

**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
ELECTRIQUE 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

FACTUM OF THE APPLICANTS

(Motion for Approval of Asset Purchase Agreement – Garden City Property)

August 16, 2017

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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

FACTUM OF THE APPLICANTS

(Motion for Approval of Asset Purchase Agreement – Garden City Property)

PART I – NATURE OF THIS MOTION

1. Sears Canada Inc. (“**Sears Canada**” or the “**Company**”) and the other applicants listed above (the “**Applicants**”) obtained relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) by an Initial Order dated June 22, 2017, as amended (the “**Initial Order**”). The relief requested by the Applicants was supported by the Affidavit of Billy Wong, sworn June 22, 2017 (the “**Initial Order Affidavit**”). FTI Consulting Canada Inc. (the “**Monitor**”) was appointed in the Initial Order to act as the Monitor in this CCAA proceeding.

2. On July 13, 2017, this Honourable Court approved a sale process (the “**Sale Process**”) whereby BMO Nesbitt Burns Inc. (the “**Sale Advisor**”) on behalf of Sears Canada and under the supervision of both the Special Committee of the Board of Directors of Sears Canada and the Monitor are seeking bids and proposals for a broad range of transaction alternatives with respect to the Business, Property, Assets and/or Leases of the Applicants (each as defined in the Court-approved Sale Process).

3. This factum is filed in support of a motion to approve the asset purchase agreement (as amended, the “**APA**”) that was negotiated with WCRE Investments Ltd. (“**WCRE**” or the “**Purchaser**”) before the CCAA filing commenced. Under the APA, the Purchaser will pay \$5 million for the property located at the Garden City Shopping Centre, 2311 McPhillips Street, Winnipeg, Manitoba (the “**Garden City Property**”), where Sears Canada currently operates an Outlet store.

4. The criteria for approval of this transaction set out in s. 36(3) of the CCAA, which are to be flexibly applied, are clearly satisfied. The process by which the decision was made to enter into a potential transaction with the Purchaser and withdraw the Garden City Property from the Sale Process was fair and reasonable in light of the facts and context. The process by which the benefits of the APA were evaluated was also entirely reasonable in the circumstances.

5. After carefully considering the likely benefits and potential risks associated with the offer by the Purchaser, the Applicants exercised their right under the terms of the Sale Process to withdraw the Garden City Property from the Sale Process. The decision to exercise this right was made in the informed business judgment of the Applicants, with expert advice from the Sale Advisor, in consultation with the Monitor and the DIP Lenders.

6. Sears Canada and the Sale Advisor have analyzed the alternatives for maximizing value with respect to the Garden City Property. Sears Canada has concluded, with the support of the Monitor, the Sale Advisor and the DIP Lenders, that the sale of the property through the APA provides the best opportunity to maximize value for this property for the benefit of all stakeholders of the Applicants and that the consideration that Sears Canada will receive under the APA is fair and reasonable. Such business judgment is to be accorded significant deference by this Court.

7. In brief, the APA secures the sale price for the Garden City Property in a manner that is both certain and efficient, while allowing the Applicants to continue the liquidation at this location for the benefit of all stakeholders. For these and the other reasons set out below, the Applicants submit that the APA should be approved and that the proposed Approval and Vesting Order should be granted.

PART II – FACTS

8. The facts with respect to this motion are more fully set out in the Affidavit of Stephen Champion.¹ Capitalized terms in this Factum not otherwise defined have the same meanings as in the Initial Order Affidavit and the Champion Affidavit.

Expression of Interest

9. Over the course of several months, Sears Canada marketed the Garden City Property by contacting a number of potential buyers including national retailers, property

¹ Affidavit of Stephen Champion, affirmed August 11, 2017 [Champion Affidavit].

developers and the landlord who owns the remainder of the Garden City Shopping Centre. The proposals received by Sears Canada were as follows:²

- (a) In November 2016, Sears Canada received a letter of interest relating to numerous properties from a party that was interested in, among other things, leasing the Garden City Property from Sears Canada. However, as part of the proposal, the interested party expected that Sears Canada, as the landlord, would provide tenant allowances for redevelopment capital expenditures. As Sears Canada was unwilling to pay for capital expenditures associated with the Garden City Property, Sears Canada did not further pursue this indication of interest.
- (b) On April 4, 2017, Sears Canada received a letter of interest with respect to the Garden City Property from WCRE, a company related to Hungerford Properties Inc. Sears Canada entered into negotiations with WCRE. On April 12, 2017, Sears Canada entered into an asset purchase agreement (the “**Original APA**”) with WCRE to purchase the Garden City Property on an “as is, where is” basis for a purchase price of \$5,000,000. Under the Original APA, there was no requirement that Sears Canada be a tenant of the property after the sale. Sears Canada understands that the Purchaser intends to redevelop the property. The Purchaser has been a highly motivated and cooperative party throughout the negotiations.
- (c) Prior to the CCAA filing, Sears Canada received a non-binding proposal relating to a number of properties. This proposal specified a purchase price of \$6,750,000 for the Garden City Property, providing that Sears Canada would sell the property and would lease it back from the purchaser on the terms contained in the proposal.

² Champion Affidavit, para 6.

In the event that the parties elected not to sign the lease, the proposal provided that the purchase price for a standalone sale would be \$4,500,000. Sears Canada considered this non-binding proposal and determined that it would not be in Sears Canada's best interests to pursue a sale leaseback transaction, as this would require Sears Canada to spend the necessary capital expenditures to improve the property and the property had been slated for closure by the company. The potential purchase price for the standalone sale was lower than the firm and committed purchase price offered by the Purchaser in the Original APA, and was therefore not attractive.

10. Since entering into the Original APA, nothing has arisen that would cause Sears Canada to move in a different direction with respect to the Garden City Property.³ Sears Canada considered a number of factors, which are detailed below, before determining to proceed with further discussions and negotiations with the Purchaser to amend the Original APA as part of the CCAA proceedings.⁴

The Terms of the APA

11. Following the commencement of these CCAA proceedings, Sears Canada and the Purchaser agreed to amend the terms of the Original APA by way of an amending agreement to account for the requirement to obtain an Approval and Vesting Order of the Court to effect the transfer of the assets. Sears Canada and the Purchaser signed an amendment to purchase and sale agreement and waiver of conditions dated as of July 28, 2017 (the "**Amendment**").

³ Champion Affidavit, para. 6(d).

⁴ Champion Affidavit, para. 13.

12. A copy of the APA (including the Amendment) is appended to the Champion Affidavit. The APA includes the following key terms:

- (a) A purchase price of \$5,000,000;
- (b) An Initial Deposit of \$20,000 that was provided to the Purchaser's solicitors in trust within two business days of the execution of the Original APA (this deposit was subsequently transferred, along with interest accrued thereon, to the Monitor in trust, within three business days of the execution of the Amendment);
- (c) An Additional Deposit of \$380,000 that was provided to the Monitor in trust within two business days after the satisfaction or waiver of the Purchaser's conditions precedent;
- (d) The requirement that the transaction be completed on an "as is, where is" basis;
- (e) The requirement that the Purchaser's conditions precedent be waived or satisfied by July 26, 2017. The Purchaser's conditions precedent include Board approval, completion of due diligence following a review of the Delivery Materials, an environmental assessment, geotechnical review and land and building survey, and a financing commitment from a third party lender. The Amendment confirmed that the Purchaser had waived all conditions precedent set out in section 6.1 of the Original APA.⁵

⁵ Champion Affidavit, para. 10; exhibit B.

13. The only condition that remains to be satisfied before Closing is obtaining the Approval and Vesting Order. The Amendment provides that it is a condition precedent that the Approval and Vesting Order be issued and entered by August 25, 2017.⁶

14. Sears Canada has the right pursuant to the APA to extend the Completion Date (as defined in the APA) until no later than October 16, 2017, which will allow sufficient time for the liquidation sale at this store to be completed.⁷

PART III – ISSUES AND THE LAW

15. The issues on this motion are as follows:

- (a) should this Honourable Court approve the APA and grant the proposed Approval and Vesting Order?; and
- (b) should this Honourable Court grant the requested sealing order?

Test Under the CCAA is Met

16. Section 36 of the CCAA sets out the legal factors to be considered when seeking court approval that applies where a debtor company seeks to sell assets outside the ordinary course of business during a CCAA proceeding. Section 36 provides:

36(1) Restriction on disposition of business assets – A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

⁶ Champion Affidavit, para. 11.

⁷ Champion Affidavit, para. 15.

36(2) Notice to creditors – A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

36(3) Factors to be considered – In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

...

36(6) Assets may be disposed of free and clear – The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

36(7) Restriction – employers – The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

17. In discussing section 36 of the CCAA, this Honourable Court has stated:⁸

The CCAA is remedial legislation designed to enable insolvent companies to restructure. As mentioned by me before in this case, the amendments do not detract from this objective. In discussing section 36, the Industry Canada Briefing Book on the amendments states that “The reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse.”

18. The factors listed in section 36(3) are, on their face, not intended to be exhaustive.

Nor are they intended to be a formulaic checklist that must be followed in every sale transaction

⁸ *Re Canwest Global Communications*, 2009 CarswellOnt 7169 (S.C.J.) [Commercial List] at para. 32.

under the CCAA.⁹ These factors overlap, to a certain degree, with the *Soundair* factors that were applied in approving sale transactions under pre-amendment CCAA case law.¹⁰

19. The Applicants submit that, taking into account the factors listed in section 36(3) of the CCAA, and with regard to the general interpretative principles underlying the CCAA, this Honourable Court should grant the Approval and Vesting Order. In the absence of any indication that the Applicants have acted improvidently, the informed business judgment of the Applicants – which is supported by the Sale Advisor and the Monitor – that the APA is in the best interests of the Applicants and their stakeholders is entitled to deference by this Court.¹¹

a) Process Was Reasonable

20. Whether the process for achieving a sale transaction under the CCAA is fair and reasonable must be examined contextually, in light of the particular circumstances existing at the time.¹² Although it is common to sell assets under the CCAA by means of a process involving a court approved broad canvass of the market, perhaps followed by a competitive bidding process among interested bidders, such a process is not the best approach in every case for every asset sold by a debtor company.¹³ Such a rigid rule would not only be antithetical to the inherent

⁹ See for example, *Re White Birch Paper Holding Co.*, 2010 QCCS 4915 [*White Birch*] at para. 48; leave to appeal refused 2010 CarswellQue 11534, 2010 QCCA 1950 (Que. C.A.).

¹⁰ *Re Canwest Publishing Inc./Publications Canwest Inc.*, 2010 ONSC 2870 at para. 13, citing *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (C.A.) [*Soundair*] at para. 16. Under the *Soundair* test, it was necessary to consider (1) whether sufficient efforts had been made to obtain the best price and that the debtor had not acted improvidently; (2) whether the interests of all parties had been considered; (3) the integrity and efficacy of the process for obtaining offers; and (4) whether there was any unfairness in working out the process.

¹¹ *Re AbitibiBowater Inc.*, 2010 QCCS 1742 [*AbitibiBowater*] at paras. 70 to 72.

¹² See *White Birch*, above note 9 at para. 49: “The Court has to look at the transaction as a whole and essentially decide whether or not the sale is appropriate, fair and reasonable. In other words, the Court could grant the process for reasons others than those mentioned in Section 36 CCAA or refuse to grant it for reasons which are not mentioned in Section 36 CCAA.”

¹³ The *Soundair* case itself acknowledges that an auction is not necessary or advisable in every case: see *Soundair*, above note 10 at para. 44, citing *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242 (Alta C.A.).

flexibility of the CCAA, but would preclude debtor companies from accepting unsolicited offers, even where such a bid (as here) offers significant benefits to the debtor company's estate.

21. The Court must be satisfied overall that the debtor has not acted improvidently. As the Courts have held, by reference to the principles in *Soundair*, the decision to accept a particular offer is a matter of business judgment on the part of the debtor that should not lightly be interfered with in the absence of evidence of imprudence or unfairness.¹⁴ Assessing the reasonableness of a sale process does not require the Court to examine in minute detail all of the circumstances leading up to the acceptance of a particular offer.¹⁵

22. The Applicants submit that there are a number of factors that support the conclusion that the process for determining whether to complete the transaction contemplated by the APA was both fair and reasonable in the circumstances:

- (a) The Sale Process was approved by this Court and was designed by the Applicants and the Sale Advisor as a flexible process in order to provide the greatest potential benefit to their stakeholders.¹⁶
- (b) The flexibility of the Sale Process expressly permits specific assets to be withdrawn from the process altogether, if this step was determined to further the objective of maximizing value for stakeholders. Paragraph 16 of the Sale Process expressly provides that, notwithstanding anything else contained therein, Sears Canada, in its reasonable business judgment and in consultation with the Sale Advisor, the Monitor and the DIP Lenders, is permitted to withdraw any Leases

¹⁴ *Re Terrace Bay Pulp Inc.*, 2012 ONSC 4247 at paras. 45 and 51-52, citing *Soundair*, at paras. 21, 30-31.

¹⁵ *Soundair*, above, note 10 at paras. 48 and 49.

¹⁶ *Champion Affidavit*, para. 12.

or Assets from the Sale Process in accordance with the CCAA and Sears Canada's rights under the Initial Order.¹⁷

- (c) The Sale Process contemplates that particular assets can be withdrawn from the process at any time, including prior to the bid deadline.¹⁸

23. The flexibility of the Sale Process reflects a reasonable and appropriate balancing of interests of stakeholders in the circumstances of this case. The APA therefore falls squarely within the range of successful outcomes that were contemplated at the time the Sale Process was approved.

24. Mindful of the fact that withdrawing the Garden City Property from the Sale Process at this time would remove it from the broader process, the Applicants and the Sale Advisor carefully considered a number of factors before deciding to negotiate the Amendment to the Original APA with the Purchaser. These factors included:

- (a) the estimated market value of the Garden City Property based on the sales and marketing efforts undertaken to date;
- (b) the identity and anticipated motivations of any third parties who may be interested in acquiring the Garden City Property or any part thereof;
- (c) the form and amount of consideration being offered;
- (d) the certainty of the transaction set out in the APA as opposed to the uncertain prospect of a better bid;

¹⁷ Champion Affidavit, para. 12.

¹⁸ Champion Affidavit, para. 12.

- (e) the financial capability of the Purchaser to consummate the contemplated transaction;
- (f) the timing of the contemplated transaction;
- (g) certainty of closing, including the fact that the Purchaser waived its conditions precedent when it executed the Amendment, which included a financing condition; and
- (h) the impact on the Sale Process of removing the Garden City Property from the process.¹⁹

25. The Applicants therefore submit that they have followed an entirely reasonable process, analyzed contextually in light of the facts surrounding the Original APA Sears Canada had already entered into with the Purchaser prior to the CCAA filing. They have fully considered the benefits and the risks of pursuing a transaction with the Purchaser. They have consulted with the Monitor, the Sale Advisor and the DIP Lenders. Once the Applicants determined with the benefit of all available information and the expert advice of the Sale Advisor that it was in the best interests of the Applicants to proceed with the Original APA, they negotiated the Amendment in order to proceed to complete the transaction.

b) Monitor Concurs

26. As required by section 36 of the CCAA and the Sale Process, the Monitor has been involved with and approved the decision to proceed with the proposed transaction, including the decision to exercise the right to withdraw the Garden City Property from the Sale

¹⁹ Champion Affidavit, para. 13.

Process (subject to Court approval of the APA) as well as the negotiation of the Amendment to the Original APA.²⁰

27. It is the Monitor's opinion that the APA would be more beneficial to the Applicants' creditors than a sale or other transaction in a bankruptcy.²¹ Based on all of the above factors and for the reasons set out in the Second Report of the Monitor, the Monitor supports this Court's approval of the APA and the granting of the proposed Approval and Vesting Order. The Monitor's views are entitled to considerable deference from this Court.²²

c) The Purchase Price is Fair and Reasonable

28. The Applicants, the Monitor and the Financial Advisor are all of the view that the consideration to be received by Sears Canada is fair and reasonable, taking into account the market value of the Garden City Property.²³ CCAA case law both prior to and subsequent to the enactment of section 36 has applied the test from *Soundair* in evaluating this criterion.²⁴ The debtor must demonstrate that sufficient effort has been made to obtain the best price and that it has not acted improvidently. This requirement is evaluated based on the information available at the time the offer is accepted. It requires deference to the debtor's business judgment (which is supported by the Monitor) in order to avoid turning the process into an auction conducted by the Court.²⁵

²⁰ Monitor's Second Report.

²¹ CCAA, s. 36(3(c)); Monitor's Second Report.

²² J. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd Ed. (Toronto: Carswell, 2013) at p. 573.

²³ Champion Affidavit, para. 16; Monitor's Second Report.

²⁴ See for example *Terrace Bay*, above, note at paras. 50-55.

²⁵ *Terrace Bay*, above note 14 at para. 51, citing *Soundair*.

29. Case law interpreting section 36 of the CCAA does not mandate that the purchase price of a debtor company's assets must be established following an "auction-like" process before the Court can determine that the consideration offered is fair and reasonable.²⁶ An auction or similar competitive bid process is simply one mechanism for providing a market-based evaluation of the consideration for a debtor company's assets.

30. The purchase price of \$5 million is higher than the standalone purchase price of \$4.5 million offered in the non-binding sale proposal that Sears Canada subsequently received. Moreover, the proposed transaction does not require that Sears Canada continue to invest capital in the redevelopment of the Garden City Property as the November 2016 lease proposal required.²⁷ The Applicants submit that the use of these comparators represents a reasonable alternative to subjecting this property to the broader market testing of the bidding phase of the Sale Process.

31. The reasonableness of the purchase price and other consideration offered under the APA must be viewed in light of the "benefit-risk balancing" exercise engaged in by Sears Canada and the Sale Advisor in determining to pursue the Amendment to the Original APA. On one hand, the parties were presented with a firm offer for the Garden City Property, with no diligence or financing conditions, that could close rapidly with minimal disruption to Sears Canada and that offered significant objectively measurable benefits to the Applicants and their stakeholders. On the other hand, the parties had to consider the purely theoretical possibility that rejecting this firm offer in the interests of subjecting the Garden City Property to the competitive bidding procedures under the Sale Process could generate a better offer. The latter choice would

²⁶ As noted above, *Soundair* itself was a case in which the Court held that a reasonable process did not necessarily require an auction.

²⁷ Champion Affidavit, para. 6.

necessarily involve a significant risk that no such offer would be forthcoming. The Applicants note that no such better offer was provided when the Garden City Property was marketed prior to the CCAA proceedings.

32. Sears Canada, informed by the expertise of the Sale Advisor and supported by the Monitor, concluded that it was not in the best interests of the Applicants or their stakeholders to run the risk of rejecting the Purchaser's offer in order to pursue a hypothetical better deal in the bidding phase of the Sale Process. This exercise of reasonable, informed business judgment is therefore entitled to significant deference by this Court. As the Quebec Superior Court noted in *AbitibiBowater*, in appropriate circumstances it is permissible to "prefer a bird in the hand to two in the bush."²⁸

d) Transaction in Best Interests of Stakeholders

33. In addition to the significant benefits represented by the purchase price, there are a number of other material advantages to the APA that support the reasonable, informed business judgment of Sears Canada that the APA is in the best interests of the Applicants and their stakeholders. These include:

- (a) *Certainty*: the Purchaser has agreed to acquire the Garden City Property on an "as is, where is" basis, providing certainty of terms and conditions, including closing.
- (b) *Flexibility of Closing*: the APA provides that Sears Canada may extend the Completion Date until no later than October 16, 2017, which will allow sufficient time for the liquidation sale at this store to be completed.

²⁸ *AbitibiBowater*, above note 11 at para. 73.

34. The Sale Advisor has expressed the opinion that removing the Garden City Property from the Sale Process and completing the APA will likely maximize the value to be achieved from the property and that the Sale Advisor supports its removal from the Sale Process.²⁹

35. The Applicants therefore submit that the APA is beneficial to the creditors and other stakeholders of the Applicants. Moreover, the firm, objectively advantageous terms of the APA far outweigh any theoretical advantages that might (or might not) be obtained if the Original APA had been rejected with a view to seeking a better deal in the Sale Process.

e) Compliance with Additional Requirements Under Section 36

36. The Applicants submit that all of the other statutory requirements for obtaining relief under section 36 of the CCAA have been satisfied:

- (a) All parties who have registered a security interest against the Garden City Property or who have a general security interest against Sears Canada and who might be affected by the relief requested in this motion have been notified.³⁰
- (b) Pursuant to section 36(4) of the CCAA, certain mandatory criteria must be met for court approval of a sale or disposition to a related party. The Applicants and the Purchaser are not related parties and these criteria are therefore not relevant for the purposes of this motion.
- (c) Section 36(6) of the CCAA permits this court to authorize a sale or disposition free and clear of any security, charge or other restriction. As such, the proposed

²⁹ Champion Affidavit, para. 14.

³⁰ CCAA, s. 36(2).

Approval and Vesting Order provides that the Garden City Property will be vested free and clear of all security interests, except certain Permitted Encumbrances.³¹ Consistent with section 36(6) and with the Court-approved DIP Term Credit Agreement, the proposed Approval and Vesting Order further provides that the net proceeds received shall be paid forthwith by the Monitor to the DIP Term Agent in partial repayment of amounts owing by the Applicants under the DIP Term Credit Agreement.³²

- (d) Section 36(7) of the CCAA provides that relief under section 36 cannot be granted unless the Court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.³³ The amounts referred to under these subsections are amounts owing by a debtor company to its employees and former employees for unpaid wages that these employees would have been entitled to receive under the *Bankruptcy and Insolvency Act*, in addition to amounts that are owing for post-filing services to the debtor company and in respect of certain pension obligations. Given that the Applicants have been paying employees for all post-filing services and that the Applicants are currently making all of their required payments with respect to their pension plans, the requirements of section 36(7) of the CCAA are satisfied in this motion.

³¹ Proposed Approval and Vesting Order, para. 4 and Schedule “C”, Motion Record of the Applicants, Tab 3.

³² Proposed Approval and Vesting Order, para. 6, Motion Record of the Applicants, Tab 4.

³³ Section 36(7) appears to contain a drafting error, as it references amounts that would be required to be paid under section 6(4)(a) of the CCAA. Section 6(4) of the CCAA does not have any subparagraphs. It may be inferred that the intention was to require payments under section 6(5)(a) and 6(6)(a).

37. For all of the reasons submitted above, the Applicants submit that the criteria for the approval of the APA have been satisfied and that the Approval and Vesting Order should be granted.

The Sealing Order Should Be Granted

38. In accordance with section 137(2) of the *Courts of Justice Act* (Ontario),³⁴ the Applicants request that the Confidential Appendix to the Monitor's Report containing appraisals for the Garden City Property be subject to a sealing order.³⁵

39. Sears Canada is of the view that publicly disclosing the appraisals could be materially prejudicial to the Applicants in connection with the Sale Process generally and in connection with any further marketing of the Garden City Property in particular if the proposed transaction does not proceed to close as anticipated.³⁶ The information contained in the valuation analysis would not normally be public, and the effects of disclosing this information could seriously undermine the ability of the Applicants to conduct a fair process for maximizing value for all stakeholders.

40. The proposed sealing order will allow the Applicants to present full proof of the matters relevant to the relief requested in this motion, without undue deleterious effects on the public's interest in openness or access to the courts. As such, the requested relief satisfies the well-established two-part test established in the *Sierra Club* decision.³⁷ CCAA courts have

³⁴ R.S.O. 1990, c. C-43. Section 137(2) provides: "A Court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record."

³⁵ The Confidential Appendix to the Monitor's Second Report contains the two valuations of the Garden City property.

³⁶ Champion Affidavit, para. 7.

³⁷ *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 at para. 53.

routinely granted sealing orders for commercially sensitive information that supports the approval of an asset sale.³⁸

41. The Applicants therefore submit that this relief should be granted.

PART IV – NATURE OF THE ORDER SOUGHT

42. For all of the reasons above, the Applicants submit that this Honourable Court should grant the relief substantially in the form of the draft Order attached as Tab 4 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:



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³⁸ See, for example, *Terrace Bay*, above note 14 at para. 73; *Re Nortel Networks Corp.*, 2009 CarswellOnt 4838 at paras. 38-39; *Re Nortel Networks Corp.*, 2009 CarswellOnt 9345 at paras. 9-11.

Schedule “A”

LIST OF AUTHORITIES

Case Law

1. *Re AbitibiBowater Inc*, 2010 QCCS 1742
2. *Re Canwest Global Communications*, 2009 CarswellOnt 7169 (SCJ)
3. *Re Canwest Publishing Inc/Publications Canwest Inc*, 2010 ONSC 2870
4. *Re Nortel Networks Corp*, 2009 CarswellOnt 4838 (SCJ)
5. *Re Nortel Networks Corp.*, 2009 CarswellOnt 9345 (SCJ)
6. *Re Terrace Bay Pulp Inc*, 2012 ONSC 4247
7. *Re White Birch Paper Holding Co*, 2010 QCCS 4915, leave to appeal to the CA refused, 2010 QCCA 1950
8. *Royal Bank v. Soundair Corp*, [1991] OJ No 1137 (CA)
9. *Salima Investments Ltd v Bank of Montreal* (1985), 59 CBR (NS) 242 (Alta CA)
10. *Sierra Club of Canada v Canada (Minister of Finance)*, [2002] 2 SCR 522

Secondary Sources

11. J. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd Ed. (Toronto: Carswell, 2013)

Schedule “B”

COMPANIES’ CREDITORS ARRANGEMENT ACT

R.S.C. 1985, c. C-36, as amended

Compromises to be sanctioned by court

6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

[...]

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court’s sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company’s business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

[...]

R.S., 1985, c. C-36, s. 6; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 123; 2004, c. 25, s. 194; 2005, c. 47, s. 126, 2007, c. 36, s. 106; 2009, c. 33, s. 27; 2012, c. 16, s. 82.

Restriction on disposition of business assets

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

2005, c. 47, s. 131; 2007, c. 36, s. 78.

COURTS OF JUSTICE ACT

RSO 1990, c C.43,

Documents public

137. (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Court lists public

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

Copies

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

R.S.O. 1990, c. C.43, s. 137.

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

Ontario
**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

FACTUM OF THE APPLICANTS

(Motion for Approval of Asset Purchase Agreement –
Garden City Property)

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