

Sears Canada pensioners reach settlement for \$48-million

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Sears Canada Inc. pensioners have dropped their bid to recoup all of the money available to remaining creditors in the retailer's insolvency proceedings, instead agreeing to collect an estimated \$48-million.

The Sears retirees had asked the court to give them priority for what value would be left in the insolvent retailer – about \$182-million as of Dec. 1, according to filings this week. But the court-appointed monitor that is overseeing Sears's creditor-protection process had opposed giving the pensioners first dibs on the remaining funds, which would have left other unsecured creditors with nothing.

In a tentative settlement with the monitor filed with the Ontario Superior Court this week, the pensioners have agreed to no longer pursue a priority claim, called a deemed trust. That could have generated more than three times the roughly \$48-million they will get under the pact. But a deemed trust is a risky route involving potentially costly litigation with no certain victory, said Andrew Hatnay, a lawyer at Koskie Minsky LLP, which represents the pensioners.

“You just never know in litigation,” Mr. Hatnay said in an interview. “There is very little room for error. ... We're talking about pensioners. We'd like to get it [money] into their hands sooner rather than later.”

The pension issue was a key one in the Sears proceedings, underlining the difficult choices in an insolvency such as Sears in which little money remains for creditors with different interests, including former employees who are also unsecured creditors.

Still, the Sears retirees are counting on another potential source of funds: A number of parties, including the pension administrator and the monitor, are contemplating lawsuits against Edward Lampert, chief executive of Sears Holdings Corp. – which itself collapsed into bankruptcy protection last month in the United States – as well as Mr. Lampert's hedge fund, ESL Investments Inc., its affiliated firms and former Sears Canada board of director members.

Mr. Lampert and his companies and the former directors are fighting attempts to sue them and deny allegations against them.

The monitor's lawsuit, which the court will be asked to approve on Monday, focuses on a \$509-million dividend that Sears Canada paid to shareholders, including Mr. Lampert and ESL, in late 2013. The dividend was endorsed "through a materially deficient process that led to diversion of significant liquidity to shareholders, largely benefiting insiders at the expense of creditors, while the corporation proceeded inevitably to an insolvent liquidation in which the substantial shortfalls to creditors are and should have been clear," says a filing by monitor FTI Consulting.

The monitor says the decision to pay the 2013 dividend appears to have been influenced by key shareholders: Mr. Lampert, ESL, some of its affiliates and Sears Holdings; and two former Sears Canada directors who had links to those shareholders. "These non-arm's length parties appear to have been motivated by liquidity pressures in the form of redemption requests from ESL's investors, which may have created an urgent need for the cash provided by the 2013 dividend."

Mr. Lampert's lawyers counter that after Sears Canada paid the \$509-million dividend payment in 2013, the retailer still had \$513.8-million of cash remaining – an amount greater than its cash on hand after a \$101-million dividend payment a year earlier that is not being challenged.

As well, as part of a rights offering in October, 2014, the ESL parties paid about US\$168.5-million to Sears Holdings in exchange for more equity interest in Sears Canada, Mr. Lampert's lawyers say.

Sears Canada filed for court protection from its creditors in June, 2017, after years of shifting leaders, strategies and financial difficulties. It shut about 255 stores by early this year, leaving about 16,000 employees without jobs.

Mr. Lampert's lawyers argue his accusers have had access to Sears Canada documents for months while the ESL parties have been given no reciprocal right of access. And the lawyers say ESL's accusers haven't obtained Sears Canada's waiver of privilege over the documents on which their claims will have to rely.

Under the pension settlement, retirees would get an estimated \$48-million on a claim of about \$650 million – more than an estimated \$19-million they would have got if the claim had been based on the amount of their unfunded wind-up pension deficit of \$260-million.

Mr. Hatnay said there are at least five planned or proposed lawsuits against Mr. Lampert and his related firms and former board members. "There are some more being discussed," he added.

One of the lawsuits is from former Sears Hometown operators in their class-action lawsuit against Sears Canada. The lawsuit was started several years ago and received court sanction in 2014 to proceed, although it was suspended during the Sears Canada insolvency proceedings. Lou Brzezinski, a lawyer at Blaney McMurtry LLP which

represents the Hometown dealers, said the pensioners made a “fair and reasonable” compromise.

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