

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C.
1985, c.C -36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
SEARS CANADA INC., 9370-2751 QUEBEC INC., 191020 CANADA INC., THE CUT
INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC.,
INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP.,
SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089
ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580
ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886
CANADA INC. AND 3339611 CANADA INC.

NOTICE OF CONSTITUTIONAL QUESTION

The respondent, Ursel Phillips Fellows Hopkinson LLP in its capacity as representative counsel ("**Employee Representative Counsel**") to the court-appointed representatives of the Employees (as defined below) intends to question the constitutional applicability of ss. 57(4), 57(5), 66 and 86 of the *Pension Benefits Act*, RSO 1990, c P.8 and the analogous sections in the pension legislation of other Provinces.

The question is to be argued on Thursday, November 1, 2018 at 10am at 330 University Avenue, Toronto, ON.

The following are the material facts giving rise to the constitutional question:

1. Sears Canada Inc. (“Sears”), 9370-2751 Québec Inc. (formerly Corbeil Électrique Inc.) (“**Former Corbeil**”), 191020 Canada Inc. (formerly S.L.H. Transport Inc.) and 168886 Canada Inc. (together “**Former SLH**”, and collectively with Sears and Corbeil, the “**Employers**”), among others, were granted protection from their creditors under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended (the “**CCAA**”) pursuant to an initial order of the Ontario Superior Court of Justice (Commercial List) granted on June 22, 2017 (as amended and restated, the “**Initial Order**”);
2. The Initial Order granted a stay of proceedings (the “**Stay of Proceedings**”) in favour of the Employers, among others, until July 22, 2017, which period has since been extended by the Court and which currently expires December 18, 2018;
3. Pursuant to an employee representative counsel order issued by the Court on July 13, 2017 (the “**Employee Representative Counsel Order**”), Ursel Phillips Fellows Hopkinson LLP was appointed as Employee Representative Counsel to represent the interests of the approximately 22,000 non-unionized Active Employees and Former Employees of the Sears Canada Entities, excluding any Opt-Out Individuals (as each such term is defined in the Employee Representative Counsel Order) (collectively, the “**Employees**”) for the purposes set out in such Order. The Employee Representative Counsel Order also appointed five individuals as representatives of all Employees to act in the overall

best interests of the Employees, and to advise and where appropriate instruct Employee Representative Counsel;

4. As at the date hereof, and further to the claims methodologies set out in the employee and retiree claims procedure order granted by the Court on February 22, 2018, the Applicants are indebted to the Employees in an amount claimed to be not less than \$191,668,000.00;

5. On August 24, 2018, Morneau Shepell Ltd., in its capacity as Administrator (the **“Plan Administrator”**) of the Sears Canada Inc. Registered Retirement Plan (the **“Pension Plan”**) and the Superintendent of Financial Services in his capacity as Administrator of the Ontario Pension Benefits Guarantee Fund (the **“Superintendent”**) jointly served a motion (the **“Administrators’ Deemed Trust Motion”**) seeking an order, among other things, that:
 - (a) the Employers, be deemed to hold all assets and proceeds therefrom (the **“Proceeds”**) up to the amount due by them in respect of the wind up of the Pension Plan in trust for the beneficiaries of the Pension Plan (such amount being the **“Wind-Up Deficiency”**);

 - (b) the Plan Administrator has a lien and charge attached to the Proceeds for the amounts due the wind-up of the Pension Plan by the Employers;

 - (c) the Superintendent has a lien and charge attached to the Proceeds as security for any funds that are paid out of Ontario’s Pension Benefit Guarantee Fund in respect of the Wind-Up Deficiency; and

- (d) such claims in respect of the Wind-Up Deficiency have priority to the claims of all other creditors of the Employers, including the Employees represented by Employee Representative Counsel;
6. The Administrators' Deemed Trust Motion follows a motion (the "**Pensioners' Deemed Trust Motion**") served on July 20, 2018 by Representative Counsel to the court-appointed representatives of employees and retirees of the Sears Canada Entities with respect to pensions and post-retirement benefits, which motion seeks substantially similar relief as the Administrators' Deemed Trust Motion (together with the Pensioners' Deemed Trust Motion, the "**Deemed Trust Motions**") but in respect of the assets and proceeds of Sears only and not those of Former SLH or Former Corbeil;
7. On September 7, 2018, Employee Representative Counsel served a motion seeking an order, among other things, lifting the Stay of Proceedings to permit Employee Representative Counsel, on behalf of the Employees, to issue an Application for a Bankruptcy Order in respect of each of the Employers (with such applications being collectively, the "**Bankruptcy Applications**");

The following is the legal basis for the constitutional question:

1. Recognition of a priority interest in favour of the Pension Plan and/or the Superintendent pursuant to sections 57(4), 57(5), 66 and/or 86 of the *Pension Benefits Act* and the analogous sections in the pension legislation of other Provinces is inconsistent with and would frustrate the purposes of the CCAA, and

these provisions are therefore constitutionally inapplicable under the doctrine of federal paramountcy;

2. In respect of the Bankruptcy Applications, recognition of a priority interest in favour of the Pension Plan and/or the Superintendent pursuant to sections 57(4), 57(5), 66 and/or 86 of the *Pension Benefits Act* and the analogous sections in the pension legislation of other Provinces is inconsistent with and would frustrate the purposes of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended, and these provisions are therefore constitutionally inapplicable under the doctrine of federal paramountcy.

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