

**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.

(each an "**Applicant**", and collectively, the "**Applicants**")

FACTUM

**(For an order appointing Hon. Frank Newbould as Litigation Trustee,
returnable February 15, 2018)**

February 14, 2018

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TO: THE SERVICE LIST

PART I — INTRODUCTION

1. Representative Counsel ("**Representative Counsel**") for the court-appointed Representatives of the retirees and active and former employees of the Applicants (collectively, "**Sears Canada Entities**") with pension and benefit entitlements (the "**Representatives**") have brought a motion for an Order appointing The Hon. Frank Newbould, Q.C. as Litigation Trustee for the benefit of the creditors of the estates of the applicants (the "**Litigation Trustee Order**").

2. There are approximately 18,000 retiree creditors of the Sears Canada Entities across Canada who are represented by the Representatives pursuant to an Order of the Court dated July 13, 2017 (the "**Representation Order**").¹

Urgent need to appoint Mr. Newbould as Litigation Trustee at this time

3. Sears Canada Inc. ("**Sears Canada**") filed for CCAA protection on June 22, 2017. It did not restructure. It rapidly liquidated all of its store inventory and sold its real estate assets. An attempt at going-concern transactions to continue the operation of certain stores was not successful.

4. As a liquidated estate of a closed down company, the estate of Sears Canada is dissipating. Such a situation reduces creditor recoveries with the passage of time. In addition to major creditor groups supporting the appointment of Mr. Newbould as Litigation Trustee, it is urgent that a Litigation Trustee be appointed at this time for the following additional reasons:

¹ The Affidavit of William Turner sworn February 12, 2018 (the "**Feb 12th Turner Affidavit**") Applicants' Motion Record, Tab 2 at para 1.

- (a) There are no further material assets to realize. The amount of creditors' claims are expected to be multiples of that amount. There will be a significant shortfall in paying creditors' claims, including the claims of retirees for pension losses and health and life insurance benefits losses;
- (b) The professional costs charged to the estate of Sears Canada for legal, financial advisors, DIP lender charges, are substantial. The Monitor reported in its 11th Report at para. 59 (attached as Schedule "C" hereto) that as of January 15, 2018, \$53 million has already been charged to the estate covering a six-month period only. Further delays in the appointment of the Litigation Trustee and further meetings and protected discussions will only cause further unnecessary expenses to the estate;
- (c) In 2018, the Monitor's 10th Report dated January 11, 2018, the Monitor reported at paras. 50-54 that it was investigating certain transactions that it referred to as "Transactions of Interest" relating to past dividend declarations (described further herein) and also investigating whether such dividends would constitute a reviewable transaction at undervalue. By publicizing its investigations in a Report, the Monitor has revealed that potential litigation against certain defendants is under consideration;
- (d) The concerns regarding delays in the commencement of litigation such as loss of evidence, loss of witnesses, and other factors all potentially threaten the prospects of litigation and, if successful, collecting on judgments;

- (e) Representative Counsel has been in discussions with major landlord creditors, Representative Counsel to the employees, class action plaintiffs, counsel to the Ontario Superintendent of Financial Services (Paliare Roland), and counsel to Morneau Shepell, the successful replacement pension plan administrator (Blakes LLP) since December, 2017, about the appointment of a Litigation Trustee. On January 17, 2018, all these counsel met with the Monitor to convey a proposal that Mr. Newbould be appointed by the Court as Litigation Trustee. The Monitor then met with Mr. Newbould. Blakes prepared the initial draft Order for the appointment of Mr. Newbould and provided it to Mr. Newbould for his review. Soon after that, the Superintendent and Morneau abruptly changed course and withdrew their support for Mr. Newbould. Despite extensive efforts and meetings to identify legitimate reasons for the withdrawal of support so they could be addressed, including concerns over a perceived conflict of interest, (which did not exist but in any event was addressed) no consensus could be regained with the Superintendent and Morneau for the appointment of Mr. Newbould. No consensus appears to be achievable in the near term and the passage of time and all the other deleterious factors noted above continue.

Accordingly, it is important to bring this issue to resolution with the appointment of Mr. Newbould so that the claims of the estate can proceed in a centralized, organized and cost-effective manner for the benefit of all creditors of Sears Canada.

The retirees are a significant creditor group

a) Pension benefits

5. During their employment years, employees of Sears Canada earned pension benefits that are to be paid to them during their retirement years for their lifetimes. The benefits are paid monthly from the Sears Canada Inc. Registered Retirement Plan (the "**Sears Canada Plan**") that Sears Canada established to pay the benefits. Sears Canada is obligated to fund the Sears Canada Plan appropriately so that the fund of the plan has sufficient assets to pay the full benefit amounts earned by the employees when they retire.²

6. Sears Canada is liquidated and no longer operating any business. The Sears Canada Plan is underfunded by approximately \$270 million. As a result of the underfunding, the retirees are facing significant losses to their monthly benefits.³

7. The pension benefits are the deferred wages for work they performed for Sears Canada Entities and are critical to their livelihoods in their elderly years:

[23]...[I]n *IBM Canada Limited v. Waterman*, 2013 SCC 70, [2013] 3 S.C.R. 985, Cromwell J., for the majority, wrote:

[85] Pension benefits have consistently been viewed as an entitlement earned by the employee. As Lord Reid put it in *Parry [v. Cleaver]*, [1970] A.C. 1], at p. 16: "The products of the sums paid into the pension fund are in fact delayed remuneration for [the employee's] current work. That is why pensions are regarded as earned income." The pension is therefore a form of retirement savings earned over the years of employment to which the employee acquires specific and enforceable rights...⁴

² Feb 12th Turner Affidavit, Applicants' Motion Record, Tab 2, at para 6.

³ Feb 12th Turner Affidavit, Applicants' Motion Record, Tab 2 at paras 7, 23.

⁴ *Reference re Section 32 of the Pension Benefits Act, 1997, Re*, 2018 NLCA 1, Applicants' Book of Authorities ("**Appellants' BOA**"), Tab 1, at para 23.

b) Retiree health and life insurance benefits ("OPEBs")

8. In addition to pension benefits, Sears Canada retirees also earned entitlements to health and life insurance benefits; ("**other post-employment benefits**"; "**OPEBs**") also payable to them in their retirement years. As of September 30, 2017, Sears Canada terminated payment of all OPEBs. The estimated liability for OPEBs owing to the retirees is approximately \$400 million. Combined with the pension plan funding shortfall by Sears Canada of \$270 million, this makes the Sears Canada pensioners who are represented by the moving party Representatives the largest creditor of the Sears Canada Entities, both in terms of number of creditors and the amount of debt owing.⁵

PART II – THE FACTS

The collapse of Sears Canada

9. In 2005, Sears Canada came under the control of a U.S. hedge fund called ESL Investments ("**ESL**") run by Edward Lampert. ESL as shareholder of Sears Canada and who, along with its share ownership in Sears Holdings in the United States, was at all material times the major controlling shareholder of Sears Canada.⁶

10. Since that time, Sears Canada's retail business has steadily deteriorated which culminated in its insolvency and liquidation in June, 2017. In the years prior to applying the CCAA protection in June, 2017, Sears Canada sold off significant assets, declared substantial dividends

⁵ Feb 12th Turner Affidavit at para 11.

⁶ Feb 12th Turner Affidavit at para 14.

paid to shareholders, in particular ESL and Mr. Lampert, and drastically reduced its investment and commitment to the retail business of the company.⁷

11. Since 2008, it has been reported in the company's actuarial reports that the Sears Canada Plan was underfunded on a wind-up basis. That means that on the termination of the plan, there are insufficient assets to pay the pension benefits that were earned by employees during their working lives in full. If the underfunding amount is not paid, then the monthly pension benefits will be reduced, causing financial hardship to Sears Canada retirees and their families across Canada.⁸

12. In the years leading up to the insolvency, a Sears Canada Retiree Group ("SCRG") was formed on behalf of Sears Canada retirees, which raised its concerns about the underfunding of the Sears Canada Plan, the company's failing business strategy, and the continuing decline in the company's financial performance, with Sears Canada, ESL, its directors, and the Ontario pension regulator, the Ontario Superintendent of Financial Services (the "Superintendent" or "FSCO").⁹

13. Despite the company's continued financial deterioration, the Sears Canada board of directors approved the payment of dividends to its shareholders as follows:¹⁰

	Dividend Amount
December 9, 2005	\$1,557,000,000
May 11, 2006	\$13,000,000
September 20, 2010	\$753,000,000
December 20, 2012	\$102,000,000
December 9, 2013	\$509,000,000
Total	\$2,934,000,000

⁷ Feb 12th Turner Affidavit at paras 15-18.

⁸ Feb 12th Turner Affidavit at para 19.

⁹ Feb 12th Turner Affidavit at para 16.

¹⁰ Feb 12th Turner Affidavit at para 17.

14. ESL and Mr. Lampert were the major beneficiaries of the dividend payments.¹¹
15. On January 20, 2014, SCRG demanded that Sears Canada cease paying dividends. After that letter, Sears Canada appears to have ceased declaring any further dividends.¹²
16. Nevertheless, the financial deterioration of Sears Canada's retail business continued and the wind up deficit in the Sears Canada Plan worsened. The actuarial reports indicate that the wind up deficit amounts were:¹³

	Pension Plan Wind-up Underfunding
December 31, 2007	\$36 million
December 31, 2010	\$307 million
December 31, 2013	\$133 million
December 31, 2015	\$267 million

Correspondence and actions by Retirees prior to the CCAA filing

17. In the years following the assumption of control of Sears Canada by Mr. Lampert and ESL, SCRG became increasingly concerned about Sears Canada's financial deterioration and the resulting threat to the security of their earned pension benefits payable to them from the underfunded Sears Canada Plan. SCRG wrote to Sears Canada objecting to dividend payments and other actions and inactions of the company and its management.¹⁴ SCRG also wrote to the Superintendent and FSCO voicing similar objections and identifying concerns and problems with the underfunded Sears Canada Plan.¹⁵

¹¹ 2016 Form 10-K, Sears Holdings Corporation, dated March 21, 2017, at p. 74-75, Affidavit of Jules Monteyne, sworn February 14, 2018, Exhibit "A".

¹² Feb 12th Turner Affidavit at para 19.

¹³ *Ibid.*

¹⁴ Affidavit of William Turner, sworn August, 11, 2017, ("**Aug 11 Turner Affidavit**"), Applicants' Motion Record, Tab 4, at paras. 25-29.

¹⁵ Supplemental Affidavit of William Turner, sworn February 14, 2018 ("**Supplemental Turner Affidavit**"), at paras. 5-6.

18. SCRG also specifically requested that both Sears Canada and the Superintendent to wind up the Sears Canada Plan. The wind-up at that time would have required Sears Canada to immediately fund the Sears Canada Plan's wind-up deficit in full. The wind-up of the Sears Canada Plan would have also severed the retirees and their earned pension benefits from Sears Canada's failing retail business.¹⁶

19. Despite these requests, Sears Canada refused to wind up the Sears Canada Plan, and the Superintendent did not order the wind up of the Sears Canada Plan.¹⁷

20. On June 22, 2017, Sears Canada applied for protection from its creditors under the CCAA.¹⁸

21. Three retirees of the SCRG Executive who are former executives of Sears Canada (Ken Eady, William Turner, and Larry Moore) were appointed by the court as the Representatives of all the 18,000 Sears Canada retirees across Canada.¹⁹

22. While under CCAA protection, Sears Canada has not restructured. It has liquidated all its inventory, sold its real estate interests, shut down its business and terminated the vast majority of its employees.

23. There will be a significant shortfall in paying creditors' claims.²⁰

¹⁶ Feb 12th Turner Affidavit at para 20.

¹⁷ Feb 12th Turner Affidavit at para 21.

¹⁸ Feb 12th Turner Affidavit at para 22.

¹⁹ Feb 12th Turner Affidavit at para 5.

²⁰ Feb 12th Turner Affidavit at para 24.

24. On October 17, 2017, the Superintendent/FSCO appointed the actuarial firm of Morneau Shepell Ltd. ("**Morneau**") as the administrator of the Sears Canada Plan, replacing Sears Canada as the administrator.

25. On December 8, 2017, Morneau wrote to all the Sears Canada Plan members stating that due to the pension underfunding, reductions to monthly pension benefits are expected. The timing of the monthly reductions has not yet been confirmed.

The Monitor's investigation of certain transactions post-CCAA filing

26. In the Fall of 2017, the Representatives gave copies of SCRG's past correspondence that it had sent to Sears Canada, the board of directors, and ESL to the Monitor. The Monitor has since been investigating certain past transactions.²¹ As reported in the 11th Monitor's Report dated January 15, 2018:

50. The Monitor is carrying out a review (the "**Review**") of certain material transactions, payments and dividends entered into, made or declared by the Sears Canada Entities in the period prior to their filing for protection under the CCAA. The Review is focused primarily on potential reviewable transactions and transfers at undervalue pursuant to sections 95 and 96 of the *Bankruptcy and Insolvency Act* (Canada) and section 36.1(1) of the CCAA.

51. To date, the Monitor has identified the following potential transactions of interest (the "Transactions of Interest"):

(a) the dividend paid to certain Sears Canada shareholders on December 31, 2012 in the amount of approximately \$102 million (the "2012 Dividend");

(b) the dividend paid to certain Sears Canada shareholders on December 6, 2013 in the amount of approximately \$509 million (the "2013 Dividend"); and

(c) the surrender by Sears Canada of its exclusive right to use the Craftsman trademark in Canada in connection with the sale by

²¹ Feb 12th Turner Affidavit at para 25.

Sears Holdings Corporation of the Craftsman business to Stanley Black & Decker in March 2017.

...

53. Based on the Monitor's preliminary findings, the Monitor is of the view that further review of the Transactions of Interest is appropriate. The Monitor is undertaking appropriate steps to gather and review additional relevant information, including engaging with certain independent directors and senior Sears Canada management personnel, who had direct involvement in all or some of the Transactions of Interest.

54. The Monitor has not completed its review of material transactions and will report to the Court if other potentially reviewable material transactions are identified.²²

27. The Monitor's investigations to date do not cover all potential claims that may be advanced by the Sears Canada Entities against all potential defendants. In particular, it does not cover possible and important claims against the directors and other senior management individuals.

The need for the Litigation Trustee for Sears Canada

28. In order to coordinate and organize all potential claims for the benefit of the estate and its creditors as a whole, in a comprehensive and efficient manner, and to coordinate with the work done to date by SCRG and the Monitor effectively and in a cost-effective manner, it is appropriate to appoint a Litigation Trustee for the benefit of all creditors of the estate of Sears Canada.²³

29. The actions taken or not taken by various parties in the years prior to the insolvency and commencement of these insolvency proceedings warrant a detailed review by a Litigation Trustee to determine if such actions or inactions caused, contributed to or precipitated the

²² 11th Report of the Monitor.

²³ Feb 12th Turner Affidavit at para 27.

insolvency and the losses suffered by creditors of the Sears Canada Entities such that causes of action exist.

30. Certain class action claims have already been issued against the Sears Canada Entities and other defendants, some of which are stayed by the CCAA stay of proceedings.

31. A Litigation Trustee appointed by the Court as a court officer will be in a position to review and consider the universe of potential litigation paths that currently exist or may be brought, obtain input from affected creditors and other stakeholders, consider and develop a framework for governance of a Committee of interested stakeholders for consultation and, if deemed advisable, for instructions, and make recommendations for proceeding in a manner that is most likely to produce the greatest recovery for creditors.

32. In order to avoid a multiplicity of proceedings or creditors commencing or continuing separate actions against some of the same defendants, the appointment of the Litigation Trustee is appropriate.

The role of the Litigation Trustee

33. The role of the proposed Litigation Trustee will be to act for the benefit of the estate and its creditors in respect of actions and claims that may be advanced in order to increase the amount available for distributions to creditors of Sears Canada. The mandate of the Litigation Trustee is to proceed in two stages. First, a detailed review will be undertaken and a report will be prepared for the Court and a supervising Committee on the range of potential claims that may be brought on behalf of the estate of Sears Canada for the benefit of its creditors, and provide recommendations as to litigation paths, potential defendants, and potential plaintiffs. Second, following consultations with the Committee, if deemed appropriate and if approved by the Court,

the Litigation Trustee will seek court approval to proceed with action(s) or facilitate the commencement or continuation of actions by others.

34. Given the history of Sears Canada, the legal areas and competencies involved in the mandate of the Litigation Trustee include:

- (a) Ability to manage complex and potentially overlapping litigation claims and organize them in a coherent manner for expeditious resolution;
- (b) Familiarity with claims and proceedings having cross-border elements;
- (c) Oppression;
- (d) Fiduciary duty;
- (e) Corporation law;
- (f) Transfers at undervalue and fraudulent preferences;
- (g) CCAA and BIA law;
- (h) Pension and Employment Law;
- (i) Insolvency procedure; and
- (j) Class action law.

35. The Litigation Trustee's mandate does not include reporting or advising on potential priority claims or disputes among or between creditors, nor on the merits of the claims of creditors to the proceeds available for distribution from the estate of Sears Canada.

36. The Litigation Trustee will receive input from a Committee of creditors. Its fees will be paid by the estate, subject always to Court approval.

PART III – THE ISSUE

37. The issue for this motion is: Should this Court grant the motion and order the appointment of Hon. Frank Newbould, Q.C., as Litigation Trustee? The answer is yes.

PART IV – THE LAW & ARGUMENT

This court has the authority to appoint a Litigation Trustee

38. The CCAA does not contain express provisions authorizing the appointment of a litigation trustee. However, given the broad authority given to courts in section 11 in its interpretation and application, as well as the jurisprudence where courts have appointed litigation trustees, the use of such trusts where they are reasonably connected and consistent with the policies underlying the CCAA is strongly supported.²⁴ As stated in Houlden and Morawetz: "Section 11 provides the court with a general power to make any order that it considers appropriate in the circumstances of the CCAA proceeding":

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, ***make any order that it considers appropriate in the circumstances.***

Litigation trusts have been ordered in CCAA proceedings to pursue claims

39. There have been a number of CCAA proceedings in Canada in recent years where litigation trusts have been created in order to realize upon assets that cannot be liquidated or realized within the time horizon of the proceedings. They have also been employed in order to

²⁴ Tom Cumming, Tony Mersich, and Pierre Grabinski, "Litigation Trusts in CCAA Proceedings" (2017) ARIL 617, at p. 649.

permit the validation of third party claims against a debtor and the distribution of settlement or estate proceeds among the beneficiaries of the trust. In some cases, the original debtor is simply being liquidated. In other cases, the debtor's operations are restructured to permit them to continue while a trust deals with litigation claims and distributions to creditors:

- (a) ***Re Sino-Forest Corporation***: Sino-Forest was a publicly traded holding company engaged in the operation of forest plantations and forest products in China.²⁵ In 2011, an investment firm accused Sino-Forest of releasing fraudulent information on its financial statements and the value of its shares dropped.²⁶ The company filed for CCAA protection.²⁷ A plan of compromise transferred most of the debtor's valuable assets of to a new company on a going-concern basis.²⁸ In order to approve a Plan of Compromise, the creditors needed reassurance that the fraudulent activities that led to the insolvency would be pursued on their behalf. A litigation trustee was appointed under the plan of compromise and arrangement. A Litigation Trustee was appointed to prosecute those claims. The trustee was supervised by a three-member committee approved by the creditors.²⁹

The litigation trustee has only litigated one claim against the former chairman and chief executive of Sino Forest, who was accused of defrauding the company while maintaining de facto control.³⁰ This has led to the settlement of most claims on behalf of Sino Forest to the benefit of the creditors, who have seen the distribution

²⁵ *Re Sino-Forest Corporation*, 2012 ONSC 7050 (Ont. S.C.J.) at para. 13.

²⁶ *Ibid* at para 15.

²⁷ *Re Sino-Forest*, 2015 ONSC 439 at para 28.

²⁸ *Re Sino-Forest Corporation*, 2012 ONSC 7050 (Ont. S.C.J.), at para 41.

²⁹ *Sino-Forest Litigation Trust Agreement*, at ss. 1.1, 1.5, 4.1, online FTI Consulting, <<http://cfcanada.fticonsulting.com/sfc/FinalPlanDocuments.htm>>.

³⁰ *SFC Litigation Trust (Trustee of) v Chan*, 2016 ONSC 3226 (Div. Ct.).

of millions of dollars otherwise lost from the estate.³¹ Third party litigants also benefitted from efficiencies in the administration of claims made against them.

- (b) **Hollinger Inc.:** A litigation trustee was successfully used in the contentious proceedings of *Hollinger Inc.* In those circumstances, a shareholder brought public accusations of unauthorized related party transactions against STMG, a subsidiary and principal asset of Hollinger.³² When these accusations were found to have validity, litigation was brought against STMG, which began to have a direct impact on Hollinger through its complex securities in STMG. Hollinger used the CCAA to provide breathing room for it to resolve the issues with its subsidiary.

While no Plan of Compromise was ever approved in Hollinger, a litigation trustee was successfully created through a multi-party settlement agreement between Hollinger, STMG and a noteholder.³³ Most of the causes of action that were transferred to the litigation trustee were against the directors, advisors and banking syndicate.³⁴ Many of the claims against Hollinger were capped or settled as a result of the agreement.³⁵ The proceeds from the settlements were then used to fund further litigation, which has since included claims against

³¹ Settlement Agreement between Class Action Plaintiffs and Independent Directors, online: Siskinds Law Firm, <<http://www.siskinds.com/sino-forest-corp/>>.

³² *Re Hollinger Inc.*, 2006 BCSECCOM 745 at para. 12.

³³ *Re Hollinger Inc.*, Court File No. 07-CL-7120, *Order of the Honourable Mr. Justice Campbell for the approval of multi-party settlement and cost reduction/asset enhancement program*, 21 May 2008 (Ont. S.C.J.).

³⁴ *Re Hollinger Inc.*, Court File No. 07-CL-7120, Report of John D. Ground, Q.C. (retired justice) in his Capacity as Litigation Trustee of the Applicants, dated 31 March 2011 (Ont. S.C.J.) at para. 8.

³⁵ *Re Hollinger Inc.*, Court File No. 07-CL-7120, *Order of the Honourable Mr. Justice Campbell for the approval of multi-party settlement and cost reduction/asset enhancement program*, 21 May 2008 (Ont. S.C.J.), at Schedule A at paras 10-12.

Hollinger's former counsel, auditors, officers, directors, and shareholders.³⁶ All these claims have now reached final resolution.³⁷

- (c) **Cash Store Financial Services:** Cash Store was a "payday lender" whose practices were found to contravene the criminal interest provisions and provincial payday loans regulations, resulting in several class action lawsuits for compensation for unlawful intent and other charges, and precipitating Cash Store to seek CCAA protection. Some of the plaintiffs' claims were settled under the CCAA, while others remained outstanding. During the course of the CCAA proceedings, it became clear that the debtor company "may have claims against certain of their former directors, officers, advisors and other third parties" (the "Estate Claims").³⁸ To pursue these claims, the debtor company retained litigation counsel, which was approved by court order. A number of the Estate Claims had been resolved and some remained outstanding. In order to facilitate a Plan of Compromise, a litigation trust was set up to pursue any outstanding claims against third party defendants and a litigation trustee with authority to instruct litigation counsel was appointed. A litigation fund and indemnity reserve was also set up as part of the Plan. The litigation claims remained in the name of the estate.

The creation of the Litigation Trustee was a factor for Morawetz J. in finding that the plan was fair and reasonable in the circumstances. The CCAA Court noted that the purpose of the Plan is to, among other things, "position the CCAA Estate

³⁶ *Ibid*, at Schedule A at para. 38.

³⁷ *Re Hollinger Inc.*, Court File No. 07-CL-7120, *Order of the Honourable Justice Myers (re: Stay Extension)*, 22 August 2017 at para 4.

³⁸ *Re The Cash Store Financial Services Inc*, 2015 ONSC 7253 at para 17.

of the Applicants to continue to pursue the remaining Estate Claims."³⁹ The Plan provided a global resolution of the claims, was approved by an overwhelming majority of the creditors, and provided for an ongoing Litigation Trust to pursue additional claims to the benefit of Stakeholders.⁴⁰ To date, the trust has pursued three claims against third parties on behalf of the creditors of Cash Store.

- (d) ***Lutheran Church***: Members of the Alberta and British Columbia District of the Lutheran Church were encouraged to invest in various related entities of the Lutheran Church. In 2015, the Lutheran Church and its related entities, which were subject to significant claims by members and other creditors, obtained creditor protection under the CCAA, allowing the church to restructure its investment funds. In 2016, these entities applied to the CCAA Court for an order sanctioning the plans of arrangement, which had been approved by the creditors.⁴¹ The plans of compromise sanctioned by the CCAA Court established a representative action process whereby future legal actions, which may be undertaken as a class proceeding, can be undertaken for the benefit of those creditors who elect or are deemed to elect to participate in the representative action.

The representative action provisions "funnel[ed] the process through independent Subcommittees of creditors chosen from among the Depositors who have claims remaining after the Convenience Payments and who will have the fiduciary duty to act in the best interests of the body of such creditors to maximize recovery of

³⁹ *Ibid.* at para 25.

⁴⁰ *Ibid.* at para 40.

⁴¹ *Lutheran Church - Canada, Re*, 2016 ABQB 419, 2016 CarswellAlta 1484.

their investments."⁴² Claims based on breach of contract, misrepresentation or wrongful or oppressive conduct, breaches of any legal, equitable, contractual or other duty, claims for which the insolvent debtors had coverage under directors' and officers' liability insurance, as well as claims to be pursued in the debtors' name could be pursued in the representative action.⁴³ In this case, the creditors were given the option to elect whether or not they would participate in and obtain the benefit of the representative actions or proceed on their own with their actions. A subcommittee was also established to choose the legal counsel to represent the participating creditors, with its mandate to include: (i) assisting in maximizing the amount available for distribution; (ii) serving in a fiduciary capacity on behalf of the participating creditors; and (iii) bringing any matter before the Court by way of an application for advice and direction.⁴⁴ In sanctioning the plans, the CCAA Court held that "[t]here is a nexus between the Representative Action provisions of the plans and the restructuring in that these provisions are designed to allow the District to continue in the operation of its core function without the distraction of multiple litigation, while preserving the rights of Depositors to assert actions against third parties involved in the events that led to this insolvency."⁴⁵

40. As noted above, in *Hollinger*, the Litigation Trust was outside the context of a Plan of Compromise. The trustee became an officer of the court in exercising his powers and fulfilling his obligations. The litigation trust was provided with initial funding, and directed to reserve and use funds from successful litigation and settlement to pursue further litigation. As a result, the

⁴² *Ibid* at para 130.

⁴³ *Ibid* at para 23.

⁴⁴ *Ibid* at para 27.

⁴⁵ *Ibid* at para 125.

Litigation Trustee entered mediation and settlement of all claims against third parties on behalf of Hollinger and was recently permitted to release all the remaining reserves it had been holding for ongoing litigation.

Responses to certain statements in the Monitor's 12th Report

41. At paragraph 36 of the Report, it states that "The Litigation Trustee is contemplated to have a very influential role in connection with creditors' claims and the claims of the Sears Canada Entities". The Litigation Trustee's role is expressly restricted to firstly reviewing and providing a report on potential claims and actions on behalf of the estate of Sears Canada. It would not have any "role" whatsoever in connection with creditors' claims filed against the Sears Canada estate in this CCAA proceeding. Indeed, the terms of the draft Order make clear that the Litigation Trustee has no such role. The mandate of the Litigation Trustee is set out in considerable detail in the draft Order and Representative Counsel has no concern that Mr. Newbould would not perform his duties appropriately.

42. With respect to paragraph 37 of the Report, as part of ongoing discussions among Representative Counsel to retirees, Representative Counsel to employees, counsel to major landlords and class action plaintiffs, the composition of a Committee to consult with the Litigation Trustee is already largely in place. Additional creditor groups could be added to the Committee in the future. Neither the Superintendent nor Morneau is a creditor, as discussed further below. Moreover, at this stage, they continue to object to the appointment of Mr. Newbould. They also propose an alternate approach that will involve considerable delays in the appointment of a Litigation Trustee, the continuation of a purported impasse in the identification of Litigation Trustee, (which impasse does not exist among major creditor groups, but simply

does not include their support), the Superintendent and Morneau seeking to impose a "veto" over the selection of the person, all of which will contribute to the deterioration of the estate of Sears Canada and result in lower creditor recoveries.

43. With respect to paragraph 40, and the reference to "Monitor Claims", the Monitor's 12th Report dated February 13, 2018 seems to suggest that the "Monitor Claims" (as defined in the Claims Procedure Order) can only be pursued by a Monitor, which is not the case. Section 36.1 of the CCAA, which provides that certain claims that could be pursued by a Trustee in Bankruptcy under the BIA are available to be pursued by a Monitor in a CCAA proceeding, also provides for "any modifications that the circumstances require...". This section must also be read in conjunction with section 11 of the CCAA which provides that the Court can make any Order that it deems appropriate in the circumstances.

44. The Monitor currently has no express authority to proceed with litigation on behalf of the estate of Sears Canada. As has been recently confirmed by the Ontario Court of Appeal in *Essar Global Fund Limited*⁴⁶, in order to proceed with litigation, a Monitor must obtain authority from the court by way of an Order. Accordingly, it has no authority to pursue any "Monitor claims".

45. Where litigation claims may be available to be pursued for the benefit of creditors, and a Litigation Trustee is being appointed by the Court for that purpose, it is most appropriate that all potential claims or causes of action be reviewed by the Litigation Trustee. That is in keeping with the "single proceeding" model of insolvency proceedings, will ensure that the manner in which claims are pursued based on common or similar facts or evidence do not have the effect of

⁴⁶ *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014 paras. 108,122-125. See also *Urbancorp Cumberland 2 GP Inc., Re*, 2017 ONSC 7649, paras. 17 and 18

prejudicing another claim based on those facts, and to ensure that all litigation is addressed in the most effective and expeditious manner possible and avoiding multiple proceedings.

46. With respect to paragraph 43, the Monitor states that it cannot consent to an order that will require the Monitor to disclose and deliver to the Litigation Trustee the results of the Monitor's investigations due apparently to "confidentiality and privilege" concerns with third parties. Mr. Newbould would be a court-appointed officer of the court, just like the Monitor, and readily able to address any confidentiality or privilege concerns in the transmission of the Monitor's investigations and research, including further confidentiality agreements or court orders. The Order directing the transmission of such information by the Monitor provides all the protection required, pursuant to section 142 of the *Courts of Justice Act* (Ontario).

47. At paragraph 45, similar to the submissions of the Superintendent/Morneau, the Monitor states that still further discussions should take place with respect to the selection of a Litigation Trustee, the scope of the mandate, and the composition of the Committee. Other than as it related to the "selection of a Litigation Trustee" (which has already occurred), those issues can be readily addressed as may be necessary following the appointment of Mr. Newbould. For the same reason that the submissions of Superintendent/Morneau should be rejected with respect to their counter-proposal of a further time-consuming, consultative, and costly process where the likelihood of consensus is unrealistic, the pedantic approach suggested by the Monitor should similarly be rejected. It is important for the Litigation Trustee to be appointed and move forward rapidly with its mandate, to report as quickly as possible on potential actions to pursue, and to minimize additional unnecessary costs to the estate of Sears Canada.

Responses to certain statements in the Superintendent/Morneau Joint Factum

48. In paragraph 15 of the Joint Factum, the Superintendent/Morneau state: "the pension plan administrator and the Superintendent are the only creditors who represent interests relating to the pension plan and solely those interests". This statement is highly misleading.

49. First, the Superintendent is not currently a creditor. The Superintendent and its role is defined in section 1(1) of the PBA as the Superintendent of Financial Services appointed under the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28 ("**FSCO Act**"). The Superintendent's powers and duties are prescribed under the FSCO Act and are limited to responsibility for the financial and administrative affairs of the Financial Services Commission of Ontario, the exercise of the powers and duties conferred on or assigned to the Superintendent, to administer and enforce the FSCO Act and any other act that confers powers on or assigns duties to the Superintendent, and to supervise generally the regulated sectors.

50. The Superintendent is not authorized under the PBA, the FSCO Act, or any other legislation to represent the beneficiaries of underfunded pension plans. Under section 82(2) of the PBA, the Superintendent is responsible for the administration of the PBGF (which is how the Superintendent describes itself on the cover of its Joint Factum). As administrator of a fund that is statutorily obligated to pay out funds to an underfunded Ontario pension plan on its wind up, the Superintendent only becomes a creditor after an allocation has been made from the PBGF to an underfunded Ontario pension plan. Before an allocation can be made from the PBGF, various conditions must be satisfied including that a plan be wound up and that the Superintendent issue a declaration that the PBGF applies to the Plan. At this time, the Sears Canada Plan is not wound up, no declaration that the PBGF applies to the plan has been requested or made, no

application for an allocation from the PBGF has been made, and no PBGF allocation has been made. Section 86(1) of the PBA is clear that the Superintendent does not have a lien and charge on the assets of an employer until money is paid out of the PBGF as a result of a wind up. The Superintendent is not currently a creditor and even if a PBGF allocation were to be paid into the plan, the Superintendent would be a competing creditor with the pension plan beneficiaries who are entitled to a deemed trust priority under section 57(4) of the PBA as the beneficiaries of the pension plan that operates ahead of the Superintendent's lien and charge.

51. The pension plan administrator (Morneau) at this time is also not a creditor.⁴⁷ Morneau is appointed under section 8(1.1) of the PBA by the Superintendent to wind up the plan given the liquidation and shut down at Sears Canada. Under section 57(5) of the PBA, a pension plan administrator expressly has a lien and charge for the amounts owing to the pension plan which are the same amounts subject to the deemed trust in section 57(4) of the PBA. The Newfoundland Court of Appeal recently confirmed that the lien and charge is a backup remedy for the plan administrator in case the deemed trust in favour of pension plan beneficiaries is not operative.⁴⁸ While the deemed trust operates, the plan administrator's lien and charge is a secondary secured claim – not a trust claim - that may never become operative.

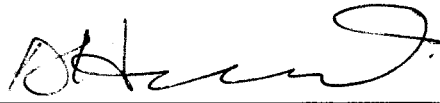
PART V – ORDER REQUESTED

52. Representative Counsel requests an Order substantially in the form of the draft Litigation Trustee Appointment Order appended to the Motion Record.

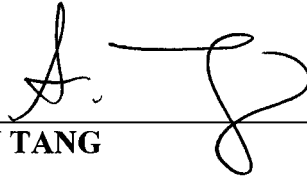
⁴⁷ Supplemental Turner Affidavit, at para. 14.

⁴⁸ Reference re Section 32 of the Pension Benefits Act, 2018 NLCA 1, at para. 48.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of February, 2018.



ANDREW J. HATNAY



AMY TANG

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014.
2. *Re Hollinger Inc.*, 2006 BCSECCOM 745.
3. *Re Hollinger Inc.*, Court File No. 07-CL-7120, *Order of the Honourable Mr. Justice Campbell for the approval of multi-party settlement and cost reduction/asset enhancement program*, 21 May 2008 (Ont. S.C.J.).
4. *Re Hollinger Inc.*, Court File No. 07-CL-7120, Report of John D. Ground, Q.C. (retired justice) in his Capacity as Litigation Trustee of the Applicants, dated 31 March 2011 (Ont. S.C.J.).
5. *Re Hollinger Inc.*, Court File No. 07-CL-7120, *Order of the Honourable Justice Myers (re: Stay Extension)*, 22 August 2017.
6. *Lutheran Church - Canada, Re*, 2016 ABQB 419, 2016 CarswellAlta 1484.
7. *Reference re Section 32 of the Pension Benefits Act, 1997, Re*, 2018 NLCA 1 (NL. C.A.).
8. *SFC Litigation Trust (Trustee of) v Chan*, 2016 ONSC 3226 (Div. Ct.).
9. *Re Sino-Forest Corporation*, 2012 ONSC 7050 (Ont. S.C.J.).
10. *Re Sino-Forest*, 2015 ONSC 439.
11. *Re The Cash Store Financial Services Inc.*, 2015 ONSC 7253.
12. *Urbancorp Cumberland 2 GP Inc., Re*, 2017 ONSC 7649.

SCHEDULE "B"
RELEVANT STATUTES

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

General power of court

s. 11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

SCHEDULE "C"

<i>Restructuring Professional Fees and Disbursements, including tax</i>	
<i>(CAD Rounded to nearest 000)</i>	
Description	Total Amount
Financial Advisor to the DIP Lenders	\$1,110,000
Legal Counsel to Directors	\$783,000
Financial Advisor to Applicants	\$14,091,000
Canadian Legal Counsel to DIP Term Lender	\$4,172,000
Monitor	\$8,904,000
Canadian Legal Counsel to DIP ABL Lender	\$2,263,000
Pension and Retiree Representative Counsel and Financial Advisors	\$723,000
Financial Advisor to Directors	\$326,000
Legal Counsel to Monitor	\$5,055,000
Legal Counsel to Applicants	\$14,147,000
US Legal Counsel to DIP Term Lender	\$1,041,000
US Legal Counsel to DIP ABL Lender	\$32,000
Employee Representative Counsel and Financial Advisors	\$238,000
Total	\$52,885,000

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC.,
CORBEIL ÉLECTRIQUE INC., S.L.H. TRANSPORT INC., THE CUT INC., SEARS CONTACT SERVICES
INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING
AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089
ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED,
955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.
(each an "Applicant", and collectively, the "Applicants")

ONTARIO
SUPERIOR COURT OF JUSTICE -
COMMERCIAL LIST

Proceeding commenced at TORONTO

FACTUM

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Canada Inc.