

**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 to Assign Contracts – SLH and Corbeil)
(Returnable November 21, 2017)**

November 17, 2017

OSLER, HOSKIN & HARcourt LLP
Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Marc Wasserman LSUC# 44066M
Tel: 416.862.4908

Jeremy Dacks LSUC# 41851R
Tel: 416.862.4923

Tracy Sandler LSUC# 32443N
Tel: 416.862.5890

Karin Sachar LSUC# 59944E
Tel: 416.862.5949

Lawyers for the Applicants

TO: SERVICE LIST

**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

(Assignment of Contracts)
(*Motions Returnable November 21, 2017*)

PART I – NATURE OF THE MOTIONS

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 October 4, 2017, this Honourable Court approved a sale of the Purchased Assets, as defined in two agreements of purchase and sale – namely, the “**SLH APA**” and the “**Corbeil APA**”, together the “**APAs**”. These assets are associated with two of Sears Canada’s business lines – S.L.H. Transport Inc./Transports S.L.H. Inc. (“**SLH**”) and Corbeil Électrique Inc. (“**Corbeil**”) and are to be conveyed to two purchasers – 8507597 Canada Inc. (the “**SLH Buyer**”) and Am-Cam Électroménagers Inc. (the “**Corbeil Buyer**”) (together, the “**Buyers**”).

3. Each of these transactions required Sears Canada to make commercially reasonable efforts to obtain consent for the assignment of rights and obligations under certain contracts and/or leases to the Buyers, or if such consent is not forthcoming prior to closing, to return to this Court to seek to have those rights and obligations assigned to the Buyers by court order.

4. Through diligent efforts over the last month, the Applicants have obtained the consent of numerous contractual counterparties for the rights and obligations of the Applicants to be assigned to the Buyers – a clear recognition that the transactions for the sale of the Corbeil and SLH businesses are beneficial to these counterparties. However, despite the Applicants’ best efforts, it has not been possible to obtain all of the required consents in the compressed timeframe prior to closing.

5. This factum is therefore filed in support of two motions (the “**SLH Motion**” and the “**Corbeil Motion**”) brought by the Applicants under section 11.3 of the CCAA. In these motions, the Applicants seek orders of this Court assigning to the Buyers the rights and obligations under those remaining contracts and/or leases that are to be conveyed to the Buyers and for which counterparty consent has not yet been obtained (the “**SLH Remaining Contracts**” and the “**Corbeil Remaining Contracts**”, together the “**Remaining Contracts**”). In addition, the Applicants seek the approval of this Court for the transfer of all of Sears Canada’s right, title and

interest in two Additional Leases (as defined in the Affidavit of Billy Wong relating to the SLH Motion) to the SLH Buyer.

6. The Applicants submit that the criteria under section 11.3 of the CCAA have been satisfied in both the SLH Motion and the Corbeil Motion. The Buyers are “appropriate” assignees because: (a) they have the financial wherewithal to comply with the terms of the APAs and to perform the assigned contractual obligations post-closing; (b) they do not seek any amendment of the Remaining Contracts; and (c) they are acquiring the Purchased Assets, including the Remaining Contracts, on a “going-concern” basis that preserves jobs and supplier relationships and that maximizes value for the Applicants and their stakeholders.

7. The requested Assignment Orders are essential to ensure that the transactions for the sale of the SLH and Corbeil businesses can close and at the best price, thereby realizing on the significant benefits of both transactions for the Applicants’ stakeholders. In addition, the transactions will preserve the employment of at least 448 employees of SLH and its subsidiary, and potentially approximately 290 employees of Corbeil (including employees working for Cobeil franchisees). The proposed Assignment Orders are therefore appropriate, as they are entirely consistent with the CCAA objective of achieving a restructuring for the benefit of stakeholders such as creditors, employees, suppliers and customers.

8. Based on these considerations, and the submissions below, the Applicants submit that the proposed Assignment Orders and the proposed Approval and Vesting Order, in the forms set out in the Applicants’ Motion Records, should be approved.

PART II – FACTS

9. The facts with respect to this motion are more fully set out in the Affidavits of Billy Wong in support of the Assignment Orders and the Approval and Vesting Order (the “**Assignment Affidavits**”).¹ Further details regarding these proceedings are contained in the prior Affidavits of Billy Wong (the “**Prior Wong Affidavits**”) as well as the individual Transaction Affidavits supporting the approval of the APAs². Capitalized terms in this Factum not otherwise defined have the same meanings as in the APAs, the Assignment Affidavits and the Prior Wong Affidavits, as applicable.

Background to the SLH Transaction

10. SLH is a wholly-owned subsidiary of Sears Canada. It carries on business providing domestic and cross-border truckload delivery and freight management services within North America. It currently serves both Sears Canada (and related businesses such as Corbeil) and third party customers. SLH is headquartered in Kingston. It is federally-incorporated and regulated.³

11. The SLH APA, which was entered into as of September 29, 2017, provides for the sale of assets related to the business of SLH (and, as applicable, certain assets of Sears Canada) to

¹ Affidavit of Billy Wong, sworn November 13, 2017 [SLH Assignment Affidavit]; Affidavit of Billy Wong, sworn November 13, 2017 [Corbeil Assignment Affidavit].

² 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]; Affidavit of Billy Wong, sworn September 29, 2017 [SLH Approval Affidavit]; Affidavit of Billy Wong, sworn October 1, 2017 [Corbeil Approval Affidavit].

³ SLH Assignment Affidavit, para. 3.

the SLH Buyer (the “**SLH Transaction**”). The SLH Transaction was approved by this Court on October 4, 2017 on the basis that it satisfied the criteria in section 36 of the CCAA.⁴

12. Since that date, SLH has been operating in the ordinary course, as a going-concern, in consultation with the Monitor.⁵ In the weeks following the granting of the Approval and Vesting Order, SLH has made progress toward securing the regulatory approvals that are a condition to closing the SLH Transaction. These include: (a) approval under the *Competition Act* (Canada); and (b) approval under the *Canada Transportation Act*.⁶

13. Under the SLH APA, SLH must use commercially reasonable efforts to obtain the written consent of the counterparties to the assignment to the SLH Buyer of the various contracts that are included in the SLH Purchased Assets. These include:

- (a) The SLH Assumed Contracts, which consist of (i) all of the 160 contracts between SLH and its customers (other than Sears Canada); and (ii) the leases between SLH and ARI Financial Services Inc. (“**ARI**”), pursuant to which SLH leases 39 vehicles from ARI (the “**ARI Leases**”).
- (b) The four SLH Assumed Real Property Leases (not including the Additional Leases).

⁴ SLH Assignment Affidavit, para. 4. The Approval and Vesting Order granted on October 4, 2017 is attached as Exhibit “C”.

⁵ SLH Assignment Affidavit, para. 20.

⁶ SLH Assignment Affidavit, paras. 21 to 28.

(c) The two Additional Leases designated for inclusion in the Purchased Assets, with SLH's consent, pursuant to section 7.12 of the SLH APA.⁷

14. The total number of contracts and leases for which SLH must make reasonable efforts to obtain counterparty consent is therefore 205. To the extent that such consent cannot be obtained, the SLH APA requires the Applicants to bring the SLH Motion to obtain the SLH Assignment Order assigning all of SLH's (or Sears Canada's) rights and obligations in the SLH Remaining Contracts to the SLH Buyer.⁸

15. Of the 199 SLH Assumed Contracts, four SLH Assumed Leases and two Additional Leases, the parties have designated 59 as key contracts (the "**SLH Key Contracts**").⁹ It is a condition of closing under the SLH APA that SLH must obtain consent to the assignment of the SLH Key Contracts to the SLH Buyer, or obtain a court-ordered assignment of the SLH Key Contracts to the SLH Buyer.¹⁰

16. The assignment of the 146 remaining "non-key" contracts or leases included in the SLH Purchased Assets (the "**SLH Additional Contracts**") is not a condition of closing of the SLH Transaction. As a result, if the consent of the counterparty or the SLH Assignment Order is not obtained for those contracts, the SLH Transaction will close with no adjustment to the purchase price.¹¹

⁷ SLH Assignment Affidavit, para. 5.

⁸ SLH Assignment Affidavit, para. 6.

⁹ The "SLH Key Contracts" are those contracts listed in Schedule N to the SLH APA and consist of 16 Assumed Contracts between SLH and its customers, four Real Property Leases between Sears Canada and its applicable landlords and the 39 ARI Leases: SLH Assignment Affidavit, para. 7.

¹⁰ SLH Assignment Affidavit, para. 32.

¹¹ SLH Assignment Affidavit, paras. 8 and 33.

17. Since the execution of the SLH APA, SLH and its representatives contacted all of the counterparties to the contracts forming part of the SLH Purchased Assets to advise them of the SLH Transaction and to seek their consent to the assignment of their respective agreements to the SLH Buyer.¹² All of these counterparties were informed that if they did not provide their consent, SLH would be required to seek an order under section 11.3 of the CCAA to assign the applicable contract without the counterparty's consent.¹³ SLH and its representatives then followed up by telephone and email with counterparties whose consent had not been received in response to the letter.¹⁴

18. After intensive efforts over a compressed timeframe of just over one month, SLH has obtained consents to the assignment of 14 of the 59 SLH Key Contracts, including all four SLH Assumed Real Property Leases. The remaining 45 SLH Key Contracts are with only two counterparties – ARI in relation to the 39 ARI Leases and Canada Post Corporation (“**Canada Post**”), which is the counterparty to the remaining six customer contracts that are SLH Key Contracts. Canada Post has signalled its intention to provide such consent, but that it needs additional time to do so.¹⁵

19. Discussions with ARI are ongoing. Thirty-nine of the ARI Leases are SLH Key Contracts. However, 12 of these ARI Leases are at the end of their term and SLH has paid the

¹² SLH Assignment Affidavit, paras. 34-37. The form of letter sent to counterparties to the SLH Key Contracts (other than SLH Assumed Real Property Leases that are SLH Key Contracts) and to the SLH Additional Contracts is attached as Exhibit “E” to the SLH Assignment Affidavit. The form of letter and draft Landlord Consent to Assignment and Assumption of Lease Agreement that was sent to landlords of the SLH Assumed Real Property Leases and of the Additional Leases is attached as Exhibit “F” to the SLH Assignment Affidavit. The form of letter sent to applicable landlords clarifying that Sears Canada is the tenant under the SLH Assumed Real Property Leases and the Additional Leases is attached as Exhibit “G”.

¹³ SLH Assignment Affidavit, para. 38.

¹⁴ SLH Assignment Affidavit, para. 39.

¹⁵ SLH Assignment Affidavit, paras. 9 and 40.

required amount to take title to the vehicle. SLH intends to pay the buy-out amounts to acquire the vehicles under the remaining 27 ARI Leases by the end of November 2017. If this process is complete in relation to any more of the subject vehicles prior to the hearing of this motion, there will be no need to include the corresponding ARI Lease in the SLH Assignment Order.¹⁶

20. SLH has also obtained consents to the assignment of 56 of the SLH Additional Contracts, as well as one of the two Additional Leases.¹⁷ SLH and the SLH Buyer have agreed that SLH will not seek to assign 61 SLH Additional Contracts (*e.g.*, those that are based solely on SLH's Standard Terms and Conditions).¹⁸

21. The SLH Remaining Contracts that are the subject of the requested SLH Assignment Order therefore include: (a) 45 of the SLH Key Contracts (namely, the Canada Post agreements and the ARI Leases); and (b) 28 of the SLH Additional Contracts, including one Additional Lease. These numbers will be reduced to the extent that further consents are received prior to the date of the hearing of the SLH Motion.¹⁹

Background to the Corbeil Transaction

22. Corbeil is a specialty retailer of major appliances, headquartered in Montreal and carrying on business through corporate and franchised stores in Quebec, the Greater Toronto Area and Eastern Ontario. Corbeil is a wholly-owned subsidiary of Sears Canada, but operates as an

¹⁶ SLH Assignment Affidavit, para. 41.

¹⁷ SLH Assignment Affidavit, paras. 9 and 40.

¹⁸ SLH Assignment Affidavit, paras. 10 and 42.

¹⁹ SLH Assignment Affidavit, para. 11.

independent business, with a separate management structure, employees, brand name, merchandise, cash management system and business model.²⁰

23. The Corbeil Transaction provides for the sale of the assets of Corbeil to the Corbeil Buyer, and is guaranteed by Distinctive Appliances Inc. (“**Distinctive**”). The Corbeil Transaction, which preserves the Corbeil business line as a going-concern, was approved by this Court on October 4, 2017 on the basis that it satisfied the criteria in section 36 of the CCAA.²¹

24. Since the granting of the Initial Order, Corbeil has been operating its business as a going concern in close consultation with the Monitor.²² Corbeil has made progress in closing the two Ontario stores that were identified at the sale approval hearing.²³ Corbeil has also obtained the required approval for the Corbeil Transaction under the *Competition Act* (Canada).²⁴

25. Under the Corbeil APA, Corbeil must use commercially reasonable efforts to obtain the written consent of the counterparties to the various contracts that are included in the Corbeil Purchased Assets to the assignment of those contracts, to the extent such consent is required by the terms of those contracts. These contracts include substantially all material contracts in connection with the Corbeil business, including leases for store locations, leases for the corporate headquarters, distribution centre and liquidation centre, franchise agreements with Corbeil

²⁰ Corbeil Approval Affidavit, para. 9.

²¹ Corbeil Assignment Affidavit, para. 3. See also Exhibit “A” for a copy of the Corbeil Approval Affidavit and the Corbeil APA and Exhibit “B” for a copy of the Approval and Vesting Order.

²² Corbeil Assignment Affidavit, para. 16.

²³ Corbeil Assignment Affidavit, paras. 17 and 18.

²⁴ Corbeil Assignment Affidavit, para. 19.

franchisees, agreements with key suppliers, and client contracts relating to the operation of the Corbeil business.²⁵

26. Specifically, Corbeil must seek the written consent of:

- (a) The Landlords to the assignment of 30 Corbeil Real Property Leases to the Corbeil Buyer.
- (b) The counterparties and any other Persons to the assignment of 48 Corbeil Assumed Contracts to the Corbeil Buyer.
- (c) The counterparties and any other Persons to the assignment of 2 Corbeil Personal Property Leases to the Corbeil Buyer.²⁶

27. In total, there are 80 Corbeil Real Property Leases, Corbeil Assumed Contracts and Corbeil Personal Property Leases for which consent is required to be sought. To the extent consent cannot be obtained, Corbeil is required under the Corbeil APA to make an application for the Corbeil Assignment Order assigning all of Corbeil's rights and obligations under these agreements to the Corbeil Buyer.²⁷

28. The parties have designated 45 of the above agreements as key contracts (the "**Corbeil Key Contracts**"). Under the Corbeil APA, it is a condition of closing of the Corbeil Transaction that Corbeil either obtain consent to the assignment of the Corbeil Key Contracts to the Corbeil Buyer or obtain the Corbeil Assignment Order effecting such assignment under section

²⁵ Corbeil Assignment Affidavit, paras. 22 and 23.

²⁶ Corbeil Assignment Affidavit, para. 4.

²⁷ Corbeil Assignment Affidavit, para. 5.

11.3 of the CCAA. The Corbeil Key Contracts consist of 28 Corbeil Real Property Leases and 17 Corbeil Assumed Contracts (16 franchise agreements and 1 supplier contract).²⁸

29. In addition, there are 35 additional contracts (including 2 Corbeil Real Property Leases) for which consent is required under the Corbeil APA to be sought that have not been designated as Corbeil Key Contracts (the “**Corbeil Additional Contracts**”). Although assignment of the Corbeil Additional Contracts by consent or court order is not a condition of closing for the Corbeil Transaction, a downward adjustment in the Corbeil Purchase Price could result if certain of the Corbeil Additional Contracts are not assigned to the Corbeil Buyer.²⁹

30. Following execution of the Corbeil APA, Corbeil and its representatives contacted each relevant Landlord and counterparty to advise them of the Corbeil Transaction and to seek their consent to the assignment of their respective agreements to the Corbeil Buyer. These counterparties were advised that if they did not provide their consent, Corbeil would be required to seek an order of this court under section 11.3 of the CCAA assigning the contract without their consent.³⁰

31. After frequent and extensive discussions with Landlords and other counterparties over a compressed timeframe of a little over a month, Corbeil has (to date) obtained consents for the assignment of 35 of the 45 Corbeil Key Contracts, including 18 of the 28 Corbeil Real Property Leases designed as Corbeil Key Contracts, as well as all 16 of the franchise agreements and the 1

²⁸ Corbeil Assignment Affidavit, paras. 6 and 24. See also Corbeil APA, Schedule 1.1(aaaa).

²⁹ Corbeil Assignment Affidavit, paras. 7, 26 and 27.

³⁰ Corbeil Assignment Affidavit, para. 28. See also Exhibit “D” for a copy of the letter sent to each Landlord of a Corbeil Real Property Lease and Exhibit “E” for a copy of the letter sent to each counterparty to a Corbeil Assumed Contract or Corbeil Personal Property Lease.

supplier agreement designated as Corbeil Key Contracts. Corbeil has also obtained consents for the assignment of 27 of the 35 Corbeil Additional Contracts.³¹

32. The requested Corbeil Assignment Order therefore seeks an order under section 11.3 of the CCAA assigning the Corbeil Remaining Contracts – namely, 10 Corbeil Real Property Leases that are Corbeil Key Contracts and the remaining 8 Corbeil Additional Contracts.³²

33. To the extent that additional consents are received prior to the hearing of the Corbeil Motion, the Corbeil Assignment Order will be revised accordingly.³³

PART III – ISSUES AND THE LAW

34. The issue on this motion is as follows:

- (a) Should this Honourable Court grant the requested Assignment Orders and grant the proposed Approval and Vesting Order for the Additional Leases designated pursuant to the SLH APA?

Section 11.3 of the CCAA

35. Section 11.3 of the CCAA gives this Court the jurisdiction and the discretion to make an order assigning the rights and obligations of the debtor company under an agreement to a third party who agrees to the assignment and to assume the obligations under the agreement.

³¹ Corbeil Assignment Affidavit, paras. 8, 30, 31.

³² Corbeil Assignment Affidavit, para. 9.

³³ Corbeil Assignment Affidavit, para. 32.

36. Section 11.3 sets out a number of requirements that must be satisfied in order for this Court to grant an assignment order transferring the rights and obligations under a contract to a third party. These include:

- (a) Notice: a motion for an assignment order must be “on notice to every party to an agreement and the monitor.”³⁴
- (b) No Exception Applies: no assignment order can be granted in respect of (i) obligations that are not assignable by reason of their nature; (ii) an agreement entered into on or after the filing date; (iii) an eligible financial contract; or (iv) a collective agreement.³⁵
- (c) Assignment is Appropriate: in deciding whether to make the order, the court must consider, among other things, (i) whether the monitor approved the proposed assignment; (ii) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and (iii) whether it would be appropriate to assign the rights and obligations to that person.³⁶
- (d) Monetary Defaults Cured: the Court may only make an assignment order if it is satisfied that all monetary defaults in relation to the agreement – other than those arising by reason only of the company’s insolvency, the commencement of

³⁴ CCAA, s. 11.3(1).

³⁵ CCAA, s. 11.3(2).

³⁶ CCAA, s. 11.3(3).

proceedings under the CCAA or the company’s failure to perform a non-monetary obligation – will be remedied on or before the day fixed by the court.³⁷

37. Even before the enactment of section 11.3, this Court held that it had the jurisdiction to order an assignment of the debtor company’s rights and obligations under contract to a third party, despite the lack of counterparty consent. The Court’s exercise of this jurisdiction was based on the evidence that the proposed assignment was necessary or important to facilitate the debtor company’s restructuring, did not unduly prejudice the rights of the third party, and was consistent with the objectives of the CCAA.³⁸

38. Courts have held that the principles applicable under section 11.3 of the CCAA have essentially codified and clarified the prior law. The proposed assignment must be important to the debtor company’s restructuring, at the same time that it treats the counterparties fairly and equitably.³⁹

39. Both the SLH Transaction and the Corbeil Transaction have already been determined to satisfy the requirements of section 36 of the CCAA.⁴⁰ Both Transactions are consistent with the objectives of the CCAA in preserving the debtor’s SLH and Corbeil businesses as going-concerns and in maximizing value for the Applicants’ stakeholders. In particular:

³⁷ CCAA, s. 11.4(4).

³⁸ *Re Playdium Entertainment Corp.*, 2001 CarswellOnt 4109 at paras. 32, 42; *Re Hayes Forest Service Ltd.*, 2009 BCSC 1169 at para. 31. See also *Re Nexient Learning Inc.*, [2009] OJ No 5507 at para. 54.

³⁹ See, for example, *Re Veris Gold Corp.*, 2015 BCSC 1204 at paras. 56 to 58 [*Veris Gold*].

⁴⁰ The key terms of the SLH Affidavit are summarized at para. 26 of the SLH Assignment Affidavit. The key terms of the Corbeil Transaction are summarized at para. 21 of the Corbeil Assignment Affidavit.

- (a) The SLH Transaction will result in the employment of at least 448 employees of SLH and its subsidiary.⁴¹
- (b) The Corbeil Transaction preserves the employment of potentially approximately 290 Corbeil employees, including employees working for Corbeil franchisees.⁴² This represents at least 90% of Corbeil's employees at assumed locations. In addition, Corbeil's franchise network will continue in operation without interruption.⁴³

40. Section 11.3 of the CCAA, on its face, does not require a debtor company to seek consent from contractual counterparties. It applies despite the terms of any contract and regardless of whether the counterparty has been asked for consent, or whether the counterparty's failure to consent is reasonable or unreasonable.

41. Even though they were not required to do so, the Applicants made significant efforts to obtain consent of all counterparties (where the terms of the applicable agreement required it) to the assignment of the contracts to the SLH Buyer or the Corbeil Buyer, respectively. As described above, the Applicants achieved substantial success in these endeavours. The requested Assignment Orders apply only to the Remaining Contracts for which counterparty consent has not been forthcoming. A similar bifurcated process – initial requests for consent from contractual

⁴¹ SLH Assignment Affidavit, para. 50(a).

⁴² Corbeil Assignment Affidavit, para. 10

⁴³ Corbeil Assignment Affidavit, para. 20.

counterparties, followed by a motion for an assignment order in relation to the remaining contracts – has been followed in several other cases.⁴⁴

42. Although they did not receive all of the key consents necessary to close the SLH Transaction and the Corbeil Transaction in the compressed time period since the execution of the APAs, neither SLH nor Corbeil has received a firm indication from any Landlord or counterparty to any of the Remaining Contracts that they intend to object to the proposed Assignment Orders.⁴⁵ In fact, the large number of consents that the Applicants have received to date is a signal that the stakeholders of both SLH and Corbeil perceive the benefits of the SLH Transaction and the Corbeil Transaction and that they have confidence in the Buyers.

43. The requested SLH Assignment Order and the Corbeil Assignment Order are critical to closing the SLH Transaction and the Corbeil Transaction. They are essential to the ability of the Applicants to realize upon the value of these transactions for the benefit of all stakeholders and to the ability of the SLH and Corbeil stakeholders to benefit from the preservation of these going-concern businesses.⁴⁶

44. The specific grounds supporting each of the proposed Assignment Orders are set out in greater detail below.

⁴⁴ *Re Primus Telecommunications Canada Inc.*, 2016 ONSC 5251 at para. 12; *Re TBS Acquireco Inc.*, 2013 ONSC 4663 at paras. 19 to 21.

⁴⁵ SLH Assignment Affidavit, para. 51(c); Corbeil Assignment Affidavit, para. 31.

⁴⁶ SLH Assignment Affidavit, para. 42; Corbeil Assignment Affidavit, para. 10

A. **SLH Transaction**

45. The Applicants submit that all of the criteria under section 11.3 of the CCAA have been satisfied in relation to the assignment of the SLH Remaining Contracts and that the proposed SLH Assignment Order should be granted for the reasons set out below.

Section 11.3(1): Appropriate Notice Has Been Given

46. All Landlords and other counterparties to the SLH Remaining Contracts received written communications from the Applicants informing them of the SLH Transaction and requesting their consent to the assignment of their agreements to the SLH Buyer. They were informed in writing that if their consent was not forthcoming, the Applicants would seek the proposed SLH Assignment Order.⁴⁷

47. All counterparties to the SLH Remaining Contracts have been provided with notice of the SLH Motion seeking to assign the SLH Remaining Contracts.⁴⁸

Section 11.3(2): No Exception Applies

48. The SLH Remaining Contracts do not fall within any exception set out in section 11.3(2) of the CCAA. In particular they are not contracts that are not assignable by their nature. Nor are they (a) eligible financial contracts; (b) contracts entered into post-filing; or (c) collective agreements.⁴⁹

⁴⁷ SLH Assignment Affidavit, para. 38.

⁴⁸ SLH Assignment Affidavit, para. 51(d). See *Veris Gold*, above, at para. 61.

⁴⁹ SLH Assignment Affidavit, para. 51(b).

Section 11.3(3): Assignment is Appropriate

49. The factors identified in s. 11.3(3)⁵⁰ have all been satisfied.
50. In particular, in accordance with s. 11.3(3)(a), the Monitor has approved the requested SLH Assignment Order.⁵¹
51. In accordance with s. 11.3(3)(b), the SLH Buyer, as the proposed assignee, will have the ability to consummate the SLH Transaction and to perform the obligations under the assigned contracts post-closing.
52. The SLH Buyer – 8507596 Canada Inc. – is an affiliate of C.A.T. Inc. (“CAT”). Founded in 1978 and headquartered in Coteau-du-Lac, Quebec, CAT is a national and cross-border freight carrier with significant operations throughout North America. The SLH Buyer is a corporation created solely for the purpose of effecting the SLH Transaction.⁵²
53. Although the SLH Buyer, as a special purpose entity, has no financial statements, it has a firm commitment from a lender in an amount sufficient to allow the SLH Buyer to pay the SLH Purchase Price, as well as related costs, including any Cure Costs. An excess of approximately \$2 million will remain available to the SLH Buyer after paying the SLH Purchase Price and related transaction costs in the event that SLH needs financing to help with post-closing operations.⁵³

⁵⁰ CCAA, s. 11.3(3): “In deciding whether to make the order, the court is to consider, among other things, (a) whether the monitor approved the proposed assignment; (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and (c) whether it would be appropriate to assign the rights and obligations to that person.

⁵¹ SLH Assignment Affidavit, para. 15.

⁵² SLH Assignment Affidavit, para. 44.

⁵³ SLH Assignment Affidavit, para. 45.

54. In addition, SLH has achieved positive EBITDA in each of the last five years. Post-closing, the SLH Buyer intends to take certain cost reduction measures to adjust SLH's operations to accommodate the loss of revenues from Sears Canada. Current projections indicate that 8507596 will generate positive cash flow and have sufficient liquidity to meet its obligations through the current fiscal year, ending in August 2018, including performing its obligations under all of the contracts to be assigned, including the SLH Remaining Contracts.⁵⁴

55. The vast majority of the SLH Remaining Contracts are contracts with SLH's customers pursuant to which SLH (and following assignment, the SLH Buyer) is obligated to perform freight carrier services or similar services. The SLH Buyer has advised that it will acquire sufficient assets from SLH and retain sufficient employees from SLH and its subsidiaries to be able to comply with its non-financial obligations under these contracts.⁵⁵

56. The SLH Buyer is not seeking any amendments to the terms of the SLH Remaining Contracts pursuant to the Assignment Order.⁵⁶ As such, the proposed assignment affects third party rights as little as possible.⁵⁷

57. Finally, in accordance with s. 11.3(c), it is appropriate to assign the rights and obligations under these contracts to the SLH Buyer. The assignment of the SLH Key Contracts is a condition of closing of the SLH Transaction. If the SLH Transaction cannot close, the Applicants will not receive the SLH Purchase Price.⁵⁸

⁵⁴ SLH Assignment Affidavit, paras. 46 and 47.

⁵⁵ SLH Assignment Affidavit, para. 48.

⁵⁶ SLH Assignment Affidavit, para. 51(a).

⁵⁷ See *Re Veris Gold Corp.*, above, at para. 54.

⁵⁸ SLH Assignment Affidavit, para. 50(a).

58. The assignment of the SLH Remaining Contracts to the SLH Buyer will assist in consummating the SLH Transaction. The SLH Transaction is in the best interests of the SLH stakeholders who will benefit from the going-concern sale of SLH and the preservation of their jobs or other relationships with SLH, as well as in the best interests of the Applicants' stakeholders for whom value will be maximized.

Section 11.3(4): Monetary Defaults Satisfied

59. In compliance with section 11.3(4), the SLH Buyer has agreed to pay all Cure Costs in connection with the SLH Assumed Contracts, the SLH Assumed Real Property Leases and the Additional Leases – namely, all amounts necessary to cure any monetary defaults other than those defaults arising by reason only of the Applicants' insolvency, the commencement of the CCAA proceeding or the failure to perform a non-monetary obligation. To the Applicants' knowledge, there are no Cure Costs owing in relation to any of the SLH Remaining Contracts.⁵⁹

Further Approval and Vesting Order Should be Granted

60. This Court already granted the requested Approval and Vesting Order for the SLH Transaction on October 4, 2017 on the basis that the SLH APA and the SLH Transaction satisfied the criteria for a sale of a debtor company's assets outside the ordinary course of business under section 36 of the CCAA.⁶⁰

61. When executed, the SLH APA contemplated that the SLH Buyer could designate certain additional contracts, including the Additional Leases, for transfer post-closing. The SLH Buyer has, in fact, made this designation prior to closing.

⁵⁹ SLH Assignment Affidavit, para. 49.

⁶⁰ SLH Assignment Affidavit, para. 19 and Exhibit "C".

62. Assuming that this Court determines to grant the SLH Assignment Order in the SLH Motion on the basis of the submissions above, there are no further factors or considerations that require consideration under section 36 of the CCAA in order for this Court to grant the requested Approval and Vesting Order to transfer the two Additional Leases to the SLH Buyer. All of the relevant factors – principally related to the fairness of the process leading up to the SLH Transaction, the broad testing of the market and the purchase price – were put before this Court on October 4, 2017.

63. For all of the above reasons, the Applicants submit that this Honourable Court should grant the requested SLH Assignment Order and the requested Approval and Vesting Order.

B. Corbeil Transaction

64. The Applicants submit that all of the criteria under section 11.3 of the CCAA have been satisfied in relation to the assignment of the Corbeil Remaining Contracts and that the proposed Corbeil Assignment Order should be granted for the reasons set out below.

Section 11.3(1): Appropriate Notice Has Been Given

65. All Landlords and other counterparties to the Corbeil Remaining Contracts received written communications from the Applicants informing them of the Corbeil Transaction and requesting their consent to the assignment of their agreements to the Corbeil Buyer. They were informed in writing that if their consent was not forthcoming, the Applicants would seek the proposed Corbeil Assignment Order.⁶¹

⁶¹ Corbeil Assignment Affidavit, para. 29.

66. All such Landlords and counterparties have been given notice of the Corbeil Motion seeking to assign the Corbeil Remaining Contracts to the Corbeil Buyer.⁶²

Section 11.3(2): No Exception Applies

67. The Corbeil Remaining Contracts do not include any eligible financial contracts, any contracts entered into post-filing, or collective agreements. Nor do they include any contracts that are not assignable by their nature.⁶³

Section 11.3(3): Assignment is Appropriate

68. The factors identified in s. 11.3(3)⁶⁴ have all been satisfied.

69. In particular, in accordance with s. 11.3(3)(a), the Monitor supports the Applicants' request for the proposed Corbeil Assignment Order.⁶⁵

70. In accordance with s. 11.3(3)(b) and as set out below, the Corbeil Buyer, as the proposed assignee, will have the ability to perform the obligations under the assigned contracts post-closing, as well as the obligations under the Corbeil APA.

71. The Corbeil Buyer is an affiliate of Distinctive, a well-known distributor of premium home appliances, with a diverse product line. The Corbeil Buyer represented in the Corbeil APA that it had a firm commitment from a lender that is sufficient to satisfy the Corbeil Purchase Price and all the other costs and expenses associated with completing the Corbeil

⁶² Corbeil Assignment Affidavit, para. 40(c). See *Veris Gold*, above, at para. 61.

⁶³ Corbeil Assignment Affidavit, para. 40(b).

⁶⁴ CCAA, s. 11.3(3): "In deciding whether to make the order, the court is to consider, among other things, (a) whether the monitor approved the proposed assignment; (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and (c) whether it would be appropriate to assign the rights and obligations to that person."

⁶⁵ Corbeil Assignment Affidavit, para. 11.

Transaction. Distinctive has also unconditionally guaranteed all of the Corbeil Buyer's obligations under the Corbeil APA.⁶⁶

72. The Corbeil Buyer has the financial ability to perform the obligations under the Corbeil Remaining Contracts. Among other things, the Corbeil Buyer is acquiring the already profitable Corbeil business.⁶⁷ In addition, the Corbeil Buyer expects to obtain a \$15 million revolving loan facility which it intends to rely upon post-closing to fund its obligations as they come due.⁶⁸

73. Under the Corbeil APA, the Corbeil Buyer has agreed to accept the assignment of all rights and obligations of Corbeil under all of the agreements forming the Corbeil Purchased Assets. The Corbeil Buyer is not entitled to request any amendments of the terms of these agreements in connection with obtaining consent or a court-ordered assignment.⁶⁹

74. Finally, in accordance with s. 11.3(c), it is appropriate to assign the rights and obligations under the Corbeil Remaining Contracts to the Corbeil Buyer.

75. The assignment of the Corbeil Remaining Contracts is essential to the continuation of Corbeil's business by the Corbeil Buyer, as it currently operates.⁷⁰ Without the assignment of the Corbeil Key Contracts, Corbeil will not be able to continue as a going-concern, resulting in the

⁶⁶ Corbeil Assignment Affidavit, para. 33.

⁶⁷ Corbeil Assignment Affidavit, paras. 34 and 35. See also Corbeil Approval Affidavit, para. 18.

⁶⁸ Corbeil Assignment Affidavit, para. 36.

⁶⁹ Corbeil Assignment Affidavit, para. 25.

⁷⁰ Corbeil Assignment Affidavit, para. 23.

loss of employment for hundreds of employees, the loss of business to Corbeil's stakeholders, and the failure to maximize value for the Applicants' stakeholders.⁷¹

76. Although the assignment of the Corbeil Additional Contracts is not a condition of closing, the failure to assign these agreements would significantly impair the business going forward and could lead to a downward adjustment in the Corbeil Purchase Price, thereby diminishing the value of the Corbeil Transaction to the Applicants' stakeholders.⁷²

77. The requested Corbeil Assignment Order is therefore consistent with the CCAA objective of restructuring the debtor's business as a going-concern, and of maximizing value for all stakeholders.

Section 11.3(4): Monetary Defaults Satisfied

78. Finally, all Cure Costs payable in respect of any of the Corbeil Remaining Contracts will be paid by the Monitor from the Corbeil Purchase Price, as required under the proposed Corbeil Assignment Order.⁷³

Request for Sealing Order

79. The Monitor will be filing financial documentation relating to both the SLH Transaction and the Corbeil Transaction as confidential appendices to the Monitor's Seventh Report. These confidential appendices will contain commercially sensitive financial information

⁷¹ Corbeil Assignment Affidavit, para. 39(a).

⁷² Corbeil Assignment Affidavit, para. 7.

⁷³ Corbeil Assignment Affidavit, para. 37.

about both Corbeil and SLH. Disclosure of this information would be harmful to the Applicants and the Buyers.⁷⁴

80. In the Applicants' submission, the test for a sealing order to protect this commercially sensitive information, as established by the Supreme Court of Canada, has been satisfied.⁷⁵ The Applicants therefore request that the confidential appendices be filed under seal and not form part of the public record.

PART IV – NATURE OF THE ORDER SOUGHT

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

Osler, Hoskin + Harcourt LLP / ^{per} Corbeil
Osler, Hoskin & Harcourt LLP

⁷⁴ SLH Assignment Affidavit, para. 53; Corbeil Assignment Affidavit, para. 42.

⁷⁵ *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53; see also *Re Target Canada Corp*, 2015 ONSC 1487 at paras 28-30.

Schedule “A”

LIST OF AUTHORITIES

Case Law

1. *Re Hayes Forest Service Ltd.*, 2009 BCSC 1169
2. *Re Nexient Learning Inc.*, [2009] O.J. No. 5507
3. *Re Playdium Entertainment Corp.*, 2001 CarswellOnt 4109
4. *Re Primus Telecommunications Canada Inc.*, 2016 ONSC 5251
5. *Re TBS Acquireco Inc.*, 2013 ONSC 4663
6. *Re Veris Gold Corp.*, 2015 BCSC 1204
7. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41
8. *Veris Gold Corp.*, 2015 BCSC 1204

Schedule “B”

COMPANIES’ CREDITORS ARRANGEMENT ACT

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

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

- (a) an agreement entered into on or after the day on which proceedings commence under this Act;
- (b) an eligible financial contract; or
- (c) a collective agreement.

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

- (a) whether the monitor approved the proposed assignment;
- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- (c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company’s insolvency, the commencement of proceedings under this Act or the company’s failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

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.

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., 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 to Assign Contracts – SLH and Corbeil)
(Returnable November 21, 2017)

OSLER, HOSKIN & HARCOURT LLP
P.O. Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Marc Wasserman LSUC# 44066M
Tel: 416.862.4908
Email: mwasserman@osler.com

Jeremy Dacks LSUC# 41851R
Tel: 416.862.4923
Email: jdacks@osler.com

Tracy Sandler LSUC# 32443N
Tel: 416.862.5890
Email: tsandler@osler.com

Karin Sachar LSUC# 59944E
Tel: 416.862.5949
Email : ksachar@osler.com
Fax: 416.862.6666

Lawyers for the Applicants