

CITATION: Sears Canada Inc. (Re), 2017 ONSC 6059  
COURT FILE NO.: CV-17-11846-00CL  
DATE: 20171012

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**(COMMERCIAL LIST)**

**RE:** 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

**BEFORE:** HAINEY J.

**COUNSEL:** *Jeremy Dacks, Shawn Irving and Karin Sachar*, for the Applicants

*Adam Slavens*, for Canadian Tire Corporation, Limited

*Orestes Pasparakis, Virginie Gauthier and Evan Cobb*, for FTI Consulting  
Canada, Monitor

*Joseph Latham and Jason Wadden*, for the ABL DIP Agent and Lenders

*Sean Zweig*, for the Board and Special Committee

*D.J. Miller and Mudasir Marfatia*, for Oxford Properties

*Mark Zigler and Andrew Hatnay*, for Sears Pensioners

*J. Dietrich and T. Pinos*, for Term DIP Agent and Lenders

*Patrick Corney*, for Distinctive Appliances Inc.

*Lily Harmer*, for Superintendent of Financial Services

*Aryo Shalviri*, for Dyson Canada Limited

*Edmond Lamek*, for RioCan and CT REIT

*Bevan Brooksbank*, for Sears Holdings, Sears Roebuck

*Rachel Migicovsky*, for Abbarch Architecture Inc.

*Daniel Murdoch*, for Stranzl Group

*Charles Simco*, for Laurin General Contractor

*Natasha MacParland*, for Cadillac Fairview

*Robert Harason*, for APM Construction Services

*Jeffrey Armel*, for Rossclair Contractors

*Susan Ursel* and *Katy O'Rourke*, for Active and Former Employees

*Lou Brzezinski*, for Far East Watchcases Ltd., HG International, 1291079 Ontario Limited

*Linda Galessiere*, for Ivanhoe, Morguard, Triovest, Crombie, Cominar, 20 VIC

*David Ullmann*, for Orchard Park Shopping Centre Holdings Inc. and Primaris Management Inc.

**HEARD:** October 4, 2017

### **ENDORSEMENT**

#### **(Approval of Stay Extension and Lease and Real Property Transactions)**

[1] These motions were brought by Sears Canada Inc. ("Sears Canada") and the other Applicants in this proceeding for orders approving certain transactions in which Sears Canada proposes the following: (i) to sell or transfer its interest in certain of its business lines, leases or other assets or, (ii) in the case of certain leases, to surrender those leases back to the applicable landlord.

[2] The proposed transactions for which the Applicants seek approval fall into the following categories:

- 1) Sales of Business Lines: Assets and businesses of each of SLH Holdings Inc. ("SLH"), Corbeil Electrique Inc. ("Corbeil") and Sears Home Improvements business are to be transferred and sold to third-party purchasers on a going-concern basis;
- 2) Sale of Owned Real Property: Sears Canada is to sell its owned property located at the Garden City Shopping Centre in Winnipeg, Manitoba; and
- 3) Lease Transfer/Surrender Transactions: These transactions involve certain leases of the Applicants being transferred or surrendered to either third-party purchasers or to the landlord on the lease. A summary of the locations subject to these transactions is set out in Schedule "A" hereto.

[3] A motion was also brought for the approval of the transfer of certain "Viking" trademarks and brands to a third-party purchaser. That motion was adjourned on consent.

[4] In addition to the approval and vesting orders, motions were also brought seeking the following orders:

- (a) with respect to the sale of the Sears Home Improvements business, an assignment order conveying to the purchaser the rights and obligations under various contracts to be assumed pursuant to s. 11.3 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA");
- (b) the sealing of certain information, including commercially sensitive transaction terms and the confidential bid summary provided by the Monitor in its Third Report;
- (c) extending the current Stay Period to November 7, 2017; and
- (d) approving a distribution of sale proceeds to the DIP lenders, subject to certain 'Construction Lien Claim Reserves'.

[5] For the reasons that follow I am satisfied that the requested orders should be granted.

### **The Approval and Vesting Orders**

[6] On July 13, 2017, I approved a sale and investment solicitation process (the "SISP") proposed by the Applicants to seek bids and proposals for a broad range of potential transactions with respect to its businesses and assets.

[7] The proposed transactions sought to be approved on these motions were identified, negotiated and entered into through the SISP process.

[8] I have concluded that the proposed transactions satisfy each of the following factors under s. 36(3) of the *CCAA*:

- (a) the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) the monitor approved the process leading to the proposed sale or disposition;
- (c) the monitor filed a report stating that in the monitor's opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the creditors were adequately consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties is fair and reasonable; and
- (f) the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[9] The sale process conducted by the Applicants, through the Sale Advisor, BMO Nesbitt Burns Inc., was undertaken in accordance with the terms of the SISP and the order approving the SISP (“SISP Order”).

[10] Although the SISP was conducted on a short timeline, I concluded, when granting the SISP Order, that an expedited process was necessary in view of the following circumstances:

- a) the Applicants’ continuing and severe operating losses;
- b) the milestones set by the DIP lenders who were funding those operating losses; and
- c) the need to determine whether a going-concern solution could be implemented so that, in the absence of such a solution, Sears Canada could move to an inventory liquidation in time to maximize value during the important holiday retail season.

[11] The Monitor has overseen the SISP since its commencement and has been involved at every stage. The Monitor also approved the process that has led to the proposed transactions being put forward for approval.

[12] Further, the Monitor is of the opinion that the proposed transactions would be more beneficial to the Applicants’ creditors than a sale or other transaction in a bankruptcy and has confirmed its support for the relief sought by the Applicants on these motions.

[13] The proposed transactions contemplate the sale of only part of the Applicants’ assets and businesses. The Applicants received a potential going-concern bid (the “Going Concern Bid”) during the SISP. A going-concern solution would be preferred by many stakeholders. However, the advantages of a going-concern solution must be weighed against the need to respond to the current financial circumstances of the Applicants, including the concerns that led to the expedited SISP.

[14] The most recent amendments to the Applicants’ DIP Credit Agreements highlight this. The amendments - which the Applicants were required to enter into as a condition of the reinstatement of essential funding under the DIP Credit Agreements - require the following:

- a) an agreement acceptable to the DIP lenders must be entered into to undertake liquidations of the remaining Sears Canada locations on October 7, 2017;
- b) that liquidation agreement must be approved by the court no later than October 13, 2017; and
- c) the liquidation agreement must provide for the commencement of liquidation at the remaining Sears Canada locations by October 19, 2017. This date can be extended to October 26, 2017 at the DIP lenders’ discretion. As a result, a liquidation process will be able to move forward quickly if a going-concern solution cannot be achieved.

[15] As noted by the Monitor in its Third Report, the Going Concern Bid still presents significant risks and uncertain recoveries. The Applicants and the Monitor are continuing to work diligently with the bidders under the Going Concern Bid on a potential transaction that does not require the assets that the Applicants' seek approval to sell on these motions.

[16] As to other interested parties, I am satisfied that the proposed real estate transactions adequately reserve for and protect the rights of construction lien claimants to assert any priority rights that they may have to the sale proceeds of those transactions. The construction lien claimants, the DIP lenders, the landlords and Sears Canada have agreed to language in the draft orders to address these concerns.

[17] I am also satisfied that the proposed distributions to the DIP lenders are appropriate in the circumstances in view of the terms of the DIP Credit Agreements and the priority of the court-ordered charge securing the obligations under the DIP Credit Agreements.

[18] It is significant that the proposed transactions in respect of Corbeil and SLH, which are not part of the Going Concern Bid, will preserve jobs and contractual and supplier relationships for those businesses.

[19] I have concluded that the proposed transactions maximize all possible value from available transactions while at the same time continuing to preserve the possibility of proceeding with a modified going-concern bid.

#### **Assignment Order**

[20] As a condition of the proposed sale of Sears Home Improvements business, the Applicants have requested an order, pursuant to s. 11.3 of the *CCAA*, assigning to the purchaser under that transaction all of Sears Canada's rights and obligations under a number of customer contracts to be assumed.

[21] I am satisfied that granting the requested assignment order is appropriate in the circumstances. The evidence demonstrates the following: (a) the Applicants have taken reasonable steps to notify each contractual counterparty; (b) these contracts do not require consent to assignment to be granted; (c) the proposed purchaser already administers these contracts on Sears Canada's behalf; (d) none of the exceptions specified in s. 11.3(2), that would otherwise preclude the assignment order being made, apply; and (e) any monetary defaults under any of the contracts to be assigned will be remedied upon closing by the proposed purchaser by its assumption of such liabilities.

#### **Co-Tenancy Stay**

[22] The proposed approval orders in connection with the lease surrender transactions preserve, for a limited time period, the benefits of the 'co-tenancy stay', which was granted pursuant to paragraph 15 of the Initial Order and provides protections to landlords from the exercise of certain rights by other tenants as a result of the insolvency of the Applicants. In the circumstances, I am satisfied that the proposed extension of the co-tenancy stay is appropriate.

### **Stay Extension Order**

[23] I find that the Applicants have been acting and continue to act in good faith and with due diligence in this proceeding. It is clear that additional time is needed to complete the proposed transactions and determine next steps in these proceedings, including further consideration of any going-concern transaction that may be possible in the timelines available. The Applicants are projected to have sufficient liquidity to continue operations through the requested stay period. The stay extension order is therefore granted.

### **Sealing Order**

[24] The Confidential Appendices to the Monitor's Third Report contain information on the bids received in the SISP, including purchase price information as well as confidential commercial terms agreed to between Sears Canada and various third parties. Certain schedules to the transaction agreements also contain commercially sensitive or otherwise confidential information. I have concluded that public disclosure of this information would be harmful to the integrity of the SISP and to the commercial interests of the parties. The sealing provisions of each of the approval and vesting orders are therefore granted.



HAINEY J

**Date:** October 12, 2017

### Schedule "A"

Lease Transfer Transaction	#10, 5800-79 Avenue S.E., Calgary, Alberta ("Calgary Distribution Centre")	Indigo Books & Music Inc.
Lease Surrender Transactions	4567 Lougheed Highway, Burnaby, British Columbia ("Brentwood Mall")	Shape Brentwood Limited Partnership, Brentwood Towncentre Limited Partnership and 0862223 B.C. Ltd.
	4750 Rutherford Road, Nanaimo, British Columbia ("Nanaimo North")	Shape Properties (Nanaimo) Corp. and NNTC Equities Inc. and 1854 Holdings Ltd.
	48 Kenmount Rd., St. John's, NL ("Avalon Mall")	Crombie Developments Limited <sup>1</sup>
	999 Upper Wentworth Street, Hamilton, Ontario ("Lime Ridge")	CF/Realty Holdings Inc. / Ontrea Inc.
	66Q – 1485 Portage Avenue, Winnipeg, Manitoba ("Polo Park")	Ontrea Inc.
	6801 Route Transcanadienne, Pointe-Claire, Quebec ("Pointe-Claire")	Fairview Point-Claire Leaseholds Inc.
	1800 Sheppard Avenue East, Suite 330, Willowdale, Ontario ("Fairview Mall")	Fairmall Leaseholds Inc.
	300 Borough Drive, Scarborough, Ontario ("Scarborough Town Centre")	Scarborough Town Centre Holdings Inc.
	240 Leighland Ave, Oakville, Ontario ("Oakville Place")	Riocan Holdings (Oakville Place) Inc.
	2271 Harvey Avenue, Kelowna, British Columbia ("Kelowna Full Line Store / Home Store")	Orchard Park Shopping Centre Holdings Inc.

<sup>1</sup> This transaction is structured as a lease amendment transaction which shortens the term of the lease such that the lease would expire in February 2018.