

**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

RESPONDING FACTUM OF OXFORD PROPERTIES GROUP

**(Response to Applicants' Motion Returnable July 13, 2017
re: Approval of SISP and Related Relief)**

July 12, 2017

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Lawyers for Oxford Properties Group

TO: THIS HONOURABLE COURT
AND TO: THE SERVICE LIST

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OF OXFORD PROPERTIES GROUP**

PART I - OVERVIEW

1. The Applicants seek certain Orders, as detailed in their Notice of Motion dated July 5, 2017 for, among other things, approval of a comprehensive sale and investment solicitation process (“**SISP**”) in respect of a portion or the entirety of the Applicants’ assets and business, in the form attached as Schedule “B” to their Notice of Motion (the “**SISP Approval Order**”).
2. Genevieve Wong, the Director, Retail Legal Services of Oxford Properties Group, and the Assistant Secretary of OPGI Management Limited Partnership (collectively, “**OPGI**”), has sworn an Affidavit on July 12, 2017 (the “**OPGI Affidavit**”) on behalf of OPGI providing evidence in response and opposition to certain relief requested by the

Applicants in the Notice, and in support of the amendments (as requested in Part V herein) to such relief.

PART II - FACTS

A. Background

3. On June 22, 2017, the Applicants sought and were granted protection under the *Companies' Creditors Arrangement Act (Canada)*¹ (the "CCAA") pursuant to the Initial Order of Mr. Justice Hainey of the Ontario Superior Court of Justice (Commercial List) (the "**Initial Order**").
4. Pursuant to the Initial Order, the Court appointed FTI Consulting Canada Inc. as an officer of the Court to monitor the assets, businesses and affairs of the Applicants (in such capacity, the "**Monitor**") in the course of these CCAA proceedings.
5. Capitalized terms not otherwise defined herein are defined in the Monitor's Pre-filing Report dated June 22, 2017 (the "**Monitor's Report**").
6. OPGI or one of its affiliates, as owner or co-owner and/or property manager, operates certain shopping centres in Canada in which the Applicants are either tenants or adjacent land owners subject to agreements with OPGI. Set out below is a chart detailing the legal name of each of OPGI's and their co-owner's affiliates who hold the ownership interests in the properties in which the Applicants are either tenants or adjacent land owners. For

¹ R.S.C., 1985, c. C-36, as amended.

the purposes of this Factum, OPGI will be referred to as the representative party for the owners of the properties listed below.²

Mall / Centre	Name of Landlord	Location	Nature of Applicants' Interest
Les Galeries de la Capitale (Sears Department Store)	Les Galeries de la Capitale Holdings Inc.	Quebec City, Quebec	Leasehold
Les Galeries de la Capitale (Sears Home Store)	Les Galeries de la Capitale Holdings Inc.	Quebec City, Quebec	Leasehold
Southcentre Mall	Oxford Properties Retail Holdings Inc. and Oxford Properties Retail Holdings II Inc.	Calgary, Alberta	Leasehold
Kingsway Mall (previously "Kingsway Garden Mall")	Kingsway Garden Holdings Inc.	Edmonton, Alberta	Leasehold
Scarborough Town Centre	Scarborough Town Centre Holdings Inc.	Toronto, Ontario	Leasehold
Upper Canada Mall (Sears Home Store)	Oxford Properties Retail Holdings II Inc. and CPPIB Upper Canada Mall Inc.	Newmarket, Ontario	Freehold (adjacent property owner)
Upper Canada Mall (Sears Department Store)	Oxford Properties Retail Holdings II Inc. and CPPIB Upper Canada Mall Inc.	Newmarket, Ontario	Freehold (adjacent property owner)

B. The Upper Canada Mall

7. The Upper Canada Mall is the premiere shopping centre in the Town of Newmarket with 7.8 million visitors annually, 994,367 square feet of retail space and 190 current tenants. Sears Canada Inc. ("**Sears Canada**") owns two parcels of real property comprising part of the Upper Canada Mall, defined and referred to herein as the "**Sears Home Store**

² OPGI Affidavit, at para 6.

Lands” and the “**Sears Department Store Lands**” (collectively, the “**Sears Lands**”). The remaining real property comprising the Upper Canada Mall is owned by OPGI, as set out above.³

8. The relationship between Sears Canada and OPGI with respect to the operation of their respective portions of Upper Canada Mall as an integrated shopping centre is governed by a series of reciprocal obligations and covenants contained within an operating agreement dated July 25, 1973 and registered on title (as amended or supplemented from time to time and as currently in effect, the “**Operating Agreement**”).⁴ The Operating Agreement includes certain critical provisions relating to the orderly operation of the Upper Canada Mall, including: the grant of rights of way and access to the Upper Canada Mall through the Sears department store, requiring Sears Canada to adhere to certain use restrictions in respect of the Sears Department Store Lands and providing for the management, maintenance, repair and upkeep of the Upper Canada Mall.⁵
9. In addition, the Sears Home Store Lands are subject to a restrictive covenant agreement in favour of OPGI (the “**Restrictive Covenant**”) registered on title. The Restrictive Covenant provides that the Sears Home Store Lands shall not be used for any purpose other than the purpose of a retail furniture, appliances and home furnishings store, or,

³ OPGI Affidavit, at para 7.

⁴ Including three Supplements to the Operating Agreement dated December 24, 1987 (the “**First Supplement**”), January 21, 1994 (the “**Second Supplement**”) and April 9, 1998 (the “**Third Supplement**”), respectively. OPGI Affidavit, at para 10.

⁵ OPGI Affidavit, at para 9.

subject to certain consent and exclusivity requirements, for such other proposed uses as the parties may mutually agree.⁶

10. The Sears Department Store Lands and the Sears Home Store Lands are subject to a right of first refusal in favour of OPGI (the “**ROFR**”).⁷
11. Pursuant to the terms of the ROFR, if Sears Canada wishes to sell all or a portion of the Sears Lands, it must require that the terms and conditions of sale be embodied in a *bona fide* offer to purchase (the “**Offer**”) and must provide a copy of the Offer to OPGI. OPGI is granted an option to purchase the lands referenced in the Offer upon the same terms and conditions contained within the Offer. OPGI is entitled to exercise its option to purchase by written notice given within 15 days of receipt of the Offer.⁸
12. Regardless of whether the right of first refusal is exercised by OPGI or not, the ROFR explicitly states that all terms of the Operating Agreement shall continue to apply to both the Sears Department Store Lands and the Sears Home Store Lands. The terms and covenants of the Operating Agreement continue to be binding on all transferees.⁹
13. The Sears Department Store Lands are also subject to a separate Option to Purchase agreement in favour of OPGI registered on title (the “**Option to Purchase**”). The Option to Purchase grants OPGI the option to purchase the Sears Department Store Lands at the

⁶ OPGI Affidavit, at para 11.

⁷ OPGI Affidavit, at para 12.

⁸ OPGI Affidavit, at para 13.

⁹ OPGI Affidavit, at para 14.

current market value in the event that the Sears Department Store Lands are not operated as a department store for a period of 91 consecutive days.¹⁰

14. The Operating Agreement, Restrictive Covenant, ROFR and Option to Purchase assist the Landlord in ensuring that, notwithstanding the separate ownership, the Upper Canada Mall is operated in accordance with best practices and tenant expectations. It is critically important to OPGI and its tenants at the Upper Canada Mall (and, by extension, the wider community of stakeholders) that all terms of the Operating Agreement, the Restrictive Covenant, the ROFR and the Option to Purchase are respected throughout this proceeding.¹¹

C. Concerns with the Proposed SISP and Initial Order

15. If not otherwise amended on this motion, the SISP (as currently proposed by the Applicants), and the Initial Order (granted by the Court on an *ex parte* basis) would have the effect of ignoring real property rights and contractual rights of landlords and parties holding rights in the nature of a ROFR, while ensuring that the rights of management insiders and DIP Lenders who may choose to participate in the SISP are fully protected.
16. Such lack of balance is not consistent with the purposes of the CCAA, is not in keeping with the requirements for fairness and reasonableness in a CCAA proceeding and ought not be approved by the Court without corresponding protections being inserted for the benefit of OPGI and any other similarly situated stakeholders.¹²

¹⁰ OPGI Affidavit, at para 15.

¹¹ OPGI Affidavit, at para 17.

¹² Factum of the Applicants dated July 7, 2017 (“**Applicants’ Factum**”) at para 38.

PART III - ISSUES AND THE LAW

17. The issues to be determined on the Applicants' motion are:
- (a) Is the form of the SISP requested by the Applicants fair and reasonable, and consistent with the objectives of the CCAA?
 - (b) Should the Applicants be entitled to ignore the contractual and real property rights of third parties when seeking court approval of a sales process?
 - (c) Should the DIP Lenders be prohibited from submitting a credit bid that includes real property that was not subject to security for indebtedness actually advanced and owing to such DIP Lenders as at the date of filing?

PART IV - LAW AND ARGUMENT

- A. The SISP as presented is not fair, reasonable or consistent with the objectives of the CCAA**
- I. *The SISP is not consistent with the objectives of the CCAA***
18. The objectives of the CCAA include:
- (a) to permit a broad balancing of stakeholder interests;¹³ and
 - (b) to create conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all.¹⁴
19. What parties may seek to do *outside* of a CCAA proceeding (where the only risk is litigation commenced by parties who are adversely affected) is not the standard by which

¹³ *Air Canada, Re* [Greater Toronto Airport Authority re gates at new terminal (Toronto)], 2004 CarswellOnt 870 at para 27.

¹⁴ *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 at para 77.

to measure its reasonableness where the Applicants have commenced a proceeding and sought the Court's assistance and approval of a SISP process. Having obtained an Initial Order suspending or staying the rights of all other parties, Applicants in a CCAA proceeding cannot then seek to use that equitable relief to ignore or undermine the rights of their stakeholders.

20. The SISP, as proposed by the Applicants, is not consistent with the purposes of the CCAA and is not fair and reasonable. Instead, it creates an imbalance in favour of management insiders, largely at the expense of landlords and holders of legitimate real property interests in the Applicants' real property. That imbalance is most glaring when reviewed in relation to rights of first refusal ("**ROFR**") or similar rights that are registered on property owned by Sears Canada that will be offered for sale pursuant to the SISP, but applies more broadly to all agreements to which OPGI is a party at its various locations.
21. The SISP terms do not balance the need to liquidate the Applicants' property with the equally-legitimate contractual and real property interests of OPGI and other stakeholders. In particular, the SISP (and by extension the SISP Approval Order and the Initial Order, in the form originally granted):
 - (a) does not exclude from the operation of the stay of proceedings, the ability of parties holding ROFRs to exercise such rights, nor does it explicitly take into account the relevant notice periods for the exercise of such rights by the beneficiaries of ROFRs as part of the SISP timeline;

- (b) requires landlords to submit a bid with respect to any property subject to a lease in favour of such landlord, two (2) weeks **prior to** the deadline by which management insiders, DIP Lenders and third parties are required to submit a bid in respect of the same property;¹⁵
- (c) provides insufficient insulation for receipt of Confidential Information and participation in the process by management insiders and DIP Lender participants who may wish to participate as bidders in the SISP, leading to at least the appearance of a lack of fairness in the SISP process;
- (d) does not include a provision confirming that potential bidders will be required to comply with the terms of existing leases or other agreements registered on title and to which the Applicants are subject, including but not limited to operating agreements that protect the proper operation and maintenance of shopping malls affecting hundreds of tenants and thousands of ancillary stakeholders;
- (e) does not provide adequate protection to ensure that beneficiaries of ROFRs (and the Court) will have the ability to fairly assess the *bona fide* nature of a bid that may be received for a specific property subject to a ROFR, including as to its separate value, on a basis that allows a detailed assessment of same;
- (f) fails to ensure that the effect of the “creeping roll-up DIP”¹⁶ does not place DIP Lenders in a position where they are permitted to credit bid the DIP as part of the

¹⁵ OPGI Affidavit, at para 17.

¹⁶ By reference to the statutory prohibition contained in section 11.2 of the CCAA.

SISP (including over real property against which no borrowings may have been advanced by, and secured in favour of, the DIP Lenders as at the filing date) rather than the requirement to pay in cash for such previously unencumbered assets; and

- (g) does not reflect that real estate assets will be sold by the Applicants subject to certain standard encumbrances including, but not limited to: easements, rights of way, rights of first refusal and restrictive covenants.¹⁷

- 22. It is critically important to OPGI and the tenants of the Upper Canada Mall that all terms of the Operating Agreement, the Restrictive Covenant, the ROFR and the Option to Purchase are respected and upheld throughout this proceeding, and that no aspect of the SISP for which court approval is sought by the Applicants could have the direct or indirect effect of undermining those agreements.¹⁸ These interests align with the objectives of the CCAA and the role of the Court in supervising a CCAA proceeding.

II. *The SISP is not fair and reasonable in the circumstances*

- 23. The Applicants acknowledge that, in order for a SISP to be approved by the Court, it must be fair and reasonable in the circumstances.¹⁹
- 24. In deciding whether to approve a sales process at the outset, the Court should consider the factors provided in section 36(3) of the CCAA, which apply when an applicant seeks

¹⁷ OPGI Affidavit, at para 18.

¹⁸ OPGI Affidavit, para 20.

¹⁹ Applicants' Factum, at para 38.

approval for a sale after the sales process has concluded.²⁰ The factors enumerated in section 36(3) of the CCAA include, among other things, whether the process leading to the proposed sale or disposition was reasonable in the circumstances.²¹

25. Fairness in the implementation of the process is a corollary of reasonableness.
26. The terms of the SISP proposed by the Applicants are not fair and reasonable to landlords and holders of ROFRs, as set out above.
27. Section 36(4) of the CCAA adds (among other things) the following additional factors to section 36(3) to be considered when any proposed sale is to a related party: (a) whether good faith efforts were made to sell the assets to persons who are not related to the debtor; and (b) whether 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.
28. These statutory provisions provide a clear roadmap for the type of information that stakeholders and the Court are entitled to receive and consider when bids by insiders are presented for approval by the Court. It is therefore necessary to include specific parameters in the SISP to ensure that this visibility can be provided when required.
29. The Applicants are requesting that the Court exercise its discretion to authorize the Applicants to undertake a sales process to assist with their restructuring/liquidation efforts. Such power, derived from an Order of the Court, needs to be exercised fairly with

²⁰ *Re Brainhunter Inc*, 2009 CarswellOnt 7627, at para 17.

²¹ CCAA, section 36(3)(a).

a view to balancing the competing interests of various stakeholders in the process. The playing field should not be tilted in favour of, or against, any participant.

30. Section 36(4) suggests that the need for fairness in a sales process is particularly acute in circumstances where management insiders are participating in a sales process. There is a cause for heightened scrutiny of the SISP proposed by the Applicants, particularly as it relates to: (i) the timing difference between bid deadlines for landlords and all other parties, (ii) the decreased level of involvement of the court-appointed Monitor in the process; and (iii) the participation of management insiders as bidders.
31. In particular, the (2) two week discrepancy in the due date for landlords compared to all other parties (including management insiders) to submit bids offends the most basic principles of fairness. Landlords and other parties seeking to submit a bid on the assets or business of the Applicants should be on an even playing field with respect to the timing for submission of their bids. The SISP, as currently proposed, would require any interested Landlords to submit bids on their leases 15 days prior to all other parties, and then explicitly states that the Sale Advisor may share information relating to the existence of such bid to other bidders who sign non-disclosure agreements.
32. The effect of this is: (i) to place landlords in the position of becoming involuntary stalking horse bidders (without compensation) and potentially used as bait in the purchase of a lease in respect of their own real property; (ii) to allow the Sale Advisor to advise non-landlord bidders (including management insiders) on which assets to include or exclude in their bids, and therefore how to best position their bid for success in the

process; or (iii) to help inform another bidder, whether directly or inadvertently, as to what assets to include in its offer based on interest expressed by other parties..

B. Should the Applicants be entitled to ignore the contractual and real property rights of third parties when seeking court approval of a sales process?

33. The approval of the SISP in the form sought by the Applicants ignores the legitimate contractual rights and real property interests of third parties in the Proceedings. Pursuant to the terms of the SISP as currently drafted, parties may bid on the real property of the Applicants without reference to a condition that such party will comply with the terms of any leases or any contracts in respect of freehold interests that bind the property owner.
34. Due to the fact that the criteria for determination of a Successful Bidder under the SISP does not currently include any consideration of such party's ability to comply with any underlying contractual interests related to the assets to be purchased, the SISP does not effectively filter out parties who would be unsuitable for the assignment of a particular lease or the purchase of a particular parcel of real property subject to, for example, an operating agreement. By not addressing that as part of the SISP, the Applicants are leaving open the possibility that they may come to the Court to request that the Court re-write the terms of any existing conflicting agreements, or seek to expunge them.
35. It is a well-established matter of contract law that a court will not re-write a contract for the parties,²² and yet this is precisely the position in which the Applicants are implying that they may place the Court.

²² *G. Ford Homes Ltd. v. Draft Masonry (York) Co*, 1983 CarswellOnt 732 at para 9.

36. The SISP should reflect and respect the balance required in all insolvency proceedings and prescribed by the CCAA and should ensure, to the greatest extent possible, that the SISP will produce a result which the Court would be capable of approving.
37. The SISP has no provisions relating to the preservation of standard existing real property encumbrances such as rights of first refusal, easements and restrictive covenants. The Court is required to act with even greater caution when faced with the potential impairment of a real property interest, than when dealing with a regular executory contract.²³ The SISP leading to any future sale for which Court approval will be sought should be directed towards the preservation of legitimate real property interests.

C. Should DIP Lenders be prohibited from submitting a credit bid that includes real property that was not subject to security for indebtedness actually advanced and owing to such DIP Lenders as at the date of filing?

38. The DIP Lenders should not be permitted to credit bid on assets that were not subject to security against assets for borrowings actually advanced by, and secured in favour of such DIP Lenders as of the date of filing. The creeping roll-up DIP proposed by the Applicants would cause the pre-filing indebtedness of the DIP Lenders secured by, among other things, only four parcels of real property, to be replaced by post-filing indebtedness secured by *all* real property.²⁴
39. Creditors are not permitted to credit bid their debt on assets over which they do not have security for borrowings they have advanced. The DIP Lenders may seek to circumvent

²³ *Terastar Realty Corp., Re*, 2005 CarswellOnt 5985, at para 47.

²⁴ Monitor's Report, at para 80.

this general rule through the proposed creeping-roll up. Without further amendment to the SISP, this could invite mischief on numerous fronts.

40. While this rule is well established in the US (where credit bidding is more prevalent), it has not been conclusively determined in Canadian law. However, Canadian academic commentary²⁵ and cases suggest that creditors must hold security for advances in the asset they wish to place a credit bid on.

41. As Professor Roderick J. Wood notes:

“[a] credit bid can only be made in respect of property that is collateral for the secured debt. If there are other, unencumbered assets that are being sold as well, the secured creditor must pay cash for these assets. If there are claims that rank in priority to the secured creditor, these claims must be paid out”.²⁶ [Emphasis added.]

42. This was evident in *White Birch Paper Holding Co., Re*²⁷ in which the Court upheld the use of a credit bid, noting that the sale and investor solicitation process order permitted the winning bidder “to credit bid up to the full amount of any allowed secured claims under the White Birch DIP Facility and the first lien term loan agreement, respectively, to the extent permitted under Section 363(k) of the [US] Bankruptcy Code and other applicable law.”²⁸

²⁵ See Martin P. Rosenthal, “Sales Process Dynamics – The Monitor’s Perspective” in Janis P. Sarra, ed., *Annual Review of Insolvency Law, 2012* (Toronto: Carswell, 2013) 123 and Wasserman, M. & Fell, C. “Credit Bidding in Canadian Insolvency Proceedings – A Useful Tool for Secured Creditors Requiring Checks and Balances” (2014) 3 *Journal of the Insolvency Institute of Canada* 21.

²⁶ Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law Inc., 2015) at page 416.

²⁷ *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 [“*White Birch*”].

²⁸ *Ibid*, at para 30.

43. Section 363(k) of the U.S. Bankruptcy Code²⁹ provides that the secured creditor must hold a valid lien on the property which is subject to the sale. The successful bidder in *White Birch* was a group of lenders under the first lien credit agreement with a bid comprised of, among other things, US\$90 million in cash allocated to the current assets of the debtor, over which the bidder **did not** hold security and \$78.5 million in the form of a credit bid over the debtor's fixed assets, over which the bidder **did** hold security.
44. The Court should be made aware of the potential for this situation occurring if the DIP Lenders become bidders in this SISP process.

PART V - RELIEF REQUESTED

45. OPGI respectfully requests that:
- (a) the terms of the SISP Approval Order be amended in accordance with the redline attached hereto as "Schedule C" (compared to the version circulated by the Applicants' counsel to the Service List at 11:33 pm on July 12, 2017);
 - (b) the terms of the SISP process be amended in accordance with the redline attached hereto as Schedule "D" (compared to the version circulated by the Applicants' counsel to the Service List at 11:33 pm on July 12, 2017); and
 - (c) a Rider be included as part of the SISP terms in the form attached hereto as Schedule "E" addressing the treatment of real property assets which are subject to rights of first refusal, options to purchase or other similar rights.

²⁹ 11 U.S.C. § 363(k).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of July, 2017.

A handwritten signature in blue ink, appearing to read "J. Grout", is written above a horizontal line.

THORNTON GROUT FINNIGAN LLP
Lawyers for Oxford Properties Group

SCHEDULE “A”

Authorities

No.	Case Reference
1.	<i>Air Canada, Re</i> , 2004 CarswellOnt 870
2.	<i>Century Services Inc. v Canada (Attorney General)</i> , 2010 SCC 60
3.	<i>Re Brainhunter Inc</i> , 2009 CarswellOnt 7627
4.	<i>G. Ford Homes Ltd. v. Draft Masonry (York) Co</i> , 1983 CarswellOnt 732
5.	<i>Terastar Realty Corp., Re</i> , 2005 CarswellOnt 5985
6.	<i>White Birch Paper Holding Co., Re</i> , 2010 QCCS 4915
No.	Other Sources
7.	Martin P. Rosenthal, “Sales Process Dynamics – The Monitor’s Perspective” in Janis P. Sarra, ed., <i>Annual Review of Insolvency Law, 2012</i> (Toronto: Carswell, 2013) 123
8.	Wasserman, M. & Fell, C. “Credit Bidding in Canadian Insolvency Proceedings – A Useful Tool for Secured Creditors Requiring Checks and Balances” (2014) 3 <i>Journal of the Insolvency Institute of Canada</i> 21
9.	Roderick J. Wood, <i>Bankruptcy and Insolvency Law</i> , 2 nd ed. (Toronto: Irwin Law Inc., 2015)

SCHEDULE “B”

Relevant Statutes

1. *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

Section 11.2

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company’s property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

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

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company’s business and financial affairs are to be managed during the proceedings;

(c) whether the company’s management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company’s property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor’s report referred to in paragraph 23(1)(b), if any.

Section 36

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.

SCHEDULE "C"

REDLINE OF PROPOSED AMENDMENTS TO THE SISP APPROVAL ORDER

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR.) THURSDAY, THE 13th
)
JUSTICE HAINEY) DAY OF JULY, 2017
)

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.

(each, an “**Applicant**”, and collectively, the “**Applicants**”)

SISP APPROVAL ORDER

THIS MOTION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the “**CCAA**”) for an order, *inter alia*, approving the Sale Process (as defined below) and certain related relief, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion of the Applicants, the Affidavit of Billy Wong sworn July 5, 2017 including the exhibits thereto (the “**Second Wong Affidavit**”), the First Report of FTI Consulting Canada Inc., in its capacity as Monitor (the “**Monitor**”) filed, and on hearing the submissions of respective counsel for the Applicants, counsel to the Monitor, counsel to the Board of Directors and the Special Committee of the Board of Directors of Sears Canada Inc., counsel to Wells Fargo Capital Finance Corporation Canada as administrative agent under

the DIP ABL Credit Agreement, counsel to GACP Finance Co., LLC as administrative agent under the DIP Term Credit Agreement,, and such other counsel as were present, no one else appearing although duly served as appears from the [Affidavit](#)[Affidavits](#) of Service of Sonja Pavic sworn July 6, 2017 filed:

SERVICE AND DEFINITIONS

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.
2. THIS COURT ORDERS that any capitalized term used and not defined herein, shall have the meaning ascribed thereto in the Initial Order in these proceedings dated June 22, 2017, as amended (the “**Initial Order**”) or the Sale Process, as applicable.

APPROVAL OF THE SALE PROCESS

3. THIS COURT ORDERS that the Sale Process attached hereto as Schedule “A” (the “**Sale Process**”) is hereby approved. The Applicants, the Monitor and the Financial Advisor are hereby authorized and directed to take any and all actions as may be necessary or desirable to implement and carry out the Sale Process, subject to the milestones contained in the Definitive Documents (as defined in the Initial Order), in order to select one or more Successful Bids which shall be consummated no later than October 25, 2017 or such other later date as agreed to by the Applicants, the Monitor and the DIP Lenders or as otherwise ordered by the Court.
4. THIS COURT ORDERS that the Applicants shall, unless otherwise ordered by the Court or agreed to by the Monitor and the DIP Lenders, by no later than September 27, 2017 seek bids for the liquidation of inventory and FF&E not otherwise included in a Successful Bid(s) (as defined in the Sale Process), if any, with such liquidation(s) to commence no later than November 1, 2017. [The terms of such liquidation process shall be in accordance with a further Order of this Court on a motion brought by the Applicants, returnable on a date to be scheduled.](#)
5. THIS COURT ORDERS that nothing in this Order or the approval of the Sale Process shall affect the rights and remedies of any party to an agreement with any of the Applicants affecting lands or premises in which Sears Canada has an interest, including without limitation

any lease, any operating agreement, any agreement containing an option or right of first refusal (or other similar right) (such right, a “ROFR”) (“**Property Agreements**”) and all rights and remedies of the Applicants and counterparties to any Property Agreements are reserved and shall remain unaffected by this Order or the approval of the Sale Process. ~~For greater certainty, the rights and remedies, if any, in favour of counterparties that are preserved herein include the right~~ In connection with any Binding Bid for an Asset subject to a ROFR, the holders of such ROFR shall be entitled to receive full disclosure of information and documentation from the Applicants, the Financial Advisor and the Monitor relating to the Sale Process, including but not limited to the allocation of the purchase price for the property(ies) subject to the ROFR(s) in that particular counterparty’s favour, and the allocation for all property that is subject to any *en bloc* offer to which it may form a part, or be related to by way of condition or otherwise.

6. THIS COURT ORDERS that:

- (a) by no later than August 4, ~~2017, on the request of a holder of a Property Agreement,~~2017 the Applicants shall advise ~~such holder~~all holders of Property Agreements whether the Applicants intend to take the position that the ROFRs ~~subject to such request~~ are no longer in force, not operative or inapplicable for any reason in connection with the Sale Process; and
- (b) if the Applicants have received a Binding Bid in the Sale Process for an Asset that is the subject of a ROFR under a Property Agreement from a bidder (a “**ROFR Bidder**”) and the Applicants take the position that the ROFR will not be triggered by such Binding Bid, then the Applicants will provide written notice to the relevant holder of the applicable Property Agreement ~~as follows: (i) — if such holder is not a bidder in the Sale Process for such Asset,~~ by September 8, ~~2017;~~ ~~and(ii) if such holder is a bidder in the Sale Process for such Asset, then once the Applicants have elected to proceed with the transaction with the ROFR Bidder, and in any event, no later than September 25, 2017.~~

7. THIS COURT ORDERS that each of the Applicants, the Monitor, the Financial Advisor and their respective affiliates, partners, directors, employees, and agents shall have no liability with respect to any and all losses, claims, damages or liability of any nature or kind to any person in connection or as a result of performing their duties under the Sale Process, except to the extent

of such losses, claims, damages or liabilities resulting from gross negligence or willful misconduct of the Applicants, the Monitor or the Financial Advisor, as applicable, as determined by this Court.

8. THIS COURT ORDERS that, in connection with the Sale Process and pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Applicants, the Financial Advisor and the Monitor are authorized and permitted to disclose personal information of identifiable individuals to prospective investors, financiers, purchasers or bidders and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more investment, finance or sale transaction (each, a “**Transaction**”). Each prospective investor, financier, purchaser, or bidder to whom such information is disclosed shall maintain and protect the privacy of such information and shall limit the use of such information to its evaluation of the Transaction, and if it does not complete a Transaction, shall: (i) return all such information to the Applicants or the Monitor; or (ii) destroy all such information that is not electronically stored and, in the case of such information that is electronically stored, destroy all such information to the extent it is reasonably practical to do so. The purchaser in any Transaction shall be entitled to continue to use the personal information provided to it, and related to the property purchased, in a manner which is in all material respects identical to the prior use of such information by the Applicants, and shall return all other personal information to the Applicants or the Monitor, or ensure that all other personal information is destroyed.

9. THIS COURT ORDERS that at any time during the Sale Process, the Monitor, the Applicants or the DIP Lenders may apply to the Court for directions with respect to the Sale Process.

GENERAL

10. THIS COURT ORDERS that this Order shall have full force and effect in all provinces and territories in Canada.

11. THIS COURT HEREBY REQUESTS the aid and recognition of any Court, tribunal, regulatory or administrative bodies, having jurisdiction in Canada or in the United States of America, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative

bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

SCHEDULE "D"

REDLINE OF PROPOSED AMENDMENTS TO SISP TERMS

Schedule "A" Sale Process

On June 22, 2017, Sears Canada Inc. and certain of its subsidiaries (collectively, "**Sears Canada**") sought and obtained protection under the *Companies' Creditors Arrangement Act* (the "**CCAA**") pursuant to an initial order (the "**Initial Order**") granted by the Ontario Superior Court of Justice (Commercial List) (the "**Court**"). The Initial Order contemplates Sears Canada pursuing all avenues of refinancing, restructuring, selling and reorganizing their Business and Property (each as therein defined) subject to prior approval of the Court.

Sale and Investment Solicitation Process

1. This sale and investment solicitation process (the "**Sale Process**") sets out the manner in which ~~(i)~~ (i) bids and proposals for a broad range of transaction alternatives including investment proposals involving the Business, Property, assets (the "**Assets**") and/or leases (the "**Leases**") of Sears Canada, whether *en bloc* or any portion(s) thereof, will be solicited from interested parties, (ii) any Binding Bids, ~~Binding Lease Modification Proposals~~ and/or Binding Lease ~~Surrender~~ Proposals (each as defined below) received will be considered and negotiated with interested parties, (iii) any Binding Bids, ~~Binding Lease Modification Proposals~~ and/or Binding Lease ~~Surrender~~ Proposals as subsequently negotiated, may be selected as Successful Bid(s) (as defined below), and (iv) the Court's approval of such Successful Bid(s) will be sought, with an anticipated completion date of all transactions by no later than October 25, 2017.
2. The Sale Process shall be conducted by BMO Nesbitt Burns Inc. ("**BMO Capital Markets**", the "**Sale Advisor**") on behalf of Sears Canada and under the supervision, review and approval of both the Special Committee of the Board of Directors of Sears Canada Inc. (the "**Special Committee**") and FTI Consulting Canada Inc. in its capacity as court-appointed monitor of Sears Canada (the "**Monitor**"). References to Sears Canada throughout this Sale Process shall mean the Special Committee in circumstances where the integrity of this Sale Process so requires (as determined by the Special Committee or any of the advisors, the Sale Advisor or the Monitor).
3. Parties who wish to have their bids or proposals considered with respect to the Business, Assets and/or Leases, whether as a whole or any portions thereof, shall participate in this Sale Process in accordance with the procedures set out herein.
4. The sale of the Business, Assets and/or Leases will be on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by Sears Canada, the Sale Advisor, the Monitor or any of their respective agents or estates, except to the extent set forth in a definitive transaction agreement executed by Sears Canada in accordance with this Sale Process.
5. For the purpose of this Sale Process, the term "Landlord" shall include (i) the landlords under of real property leases and occupancy/occupation agreements for any of the Applicants' leased premises, leased locations, and (ii) the parties to any operating agreement or other similar agreement relating to an Applicants' owned premises.

Solicitation Process

6. The Sale Process will be conducted as follows:

- a. The Sale Advisor and Sears Canada with the assistance of its advisors and in consultation with and under the supervision of the Monitor will:
 - (i) prepare a form of non-disclosure agreement acceptable to the Monitor (“NDA”) to be executed by interested parties;
 - (ii) prepare forms of transaction documents to be used by interested parties in submitting bids and proposals to Sears Canada, the form and substance of such transaction documents to be acceptable to the Monitor after consultation with the DIP ABL Lenders and DIP Term Lenders (as defined in the Initial Order, and together the “DIP Lenders”) (the “Transaction Documents”);
 - (iii) solicit interest from parties to enter into NDAs, and begin analyzing the transaction alternatives;
 - (iv) require that all potential bidders that wish to participate in the Sale Process must sign an NDA in form acceptable to Sears Canada and the Monitor prior to participation in the Sale Process, ~~provided however save~~ that a Landlord need not sign an NDA to submit a ~~Binding Lease Modification Proposal or a Binding Lease Surrender Proposal~~ proposal relating to an existing Lease to which they are a party or/and to submit an offer for the purchase of a premise in respect of which they are a party to an operating or other agreement relating to such premises (hereinafter all such leases, operating or other agreements collectively referred to as “Leases”); and
 - (v) provide potential bidders who have executed an NDA with access to an electronic data room of due diligence information.
- b. Landlords may submit to the Sale Advisor ~~Binding Lease Modification Proposals (as defined below)~~ proposals in connection with existing Leases ~~or occupancy agreements~~ to which they are a party ~~(the “Binding Lease Proposals”)~~ provided that all such proposals must be ~~received~~ submitted in binding form on or before 5:00 p.m. Eastern Daylight Time on August ~~15, 2017~~ 31, 2017, (the ~~“Binding Lease Modification Proposal Deadline”~~), with a contemporaneous copy delivered to the Monitor; ~~and~~
- c. Parties interested in pursuing a transaction must submit binding offers based on the relevant forms of Transaction Documents including the items set out in paragraph ~~87~~ below (a “Binding Bid”) by 5:00 p.m. Eastern Daylight Time on August 31, 2017 (the “Binding Bid Deadline”) to the attention of the Sale Advisor as set out below, with a contemporaneous copy delivered to the Monitor. Landlords may submit to the Sale Advisor proposals to have Sears Canada surrender existing leases to which they are a party (a “Binding Lease Surrender Proposal”) provided that all such proposals must be received in binding form on or before the Binding Bid Deadline, with a contemporaneous copy delivered to the Monitor; ~~and~~
- d. Subject to the terms set forth herein, following the Binding Bid Deadline and the Binding Lease ~~Modification~~ Proposal Deadline, Sears Canada and its advisors, in consultation with the Monitor and the DIP Lenders, may seek to negotiate final terms with one or more parties, and may select one or more Successful Bid(s) subject to the approval of the Court, all in accordance with the timeline set out in the process letter, which shall be in a form

acceptable to the Monitor and the DIP Lenders, to be delivered by the Sale Advisor to interested parties; ~~and~~

The Sale Advisor shall advise prospective bidders that if a Binding Bid will be submitted for one or more Assets or Leases that are subject to an ~~operating agreement with an adjacent land owner~~ which may or may not contain restrictions, or a right of first refusal, option to purchase or similar right (“ROFR”), the beneficiary of such agreement(s) reserves all rights and remedies in respect of such agreement(s).

7. The Sale Advisor may, in consultation with Sears Canada and the Monitor, and subject to the terms of the Definitive Documents (as defined in the Initial Order), engage local market leasing agents or real estate brokers to solicit Binding Bids for discrete Assets or assignments of Leases.

Submission of Binding Offers

8. In order for a bid to be considered a Binding Bid, it shall comply with the following:

- (i) it shall contain:
 - a. duly executed Transaction Documents;
 - b. the identity and contact information of the bidder and the identities of each person or entity that will be sponsoring or participating in such bid, including direct and indirect owners;
 - c. a blackline showing changes to the relevant Transaction Documents provided to the interested party by Sears Canada; and
 - d. evidence of authorization and approval to submit and consummate the bid from the bidder's board of directors (or comparable governing body);
- (ii) it includes a letter stating that the bid is irrevocable for a period of at least 20 business days after the Binding Bid Deadline (subject to any longer period as may be required for a ROFR Bid, as set out below);
- (iii) it provides written evidence of a firm, irrevocable financial commitment for all required funding or financing in connection with the bid;
- (iv) ~~if applicable, a separate Transaction Document that includes a separate allocation of value to each individual Asset or Lease subject to the bid that is the subject of a valid and enforceable right of first refusal, option to purchase or similar right;~~ the bid is on an Asset that is subject to a ROFR, it shall comply with the terms of the **“ROFR Rider”** set out below;
- (v) it is accompanied by a cash deposit (the **“Deposit”**) of 10% of the total cash purchase price contemplated by such bid, which shall be paid to the Monitor by wire transfer (to a bank account specified by the Monitor) and held in trust in accordance with this Sale Process;
- (vi) it does not include any request for or entitlement to any break fee, expense reimbursement or similar type of payment; ~~(vii)~~
- (vii) it is not conditional upon:
 - a. the outcome of unperformed due diligence by the bidder, and/or
 - b. obtaining financing; and
- (viii) ~~(viii)~~ it is received by the Binding Bid Deadline.

9. A Binding Lease ~~Modification Proposal and a Binding Lease Surrender~~ Proposal shall comply with the following:

- (i) it shall contain:
 - a. duly executed relevant Transaction Documents;
 - b. the identity and contact information of the Landlord contact person;

a blackline showing changes to the relevant Transaction Documents provided to the interested party by Sears Canada; and

- c. evidence of authorization and approval to submit and consummate the proposal from the Landlord's board of directors (or comparable governing body), or confirmation that such authorization and approval is not required for ~~the~~ Binding Lease ~~Modification Proposal or Binding Lease Surrender Proposal,~~ ~~as applicable,~~ to be binding on ~~such~~ the Landlord;
- (ii) it includes a letter stating that the proposal is irrevocable for a period of at least 20 business days after the Binding Bid Deadline;
- (iii) in the event ~~that~~ third party financing is required to close the transaction, ~~it provides~~ written evidence of a firm, irrevocable financial commitment for all required funding or financing;
- (iv) it is not conditional upon:
 - a. the outcome of unperformed due diligence by the Landlord, and/or
 - b. obtaining financing; and

- (v) it is received by the Binding Lease ~~Modification Proposal~~ Deadline or the Binding Bid Deadline, as applicable; ~~and (vi) to the extent that a Landlord intends to submit a proposal contemplating a material modification of an existing Lease to which it is party (a "Binding Lease Modification Proposal"), such Binding Lease Modification Proposal must, in addition to the foregoing requirements, contain such Landlord's consent that the Sale Advisor and Sears Canada may share such Binding Lease Modification Proposal with other bidders in the Sale Process who have signed NDAs, subject to any restrictions that may be contained in such Binding Lease Modification Proposal.~~

10. Sears Canada, with the consent of the Monitor, the Sale Advisor and the DIP Lenders, may waive compliance with any one or more of the requirements specified in ~~sections 8~~ section 8 and 99 and deem, with the consent of the bidding party, a non-compliant bid, ~~lease surrender proposal~~ or ~~lease modification~~ proposal to be a Binding Bid, ~~a Binding Lease Surrender Proposal~~ or ~~a Binding Lease Modification Proposal~~, respectively, with the exception of a bid ~~or a lease surrender proposal~~ that is received after the Binding Bid Deadline or a ~~lease modification~~ proposal that is received after the Binding Lease ~~Modification Proposal~~ Deadline.

Evaluation of Competing Bids and Proposals and Court Approval

Following the Binding Bid Deadline and the Binding Lease ~~Modification~~ Proposal Deadline, as applicable, Sears Canada shall consult with the Monitor, the Sale Advisor and the DIP Lenders and decide whether to (i) continue negotiations with a selected number of bidders that have submitted Binding Bids, ~~Binding~~

~~Lease Modification Proposals~~ and/or Binding Lease ~~Surrender~~ Proposals, with a view to selecting one or more non-overlapping Bindings Bids, ~~Binding Lease Modification Proposals~~ and/or Binding Lease ~~Surrender~~ Proposals (collectively, the “**Successful Bid(s)**”) upon approval of the Board of Directors of Sears Canada, and (ii) take such steps as are necessary to finalize and consummate the Successful Bid(s). Sears Canada shall have no obligation to conclude a sale arising out of this Sale Process and reserves the right and unfettered discretion to reject any bid or proposal (including any Binding Bid, ~~Binding Lease Modification Proposal~~ and any Binding Lease ~~Surrender~~ Proposal), but shall not do so without the approval of the Monitor after consultation with the DIP Lenders. If Sears Canada does select any Successful Bid(s), it shall be under no obligation to accept the highest bid.

11. Following selection of a Successful Bid(s), Sears Canada and its advisors in consultation with the Monitor shall seek to settle any necessary definitive agreement(s) with respect to the Successful Bid(s) in form and substance acceptable to the DIP Lenders and the Board of Directors of Sears Canada. Once all necessary definitive agreement(s) with respect to a Successful Bid have been finalized, Sears Canada will apply to the Court as soon as reasonably practicable for an order in form and substance acceptable to the Monitor and the DIP Lenders (an “**Approval and Vesting Order**”) approving such Successful Bid and authorizing Sears Canada to (i) enter into any and all necessary agreements with respect to the Successful Bid, (ii) undertake such other actions as may be necessary to give effect to such Successful Bid, and (iii) implement the transaction(s) contemplated in such Successful Bid.
12. Each Landlord shall be advised by no later than two business days after the selection of a Successful Bid(s) relating to such Landlord’s Lease(s), and in any event no later than ~~October 15,~~ September 30, 2017, which of its Lease(s) are included in such Successful Bid(s).

Deposits

13. All Deposits shall be retained by the Monitor and invested in an interest bearing trust account. If one or more Successful Bids are selected and an Approval and Vesting Order is granted in connection therewith, the Deposit paid in connection with such Successful Bid(s) (plus applicable interest) will be non-refundable and shall, upon closing of the transaction contemplated by such Successful Bid(s), be applied to the purchase price to be paid in connection with such Successful Bid(s) or be dealt with as otherwise set out in the definitive agreement(s) entered into in connection with such Successful Bid(s). Any Deposit (plus applicable interest) delivered with a Binding Bid that is not selected as a Successful Bid, will be returned to the applicable bidder within ten (10) business days of the date of expiration of such Binding Bid or an earlier date as may be determined by Sears Canada, in consultation with the Monitor and the Sale Advisor.

Consents and Information

14. Any non-material amendments to this Sale Process, including the relevant dates and deadlines set forth herein, ~~may~~ (except as it relates to the timeline in favour of any party holding a ROFR in respect of a ROFR Bid, without the consent of the applicable beneficiary of the ROFR), may only be made with the written consent of the Special Committee, the Monitor and the DIP Lenders, or by further order of the Court.
15. Notwithstanding anything else contained herein, Sears Canada, in its reasonable business judgment and in consultation with the Sale Advisor, the Monitor and the DIP Lenders may, from

time to time, withdraw any Leases or Assets from this Sale Process in accordance with the CCAA, and Sears Canada's rights under the Initial Order.

If any DIP Lender intends to participate as a bidder in this Sale Process, such party must provide written notice of such intention (the "**Participation Notice**") to the Sale Advisor, with a copy to the Monitor, on or before July 17, 2017 (the "**Participation Notice Deadline**"). Any DIP Lender who delivers a Participation Notice shall not be entitled to any Bid Information or Confidential Information (each as defined below), or to participate in the [Sales Process, including the](#) review or drafting of [the](#) Transaction Documents ~~or~~ and the review, consideration, negotiation ~~and~~/or selection of Successful Bid(s). The failure of such parties to deliver a Participation Notice by the Participation [Notice](#) Deadline shall render such parties unable to participate as a bidder in this Sale Process.

16. Subject to the confidentiality terms hereof, the Sale Advisor shall provide regular updates to the DIP Lenders and their advisors with respect to matters related to the Sale Process. Any information that is provided by the Sale Advisor, Sears Canada, the Monitor or their advisors to any of the DIP Lenders or their advisors, in respect of the Sale Process, including regarding any participants therein, any bids received or terms thereof or otherwise ("**Confidential Information**"), will be provided on a strictly confidential basis only and such parties shall not be permitted to share such Confidential Information with anyone other than any other DIP Lenders or the DIP Lenders' advisors, without the consent of Sears Canada and the Sale Advisor in consultation with the Monitor.

In addition, the following highly-sensitive information will solely be provided on a strictly confidential basis only to the Restricted Process Observers (as defined below), notwithstanding the terms of any bids or proposals received: the identity of the bidders; the particular Assets, Leases and/or Business that are the subject of a particular Binding Bid, ~~Binding Lease Modification Proposal~~ or Binding Lease ~~Surrender~~ Proposal; the proposed purchase price for the Business, Assets and/or Leases identified in a Binding Bid, ~~Binding Lease Modification Proposal~~ or Binding Lease ~~Surrender~~ Proposal; and the number of bidders that are considering or have submitted Binding Bids, ~~Binding Lease Modification Proposals~~ and/or Binding Lease Proposals for a particular Asset, Lease or Business, and copies of all bids or proposals received in the Sale Process (collectively, the "**Bid Information**"). The Monitor will maintain a list of personnel and/or categories of personnel who have a need to know the Bid Information, including personnel and/or categories of personnel of the financial and legal advisors to the DIP Lenders (the "**Restricted Process Observers**"). No Bid Information will be provided to any individual who is not a Restricted Process Observer and, notwithstanding the terms of the DIP Facilities (as defined in the Initial Order), Restricted Process Observers shall only be permitted to share such Bid Information with other Restricted Process Observers unless the prior written consent of the Monitor in consultation with the Sale Advisor is obtained.

Subject to the terms hereof, the Special Committee or its designate may participate in the negotiations under the Sale Process and shall give instructions to Sears Canada's advisors in respect of or relating to this Sale Process. Certain members of management of Sears Canada have advised the Special Committee and Sears Canada's advisors that they intend to submit a bid or proposal. Management of Sears Canada involved in any capacity in connection with the submission of any bid or proposal will not be provided with Confidential Information or Bid Information, including information about Binding Bids, ~~Binding Lease Modification Proposals~~ or Binding Lease ~~Surrender~~ Proposals that third parties have made or information about whether any particular party has made a Binding Bid, ~~Binding Lease Modification Proposal~~ or Binding Lease ~~Surrender~~ Proposal, shall not participate in the [Sales Process, including the](#)

review or drafting of the Transaction Documents ~~or~~ and the review, consideration, negotiation and/or selection of ~~Successful Bid(s), bids~~ and may be subject to further restrictions as may be determined from time to time by the Special Committee in consultation with Sears Canada's advisors and the Monitor.

17. ~~Notwithstanding anything else contained herein, nothing shall affect the rights and remedies of the applicable Landlord relating to any Successful Bid(s) that may exist or arise under or in respect of any Lease, or the Landlord's property, except as may be agreed by the applicable Landlord and the parties to the Successful Bid(s).~~

18. ~~20-~~ **Under no circumstances should the management of Sears Canada communicate with any interested party without one of the Sale Advisor, the Monitor or Osler, Hoskin & Harcourt LLP ("Osler"), legal advisor to Sears Canada, present.**

19. ~~21-~~ All communications relating to a potential bid must be addressed to the Sale Advisor. Interested parties must adhere to the following communication protocol:

(i) members of Sears Canada's management team will only be available to prospective bidders at times scheduled ~~and on terms determined~~ by BMO Capital Markets as it determines necessary to advance the Sale Process, provided that such meetings or other communications with management must be supervised by any one of the Sale Advisor, the Monitor or Osler; and

(ii) members of Sears Canada's management and outside advisory teams have been instructed to direct any and all inquiries from prospective bidders to BMO Capital Markets.

20. ~~22-~~ Nothing in this Sale Process shall be construed to (i) permit or require any amendments to the terms of any Lease (s) without the consent of the applicable Landlord (s) or (ii) obligate any Landlord to negotiate with a party regarding any such amendments.

Failure to adhere to this communication protocol may result in disqualification of the interested party from the Sale Process and/or the rejection of any bid made by such interested party.

SCHEDULE "E"

**RIDER TO SISP TERMS
(For Assets subject to ROFR's)**

Sale Process

ROFR Rider

1. Notwithstanding any other provision contained in the Sale Process, the following provisions shall apply to any bids relating to real property assets or Leases (collectively the “**Assets**”) which are subject to rights of first refusal, options to purchase or similar rights, as applicable (each referred to herein as a “**ROFR**”).
2. Any bid received for the purchase and/or assumption of any real estate Asset that is subject to a ROFR or similar right (a “**ROFR Bid**”), other than a bid from the party who is the beneficiary of the ROFR, shall comply with the following in order to be considered a Binding Bid. The bid shall:
 - a. contain a separate offer and purchase price for each Asset subject to a ROFR and the offer must not be conditional upon or tied to the bidder’s successful purchase of any other Assets;
 - b. confirm that the bidder agrees to be bound by the terms and covenants of any operating agreement, servitude agreement or other agreements affecting the Asset that are binding on successors in interest to Sears;
 - c. be open for acceptance for a sufficient period of time to allow Sears to present any such ROFR Bid to the holder of the ROFR for the time period provided by the particular ROFR on that Asset;
 - d. be a cash offer in the case of a bid on any Asset by the DIP Lenders that was not subject to security for indebtedness actually drawn and owing to such DIP Lender(s) as at the date of filing.
3. Nothing contained herein will derogate from any of the rights of any holder of a valid and enforceable ROFR including any designated notice period (a “**ROFR Notice Period**”) during which such holder is entitled to consider whether they wish to exercise their rights pursuant to the terms of their ROFR. For greater certainty, notwithstanding the fact that a Successful Bid in respect of a real estate Asset (which is subject to a ROFR) has been finalized, the transaction shall not be consummated until the earlier of: (i) the expiry of any applicable ROFR Notice Period, and (ii) the exercise of such ROFR right by the holder.
4. Notwithstanding anything else contained herein, nothing shall affect the rights and remedies of the applicable beneficiary of a ROFR relating to any ROFR Bid, except as may be agreed in writing by such beneficiary of the ROFR.
5. For greater certainty, nothing in this Sale Process shall be construed to (i) permit or require any amendments to the terms of any operating agreements or similar agreements affecting any real property Assets of Sears Canada without the written consent of the counter-party to such agreements; or (ii) obligate any party to such agreement(s) to negotiate with another party regarding any such amendments.

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., *et al.*

(Applicants)

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

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

Proceedings commenced at Toronto

RESPONDING FACTUM
OF OXFORD PROPERTIES GROUP
(Response to Applicants' Motion Returnable July 13, 2017
re: Approval of SISP and Related Relief)

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