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Sears Canada's sale process sparks conflict-of-interest concerns

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Creditors are worried that company insiders could have interests that are different from their own and may not provide the highest possible sale price

Creditors of Sears Canada Inc. are increasingly concerned about the potential for conflict of interest in the insolvent retailer's sale process.

Unsecured creditors, including former and current employees and suppliers, are counting on a sale of all or parts of Sears Canada, which got court protection from its creditors on June 22, to raise as much money as possible.

But among would-be buyers is a group of Sears Canada executives who plan to make a bid for some or all of the assets, court filings have revealed. As well, Sears Canada's key U.S. shareholders, including billionaire hedge fund manager Edward Lampert who runs Sears Holdings Corp. south of the border, also are considering making an offer, their lawyers say.

Creditors are worried that company insiders could have interests that are different from their own and may not provide the highest possible sale price.

"We want a wide-ranging and robust sale process to attract maximum value in a short time frame," Andrew Hatnay, a lawyer at Koskie Minsky LLP who represents current and former Sears Canada employees, said in an interview after getting court approval on Thursday for access to confidential information in the sale process. His concern is that it could become "a liquidation, not a restructuring."

The sale process, which also received the court's nod Thursday, underscores the uncertainties about whether the retailer will be able to slim down, restructure and continue operating as a going concern – as it says it intends to do – or whether it will end up in a total liquidation and shutdown.

Toronto-based Sears Canada has said it plans to close just 59 of its 255 stores (and only 20 of its 95 large department stores) and let go 2,900 of its 17,000 employees while also trying to sell some or all of its assets under the shield of the Companies' Creditors and Arrangement Act (CCAA.)

It also wanted to get rid of hundreds of millions of dollars of pensions and benefit obligations.

But on Thursday, Justice Glenn Hainey of Ontario Superior Court agreed to give employees and retirees a reprieve until Sept. 30 so that Sears Canada will have to continue to contribute to its underfunded pension plan and retiree dental, medical and life insurance benefits. The company had wanted to cut them off immediately.

And Sears Canada and the court-appointed monitor are in talks about finding alternative relief for employees who are being let go without severance and other benefits, said Susan Ursel at Ursel Phillips Fellows Hopkinson LLP, another lawyer who represents current and former workers. She said they are mulling, for instance, an "employee hardship fund." Her group also got the court's approval for access to information in the sale process.

The proceedings are providing a glimpse into burgeoning divisions between Sears Canada's top management, led by executive chairman Brandon Stranzl, and Mr. Lampert and the other U.S. majority shareholders, which together control 65.3 per cent of the Canadian retailer.

"The majority shareholders were not approached on a timely basis in advance of the CCAA filing to have constructive discussions regarding possible opportunities to preserve value in the Sears Canada entities," they say in a court document.

They are seeking more information about the "integrity" of the so-called sale and investment solicitation process (SISP.) And they want to ensure that each Sears Canada executive who intends to submit a bid "is expressly excluded from any involvement whatsoever in the SISP, including with respect to any decision around the selection of a successful bid," they say.

Suppliers have their own concerns and want to have a "window" into the sale process, said Lou Brzezinski, a lawyer at Blaney McMurtry LLP who represents some unsecured suppliers.

He said in an interview the sale seems "a little incestuous, contrived" in potentially pitting a management group's bid against one from the U.S. majority shareholders.

In a letter filed with court, he said: "We are of the view that given the fact that there may be two non-arm's-length bidders interested in acquiring the business assets of Sears, it is of extreme importance that special provision be made to ensure that this process is fair, open and transparent."

Mr. Brzezinski is urging the retailer and monitor to set up a "restricted process observers" committee to represent creditors' interests. He has also started a blog on his law firm's website called "Blaneys on Sears CCAA."

Monitor FTI Consulting Canada Inc. said in a report it is "aware that a number of stakeholders are concerned as to the potential conflict of interest presented by the development and submission of a management bid."

It said it will work closely with Sears Canada's financial adviser, BMO Nesbitt Burns, as well as a special committee of the retailer's board of directors and management "to prevent such potential conflicts interfering with the proper conduct of the SISP."

References

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