

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SEARS CANADA INC., 9370-2751
QUÉBEC INC., 191020 CANADA INC., THE CUT INC., SEARS
CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES
INC., 9845488 CANADA INC., INITIUM TRADING AND
SOURCING CORP., SEARS FLOOR COVERING CENTRES
INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741
CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO
LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC.,
168886 CANADA INC., AND 3339611 CANADA INC.

**FACTUM
(CDTel Motion)
(returnable April 12, 2021)**

March 31, 2021

NORTON ROSE FULBRIGHT CANADA LLP
222 Bay Street
Suite 3000
P.O. Box 53
Toronto, Ontario M5K 1E7

Alan Merskey LSO#: 413771

Tel: 416.216.4805

Evan Cobb LSO#: 55787N

Tel: 416.216.1929

Peter Tae-Min Choi LSO#: 74952L

Tel: 416.216.2474

Fax: 416.216.3930

alan.merskey@nortonrosefulbright.com

evan.cobb@nortonrosefulbright.com

peter.choi@nortonrosefulbright.com

Lawyers for the Monitor, FTI Consulting
Canada Inc.

TO: **THE 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., 9370-2751
QUÉBEC INC., 191020 CANADA INC., THE CUT INC., SEARS
CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES
INC., 9845488 CANADA INC., INITIUM TRADING AND
SOURCING CORP., SEARS FLOOR COVERING CENTRES
INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741
CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO
LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC.,
168886 CANADA INC., AND 3339611 CANADA INC.

**FACTUM
(CDTel Motion)
(returnable April 12, 2021)**

TABLE OF CONTENTS

	PAGE
PART I - INTRODUCTION.....	1
PART II - OVERVIEW.....	1
PART III - THE FACTS	3
PART IV - ISSUES AND THE LAW	15
A. The Monitor has the Authority to Bring this Motion	15
B. CDTel's Purported Termination Date is Not Applicable	18
C. Post-Termination Residual Fees are Based on Enrolled Customers	23
PART V - ORDER REQUESTED	25
SCHEDULE "A" LIST OF AUTHORITIES	26
SCHEDULE "B" RELEVANT STATUTES	27

PART I - INTRODUCTION

1. FTI Consulting Canada Inc., in its capacity as court-appointed Monitor (the “**Monitor**”) of the Applicants, seeks an order for, among other things, the following (the “**Order**”):

(a) Payment of **Residual Fees** (from October 1, 2017 to December 31, 2019):

(i) directing CDTel Inc. (“**CDTel**”) to pay Sears Connect (“**Sears**”) outstanding Residual Fees (as defined herein) in the amount of \$1,256,570 (including HST);

(b) Payment of **Post-Termination Residual Fees** (January 1, 2020 onward):

(i) directing CDTel to pay Sears outstanding Post-Termination Residual Fees (as defined herein) in the amount of \$141,873.45 (including HST);

(ii) directing CDTel to deliver documentation necessary for the Monitor to calculate ongoing Post-Termination Residual Fees within 15 days following the end of each subsequent month; and

(iii) directing CDTel to pay to Sears Post-Termination Residual Fees within 30 days following the end of each month from January 1, 2021 onward at the rates calculated in accordance with the parties’ contractual arrangements based upon Enrolled Customers (as defined herein) revenue.

PART II - OVERVIEW

2. Prior to 2015, Sears directly administered and provided certain long distance calling plans and services to customers. In 2015, Sears assigned its long distance calling business to CDTel pursuant to a telecommunications services agreement (the “**Agreement**”). In return, CDTel is obligated to remit two types of residual fees to Sears.

Prior to termination of the Agreement, CDTel is obligated to pay residual fees at certain fixed rates. After termination of the Agreement, CDTel is obligated to pay tail fees (or post-termination residual fees) at significantly reduced variable rates.

3. CDTel purported to terminate the Agreement in November 2017. CDTel claims that it was entitled to do so as a result of, among other things, Sears' cessation of business, insolvency and/or commencement of these CCAA proceedings which trigger a party's right to terminate under the Agreement. Based on CDTel's purported termination date of November 2017, CDTel claims that its obligation to pay pre-termination residual fees stopped at that date and it only owes *post-termination* residual fees in the amount of \$300,938.25 (including HST).
4. The Monitor disagrees. CDTel's purported termination of the Agreement in November 2017 contravenes the provisions of the Initial Order and section 34(1) of the CCAA, and reliance upon such termination rights also violates the anti-deprivation rule. As such, the Monitor is seeking an order directing CDTel to rectify its ongoing breach of the Initial Order and to comply with its contractual obligations under the Agreement.
5. In the Monitor's view, the Agreement remained in full force and effect until the expiry of its initial five-year term on December 31, 2019. As a result, CDTel is obligated to remit residual fees in the amount of \$1,256,570 (including HST) for the period October 2017 to December 2019, and post-termination residual fees for the period January 2020 to December 2020 in the amount of \$141,873.45 (including HST). CDTel's obligation to pay post-termination residual fees continues until the number of customers enrolled in the applicable programs drops below certain thresholds. Based on information received to date, it is the Monitor's view that CDTel's obligation to remit post-termination residual fees in an amount of approximately \$10,000 per month will continue for several years

PART III - THE FACTS¹

A. Background

6. On June 22, 2017, the Applicants (including Sears Connect, the “**Sears Canada Entities**”) sought and obtained an initial order (as amended and restated, the “**Initial Order**”) under the CCAA (the “**CCAA Proceedings**”). The relief granted pursuant to the Initial Order was also extended to Sears Connect, a partnership forming part of the operations of the Applicants.²
7. The Initial Order appointed FTI Consulting Canada Inc. as the Monitor. The Initial Order also granted an initial stay of proceedings (the “**Stay**”) against the Sears Canada Entities until July 22, 2017 (the “**Stay Period**”). The Stay Period was most recently extended to July 31, 2021.³

B. The CDTel Agreement

8. Before 2015, Sears directly managed, administered and provided certain long distance communications products and services that were marketed under the name “Sears Connect” (the “**Brand Name**”).⁴
9. On January 1, 2015, Sears and CDTel entered into the Agreement.⁵ Under the Agreement, Sears assigned to CDTel all rights in and to Sears’ long distance

¹ The facts with respect to this motion are more fully set out in the Monitor’s Forty-Fourth Report dated January 27, 2021 (“**Forty-Fourth Report**”), Monitor’s Motion Record dated January 27, 2021 (“**Monitor’s Record**”), Tab 2, p. 8-21, and Supplement to the Forty-Fourth Report of the Monitor, dated March 18, 2021 (“**Supplement to the Forty-Fourth Report**”), Monitor’s Supplemental Motion Record dated March 18, 2021 (“**Monitor’s Supplemental Record**”), Tab 1, pp. 1-12.

² Forty-Fourth Report at para. 1, Monitor’s Record, Tab 2, p. 10.

³ Forty-Fourth Report at para. 2, Monitor’s Record, Tab 2, p. 11.

⁴ Forty-Fourth Report at para. 12, Monitor’s Record, Tab 2, p. 13.

telecommunications service (the “**LD Program**”), and transferred to CDTel all of the customers enrolled in the LD Program.⁶ In essence, CDTel purchased Sears’ book of LD Program customers and the revenues associated with that customer base.

10. CDTel is also entitled to provide another long distance service program to existing and new customers (the “**ComparAction Program**”, and together with the LD Program, the “**Programs**”).⁷
11. CDTel received millions of dollars in annual net revenues from the LD Program customers that Sears transferred to CDTel in 2015. For instance, the net revenue generated from the LD Program between October 2017 and December 2020 was \$9,454,494 (before HST).⁸ The net revenues generated from the ComparAction Program is only a fraction of the net revenues generated from the LD Program. The net revenues generated from the ComparAction Program during that same period was \$83,712 (before HST).⁹
12. In return for the assignment, CDTel was obligated to remit to Sears certain residual fees based upon a fixed percentage of the revenue streams purchased by CDTel during the term of the Agreement, and certain post-termination residual fees tied to the same revenue streams after termination at reduced variable rates.¹⁰

⁵ Forty-Fourth Report at paras. 6(a), 13, Monitor’s Record, Tab 2, p. 11, 13.

⁶ Forty-Fourth Report at para. 13, Monitor’s Record, Tab 2, pp. 13-14; Agreement, s. 3.01, CDTel’s Responding Record dated February 17, 2021 (“**CDTel’s Responding Record**”), Tab 1(N), p. 372.

⁷ Forty-Fourth Report at para. 13, Monitor’s Record, Tab 2, pp. 13-14.

⁸ Appendix C to the Supplement to Forty-Fourth Report, Monitor’s Supplemental Record, Tab 1(C), p. 58.

⁹ Appendix C to the Supplement to Forty-Fourth Report, Monitor’s Supplemental Record, Tab 1(C), p. 58.

¹⁰ Sears Connect Telecommunications Services Agreement (“**Agreement**”), s. 7.02, 9.04, CDTel’s Responding Record, Tab 1(N), pp. 383-384, 389-390.

13. As part of the Agreement, Sears also assigned to CDTel a non-exclusive license to use the Brand Name and associated Sears trademarks (the “**Sears Trademarks**”) for the duration of the term of the Agreement.¹¹ Pursuant to the Agreement, CDTel agreed to pay to Sears a lump-sum payment of \$800,000, which was paid out in 2015, 2016 and 2017.¹² This fee was described as the Trade-Mark License Fee.

C. CDTel Purports to Terminate the Agreement

14. On or around November 1, 2017, CDTel advised Sears that CDTel was terminating the Agreement pursuant to sections 9.03(b) and (c) as a result of Sears’ commencement of these CCAA proceedings, insolvency and cessation of business (the “**Purported Termination**”).¹³ These termination provisions are reproduced below:

Section 9.03 Termination. Either Party (the “Terminating Party”) may terminate this Agreement at any time by delivery of written notice to the other Party (the “Defaulting Party”) upon the occurrence of any one of the following: [...]

(b) the cessation or threatened cessation by the Defaulting Party of its business generally or the admission by the Defaulting Party of its inability to, or, its actual failure to, pay its debts generally;

(c) the entering or obtaining a decree or order of a court of competent jurisdiction adjudging the Defaulting Party a bankrupt or insolvent, or approving as properly filed a petition seeking the winding-up of the Defaulting Party under the *Companies’ Creditors Arrangement Act* (Canada), the *Bankruptcy and Insolvency Act* (Canada) or the *Winding-up and Restructuring Act* (Canada) or any other bankruptcy, insolvency or analogous laws or ordering the winding up or liquidation of its affairs;¹⁴

¹¹ Agreement, s. 5.01, CDTel’s Responding Record, Tab 1(N), p. 380.

¹² Agreement, s. 7.01, CDTel’s Responding Record, Tab 1(N), p. 383; Exhibit D to the Affidavit of Alain Harari sworn March 16, 2021 (“**Second Harari Affidavit**”) CDTel’s Supplementary Responding Record dated March 16, 2021 (“**CDTel’s Supplementary Responding Record**”), Tabs 1(D), p. 30.

¹³ Forty-Fourth Report at para. 16, Monitor’s Record, Tab 2, p. 14.

¹⁴ Agreement, s. 9.03, CDTel’s Responding Record, Tab 1(N), p. 388-389.

15. On November 7, 2017, the Monitor sent a letter to CDTel to advise that the Initial Order prevented CDTel from ceasing to perform its obligations under the Agreement. The Monitor further advised that the Purported Termination was contrary to section 34(1) of the CCAA. As a result, the Monitor advised CDTel that the Agreement remained in full force and effect and that CDTel must comply with its obligations under the Agreement.¹⁵
16. CDTel did not agree with the Monitor's position and, in continued breach of the Initial Order, has operated under the basis that it properly terminated the Agreement effective November 2017 and ceased paying fees in May 2018.¹⁶

D. Types of Residual Fees

17. There are two categories of residual fees payable to Sears under the Agreement:
 - (a) residual fees payable at fixed rates during the term of the Agreement (the "**Residual Fees**"),¹⁷ and
 - (b) residual fees payable at reduced variable rates after the expiry or termination of the Agreement (the "**Post-Termination Residual Fees**").¹⁸
18. Pursuant to section 9.01 of the Agreement, the Agreement has an initial term of five years with automatic renewals for successive one-year periods unless terminated upon six months written notice from either party.¹⁹ The initial term of the Agreement expired

¹⁵ Forty-Fourth Report at para. 17, Monitor's Record, Tab 2, p. 14; Letter dated November 7, 2017, Monitor's Record, Tab 2(B), pp. 24-25.

¹⁶ CDTel's last payment in May 2018 was in respect of CDTel's calculation of Post-Termination Residual Fees owing for December 2017; Exhibit U to CDTel's Responding Record, Tab 1(U), p. 516.

¹⁷ Agreement, s. 7.02, CDTel's Responding Record, Tab 1(N), pp. 383-384.

¹⁸ Agreement, s. 9.04, CDTel's Responding Record, Tab 1(N), pp. 389-390.

¹⁹ Agreement, s. 9.01, CDTel's Responding Record, Tab 1(N), p. 388.

on December 31, 2019, but automatically renewed for one year on January 1, 2020, in accordance with section 9.01 of the Agreement.²⁰

19. However, for the purpose of this motion, the Monitor accepts a termination date of December 31, 2019, which represents the date of the expiry of the initial five-year term of the Agreement, without the automatic renewal.²¹

(a) Residual Fees

20. During the life of the Agreement, CDTel is obligated to remit to Sears Residual Fees on a monthly basis equal to:²²

(a) 24% of the previous month's LD Program net revenue ("**LD Net Revenue**"), and

(b) 15% of the ComparAction Program net revenue ("**ComparAction Net Revenue**").

21. CDTel claims that the Agreement was amended to reduce the residual fees for the LD Program from a rate of 24% to 17%.²³ In support, CDTel relies upon an unexecuted copy of an amending agreement dated September 1, 2016 (the "**Amending Agreement**").²⁴ The Monitor has conducted a review of the books and records of Sears and has not been able to verify whether the Amending Agreement was executed and in

²⁰ Forty-Fourth Report at para. 15, Monitor's Record, Tab 2, p. 14.

²¹ Supplement to the Forty-Fourth Report at para. 12, Monitor's Supplemental Record, Tab 1, p. 4.

²² Agreement, s. 7.02, CDTel's Responding Record, Tab 1(N), p. 383-384.

²³ Affidavit of Alain Harari sworn February 17, 2021 ("**Harari Affidavit**") at paras. 17-18, CDTel's Responding Record, Tab 1, p. 12.

²⁴ Harari Affidavit at para. 19, CDTel's Responding Record, Tab 1, p. 12; First Amending Agreement, CDTel's Responding Record, Tab 1(P), p. 457-462.

effect.²⁵ However, based on CDTel's Supplementary Responding Record, it appears that the parties operated on the basis that the Amending Agreement was in force.²⁶

22. As such, the Monitor has calculated the amount of outstanding Residual Fees for the LD Program and the ComparAction Program for the remainder of the initial term of the Agreement (i.e. from October 1, 2017 to December 31, 2019) based upon a 17% rate for the LD Program and a 15% rate for the ComparAction Program pursuant to the terms of the Amending Agreement, as shown below:²⁷

LD Program	ComparAction Program	Residual Fees Owing from October 1, 2017 to December 31, 2019
17% (assumes the Amending Agreement was in force)	15%	\$1,256,570 (incl. HST)

(b) Post-Termination Residual Fees

23. After December 31, 2019, and provided that CDTel ceases to use the Sears Trademarks, CDTel is required to pay Sears Post-Termination Residual Fees at the following rates until there are no longer any "Enrolled Customers" in the Programs:²⁸

(a) **ComparAction Program:** the rate for the ComparAction Program is reduced from 15% to 5%; and

(b) **LD Program:** the rate for the LD Program is dictated by a churn table that is included in Schedule 2 of the Agreement (the "**Churn Table**").

²⁵ Supplement to the Forty-Fourth Report at para. 13, Monitor's Supplemental Record, Tab 1, p. 5.

²⁶ Exhibits A-E to CDTel's Supplementary Responding Record, Tabs 1(A) - 1 (E), p. 6-33; Supplement to the Forty-Fourth Report at para. 15, Monitor's Supplemental Record, Tab 1, p. 5.

²⁷ Supplement to the Forty-Fourth Report at para. 16, Monitor's Supplemental Record, Tab 1, p. 5; Monitor's Calculation of Residual Fees Owing from October 1, 2017 to December 31, 2019, Monitor's Supplemental Record, Tab 1(C), p. 58-60.

²⁸ Agreement, s. 9.04(a)(ii), CDTel's Responding Record, Tab 1(N), p. 389.

24. The Churn Table, reproduced below, provides the applicable percentage of LD Net Revenue that is payable to Sears based on the number of Enrolled Customers in the LD Program:²⁹

Residual % based on Enrolled Customer counts at the end of each year

% Residual	Ending Enrolled Customer Range									
	Year 1		Year 2		Year 3		Year 4		Year 5	
24%	62,000		48,000		37,500		29,000		22,5000	
20%	59,000	61,999	45,000	47,999	34,500	37,499	26,000	28,999	20,000	22,499
15%	54,000	58,999	40,000	44,999	29,500	34,499	21,000	25,999	17,000	19,999
10%	48,000	53,999	34,000	39,999	23,500	29,499	15,000	20,999	14,000	16,999
5%	19,000	47,999	19,000	33,999	11,000	23,499	11,000	14,999	11,000	13,999
0%	0	18,999	0	18,999	0	10,999	0	10,999	0	10,999

25. An Enrolled Customer is defined in the Agreement to include any customer enrolled in the LD Program and/or the ComparAction Program.³⁰

26. The Monitor was previously unable to calculate Post-Termination Residual Fees as CDTel only provided data regarding the number of Billed Accounts (as defined below), instead of the number of Enrolled Customers despite repeated requests by the Monitor for CDTel to provide the latter.³¹

Customer-Enrollment Data

27. On March 24, 2021, Mr. Alain Harari of CDTel was cross-examined for the primary purpose of understanding the types of customer-enrollment data CDTel was able to

²⁹ Agreement, Schedule 2, CDTel's Responding Record, Tab 1(N), p. 408.

³⁰ Agreement, s. 1.01, CDTel's Responding Record, Tab 1(N), p. 370.

³¹ The Monitor notes that CDTel is obligated to provide weekly reporting of customer-enrollment data pursuant to section 6.05 of the Agreement, but the Monitor has requested and will be satisfied with monthly reporting.

provide the Monitor. Mr. Harari admitted that CDTel could provide data with respect to the following three customer-enrollment metrics:³²

(a) customers that are enrolled in the LD Program and whose accounts have not been terminated due to unpaid invoices (the “**Active Customers**”);

(b) customers that are enrolled in the LD Program that have made a long distance call, and for which CDTel has issued a bill for such usage, within the preceding 24 months (the “**Active Customers Billed in Preceding 24 Months**”); and

(c) customers that are enrolled in the LD Program that made a long distance call, and for which CDTel has issued a bill for such usage, in a particular month (“**Billed Accounts**”).

Active Customers Consistent with Enrolled Customers

28. In the Monitor’s view, the data with respect to the number of Active Customers, which include customers that are enrolled in the LD Program and whose accounts have not been terminated by CDTel for unpaid invoices, appears to be the most consistent with the definition of Enrolled Customers and the purpose of the Agreement as these are all customers who represent potential future revenue streams for CDTel. As such, it is the Monitor’s position that the number of the Active Customers should be used to calculate the Post-Termination Residual Fees in accordance with the Churn Table.

29. As a response to an undertaking, CDTel provided data for each of the three customer-enrollment metrics.³³ As shown below, the number of Active Customers is consistently much higher than the number of Billed Accounts:³⁴

³² Answers to undertakings from the cross-examination of A. Harari held on March 24, 2021, the Monitor’s Second Supplemental Motion Record dated March 31, 2021, Tab 2.

	Active Customers	Active Customers Billed in Preceding 24 Months	Billed Accounts	Net LD Program Revenue for Year Ending
October 2018	35,396	32,318	19,480	\$3,438,412.57
October 2019	30,767	27,122	16,780	\$2,824,107.95
October 2020	26,974	23,039	14,809	\$2,515,865.09
			Total	\$8,778,385.61

	Active Customers	Active Customers Billed in Preceding 24 Months	Billed Accounts	Net LD Program Revenue for Year Ending
December 2019	30,083	26,336	16,838	\$2,754,557.04
December 2020	26,441	22,366	14,677	\$2,491,954.70
			Total	\$5,246,511.74

Billed Accounts vs. Enrolled Customers

30. CDTel asserts that the “best metric” to calculate Post-Termination Residual Fees is Billed Accounts because it only accounts for the customers that actually used the LD Program and were billed for such usage during a particular month.³⁵ However, there is no reference to “billed accounts” anywhere in the Agreement.
31. The relevant metric used in the Agreement to calculate Post-Termination Residual Fees is the number of Enrolled Customers, which includes any customer enrolled in the LD Program.³⁶

³³ Answers to undertakings from the cross-examination of A. Harari held on March 24, 2021, the Monitor’s Second Supplemental Motion Record, Tab 2.

³⁴ For the purposes of determining Post-Termination Residual Fees, the “year end” date to assess the number of Enrolled Customers is the date that is 12 months following the termination effective date. For CDTel, the applicable year-end date is every October based on its position that it terminated the Agreement effective November 1, 2017. For the Monitor, it is every December based on its position that the Agreement was terminated effective December 31, 2019.

³⁵ Harari Affidavit at para. 39, CDTel’s Responding Record, Tab 1, p. 18.

³⁶ Supplement to the Forty-Fourth Report at para. 25, Monitor’s Supplemental Record, Tab 1, p. 7.

32. CDTel also claims that using the number of Billed Accounts is consistent with “all of CDTel’s prior Monthly Reports and Invoices”.³⁷ However, the prior Monthly Reports and Invoices only provided net revenue amounts generated from the LD Program, not any customer-enrollment data.³⁸

Post-Termination Residual Fees Based on December 2019 Termination Date

33. Since the Agreement was terminated at the end of the initial five year term on December 31, 2019, CDTel is obligated to pay Post-Termination Residual Fees from January 1, 2020 onward.
34. The amount of Post-Termination Residual Fees owing for the LD Program for the period January 1, 2020 to December 31, 2020 based on the number of Active Customers is \$140,795 (including HST), or 5% of the LD Net Revenue of \$2,491,954.70 (plus HST).
35. CDTel’s obligation to remit Post-Termination Residual Fees for the LD Program continues until there are less than 11,000 Enrolled Customers in the LD Program.³⁹ Given there were over 26,000 Active Customers as of December 2020, the Monitor notes that CDTel’s obligation to pay Post-Termination Residual Fees in the amount of approximately \$10,000 per month or more will continue for several years given the relatively low year over year churn rate.
36. For comparison purposes, the Monitor has also calculated the amount of the LD Program Post-Termination Residual Fees that would be owing under the other two customer enrollment metrics for the period January 2020 to December 2020:

³⁷ Harari Affidavit at para. 39, CDTel’s Responding Record, Tab 1, p. 18.

³⁸ Exhibit W to the Harari Affidavit, CDTel’s Responding Record, Tab 1(W), p. 523.

³⁹ Agreement, Schedule 2, CDTel’s Responding Record, Tab 1(N), p. 408.

LD Program	Active Customers	Active Customers Billed in Preceding 24 Months	Billed Accounts
Post-Termination Residual Fees payable (incl. HST)	\$140,795.45	\$140,795.45	\$0

37. The amount of Post-Termination Residual Fees owing for the ComparAction program for the period January 1, 2020 to December 31, 2020 is \$1,078 (including HST).⁴⁰

E. CDTel’s Assessment of Post-Termination Residual Fees

38. CDTel has calculated Post-Termination Residual Fees payable to Sears in respect of the LD Program based on its position that (a) it terminated the Agreement effective November 1, 2017, and (b) it could apply the number of Billed Accounts instead of Enrolled Customers, or Active Customers, to calculate fees under the Churn Table.⁴¹ Notwithstanding the Monitor’s position to the contrary on both points, the Monitor previously made two corrections to CDTel’s calculations that increased the amount of Post-Termination Residual Fees for the period November 2017 to October 2020 from \$94,982.86 (incl. HST) to \$300,938.25⁴² (incl. HST).⁴³

39. At Mr. Harari’s cross-examination, counsel for CDTel confirmed the accuracy of the Monitor’s corrections.⁴⁴

⁴⁰ Appendix C to the Supplement to the Forty-Fourth Report, Monitor’s Supplemental Record, Tab 1(C), p. 58-60.

⁴¹ Harari Affidavit at para. 39, CDTel’s Responding Record, Tab 1, p. 18; Supplement to the Forty-Fourth Report at para. 30, Monitor’s Supplemental Record, Tab 1, p. 9.

⁴² This amount includes a deduction in the amount of \$35,479 for prior payments that were made by CDTel for the months of November 2017 and December 2017.

⁴³ Supplement to the Forty-Fourth Report at paras. 30-31, Monitor’s Supplemental Record, Tab 1, p. 9-10.

⁴⁴ Cross-Examination of A. Harari Transcript, pp. 4-5, ln. 16-10, Monitor’s Second Supplemental Motion Record, Tab 1.

40. The Monitor has also calculated the amount of Post-Termination Residual Fees owing based on all three customer-enrollment metrics for the period November 2017 to October 2020:

Assuming CDTel's Purported Termination Date of November 1, 2017

	Active Customers	Active Customers Billed in Preceding 24 Months	Billed Accounts
Year 1 (Nov. 2017 to Oct. 2018)	\$171,920.63	\$171,920.63	\$171,920.63
Year 2 (Nov. 2018 to Oct. 2019)	\$141,205.40	\$141,205.40	\$0.00
Year 3 (Nov. 2019 to Oct. 2020)	\$251,586.51	\$125,793.25	\$125,793.25
Total (incl. HST)	\$638,125.17	\$495,978.79	\$336,416.68

41. If the Court were to accept CDTel's termination date of November 1, 2017, the Monitor submits that the number of Active Customers, not Billed Accounts, should be used to calculate Post-Termination Residual Fees from that date onward. As shown in the table above, if the number of Active Customers is applied, CDTel owes Sears Post-Termination Residual Fees in the amount of \$638,125.17 (including HST) for the period November 2017 to October 2020 and potentially additional fees for future periods.

F. CDTel's Use of the Brand Name

42. Despite CDTel's position that it unilaterally terminated the Agreement effective November 1, 2017, CDTel continued to use the Sears Trademarks and the Brand Name on the Sears Connect Website until at least December 15, 2020.⁴⁵ Sometime between December 15, 2020 and the date of the Forty-Fourth Report, CDTel took down the Sears Connect Website. Before it was taken down, the telephone numbers listed on the Sears

⁴⁵ Forty-Fourth Report at para. 30, Monitor's Record, Tab 2, p. 18; Sears Connect Website, Monitor's Record, Tab 2(K), p. 49.

Connect Website were active and connected callers to a CDTel customer service representative for enrollment purposes.⁴⁶

43. Notwithstanding the fact that CDTel could not have terminated the Agreement effective November 1, 2017, CDTel's continued use of Sears Trademarks and the Brand Name until at least December 15, 2020 prevents CDTel from using the reduced Post-Termination Residual Fees based upon the end of term procedures set out in section 9.04 of the Agreement.⁴⁷

PART IV - ISSUES AND THE LAW

44. The issues to be considered on this motion include:

- (a) Whether the Monitor has the authority to bring this motion to seek an order directing CDTel to comply with the Initial Order;
- (b) Whether CDTel's Purported Termination date is the applicable date to calculate Residual Fees and Post-Termination Residual Fees; and
- (c) Whether Post-Termination Residual Fees pursuant to the Churn Table is based on the number of Enrolled Customers and not Billed Accounts.

A. The Monitor has the Authority to Bring this Motion

45. It is trite law that the court can order a breaching entity to comply with the provisions of an initial order. For instance, in *Air Canada (Re)*, Air Canada successfully brought a motion against the Greater Toronto Airport Authority to direct the latter's compliance with

⁴⁶ Forty-Fourth Report at para. 30, Monitor's Record, Tab 2, p. 18.

⁴⁷ Forty-Fourth Report at para. 31, Monitor's Record, Tab 2, p. 19.

the terms of an initial order.⁴⁸ In *Skydome Corp. (Re)*, the court specifically addressed the issue of a counterparty that had failed to remit revenues payable under a contract in direct violation of a CCAA order.⁴⁹ In that case, Justice Blair held that parties cannot simply ignore a CCAA order because “they don’t like its effect on them”:

Parties affected by a CCAA Order — as with any other Order — are not entitled to ignore that Order, much less to flout it, simply because they don’t like its effect on them or because they wish to use the difficulties caused to the CCAA company by their non-compliance as a lever to enhance their bargaining position with the debtor company.⁵⁰

46. The courts have held that parties that are aware of and disobey a stay order are in contempt of court and should not be heard by the court until it has purged itself of its contempt.⁵¹
47. In this case, CDTel ignored the Initial Order when it purported to terminate the Agreement effective November 1, 2017. Pursuant to paragraphs 14, 17, 18 and 19 of the Initial Order, CDTel is expressly prevented from terminating the Agreement and from ceasing to perform its obligations thereunder, except with the written consent of the Sears Canada Entities and the Monitor, or leave of this Court.⁵² CDTel has neither obtained the written consent of the Sears Canada Entities and the Monitor, nor leave of this Court.⁵³
48. CDTel has maintained its position that it terminated the Agreement as of November 2017 despite the fact that the Monitor advised on numerous occasions that such

⁴⁸ *Air Canada, Re*, [2004] OJ No 842 at para. 27, Monitor’s Book of Authorities (“**Monitor’s BOA**”), Tab 1.

⁴⁹ *Skydome Corp., Re*, [1999] OJ No 221 at para. 2, Monitor’s BOA, Tab 2.

⁵⁰ *Skydome Corp., Re*, [1999] OJ No 221 at para. 20, Monitor’s BOA, Tab 2.

⁵¹ *Philip’s Manufacturing Ltd., Re*, [1992] B.C.W.L.D. 519 at para. 21, Monitor’s BOA, Tab 3.

⁵² Initial Order at paras. 14, 17-19, Monitor’s Supplemental Record, Tab 1(B), p. 35-38.

⁵³ Supplement to the Forty-Fourth Report at para. 6, Monitor’s Supplemental Record, Tab 1, p. 3.

termination was in breach of the Initial Order.⁵⁴ CDTel's prolonged breach of the Initial Order should be, at best, rectified immediately, and, at worst, considered contempt.

The Governance Protocol Order

49. The Monitor is empowered under the Governance Protocol Order dated December 3, 2018 (the "**Governance Order**") to bring this motion seeking an order directing CDTel to comply with the provisions of the Initial Order.⁵⁵

50. Pursuant to the Governance Order, the Monitor is, among other things, empowered to:⁵⁶

(a) oversee the remaining wind-down of the Sears Canada Entities, including without limitation:

2. receiving, collecting and taking possession of all monies and accounts now owed or hereafter owing to any of the Sears Canada Entities;

[...]

(i) exercise any and all of the rights and powers of the Sears Canada Entities set out herein and in any other Order in the CCAA proceedings and to perform such other duties or to take any steps reasonably incidental to the exercise of the powers and obligations conferred upon the Monitor herein. [emphasis added]

51. Based on the foregoing provisions of the Governance Order, the Monitor has the authority to collect all monies owing to Sears under the Agreement and to exercise "any and all of the rights and powers of the Sears Canada Entities" to seek an order directing CDTel to comply with the Initial Order.

⁵⁴ Forty-Fourth Report at para. 17, Monitor's Record, Tab 2, p. 14; Letter dated March 9, 2020, Monitor's Record, Tab 2(G), p. 37-38.

⁵⁵ Governance Order Protocol and Stay Extension Order dated December 3, 2018 ("**Governance Order**"), Monitor's Supplemental Record, Tab 1(A), p. 14-26; Supplement to the Forty-Fourth Report at para. 4, Monitor's Supplemental Record, Tab 1, p. 3.

⁵⁶ Governance Order, Monitor's Supplemental Record, Tab 1(A), p. 23-25.

52. Further, paragraph 64 of the Initial Order authorizes the Monitor to apply to this Court for advice and directions in the discharge of its powers and duties under the Initial Order.⁵⁷ Based on that provision, the Monitor is authorized to seek the Court's direction with respect to CDTel's breach of the Initial Order.

No Requirement to Obtain Leave to Commence a Proceeding

53. CDTel claims that the Monitor requires specific authority to commence a claim against it and relies upon the Monitor's prior claim against certain parties in relation to the payment of dividends by Sears Canada Inc. to its shareholders in 2013.⁵⁸ However, there is no statutory obligation to obtain leave to commence a proceeding. Instead, additional court approval for such steps is sought on a case-by-case basis, depending on the circumstances.⁵⁹

54. In any event, the Monitor is not commencing a claim against CDTel. Rather, the Monitor is seeking an order directing CDTel to rectify its breach of the Initial Order.⁶⁰

B. CDTel's Purported Termination Date is Not Applicable

55. Given CDTel did not obtain the Monitor's and the Sears Canada Entities' consent nor leave of this Court to terminate the Agreement pursuant to the terms of the Initial Order, the Agreement remained in full force and effect until the expiry of its initial term on December 31, 2019. The Monitor accepts that date as the effective termination date for the purpose of this motion despite the fact that the Agreement renewed automatically on

⁵⁷ Initial Order at para. 64, Monitor's Supplemental Record, Tab 1(B), p. 54.

⁵⁸ Harari Affidavit at paras. 3-10, CDTel's Responding Record, Tab 1, p. 7-9.

⁵⁹ Supplement to the Forty-Fourth Report at para. 8, Monitor's Supplemental Record, Tab 1, p. 4.

⁶⁰ Supplement to the Forty-Fourth Report at para. 9, Monitor's Supplemental Record, Tab 1, p. 4.

January 1, 2020, and CDTel provided notice on June 26, 2020, in accordance with Agreement, that its alternative termination date was December 31, 2020.⁶¹

56. As a result, the Residual Fees and Post-Termination Residual Fees payable to Sears should be based upon a termination date of December 31, 2019, not CDTel's Purported Termination Date of November 1, 2017.

57. Moreover, CDTel's Purported Termination was unlawful, and therefore should not be used to calculate the applicable fees payable to Sears, as it contravenes section 34 of the CCAA and the anti-deprivation rule.

i. The Purported Termination Contravenes Section 34 of the CCAA

58. Section 34(1) of the CCAA prevents CDTel from terminating the Agreement due to Sears' commencement of these CCAA Proceedings or insolvency:⁶²

34(1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under this Act or that the company is insolvent.

59. Section 34(5) of the CCAA provides that "Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force of effect."⁶³ [*emphasis added*]

60. In this case, CDTel has relied upon the termination provisions of the Agreement that are triggered by the cessation of Sears' business generally or insolvency, and the commencement of proceedings under, among others, the CCAA.⁶⁴

⁶¹ Forty-Fourth Report at para. 25, Monitor's Record, Tab 2, p. 16; Notice Letter dated June 26, 2020, Monitor's Record, Tab 2(J), p. 46.

⁶² R.S.C., 1985, c. C-36, s. 34(1).

⁶³ R.S.C., 1985, c. C-36, s. 34(5).

Section 9.03 Termination. Either Party (the “Terminating Party”) may terminate this Agreement at any time by delivery of written notice to the other Party (the “Defaulting Party”) upon the occurrence of any one of the following: [...]

(b) the cessation or threatened cessation by the Defaulting Party of its business generally or the admission by the Defaulting Party of its inability to, or, its actual failure to, pay its debts generally;

(c) the entering or obtaining a decree or order of a court of competent jurisdiction adjudging the Defaulting Party a bankrupt or insolvent, or approving as properly filed a petition seeking the winding-up of the Defaulting Party under the *Companies’ Creditors Arrangement Act* (Canada), the *Bankruptcy and Insolvency Act* (Canada) or the *Winding-up and Restructuring Act* (Canada) or any other bankruptcy, insolvency or analogous laws or ordering the winding up or liquidation of its affairs;⁶⁵

61. The Monitor submits that both sections 9.03(b) and (c) of the Agreement are in substance contrary to section 34(1) of the CCAA and should have no force of effect.
62. In its responding Record, CDTel suggests that it was entitled to terminate the Agreement primarily based on the fact that there was a cessation of Sears’ business generally after it became aware of the court order dated October 13, 2017 approving the liquidation of Sears’ assets.⁶⁶ In the Monitor’s view, that liquidation order was issued in these CCAA proceedings, which were commenced as a result of Sears’ insolvency.⁶⁷ CDTel cannot now claim to be only relying upon Sears’ cessation of business as the applicable trigger and ignore the second half of that clause when such cessation of business was caused by Sears’ insolvency. Such a view ignores the substance of the provision.

⁶⁴ Forty-Fourth Report at para. 16, Monitor’s Record, Tab 2, p. 14.

⁶⁵ Agreement, s. 9.03, CDTel’s Responding Record, Tab 1(N), p. 388-389.

⁶⁶ Harari Affidavit at paras. 24-25, CDTel’s Responding Record, Tab 1, p. 14.

⁶⁷ Forty-Fourth Report at para. 3, Monitor’s Record, Tab 2, p. 11.

ii. The Purported Termination Contravenes the Anti-Deprivation Rule

63. CDTel's reliance upon sections 9.03(b) and (c) as a basis for its Purported Termination also contravenes the common law anti-deprivation rule, which applies to clauses that are triggered by insolvency and that have the effect of removing value from the insolvent company's estate.
64. In *Chandos Construction Ltd. v Deloitte*, the Supreme Court of Canada recently confirmed the two-part test to determine whether a party to a contract has violated the anti-deprivation rule, as follows:⁶⁸
- (a) the clause has been triggered by an event of insolvency or bankruptcy; and
 - (b) the effect of the clause is that it removes value from the insolvent's estate.
65. In this case, the first step of the anti-deprivation rule is satisfied because sections 9.03(b) and (c) are triggered upon Sears' insolvency and the commencement of CCAA proceedings, respectively. As mentioned above, CDTel attempts to rely primarily on the first half of section 9.03(b) of the Agreement – i.e. cessation of business generally – as a basis for its position that it validly terminated the Agreement in November 2017.⁶⁹ Again, CDTel cannot pick and choose a portion of a termination clause that works in its favour in an attempt to circumvent the anti-deprivation rule when such clause is in substance triggered upon insolvency.
66. In *Chandos*, the Supreme Court of Canada held that once public policy has been established pursuant to legislation, "What is left to the common law is the choice of

⁶⁸ *Chandos Construction Ltd. v. Deloitte*, [2020 SCC 25](#) at para. 31 ("**Chandos**").

⁶⁹ Harari Affidavit at paras. 24-25, CDTel's Responding Record, Tab 1, p. 14.

means that best gives effect to the statutory scheme adopted by Parliament.”⁷⁰ In other words, the common law must be interpreted hand in hand with the applicable legislation.

67. In section 34 of the CCAA, Parliament has adopted a statutory scheme that protects an insolvent company by invalidating provisions that in substance allow a counterparty to terminate an agreement as a result of the company’s commencement of CCAA proceedings or insolvency. The Monitor submits that this Court should apply the anti-deprivation rule that best gives effect to that scheme and find that section 9.03(b) is in substance triggered upon insolvency.
68. Further, as held in *Chandos*, the anti-deprivation rule looks at the effect of a triggering clause in the event of bankruptcy or insolvency rather than the intention of contracting parties:⁷¹

The effects-based rule, as it stands, is clear. Courts (and commercial parties) do not need to look to anything other than the trigger for the clause and its effect. The effect of a clause can be far more readily determined in the event of bankruptcy than the intention of contracting parties.

69. Based on the effects-based rule, there is no question that the effect of section 9.03(b) is to allow for termination of the Agreement, and trigger substantially lower fees payable to Sears, upon Sears’ insolvency.
70. From a commercial standpoint, the cessation of Sears’ business upon insolvency has not prejudiced CDTel’s ability to generate revenues from customers. As described above, CDTel’s revenues are predominantly generated from Enrolled Customers in the LD Program. Sears transferred the LD Program Enrolled Customers to CDTel in 2015

⁷⁰ *Chandos supra* at para. 33.

⁷¹ *Chandos supra* at para. 35.

pursuant to the Agreement.⁷² The cessation of Sears' business upon insolvency years later in 2017 and 2018 would have had little to no effect on the revenues generated from the customers that Sears already transferred to CDTel in 2015. In fact, between October 2017 and December 2020, CDTel received net revenues in the amount of \$9,454,494 (before HST) from these LD Program Enrolled Customers.⁷³ As a result, it makes no commercial sense for CDTel's termination to be based upon a cessation of Sears' business. It is rather a disguised insolvency-related termination.

71. There appears to be no controversy that section 9.03(c), which is triggered upon the commencement of proceedings under the CCAA, offends the anti-deprivation rule.
72. The second step of the anti-deprivation rule is also satisfied. CDTel's Purported Termination based upon sections 9.03(b) and (c) has the effect of depriving the Sears Canada Entities' estate of at least \$1,097,505.20,⁷⁴ which represents the difference in the amount of Residual Fees and Post-Termination Residual Fees payable to Sears based upon CDTel's position that the Agreement was terminated on November 1, 2017 (\$300,938.25) and the Monitor's position that the Agreement was terminated on December 31, 2019 (\$1,398,443.45).

C. Post-Termination Residual Fees are Based on Enrolled Customers

73. The Agreement clearly stipulates that Post-Termination Residual Fees payable for net revenues generated from the LD Program are calculated based on the number of

⁷² Agreement, s. 3.01, CDTel's Responding Record, Tab 1(N), p. 372.

⁷³ Appendix C to the Supplement to the Forty-Fourth Report, Monitor's Supplemental Record, Tab 1(C), p. 58-60.

⁷⁴ Harari Affidavit at paras. 39, 42, CDTel's Responding Record, Tab 1, p. 18-19; Supplement to the Forty-Fourth Report at para. 16, Monitor's Supplemental Record, Tab 1, p. 5; Monitor's Calculation of Residual Fees Owing from October 1, 2017 to December 31, 2019, Monitor's Supplemental Record, Tab 1(C), p. 58-60.

Enrolled Customers. Such fees are not based upon the number of Billed Accounts, which is an entirely new metric put forward by CDTel years after the Agreement was executed.

74. As the Supreme Court of Canada held in *Sattva Capital Corp. v. Creston Moly Corp.*,⁷⁵ the overriding concern in contractual interpretation is to determine the “intent of the parties and scope of their understanding”.⁷⁶ The decision-maker must read the contract as a whole, giving the words their ordinary and grammatical reading, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.⁷⁷ In so doing, one of the guiding principles is to take a practical, common-sense approach.⁷⁸

75. Here, the parties contemplated and negotiated the payment of certain fees by CDTel during the life of the agreement and after termination in exchange for Sears’ long-distance calling business and the transfer of Sears’ valuable customer base to CDTel.⁷⁹ At the time of formation of the Agreement, the parties agreed to use the number of Enrolled Customers, or the Active Customer metric, to determine Post-Termination Residual Fees as those customers, whose accounts have not yet been terminated due to unpaid invoices, represented all current and potential future revenue streams for CDTel. CDTel has not adduced any evidence to the contrary at the time the Agreement was negotiated and executed.

⁷⁵ *Sattva Capital Corp. v. Creston Moly Corp.*, [2014 SCC 53](#) (“**Sattva**”).

⁷⁶ *Ibid* at para. 47.

⁷⁷ *Ibid*.

⁷⁸ *Ibid*.

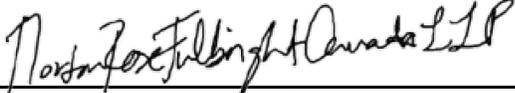
⁷⁹ Agreement, s. 3.01, CDTel’s Responding Record, p. 372.

76. CDTel in essence asserts that the rate to calculate an entire year's worth of Post-Termination Residual Fees should be determined based upon how many customers used the LD Program in one particular month – i.e. every October.⁸⁰ For instance, if there were less than 11,000 customers that used the LD Program in the month of October 2021, but there were 11,000 or more customers that used the LD Program in each of the surrounding months, the applicable rate for an entire year of Post-Termination Residual Fees would still be 0% based on the arbitrary and unfortunate fact that there happened to be less than 11,000 customers that used the LD Program in October 2021. Without express language that monthly usage would be the applicable metric to calculate a year's worth of fees, such a view belies any commercial or common sense.
77. If the parties had contemplated and intended for Post-Termination Residual Fees to be limited by monthly usage, then common-sense dictates that such a significant limitation would have been negotiated and stipulated in the Agreement, either in the original version or as amended by the parties in September 2016.

PART V - ORDER REQUESTED

78. For the reasons set out above, the Monitor requests that this Honourable Court grant the proposed Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of March, 2021.



Norton Rose Fulbright Canada LLP

Lawyers for the Monitor, FTI Consulting Canada Inc.

⁸⁰ Harari Affidavit at para. 37, CDTel's Responding Record, p. 17; Exhibit V to the Harari Affidavit, CDTel's Responding Record, p. 520.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Air Canada, Re*, [2004] O.J. No 842
2. *Chandos Construction Ltd. v. Deloitte*, [2020 SCC 25](#)
3. *Philip's Manufacturing Ltd., Re*, [1992] B.C.W.L.D. 519
4. *Sattva Capital Corp. v. Creston Moly Corp.*, [2014 SCC 53](#).
5. *Skydome Corp., Re*, [1999] O.J. No. 221

SCHEDULE "B"
RELEVANT STATUTES

1. ***Companies' Creditors Arrangement Act, RSC 1985, c C-36***

Certain rights limited

34(1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under this Act or that the company is insolvent.

[...]

Provisions of section override agreement

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

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

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

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at TORONTO

**FACTUM
(CDTel Motion)
(returnable April 12, 2021)**

NORTON ROSE FULBRIGHT CANADA LLP
222 Bay Street
Suite 3000
P.O. Box 53
Toronto, Ontario M5K 1E7

Alan Merskey LSO#: 413771
Tel: 416.216.4805

Evan Cobb LSO#: 55787N
Tel: 416.216.1929

Peter Tae-Min Choi LSO#: 74952L
Tel: 416.216.2474
Fax: 416.216.3930

alan.merskey@nortonrosefulbright.com
evan.cobb@nortonrosefulbright.com
peter.choi@nortonrosefulbright.com

Lawyers for the Monitor, FTI Consulting
Canada Inc.