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

SEARS CANADA INC.,
AND RELATED APPLICANTS

SUPPLEMENT TO THE TENTH REPORT OF FTI CONSULTING CANADA INC., AS MONITOR

January 17, 2018

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.

APPLICANTS

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

A. INTRODUCTION

1. On January 10, 2018, the Monitor filed its Tenth Report to the Court (the "Tenth Report") in these CCAA Proceedings in relation to a motion (the "**Restraining Order Motion**") brought by the Monitor, returnable January 22, 2018, for the granting of an Order (the "**Restraining Order**"):

    (a) declaring that the plaintiffs (the "**Tremblay Plaintiffs**") in the class action *Karine Tremblay v. Centre Hi-Fi Chicoutimi, et al.* (Superior Court of Quebec File Number: 150-06-000010-173) (the "**Tremblay Action**") have failed to comply with and breached the Stay established by the Initial Order; and

(b) restraining and enjoining the Tremblay Plaintiffs and the plaintiffs in each of the following further class actions (the "**Plaintiffs**") styled as:

(i) *Luc Cantin and Francois Routhier v. Ameublements Tanguay Inc. et al.* (Superior Court of Quebec File Number: 500-06-000709-143);

(ii) *Lise Ostiguy v. Sears Canada Inc.* (Superior Court of Quebec File Number: 500-06-000537-106); and

(iii) *Jacques Fillion v. Corbeil Électrique Inc.* (Superior Court of Quebec File Number: 500-06-000535-100)

from taking any further step or action that would be in contravention of the Initial Order, the Stay ordered thereby, or any other Order of the Court; and

(c) ordering that the Monitor is entitled to the costs of the Restraining Order Motion on a substantial indemnity basis.

2. Capitalized terms used herein and not otherwise defined in this Supplement to the Tenth Report (the "**Supplement**") have the meanings given to them in the Tenth Report.

3. The purpose of this Supplement is to provide an update on events and correspondence relevant to the Restraining Order Motion that have occurred since service of the Tenth Report.

B. RESTRAINING ORDER MOTION UPDATE

4. On January 12, 2018, following service of the Monitor's motion record in support of the Restraining Order Motion (the "**Restraining Order Record**"), counsel for the Plaintiffs sent a letter to Justice Dallaire, who is seized of the Tremblay Action in the Quebec Superior Court, alleging that by its motion, the Monitor was "attempting to circumvent both Quebec's jurisdiction and your case management decision [in the Tremblay Action on December 21, 2017]".[1] In that decision, Justice Dallaire had earlier scheduled a hearing on the Tremblay Plaintiffs' motion to amend (the "**Motion to Amend**") the pleadings in the Tremblay Action by, among other things, adding both the Monitor and

[1] [Translation]

certain current and former directors of Sears Canada (the "**Named Directors**") as defendants. In that decision, Justice Dallaire had also required that the Tremblay Plaintiffs serve and file their written submissions in support of the Motion to Amend by January 15, 2018, with any responding materials from the Monitor, the Named Directors and the other defendants in the Tremblay Action to be served and filed by February 2, 2018.

5. The letter also requested a further case conference on the matter as soon as possible, which Justice Dallaire ultimately scheduled for January 18, 2018. A copy of the January 12 letter, together with a copy of the Restraining Order Record that it enclosed (without appendices) and together with a certified translation of the January 12 letter, is collectively attached hereto as **Appendix "A"**.

6. On January 16, following the Tremblay Plaintiffs' failure to file to written submissions by the required deadline, counsel to the Monitor requested that such materials be provided as soon as possible. Plaintiffs' counsel responded by email on the morning of January 17, 2018, alleging that the Monitor had committed a "procedural breach" by bringing the Motion to Restrain and failing to inform Justice Dallaire that it would do so. The email also advised that Plaintiffs' counsel would "raise this lack of transparency"[2] at the January 18 case conference. A copy of the chain of emails, together with a certified translation of the same, is attached hereto as **Appendix "B"**.

7. Shortly thereafter, also on January 17, 2018, counsel to the Plaintiffs emailed a letter to the Service List addressed to Regional Senior Justice Morawetz (presumably intended for Justice Hainey, who is seized of these CCAA Proceedings) requesting that the Restraining Order motion be postponed until the Motion to Amend could be heard by Justice Dallaire on February 16, 2018. A copy of the January 17, 2018 letter is attached hereto as **Appendix "C"**.

8. In response to Plaintiffs' counsel's correspondence and further to the January 18, 2018 case conference, counsel to the Monitor sent a letter to Justice Dallaire later in the day on January 17, 2018 advising, among other things:

[2] [Translation]

(a) that the Restraining Order Motion had been brought in order to address continuing breaches by the Tremblay Plaintiffs of Orders of the Ontario Superior Court of Justice, and that was why the Monitor had gone back to that Court to attempt to enforce those Orders;

(b) that the stay of proceedings established by the Initial Order had been granted pursuant to the CCAA, a federal act which case law has confirmed mandates that the presiding CCAA court has jurisdiction to deal with all of the issues that arise in the context of CCAA proceedings; which principle the stay of proceedings in turn gives effect to by preventing creditors from bringing proceedings outside the CCAA proceedings without the authorization of the CCAA court; and

(c) that, subject to this Court's direction, Plaintiffs' counsel may be able to attend and make submissions at the return of the Restraining Order Motion via teleconference, and the Monitor would be more than happy to facilitate this for them.

A copy of the Monitor's January 17, 2018 letter (in French only, given timing concerns) is attached hereto as **Appendix "D"**.

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

Dated this 17th day of January, 2018.

FTI Consulting Canada Inc.
In its capacity as Monitor of
Sears Canada Inc. and the other corporations in the Sears Canada Group

Paul Bishop
Senior Managing Director

Greg Watson
Senior Managing Director

APPENDIX “A”
(see attached)

[Translation]

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BY EMAIL

Quebec, December 12, 2017

The Honourable Martin Dallaire (J.S.C.)
CHICOUTIMI COURTHOUSE
227 Racine Street East
Chicoutimi, Quebec G7H 7B4

ORDRE DES TRADUCTEURS, TERMINOLOGUES ET INTERPRÈTES AGRÉÉS DU QUÉBEC
Traducteur agréé - Certified Translator
KENNETH MCDONOUGH
2138

Re:	Karine Tremblay
v.:	Centre Hi-Fi Chicoutimi et als.
Court No.:	150-06-000010-173
O/F:	BGA-0070-4

Dear Justice Dallaire:

On the evening of January 10, a Motion for a Restraining Order by FTI Consulting, represented by the firm Norton Rose, was delivered to the undersigned. The proceeding is to be presented on January 22, 2018 before the Superior Court in Toronto in the matter CV-17-11846-00CL (see the attached extract of the Motion). This application for an injunction is aimed, among other things, at preventing the plaintiff from being able to present its application for leave to amend the application for authorization to institute a class action.

It is our opinion that, with this application for an injunction, FTI Consulting is attempting to circumvent both Quebec's jurisdiction and your case management decision, made in the conference call of December 21, 2017, to hold a hearing on February 16, 2018 on the component of the application for leave to amend the application for authorization to institute a class action pertaining to the addition of Sears' directors and the monitor.

The attorneys for the directors, the monitor and Sears pleaded on December 21 that you could not even hear the application for leave to amend unless a lifting of the stay was obtained from an Ontario judge under the CCAA process.

Your decision to set the hearing on the application for leave to amend was not appealed by our colleagues and this procedural manoeuvre is clearly designed by them to get around your decision or to grant themselves a disguised appeal without having to go through the Court of Appeal.

Such an application for an injunction aimed at preventing judicial proceedings is, moreover, specifically proscribed by Quebec law in Article 513 of the *Code of Civil Procedure*.

Considering that the application for an injunction is scheduled to be heard on January 22 in Toronto and that the application for leave to amend is to be heard on February 16, this irregular situation requires your prompt attention through a conference call that we are requesting to schedule at your earliest convenience for before January 19.

We look forward to your reply.

Yours truly,

(signed)

David Bourgoin
BGA Barristers & Solicitors LLP
DB/st

c.c.: Mtre. Guy Poitras / *Gowling WLG (Canada) LLP*
Mtre. Marie Audren – Mtre. Emanuelle Rolland / *Audren Rolland LLP*
Mtre. Luc Thibaudeau / *Lavery De Billy*
Mtre. Julien Morissette – Mtre. Éric Préfontaine / *Osler Hoskin Harcourt*
Mtre. Arad Mojtahedi / *Norton Rose Fulbright Canada*
Mtre. Sean Zweig / *Bennett Jones*
Mtre. Benoît Gamache / *BG LAW FIRM INC.*

ORIGINAL DOCUMENT(S) FOLLOW

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PAR COURRIEL

Québec, le 12 décembre 2017

L'honorable Martin Dallaire (j.c.s.)
PALAIS DE JUSTICE DE CHICOUTIMI
227, rue Racine Est
Chicoutimi (Québec) G7H 7B4

Objet : Karine Tremblay
c. : Centre Hi-Fi Chicoutimi et als.
No de Cour : 150-06-000010-173
N/D : BGA-0070-4

Monsieur le Juge,

Les soussignés se sont vus notifier le 10 janvier en soirée une *Motion for a Restraining Order* par FTI Consulting représentée par le cabinet Norton Rose. La procédure est présentable le 22 janvier 2018 devant la Cour supérieure à Toronto dans le dossier CV-17-11846-00CL (voir l'extrait de la Motion ci-joint). Cette demande d'injonction a notamment pour objectif d'empêcher la demanderesse de pouvoir présenter sa demande pour permission de modifier la demande pour autorisation d'exercer une action collective.

Nous sommes d'avis que par cette demande d'injonction, FTI Consulting tente de court-circuiter tant la juridiction du Québec que votre décision de gestion rendue lors de la conférence téléphonique du 21 décembre dernier à l'effet d'entendre le 16 février prochain la demande pour permission de modifier la demande pour autorisation d'exercer l'action collective sur le volet de l'ajout des administrateurs de Sears et du contrôleur.

Les procureurs représentant les administrateurs, le contrôleur et Sears vous avaient fait valoir le 21 décembre que vous ne pouviez même pas entendre la demande pour permission de modifier à moins qu'une levée de suspension ne soit obtenue d'un juge en Ontario dans la cadre du processus de la LAAC.

Votre décision de fixer l'audition sur la demande pour permission de modifier n'a pas été portée en appel par nos collègues et cette manœuvre procédurale vise clairement à contourner votre décision ou à s'octroyer un appel déguisé sans avoir à passer par la Cour d'appel.

Une telle demande d'injonction visant à empêcher des procédures judiciaires est d'ailleurs spécifiquement proscrite par le droit québécois à l'article 513 du *Code de procédure civile*.

Compte tenu que la présentation de la demande d'injonction est fixée le 22 janvier prochain à Toronto et que l'audition de la demande pour permission de modifier doit procéder le 16 février, cette situation irrégulière requiert votre attention rapide par le biais d'une conférence téléphonique que nous demandons de fixer à votre plus convenance avant le 19 janvier.

Dans l'attente de votre suivi, je vous prie d'agréer, Monsieur le Juge, mes salutations distinguées.

David Bourgoin
BGA Avocats s.e.n.c.r.l.
DB/st

p.j.
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Me Luc Thibaudeau / *Lavery De Billy*
Me Julien Morissette – Me Éric Préfontaine / *Osler Hoskin Harcourt*
Me Arad Mojtahedi-Me Julie Himo / *Norton Rose Fulbright Canada*
Me Sean Zweig / *Bennett Jones*
Me Benoît Gamache / *Cabinet BG Avocat inc.*

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.

MOTION RECORD OF THE MONITOR
(Motion for a Restraining Order)
(returnable January 22, 2017)

January 10, 2018

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Lawyers for the plaintiffs in the Warranty Class Actions

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

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MOTION RECORD OF THE MONITOR
(Motion for a Restraining Order)
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Applicants

NOTICE OF MOTION
(returnable January 22, 2017)

FTI Consulting Canada Inc., in its capacity as Court-appointed monitor (the "**Monitor**") in the proceedings of the Applicants pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "**CCAA**") will make a motion to a Judge, on Monday, January 22, 2017, at 10:00 am or as soon after that time as the motion can be heard, at the courthouse located at 330 University Avenue.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1 an Order, substantially in the form included in the Monitor's Motion Record (the "**Restraining Order**"):

(a) declaring that the plaintiffs (the "**Tremblay Plaintiffs**") in the class action styled as *Karine Tremblay v. Centre Hi-Fi Chicoutimi, et al.* (Superior Court of Quebec

File Number: 150-06-000010-173) (the "**Tremblay Action**") have failed to comply with and breached the stay of proceedings (the "**Stay**") established by the Initial Order (as defined below);

(b) restraining and enjoining the Tremblay Plaintiffs and the plaintiffs in each of the following further class actions (the "**Plaintiffs**") styled as:

(i) *Luc Cantin and Francois Routhier v. Ameublements Tanguay Inc. et al.* (Superior Court of Quebec File Number: 500-06-000709-143);

(ii) *Lise Ostiguy v. Sears Canada Inc.* (Superior Court of Quebec File Number: 500-06-000537-106); and

(iii) *Jacques Fillion v. Corbeil Électrique Inc.* (Superior Court of Quebec File Number: 500-06-000535-100),

(collectively with the Tremblay Action, the "**Warranty Class Actions**") from taking any further step or action that would be in contravention of the Initial Order, the Stay ordered thereby, or any other Order of this Court; and

(c) ordering that the Monitor is entitled to the costs of this motion on a substantial indemnity basis, payable forthwith.

THE GROUNDS FOR THE MOTION ARE:

1 On June 22, 2017, the Applicants in these proceedings, including Sears Canada Inc. ("**Sears Canada**") and Corbeil Électrique Inc. ("**Corbeil**"), sought and obtained an initial order (as amended and restated on July 13, 2017, the "**Initial Order**") under the CCAA;

2 The Initial Order, among other things:

(a) appointed FTI Consulting Canada Inc. as Monitor of the Sears Canada Entities in the CCAA proceedings;

(b) granted an initial stay of proceedings (the "**Stay**") in respect of the Sears Canada Entities, their current and former directors and officers, the Monitor and the Sears Canada Entities and Monitor's respective employees and representatives until July 22, 2017;

3 The Stay has since been extended by various Orders of the Court, most recently on October 13, 2017, and is currently is set to expire on January 22, 2017. The Monitor understands that the Applicants will bring a motion on that date to have it further extended;

4 Sears Canada and Corbeil are currently the subject of each of the Warranty Class Actions, either together or singularly;

5 The Monitor has made counsel to the Plaintiffs in the Warranty Class Actions aware of the fact of the Initial Order and Stay on at least six occasions and the Applicants have also made counsel to the Plaintiffs aware of the Initial Order and the Stay;

6 Notwithstanding such warnings, on November 29, 2017, Plaintiffs' counsel served a motion to amend the Tremblay Plaintiffs' "original application for leave to institute a class action" (the "**Motion to Amend**") in order to, among other things, add both the Monitor and certain former and current directors of Sears Canada as defendants in the Tremblay Action;

7 The Motion to Amend is scheduled to be heard by the Quebec Superior Court on February 16, 2018;

8 The provisions of the CCAA, including sections 11 and 11.02 thereof, and the inherent and equitable jurisdiction of this Honourable Court;

9 Rules 1.04, 1.05, 2.03, 16, 17.02, 37 and 57 of the *Rules of Civil Procedure*, R.R.O 1990, Reg. 194, as amended and sections, 101, 106 and 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 as amended; and

10 Such other and further grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1 The Tenth Report of the Monitor dated January 10, 2018; and

2 Such further and other evidence as counsel may advise and this Court may permit.

January 10, 2018

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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., et al.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

NOTICE OF MOTION
(Motion for a Restraining Order)
(returnable January 22, 2017)

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6

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

SEARS CANADA INC.,
AND RELATED APPLICANTS

TENTH REPORT OF FTI CONSULTING CANADA INC., AS MONITOR

January 10, 2018

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ONTARIO
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APPLICANTS

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

A. INTRODUCTION

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

2. The Initial Order, among other things:

(a) appointed FTI Consulting Canada Inc. as monitor of the Sears Canada Entities (the "**Monitor**") in the CCAA Proceedings;

(b) granted an initial stay of proceedings (the "**Stay**") against the Sears Canada Entities, their current and former directors and officers, the Monitor and the Sears Canada Entities and Monitor's respective employees and representatives until July 22, 2017.

The Stay has since been extended by various Orders of the Court, most recently on October 13, 2017 (such Order being the "**Stay Extension Order**"), and is currently is set to expire on January 22, 2017. The Monitor understands that the Applicants will bring a motion on that date to have it further extended. Copies of the Initial Order and Stay Extension Order are included with **Appendix "E"**.

3. On October 13, 2017, the Court also approved an agreement and a process (the "**Second Liquidation Process**") for the liquidation of the inventory and FF&E at all remaining Sears Canada locations (which liquidation commenced shortly thereafter).

4. On October 4, 2017, the Court issued orders approving the sale of various businesses and assets of the Applicants, including the going-concern sale of substantially all of the assets of Corbeil Électrique Inc. ("**Corbeil**") to Am-Cam Électroménagers Inc. (the "**Corbeil Purchaser**"), which transaction ultimately closed on November 25, 2017.

5. On December 8, 2017, the Court issued, among other orders, an order approving a claims process for the identification, determination and adjudication of claims of certain creditors against the Sears Canada Entities and their current and former officers and directors.

6. In connection with the CCAA Proceedings, the Monitor has provided nine reports and four supplemental reports (collectively, the "**Prior Reports**"), and prior to its appointment as Monitor, FTI also provided to this Court a pre-filing report of the proposed Monitor dated June 22, 2017 (the "**Pre-Filing Report**"). The Pre-Filing Report, the Prior Reports and other Court-filed documents and notices in these CCAA

Proceedings are available on the Monitor's website at cfcanada.fticonsulting.com/searscanada/ (the "**Monitor's Website**").

B. PURPOSE

7. The purpose of this tenth report of the Monitor (the "**Tenth Report**") is to provide the Court with information on the Monitor's motion for an Order, substantially in the form included in the Monitor's Motion Record (the "**Restraining Order**"):

(a) declaring that the plaintiffs (the "**Tremblay Plaintiffs**") in the class action *Karine Tremblay v. Centre Hi-Fi Chicoutimi, et al*. (Superior Court of Quebec File Number: 150-06-000010-173) (the "**Tremblay Action**") have failed to comply with and breached the Stay established by the Initial Order; and

(b) restraining and enjoining the Tremblay Plaintiffs and the plaintiffs in each of the following further class actions (the "**Plaintiffs**") styled as:

(i) *Luc Cantin and Francois Routhier v. Ameublements Tanguay Inc. et al.* (Superior Court of Quebec File Number: 500-06-000709-143) (the "**Cantin/Routhier Action**");

(ii) *Lise Ostiguy v. Sears Canada Inc.* (Superior Court of Quebec File Number: 500-06-000537-106); and

(iii) *Jacques Fillion v. Corbeil Électrique Inc.* (Superior Court of Quebec File Number: 500-06-000535-100)

(collectively with the Tremblay Action and Cantin/Routhier Action, the "**Warranty Class Actions**") from taking any further step or action that would be in contravention of the Initial Order, the Stay ordered thereby, or any other Order of the Court; and

(c) ordering that the Monitor is entitled to the costs of the motion for the Restraining Orders on a substantial indemnity basis.

C. TERMS OF REFERENCE

8. In preparing this Tenth Report, the Monitor has relied upon audited and unaudited financial information of the Sears Canada Entities, the Sears Canada Entities' books and records, certain financial information and forecasts prepared by the Sears Canada Entities and discussions and correspondence with, among others, the senior management ("**Management**") of, and advisors to, the Sears Canada Entities (collectively, the "**Information**").

9. Except as otherwise described in this Tenth Report:

   (a) the Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would comply with Generally Accepted Assurance Standards pursuant to the *Chartered Professional Accountants of Canada Handbook*; and

   (b) the Monitor has not examined or reviewed the financial forecasts or projections referred to in this Tenth Report in a manner that would comply with the procedures described in the *Chartered Professional Accountants of Canada Handbook.*

10. Future-oriented financial information reported in or relied on in preparing this Tenth Report is based on Management's assumptions regarding future events. Actual results will vary from these forecasts and such variations may be material.

11. The Monitor has prepared this Tenth Report in connection with its motion for the Restraining Order. The Tenth Report should not be relied on for any other purpose.

12. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the affidavit of Mr. Billy Wong, the Chief Financial Officer of Sears Canada, sworn on June 22, 2017, and the Prior Reports of the Monitor in these proceedings.

D. BACKGROUND ON THE WARRANTY CLASS ACTIONS

13. Two of the Applicants in these CCAA Proceedings, Sears Canada and Corbeil, are currently the subject of each of the Warranty Class Actions, either together or singularly, along with various other defendants in certain of the actions.

14. The Warranty Class Actions were initiated at various dates ranging from November 2010 to 2017 but in general they concern customers in Quebec who purchased an extended warranty from various appliance and other electronics retailers, including Sears Canada and Corbeil, following and in reliance upon misrepresentations allegedly made by these retailers.

15. The alleged misrepresentations made by the retailers at issue are that, absent the purchase of an extended warranty:

    (a) the goods purchased by the Plaintiff class members would no longer be protected by any retailers' warranty beyond one year and/or expiry of the manufacturer's own warranty; and

    (b) all costs of replacement or repair following damage to the good/product at issue would be the consumer's responsibility after such period.

16. According to the Plaintiffs, these were misrepresentations because sections 37 and 38 of the *Consumer Protection Act* (Quebec) (the "**CPAQ**") already requires merchants to warrant that all goods they sell be "fit for the purpose for which goods of that kind are ordinarily used" and be "durable in normal use for a reasonable length of time, having regard to their price, the terms of the contract and the conditions of their use."

17. The Plaintiffs involved in the Warranty Class Actions are generally seeking reimbursement of the cost (including taxes) of the extended warranties at issue plus punitive damages.

18. For the purposes of the present motion for the Restraining Order, the Monitor takes no position on the validity of the Plaintiffs' claims made.

E. INITIAL INQUIRIES BY PLAINTIFFS' COUNSEL

19. The Plaintiffs are represented by both David Bourgoin of BGA Avocats, S.E.N.C.R.L. and Benoit Gamache of Cabinet BG Avocat Inc. On each of October 5 and 11, 2017, Mr. Gamache sent an email to the Monitor's general address, asking how he might file one or more proof of claim forms in respect of the Warranty Class Actions so that the underlying claims could be added to any claims register. Copies of these emails, together with certified translations of the same, are together attached hereto as **Appendix "A"**.

20. On October 17, 2017, Arad Mojtahedi, an associate at Norton Rose Fulbright Canada LLP, counsel to the Monitor, telephoned Mr. Gamache to discuss his questions. Among other things, Mr. Mojtahedi explained to Mr. Gamache the fact and nature of the CCAA Proceedings and Stay generally, and also noted that it was anticipated that the Sears Canada Entities would ultimately commence a claims process in which the claims of his clients could be addressed.

21. As Mr. Gamache also had further specific questions and concerns which Mr. Mojtahedi could not yet answer, he also invited Mr. Gamache to send an email setting out his questions so that could be more fully addressed in due course.

22. Mr. Gamache followed up by email to Mr. Mojtahedi on October 18, 2017, and enclosed various attachments including a letter dated October 16, 2017 addressed to the Monitor and a further letter dated the same date addressed to an individual understood to be former counsel to Corbeil in one of the Warranty Class Actions. In the email and letters, Mr. Gamache advised that section 256 of the CPAQ stipulated that where a merchant's obligations under a contract extended beyond two months after execution of the contract, monies transferred by a consumer to the merchant under the contract were to be held in trust pending the merchant's performance of those obligations. Mr. Gamache indicated he understood that, in order to exempt themselves from this requirement, both Sears Canada and Corbeil had posted performance bonds (the "**Consumer Protection Bonds**") with the Consumer Protection Office of Quebec (the "**CPO**") as security for such obligations.

23. Mr. Gamache suggested that the funds posted did not constitute property of the Applicants and indicated that he wished to access these funds for the benefit of the

Plaintiffs. In order to do so under the CPAQ, he advised that he needed either a "judgement (impossible under the stay) or an out-of-court settlement"[1], and asked that the Monitor consider whether such a settlement might be possible. In addition, Mr. Gamache also requested that the Monitor provide him with various details of the Consumer Protection Bonds, including the amounts posted under each. A copy of the October 18, 2017 email, together with its attachments and together with a certified translation of the email and certain of those attachments (being the two letters dated October 16, 2017), are attached collectively hereto as **Appendix "B"**.

24. As the Monitor at that time had only very limited information regarding the circumstances or background of the Warranty Class Actions, it made inquiries with the Sears Canada Entities, as well as with the CPO and the relevant insurers on the Consumer Protection Bonds. To that end, on October 20, 2017, and then again on October 23 and 27, in reply to further follow up emails from Mr. Gamache, Mr. Mojtahedi advised that the Monitor was making such inquiries, and would respond once it had sufficient information to consider and reply to his requests. A copy of the chain of emails, together with a certified translation of the same, is attached hereto as **Appendix "C"**.

F. BREACHES OF THE STAY DESPITE REPEATED WARNINGS

25. On November 14, 2017, Mr. Gamache sent an email to Mr. Mojtahedi advising that, in light of evidence he had that extended warranties continued to be sold after the commencement of the CCAA Proceedings and after the October 13, 2017 approval of the Second Liquidation Process, he would be taking steps to add the Monitor as a defendant in the Tremblay Action unless "a negotiated solution" could be quickly found. A copy of the November 14, 2017 email, together with its attachments and a certified translation of the email, is attached hereto as **Appendix "D"**.

26. The next day, Mr. Mojtahedi sent a letter to Mr. Gamache confirming not only that the Stay continued to apply as against not only the Sears Canada Entities, but as against the Monitor as well, in addition to their respective employees and representatives. The letter

[1] [Translation]

enclosed copies of both the Initial Order and Stay Extension Order, quoting the relevant excerpts in French, and further cautioned that the Initial Order holds the Monitor immune from any action brought by reason of its appointment, on the following terms:

> "34. THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation."

27. Mr. Mojtahedi's November 15, 2017 letter advised Mr. Gamache that in due course he would be able to prove any claims his clients might have once the Court had approved a claims process, including any claims his clients might assert against the Consumer Protection Bonds. A copy of the November 15, 2017 letter, together with a certified translation of the same, is attached hereto as **Appendix "E"**.

28. Plaintiffs' counsel provided no response to this letter to either the Monitor or its counsel. However on November 29, 2017, Mr. Gamache served Nick Rodrigo (of Davies, Ward, Philips & Vineberg LLP, counsel to Sears Canada in three of the Warranty Class Actions) with a motion to amend the Tremblay Plaintiffs' "original application for leave to institute a class action" (the "**Motion to Amend**") in order to, among other things, add both the Monitor and certain current and former directors of Sears Canada as defendants in the Tremblay Action. A copy of the Motion to Amend dated November 29, 2017, together with a certified translation of the same, is attached hereto as **Appendix "F"**.

29. On receipt of the Motion to Amend, counsel to the Monitor moved immediately to file a "Notice of Stay" in each of Warranty Class Actions that same day, and on December 4, 2017, Mr. Mojtahedi sent a further letter to Plaintiffs' counsel again putting them on notice of the Stay and asking that they withdraw their Motion to Amend immediately and by no later than December 7, 2017. The letter additionally warned Mssrs. Gamache and Bourgoin of the potential consequences of their actions on the following terms:

> [TRANSLATION] "This letter is therefore a warning. We request that you withdraw your Application to Amend **by December 7, 2017** at 5 p.m. and that you comply with the stay of proceedings in respect of Sears

> Canada, Corbeil and the Monitor in each of your Class Actions. Our client will not permit any further breach of the Initial Order. In the event of a further breach, our client will be compelled to institute the appropriate proceedings, including for contempt of court. If we do not receive confirmation before December 8 that your Application to Amend has been withdrawn and that you agree to comply with the stay of proceedings in respect of the Sears Canada Entities and the Monitor, we intend to speak directly to the Honourable Justice Martin Dallaire and to make the necessary representations. We also reserve the right to produce this letter and the November 15 Letter, in the event of another breach, in order to show that it is not the first time you have breached the Initial Order."

A copy of the December 4, 2017 letter, together with a certified translation of the same, is attached hereto as **Appendix "G"**.

30. Counsel to the Monitor at this time also learned that the Motion to Amend had been served by Plaintiffs' counsel in the face of three previous notices by Mr. Rodrigo of the fact and effect of the Stay and Initial Order; firstly by email on June 26, 2017, and subsequently by copy in a letter to Justice Dallaire in the Tremblay Action dated September 25, 2017, and a letter to the presiding judge in the Cantin/Routhier Action dated September 21, 2017, in each case enclosing the Initial Order and any relevant Orders extending the Stay. Copies of the June 26, 2017 email, and the September 21 and September 25, 2017 letters, together with certified translations of the same, are attached hereto as **Appendices "H"**, **"I"** and **"J"**, respectively.

CASE CONFERENCE IN THE TREMBLAY ACTION

31. At the time that Mr. Gamache had served the Motion to Amend, a motion to dismiss (the Tremblay Action (the "**Motion to Dismiss**") was pending before the Honourable Justice Dallaire of the Superior Court of Quebec in Chicoutimi, which was scheduled to be heard on February 16, 2018. As a result, Justice Dallaire sent a letter the following day requesting a case conference amongst the parties in order to consider the impact of Tremblay Plaintiffs' Motion to Amend on the scheduled Motion to Dismiss.

32. On December 8, after having been advised of the case conference by Mr. Rodrigo and having received nothing from Plaintiffs' counsel by the December 7 deadline, counsel to Monitor circulated a letter to Justice Dallaire (copying each of the other parties, including

Mr. Gamache) advising him of the CCAA Proceedings and Stay, and detailing the history of both the Monitor's warnings and notices to Plaintiffs' counsel as well as their actions to breach the Stay in spite of them. The letter advised as well that the Monitor proposed to participate in the pending case teleconference—which by that time had been scheduled for December 21, 2017. A copy of the December 8 letter to Justice Dallaire, together with a certified translation of the same, is attached hereto as **Appendix "K"**.

33. Counsel to the Tremblay Plaintiffs responded by way of a letter to Justice Dallaire on December 12, 2017, advised that they "consider[ed] it inappropriate for our colleague to plead his clients' position in writing without having been authorized by the court and without any status to do so."[2] This letter remains the only correspondence—direct or indirect—received by the Monitor from Plaintiff's counsel since their November 14 email. A copy of the December 12 letter, together with a certified translation of the same, is attached hereto as **Appendix "L"**.

34. On December 14, 2017, counsel to the Monitor responded by letter to Justice Dallaire, copying the parties and noting that, contrary to Mr. Gamache's suggestion, there was "nothing inappropriate"[3] about a Court-appointed officer notifying the Superior Court of Quebec that a stay was in effect in respect of the parties against whom the Tremblay Plaintiffs were seeking to exercise remedies. The letter went on to emphasize that if the Tremblay Plaintiffs sought to institute proceedings against such parties, a motion to lift that stay was required before the Ontario Superior Court of Justice in Toronto. A copy of the December 14 letter to Justice Dallaire, together with a certified translation of the same, is attached hereto as **Appendix "M"**.

35. On December 21, 2017, the case teleconference took place as scheduled and counsel to each of the original parties to the Tremblay Action, as well as counsel to each the Monitor and the Board of Directors participated. The Monitor participated in an effort to avoid costs and Court time for the instant motion.

---

[2] [Translation]

[3] [Translation]

36. Justice Dallaire directed that the Motion to Amend proceed on February 16, 2018, instead of the Motion to Dismiss as had been previously scheduled, and asked that the parties make full written submissions. Under the timeline ordered by Justice Dallaire, each of the existing defendants, the Monitor and the Board of Directors must submit their written submissions against the Motion to Amend by February 2, 2018.

G. NEED FOR THE RESTRAINING ORDER

37. The Monitor has now made Plaintiffs' counsel aware of the Initial Order and Stay on at least six occasions—four in writing—and Mr. Rodrigo on behalf of the Applicants has separately notified them on at least three further occasions. Plaintiffs' counsel's response has been not only to consistently ignore these notices and warnings, but also in fact to take multiple steps in direct breach of the Initial Order and Stay in spite of them.

38. The steps taken by Plaintiffs' counsel to add the Monitor and the certain former and past directors of Sears Canada as defendants in the Tremblay Action are not the only time that they have recently sought to circumvent Court Orders and cause additional costs for stakeholders in these CCAA Proceedings. On November 9, 2017, Plaintiff's counsel served on the Corbeil Purchaser an originating application in a class action (the "**Originating Application**") seeking to add the Corbeil Purchaser as a defendant in the Cantin/Routhier Action and hold it responsible for alleged actions of Corbeil, whose assets the Corbeil Purchaser acquired on November 25, 2017. In response, the Corbeil Purchaser's counsel promptly advised counsel to the Plaintiffs by letter dated November 28, 2017 that the transaction had been the subject of an approval and vesting order dated October 4, 2017 in the CCAA Proceedings that specifically excluded the assumption of any liabilities of Corbeil in the Cantin/Routhier Action. The letter included a copy of that Order, and accordingly requested that the Originating Application be withdrawn within five business days. A copy of the November 28, 2017 letter is attached hereto as **Appendix "N"**.

39. However, Plaintiffs' counsel failed to provide any substantive response to the November 28 letter and refused to withdraw its Originating Application, which in turn forced the

Corbeil Purchaser to file its own application to dismiss the Plaintiffs' Originating Application on December 21, 2017.

40. In light of such continuing attempts to circumvent the Initial Order, the Stay Extension Order and the other Orders of this Court, and with responding materials to the Motion to Amend due on February 2, 2018, the Monitor is now left with no alternative but to move for the Restraining Order. The Applicants, the Monitor and the other parties protected by the Stay and those Orders should not have to continue to expend time and limited resources addressing and responding to the Tremblay Plaintiffs' breaches, and it does not remain open to the Tremblay Plaintiffs or their counsel to continue them.

41. The Monitor therefore requests that the Court formally recognize this and grant the Restraining Order.

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

Dated this 10th day of January, 2018.

FTI Consulting Canada Inc.
In its capacity as Monitor of
Sears Canada Inc. and the other corporations in the Sears Canada Group

Paul Bishop
Senior Managing Director

Greg Watson
Senior Managing Director

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., et al.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

MOTION RECORD OF THE MONITOR
(Motion for a Restraining Order)
(returnable January 22, 2017)

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

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alexander.schmitt@nortonrosefulbright.com

Lawyers to the Monitor, FTI Consulting Canada Inc.

APPENDIX “B”
(see attached)

From: David Bourgoin [mailto:dbourgoin@bga-law.com]
Sent: January 17, 2018 10:32
To: Mojtahedi, Arad; Benoit Gamache
Cc: Sonia Tremblay; Himo, Julie; jmorissette@osler.com; eprefontaine@osler.com; Sean Zweig; Jessica Starck; Benoit Gamache
Subject: Re: Karine Tremblay c. Centre Hi-Fi Chicoutimi et al

You have committed a procedural breach by failing to inform Justice Dallaire and the counsel for the Plaintiff that an application for an injunction for the same matter would be filed in Toronto by your firm, to which we were required to dedicate time that had not been planned.

We will raise this lack of transparency tomorrow and will make representations in this regard.

Regarding our schematic argumentation, we believe that the amended application for authorization to institute a class action and the application for leave to amend are self-explanatory. Furthermore, the rules and conditions of the amendment are well known.

We will therefore assess whether an argumentation in schematic format is required and will provide any further value.

David Bourgoin

Sent from my Samsung Galaxy smart phone.

-------- Original message --------

From: "Mojtahedi, Arad" <arad.mojtahedi@nortonrosefulbright.com>
Date: 18-01-16 1:45 PM (GMT-05:00)
To: David Bourgoin <dbourgoin@bga-law.com>, Benoit Gamache <bgamache@bga-law.com>
Cc: Sonia Tremblay <stremblay@bga-law.com>, "Himo, Julie" <julie.himo@nortonrosefulbright.com>, jmorissette@osler.com, eprefontaine@osler.com, Sean Zweig <ZweigS@bennettjones.com>, Jessica Starck <StarckJ@bennettjones.com>
RE: RE: Karine Tremblay v Centre Hi-Fi Chicoutimi et al

Dear confrères,

I would like to remind you that you are required to file your memorandum with your authorities. I refer you to Justice Dallaire's letter dated December 21, 2017 (attached):

> [Translation]
>
> *It should be understood that the applications for amendment presented by M^tre Bourgoin and that raise grounds of contestation will be set forth in writing in **a schematized memorandum** along with the case law that the Plaintiff agrees to send to all counsel and to the court by no later than January 15, 2018 at 5:00 p.m..*

Please send your written arguments to all parties, copying the court, as soon as possible.

Regards,

Arad Mojtahedi
Avocat
Associate

Norton Rose Fulbright Canada S.E.N.C.R.L., s.r.l. / LLP
1, Place Ville Marie, Bureau 2500, Montréal, QC, H3B 1R1, Canada
T: +1 514.847.4582 | F: +1 514 286 5474
arad.mojtahedi@nortonrosefulbright.com

NORTON ROSE FULBRIGHT

From: Sonia Tremblay [mailto:stremblay@bga-law.com]
Sent: January 15, 2018 5:06 p.m.
To: Manon Tremblay (Chicoutimi)
Cc: erolland@audrenrolland.com; maudren@audrenrolland.com; zweigs@bennettjones.com; Benoit Gamache; David Bourgoin; guy.poitras@gowlingwlg.com; lthibaudeau@lavery.ca; Mojtahedi, Arad; Himo, Julie; eprefontaine@osler.com; jmorissette@osler.com
RE: Karine Tremblay v Centre Hi-Fi Chicoutimi et al

Dear Ms. Tremblay,

Please find attached the authorities in anticipation of the hearing of the application for leave to amend presentable on February 16, 2018.

Best regards.

Sonia Tremblay
Assistant to Mtre. David Bourgoin
BGA Barristers and Soliciters LLP
67 Sainte-Ursule
Quebec City, Quebec G1R 4E7
Tel.: (418) 692-5137
Fax: (418) 692-5695

stremblay@bga-law.com

ORDRE DES TRADUCTEURS, TERMINOLOGUES ET INTERPRÈTES AGRÉÉS DU QUÉBEC
Traducteur agréé - Certified Translator
KENNETH MCDONOUGH
2138

Le droit à l'échelle mondiale
Law around the world
nortonrosefulbright.com

ORIGINAL DOCUMENT(S) FOLLOW

Schmitt, Alexander

From: David Bourgoin <dbourgoin@bga-law.com>
Sent: January-17-18 10:32 AM
To: Mojtahedi, Arad; Benoit Gamache
Cc: Sonia Tremblay; Himo, Julie; jmorissette@osler.com; eprefontaine@osler.com; Sean Zweig; Jessica Starck; Benoit Gamache
Subject: Re: Karine Tremblay c. Centre Hi-Fi Chicoutimi et al

Vous avez contrevenu au déroulement du dossier en n'informant pas le juge Dallaire et les procureurs de la demanderesse qu'une demande d'injonction visant le même objet serait déposée à Toronto par votre cabinet, sur laquelle nous avons dû consacrer du temps qui n'était pas prévu.

Nous dénoncerons ce manque de transparence demain et ferons des représentations à cet égard.

Quant à notre argumentation schématisée, nous sommes d'avis que la demande modifiée pour autorisation d'exercer une action collective et la demande pour permission de modifier parlent d'elles-même. De plus, les règles et conditions de l'amendement sont bien connues.

Nous évaluons donc si un schéma
d'argumentation est nécessaire et apportera quoi que ce soit de plus.

David Bourgoin

Envoyé depuis mon téléphone intelligent Samsung Galaxy.

-------- Message d'origine --------
De : "Mojtahedi, Arad" <arad.mojtahedi@nortonrosefulbright.com>
Date : 18-01-16 1:45 PM (GMT-05:00)
À : David Bourgoin <dbourgoin@bga-law.com>, Benoit Gamache <bgamache@bga-law.com>
Cc : Sonia Tremblay <stremblay@bga-law.com>, "Himo, Julie" <julie.himo@nortonrosefulbright.com>, jmorissette@osler.com, eprefontaine@osler.com, Sean Zweig <ZweigS@bennettjones.com>, Jessica Starck <StarckJ@bennettjones.com>
Objet : RE: Karine Tremblay c. Centre Hi-Fi Chicoutimi et al

Chers confrères,

Je vous rappelle que vous aviez l'obligation de soumettre votre exposé avec vos autorités. Je vous réfère à la lettre de M. le juge Dallaire daté du 21 décembre, 2017 (ci-jointe) :

> *On doit comprendre que les demandes en modification présentées par M^e^ Bourgoin et qui soulèvent des motifs de contestation seront exposées par écrit dans **un exposé schématisé** accompagné de jurisprudence que la demanderesse s'engage à transmettre à l'ensemble des avocats et au tribunal au plus tard le 15 janvier 2018 à 17 h.*

Veuillez svp envoyer vos arguments écrits à toutes les parties, en mettant le tribunal également en copie, et ce dans les plus brefs délais.

Salutations,

Arad Mojtahedi
Avocat
Associate

Norton Rose Fulbright Canada S.E.N.C.R.L., s.r.l. / LLP
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arad.mojtahedi@nortonrosefulbright.com

NORTON ROSE FULBRIGHT

De : Sonia Tremblay [mailto:stremblay@bga-law.com]
Envoyé : 15 janvier 2018 17:06
À : Manon Tremblay (Chicoutimi)
Cc : erolland@audrenrolland.com; maudren@audrenrolland.com; zweigs@bennettjones.com; Benoit Gamache; David Bourgoin; guy.poitras@gowlingwlg.com; lthibaudeau@lavery.ca; Mojtahedi, Arad; Himo, Julie; eprefontaine@osler.com; jmorissette@osler.com
Objet : Karine Tremblay c. Centre Hi-Fi Chicoutimi et al

Mme Tremblay,

Veuillez trouver ci-joint les autorités en prévision de l'audition de la requête pour permission d'amender présentable le 16 février prochain.

Espérant le tout conforme.

Sonia Tremblay
Adjointe de Me David Bourgoin
BGA Avocats s.e.n.c.r.l.
67, Sainte-Ursule
Québec (Quebec) G1R 4E7
Tél. / tel. : (418) 692-5137
Télécopieur / Fax : (418) 692-5695

stremblay@bga-law.com

APPENDIX “C”
(see attached)

BGA AVOCATS S.E.N.C.R.L. BARRISTERS SOLICITORS LLP

67, Sainte-Ursule, Québec (Québec) G1R 4E7
4725, boul. Métropolitain Est, bur. 207, Montréal (Québec) H1R 0C1

David Bourgoin, avocat
Main : 418 692-5137
Fax : 418 692-5695
dbourgoin@bga-law.com

BY FAX

January 17, 2018

Justice Geoffrey B. Morawetz
Regional coordinator judge
SUPERIOR COURT OF JUSTICE (TORONTO AREA)
Commercial department
393, avenue University, 10th floor
Toronto (Ontario) M5G 1E6

Re: Request to postpone the Motion Record from the Monitor (FTI Consulting Canada Inc.) in the Court File CV-17-11846-00CL

Mr. Justice Morawetz,

The undersigned represents the plaintiff in the following Quebec "Extended Warranty" Class Action: *Karine Tremblay v. Centre Hi-Fi Chicoutimi et als* (Superior Court of Quebec File Number: 150-06-000010-173). Our firm also represents other plaintiffs in the Province of Quebec in the following "Extended Warranty" Class Actions, also identified in the Notice of Motion dated January 10, 2017 in the court file CV-17-11846-00CL:

(i) *Luc Cantin and Francois Routhier v. Ameublements Tanguay Inc. et al.* (Superior Court of Quebec File No: 500-06-000709-143)

(ii) *Lise Ostiguy v. Sears Canada Inc.* (Superior Court of Quebec File No: 500-06-000537-106)

(iii) *Jacques Fillion v. Corbeil Électrique Inc.* (Superior Court of Quebec File No: 500-06-000535-100)

All of the above-mentioned cases were filed in the Province of Quebec and are known collectively as the "Quebec Warranty Class Actions". Furthermore, Sears Canada and/or Corbeil are currently respondents in one or many of these proceeding.

On June 22, 2017, Sears Canada Inc. (“Sears”) sought and obtained an initial order to stay the proceedings notably against the Sears Entities and their current and former directors and officers. The initial Stay Order has been extended by various Orders of the Court, and will expire on January 22, 2018.

On November 29, 2017, the undersigned lawyer served a Motion to Amend plaintiff Karine Tremblay’s application for authorization to institute a class action (the “Motion to Amend”) in order to, among other things, add both the Monitor and certain current and former directors of Sears as respondents in that file. Your colleague Justice Martin Dallaire from the Superior Court of Quebec is in charge of the case management in this file.

Essentially, we allege that both the directors and the Monitor committed a fault between the Stay Order and the liquidation by deliberately letting the vendors sells extended warranties without informing the consumers that there was a high risk that these warranties would not be honoured due to Sears insolvency, which effectively happens on October 19, 2017. We consider that this type of fault is not covered by any immunity or by the Stay Order.

On January 11, 2018, FTI Consulting Canada Inc.(FTI), in its capacity of Court-appointed monitor (the “Monitor”) served the undersigned a motion to restrain all the Quebec Plaintiffs to continue any legal proceedings against the Monitor, the Directors, Sears and Corbeil, with respect to the four “Quebec Extended Warranty” Class Actions (“The Motion”).

In the undersigned’s opinion, the core of this Motion is to provide an Injunction against Quebec Plaintiffs to restrain all of their judicial proceedings in Quebec the regards of the of sale of extended warranties under Sears and Corbeil‘s names, and this, beyond the limitation of the initial Stay Order.

The Motion is scheduled to be presented to a judge of the Superior Court in Toronto on Monday, January 22, 2018, at 10:00 am at the Toronto Court house.

Under the following grounds, the undersigned respectfully request that the Monitor’s Motion be postponed until the judgment of Justice Dallaire on our Motion to Amend:

1- It is almost impossible for the Quebec plaintiff’s lawyers to hire and be represented by a law firm authorized to practice in Ontario for next Monday.

2- The Quebec plaintiffs and their lawyers require additional time to oppose the Motion.

3- The hearing of the Monitor’s Motion would be *prima facie* premature for the following reasons:

a. In a case management hearing held on December 21, 2017, where the Monitor, the Directors and Sears were duly represented, your colleague Justice Martin Dallaire from the Quebec Superior Court scheduled the hearing on the Motion to Amend Tremblay's Class Action on February 16, 2018. The Monitor, the Directors and Sears raised the same arguments with respect to the Stay Order and the immunity, but Justice Dallaire decided to fix the hearing on the Motion to Amend and this management ruling was not appealed.

b. Essentially, the same grounds as described in the Motion will be raised by the Monitor, the Directors and Sears to contest the Motion to Amend Tremblay's Class Action.

c. Justice Dallaire is entitled, within his conferred jurisdiction to decide if the Motion to Amend shall be granted and by doing so, the Monitor's Motion for a restraining order will then become a non issue.

The undersigned respectfully submit that the following grounds supports the inappropriate character of the Monitor's Motion:

a. Both *Ostiguy* and *Fillion Inc.* cases are currently inactive and no further action and/or step are scheduled to be done involving Sears and Corbeil.

b. Article 513 of the *Quebec Code of civil procedure* forbid that an injunction be granted to restrain judicial proceedings. A serious jurisdiction question could legitimately be raised if an Order issued from the Ontario Superior Court would seek to restrain the Quebec Superior Court to exercise its jurisdiction and hear the Motion to Amend the Quebec Class action.

c. On June 22, 2017, the Ontario Superior Court has already ordered a stay (with it's own limitations) to avoid further step and/or action scheduled against the defendant "Sears", notably in the Tremblay Case.

The present correspondence establishes our preliminary position. We trust the above to be satisfactory and we remain available at any time to discuss the foregoing by the end of the week in conference call. With respect to our request to postpone the Monitor's Motion, we will be waiting for a decision on this matter from the case management judge in the file CV-17-11846-00CL before planning our presence on January 22, 2018.

David Bourgoin
BGA Avocats s.e.n.c.r.l.
DB/st

Encl : Article 513, *Code of Civil Procedure*

c.c.: Justice Martin Dallaire (j.c.s.) (*By Email*)
Orestes Pasparakis, Norton Rose Fulbright Canada LLP (*By Email*)
Virginie Gauthier, LSUC#, Norton Rose Fulbright Canada LLP (*By Email*)
Alan Merskey, Norton Rose Fulbright Canada LLP (*By Email*)
Evan Cobb, Norton Rose Fulbright Canada LLP (*By Email*)
Alexander Schmitt, Norton Rose Fulbright Canada LLP (*By Email*)
Arad Mojtahedi, Norton Rose Fulbright Canada LLP (*By Email*)
Benoit Gamache, Cabinet BG Avocat Inc. (*By Email*)

Chapter C-25.01

Code of Civil Procedure

BOOK VI
SPECIAL PROCEDURES
I.N. 2016-12-01.

TITLE I
PROVISIONAL AND CONTROL MEASURES

CHAPTER I
INJUNCTION

[…]

513. An injunction cannot be granted to restrain judicial proceedings or the exercise of an office within a legal person established in the public interest or for a private interest, except in the cases described in article

329 of the Civil Code.

2014, c. 1, a. 513.

APPENDIX “D”
(see attached)

Le 17 janvier 2018

Transmis par courriel *(manon.tremblay@judex.qc.ca)*

L'honorable Martin Dallaire
Juge de la Cour supérieure du Québec
Palais de justice
227, rue Racine Est
Chicoutimi (Québec) G7H 7B4

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Votre référence	Notre référence
150-06-000010-173	1000299972

***Karine Tremblay* c. *Centre Hi-Fi Chicoutimi et al* (150-06-000010-173)**

Monsieur le Juge Dallaire,

La présente fait suite à la lettre de Me David Bourgoin en date du 12 janvier 2018 transmise dans l'affaire mentionnée en titre et aux correspondances subséquentes.

Comme vous le savez déjà, le Contrôleur est d'avis que Mes Bourgoin et Gamache ont contrevenu à l'ordonnance de suspension des procédures (« **l'Ordonnance de suspension »**) émise par la Cour supérieure de l'Ontario (la « **Cour LACC** ») aux termes de la *Loi sur les arrangements avec les créanciers des compagnies*, LRC 1985, c C-36 (la « **LACC** »), et ce à plusieurs reprises. À titre d'officier de justice nommé par la Cour LACC, FTI Consulting Canada Inc., en sa qualité de Contrôleur de Sears Canada Inc., a l'obligation d'informer ladite Cour de toute violation à ces ordonnances, incluant en l'espèce, à l'Ordonnance de suspension. C'est dans ce contexte que le Contrôleur estime approprié de s'adresser à la Cour LACC afin de l'aviser du respect des ordonnances présentement en vigueur.

Par ailleurs, la suspension des procédures prévue dans l'Ordonnance initiale et dans l'Ordonnance de suspension ont été rendues en vertu de la LACC, une loi fédérale laquelle confère à la Cour LACC la compétence pour régler toutes questions concernant notamment les entités Sears, ses administrateurs et le Contrôleur. Le droit à la suspension des procédures est d'ailleurs nécessaire afin d'empêcher des situations comme la présente alors que des prétendus créanciers tentent d'intenter un recours contre les personnes visées par la suspension de procédures sans obtenir l'autorisation de la Cour LACC et en parallèle aux procédures aux termes de la LACC. Nous vous référons à ce sujet à la décision de l'honorable juge Stephen Hamilton dans l'affaire *Bloom Lake General Partner Limited et al*, aux paragraphes 29 à 33, dont copie est jointe aux présentes. Plus particulièrement, les paragraphes 31 à 33 traitent de la nécessité d'une suspension de procédure en faveur d'entreprises qui sont insolvables afin de leur permettre de concentrer leurs ressources sur les objectifs qui sous-tendent la LACC :

> [31] Although the *Sam Lévy* case was decided in the context of the *Bankruptcy and Insolvency Act* ("BIA"), the same principles apply in the context of the other insolvency legislation, including the CCAA. The CCAA court has jurisdiction to deal with all of the issues that arise in the context of the CCAA proceedings. The stay of proceedings under the CCAA gives effect to this principle by preventing creditors from bringing proceedings outside the CCAA proceedings without the authorization of the CCAA court.

> [32] There are clear efficiencies to having a single court deal with all of the issues in a single judgment.
>
> [33] The general rule is therefore that the Court should rule on all issues that arise in the context of these insolvency proceedings.

De plus, en vertu de la doctrine de la prépondérance fédérale, l'article 513 du *Code de procédure civile* ne peut avoir pour effet de rendre inopérantes les dispositions de la LACC eu égard à la suspension de procédures et à la nécessité d'obtenir l'autorisation de la Cour LACC avant d'intenter des procédures contre les personnes visées par la suspension de procédures. En vertu de l'article 11.02(2) de la LACC, la Cour LACC peut, « par ordonnance, aux conditions qu'[elle] peut imposer et pour la période qu'[elle] estime nécessaire surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre » Sears Canada Inc. De la même manière, l'article 11.03(1) de la LACC prévoit que la Cour LACC « peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, ès qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers ». De surcroît, et comme vous le savez, les paragraphes 14 et 25 de l'Ordonnance initiale émise en vertu de la LACC prévoient également la suspension des procédures à l'égard des Entités Sears Canada, le Contrôleur et les administrateurs et dirigeants des Entités Sears Canada.

En ce qui concerne les représentations de Mes Bourgoin et Gamache relativement à l'audition devant la Cour LACC, sous réserve des directives de la Cour LACC, nos confrères pourraient assister à l'audience de la *Motion for a Restraining Order* par voie de téléconférence et présenter leurs observations à cet effet. Le Contrôleur est disposé à prendre les mesures nécessaires auprès de la Cour LAAC afin de faciliter une telle participation par voie téléphonique.

Finalement, soyez assuré, Monsieur le juge Dallaire, que le Contrôleur avait et a toujours l'intention d'aviser cette Cour de toute ordonnance émise par la Cour LACC, incluant eu égard à la *Motion for a Restraining Order*.

Veuillez agréer, monsieur le Juge Dallaire, l'expression de nos sentiments les plus distingués,

Norton Rose Fulbright Canada S.E.N.C.R.L., s.r.l.
Par :

Arad Mojtahedi
Avocat

AM/cc

Pièce jointe (*Arrangegement relatif à Bloom Lake*)

Copie : Me David Bourgoin – *BGA Avocats*
Me Benoit Gamache – *Cabinet BG Avocats Inc*.
Me Guy Poitras – *Gowling WLG*
Me Marie Audren et Me Emanuelle Rolland – *Audren Rolland*
Me Luc Thibaudeau – *Lavery de Billy*
Me Nick Rodrigo – *Davies Ward Phillips & Vineberg*
Me Sean Zweig and Me Jessica Starck – *Bennett Jones*
Me Sandra Abitan, Me Éric Préfontaine et Me Julien Morissette – *Osler, Hoskin & Harcourt*
Me Julie Himo, Me Virginie Gauthier et Me Alan Mersky – *Norton Rose Fulbright Canada*

SUPERIOR COURT

(*Commercial Division*)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No: 500-11-048114-157

DATE: January 30, 2017

PRESIDED BY THE HONOURABLE STEPHEN W. HAMILTON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
8568391 CANADA LIMITED
CLIFFS QUÉBEC IRON MINING ULC
WABUSH IRON CO. LIMITED
WABUSH RESOURCES INC.
Petitioners
And
THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
BLOOM LAKE RAILWAY COMPANY LIMITED
WABUSH MINES
ARNAUD RAILWAY COMPANY LIMITED
WABUSH LAKE RAILWAY COMPANY LIMITED
Mises en cause
And
MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON
SYNDICAT DES MÉTALLOS, SECTIONS LOCALES 6254 ET 6285
MORNEAU SHEPELL LTD, IN ITS CAPACITY AS REPLACEMENT PENSION PLAN ADMINISTRATOR
HER MAJESTY IN RIGHT OF NEWFOUNLAND AND LABRADOR, AS REPRESENTED BY THE

SUPERINTENDENT OF PENSIONS
THE ATTORNEY GENERAL OF CANADA, ACTING ON BEHALF OF THE OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS
RÉGIE DES RENTES DU QUÉBEC
VILLE DE SEPT-ÎLES
Mises en cause
And
FTI CONSULTING CANADA INC.
Monitor

JUDGMENT

INTRODUCTION

[1] The debtors have filed proceedings under the *Companies' Creditors Arrangement Act* ("CCAA").[1] They owe substantial liabilities under two pension plans, including special payments, catch-up special payments and wind-up deficiencies. The Monitor has filed a motion for directions with respect to the priority of the various components of the pension claims.

[2] A preliminary issue has arisen as to whether the Court should request the aid of the Supreme Court of Newfoundland and Labrador (the "NL Court") with respect to the scope and priority of the deemed trust and other security created by the Newfoundland and Labrador *Pension Benefit Act* ("NLPBA"),[2] which regulates in part the pension plans.

CONTEXT

[3] On May 19, 2015, the Petitioners Wabush Iron Co. Limited and Wabush Resources Inc. and the Mises-en-cause Wabush Mines (a joint venture of Wabush Iron and Wabush Resources), Arnaud Railway Company and Wabush Lake Railway Company Limited (together the "Wabush CCAA Parties") filed a motion for the issuance of an initial order under the CCAA, which was granted the following day by the Court.

[4] Prior to the filing of the motion, Wabush Mines operated (1) the iron ore mine and processing facility located near the Town of Wabush and Labrador City, Newfoundland and Labrador, and (2) the port facilities and a pellet production facility at Pointe-Noire, Québec. Arnaud Railway and Wabush Lake Railway are both federally regulated

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1 R.S.C. 1985, c. C-36.
2 S.N.L. 1996, c. P-40.1.

railways that transported iron ore concentrate from the Wabush mine to the Pointe-Noire port. The operations had been discontinued and the employees terminated or laid off prior to the filing of the CCAA motion.

[5] The Wabush CCAA Parties have two pension plans for their employees which include defined benefits:

- A hybrid pension plan for salaried employees at the Wabush mine and the Pointe-Noire port hired before January 1, 2013, known as the Contributory Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company (the "Salaried Plan"); and

- A pension plan for unionized hourly employees at the Wabush mine and Pointe-Noire port, known as the Pension Plan for Bargaining Unit Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company (the "Union Plan").

[6] Wabush Mines was the administrator of both plans.

[7] The majority of the employees covered by the plans reported for work in Newfoundland and Labrador while some reported for work in Québec. Moreover, some of the employees covered by the Union Plan worked for Arnaud Railway, which is a federally regulated railway. The result is that the Salaried Plan is governed by the NLPBA, while the Union Plan is governed by both the NLPBA and the federal *Pension Benefits Standards Act* ("PBSA").[3] Further, the Union suggests that the Québec *Supplemental Pension Plans Act* ("SPPA")[4] might be applicable to employees or retirees who reported for work in Québec. Both plans are subject to regulatory oversight by the provincial regulator in Newfoundland and Labrador, the Superintendent of Pensions (the "NL Superintendent"), while the Union Plan is also subject to regulatory oversight by the federal pension regulator, the Office of the Superintendent of Financial Institutions ("OSFI"). The Québec regulator, Retraite Québec, might also have a role to play.

[8] On June 26, 2015, in the context of approving the interim financing of the debtors, the Court ordered the suspension of payment by the Wabush CCAA Parties of the monthly amortization payments and the annual lump sum "catch-up" payments coming due under the plans, and confirmed the priority of the Interim Lender Charge over the deemed trusts with respect to the pension liabilities. The Court also ordered the

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3 R.S.C. 1985 (2nd Supp.), c. 32.

4 CQLR, c R-15.1, s. 49.

suspension of payment of other post-retirement benefits, including life insurance, health care and a supplemental retirement arrangement plan.[5]

[9] On December 16, 2015, the NL Superintendent terminated both plans effective immediately on the basis that the plans failed to meet the solvency requirements under the regulations, the employer has discontinued all of its business operations and it was highly unlikely that any potential buyer of the assets would agree to assume the assets and liabilities of the plans.[6] On the same date, OSFI terminated the Union Plan effective immediately for the same reasons.[7]

[10] Both the NL Superintendent and OSFI reminded the Wabush CCAA Parties of the employer's obligation upon termination of the plan to pay into the pension fund all amounts that would be required to meet the solvency requirements and the amount necessary to fund the benefits under the plan. They also referred to the rules with respect to deemed trusts.[8]

[11] On January 26, 2016, the salaried retirees received a letter from Wabush Mines notifying them that the NL Superintendent had directed Wabush Mines to reduce the amount of monthly pension benefits of the members by 25%.[9] Retirees under the Union Plan had their benefits reduced by 21% on March 1, 2016.[10]

[12] On March 30, 2016, the NL Superintendent and OSFI appointed Morneau Shepell Ltd as administrator for the plans.[11]

[13] The Wabush CCAA Parties paid the monthly normal cost payments for both plans up to the termination of the plans on December 16, 2015. As a result, the monthly normal cost payments for the Union Plan were fully paid as of December 16, 2015.[12] The monthly normal cost payments for the Salaried Plan had been overpaid in the amount of $169,961 as of December 16, 2015.[13]

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5 2015 QCCS 3064; motion for leave to appeal dismissed, 2015 QCCA 1351.
6 Exhibit R-13.
7 Exhibit R-14.
8 Exhibits R-13 and R-14.
9 Exhibit RESP-7.
10 Affidavit of Terence Watt, sworn December 14, 2016, par. 19.
11 Exhibit R-15.
12 There is a debate as to whether the Wabush CCAA Parties were required to pay the full monthly payment for December or only a pro-rated portion. The amount at issue for the period from December 17 to 31, 2015 is $21,462.
13 Exhibit R-16.

[14] However, the Wabush CCAA Parties ceased making the special payments in June 2015 pursuant to the order issued by the Court, with the result that unpaid special payments as of December 16, 2015 total $2,185,752 for the Salaried Plan[14] and $3,146,696 for the Union Plan.[15]

[15] Further, the Wabush CCAA Parties did not make the lump sum "catch-up" special payments that came due after June 2015. The amount payable is now calculated to be $3,525,125.[16] These amounts became known with certainty only when the actuarial report was completed and filed in July 2015, but some of these amounts may relate to the pre-filing period.

[16] Finally, the plans are underfunded. The Plan Administrator estimates the wind-up deficits as at December 16, 2015 to be approximately $26.7 million for the Salaried Plan and approximately $27.7 million for the Union Plan.

[17] As a result, according to the Monitor, the total amounts owing are approximately $28.7 million to the Salaried Plan and $34.4 million to the Union Plan.

[18] The Plan Administrator filed a proof of claim in respect of the Salaried Plan that includes a secured claim in the amount of $24 million and a restructuring claim in the amount of $1,932,940,[17] and a proof of claim with respect to the Union Plan that includes a secured claim in the amount of $29 million and a restructuring claim in the amount of $6,059,238.[18]

[19] The differences in the numbers are not important at this stage. It is sufficient to note that there are very large claims and that the Plan Administrator claims the status of a secured creditor with respect to a substantial part of its claims.

[20] It is also important to note that the Wabush CCAA Parties held assets both in Newfoundland and Labrador and in Québec. Many of the Québec assets have been sold and have generated substantial proceeds currently held by the Monitor.

[21] The Monitor is now working through the claims procedure. In that context, the Monitor applies to the Court for an order declaring that:

a) normal costs and special payments outstanding as at the date of the Wabush Initial Order are subject to a limited deemed trust;

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14 Exhibit R-16.
15 Exhibit R-17.
16 Exhibit R-17.
17 Exhibit R-18.
18 Exhibit R-19.

b) normal costs and special payments payable after the date of the Wabush Initial Order, including additional special payments and catch up payments established on the basis of actuarial reports issued after the Wabush Initial Order, constitute unsecured claims;

c) the wind-up deficiencies constitute unsecured claims; and

d) any deemed trust created pursuant to the NLPBA may only charge property in Newfoundland and Labrador.

[22] Those issues are not yet before the Court. A preliminary issue has arisen as to whether the Court should request the aid of the NL Court with respect to the scope and priority of the deemed trust and the lien created by the NLPBA and whether the deemed trust and the lien extend to assets located outside of Newfoundland and Labrador.

POSITION OF THE PARTIES

[23] All parties agree that (1) the Court has jurisdiction to deal with all of the issues, and (2) the Court has the discretion to request the aid of the NL Court.

[24] Three parties suggest that the Court should exercise that discretion and request the aid of the NL Court:

- The Plan Administrator;
- The representatives of the salaried employees and retirees; and
- The NL Superintendent.

[25] The representatives of the salaried employees and retirees have proposed that the following questions should be resolved by the NL Court:

1. The Supreme Court of Canada has confirmed in *Indalex* that provincial laws apply in CCAA proceedings, subject only to the doctrine of paramountcy. Assuming there is no issue of paramountcy, what is the scope of section 32 in the NPBA [NLPBA] deemed trusts in respect of:

   a) unpaid current service costs;

   b) unpaid special payments; and,

   c) unpaid wind-up liability.

2. The Salaried Plan is registered in Newfoundland and regulated by the NPBA.

a) (i) Does the PBSA deemed trust also apply to those members of the Salaried Plan who worked on the railway (i.e., a federal undertaking)?

(ii) If yes, is there a conflict with the NPBA and PBSA if so, how is the conflict resolved?

b) (i) Does the SPPA also apply to those members of the Salaried Plan who reported for work in Québec?

(ii) If yes, is there a conflict with the NPBA and SPPA and if so, how is the conflict resolved?

(iii) Do the Quebec SPPA deemed trusts also apply to Québec Salaried Plan members?

3. Is the NPBA lien and charge in favour of the pension plan administrator in section 32(4) of the NPBA a valid secured claim in favour of the plan administrator? If yes, what amounts does this secured claim encompass?

[26] Three other parties suggest that the Court should not transfer any issues to the NL Court and should decide all of the issues:

- The Monitor;
- The Syndicat des métallos, sections locales 6254 et 6285; and
- The Ville de Sept-Îles.

[27] The Ville de Sept-Îles argues that the request to transfer should be dismissed because it is too late.

[28] Finally, two parties do not take a position on the request to transfer:

- The Attorney–General of Canada, acting on behalf of OSFI; and
- Retraite Québec.

ANALYSIS

1. The jurisdiction of the CCAA Court

[29] In principle, all issues relating to a debtor's insolvency are decided before a single court.[19] This rule is based on the "public interest in the expeditious, efficient and

[19] *Sam Lévy & Associés Inc.* v. *Azco Mining Inc.*, 2001 SCC 92, par. 25-28.

economical clean-up of the aftermath of a financial collapse."[20] This public interest favours a "single control" of insolvency proceedings by one court as opposed to their fragmentation among several courts.[21]

[30] The Supreme Court in *Sam Lévy* concluded as follows with respect to the relevant test:

> 76 In the present case, we are confronted with a federal statute that *prima facie* establishes one command centre or "single control" (*Stewart*, *supra*, at p. 349) for all proceedings related to the bankruptcy (s. 183(1)). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple jurisdictions. Parliament was of the view that a substantial connection sufficient to ground bankruptcy proceedings in a particular district or division is provided by proof of facts within the statutory definition of "locality of a debtor" in s. 2(1). The trustee in that locality is mandated to "recuperate" the assets, and related proceedings are to be controlled by the bankruptcy court of that jurisdiction. The Act is concerned with the economy of winding up the bankrupt estate, even at the price of inflicting additional cost on its creditors and debtors.[22]
>
> (Emphasis added)

[31] Although the *Sam Lévy* case was decided in the context of the *Bankruptcy and Insolvency Act* ("BIA"),[23] the same principles apply in the context of the other insolvency legislation, including the CCAA.[24] The CCAA court has jurisdiction to deal with all of the issues that arise in the context of the CCAA proceedings.[25] The stay of proceedings under the CCAA gives effect to this principle by preventing creditors from bringing proceedings outside the CCAA proceedings without the authorization of the CCAA court.

[32] There are clear efficiencies to having a single court deal with all of the issues in a single judgment.

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20 *Ibid*, par. 27.
21 *Ibid*, par. 64.
22 *Ibid*, par. 76.
23 R.S.C. 1985, c. B-3.
24 *Century Services Inc.* v. *Canada (Attorney General)*, 2010 SCC 60, par. 22; *Newfoundland and Labrador* v. *AbitibiBowater Inc.*, 2012 SCC 67, par. 21; *Montreal, Maine & Atlantic Canada Co./Montréal, Maine & Atlantique Canada Cie (Arrangement relatif à)*, 2013 QCCS 5194, par. 24-25; *Re Nortel Networks Corporation et al*, 2015 ONSC 1354, par. 24; *Re Essar Steel Algoma Inc.*, 2016 ONSC 595, par. 29-30, judgment of Court of Appeal ordering (i) Cliffs to seek leave to appeal the Order, (ii) the hearing of the leave to appeal motion be expedited, and (iii) the issuance of a stay pending the disposition of the leave to appeal motion, 2016 ONCA 138.
25 Section 16 CCAA provides that the orders of the CCAA court are enforced across Canada.

[33] The general rule is therefore that the Court should rule on all issues that arise in the context of these insolvency proceedings.

2. The discretion to ask for the assistance of another court

[34] There are however situations where another court can deal more efficiently with specific issues. The CCAA Court has jurisdiction to ask for the assistance of another court under Section 17 CCAA:

> **17** All courts that have jurisdiction under this Act and the officers of those courts shall act in aid of and be auxiliary to each other in all matters provided for in this Act, and an order of a court seeking aid with a request to another court shall be deemed sufficient to enable the latter court to exercise in regard to the matters directed by the order such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within their respective jurisdictions.

[35] The representative of the salaried employees and retirees also pleaded the notion of *forum non conveniens* under the Civil Code:

> **3135.** Even though a Québec authority has jurisdiction to hear a dispute, it may, exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another State are in a better position to decide the dispute.

[36] The Supreme Court held in *Sam Lévy*[26] that Article 3135 C.C.Q. does not apply in bankruptcy matters because of Section 187(7) BIA, which provides:

> **187 (7)** The court, on satisfactory proof that the affairs of the bankrupt can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may by order transfer any proceedings under this Act that are pending before it to another bankruptcy district or division.

[37] While Section 17 CCAA is not as explicit, the Court is satisfied that it is not necessary or appropriate to refer to Article 3135 C.C.Q. in the present context. The CCAA court is not being asked to decline jurisdiction, but rather it is being asked to seek the assistance of another court.

[38] The Court is therefore satisfied that, notwithstanding the general rule that it should rule on all issues that arise in the context of these insolvency proceedings, it can seek the assistance of another court. It is a discretionary decision of this Court, based on factors such as cost, expense, risk of contradictory judgments, expertise, etc.

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[26] *Supra* note 19, par. 62.

3. Specific grounds

[39] The arguments put forward in support of the referral of the issues to the NL Court can be summarized as follows:

a) Legal considerations:

- These are complex and important issues of provincial law;
- The courts in Newfoundland and Labrador possess far greater expertise in interpreting the NLPBA than does the courts in Québec, although these specific questions have not yet been considered by any court in Newfoundland and Labrador;
- The interpretation of the NLPBA is a question of the intention of the legislator in Newfoundland and Labrador, and the NL Court is better situated to determine this intention;

b) Factual considerations:

- It is a question of purely local concern and it may significantly impact a large number of residents of Newfoundland and Labrador;
- The province of Newfoundland and Labrador is closely connected to the dispute: a majority of the employees reported for work in the province and the Wabush CCAA Parties maintained significant business operations in the province;
- If justice is to be done and be seen to be done it is important that consequential decisions on provincial legislation be made by the courts of that province;
- The representatives of the salaried employees and retirees want the NL Court to interpret the NLPBA;

c) Practical considerations:

- The law of another province is treated as a question of fact in Québec, with the result that the conclusion on a matter of foreign law is not binding on subsequent courts and can only be overturned in the presence of a palpable and overriding error;
- It might be difficult to prove the law of Newfoundland and Labrador in a Québec court given the lack of jurisprudence on the specific issues;

- There will be increased costs if the Québec Court interprets the NLPBA because of the need to retain experts to provide legal opinions;

- There is no reason to believe that fragmenting the proceedings will result in additional delay;

- The judgment to be rendered will be a precedent and only a decision of the courts of Newfoundland and Labrador would be an authoritative precedent;

- Other persons or parties may wish to intervene on the issue of the scope of the Section 32 NLPBA deemed trusts, which would be more practical in the NL Court.

[40] These arguments do not convince the Court that this is an appropriate case to refer the issues to the NL Court.

a) Legal considerations

[41] This is the key argument put forward by the parties suggesting that the NLPBA issues be referred to the NL Court: the issues relate to the NLPBA, and the NL Court is best qualified to interpret the NLPBA.

[42] The Court accepts as a starting point that the NLPBA applies in the present matter: the pension plans are regulated by the NL Superintendent in accordance with the NLPBA (although OSFI also regulates the Union Plan in accordance with the PBSA) and the plans expressly provide that they are interpreted in accordance with the NLPBA.

[43] The Court also accepts the obvious proposition that the NL Court is more qualified to deal with an issue of Newfoundland and Labrador law than the courts of Québec, particularly since Newfoundland and Labrador is a common law jurisdiction and Québec is a civil law jurisdiction.

[44] However, that does not mean that the Court will automatically refer every issue governed by the law of another jurisdiction to the courts of that other jurisdiction.

[45] First, there are rules in the Civil Code with respect to how Québec courts deal with issues governed by foreign law. Articles 3083 to 3133 C.C.Q. set out the rules to determine which law is applicable to a dispute before the Québec courts, and Article 2809 C.C.Q. sets out how the foreign law is proven before the Québec courts.

[46] Further, pursuant to these rules, Québec courts regularly hear matters governed by foreign law. The Court of Appeal recently held that the fact that a dispute is governed by foreign law does not have much weight in a *forum non conveniens* analysis:

> [98] Si on revoie les considérations du Juge, portant sur dix points, pour conclure que le for géorgien est préférable, deux aspects principaux en ressortent, soit les coûts et la loi applicable.
>
> [99] Quant à cette dernière considération, elle n'est pas d'un grand poids, à mon avis. Parce que le débat porte sur les faits plutôt que sur le droit. Parce que la *common law* est tout de même familière aux tribunaux québécois. Parce que faire la preuve de la loi d'un État américain n'est pas un grand défi, c'est même chose courante.
>
> [100] Et surtout, parce que le critère de la loi applicable ne constitue pas en soi un facteur important. Dans tout litige international, les conflits de lois sont l'ordinaire et non l'exception.[27]

[47] In other words, the mere fact that a dispute is governed by foreign law is not a good reason to send the case to the foreign jurisdiction. This principle was applied in a CCAA context in the *MMA* case.[28]

[48] There are examples in the insolvency context of the court with jurisdiction over the insolvency declining to send an issue governed by foreign law to the foreign court. In *Sam Lévy*, the Supreme Court declined to send an insolvency matter to British Columbia simply because there was a choice of B.C. law, stating, "The Quebec courts are perfectly able to apply the law of British Columbia."[29]

[49] In *Lawrence Home Fashions Inc./Linge de maison Lawrence inc. (Syndic de)*, Justice Schrager, then of this Court, stated :

> [18] In any event, should equitable set-off under Ontario law become relevant to the case, Québec judges sitting in such matters, on the presentation of the appropriate evidence, are readily capable of dealing with foreign law issues. Indeed, this is a frequent occurrence particularly in insolvency matters.[30]

[50] The Ontario courts rejected similar arguments in *Essar Algoma*:

> [80] Ontario courts can and do often apply foreign law. In this case I do not consider the fact that the law to be applied is Ohio law much of a factor, if any. [31]

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27 *Stormbreaker Marketing and Productions Inc.* c. *Weinstock*, 2013 QCCA 269, par. 98-100.
28 *MMA*, *supra* note 24, par. 20.
29 *Sam Lévy*, *supra* note 19, par. 61.
30 2013 QCCS 3015, par. 18.
31 *Supra* note 24, par. 80. See also *Nortel Networks*, *supra* note 24, par. 29.

[51] The Monitor submitted cases in which Québec courts have interpreted different provisions of the pension laws of other provinces.[32] The Court also notes that it dealt to a more limited extent with the deemed trust under the NLPBA in its decision dated June 26, 2015.

[52] There are nevertheless circumstances where the CCAA court has referred legal issues to the courts of another province. The *Curragh*[33] and *Yukon Zinc*[34] judgments were cited as examples of such cases. However, in both cases, the legal issues related to the Yukon *Miners Lien Act*.[35] Justice Farley in *Curragh* wrote :

> This legislation and its concept of the lien affecting the output of the mine or mining claim is apparently unique to the Yukon Territory.[36]

[53] Moreover, both cases involved real rights on property in Yukon.

[54] The parties also pointed to *Timminco* as precedent authority directly on point supporting the transfer of a pension issue by the CCAA court to the jurisdiction where the pension plan is registered and has been administered.[37] However, *Timminco* is not a precedent in that the parties in that case consented to the referral of the issue and Justice Morawetz simply gave effect to their consent.

[55] Without concluding that the Court would only refer a legal issue if the foreign law at issue is unique, the Court concludes that the arguments favouring the referral of a legal issue are stronger when the foreign law is unique.

[56] It is therefore important to examine the issues that might be referred to the NL Court and the uniqueness of the NLPBA provisions that are at issue in the present matter.

[57] The representatives of the salaried employees and retirees identify the relevant questions as being the scope of the deemed trust and of the lien and charge under Section 32 NLPBA, as well as the interaction between the NLPBA and the federal and Québec statutes.

[58] Section 32 NLPBA provides:

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32 *Emerson Électrique du Canada ltée* c. *Chatigny*, 2013 QCCA 163; *Bourdon* c. *Stelco inc.*, 2004 CanLII 13895 (QC CA).

33 *Canada (Minister of Indian Affairs and Northern Development)* v. *Curragh Inc.*, [1994] O.J. No. 953 (Gen. Div.)

34 *Yukon Zinc Corp. (Re)*, 2015 BCSC 1961.

35 R.S.Y. 2002, c. 151.

36 *Supra* note 33, par. 11. See also *Yukon Zinc*, *supra* note 34, par. 47 and 57.

37 *Timminco Limited (Re)*, 2012 ONSC 5959.

> **32.** (1) An employer or a participating employer in a multi-employer plan shall ensure, with respect to a pension plan, that
>
> (a) the money in the pension fund;
>
> (b) an amount equal to the aggregate of
>
> (i) the normal actuarial cost, and
>
> (ii) any special payments prescribed by the regulations, that have accrued to date; and
>
> (c) all
>
> (i) amounts deducted by the employer from the member's remuneration, and
>
> (ii) other amounts due under the plan from the employer that have not been remitted to the pension fund
>
> are kept separate and apart from the employer's own money, and shall be considered to hold the amounts referred to in paragraphs (a) to (c) in trust for members, former members, and other persons with an entitlement under the plan.
>
> (2) In the event of a liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that under subsection (1) is considered to be held in trust shall be considered to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own money or from the assets of the estate.
>
> (3) Where a pension plan is terminated in whole or in part, an employer who is required to pay contributions to the pension fund shall hold in trust for the member or former member or other person with an entitlement under the plan an amount of money equal to employer contributions due under the plan to the date of termination.
>
> (4) An administrator of a pension plan has a lien and charge on the assets of the employer in an amount equal to the amount required to be held in trust under subsections (1) and (3).

[59] The first point is that there is nothing particularly unique about Section 32 NLPBA.

[60] There is a very similar deemed trust provision in Section 8(1) and (2) PBSA:

> **8 (1)** An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and the employer is deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan:
>
> **(a)** the moneys in the pension fund,
>
> **(b)** an amount equal to the aggregate of the following payments that have accrued to date:
>
> **(i)** the prescribed payments, and
>
> **(ii)** the payments that are required to be made under a workout agreement; and
>
> **(c)** all of the following amounts that have not been remitted to the pension fund:
>
> **(i)** amounts deducted by the employer from members' remuneration, and
>
> **(ii)** other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6).
>
> **(2)** In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

[61] In Québec, the SPPA provides :

> **49.** Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property.

[62] There are similar deemed trusts and/or liens in every Canadian province outside Québec except Prince Edward Island: Ontario,[38] British Columbia,[39] Alberta,[40] Saskatchewan,[41] Manitoba,[42] Nova Scotia[43] and New Brunswick.[44]

[63] The second point is that there is no Newfoundland and Labrador jurisprudence interpreting the relevant provisions of the NLPBA. The NL Superintendent pleaded that "the courts of Newfoundland & Labrador possess far greater expertise in interpreting the *PBA* [NLPBA] than does the Superior Court of Québec." While this is undoubtedly true with respect to the NLPBA as a whole, it is not true with respect to Section 32 NLPBA. In an earlier ruling also issued in the *Yukon Zinc* matter, Justice Fitzpatrick of the B.C. Supreme Court refused to decline jurisdiction and refer a matter involving the Yukon *Miners Lien Act* to the courts of Yukon and one of the factors that went against referring the matter to the Yukon court was the lack of jurisprudence in the Yukon court.[45]

[64] Moreover, in this case, because of the similarities between the NLPBA and the federal and other provincial pension laws, the judge interpreting the NLPBA will likely refer to decisions of the courts of other provinces interpreting their legislation or the federal PBSA.

[65] The Québec Court should be in as good a position as the NL Court in that exercise.

[66] Finally, as is typical in these cases, there is a close interplay between the NLPBA and the CCAA. The first question proposed by the representatives of the salaried employees and retirees is: "Assuming there is no issue of paramountcy, what is the scope of section 32 in the NPBA [NLPBA] deemed trusts". The scope of the NLPBA is not relevant if the NLPBA does not apply because of a conflict with the CCAA and federal paramountcy. In that sense, there may not even be a need to deal with the interpretation of the NLPBA.

[67] Moreover, there are issues in this case with the federal PBSA and the Québec SPPA. The representatives of the salaried employees and retirees suggest that the following questions are relevant:

> 2. The Salaried Plan is registered in Newfoundland and regulated by the NPBA.

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38 Ontario *Pension Benefits Act*, R.S.O. 1990, c. P.8, s. 57.
39 British Columbia *Pension Benefits Standards Act*, S.B.C. 2012, c. 30, s. 58
40 Alberta *Employment Pension Plans Act*, S.A. 2012, c. E-8.1, s. 58 and 60.
41 Saskatchewan *Pension Benefits Act, 1992*, S.S. 1992, c P-6.001, s. 43
42 Manitoba *Pension Benefits Act*, C.C.S.M., c. P32, s. 28.
43 Nova Scotia *Pension Benefits Act*, S.N.S. 2011, c. 41, s. 80.
44 New Brunswick *Pension Benefits Act*, S.N.B. 1987, c P-5.1, s. 51.
45 *Yukon Zinc Corporation (Re)*, 2015 BCSC 836, par. 90.

a) (i) Does the PBSA deemed trust also apply to those members of the Salaried Plan who worked on the railway (i.e., a federal undertaking)?

(ii) If yes, is there a conflict with the NPBA and PBSA if so, how is the conflict resolved?

b) (i) Does the SPPA also apply to those members of the Salaried Plan who reported for work in Québec?

(ii) If yes, is there a conflict with the NPBA and SPPA and if so, how is the conflict resolved?

(iii) Do the Quebec SPPA deemed trusts also apply to Québec Salaried Plan members?

[68] The representatives of the salaried employees and retirees and the NL Superintendent suggest that, in the interests of simplicity and expediency, all of these questions should be referred to the NL Court.

[69] The Court has great difficulty with this suggestion. On what basis should the Court conclude that the NL Court is in a better position to decide whether the Québec SPPA and deemed trust apply to employees who reported for work in Québec (question 2(b)(i) and (iii)) and how the conflict between the NLPBA and the SPPA should be resolved (question 2(b)(ii))? The first are pure questions of Québec law, and the last is a question where the laws of Québec and of Newfoundland and Labrador have equal application. There are similar questions with respect to the federal PBSA (question 2(c)), which the Court is in as good a position to decide as the NL Court.

[70] The Court will not refer issues of Québec law or federal law to the NL Court, and if those issues are too closely interrelated to the NLPBA issues, or if in the interests of simplicity and expediency they should all be decided by the same court, then the solution is not to refer any issues to the NL Court.

[71] In the earlier *Yukon Zinc* ruling where Justice Fitzpatrick refused to refer the matter to the courts of Yukon, she found that the issues related to the interrelationship between the Yukon *Miners Lien Act* and the rights asserted by others under B.C. law, in relation to assets the majority of which were located in British Columbia:

> [89] As for the law to be applied to the various issues, it is clear that whatever forum is used to resolve these issues, there will be a blend of both British Columbian contract law and Yukon miner's lien law. The majority of the concentrate is located in British Columbia and was in this Province well before the 2015 Procon Lien was registered. Further, the contract rights are to be decided in accordance with British Columbian law, particularly as to if, and if so, when, title to the concentrate passed from Yukon Zinc to Transamine.

> [90] This is not akin to the situation discussed in *Ecco Heating Products Ltd. v. J.K. Campbell & Associates Ltd.*, 1990 CanLII 1631 (BC CA), [1990] 48 B.C.L.R. (2d) 36 (C.A.), where the major issue arose under builder's lien legislation in British Columbia and where the court referred to the "extensive existing relevant jurisprudence" in British Columbia: at 43-44. It is common ground here that there is no case law on the issues of scope and priority under the *MLA* that arise here, let alone relevant Yukon jurisprudence.
>
> [91] It is quite apparent that some issues arise under the *MLA* and, in particular, issues relating to Procon's rights in relation to the concentrate remaining in Yukon which is claimed by Transamine under British Columbian law. Transamine argues that this Court can take judicial notice of the *MLA*: see *Evidence Act*, R.S.B.C. 1996, c. 124, s. 24(2)(e). In any event, Procon has fully researched the issues as they arise under the *MLA* and made submissions on them. To turn the tables on Procon, if I were to decline jurisdiction in favour of the Yukon courts, there equally would be issues as to the Yukon court interpreting and applying British Columbian law on the contract issues.
>
> [92] It would be impossible in the circumstances to bifurcate the issues based on the applicable law. Even if bifurcation was available, it would be neither a practical nor an efficient strategy in resolving the issues between Yukon Zinc, Procon and Transamine.
>
> (Emphasis added)

[72] In the present matter, the bulk of the assets on which the deemed trust or the lien created by the NLPBA may apply are the proceeds of the sale of assets in Québec.

[73] On balance, the legal considerations do not favour referring the issues to the NL Court.

b) Factual considerations

[74] The parties suggesting that the NLPBA issues be referred to the NL Court also argue that these are essentially local issues that should be decided by the localcourt.

[75] It is clear that there are significant factual links between these issues and the province of Newfoundland and Labrador.

[76] In particular, the Wabush mine is located in Newfoundland and Labrador and most of the employees reported to that mine. As a result, many of the retirees are currently resident in Newfoundland and Labrador. The representatives of the salaried employees and retirees want the NL Court to interpret the NLPBA.

[77] However, there are equally strong factual links to the province of Québec: the Pointe-Noire facility is in Québec and most of the railway joining the Wabush mine and the Pointe-Noire facility is in Québec. There are almost as many employees and retirees in Québec:

	Salaried Plan	Union Plan
Newfoundland and Labrador	313	1,005
Québec	329	661
Other	14	66[46]

[78] As a result, this is not a matter of purely local concern in Newfoundland and Labrador.

[79] Although the representatives of the salaried employees and retirees want the NL Court to interpret the NLPBA, more than half of the persons that they represent live in Québec.

[80] It is also worth noting that the Union, which represents more employees and retirees, asks that the case remain in Québec, even though most of their members reside in Newfoundland and Labrador.

c) Practical considerations

[81] The parties suggesting that the NLPBA issues be referred to the NL Court argue that the law of Newfoundland and Labrador is in principle a question of fact in a Québec court which is proven with expert witnesses. They argue that this has a series of somewhat inconsistent consequences:

- The parties will have to hire experts, which is costly and time consuming;
- It will be difficult to find experts because these questions have never been litigated before;
- If there is an appeal, the interpretation of the NLPBA will be treated as a question of fact and therefore only subject to be overturned if there is a palpable and overriding error.

[46] Watt Affidavit, par. 16.

[82] This seems to exaggerate the difficulty. The Court can take judicial notice of the law of another province.[47] This is particularly true when it is an issue of interpreting a statute.[48] In this case, where the parties plead that it will be difficult to find an expert, it seems unlikely that the Court would require expert evidence. This is particularly so when the provisions of the NLPBA which are at issue are similar to the provisions of the federal PBSA with respect to which expert evidence is not admissible. If there is no expert evidence to be offered, then there is no expense. A finding of fact with respect to expert evidence may attract the higher standard for appellate review of a palpable and overriding error.[49] This does not mean that every ruling on an issue of foreign law attracts the same standard. If the judge decides the interpretation of the NLPBA without considering the credibility of expert witnesses, then there is no reason for the Court of Appeal to apply the higher standard for appellate review.

[83] In terms of cost, it is difficult to see how the cost of continuing the proceedings in Québec will be higher than the cost of hiring attorneys in Newfoundland and Labrador and debating part of the issues there. The Union and Sept-Îles argued that it would be more expensive for them to argue the issues in Newfoundland and Labrador, and they added that they pay their own costs, unlike the representatives of the salaried employees and retirees and the Plan Administrator.

[84] Another issue is the delays that the referral might create.

[85] Sept-Îles bases its argument that it is too late now to raise the issue of a transfer on the fact that the Court already dealt with some of these issues 18 months ago. The representatives of the salaried employees and retirees plead that they raised the issue of a possible transfer of issues to the NL Court at the hearing of the motion for approval of the Claims Procedure Order on November 16, 2015.

[86] The Court will not dismiss the issue for lateness. However, it is relevant that the issue is being debated now as opposed to 18 months ago. If the issue had been debated at that time, the Court might have been less concerned about the possible delays that would result from referring the issues to the NL Court.

[87] The parties suggesting that the NLPBA issues be referred to the NL Court plead that there is no reason to believe that fragmenting the proceedings will result in additional delay. They do not however offer the Court any concrete indication of how quickly the case could proceed through the NL Court and any appeal.

[88] The Court is concerned by the possible delay. The parties pointed to *Timminco*, where the CCAA Court transferred a pension issue to the Québec Superior Court, as an example of how these referrals should work. In that case, the parties consented to refer

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47 Article 2809 C.C.Q.

48 *Constructions Beauce-Atlas inc.* c. *Pomerleau inc.*, 2013 QCCS 4077, par. 14.

49 *Canada (Minister of Citizenship and Immigration)* v. *Asini*, 2001 FCA 311, par. 26.

the Québec pension aspects of the CCAA file that was being litigated in Ontario to a Québec court. Even in those circumstances, the delay between the referral (October 18, 2012)[50] and the final judgment of the Québec court (January 24, 2014)[51] was over 15 months.

[89] Finally, the Court does not consider the question of whether its decision will or will not be treated as a precedent to be a relevant consideration. Similarly, the Court does not consider the possibility of intervenants to be relevant. The Court's focus is on resolving the difficulties of the parties appearing before it. If the government of Newfoundland and Labrador wishes to obtain a judgment from the courts of the province on the interpretation of the NLPBA, it can refer a matter to the Court of Appeal of Newfoundland and Labrador.[52]

CONCLUSION

[90] For all of the foregoing reasons, the Court concludes that it is not appropriate in the present circumstances to refer the proposed questions to the NL Court.

FOR THESE REASONS, THE COURT:

[91] **DECIDES** that it has jurisdiction to deal with the issues related to the interpretation of the Newfoundland and Labrador *Pension Benefits Act* in the context of the present proceedings under the *Companies' Creditors Arrangement Act* and that it will not refer those issues to the Supreme Court of Newfoundland and Labrador;

[92] **THE WHOLE WITHOUT JUDICIAL COSTS**.

_____
Stephen W. Hamilton, J.S.C.

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50 *Supra* note 37.
51 2014 QCCS 174.
52 *Judicature Act*, R.S.N.L. 1990, c. J-4, Section 13.

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Date of hearing: December 20, 2016

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., *et al.*

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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

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