

FSRAFinancial Services Regulatory
Authority of Ontario**ARSF**Autorité ontarienne de réglementation
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May 31, 2021

Attn: Al Kiel, Managing Partner
al.kiel@lifeworks.com
LifeWorks (Canada) Ltd.
895 Don Mills Road, Tower One, Suite 700
Toronto ON M3C 1W3

and

Attn: Andrew Hatnay, Partner
ahatnay@kmlaw.ca
Koskie Minsky LLP
20 Queen Street West, Suite 900
Toronto, ON M5H 3R3

**Re: Sears Canada Inc. Registered Retirement Plan
Registration Number 0360065**

Enclosed, please find the Notice of Intended Decision with respect to the above noted pension plan.

Yours truly,

A handwritten signature in black ink, appearing to read "Mitzi D'Souza".

Mitzi D'Souza
Administrative Assistant, Pensions

Enclosure

c: Chantal Laurin, Financial Services Regulatory Authority of Ontario

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the “Act”), in particular sections 85, 87 and 89;

AND IN THE MATTER OF the Sears Canada Inc. Registered Retirement Plan, Registration Number 0360065 (the “Plan”).

NOTICE OF INTENDED DECISION

TO: LifeWorks (Canada) Ltd.
895 Don Mills Road
Tower One, Suite 700
Toronto ON M3C 1W3

Attention: Al Kiel
Managing Partner

Administrator

AND TO: Koskie Minsky LLP
20 Queen Street West, Suite 900
Toronto, ON M5H 3R3

Attention: Andrew Hatnay
Partner

Representative Counsel

TAKE NOTICE THAT pursuant to section 87 of the Act, and by delegated authority from the Chief Executive Officer of the Financial Services Regulatory Authority of Ontario (the “CEO”), the Head, Relationship Management and Prudential Supervision (the “Head”) intends to refuse to make an order to require the Plan be administered as if the Pension Benefits Guarantee Fund applied to employees of SLH Transport Inc. Details of this intended decision are described below.

SI VOUS DÉSIREZ RECEVOIR CET AVIS EN FRANÇAIS, veuillez nous envoyer votre demande par courriel immédiatement à: contactcentre@fsrao.ca.

YOU ARE ENTITLED TO A HEARING BY THE FINANCIAL SERVICES TRIBUNAL (THE “TRIBUNAL”) PURSUANT TO SUBSECTION 89(6) OF THE ACT. A hearing by the Tribunal about this Notice of Intended Decision may be requested by completing the enclosed Request for Hearing Form (Form 1) and delivering it to the Tribunal within

thirty (30) days after this Notice of Intended Decision is served on you. The Request for Hearing Form (Form 1) must be mailed, delivered, faxed or emailed to:

Address: Financial Services Tribunal
25 Sheppard Avenue West,
7th floor
Toronto, ON
M2N 6S6

Attention: Registrar

Fax: 416-226-7750

Email: contact@fstontario.ca

TAKE NOTICE THAT if you do not deliver a written request for a hearing to the Tribunal within thirty (30) days after this Notice of Intended Decision is served on you, an order will be issued as described in this Notice of Intended Decision.

For additional copies of the Request for Hearing Form (Form 1), visit the Tribunal's website at www.fstontario.ca.

The hearing before the Tribunal will proceed in accordance with the *Rules of Practice and Procedure for Proceedings before the Financial Services Tribunal* ("Rules") made under the authority of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. The Rules are available at the website of the Tribunal: www.fstontario.ca. Alternatively, a copy can be obtained by telephoning the Registrar of the Tribunal at (416) 590-7294, or toll free at 1-800-668-0128 extension 7294.

REASONS FOR INTENDED DECISION

1. Sears Canada Inc. and its affiliated companies (collectively "Sears") was the employer under the Plan. One of these affiliated companies was SLH Transport Inc. ("SLH Transport").
2. The Plan is a single employer, multi-jurisdictional, hybrid pension plan.

Plan History and the CCAA Filing:

3. The Plan is a hybrid pension plan containing defined benefit ("DB") and defined contribution ("DC") components.
4. The Plan was established on January 1, 1971, as a DB pension plan.
5. On July 1, 2008, all members of the Plan had their DB service frozen, although the DB entitlement at termination or retirement would continue to reflect any

earning increases after July 1, 2008. For service on or after July 1, 2008, pension benefits for all members accrued under the DC component of the Plan.

6. On June 22, 2017, Sears was granted an initial order under the *Companies' Creditors Arrangement Act* (the "CCAA"). Sears was subsequently liquidated.
7. Before October 17, 2017, Sears was the administrator of the Plan. Effective October 17, 2017, the Superintendent of Financial Services (the "Superintendent") appointed LifeWorks (Canada) Ltd. (formerly Morneau Shepell Ltd.) (the "Administrator") as the administrator of the Plan.
8. The former Superintendent ("Superintendent") of the Financial Services Commission of Ontario ("FSCO") ordered the Plan to be wound up, effective October 1, 2017 (the "Wind Up Date"). Effective June 8th, 2019, all liabilities, rights, and obligations of the Superintendent were transferred to the Chief Executive Officer pursuant to a Minister's Transfer Order. For ease of reference, the Superintendent will be referred to as the CEO.

PBGF Coverage:

9. As of the Wind Up Date, the Plan had a significant wind up deficit.
10. Upon consideration of the significant wind up deficit in the Plan and developments in the CCAA proceedings, the CEO determined there were reasonable and probable grounds that the funding requirements of the Act and its regulations could not be satisfied with respect to the Plan.
11. On September 27, 2018, the CEO made an order declaring that the Pension Benefits Guarantee Fund (the "PBGF") applied to the Plan.
12. The PBGF guarantee applies only in respect of certain Ontario DB benefits.
13. Pursuant to paragraph 4.1 of section 85 of the Act, pension benefits governed by the *Pension Benefits Standards Act, 1985* (Canada) (the "PBSA") are not guaranteed by the PBGF.
14. The PBSA governs pension benefits accrued in connection with employment within the legislative jurisdiction of the Parliament of Canada, including international and interprovincial transportation undertakings.
15. Therefore, the PBGF does not guarantee pension benefits accrued by employees working in international or interprovincial transportation undertakings.

SLH Transport:

16. SLH Transport was federally incorporated under the provisions of the *Canadian Business Corporations Act*, R.S.C. 1985, c.C-44. SLH Transport was a wholly owned subsidiary of Sears Canada Inc.
17. SLH Transport provided transportation services to Sears and external customers.
18. SLH Transport directly employed workers in Ontario (the “SLH Ontario Employees”) and in Quebec. These employees were members of the Plan.
19. SLH Transport also used the services of independent contractors (the “Owner/Operators”) and employees of 168886 Canada Inc. (the “Numbered Company Employees”).

Submissions of the Administrator and Representative Counsel:

20. The Financial Services Regulatory Authority of Ontario (“FSRA”), which is the successor regulator to FSCO, requested submissions from the Administrator and Koskie Minsky LLP, counsel for retirees of Sears in the CCAA proceedings (“Representative Counsel”), to assist in determining whether the PBGF guarantee applies to pension benefits accrued by the SLH Ontario Employees.
21. On March 5, 2021, the Administrator and Representative Counsel provided submissions to FSRA.
22. The Administrator submitted that the PBGF guarantee did not apply to the SLH Ontario Employees. The Administrator’s reasons included:
 - a. The SLH Ontario Employees worked in the same undertaking as the Owner/Operators and the Numbered Company Employees;
 - b. SLH Transport operated a single transportation undertaking which was distinct from the Sears retail undertaking; and
 - c. The SLH Transport undertaking was federally regulated because it involved regular and continuous interprovincial transportation activities.
23. Representative Counsel submitted that the PBGF guarantee did apply to the SLH Ontario Employees. Representative Counsel’s reasons included:
 - a. The SLH Ontario Employees were engaged primarily in intra-provincial transportation which falls within provincial jurisdiction; and
 - b. If SLH Transport falls within federal jurisdiction, the SLH Ontario Employees constitute a distinct and severable provincial undertaking.

The CEO’s Determination:

a) SLH Operated a Single Undertaking.

24. The Owner/Operators, the SLH Ontario Employees, and other SLH Transport drivers were engaged in functionally integrated tasks. The Owner/Operators were engaged in long-haul trucking, transporting goods to Sears distribution centers. The SLH Ontario Employees transported these same goods from the distribution centers to Sears stores and third-party customers.
25. The Owner/Operators and the SLH Ontario Employees operated under common management, control, and direction. The Owner/Operators contracted exclusively with SLH Transport. The SLH Transport management set the routes and schedules to which the Owner/Operators and the SLH Ontario Employees adhered.
26. As a result of its functional integration and common management, SLH Transport operated a single undertaking.

b) SLH Transport Operated a Transportation Undertaking.

27. The single SLH Transport undertaking was distinct from the Sears retail undertaking.
28. SLH Transport did not work exclusively for Sears. SLH Transport also provided transportation services for third-party customers. Work for third-party customers constituted up to fifty percent of SLH Transport's total business.
29. Therefore, SLH Transport operated a distinct transportation undertaking, independent of the Sears retail undertaking.

c) SLH Transport Operated a Federal Undertaking.

30. SLH Transport provided international, interprovincial, and intra-provincial transportation services.
31. SLH Transport drivers regularly and continuously transported goods across provincial boundaries.
32. Approximately eighty percent of the Owner/Operators' work with SLH Transport constituted interprovincial or international transportation. The Owner/Operators were engaged in regular and continuous interprovincial transport.
33. The Numbered Company Employees also regularly transported goods between the provinces.
34. The interprovincial transportation work by the Owner/Operators, Numbered Company Employees, and other SLH Transport drivers constituted a material proportion of SLH Transport's total business.

35. The Owner/Operators, SLH Ontario Employees, and other SLH Transport drivers contributed to a single transportation undertaking. As noted above, the SLH Transport operations were functionally integrated and subject to common management.
36. SLH Transport operated as a single undertaking that regularly and continuously engaged in interprovincial transportation. Therefore, SLH Transport was a federal undertaking.
37. The SLH Ontario Employees were employed in this federal undertaking.
38. As a result, pension benefits accrued by the SLH Ontario Employees are subject to the PBSA and are not guaranteed by the PBGF.
39. Such further and other reasons as may come to my attention.

DATED at Toronto, Ontario, May 31, 2021.



Andrew Fung
Head, Relationship Management and Prudential Supervision

By delegated authority from the Chief Executive Officer