

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

**SEARS CANADA INC.,
AND RELATED APPLICANTS**

FORTY-FIRST REPORT OF FTI CONSULTING CANADA INC., AS MONITOR

September 25, 2020

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**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.

APPLICANTS

**FORTY-FIRST REPORT TO THE COURT
SUBMITTED BY FTI CONSULTING CANADA INC.,
IN ITS CAPACITY AS MONITOR**

A. INTRODUCTION

1. On June 22, 2017, Sears Canada Inc. (“**Sears Canada**”) and a number of its operating subsidiaries (collectively, with Sears Canada, the “**Applicants**”) sought and obtained an initial order (as amended and restated on July 13, 2017, the “**Initial Order**”), under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”). The relief granted pursuant to the Initial Order was also extended to Sears Connect, a partnership forming part of the operations of the Applicants (and together with the Applicants, the “**Sears Canada Entities**”). The proceedings commenced under the CCAA by the Applicants are referred to herein as the “**CCAA Proceedings**”.

2. The Initial Order, among other things:
 - (a) appointed FTI Consulting Canada Inc. as monitor of the Sears Canada Entities (the “**Monitor**”) in the CCAA Proceedings; and
 - (b) granted an initial stay of proceedings against the Sears Canada Entities until July 22, 2017 (the “**Stay Period**”), which was most recently extended to September 30, 2020.
3. On October 13, 2017, the Court issued, among other orders, an order approving an agreement and a process for the liquidation of the inventory and furniture, fixtures and equipment at all remaining Sears Canada retail locations.
4. The liquidation is now completed and all Sears Canada retail locations are closed.
5. In connection with the CCAA Proceedings, the Monitor has provided forty reports and twenty-four supplemental reports (collectively, the “**Prior Reports**”), and prior to its appointment as Monitor, FTI Consulting Canada Inc. also provided to this Court a pre-filing report of the proposed Monitor dated June 22, 2017 (the “**Pre-Filing Report**”). The Pre-Filing Report, the Prior Reports, and other Court-filed documents and notices in these CCAA Proceedings are, or will be made, available on the Monitor’s website at <http://cfcanada.fticonsulting.com/searscanada/>.

B. PURPOSE

6. The purpose of this forty-first report of the Monitor (the “**Forty-First Report**”) is to provide the Court with information regarding the motion by the Monitor for an order approving an agreement for the return of certain Remaining LC Funds (as defined below) from Coface North America Insurance Company and Compagnie Française d’Assurance pour le Commerce Extérieur, Canada Branch (collectively, “**Coface**”) and the Monitor’s comments and recommendations in connection with the foregoing.

C. TERMS OF REFERENCE

7. In preparing this Forty-First Report, the Monitor has relied upon audited and unaudited financial information of the Sears Canada Entities, the Sears Canada Entities’ books and

records, certain financial information prepared by the Sears Canada Entities, and discussions with, among others, employees of the Sears Canada Entities (collectively, the “**Information**”).

8. Except as otherwise described in this Forty-First Report, the Monitor has not audited, reviewed, or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would comply with Generally Accepted Assurance Standards pursuant to the *Chartered Professional Accountants of Canada Handbook*.
9. Future-oriented financial information reported in or relied on in preparing this Forty-First Report is based on assumptions regarding future events. Actual results will vary from these forecasts and such variations may be material.
10. The Monitor has prepared this Forty-First Report in connection with its request for approval of an agreement with Coface for the return of the Remaining LC Funds. The Forty-First Report should not be relied on for any other purpose.
11. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars.

D. COFACE RECEIVABLES INSURANCE

12. Coface provided commercial trade credit insurance (the “**Trade Credit Insurance**”) to certain of Sears Canada’s suppliers (the “**Insured Suppliers**”) for their receivables owing by Sears Canada (the “**Insured Receivables**”), subject to certain credit limits imposed by Coface.
13. In connection with the Trade Credit Insurance and in order to mitigate Coface’s exposure to Sears Canada’s credit risk and related liabilities (thus facilitating the possibility of Insured Suppliers obtaining a credit limit or a higher credit limit), Sears Canada delivered to Coface certain demand irrevocable letters of credit number G201934 and G201933 issued by a third party financial institution in the face amounts of CDN\$9,000,000 and US\$1,000,000 (the “**Coface LCs**”), respectively, on or about January 5, 2015. Copies of the Coface LCs are attached hereto as Appendix “A”. Copies of the letter agreements

between Sears Canada and Coface (the “**LC Letter Agreements**”) regarding the Coface LCs and executed by Sears Canada are attached hereto as Confidential Appendix “B”.

14. The Coface LCs could be drawn by Coface at any time, including (but not limited to), if Sears Canada sought protection under the bankruptcy or insolvency laws of Canada, as such steps by Sears Canada could increase the risk exposure of Coface on the Insured Receivables.
15. Following the commencement of the CCAA Proceedings, Coface drew down on the full value of the Coface LCs (less a US\$10 banking fee in respect of the US dollar letter of credit) on or about July 15, 2017.

E. REMAINING COFACE CASH COLLATERAL

16. The Monitor understands that certain amounts drawn on the Coface LCs have been applied to satisfy obligations owing by Sears Canada to Coface, pursuant to its subrogation rights. Attached hereto as Confidential Appendix “C” is a summary of the proceeds of the Coface LCs applied to satisfy such obligations (the “**Reimbursement Summary**”), which summary has been provided by Coface and has been reviewed by the Monitor for consistency with Sears Canada’s own accounts payable records.
17. Based upon the information provided to the Monitor by Coface in the Reimbursement Summary, the Monitor believes that Coface continues to hold CDN\$4,808,049.50 and US\$ \$282,126.85 in funds drawn from the Coface LCs that were not applied to satisfy obligations to Coface, pursuant to its subrogation rights (the “**Remaining LC Funds**”).
18. At the current stage of the CCAA Proceedings, it is necessary for Sears Canada to recover all of its remaining assets for distribution to creditors, including the Remaining LC Funds.

F. RELEASE AGREEMENT

19. Further to the Monitor’s request that Coface release the Remaining LC Funds, Coface, Sears Canada and the Monitor have entered into an Acknowledgment and Release Agreement (the “**Release Agreement**”).

20. The Release Agreement, which is conditional upon approval of the Court provides, among other things that:
- (a) the Remaining LC Funds, net of a CDN\$25,000 professional fee reserve, would be returned to the Monitor, on behalf of Sears Canada;
 - (b) any portion of the professional fee reserve that is not used to satisfy the professional costs incurred in relation to the Release Agreement and the approval of the Release Agreement by the Court, would be returned to Sears Canada as well;
 - (c) each of Coface and Sears Canada provide mutual releases for matters related to the Insured Receivables, the policies provided by Coface, the Coface LCs, and the Remaining LC Funds, among other things; and
 - (d) the Monitor releases the suppliers insured by Coface of any preference or similar reviewable transaction claims, as such claims could result in further claims against the Coface insurance policies.
21. A copy of the Release Agreement is attached hereto as Confidential Appendix “D”.

G. POTENTIAL PREFERENCE CLAIMS

22. Coface has advised the Monitor that the Coface insurance policies may be required to respond to asserted losses to Sears Canada’s suppliers in a circumstance where amounts previously paid by Sears Canada to such suppliers on account of Insured Receivables are clawed back into the estate as preferences or other reviewable transactions.
23. The Monitor has not identified any transactions with any suppliers of Sears Canada that should be pursued as potential preferences or reviewable transactions.
24. The Monitor is not in a position on its own to prevent third parties from pursuing any such hypothetical preference or reviewable transaction claims pursuant to Section 36.1 of the CCAA and Section 38 of the *Bankruptcy and Insolvency Act* (Canada).
25. On this Motion the Monitor requests the Court’s assistance in confirming that no such hypothetical claims on account of preferences or other reviewable transactions will be

advanced or permitted against Sears Canada's suppliers, thereby facilitating the release of the Remaining LC Funds to Sears Canada.

26. As noted above, the Monitor has not identified any basis for any claims for preferences or other reviewable transactions against Sears Canada's suppliers.

H. SEALING

27. The LC Letter Agreements, Reimbursement Summary and the Release Agreement contain certain information that Coface believes is confidential and contains commercially sensitive information regarding the Coface insured parties and Coface's business, the public disclosure of which Coface believes would be in violation of the confidential nature of such information and prejudicial to the interests of Coface and those insured parties. Accordingly, the Monitor requests that Confidential Appendix "B", containing the LC Letter Agreements, Confidential Appendix "C", containing the Reimbursement Summary, and Confidential Appendix "D", containing the Release Agreement, be sealed and not form part of the public record.
28. The information that is the subject of the sealing request is not, in the Monitor's view, material to the interests of any stakeholders in these proceedings.

I. MONITOR'S RECOMMENDATION

29. The proposed resolution with Coface will result in the return of material funds to Sears Canada.
30. The relief sought on this motion is limited only to the specific matters on which Coface and Sears Canada require confirmation so that Coface can release the Remaining LC Funds.
31. The barring of any potential preference or reviewable transaction claims as described above is reasonable in the circumstances as the Monitor is not aware of any such claims having been identified or threatened against any suppliers during these proceedings.
32. The Monitor recommends the approval of the resolution with Coface and the ancillary relief requested on this Motion.

The Monitor respectfully submits to the Court this, its Forty-First Report.

Dated this 25th day of September, 2020.

FTI Consulting Canada Inc.
in its capacity as Monitor of
the Sears Canada Entities

A handwritten signature in blue ink, appearing to read 'S. Bissell', written in a cursive style.

Steven Bissell
Managing Director

APPENDIX "A"

THE TORONTO-DOMINION BANK

THE TORONTO-DOMINION BANK
GLOBAL TRADE FINANCE,
7250 MILE-END ST., 6TH FLOOR,
MONTREAL, QUEBEC, H2R 3A4 CANADA
TEL: 1-866-661-6866
FAX: 1 866-661-6766

IRREVOCABLE STANDBY LETTER OF
CREDIT NO. G201933

PLACE AND DATE OF ISSUE: MONTREAL 31 DECEMBER, 2014
DATE AND PLACE OF EXPIRY: 01 DECEMBER, 2015 OUR COUNTERS

*****APPLICANT*****BENEFICIARY*****
SEARS CANADA INC. COFACE NORTH AMERICA INSURANCE
290 YONGE STREET, SUITE 700 COMPANY, 50 MILLSTONE ROAD,
TORONTO, ON M5B 2C3 CANADA BUILDING 100, SUITE 360,
EAST WINDSOR, NJ 08520-1419
USA

*****ISSUING BANK*****
THE TORONTO-DOMINION BANK
GLOBAL TRADE FINANCE,
7250 MILE-END ST., 6TH FLOOR,
MONTREAL, QUEBEC, H2R 3A4 CANADA

AMOUNT: U.S. DOLLARS 1,000,000.00
ONE MILLION 00/100

WE ARE PLEASED TO INFORM YOU THAT, FOR ACCOUNT OF SEARS CANADA
INC., WE, THE TORONTO-DOMINION BANK, HEREBY ESTABLISH OUR
IRREVOCABLE STANDBY LETTER OF CREDIT NO. G201933 IN FAVOUR OF
THE COFACE NORTH AMERICA INSURANCE COMPANY FOR A SUM NOT
EXCEEDING THE AGGREGATE AMOUNT OF USD1,000,000.00 (ONE MILLION
AND 00/100 UNITED STATES DOLLARS) EFFECTIVE IMMEDIATELY AND
EXPIRING AT OUR OFFICE WITH THE CLOSE OF BUSINESS ON 01
DECEMBER, 2015.

FUNDS UNDER THIS IRREVOCABLE STANDBY LETTER OF CREDIT ARE
AVAILABLE TO YOU AGAINST PRESENTATION OF YOUR SIGHT DRAFT(S)
DRAWN ON OURSELVES, MENTIONING THEREON, THE TORONTO-DOMINION
BANK IRREVOCABLE STANDBY LETTER OF CREDIT NO. G201933 DATED 31
DECEMBER, 2014, ACCOMPANIED BY A LETTER PURPORTEDLY SIGNED BY
ONE OF YOUR AUTHORIZED SIGNATORIES, STATING THAT FUNDS ARE DUE

CONTINUATION OF IRREVOCABLE STANDBY LETTER OF CREDIT NO. G201933

AND PAYABLE TO THE BENEFICIARY, AND THE ORIGINAL OF THIS IRREVOCABLE STANDBY LETTER OF CREDIT AND ANY SUBSEQUENT AMENDMENT(S), IF ANY.

PARTIAL DRAWINGS AND MULTIPLE PRESENTATIONS ARE PERMITTED.

IT IS A CONDITION OF THIS IRREVOCABLE STANDBY LETTER OF CREDIT THAT IT SHALL BE DEEMED TO BE AUTOMATICALLY EXTENDED WITHOUT AMENDMENT FOR A FURTHER ONE (1) YEAR PERIOD FROM THE PRESENT OR ANY FUTURE EXPIRATION DATE HEREOF, UNLESS AT LEAST NINETY (90) DAYS PRIOR TO THE PRESENT OR ANY FUTURE EXPIRATION DATE, THE BANK NOTIFIES THE BENEFICIARY IN WRITING BY COURIER, THAT IT DOES NOT ELECT TO CONSIDER THIS IRREVOCABLE STANDBY LETTER OF CREDIT TO BE RENEWABLE FOR ANY ADDITIONAL PERIOD.

WE HEREBY ENGAGE WITH YOU, THAT WE WILL HONOUR ALL DRAFT(S) DRAWN UNDER AND IN COMPLIANCE WITH THE TERMS AND CONDITIONS OF THIS IRREVOCABLE STANDBY LETTER OF CREDIT.

THIS IRREVOCABLE STANDBY LETTER OF CREDIT IS SUBJECT TO THE INTERNATIONAL STANDBY PRACTICES, ISP98, INTERNATIONAL CHAMBER OF COMMERCE PUBLICATION NO. 590.

THE BENEFICIARY MAY MAKE INQUIRIES REGARDING THIS IRREVOCABLE STANDBY LETTER OF CREDIT BY WAY OF WRITING ADDRESSED TO THE BANK'S ADDRESS OR BY TELEPHONE AT 1-866-661-6866.

AUTHORIZED SIGNATURE

Lin Chu C4719

AUTHORIZED SIGNATURE

Karen Licorish L2470

THE TORONTO-DOMINION BANK

THE TORONTO-DOMINION BANK
GLOBAL TRADE FINANCE,
7250 MILE-END ST., 6TH FLOOR
MONTREAL, QUEBEC H2A 3R4 CANADA
TEL: 1-866-661-6866
FAX: 1 866-661-6766

IRREVOCABLE STANDBY LETTER OF
CREDIT NO. G201934

PLACE AND DATE OF ISSUE: MONTREAL 31 DECEMBER, 2014
DATE AND PLACE OF EXPIRY: 01 DECEMBER, 2015 OUR COUNTERS

*****APPLICANT*****BENEFICIARY*****	
SEARS CANADA INC. 290 YONGE STREET, SUITE 700 TORONTO, ON M5B 2C3 CANADA	COMPAGNIE FRANCAISE D'ASSURANCE POUR LE COMMERCE EXTERIEUR CANADA BRANCH, 251 CONSUMERS ROAD SUITE 910, TORONTO, ON M2J 1R3 CANADA

*****ISSUING BANK*****

THE TORONTO-DOMINION BANK
GLOBAL TRADE FINANCE,
7250 MILE-END ST., 6TH FLOOR,
MONTREAL, QUEBEC, H2R 3A4 CANADA

AMOUNT: CANADIAN DOLLARS 9,000,000.00
NINE MILLION 00/100

WE ARE PLEASED TO INFORM YOU THAT, FOR ACCOUNT OF SEARS CANADA INC., WE, THE TORONTO-DOMINION BANK, HEREBY ESTABLISH OUR IRREVOCABLE STANDBY LETTER OF CREDIT NO. G201934 IN FAVOUR OF COMPAGNIE FRANCAISE D'ASSURANCE POUR LE COMMERCE EXTERIEUR FOR A SUM NOT EXCEEDING THE AGGREGATE AMOUNT OF CAD9,000,000.00 (NINE MILLION AND 00/100 CANADIAN DOLLARS) EFFECTIVE IMMEDIATELY AND EXPIRING AT OUR OFFICE WITH THE CLOSE OF BUSINESS ON 01 DECEMBER, 2015.

FUNDS UNDER THIS IRREVOCABLE STANDBY LETTER OF CREDIT ARE AVAILABLE TO YOU AGAINST PRESENTATION OF YOUR SIGHT DRAFT(S) DRAWN ON OURSELVES, MENTIONING THEREON, THE TORONTO-DOMINION BANK IRREVOCABLE STANDBY LETTER OF CREDIT NO. G201934 DATED 31 DECEMBER, 2014, ACCOMPANIED BY A LETTER, PURPORTEDLY SIGNED BY ONE OF YOUR AUTHORIZED SIGNATORIES STATING THAT FUNDS ARE DUE

CONTINUATION OF IRREVOCABLE STANDBY LETTER OF CREDIT NO. G201934

AND PAYABLE TO THE BENEFICIARY, AND THE ORIGINAL OF THIS IRREVOCABLE STANDBY LETTER OF CREDIT AND ANY SUBSEQUENT AMENDMENT(S), IF ANY.

PARTIAL DRAWINGS AND MULTIPLE PRESENTATIONS ARE PERMITTED.

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AUTHORIZED SIGNATURE

Lin Chu C4719

AUTHORIZED SIGNATURE

Karen Licorish L2470

CONFIDENTIAL APPENDIX “B”

CONFIDENTIAL APPENDIX "C"

CONFIDENTIAL APPENDIX “D”

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

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**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at TORONTO

**FORTY-FIRST REPORT TO THE COURT
SUBMITTED BY FTI CONSULTING CANADA
INC., IN ITS CAPACITY AS MONITOR**

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