

CITATION: Sears Canada Inc. (Re), 2017 ONSC 6235
COURT FILE NO.: CV-17-11846-00CL
DATE: 20171024

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 and Shawn Irving*, for the Applicants

Susan Ursel and Kristen Allen, Employee Representative Counsel

Natasha MacParland, for Cadillac Fairview Corporation

J. Dietrich and R. Jacobs, for DIP Term Agent and Lenders

David Ullmann, for Bentall Kennedy and Primaris Management Inc.

Orestes Pasparakis, Alan Merskey and Evan Cobb, for the Monitor, FTI Consulting
Canada Inc.

Joseph Latham, for Wells Fargo, DIP ABL Agent

Ken Rosenberg and Lily Harmer, for Superintendent of Financial Services

Aryo Shalviri, for Dyson Canada Limited

Jules Monteyne and Andrew Hatnay, Representative Counsel for Pensioners

Bevan Brooksbank, for Sears Holdings, Sears, Roebuck & Company

Jeffrey Levine, for Luxottica Retail Canada Inc.

Sean Zweig, for the Board of Directors and the Special Committee of the Board of
Directors of Sears Canada Inc.

Monique Jilesen, for Middleby Corporation

Lou Brzezinski and Alexandra Teodorescu, for Far East Watchcases Ltd.

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

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

C.W. Besant, for Promenade Limited Partnership and Promenade General Partner Inc.

HEARD: October 13, 2017

ENDORSEMENT

Background

[1] Sears Canada has been a significant Canadian retailer and an important part of the lives of Canadians for over 65 years. At the commencement of these proceedings, Sears Canada and its affiliates employed approximately 17,000 people at 225 stores across Canada and at its head office. The evidence has clearly established the serious financial difficulties the company has faced in recent times. The consequences of these financial difficulties have affected countless employees who have invested years of their lives as part of Sears Canada as well as suppliers, landlords and others who have dealt with the company over many years.

[2] The applicants commenced these proceedings with the stated goal of emerging as a stronger, more focused, competitor in the Canadian retail industry. According to the evidence, Sears Canada's goal was to continue to operate a large number of stores, maintain a significant number of employees, and service Sears Canada's customers across Canada, either through a restructuring or a going-concern sale.

[3] Although I am satisfied that the applicants diligently pursued a going-concern solution for several months, Sears Canada's operating losses continued to significantly mount during this time. As each day passed, the value recoverable by the applicants' creditors from Sears Canada's assets continued to erode. Despite the applicants' efforts, a viable going-concern solution did not materialize.

[4] For the reasons outlined in the motion materials and the Third and Fourth Reports of the Monitor, it has become apparent to me that steps have to be taken immediately to realize upon the remaining value in Sears Canada's business for the benefit of all creditors through an orderly liquidation process during the holiday retail season. Unfortunately, there is no other viable alternative.

The Motions

[5] On October 13, 2017, the applicants sought the following orders:

- a) Approval of an Agency Agreement (the "Liquidation Agreement") pursuant to which the inventory, furniture, fixtures and equipment at all remaining Sears Canada locations would be liquidated commencing on October 19, 2017 (the "Liquidation");

- b) An extension of the stay of proceedings granted in the Initial Order to January 22, 2018 to permit the Liquidation to be completed; and
- c) An amendment to the DIP Term Credit Agreement to allow the Sears Canada Group to retain sufficient liquidity to proceed with the Liquidation (the "Ninth Amendment").

I have granted the orders for the following reasons.

The Liquidation

[6] I am satisfied that the Liquidation should be approved. The process to solicit bids from potential liquidators, as described in the applicants' motion materials and the Monitor's Fourth Report, was a reasonable process. Based upon the summary of bids provided in the Confidential Appendix to the Monitor's Fourth Report, I am satisfied that the terms of the Liquidation Agreement resulted from the best bid received for the Liquidation.

[7] I am also satisfied that the proposed approval order and accompanying sale guidelines are reasonable in the circumstances and are consistent with other liquidation arrangements for other large retail liquidations.

[8] For the foregoing reasons, and after consideration of the criteria set out in s. 36 of the *Companies' Creditors Arrangement Act*, the order approving the Liquidation is granted.

[9] The Confidential Appendix to the Monitor's Fourth Report contains commercially sensitive information regarding the bids submitted by various potential liquidators. The public disclosure of this information could be prejudicial to the sale process and to the interests of those liquidators who have submitted bids. I am satisfied that in the circumstances the Confidential Appendix should be sealed and kept confidential pending further order of the court.

DIP Credit Agreements

[10] The DIP credit agreements have been amended a number of times during these proceedings.

[11] According to the Monitor, the Ninth Amendment to the DIP Term Credit Agreement will allow the applicants to retain \$67,700,000 from the initial proceeds of the Liquidation that would otherwise have been paid to the DIP term lenders. These retained proceeds may be used by the applicants in accordance with an approved budget. According to the applicants' forecasts, this will provide sufficient cash to continue operations and, subject to the receipt of additional asset sale proceeds, repay all outstanding obligations under the DIP Term Credit Agreement upon its maturity.

[12] Although an amendment fee of US \$587,500 is payable in connection with the Ninth Amendment to the DIP Term Credit Agreement, the funding provided by the amendment is essential to the continued progress of these proceedings and the continued steps to maximize recoveries for creditors. As noted by the Monitor in its Supplement to the Fourth Report, any alternative to the funding provided under the Ninth Amendment would likely also result in significant additional fees and professional costs to the applicants.

[13] I am therefore satisfied that the approval of the Ninth Amendment to the DIP Term Credit Agreement, including the amendment fee, is appropriate in the circumstances.

[14] The applicants have also proposed minor amendments to paragraph 54 of the Initial Order which I have approved. Paragraph 54 of the Initial Order provided certain protections in connection with cash collateral provided to the DIP ABL lenders to secure obligations under outstanding pre-filing letters of credit. I am satisfied that the amendments to paragraph 54 are necessary to ensure that cash collateral provided to the DIP ABL lenders to secure obligations under outstanding letters of credit issued in the post-filing period has the benefit of similar protections.

Stay Extension

[15] 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 Liquidation and finalize additional transactions for remaining assets. The Liquidation is to be completed on or about January 21, 2018.

[16] As a result of the Ninth Amendment, the applicants will have sufficient liquidity to continue operations through the requested stay period.

[17] The requested extension of the stay of proceedings to January 22, 2018 is therefore granted.

Promenade Transaction

[18] The applicants also requested an order approving a transaction pursuant to which Sears Canada's lease at Promenade Mall in Thornhill, Ontario, would be surrendered to the landlord in return for cash consideration (the "Promenade Transaction").

[19] The Promenade Transaction is similar to the lease surrender transactions that I previously approved on October 4, 2017. It was negotiated and finalized through the same process as those earlier transactions. For the reasons set out in my endorsement in connection with the October 4, 2017 orders, I am satisfied, after considering the factors set out in s. 36 of the *Companies' Creditors Arrangement Act*, that the Promenade Transaction should be approved.

[20] The unredacted version of the agreement governing the Promenade Transaction contains confidential purchase price information. Public disclosure of this information would be harmful to the integrity of the sale process, including any further marketing of the Promenade lease that may be required if the Promenade Transaction does not close. Accordingly, the unredacted version of the agreement shall be sealed pending further order of the court.

Conclusion

[21] The Liquidation and the closure of Sears Canada's business marks the end of an important era in Canadian retail history. This event affects a broad range of stakeholders. A number of counsel made submissions regarding the valuable contributions made by various groups to the restructuring process. I want to recognize, in particular, the contributions of Sears Canada's employees and pensioners both prior to and during this difficult process. I am mindful of the challenges that many of these individuals and their families now face. For many years Sears

Canada was a source not only of employment and income, but also a community to these employees and pensioners. I recognize and commend their continued commitment and professionalism at this difficult time.


HAINNEY J.

Date: October 24, 2017