

**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., 9370-2751 QUÉBEC INC., 191020 CANADA INC., THE CUT INC.,  
SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., 9845488 CANADA  
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  
(Coface LCs)  
(returnable September 29, 2020)**

September 25, 2020

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**TO: THE SERVICE LIST**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
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**Ontario**  
**SUPERIOR COURT OF JUSTICE**  
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IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

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APPLICANTS

**NOTICE OF MOTION**  
**(Coface LCs)**

FTI Consulting Canada Inc., in its capacity as Monitor in these proceedings (the "**Monitor**"), will make a motion before a judge of the Ontario Superior Court of Justice (Commercial List) on September 29, 2020 at 12:00 p.m., or as soon after that time as the motion can be heard, by judicial teleconference via Zoom at Toronto, Ontario. Please refer to the conference details attached as Schedule "A" hereto in order to attend the motion and advise if you intend to join the motion by emailing Peter Choi at [peter.choi@nortonrosefulbright.com](mailto:peter.choi@nortonrosefulbright.com).

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

**THE MOTION IS FOR:**

1. An Order substantially in the form attached hereto as Schedule "B", *inter alia*:
  - (a) if necessary, abridging the time for service of this Notice of Motion and the Motion Record and dispensing with service on any person other than those served;
  - (b) approving an Acknowledgment and Release Agreement (the "**Release Agreement**"), *nunc pro tunc*, between Sears Canada Inc., the Monitor and Coface

North America Insurance Company and Compagnie Française d'Assurance pour le Commerce Extérieur, Canada Branch (collectively, "**Coface**");

- (c) directing that the Remaining LC Funds (as defined below) be released to Sears Canada Inc. ("**Sears Canada**");
- (d) confirming that no payment of an Insured Receivable (as defined below) is void or voidable by the Monitor or any creditors of any of the Applicants, nor shall it constitute nor be deemed to be a preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation;
- (e) sealing Confidential Appendices "B", "C" and "D" to the Monitor's Forty-First Report, being a summary of the proceeds of the Coface LCs (as defined below) (The "**Reimbursement Summary**") applied to satisfy insured obligations and a copy of the Release Agreement; and

2. Such further and other relief as this Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

- 1. The Applicants were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended (the "**CCAA**") pursuant to the Initial Order of the Ontario Superior Court of Justice (Commercial List) dated June 22, 2017, as amended and restated;
- 2. FTI Consulting Canada Inc. was appointed to act as Monitor in the CCAA proceedings;

### **Coface Insurance**

- 3. From time to time, Coface provided commercial trade credit insurance (the "**Trade Credit Insurance**") to certain of Sears Canada's suppliers (the "**Insured Suppliers**") for their receivables owing by Sears Canada (the "**Insured Receivables**"), subject to certain credit limits imposed by Coface;
- 4. In connection with the Trade Credit Insurance and in order to mitigate Coface's exposure to Sears Canada's credit risk and related liabilities (thus facilitating the possibility of obtaining a credit limit or a higher credit limit with the Insured Suppliers), Sears Canada delivered to Coface

certain demand irrevocable letters of credit number G201934 and G201933 issued by a third party financial institution in the face amounts of CDN\$9,000,000 and US\$1,000,000 (the “**Coface LCs**”), respectively, on or about January 5, 2015;

5. The Coface LCs could be drawn by Coface at any time, including (but not limited to), if Sears Canada sought protection under the bankruptcy or insolvency laws of Canada, as such steps by Sears Canada could increase the risk exposure of Coface on the Insured Receivables;

6. Following the commencement of the Applicants’ CCAA proceedings, Coface drew down on the full value of the Coface LCs (less a US\$10 banking fee in respect of the US dollar letter of credit) on or about July 15, 2017;

### **Remaining Coface Cash Collateral**

7. The Monitor understands that certain amounts drawn on the Coface LCs have been applied to satisfy obligations owing by Sears Canada to Coface, pursuant to its subrogation rights;

8. Based upon information provided to the Monitor by Coface, the Monitor believes that Coface continues to hold CDN\$4,808,049.50 and US\$282,126.85 in funds drawn from the Coface LCs that were not applied to satisfy obligations to Coface, pursuant to its subrogation rights (the “**Remaining LC Funds**”);

9. At the current stage of the Applicants’ CCAA proceedings, it is necessary for Sears Canada to recover all of its remaining assets for distribution to creditors, including the Remaining LC Funds;

10. Further to the Monitor’s request that Coface release the Remaining LC Funds, Coface, Sears Canada and the Monitor have entered into the Release Agreement that provides for, among other things, the release of the Remaining LC Funds subject to a reasonable reserve of CDN \$25,000 for potential professional fees;

11. Coface’s agreement regarding the release of the Remaining LC funds is conditional upon the parties entry into the Release Agreement and also the proposed order sought by the Monitor on this motion;

### **Potential Preference Claims**

12. Coface has advised the Monitor that the Coface insurance policies may be required to respond to asserted losses to Sears Canada's suppliers in a circumstance where amounts previously paid by Sears Canada to such suppliers on account of Insured Receivables are clawed back into the estate as preferences or other reviewable transactions;

13. The Monitor has not identified any transactions with any suppliers of Sears Canada that should be pursued as potential preferences or reviewable transactions;

14. The Monitor is not in a position on its own to prevent third parties from pursuing any such hypothetical preference or reviewable transaction claims pursuant to Section 36.1 of the CCAA and Section 38 of the *Bankruptcy and Insolvency Act* (Canada);

15. The relief sought on this motion would provide the necessary assurance to Coface that it would not have exposure for any such hypothetical claims on account of preferences or reviewable transactions, thereby facilitating the release of the Remaining LC Funds to Sears Canada;

### **Sealing**

16. The letter agreements among Coface and Sears Canada regarding the Coface LCs, Reimbursement Summary and the Release Agreement contain certain information that Coface believes is confidential and contains commercially sensitive information regarding the Coface insured parties and Coface's business, the public disclosure of which Coface believes would be in violation of the confidential nature of such information and prejudicial to the interests of Coface and those insured parties;

17. The information that is the subject of the sealing request is not, in the Monitor's view, material to the interests of any stakeholders in these proceedings;

### **General**

18. The provisions of the CCAA, including section 11 thereof, and the inherent and equitable jurisdiction of this Court;

19. Rules 1.04, 1.05, 2.03, 3.02, 16 and 37 of the *Rules of Civil Procedure* (Ontario), R.R.O. 1990, Reg. 194, as amended;

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

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

1. The Forty-First Report of the Monitor, dated September 25, 2020;
2. Such further and other evidence as counsel may advise and this Court may permit.

September 25, 2020

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Lawyers for FTI Consulting Canada Inc.,  
as Court-appointed Monitor

**TO: SERVICE LIST**

**SCHEDULE "A"**  
**ZOOM CONFERENCE DETAILS**

Join Zoom Meeting

<https://nortonrosefulbright.zoom.us/j/94490812089?pwd=dEVVTnBKUjBtVHRzTUZCbMVFMMYOUT09>

Meeting ID: 944 9081 2089

Password: 177798

One tap mobile

+13462487799,,94490812089#,1#,177798# US (Houston)

+16465588656,,94490812089#,1#,177798# US (New York)

Dial by your location:

+1 346 248 7799 US (Houston)

+1 646 558 8656 US (New York)

+1 669 900 9128 US (San Jose)

+1 253 215 8782 US (Tacoma)

+1 301 715 8592 US (Germantown)

+1 312 626 6799 US (Chicago)

888 475 4499 US Toll-free

833 548 0276 US Toll-free

833 548 0282 US Toll-free

877 853 5257 US Toll-free

Meeting ID: 944 9081 2089

Password: 177798

Find your local number: <https://nortonrosefulbright.zoom.us/j/94490812089?pwd=dEVVTnBKUjBtVHRzTUZCbMVFMMYOUT09>

**SCHEDULE "B"**

**Form of Draft Order**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

THE HONOURABLE MR. ) TUESDAY, THE 29th  
 )  
JUSTICE HAINEY ) DAY OF SEPTEMBER, 2020

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  
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CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES  
INC., 9845488 CANADA INC., INITIUM TRADING AND  
SOURCING CORP., SEARS FLOOR COVERING CENTRES  
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LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC.,  
168886 CANADA INC., AND 3339611 CANADA INC.

Applicants

**ORDER  
(Coface LCs)**

**THIS MOTION**, made by FTI Consulting Canada Inc., in its capacity as Court-appointed Monitor (the "**Monitor**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order (i) approving the Acknowledgement and Release Agreement among Compagnie Française D'assurance Pour Le Commerce Exterieur, Canada Branch and Coface North America Insurance Company (collectively, "**Coface**"), Sears Canada Inc. ("**Sears Canada**") and the Monitor dated September 25, 2020 (the "**Agreement**"); and (ii) certain other relief, proceeded by way of videoconference due to the COVID-19 crisis.

**ON READING** the Notice of Motion of the Monitor and the Forty-First Report of the Monitor dated September 25, 2020 (the "**Forty-First Report**"), filed, and on hearing the submissions of counsel for the Monitor, counsel for Coface, and such other counsel as were present, no one else appearing although duly served as appears from the Affidavit of Service of [●] sworn September [●], 2020, filed,

## **SERVICE AND DEFINED TERMS**

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record and the Forty-First Report is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that unless otherwise indicated or defined herein, capitalized terms used in this Order shall have the meaning given to them in the Agreement.

## **APPROVAL OF AGREEMENT AND RELEASES**

3. **THIS COURT ORDERS AND DECLARES** that (i) the Agreement and the settlement and releases contemplated therein are hereby approved, (ii) Sears Canada and the Monitor are hereby authorized and directed, *nunc pro tunc*, to enter into such Agreement, and to take or cause to be taken such steps and execute such additional documents as may be necessary or desirable for the performance of their obligations thereunder, and (iii) upon satisfaction of the conditions set out in Section 1 of the Agreement, Coface is directed to remit to the Monitor (for and on behalf of Sears Canada), in accordance with the terms of the Agreement, (i) the Remaining CAD LC Funds, less a Professional Fee Reserve in the amount of CAD \$25,000, and (ii) the Remaining USD LC Funds, which payments shall be in full and final satisfaction of any and all obligations that Coface may have to the Sears Releasors in respect of the Released Matters or to the Issuing Bank and Wells Fargo Capital Finance Corporation in respect of the Released Matters.

4. **THIS COURT ORDERS AND DECLARES** that, upon the remittance of the payment set out at paragraph 3 above, any and all Avoidance Actions that may be asserted by any party against any Insured Supplier in connection with the Insured Receivables, including, without limitation, by the Monitor, any trustee in bankruptcy of Sears Canada and any creditor or stakeholder of Sears Canada are hereby fully, finally and forever barred, extinguished and released.

## **SEALING OF CONFIDENTIAL APPENDICES**

5. **THIS COURT ORDERS** that Confidential Appendices "B", "C" and "D" to the Forty-First Report be sealed, kept confidential and not form part of the public record and be placed separate and apart from all other contents of the Court File, in a sealed envelope attached to a

notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further Order of this Court.

## **GENERAL**

6. **THIS COURT ORDERS** that, notwithstanding:

- (a) the pendency of these proceedings under the CCAA;
- (b) any assignment in bankruptcy or any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. (“**BIA**”) and any order issued pursuant to any such application;
- (c) any application for a receivership order; or
- (d) the provisions of any federal or provincial legislation;

the payment and releases provided for in the Agreement and this Order shall be binding on any trustee in bankruptcy or receiver that may be appointed in respect of Sears Canada and shall not be void or voidable by creditors of Sears Canada nor shall they constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall they constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

7. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Parties and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Parties and their respective agents as may be necessary or desirable to give effect to this Order or to assist the Parties, and their respective agents, in carrying out the terms of this Order.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c.  
C-36, AS AMENDED

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS  
CANADA INC., et al.

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

Proceeding commenced at TORONTO

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(Coface LCs)**

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