

**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 THE APPLICANTS
(Remington Motion Returnable January 22, 2018)**

January 16, 2018

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PART I – INTRODUCTION

1. This factum is filed by the Applicants in response to the motion brought by Remington Properties Inc. (“**Remington**”), a former landlord of Sears Canada Inc. (“**Sears Canada**”), seeking payment of outstanding real property tax amounts attributable to the pre-filing period and the period following the termination of Sears Canada's lease of premises at 70 Glendeer Circle SE in Calgary, Alberta (the “**Remington Lease**”).

2. Remington's motion initially sought directions of the Court regarding whether the full amount of \$191,651.71 invoiced to Sears Canada for 2017 real property taxes should be payable. Remington has since conceded that Sears Canada has paid \$66,159.22, the portion owed

for real property taxes from the date of the Initial Order (June 22, 2017) to the effective date of the disclaimer of the Remington Lease (October 25, 2017) (the “**Post-Filing Tax Amount**”).¹

3. The amounts which are therefore the subject of this motion are: (i) the amount attributable to the pre-filing period – January 1, 2017 to June 21, 2017 – being \$90,312.59 (the “**Pre-Filing Tax Amount**”); and (ii) the amount attributable to the period commencing from October 25, 2017, the effective date of the disclaimer of the Remington Lease (the “**Lease Termination Date**”), to December 31, 2017, being \$35,179.36 (the “**Post-Disclaimer Tax Amount**”).

4. The Applicants submit that the requested relief should be denied. There is no basis for Remington's position that the Post-Disclaimer Tax Amount is owing, and the Pre-Filing Tax Amount is stayed pursuant to the Initial Order. It is telling that Remington's factum in support of this motion does not cite *any* authority supporting its position.

5. Remington's principal argument for why it is entitled to full and immediate payment for real property taxes relating to the pre-filing and post-disclaimer periods is that the invoice it issued to Sears Canada was for a lump sum for the entire 2017 tax year and became due in full on June 30, 2017 (i.e., 8 days after the CCAA filing). This argument confuses the distinction between when an underlying obligation to pay is incurred (i.e., when the service is rendered) versus when the obligation to pay crystallizes (i.e., when the invoice becomes payable). It is the former that is determinative of whether the obligation is a pre- or post-filing obligation.

6. Based on the clear wording of the Initial Order, the Monitor and Sears Canada have consistently taken the position that real property taxes owed under all of Sears Canada's real

¹ See Moving Party's Factum dated January 9, 2018, para. 16.

property leases must be calculated on a *per diem basis* and paid from the date of the Initial Order to the effective date of the termination of the relevant lease, if applicable.

7. Adopting Remington's interpretation of what constitutes a post-filing obligation (namely, any amount that becomes due and payable after the filing date) would have far reaching implications for this and all other CCAA proceedings. Among other things, it would encourage creditors to strategically delay invoicing a distressed company until after the CCAA filing, so that their debt would be considered a post-filing obligation. It would also result in certain creditors being treated more favourably than others.

8. Remington's fairness argument – that it is in an unfair position vis-à-vis other landlords because it had no choice but to collect real property taxes annually – is a red herring, and is not supported by the facts. The uncontradicted evidence is that Sears Canada had negotiated a wide variety of lease arrangements with its landlords with respect to how and when property tax payments were made. Moreover, the Remington Lease itself does not mandate how Sears Canada is to pay real property taxes. There is no evidence on the record that Remington was forced to invoice Sears Canada annually for a lump sum amount, or that it could not have opted to invoice Sears Canada monthly if it preferred to do so.

9. The Applicants' position is supported by the Monitor.

PART II – FACTS

10. The facts relevant to this responding factum are more fully set out in the Affidavit of Billy Wong sworn December 19, 2017 (the “**Wong Affidavit**”).² Further details regarding these proceedings are contained in the prior affidavits of Billy Wong.³

B. Payment of Post-Filing Real Property Taxes pursuant to the Initial Order

11. Paragraph 11 of the Initial Order provides, in part, that Sears Canada shall pay all amounts constituting rent or payable as rent under real property leases, including realty taxes, for the period commencing from and including the date of the Initial Order, in equal payments twice-monthly on the first and fifteenth day of each month.⁴ In accordance with this provision, Sears Canada, with the concurrence of the Monitor, has made payments for real property taxes under its leases for the period from and after the date of the Initial Order, on a pro-rated basis.⁵

12. On July 13, 2017, Remington sent Sears Canada an email enclosing an invoice dated June 21, 2017 (the “**Invoice**”) in the amount of \$191,651.71 for the real property taxes owing by Sears Canada in connection with the Remington Lease for the full 2017 taxation year.⁶

² Affidavit of Billy Wong, sworn December 19, 2017 [Wong Affidavit], Responding Motion Record of the Applicants dated December 19, 2017 [Responding Motion Record].

³ See, in particular: Affidavit of Billy Wong, sworn on June 22, 2017; Affidavit of Billy Wong sworn July 5, 2017; and the Affidavit of Billy Wong, sworn July 12, 2017.

⁴ Wong Affidavit, para. 4, referring to paragraph 11 of the Initial Order: Responding Motion Record, p. 2.

⁵ Wong Affidavit, para. 5: Responding Motion Record, p. 2.

⁶ Wong Affidavit, para. 6: Responding Motion Record, p. 2.

13. On September 25, 2017, Sears Canada issued a disclaimer notice to Remington providing that the Remington Lease would be disclaimed pursuant to the CCAA, effective on the Lease Termination Date (October 25, 2017).⁷

14. On November 20, 2017, Sears Canada paid Remington the amount of \$66,159.22, representing the Post-Filing Tax Amount (i.e., for the period from the date of the Initial Order to the Lease Termination Date). It is no longer disputed that Sears Canada has made this payment. The remaining amount properly owing to Remington under the Remington Lease is \$90,312.59, representing the Pre-Filing Tax Amount (i.e., for the period January 1, 2017 to June 21, 2017).⁸ As discussed below, this is a claim that is stayed pursuant to the terms of the Initial Order.

15. Based on the Order requested in its factum, Remington also appears to be claiming that it is owed the Post-Disclaimer Tax Amount (i.e., for the period commencing from the Lease Termination Date to December 31, 2017), but it does not make any specific references or arguments relating to this amount in its factum. The Applicants submit that the Post-Disclaimer Tax Amount cannot be payable, as the Remington Lease was no longer in effect after October 25, 2017.

C. Variety of Lease Arrangements for Payment of Real Property Taxes

16. Sears Canada's arrangements with its former and current landlords vary with respect to when and how real property taxes are invoiced and the frequency with which they are paid. In some cases, landlords make payments to the taxation authority and invoice Sears Canada

⁷ Wong Affidavit, para. 7: Responding Motion Record, pp. 2-3.

⁸ Wong Affidavit, para. 9: Responding Motion Record, p. 3.

for the applicable amount, while in other cases Sears Canada makes the payments to the taxation authority directly.⁹

17. Prior to the CCAA filing, many landlords invoiced Sears Canada for realty tax payments on a monthly or quarterly basis, based on an estimate using the prior year's taxation assessment. A reconciliation was then done at the end of the taxation period. Other landlords invoiced Sears Canada annually.¹⁰

18. In practice, it is generally the landlords that choose in what increments and frequency they will invoice Sears Canada for the annual property tax amount owing on a particular lease (i.e., monthly, quarterly, annually or bi-annually).¹¹

D. The Remington Lease

19. The Remington Lease provides that Sears Canada will pay all real property taxes charged or assessed against the premises either to Remington (acting as agent for the taxing authority) or directly to the taxing authority.¹² The Remington Lease does not prescribe how often the landlord is to invoice Sears Canada (i.e., monthly, annually, etc.), but it does contemplate the option that Sears Canada could pay the tax amounts owing to the landlord in equal monthly instalments based on Remington's estimate of taxes for the year, to be adjusted at year end.¹³

⁹ Wong Affidavit, para. 11: Responding Motion Record, p. 3.

¹⁰ Wong Affidavit, para. 13: Responding Motion Record, p. 4.

¹¹ Wong Affidavit, paras. 11-12: Responding Motion Record, p. 3-4.

¹² Sections 8.1 and 8.9 of the Remington Lease, Exhibit "A" to the Affidavit of Randy Remington, sworn November 16, 2017 [Remington Affidavit]: Remington's Motion Record, pp. 27-28, 30. The premises governed by the Remington Lease formerly housed a Sears Canada Home Store.

¹³ Sections 8.9 of the Remington Affidavit: Remington's Motion Record, p. 30.

20. The practice followed by Remington was to invoice Sears Canada annually for the real property taxes, following receipt of an invoice from the City of Calgary.¹⁴

21. In its factum, Remington baldly asserts that it "had no means of collecting property taxes from January to June 2017", without citing any evidence. The uncontradicted evidence set out in the Wong Affidavit is that it would have been open to Remington to invoice Sears Canada on a monthly basis for real property taxes, as many other landlords did.

PART III – ISSUES AND THE LAW

22. The singular issue on this motion is whether Remington's claim for the Pre-Filing Tax Amount and the Post-Disclaimer Tax Amount constitute rent payable for the post-filing period pursuant to paragraph 11 of the Initial Order.

A. Required Post-Filing Payments under the Initial Order

23. Pursuant to paragraph 9 of the Initial Order, Sears Canada is prohibited from making any payments of amounts owing by the Applicants to any of their creditors as of the date of the Initial Order, except as specifically permitted in the Initial Order.

24. Paragraph 11 requires Sears Canada to pay "all amounts constituting rent or payable as rent... for the period commencing from and including the date of this Order." On a plain reading of this provision, it is clear that the amounts payable as rent must be "for" the post-filing period in order to be required payments under paragraph 11.

¹⁴ Wong Affidavit, para. 15; Responding Motion Record, p. 4.

25. The Pre-Filing Tax Amount cannot be properly characterized as an amount constituting rent “for the period commencing from and including the date of this Order.” That amount squarely relates to the period preceding the date of the Initial Order.

B. Obligations Incurred Before Filing Constitute Pre-Filing Claims

26. Remington claims that the entire amount it invoiced to Sears Canada for 2017 real property taxes is properly characterized as a post-filing obligation based solely on the fact that the Invoice was due and payable in full on June 30, 2017 (i.e., 8 days after the date of the Initial Order). This interpretation is inconsistent with the plain words of the Initial Order, as well as the case law.

27. Remington has not provided any explanation for why the due date on an invoice would alter the underlying nature of the payments to which the invoice relates. As described above, paragraph 11 of the Initial Order makes clear that the post-filing amounts payable as rent must be “for the period commencing from and including the date of this Order.” There is nothing in paragraph 11 that alters the crucial distinction between pre-filing and post-filing obligations, which is an important characteristic of every CCAA proceeding.

28. Contrary to Remington's position, as set out below, it is a recognized principle in insolvency law that whether a claim relates to the pre-filing or post-filing period depends on when the underlying obligation was incurred, not when the debt formally becomes due.

29. Section 19(1)(b) of the CCAA supports the proposition that a debt payable post-filing will constitute a pre-filing claim if it arises from a pre-filing obligation. This section lists the claims that may be compromised in a CCAA proceeding:

19. (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii). [emphasis added]

30. As a result, under section 19(1)(b) of the CCAA, a debt that becomes due in the post-filing period may be compromised only if it is based on an obligation the debtor incurred during the pre-filing period.

31. This principle has been confirmed by CCAA Courts. In both *Nortel Networks Corp.* and *Windsor Machine & Stamping Ltd.*, the Court considered an analogous issue in the context of severance payments.¹⁵ Like real property taxes, severance payments are debts that crystallize (or become payable) at a fixed point in time, but relate to obligations incurred over the duration of a previous period.

32. In *Nortel*, Morawetz J. held that severance payments related to employment in the pre-filing period constituted pre-filing obligations, even though the severance payment only became due and payable post-filing. The determinative factor was not when the debt became due, but when the underlying obligation was incurred:

The exact time of when the payment obligation crystallized is not, in my view, the determining factor... Rather, the key factor is whether the employee performed services after the date of the

¹⁵*Nortel Networks Corp, Re*, [2009] O.J. No. 2558 [*Nortel*]; *Windsor Machine & Stamping Ltd, Re*, [2009] O.J. No. 3195 [*Windsor*].

Initial Order. If so, he is entitled to compensation benefits for such current service.¹⁶

33. This Court has also confirmed that when a lump sum debt crystallizes post-filing, the Court can divide the total debt into amounts attributable to services rendered pre-filing and services rendered post-filing, with different payment obligations attaching to each pro-rated portion. In *Windsor*, Morawetz J. concluded that where employees had provided both pre-filing and post-filing employment services to the debtor, the amount of severance payable as a post-filing claim could be pro-rated by duration of service. Severance pay attributable to pre-filing services constituted pre-filing claims and thus were stayed and subject to compromise. Incremental increases to severance pay resulting from post-filing services constitute payable post-filing claims.

34. Sears Canada's obligation to pay real property taxes arises from the Remington Lease, which was signed well before these CCAA proceedings were contemplated. The Pre-Filing Tax Amount claimed is attributable to Sears Canada's occupancy of the leased premises during the 2017 pre-filing period.

35. Additionally, Remington received the tax bill from the taxing authority and issued the Invoice to Sears prior to the filing date.¹⁷

36. Remington's decision to invoice Sears for the total 2017 real property taxes in a lump sum does not alter the nature of the underlying amounts – i.e., taxes attributable to the pre-filing period, the post-filing period and the post-disclaimer period.

¹⁶ *Nortel* at para 67.

¹⁷ Remington Affidavit, para. 6: Remington's Motion Record, p. 10.

37. Regardless of the due date on Remington's invoice, Sears incurred the obligation to pay the Pre-Filing Tax Amount prior to the CCAA filing date. Remington's invoice merely crystallized the payment obligation under the Remington Lease into an enforceable debt.

C. No Entitlement to Real Property Taxes for the Post-Disclaimer Period

38. In its factum, Remington baldly asserts that it is entitled to payment for the "entire" 2017 property tax amount. However, Remington has not provided any legal basis or cogent argument for why it would be entitled to the Post-Disclaimer Tax Amount. Indeed, Remington's factum is completely silent on this point.

39. The Post-Disclaimer Tax Amount does not constitute "rent" or an amount "payable as rent" under paragraph 11 of the Initial Order, since it relates to the period after which the Remington Lease was disclaimed.

40. Under the Remington Lease, Sears Canada was obligated to pay real property taxes for the leased premises during the term of the lease. Subsequent to the disclaimer of the Remington Lease, such payment obligations ceased to exist. As a result, Sears Canada simply has no obligation whatsoever with respect to the Post-Disclaimer Tax Amount.

D. No Unfairness to Remington

41. Remington's argument that it is in an unfair position vis-à-vis other landlords because it had no choice but to collect real property taxes annually has no support in the record. The uncontradicted evidence is that Sears Canada was open to negotiating a wide variety of lease arrangements with its landlords with respect to how and when property tax payments were made.

42. The Remington Lease itself does not mandate how Sears Canada is to pay real property taxes. There is no evidence that Remington was forced to invoice Sears Canada annually

for a lump sum amount, or that it could not have opted to invoice Sears Canada monthly if it preferred to do so.

43. To the contrary, what Remington seeks in the present motion is to be treated more favourably than other unsecured creditors who are owed pre-filing amounts by the Applicants. Sears Canada and the Monitor have taken a consistent approach with respect to the calculation of real property taxes and other amounts owing which relate to services rendered or obligations incurred prior to the Initial Order. It would be inappropriate and unfair to the Applicants' other creditors to treat Remington's debt any differently.

E. Monitor Supports the Applicants

44. The Monitor has expressed its view that Remington is not entitled to payment for real property taxes that relate to the Pre-Filing Tax Amount and Post-Disclaimer Tax Amount. Based on the reasons provided herein and in the Monitor's Eleventh Report, the Monitor supports the Applicants' position on this motion.¹⁸

PART IV – NATURE OF THE ORDER SOUGHT

45. For all of the reasons above, the Applicants submit that this Honourable Court should refuse to grant the relief sought by Remington in its motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:


per Osler, Hoskin & Harcourt LLP

¹⁸ Wong Affidavit, para. 17; Eleventh Report of the Monitor dated January 15, 2018, paras 78-86.

Schedule "A"

LIST OF AUTHORITIES

Case Law

1. *Nortel Networks Corp, Re*, [2009] O.J. No. 2558
2. *Windsor Machine & Stamping Ltd, Re*, [2009] O.J. No. 3195

Schedule "B"

COMPANIES' CREDITORS ARRANGEMENT ACT

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

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(i) the day on which proceedings commenced under this Act, and

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