities shall contribute to the Employee Hardship Fund an aggregate, maximum amount of no more than $500,000, as follows:

(a) upon Court approval of this Term Sheet[2], $300,000 from otherwise earned but foregone executive payment entitlements under the KERP; and

(b) following the second installment payment date under the KERP, up to $200,000 from otherwise earned but foregone executive payment entitlements under the KERP.

No additional contributions to the Employee Hardship Fund shall be made by the Sears Canada Entities for the duration of the CCAA Proceedings without further order of the Court and unless: (i) the DIP Facilities (as defined in the Initial Order) have been repaid in full and have been terminated; (ii) the DIP ABL Agent and the DIP Term Agent (as each such term is defined in the Initial Order) have consented to such contribution; or (iii) such contribution is made from further otherwise earned but foregone payment entitlements to the first installment payment and/or the second installment payment under the KERP. For greater certainty, there is no obligation to increase the Maximum Employee Hardship Fund Amount without Court approval, even if (i), (ii) or (iii) above occur.

Any amounts remaining in the Employee Hardship Fund upon the termination of the CCAA Proceedings shall be forthwith returned to the Sears Canada Entities with no further claims thereon.

7. Application Period

From the date of Court approval of the Employee Hardship Fund to October 4, 2017, or in the event of the extension of the stay of proceedings, such further date as determined by the Court.

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[2] The order of the Court approving this Term Sheet shall provide that any foregone executive payment entitlements under the KERP directed to fund the Employee Hardship Fund shall correspondingly reduce the KERP entitlements and the KERP Priority Charge (as defined in the Initial Order).

8.	Terms and Conditions	Any Hardship Payments made to any former employee of the Sears Canada Entities shall be deducted from any payments on claims that may be allowed in any claims process conducted by the Sears Canada Entities in the CCAA Proceedings or any related bankruptcy, receivership or insolvency proceeding, but in no case shall any recipient be required to return any Hardship Payments received.
9.	Reporting	The Monitor shall report to the Court on or before October 4, 2017, with respect to the processing and administration of Hardship Payment applications.

Appendix "A"

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., 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.

NOTICE RESPECTING HARDSHIP PAYMENT APPLICATIONS

On August ●, 2017, the Honourable Mr. Justice Hainey approved a process for former employees 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., 3339611 Canada Inc. and SearsConnect, who are experiencing financial hardship to apply to receive payment from the Employee Hardship Fund. The eligibility requirements and application process that have been approved by the Court are attached to this notice.

Eligibility Requirements and Procedure with Respect to Hardship Payment Application

1. **Eligibility** – A former employee of any of the Sears Canada Entities[1] whose entitlement to receive a payment from a Sears Canada Entity has been stayed or suspended pursuant to the proceedings of the Sears Canada Entities under the *Companies' Creditors Arrangement Act* (the "**CCAA Proceedings**") may be eligible to receive hardship payments from the Employee Hardship Fund (the "**Hardship Payments**") if:

   (a) he or she is resident in Canada;

   (b) he or she has no available source of income, being all monies receivable by the former employee, including, without limitation, employment income such as wages, salary or bonuses, consulting income, or pension income, or unless otherwise determined by the Monitor or, if applicable, the Hardship Committee (as defined below), disability payments or income replacement payments (other than employment insurance ("**EI**") and limited disability payments) (collectively, "**Income**"), as of the date of their application to the Employee Hardship Fund,

   (c) he or she has no reasonable expectation of being in receipt of Income during the "Application Period" set forth below; and

   (d) he or she:

      (i) is unable to work due to illness and is incurring costs in excess of 20% of his or her limited disability payments where he or she has no access to any program which would cover such costs, or is incurring costs in excess of 20% of his or her EI, such costs, in either case, being incurred as a result of treatment for illness or healthcare costs, or as a result of the illness of a family member who is dependent on the former employee for support; or

      (ii) is not receiving EI as a result of ineligibility for EI or exhaustion of EI benefits, and demonstrates some other significant hardship in dealing with financial obligations.

   In all cases, the former employee must demonstrate urgent or immediate hardship in dealing with their financial obligations and funds must not be available to such former employee from any alternative sources to satisfy the obligations for which the Employee Hardship Fund has been established.

2. **Application Process** – In order to receive Hardship Payments from the Employee Hardship Fund, a former employee shall be required to complete the application form for hardship payments (the "**Application Form**") found on the websites of FTI Consulting Canada Inc. in its capacity as Court-appointed monitor of the Sears Canada Entities (the "**Monitor**") or Ursel Phillips Fellows Hopkinson LLP, as employee representative counsel ("**Employee Representative Counsel**"), and shall be required to submit the Application Form to the Monitor at the address set forth therein.

   The Monitor shall assess completed applications within 14 calendar days and make an initial determination to approve or reject each such application. If approved, the first Hardship Payment will proceed within seven (7) business days following the date of such approval, subject to the

---

[1] The "Sears Canada Entities" are 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., 3339611 Canada Inc. and SearsConnect.

payment parameters set out below. If not approved, the application is to be reviewed by an informal committee (the "**Hardship Committee**") and the applicant will be given the right to be heard by such committee. The Hardship Committee shall be composed of one appointee of the Sears Canada Entities, one appointee of Employee Representative Counsel and one appointee of the Monitor, and shall convene meetings (whether in person, by phone or other means) as necessary, but no more than weekly, to review and determine any applications not approved by the Monitor. All decisions of the Hardship Committee shall be final and binding and there shall be no right of appeal, review or recourse to the Ontario Superior Court of Justice (Commercial List) (the "**Court**") from any of the Hardship Committee's decisions.

3. **Payment Parameters** – Any successful applicant may be approved for a maximum payment of up to eight (8) weeks' of the applicant's regular wages (as determined by applicable employment standards legislation) up to a maximum weekly amount of $1,200 per week, payable in monthly installments. The Hardship Committee shall have the discretion to approve additional amounts in cases of medical and other emergencies in an amount up to $2,500.

   In determining the amount to be paid, the Monitor and, if applicable, the Hardship Committee, shall consider the amount payable to the applicant from a Sears Canada Entity which has been stayed or suspended under the CCAA Proceedings (the "**Stayed Amount Owing**"). Payment to an applicant shall only exceed the Stayed Amount Owing in exceptional circumstances.

   All Hardship Payments are subject to all applicable tax and other withholdings, which shall not be incremental obligations of the Sears Canada Entities.

4. **Application Period** – From the date of Court approval of the Employee Hardship Fund to October 4, 2017, or in the event of the extension of the stay of proceedings, such further date as determined by the Court.

5. **Miscellaneous**

   (a) Any Hardship Payments made to any former employee of the Sears Canada Entities shall be deducted from any payments on claims that may be allowed in any claims process conducted by the Sears Canada Entities in the CCAA Proceedings or any related bankruptcy, receivership or insolvency proceeding, but in no case shall any recipient be required to return any Hardship Payments received.

   (b) The Sears Canada Entities shall contribute to the Employee Hardship Fund an aggregate, maximum amount of no more than $500,000, as follows:

      (i) upon Court approval of the Employee Hardship Fund, $300,000 from otherwise earned but foregone executive payment entitlements under the Key Employee Retention Plan (the "**KERP**") approved by the Court in the CCAA Proceedings; and

      (ii) following the second installment payment date under the KERP, up to $200,000 from otherwise earned but foregone executive payment entitlements under the KERP.

Appendix "B"

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., 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.

APPLICATION FORM FOR HARDSHIP PAYMENTS

APPLICANT INFORMATION

1. Name: _____
2. Address: _____

   _____
3. Telephone Number(s): _____
4. Email Address: _____
5. Social Insurance Number: _____
6. Sears Canada Employee Number: _____

SEARS CANADA EMPLOYMENT INFORMATION

1. Date Employment with Sears Canada Began: _____
2. Date Employment with Sears Canada Terminated: _____
3. Province or Region employed in: _____
4. Store or Head Office: _____ Store No.: _____
5. Position: _____
6. Gross Monthly Income: $ _____
7. If any, amount of severance received: _____
8. If eligible, date of eligibility to receive Sears Canada pension: _____

CURRENT SOURCES OF INCOME

1. Employment Insurance:

    a. Amount: _____

    b. Actual/Expected End Date: _____

    c. If no EI, or EI terminated, reason(s):
    _____
    _____
    _____

2. Social Assistance:

    a. Type of Social Assistance: _____

    b. Commencement Date: _____

    c. Amount: _____

    d. Actual/Expected End Date:
    _____

    e. If social assistance is being terminated, reason(s) why:
    _____
    _____
    _____

3. Other Sources of Income (including LTD, other disability payments, other employment, pension, workers' compensation, etc.):
    _____

    a. Amount: _____

    b. Actual/Expected End Date: _____

4. Provincial Drug Benefit Programs:

    a. Have you applied for, or been granted, any provincial drug benefit program? If so, which program?
    _____
    _____

    b. What are the conditions of your receiving this benefit?
    _____
    _____
    _____

    c. Why does this benefit not cover your needs?
    _____
    _____
    _____

5. Other Extended Health and Dental Benefits:

    a. Do you have access to other extended health and dental benefits through a family member (i.e. a spouse)?

    _____

    b. If so, please explain how those benefits do not cover your needs:

    _____
    _____
    _____

6. Other Sources of Income:

    a. Gross yearly income of your spouse? _____

PERSONAL CIRCUMSTANCES REQUIRING HARDSHIP PAYMENT

Medical expenses for self or dependent (including nature of expense, amount, whether can be reimbursed from another source):

_____
_____
_____
_____

Other reason for immediate or urgent need for funds (for example, risk of loss of housing in the next 30 days):

_____
_____
_____
_____

I certify the contents hereof to be true and that I have obtained all necessary consents for the disclosures set forth herein.

_____ _____ _____

Witness Signature Date

Please deliver your completed application form to the Monitor at the following address:

FTI Consulting Canada Inc., in its capacity as Court Appointed Monitor of Sears Canada Inc. et al.
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, Ontario M4K 1G8
Fax: (416) 649-8101
Email: searscanada@fticonsulting.com

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 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. (collectively, the "Applicants")

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

EMPLOYEE HARDSHIP FUND ORDER

Ursel Phillips Fellows Hopkinson LLP
555 Richmond St. W., Suite 1200
Toronto, Ontario M5V 3B1

Susan Ursel LS#: 26024G
Email: sursel@upfhlaw.ca
Tel: (416) 969-3515

Ashley Schuitema LS#: 68257G
Email: aschuitema@upfhlaw.ca
Tel: (416) 969-3062

Fax: (416) 968-0325

Employee Representative Counsel

TAB 5

See para. 4

2015 ONCA 405
Ontario Court of Appeal

Himel v. Molson

2015 CarswellOnt 8395, 2015 ONCA 405, 255 A.C.W.S. (3d) 104

Evelyn Himel, Plaintiff (Respondent/Appellant by way of cross-appeal) and David Molson and Leslie Toth, Defendants (Appellant/ Respondent by way of cross-appeal) and Lee Edward Fingold, Third Party

R.G. Juriansz J.A., P. Lauwers J.A., Grant Huscroft J.A.

Heard: June 1, 2015
Judgment: June 1, 2015
Docket: CA C58944

Proceedings: affirming *Himel v. Molson* (2014), 2014 ONSC 3155, 2014 CarswellOnt 6963, D.L. Corbett J. (Ont. S.C.J.)

Counsel: Charles Sinclair, for Appellant, David Molson
Harvey J. Ash, for Respondent, Evelyn Himel

***R.G. Juriansz J.A., P. Lauwers J.A., Grant Huscroft J.A.*:**

1 We find the appellant's grounds of appeal to be without merit, for the following reasons:

2 First, the trial judge applied the correct standard of proof, which is the balance of probabilities: *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40.

3 Second, it is not for this court to review the trial judge's credibility findings in the absence of a palpable and overriding error, which the appellant has not made out.

4 Third, the trial judge had the discretion to draw the adverse inferences he did from Mr. Molson's failure to testify in response to the evidence of Dr. Toth and Mr. Fingold, and his failure to explain the presence in his file of the allegedly forged direction not to seek an appraisal of the investment property: *Lawyers' Professional Indemnity Co. v. Geto Investments Ltd.* (2007), 51 C.C.L.I. (4th) 74, at para. 93. It appears that Mr. Molson's failure to testify was a tactical defence decision, and there is no reason to relieve him of the consequences of that call.

5 Similarly, it was open to the trial judge to refuse to draw an adverse inference from the respondent's failure to call the vendors of the investment property, the Holdens, or their lawyers as witnesses.

6 Finally, no submissions were made against the punitive damages award and we see no reason to disturb it.

7 Both issues raised by the respondent in the cross-appeal were within the trial judge's discretion. First, although the trial judge had discretion to order a higher interest rate than that provided for in the *Courts of Justice Act*, R.S.O. 1990, c. C.43, he expressly declined to do so in view of his decision to award punitive damages at $30,000. This remedial structure was open to the trial judge.

8 Second, in deciding to award substantial indemnity costs in the amount of the respondent's full bill of costs, the trial judge noted that this was a straightforward claim, the costs were high relative to the judgment amount, and the trial did not require the most senior solicitors. These are relevant factors and the trial judge did not err in taking them into account.

9 Accordingly, the appeal and the cross-appeal are dismissed.

10 Costs are fixed at $14,000, all inclusive, to the respondent.

Defendant M appealed; plaintiff cross-appealed.

SEARS CANADA INC., by its Court-appointed Litigation Trustee, J. Douglas Cunningham, Q.C. Plaintiff	-and-	ESL INVESTMENTS INC. et al. Defendants	Court File No. CV-18-00611214-00CL
FTI CONSULTING CANADA INC. Plaintiff	-and-	ESL INVESTMENTS INC. et al. Defendants	Court File No. CV-18-00611219-00CL
MORNEAU SHEPELL LTD. Plaintiff	-and-	ESL INVESTMENTS INC. et al. Defendants	Court File No. CV-18-00611217-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

JOINT BOOK OF AUTHORITIES OF THE MONITOR, THE LITIGATION TRUSTEE, AND THE PENSION ADMINISTRATOR (TIMETABLE MOTION)

BLAKE, CASSELS & GRAYDON LLP
199 Bay Street, Suite 4000
Commerce Court West
Toronto, ON M5L 1A9

Michael Barrack LSO #21941W
michael.barrack@blakes.com
Tel: 416 863 5280
Kathryn Bush LSO #23636O
kathryn.bush@blakes.com
Tel: 416 863 2633
Kiran Patel LSO #58398H
kiran.patel@blakes.com
Tel: 416 863 2205
Fax: 416 863 2653
Lawyers for Morneau Shepell Ltd., in its capacity as administrator of the Sears Canada Inc. Registered Retirement Plan

NORTON ROSE FULBRIGHT CANADA LLP
222 Bay Street, Suite 3000,
P.O. Box 53
Toronto ON M5K 1E7

Orestes Pasparakis LSO#: 36851T
orestes.pasparakis@nortonrosefulbright.com
Tel: 416 216 4815
Robert Frank LSO#: 35456F
robert.frank@nortonrosefulbright.com
Tel: 416 202 6741
Evan Cobb LSO#: 55787N
evan.cobb@nortonrosefulbright.com
Tel: 416 216 1929
Fax: 416 216 3930

Lawyers for FTI Consulting Canada Inc., in its capacity as Court-appointed monitor

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Matthew P. Gottlieb LSO#: 32268B
mgottlieb@lolg.ca
Tel: 416 644 5353
Andrew Winton LSO#: 54473I
awinton@lolg.ca
Tel: 416 644 5342
Philip Underwood LSO#: 73637W
punderwood@lolg.ca
Tel: 416 645 5078
Fax: 416 598 3730

Lawyers for Sears Canada Inc., by its Court-appointed Litigation Trustee, J. Douglas Cunningham, Q.C.