

**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., 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.

**MOTION RECORD OF THE MONITOR  
(Construction Lien Claims Order)  
(returnable June 15, 2018)**

June 12, 2018

**NORTON ROSE FULBRIGHT CANADA LLP**  
Royal Bank Plaza, South Tower  
200 Bay Street, Suite 3800, P.O. Box 84  
Toronto, Ontario M5J 2Z4

**Orestes Pasparakis, LSO#: 36851T**

Tel: +1 416.216.4815

**Virginie Gauthier, LSO#: 41097D**

Tel: +1 416.216.4853

**Alan Merskey, LSO#: 41377I**

Tel: +1 416.216.4805

**Evan Cobb, LSO#: 55787N**

Tel: +1 416.216.1929

Fax: +1 416.216.3930

orestes.pasparakis@nortonrosefulbright.com

virginie.gauthier@nortonrosefulbright.com

alan.merskey@nortonrosefulbright.com

evan.cobb@nortonrosefulbright.com

Lawyers to the Monitor, FTI Consulting  
Canada Inc.

**TO: THE SERVICE LIST**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
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Court File No.: CV-17-11846-00CL

**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  
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10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531  
CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

Applicants

**NOTICE OF MOTION  
(Construction Lien Claims Order)  
(returnable June 15, 2018)**

FTI Consulting Canada Inc., in its capacity as Court-appointed monitor (the "**Monitor**") in the proceedings of the Applicants pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "**CCAA**") will make a motion to a Judge of the Ontario Superior Court of Justice (Commercial List), on Friday, June 15, 2018, at 10:00 am or as soon after that time as the motion can be heard, at the courthouse located at 330 University Avenue.

**PROPOSED METHOD OF HEARING:** The motion is to be heard orally.

**THE MOTION IS FOR:**

1 an Order, substantially in the form included in the Monitor's Motion Record (the "**Construction Lien Claims Order**"):

- (a) confirming the Monitor's determination of the Allowed Secured Construction Lien Claims and the Allowed Unsecured Construction Claims of the Identified Contractors and Connected Sub-Contractors (in each case, as defined below);
- (b) confirming the Monitor's determination of the quantum of the Remaining Owned Properties Claims (as defined below) of Identified Contractors and Connected Sub-Contractors;
- (c) confirming the Monitor's determination that the Identified Contractors and the Connected Sub-Contractors do not hold any (i) unsecured Construction Claims (as defined in the Claims Procedure Order of the Ontario Superior Court of Justice (Commercial List) granted in these proceedings on December 8, 2017 (the "**Claims Procedure Order**")) in respect of the Surrendered Leased Properties, Affiliated Leased Properties or Remaining Owned Leased Properties as identified in the Monitor's Twentieth Report separately for each such Identified Contractor (in each case as defined below, and collectively the "**Applicable Properties**"), other than the Allowed Unsecured Construction Claims; or (ii) post-filing Construction Claims in respect of their Applicable Properties;
- (d) directing the Monitor to distribute the Secured Construction Lien Payments (as defined below) to the Identified Contractors in full satisfaction of the Allowed Secured Construction Lien Claims of the Identified Contractors and the Connected Sub-Contractors;
- (e) confirming that any further Claim (as defined in the Claims Procedure Order) by any Identified Contractor or by any Connected Sub-Contractor arising in respect of their Applicable Properties is fully and finally barred and extinguished;

(f) directing steps be taken to dismiss or vacate resolved lien claims and construction liens; and

2 such further and other relief as this Court may deem just.

**THE GROUNDS FOR THE MOTION ARE:**

*Lease Surrender Transactions*

1 On October 4, 2017 and October 13, 2017, the Court approved transactions that would provide for the return to the applicable landlord of certain premises leased by Sears Canada Inc. ("**Sears Canada**") in return for cash consideration payable to Sears Canada by the applicable landlord (the "**Lease Surrender Transactions**");

2 The Lease Surrender Transactions provided material cash consideration to Sears Canada in connection with the surrender of the following leased premises: Promenade Mall; Lime Ridge Mall; Polo Park; Fairview Pointe-Claire; Fairview Mall; Scarborough Town Centre; Oakville Place; Nanaimo North Town Centre; Orchard Park Shopping Centre; Brentwood Mall; and Avalon Mall (collectively, the "**Surrendered Leased Properties**");

3 The Lease Surrender Transactions were all implemented during October and November 2017;

4 In connection with the Lease Surrender Transactions, certain Court-ordered Construction Lien Claim Reserves were established to hold proceeds from the Lease Surrender Transactions in the aggregate amounts claimed under all construction liens registered against the Surrendered Leased Properties;

5 All liens registered against the Surrendered Leased Properties were vacated pursuant to orders of the Court;

6 The Court ordered that the only recourse of a lien claimant in connection with a construction lien on Surrendered Leased Properties would be to the Construction Lien Claim Reserve for the applicable Surrendered Leased Property, which can only be released upon further Order of the Court;

7 In addition, Sears Canada agreed with certain of the landlords under the Lease Surrender Transactions to cause certain liens registered against other properties owned by those landlords or affiliated landlords (the “**Affiliated Leased Properties**”) to be vacated;

8 Sears Canada has also paid to the Monitor or the Monitor’s legal counsel, pursuant to escrow arrangements, or into court, pursuant to orders under applicable construction lien legislation, funds (the “**Affiliated Properties Reserves**”) in an amount sufficient to vacate all liens that were registered against the Affiliated Leased Properties at the time of closing of the Lease Surrender Transactions;

9 In the case of all leased properties on which construction liens have been filed other than the Surrendered Leased Properties and Affiliated Leased Properties, no Lease Surrender Transaction took place and no proceeds are available to satisfy any liens registered against those properties;

10 In aggregate, the Construction Lien Claim Reserves and the Affiliated Properties Reserves hold \$11,129,783.92, which represents an amount in excess of the total aggregate value of all liens filed against the Affiliated Leased Properties and the Surrendered Leased Properties and the maximum potential secured lien claims against these properties prior to review by the Monitor;

Remaining Owned Properties

11 Sears Canada has not yet transferred its right, title and interest in any owned real properties other than the Garden City (Winnipeg) property and the Upper Canada Home Store property (Newmarket) (the remaining owned properties, being the “**Remaining Owned Properties**”);

Claims Procedure Order

12 On December 8, 2017, the Court granted the Claims Procedure Order;

13 The Claims Procedure Order established a process for the Monitor to notify Construction Contractors of the Monitor’s position on the value of the Construction Claims, which notification (the “**Notice of Construction Claim**”) is deemed to include all of the Construction Claims of not only the Construction Contractor itself but also the Construction Claims of any and all sub-contractors who provided materials and/or services in connection with the improvement under an agreement or engagement with the Construction Contractor or any other construction sub-contractor at any level (each a “**Connected Sub-Contractor**”);

14 The Claims Procedure Order also provided a notice procedure (the “**Notices of Dispute of Construction Claims**”) for any Construction Contractor to dispute, on its own behalf and on behalf of any Connected Sub-Contractor, the position of the Monitor and Sears Canada on applicable Construction Claims as set out in a Notice of Construction Claim;

15 In certain cases, Construction Contractors did not file Notices of Dispute of Construction Claim in respect of their Construction Claims and the Construction Claims of Connected Sub-Contractors as determined by the Monitor and set out in the Notice of Construction Claim delivered to such Construction Contractors (such Construction Contractors being referred to herein as the “**Identified Contractors**”);



16 If a Construction Contractor did not deliver to the Monitor a completed Notice of Dispute of Construction Claim and no other Notices of Dispute of Construction Claim were received by the Monitor from any Connected Sub-Contractors in respect of such Construction Claim by February 15, 2018, then all applicable parties are deemed to have accepted the Construction Claim as set out in the Notice of Construction Claim and shall have no further right to dispute the determination of such Construction Claim as set out in the Notice of Construction Claim (such Construction Claims are referred to herein as the “**Undisputed Construction Claims**”);<sup>1</sup>

*Resolution of Construction Claims*

17 A summary of the Construction Claims of Identified Contractors and the associated Connected Sub-Contractors claiming under them that the Monitor has determined are allowed and secured by the Construction Lien Claim Reserve or the Affiliated Properties Reserves (the “**Allowed Secured Construction Lien Claims**”) is set out in the Twentieth Report of the Monitor served in connection with this motion;

18 A summary of the Construction Claims of Identified Contractors and the associated Connected Sub-Contractors claiming under them that do not relate to the Remaining Owned Properties and that the Monitor has determined are allowed and not secured by the Construction Lien Claim Reserve or the Affiliated Properties Reserves and are not post-filing claims (the “**Allowed Unsecured Construction Claims**”) is set out in the Twentieth Report of the Monitor served in connection with this motion;

19 The Monitor’s determination of the quantum of the Construction Claims of Identified Contractors and the Connected Sub-Contractors claiming under them in connection with the

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<sup>1</sup> One Notice of Dispute of Construction Claim was received from a Construction Sub-Contractor in connection with the Applicable Properties and the Identified Contractors’ Construction Claims. However, that Notice of Dispute of Construction Claim was subsequently withdrawn.

Remaining Owned Property located at Upper Canada Mall (Newmarket, Ontario) are also set out in the Twentieth Report of the Monitor (the “**Remaining Owned Properties Claims**”);

20 To the extent the proceeds of a Remaining Owned Property are sufficient to satisfy the Remaining Owned Properties Claims secured by a lien on such Remaining Owned Property, those Remaining Owned Properties Claims should, subject to further Court order, be treated in the same manner as Allowed Secured Construction Lien Claims and paid in full from the proceeds of sale of the applicable Remaining Owned Property;

21 To the extent the proceeds of a Remaining Owned Property are not sufficient to satisfy the Remaining Owned Properties Claims secured by a lien on such Remaining Owned Property or to the extent the Remaining Owned Properties Claims are not secured by a lien on any Remaining Owned Property, such Remaining Owned Properties Claims would be unsecured claims;

#### Distributions

22 The Monitor now requires approval of the Court to distribute funds to the Identified Contractors from the Construction Lien Claims Reserves and the Affiliated Properties Reserves to satisfy the Allowed Secured Construction Lien Claims (the “**Secured Construction Lien Payments**”);

#### Releases

23 Sears Canada and the Monitor require certainty regarding the resolution of lien and Construction Claim issues and, accordingly, the Monitor requests an Order confirming that all Claims by the Identified Contractors and the Connected Sub-Contractors claiming under them arising in respect of their Applicable Properties, including any claims against any Sears Canada Entities or their current and former directors and officers, and any claims against the Sears

Canada Entities' current and former employees, are fully and finally determined as set out above and, in the case of the Allowed Secured Construction Lien Claims, fully and finally satisfied through the payment in satisfaction of the Allowed Secured Construction Lien Claims;

24 Upon completion of the payments of the Allowed Secured Construction Lien Claims, any liens securing such claims, any actions in which such liens are asserted, and any funds paid into court in respect of such claims should be vacated or discharged, dismissed and released as applicable;

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

- 1 The Twentieth Report of the Monitor dated June 12, 2018; and
- 2 Such further and other evidence as counsel may advise and this Court may permit.

June 12, 2018

**Norton Rose Fulbright Canada LLP**  
 Royal Bank Plaza, South Tower, Suite 3800  
 200 Bay Street, P.O. Box 84  
 Toronto, Ontario M5J 2Z4 CANADA

**Orestes Pasparakis, LSO#: 36851T**

Tel: +1 416.216.4815

**Virginie Gauthier, LSO#: 41097D**

Tel: +1 416.216.4853

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Tel: +1 416.216.1929

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Lawyers for the Monitor

TO: **THE SERVICE LIST**

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

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

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

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

Proceeding commenced at TORONTO

**NOTICE OF MOTION**  
**(Construction Lien Claims Order)**  
**(returnable June 15, 2018)**

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Royal Bank Plaza, South Tower  
200 Bay Street, Suite 3800, P.O. Box 84  
Toronto, Ontario M5J 2Z4

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Tel: +1 416.216.4815

**Virginie Gauthier, LSO#: 41097D**

Tel: +1 416.216.4853

**Alan Merskey, LSO#: 41377I**

Tel: +1 416.216.4805

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orestes.pasparakis@nortonrosefulbright.com

virginie.gauthier@nortonrosefulbright.com

alan.merskey@nortonrosefulbright.com

evan.cobb@nortonrosefulbright.com

Lawyers to the Monitor, FTI Consulting Canada Inc.

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

THE HONOURABLE MR. ) ●, THE ●  
 )  
JUSTICE HAINEY ) DAY OF ●, 2018

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  
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LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC.,  
168886 CANADA INC., AND 3339611 CANADA INC.

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

**ORDER  
(Construction Lien Claims)**

THIS MOTION made by FTI Consulting Canada Inc., in its capacity as court-appointed Monitor (the “**Monitor**”), for an Order with respect to Claims of certain Construction Contractors and certain reserve amounts described as the Construction Lien Claims Reserves and the Affiliated Properties Reserves, as described in the Twentieth Report of the Monitor, dated ●, 2018, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Twentieth Report of the Monitor, dated June 12, 2018, (the “**Twentieth Report**”), and on hearing the submissions of counsel for the Applicants, the Monitor,

and those other counsel present, no one else appearing although duly served as appears from the affidavit of service of ● sworn ●, 2018,

## **SERVICE**

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

## **DEFINED TERMS**

2. THIS COURT ORDERS that all capitalized terms used herein and not defined have the meanings ascribed to them in the Twentieth Report.

## **CLAIMS OF CONSTRUCTION CONTRACTORS**

3. THIS COURT ORDERS that the Allowed Secured Construction Lien Claims and the Allowed Unsecured Construction Claims (collectively, the “**Allowed Construction Claims**”) are hereby confirmed, in accordance with the terms of the Claims Procedure Order, to be accepted Claims pursuant to the Claims Procedure Order.

4. THIS COURT ORDERS that the Monitor’s determination of the quantum of the Remaining Owned Properties Claims of the Identified Contractors and the Connected Sub-Contractors (in their capacities as Connected Sub-Contractors) as set out in the Twentieth Report and the Monitor’s determination that the Identified Contractors and the Connected Sub-Contractors (in their capacities as Connected Sub-Contractors) have no Post-Filing Claims in respect of their Applicable Properties are hereby confirmed in accordance with the terms of the Claims Procedure Order.

5. THIS COURT ORDERS that the Identified Contractors and all Connected Sub-Contractors (in their capacities as Connected Sub-Contractors) are deemed to have accepted and agreed (i) to the determination of the value and, if applicable, characterization of the Claims described in paragraphs 3 and 4 above; (ii) that they have no Post-Filing Claims in respect of their Applicable Properties; and (iii) excluding those Allowed Unsecured Construction Claims described in paragraph 3 above, that they have no other Allowed Unsecured Construction Claims in respect of any of their Applicable Properties, in each case in accordance with the Claims Procedure Order.

**PAYMENT OF ALLOWED SECURED CONSTRUCTION LIEN CLAIMS**

6. THIS COURT ORDERS that the Monitor is hereby directed to make payments from the Construction Lien Claims Reserve and the Affiliated Properties Reserves (or otherwise from Sears Canada's funds on account of amounts paid into Court in connection with vacating the liens registered against the Affiliated Leased Properties) in the amounts and to the Identified Contractors set out on Schedule "A" hereto in full satisfaction of the Allowed Secured Construction Lien Claims.

7. THIS COURT ORDERS that the Identified Contractors shall have sole responsibility to distribute the payments made pursuant to paragraph 6 above to the Connected Sub-Contractors in connection with the improvement for which such payment is made and the Sears Canada Entities shall have no liability to the Connected Sub-Contractors in connection with any Allowed Secured Construction Lien Claims after payment of the amounts paid pursuant to paragraph 6 are made.

8. THIS COURT ORDERS that the Monitor shall have no liability with respect to or as a result of performing its duties under this Order, including the payment of the amounts set out in paragraph 6 above except to the extent such liabilities result from the gross negligence or wilful misconduct of the Monitor as determined by this Court.

**RELEASE OF CLAIMS**

9. THIS COURT ORDERS that any Claims (as defined in the Claims Procedure Order), which for greater certainty includes D&O Claims (as defined in the Claims Procedure Order), and any claims against the Sears Canada Entities' current or former employees, in each case by the Identified Contractors and the Connected Sub-Contractors (in their capacities as Connected Sub-Contractors) arising in respect of any of their Applicable Properties, other than: (i) the Allowed Construction Claims; and (ii) the Remaining Owned Properties Claims, are hereby extinguished and the Identified Contractors and the Connected Sub-Contractors (in their capacities as Connected Sub-Contractors) are hereby barred, estopped and enjoined from asserting or enforcing any such Claims.

10. THIS COURT ORDERS AND DIRECTS that each Identified Contractor and Connected Sub-Contractor will execute consents to an order or orders in respect of their Applicable Properties, as follows, other than in connection with the Remaining Owned Properties Claims:



- a) discharging all liens securing the Identified Contractor's or the Connected Sub-Contractor's Construction Claims, whether such liens were preserved through registration or delivery;
  - b) for any liens securing the Identified Contractor's or the Connected Sub-Contractor's Construction Claims preserved through registration, vacating the registration of the claim(s) for lien and certificate(s) of action (if any), by which such liens were preserved and perfected;
  - c) for any liens securing the Identified Contractor's or the Connected Sub-Contractor's Construction Claims preserved through delivery, vacating the claims for lien that have been delivered;
  - d) dismissing without costs the actions through which the liens securing the Identified Contractor's or the Connected Sub-Contractor's Construction Claims are being pursued; and
  - e) where security has been posted pursuant to section 44(1) of the *Construction Lien Act* or equivalent legislation in other jurisdictions, delivering up out of court of the funds or other instrument so posted.
-

**SCHEDULE "A"**

Abbarch Architecture Inc.	Fairview Mall, Toronto, ON	\$105,960.05
Petroff Partnership Architects	Fairview Park Mall, Kitchener, ON	\$130,637.74
152610 Canada Inc. cob Laurin & Company	Limeridge Mall, Hamilton, ON	\$1,059,648.80
Hanson + Jung Architects Inc.	Limeridge Mall, Hamilton, ON	\$60,207.77
APM Construction Services Inc.	Mapleview Centre, Burlington, ON	\$100,339.47
Hanson + Jung Architects Inc.	Mapleview Centre, Burlington, ON	\$14,786.71
Hanson + Jung Architects Inc.	Oakville Place, Oakville, ON	\$127,032.84
APM Construction Services Inc.	Oshawa Centre, Oshawa, ON	\$134,295.54
152610 Canada Inc. cob Laurin & Company	Scarborough Town Centre, Toronto, ON	\$842,667.78
Abbarch Architecture Inc.	Scarborough Town Centre, Toronto, ON	\$99,359.94
		<b>\$2,674,936.64</b>

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at Toronto

**ORDER (CONSTRUCTION LIEN CLAIMS)**

**NORTON ROSE FULBRIGHT CANADA LLP**  
Royal Bank Plaza, South Tower, Suite 3800  
200 Bay Street, P.O. Box 84  
Toronto, Ontario M5J 2Z4 CANADA

**Orestes Pasparakis, LSUC#: 36851T**

Tel: +1 416.216.4815

**Virginie Gauthier, LSUC#: 41097D**

Tel: +1 416.216.4853

**Alan Merskey, LSUC#: 41377I**

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Tel: +1 416.216.1929

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orestes.pasparakis@nortonrosefulbright.com  
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evan.cobb@nortonrosefulbright.com

Lawyers for FTI Consulting Canada Inc., in its capacity as Monitor

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