

**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  
(Approval of Liberty Termination Fee)  
(returnable November 19, 2018)**

November 14, 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**

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SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

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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

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APPLICANTS

**NOTICE OF MOTION**  
**(Approval of Liberty Termination Fee)**

The Monitor will make a motion before a judge of the Ontario Superior Court of Justice (Commercial List) on November 19, 2018, at 2:00 p.m., or as soon after that time as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

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

**THE MOTION IS FOR:**

1. An Order, among other things, approving the payment of a termination fee pursuant to an Agreement of Purchase and Sale entered into between Sears Canada Inc. ("**Sears Canada**") and 1979353 Ontario Inc. dated June 13, 2018 (the "**Liberty APA**") for the former full line store owned by Sears Canada at the Upper Canada Mall in Newmarket, Ontario (the "**UCM Full Line Property**"); and
2. Such further and other relief as this Court may deem just.

**THE GROUNDS FOR THE MOTION ARE:**

1. The Applicants were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended (the "**CCAA**") pursuant to the Initial Order of the Ontario Superior Court of Justice (Commercial List) dated June 22, 2017, as amended and restated;
2. FTI Consulting Canada Inc. was appointed to act as the Monitor (the "**Monitor**") in the CCAA proceeding;
3. The UCM Full Line Property is located adjacent to the Upper Canada Mall in Newmarket, Ontario;
4. The UCM Full Line Property is the subject of an Option Agreement (the "**Option Agreement**") made as of January 21, 1994 between Sears Canada and the owner of the adjacent Upper Canada Mall property (the "**Option Holder**");
5. Pursuant to the Option Agreement, Sears Canada granted the Option Holder an option to purchase the UCM Full Line Property (the "**Option**");
6. The Option Holder has exercised the Option and the transaction between the Option Holder and Sears Canada created thereby is proceeding for court approval;
7. Prior to the exercise of the Option by the Option Holder, Sears Canada, with the support of the Monitor, entered into the Liberty APA;
8. When entering into the Liberty APA, the parties were aware of the possibility that the Option Holder may either exercise the Option or exercise its rights under a separate right of first refusal (the "**ROFR**") thereby preventing the transaction under the Liberty APA from closing;
9. 1979353 Ontario Inc. would only agree to enter into the Liberty APA if: (i) it was a condition of closing that neither the Option nor the ROFR had been exercised; and (ii) a termination fee was a feature of the agreement such that 1979353 Ontario Inc. would be compensated in the event the Liberty APA could not close as a result of the exercise of the Option or the ROFR;
10. As a result, Section 6.6 of the Liberty APA provided, among other things, that if the Liberty APA is terminated as a result of the exercise of the Option and if the closing of the sale

to the Option Holder under the Option occurs, then 1979353 Ontario Inc. would be entitled to a termination payment in the amount of \$1,000,000 (the “**Liberty Termination Fee**”);

11. At the time of the Liberty APA, the Monitor supported the agreement to pay the Liberty Termination Fee;

12. 1979353 Ontario Inc. has relied in good faith on the obligation to pay the Liberty Termination Fee;

13. The Monitor supports payment of the Liberty Termination Fee;

14. Confidential Appendix “B” to the Sixth Supplement to the Nineteenth Report of the Monitor contains confidential and commercially sensitive information the disclosure of which would be inconsistent with confidentiality terms previously agreed to by Sears Canada;

#### **General**

15. The provisions of the CCAA, including section 11, and the inherent and equitable jurisdiction of this Honourable Court;

16. Rules 1.04, 1.05, 2.03, 3.02, 16 and 37 of the Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194; and

17. Such further and other grounds as counsel may advise and this Court may permit.

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

1. The Sixth Supplement to the Nineteenth Report of the Monitor to be served in connection with this Motion; and

2. Such further and other evidence as counsel may advise and this Court may permit.

November 14, 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

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[orestes.pasparakis@nortonrosefulbright.com](mailto:orestes.pasparakis@nortonrosefulbright.com)

[virginie.gauthier@nortonrosefulbright.com](mailto:virginie.gauthier@nortonrosefulbright.com)

[alan.merskey@nortonrosefulbright.com](mailto:alan.merskey@nortonrosefulbright.com)

[evan.cobb@nortonrosefulbright.com](mailto:evan.cobb@nortonrosefulbright.com)

Lawyers for FTI Consulting Canada Inc.,  
as Court-appointed Monitor

**TO: SERVICE LIST**

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**  
**(Liberty Termination Fee)**

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200 Bay Street, Suite 3800, P.O. Box 84  
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Fax: +1 416.216.3930

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virginie.gauthier@nortonrosefulbright.com  
alan.merskey@nortonrosefulbright.com  
evan.cobb@nortonrosefulbright.com

Lawyers for FTI Consulting Canada Inc.,  
as Court-appointed Monitor



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

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

THE HONOURABLE MR.	)	MONDAY, THE 19 <sup>TH</sup>
	)	
JUSTICE HAINEY	)	DAY OF NOVEMBER, 2018

IN THE MATTER OF THE *COMPANIES' CREDITORS  
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APPLICANTS

**TERMINATION FEE ORDER  
(Newmarket Full Line)**

THIS MOTION, made by FTI Consulting Canada Inc., in its capacity as court-appointed Monitor of Sears Canada Inc., among others, (the "**Monitor**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "**CCAA**"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion of the Monitor and the Sixth Supplement to the Nineteenth Report of FTI Consulting Canada Inc., in its capacity as Monitor, filed, and on hearing the submissions of respective counsel for the Applicants, the Monitor and such other counsel as were present, no one else appearing although duly served as appears from the Affidavit of Service of ● sworn ●, 2018, 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 Amended and Restated Initial Order in these proceedings dated June 22, 2017 (the “**Initial Order**”), or in the Sixth Supplement to the Nineteenth Report of the Monitor, as applicable.

## APPROVAL OF THE LIBERTY TERMINATION FEE

3. THIS COURT ORDERS that the Monitor is authorized to distribute the Liberty Termination Fee to 1979353 Ontario Inc. from the funds held by the Monitor on behalf of Sears Canada Inc. at the time set out in, and in accordance with the terms of, the Liberty APA.

## SEALING

4. THIS COURT ORDERS that Confidential Appendix “B” to the Sixth Supplement to the Nineteenth Report of the Monitor shall be and is hereby sealed, kept confidential and shall not form part of the public record pending further Order of this Court.

## GENERAL PROVISIONS

5. THIS COURT ORDERS that, notwithstanding:

- (a) the pendency of these proceedings;
- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of any of the Applicants and any bankruptcy order issued pursuant to any such applications; or
- (c) any assignment in bankruptcy made in respect of any of the Applicants;

the payment of the Liberty Termination Fee pursuant to this Order shall be binding on any trustee in bankruptcy or receiver that may be appointed in respect of any of the Applicants and shall not be void or voidable by creditors of any of the Applicants, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent

conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

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

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
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Proceeding commenced at Toronto

**TERMINATION FEE ORDER  
(Newmarket Full Line)**

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Royal Bank Plaza, South Tower, Suite 3800  
200 Bay Street, P.O. Box 84  
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