

**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
QUEBEC INC., 191020 CANADA 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

(Approval of Remaining Owned Real Estate Transactions)
(Motion Returnable June 5, 2018)

June 1, 2018

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PART I – NATURE OF THE MOTION

1. Sears Canada Inc. (“**Sears Canada**”) 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 and restated on July 13, 2017 (the “**Initial Order**”). FTI Consulting Canada Inc. was appointed in the Initial Order to act as the Court-appointed Monitor (the “**Monitor**”) in this CCAA proceeding.

2. On July 13, 2017, this Honourable Court approved a sale and investment solicitation process (the “**SISP**”) to seek bids or proposals for the Applicants’ business, property, assets and/or leases, to be conducted by the Applicants, under the supervision of the Special Committee (the “**Special Committee**”) of Sears Canada’s Board of Directors (the “**Board**”) in consultation with their financial advisor, BMO Nesbitt Burns Inc. (“**BMO**” or the “**Sale Advisor**”), under the supervision and oversight of the Monitor. The SISP successfully resulted in a number of transactions that were approved by this Court in the fall of 2017 on the basis that the process was fair and reasonable, and that the transactions maximized value for the Applicants’ stakeholders.

3. Although some bidders expressed interest in certain of the Applicants’ owned real property (the “**Owned Real Estate**”) both before and after the SISP bid deadline of August 31, 2017, Sears Canada, in consultation with the Sale Advisor and the Monitor determined in the fall of 2017 that better opportunities to monetize the Owned Real Estate would be available only after additional environmental assessments were completed and made available to potential purchasers. With the support of the Monitor and key creditor stakeholders, these assessments were completed and placed in the applicable electronic data room. Interest in the Owned Real Estate from potential purchasers was then re-solicited in the spring of 2018.

4. This factum is filed in support of a motion to approve the sale of the Applicants’ owned real property located at Place Vertu, Montreal (the “**Place Vertu Transaction**”) to LaSalle Acquisitions Corp. (“**LaSalle**”). Subject to court approval, the agreement of purchase and sale for the Place Vertu Transaction has now been entered into on terms acceptable to the Applicants, the Sale Advisor, the Board and the Monitor.

5. In addition, the Applicants expect to rely upon this factum in seeking this Court's approval of certain further agreements of purchase and sale for the Owned Real Estate (together with the Place Vertu Transaction, the "**Transactions**") that may be concluded. The Applicants will file supplemental submissions where necessary and appropriate to address specific legal or factual issues arising out of a future Transaction.

6. As required by s. 36 of the CCAA, each of the proposed Transactions is the product of a fair and reasonable process that fully canvassed the market over a period of almost a year. The Monitor has closely supervised the process. Major stakeholders have been consulted throughout the sale process for the Owned Real Estate.

7. In relation to the Place Vertu Transaction, the Sale Advisor and the Board are of the view, in their business judgment, that the proposed Transaction maximizes value for the Applicants' stakeholders and that all reasonable efforts to obtain the best price have been made. The Monitor supports the approval of the proposed Transaction. The Applicants expect to provide similar evidence supporting the approval of all subsequent proposed Transactions.

PART II – FACTS

8. The facts with respect to this motion are more fully set out in the third Affidavit of Mark Caiger¹ and the Affidavit of Philip Mohtadi (the "**Transaction Affidavits**").² Further details regarding these proceedings are contained in the prior Affidavits of Billy Wong (the "**Prior Wong**

¹ Affidavit of Mark Caiger, sworn May 28, 2018 [Third Caiger Affidavit].

² Affidavit of Philip Mohtadi, affirmed May 28, 2018 [Mohtadi Affidavit].

Affidavits)³ and in the first and second Affidavits of Mark Caiger.⁴ Capitalized terms in this Factum not otherwise defined have the same meanings as in the Transaction Affidavits and the Prior Wong Affidavits, as applicable.

The SISP

9. The SISP was approved by this Court on July 13, 2017, to be conducted by the Sale Advisor, on behalf of the Applicants and under the supervision of both the Special Committee and the Monitor. The SISP contemplated that bids and proposals would be sought for a broad range of transaction alternatives for the business, property, assets and leases of the Applicants.⁵ Details of the efforts made by the Applicants and the Sale Advisor to implement the SISP and to maximize value for the benefit of all stakeholders are set out in the First Caiger Affidavit.⁶

10. As of August 31, 2017, the Binding Bid Deadline under the SISP, the Sale Advisor had received 69 bids for the Applicants' assets.⁷ Sears Canada and the Sale Advisor worked throughout the fall of 2017 to conclude and obtain this Court's approval for a number of transactions (the "**Concluded Transactions**") for the amendment, surrender and/or transfer of the Applicants' Leases, for the sale of two owned real properties, and for the Corbeil and SLH business lines.⁸

³ Affidavit of Billy Wong, sworn on June 22, 2017 [Initial Order Affidavit]; Affidavit of Billy Wong sworn July 5, 2017 and the Affidavit of Billy Wong, sworn July 12, 2017 [Third Wong Affidavit].

⁴ Affidavit of Mark Caiger, sworn September 28, 2017 [First Caiger Affidavit]; Affidavit of Mark Caiger sworn October 10, 2017 [Second Caiger Affidavit].

⁵ Mohtadi Affidavit, para. 8; Third Caiger Affidavit, para. 4 and Exhibit "A".

⁶ Third Caiger Affidavit, para. 5 and Exhibit "B".

⁷ Third Caiger Affidavit, para. 6.

⁸ Third Caiger Affidavit, paras. 10 to 12.

11. By October 2017, it was clear to the Sale Advisor, the Applicants and the Monitor that no executable going-concern transaction existed, and that liquidation of the inventory in the Applicants' remaining stores was the best way to maximize recoveries for the Applicants' creditors. The proceeds from the Concluded Transactions, together with the initial payment from the inventory liquidation, allowed the Applicants to repay the DIP lenders in full.⁹

12. A number of the bids received under the SISP for the Owned Real Estate were conditional on conducting additional environmental due diligence, including obtaining Phase II and other supplementary environmental reports.¹⁰ Sears Canada therefore determined, in consultation with the Sale Advisor and the Monitor, as well as representatives of various creditor groups and their advisors, that better opportunities to monetize the remaining Owned Real Estate would be available only after additional due diligence materials, including environmental studies, were completed and made available to potential purchasers.¹¹

Remaining Owned Real Estate Transactions

13. At the time that the sale process was temporarily suspended to complete further environmental diligence, the following Owned Real Estate being dealt with by the Sale Advisor was unsold¹²:

⁹ Third Caiger Affidavit, paras. 13 and 14.

¹⁰ Third Caiger Affidavit, para. 9.

¹¹ Mohtadi Affidavit, para. 9; Third Caiger Affidavit, para. 15.

¹² As detailed at paras. 22 – 28 of the Affidavit of Philip Mohtadi affirmed May 2, 2018 filed in connection with the stay extension motion, CBRE Limited is running a separate marketing process for additional owned real estate assets including the former full-line store located in Charlottetown, Prince Edward Island and residual land in each of Chicoutimi, Quebec, Edmonton, Alberta and Sainte-Agathe-des-Monts, Quebec.

| Store No. | Property | Province | Address | ROFR | Option to Purchase | Square Footage |
|-----------|--------------------------------|----------|---|------|--------------------|----------------|
| n/a | Belleville Distribution Centre | Ontario | 500-531 College Street East, Belleville | N | N | 1,804,896 |
| 1017 | Devonshire Mall | Ontario | 3050 Howard Avenue, Windsor | Y | Y | 209,330 |
| 1031 | Georgian Mall | Ontario | 521 Bayfield Street, Barrie | Y | Y | 121,000 |
| 1020 | Lansdowne Place | Ontario | 637 Lansdowne Street West, Peterborough | N | N | 71,000 |
| 1085 | Les Galeries Chagnon | Quebec | 1200 Boulevard Alphonse Desjardins, Levis | Y | N | 122,000 |
| 1060 | Les Rivieres Shopping Centre | Quebec | 4025 Boulevard des Forges, Trois Rivieres | Y | N | 144,677 |
| 1012 | Place Fleur de Lys | Quebec | 500 Boulevard Wilfrid Hamel, Quebec City | Y | N | 210,900 |
| 1084 | Place Vertu | Quebec | 3055 Cote Vertu Boulevard, Montreal | Y | N | 200,000 |
| 1088 | Upper Canada Mall | Ontario | 17600 Yonge Street, Newmarket | Y | Y | 145,000 |

14. As noted in the above Chart, certain of Sears Canada’s operating agreements (the “**Property Agreements**”) provide the counterparty to the Property Agreement with a right of first refusal, option to purchase or similar right (“**ROFR**”). In most cases, the ROFR offers the counterparty to the Property Agreements a right of first refusal to purchase the property at the same price and on the same terms and conditions as any offer to purchase received by Sears Canada.

The ROFR is to be exercised within a specified number of days following receipt of notice of the offer to purchase.¹³

15. As the Applicants advised in August 2017, in accordance with the terms of the SISP, the Applicants do not take the position that the ROFRs are no longer in force in relation to the above properties.¹⁴ Details regarding the proposed treatment of ROFRs or similar interests will be provided as necessary in relation to specific proposed Owned Real Estate Transactions.

Resumption of Owned Real Estate Marketing Activities

16. Additional environmental diligence for the Owned Real Estate was completed in late January 2018 and placed in the applicable electronic data room.¹⁵

17. In February 2018, following consultation with the Monitor and the Owned Real Estate Consultation Parties (described below), the Sale Advisor recommenced marketing efforts in relation to the Owned Real Estate.¹⁶ The Sale Advisor delivered an updated sale process letter (the “**Updated Sale Process Letter**”) to parties who had previously expressed an interest in the Owned Real Estate. In addition, this letter was delivered to additional potentially interested parties identified by Ernst & Young LLP (“**EY**”), which acts as real estate advisor to the Superintendent of Financial Institutions (the “**Superintendent**”).¹⁷ A bid deadline of March 7, 2018 was established.¹⁸

¹³ Mohtadi Affidavit, para. 16; Third Caiger Affidavit, para. 27.

¹⁴ Third Caiger Affidavit, paras. 28 and 29.

¹⁵ Mohtadi Affidavit, para. 10; Third Caiger Affidavit, para. 21.

¹⁶ Mohtadi Affidavit, paras. 11 and 12; Third Caiger Affidavit, para. 23.

¹⁷ Third Caiger Affidavit, paras. 17 and 23.

¹⁸ Third Caiger Affidavit, para. 23 and Exhibit “C”.

18. Potential bidders were provided with an updated draft standard form of agreement of purchase and sale.¹⁹

19. Bids and proposal documentation received by the bid deadline were uploaded to the Bid Results Data Room maintained by the Sale Advisor and the Applicants. These bids were then reviewed by counsel to the Applicants and by the Sale Advisor. The Monitor and its counsel, as well as the Owned Real Estate Consultation Parties, also had access to the Bid Results Data Room.²⁰

20. The Sale Advisor, on behalf of the Applicants, in consultation with the Monitor and taking into account feedback provided by the Owned Real Estate Consultation Parties, has engaged in negotiations with several bidders with a view to selecting one or more non-overlapping Successful Bids to be negotiated upon approval of the Board. The Applicants and their advisors have also taken steps to settle definitive agreements with bidders for certain properties, in consultation with the Monitor.²¹

21. At this time, the Applicants seek this Court's approval of one Transaction – the Place Vertu Transaction – described further below. Subject to Court approval, this Transaction has been entered into on terms acceptable to the Applicants, the Board, the Sale Advisor, and the Monitor.

22. The Applicants anticipate concluding additional Transactions for the Remaining Owned Real Estate. The Applicants anticipate that they will seek this Court's approval for these

¹⁹ Third Caiger Affidavit, para. 25.

²⁰ Third Caiger Affidavit, paras. 32 and 33.

²¹ Third Caiger Affidavit, para. 36.

further Transactions arising out of the Owned Real Estate sale process as the terms of these Transactions are settled on acceptable terms.

Place Vertu Transaction

23. In this motion, the Applicants seek this Court's approval of the Place Vertu Transaction, as effected by an agreement of purchase and sale ("**APS**") between Sears Canada and LaSalle. The APS is dated May 17, 2018 and contemplates the purchase by LaSalle of the Subject Assets, as defined in the APS, including all the right, title and interest of Sears Canada in the Place Vertu property.²² The APS is based on the form of agreement that was provided to LaSalle, as revised in consultation with the Monitor during the Owned Real Estate sale process.²³

24. The details of the Place Vertu Transaction are set out in the APS and in the Mohtadi Affidavit. Briefly, key points include:

- (a) The Closing Date is to be no later than July 24, 2018.
- (b) LaSalle is purchasing the Subject Assets, subject to the terms of the APS and the proposed Approval and Vesting Order, on an "as is, where is" basis.
- (c) There are no financing conditions to the APS.²⁴

25. Sears Canada is party to an operating agreement (the "**Place Vertu Operating Agreement**") dated June 1, 1975, as amended, with Place Vertu Holdings Inc./Fiduciaire Place Vertu Inc. (or its successor or assign) (the "**Mall Owner**"). The Mall Owner is an affiliate of LaSalle. Under the Place Vertu Operating Agreement, the Mall Owner retains a ROFR to purchase

²² Mohtadi Affidavit, para. 2.

²³ Mohtadi Affidavit, para. 13.

²⁴ Mohtadi Affidavit, para. 15.

the Place Vertu property at the price and upon the terms and conditions contained in any offer received by Sears Canada, by written notice to Sears Canada, within 15 days of the receipt of notice of any offer. It is a condition of closing of the APS that this ROFR shall have validly expired in accordance with the terms of the Operating Agreement or as ordered by the Court or have been waived by the Mall Owner in writing.²⁵

26. It is also a condition of closing of the APS that LaSalle have delivered to Sears Canada (i) a release of Sears Canada from the Mall Owner of all of Sears Canada's obligations under the Place Vertu Operating Agreement; and (ii) an assumption agreement in respect of the Place Vertu Operating Agreement, all in a form acceptable to Sears Canada.²⁶

27. On May 23, 2018, the Mall Owner agreed to waive its ROFR in connection with the Place Vertu Transaction, or in connection with any other transaction to the extent that the APS does not close solely as a result of a default by LaSalle.²⁷

28. Pursuant to the proposed Approval and Vesting Order, the Monitor will retain the proceeds of the Place Vertu Transaction on behalf of the Applicants to be dealt with by further order of this Court.²⁸

²⁵ Mohtadi Affidavit, paras. 17 to 18.

²⁶ Mohtadi Affidavit, para. 20. Note that the Mall Owner does not release Sears Canada of any claims, obligations or liability set out in the Mall Owner's Proofs of Claim.

²⁷ Mohtadi Affidavit, para. 21 and Exhibit "B".

²⁸ Mohtadi Affidavit, para. 22.

PART III – ISSUES AND THE LAW

29. The sole issue on this motion is whether this Honourable Court should approve the Place Vertu Transaction and grant the proposed Approval and Vesting Order?

Test Under the CCAA is Met

30. Section 36 of the CCAA sets out the legal test for obtaining 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.

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.

31. It is well-established that 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 under the CCAA.²⁹ These factors overlap, to a certain degree, with the *Soundair* factors that were applied in approving sale transactions under pre-2009 CCAA case law.³⁰

32. As set out further below in relation to the Place Vertu Transaction, 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 requested Approval and Vesting Order.

33. In the absence of any indication that the Applicants have acted improvidently, the informed business judgment of the Applicants that the Place Vertu Transaction – and the remaining Owned Real Estate Transactions that will be brought forward – are in the best interests of the Applicants and their stakeholders is entitled to deference by this Court.³¹

²⁹ 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.); *Re Target Canada Co.*, 2015 ONSC 2066 [*Target*] at para. 15.

³⁰ *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. See also *Target*, above note 29 at para. 15.

³¹ *Re AbitibiBowater Inc.*, 2010 QCCS 1742 [*AbitibiBowater*] at paras. 70-72. See also *Re Sanjel Co.*, 2016 ABQB 257 [*Sanjel*] at para. 57; *Re Target Canada Co.*, 2015 ONSC 1487 at para. 18.

a) Process Was Reasonable

34. 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.³² 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. The Court must be satisfied overall that the debtor has not acted improvidently.³³

35. Substantially the same process – which is described in detail above – has been followed in order to identify each of the Transactions that the Applicants will bring to this Court for its approval.

36. The market has been fully canvassed in a manner that is both transparent and fair. The Owned Real Estate has been the subject of a comprehensive and well-publicized canvassing of the market since July 13, 2017³⁴ when the SISP was approved by this Court.³⁵

37. A number of transactions that were generated through the SISP have already been approved by this Court on the basis that the process was fair and reasonable, despite the fact that the initial phases of the SISP were conducted over a compressed timeframe due to the exigent circumstances in which the Applicants found themselves.³⁶ The sale process for the Owned Real Estate has been carried out over a more lengthy time period – approximately nine months –

³² See *Re Terrace Bay Pulp Inc.*, 2012 ONSC 4247 at paras. 45 and 51-52, citing *Soundair*, above note 30 at paras. 21, 30-31. See also *Sanjel*, above note 31 at paras 77 and 80.

³³ *Soundair*, above, note 30 at paras. 48-49. See also *White Birch*, above note 29 at paras. 49-50.

³⁴ Third Caiger Affidavit, para. 38.

³⁵ Endorsement of Hainey J., dated July 13, 2017.

³⁶ See, for example, Endorsement of Hainey J. dated October 12, 2017 at para. 8.

allowing for the market to be fully tested with the benefit of additional environmental information to ensure that the value of the Owned Real Estate is maximized.

38. The Sale Advisor has consulted regularly with the Owned Real Estate Consultation Parties throughout these proceedings. The Owned Real Estate Consultation Parties were identified as appropriate consultation parties by the Applicants and the Monitor, as they represent a large and coordinated portion of the unsecured creditor class. These parties include the Superintendent; EY, as real estate advisor to the Superintendent; as well as Employee Representative Counsel, Pension Representative Counsel, the Plan Administrator and their respective advisors.³⁷

39. In particular, the Owned Real Estate Consultation Parties were kept apprised of the status of the environmental diligence, and of the Sale Advisor's intentions to resume marketing the Owned Real Estate.³⁸ Further, consultations with these parties are ongoing throughout the process of assessing which bids for the Owned Real Estate that the Applicants should pursue and as the negotiations with potential purchasers are underway.³⁹

40. The Sale Advisor has also provided regular reports regarding the Owned Real Estate sale process to the Special Committee.⁴⁰

b) Monitor Concurs

41. As required by section 36 of the CCAA and the SISP, the Monitor has been or will have been involved at virtually every stage related to the Transactions.

³⁷ Third Caiger Affidavit, paras. 17 to 19. See also Fourteenth Report of the Monitor, dated March 1, 2018, para. 55.

³⁸ Third Caiger Affidavit, paras. 15 and 17 to 19.

³⁹ Third Caiger Affidavit, para. 34.

⁴⁰ Third Caiger Affidavit, para. 30.

42. The Sale Advisor was in frequent contact with the Monitor throughout the sale process for the Owned Real Estate.⁴¹ The Monitor has been closely involved in reviewing and approving the Updated Sale Process Letter, approving the form of NDA sent to additional interested parties, approving the revised draft transaction agreement, and attending update calls with Owned Real Estate Consultation Parties. In addition, the Monitor and its counsel responded to inquiries regarding the status of the SISP from various stakeholder groups.⁴²

43. The Monitor has also had access to the Bid Results Data Room and has been closely involved in reviewing the bids received and determining which bids the Applicants should pursue.⁴³

44. It is anticipated that the Monitor will confirm its view on all Owned Real Estate Transactions that are sought to be approved, providing additional information specific to those Transactions where necessary or appropriate.

c) The Purchase Price is Fair and Reasonable

45. Each of the proposed Transactions has been or, it is anticipated that they will be, approved by the Sale Advisor, the Monitor and the Board on the basis of their view that (i) for the Place Vertu Transaction the purchase price is fair and reasonable and that it maximizes value for the Applicants' stakeholders and (ii) on the basis that, following review of all other Transactions, the purchase price for those Transactions will be fair and reasonable and maximize value for the Applicants' stakeholders.

⁴¹ Third Caiger Affidavit, para. 30.

⁴² Third Caiger Affidavit, para. 31.

⁴³ Third Caiger Affidavit, paras. 7 and 32 to 33.

46. CCAA case law both prior to and subsequent to the enactment of section 36 has applied the test from *Soundair* in evaluating this criterion.⁴⁴ 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. Like other elements of the test under section 36, 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.⁴⁵

47. 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 any specific type of process – such as an “auction” – before the Court can determine that the consideration offered is fair and reasonable.⁴⁶ Whether the process has obtained Court approval in advance is also not determinative.⁴⁷ As long as the process is fair and reasonable in the circumstances, it cannot be impugned.

48. The purchase price for the properties that are the subject of the Transactions is the result of the comprehensive and competitive marketing process undertaken by the Sale Advisor under the well-publicized SISP and during the sale process for the Owned Real Estate.

49. This process began with a broad canvass of approximately 145 interested parties.⁴⁸ By the completion of the initial phase of the SISP, 40 unique and potentially interested parties had

⁴⁴ See for example *Terrace Bay*, above, note 32 at paras. 49-55; *Sanjel*, above note 31 at para 56.

⁴⁵ *Terrace Bay*, above note 32 at para. 51, citing *Soundair*.

⁴⁶ As noted above, *Soundair* itself was a case in which the Court held that a reasonable process did not necessarily require an auction.

⁴⁷ See generally *Sanjel*, above note 31.

⁴⁸ See First Caiger Affidavit, para. 8.

contacted or were contacted by the Sale Advisor in relation to the Owned Real Estate. Of these, 24 entered into NDAs with Sears Canada and 21 accessed the Diligence Data Room.⁴⁹

50. After the sale process was formally recommenced in February 2018, the Sale Advisor contacted or was contacted by approximately 62 additional unique interested parties. These included parties who had been involved in the SISP generally, and who subsequently expressed interest in the Owned Real Estate. They also included parties who did not submit a bid prior to the August 31, 2017 bid deadline but had subsequently expressed interest and signed an NDA, as well as parties identified by EY. Of these, 31 interested parties entered into NDAs with Sears Canada and 29 accessed the Diligence Data Room.⁵⁰

51. There is therefore ample evidence that the market has been thoroughly tested and that the Sale Advisor, the Board and the Monitor have or will have exercised their informed judgment as to which Transactions are likely to maximize value for stakeholders.

e) Compliance with Additional Requirements Under Section 36

52. 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 security interests against the Applicants' interest in the Owned Real Estate and who might be affected by the relief requested in this motion have been notified.⁵¹

⁴⁹ Third Caiger Affidavit, para. 24.

⁵⁰ Third Caiger Affidavit, para. 25.

⁵¹ CCAA, s. 36(2).

- (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. None of the Transactions will be entered into with 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. Where necessary, this will be addressed in relation to specific proposed Transactions.
- (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.⁵² 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. The Applicants have paid employees for all post-filing services, and are otherwise simply monetizing hard assets. The requirements of section 36(7) of the CCAA are either satisfied or inapplicable.

⁵² 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).

Place Vertu Transaction

53. The details of the Place Vertu Transaction are set out in the Mohtadi Affidavit.⁵³

The Applicants submit that the Place Vertu Transaction satisfies all of the applicable requirements under section 36 of the CCAA.

54. ***Fairness of Process:*** The Place Vertu Transaction is the product of the extensive sale process for the Owned Real Estate, including under the SISP. This process was fair and reasonable and is described in detail above.

55. ***Monitor Approval:*** The Monitor supports the approval of the Place Vertu Transaction. The Monitor approved the marketing process that led to the Place Vertu Transaction and has stated that such process was fair and reasonable, and the granting of the proposed Approval and Vesting Order.

56. ***Benefits of Place Vertu Transaction:*** The benefits of the Place Vertu Transaction primarily arise out of the cash consideration to be received for the benefit of all stakeholders. In addition, concluding the Place Vertu Transaction relieves the Applicants of the approximately \$96,000 per month that it is costing to continue to carry this property.⁵⁴

57. ***Reasonable and Fair Price:*** The market for the Place Vertu Property has been thoroughly canvassed and tested. The terms of the APS were negotiated with LaSalle. In accepting the purchase price as fair and reasonable, the Applicants and the Sale Advisor considered the available alternatives. The Board determined, in its business judgment, that LaSalle's offer was

⁵³ Mohtadi Affidavit.

⁵⁴ Mohtadi Affidavit, para. 14.

in the best interests of the Applicants and their stakeholders and therefore authorized Sears Canada to enter into the proposed Transaction, subject to approval from this Court.⁵⁵

58. ***ROFR Has Been Waived:*** As submitted above, the Mall Owner has waived its ROFR in connection with the proposed Transaction.⁵⁶

e) Request for Sealing Order

59. The Applicants request that certain confidential and commercially sensitive information in connection with the Transactions for which approval is sought in this and future motions to approve the Transactions, including the purchase price and deposit for each Transaction, and other information concerning offers received for the individual Owned Real Estate asset, be sealed. Such confidential information is or will be contained in the Confidential Appendix to the applicable Monitor's Report. In the Applicants' submission, the test for such an order, as established by the Supreme Court of Canada, has been satisfied.⁵⁷

60. In the view of the Applicants and the Sale Advisor, information about the amount of the consideration to be paid for a particular Owned Real Estate asset is confidential. Further, more particularized information about the offers received during the sale process for each Owned Real Estate asset is also confidential in the circumstances. General disclosure of such information could be materially prejudicial to the Applicants and the purchasers, particularly in the event that one or more of the proposed Transactions does not close as anticipated.⁵⁸

⁵⁵ Mohtadi Affidavit, para. 14.

⁵⁶ Mohtadi Affidavit, para. 21.

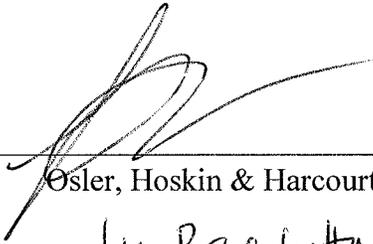
⁵⁷ *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53; see also *Re Target Canada Co.*, 2015 ONSC 1487, above note 31 at paras. 28-30.

⁵⁸ Mohtadi Affidavit, para. 5.

PART IV – NATURE OF THE ORDER SOUGHT

61. For all of the reasons above, the Applicants submit that this Honourable Court should grant the relief sought by the Applicants in this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:



Osler, Hoskin & Harcourt LLP
Lia Bruechler

Schedule "A"

LIST OF AUTHORITIES

Case Law

1. *AbitibiBowater Inc. (Re)*, 2010 QCCS 1742
2. *Canwest Publishing Inc./Publications Canwest Inc. (Re)*, 2010 ONSC 2870
3. *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (C.A.)
4. *Sanjel Co. (Re)*, 2016 ABQB 257
5. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41
6. *Target Canada Co. (Re)*, 2015 ONSC 1487
7. *Target Canada Co. (Re)*, 2015 ONSC 2066
8. *Terrace Bay Pulp Inc. (Re)*, 2012 ONSC 4247
9. *White Birch Paper Holding Co. (Re)*, 2010 QCCS 4915; leave to appeal refused 2010 CarswellQue 11534, 2010 QCCA 1950 (Que. C.A.)

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).

[...]

General power of court

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[...]

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., 9370-2751 QUEBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INTIUM LOGISTICS SERVICES INC., INTIUM COMMERCE LABS INC., INTIUM 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
**(Approval of Remaining Owned Real Estate
Transactions)**
(Motion Returnable June 5, 2018)

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