

**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., CORBEIL  
ELECTRIQUE 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 LIMTIED, 955041 ALBERTA LTD., 4201531 CANADA  
INC., 168886 CANADA INC. and 3339611 CANADA INC.**

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

**FACTUM OF THE MOVING PARTY  
(MOTION RETURNABLE JANUARY 22, 2018)**

January 17, 2018

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**TO: THE ATTACHED SERVICE LIST**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
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**IN THE MATTER OF THE *COMPANIES' CREDITORS*  
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ARRANGEMENT OF SEARS CANADA INC., CORBEIL  
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(each an “**Applicant**”) and collectively the “**Applicants**”)

**FACTUM  
(Motion Returnable January 22, 2018)**

**PART I – OVERVIEW**

1. The moving party, 1291079 Ontario Limited (“**129**”), is the representative plaintiff in a class action certified under the *Class Proceedings Act, 1992* against the Applicant, Sears Canada Inc. (“**Sears Canada**”). The class action was certified on behalf of all corporations, partnerships and individuals carrying on business as Sears hometown dealers (“**Hometown Dealers**”) under a dealer agreement with Sears Canada (“**Dealer Agreement**”) between July 5, 2011 and March 17, 2015 (“**Hometown Dealers Class Action**”).

2. The Hometown Dealers Class Action alleges that, *inter alia*, Sears Canada breached its contractual obligations and its common law and statutory duty to deal fairly and in good faith

with Hometown Dealers, and that Sears Canada's acts and omissions resulted in the vast majority of Hometown Dealers being unable to make a living wage from their businesses. As a result of these breaches, the Hometown Dealers claim damages for breach of contract, negligent misrepresentation and breach of the *Arthur Wishart Act (Franchise Disclosure), 2000* ("**Wishart Act**") in the amount of \$100 million.

3. Class members are now creditors of the estate, and require the assistance of a financial advisor to file a claim in the Applicants' claims process. 129 has retained the services of MNP LLP ("**MNP**") to prepare a comprehensive and evidence-based omnibus claim ("**Omnibus Claim**") on behalf of the Hometown Dealers.

4. The Hometown Dealers are vulnerable stakeholders, and are seeking an Order directing that the reasonable fees and expenses of MNP be paid from the estate (which fees shall be repaid from any distributions made to the class), and a charge in favour of MNP in the aggregate amount of \$250,000, so that they may participate in the Applicants' claims process.

5. 129 on behalf of the class is also seeking an Order appointing Sotos LLP and Blaney McMurtry LLP as representative counsel for the Hometown Dealers Class Action.

## **PART II – FACTS**

### **Hometown Dealers Class Action**

6. 129 initiated the Hometown Dealers Class Action on July 5, 2013. The Hometown Dealers Class Action was certified by the Honourable Justice Gray on September 8, 2014. The class is defined as all corporations, partnerships and individuals carrying on business as a Sears

Hometown Dealer under a Dealer Agreement at any time from July 5, 2011 to March 17, 2015 (“**Class**”). There are 351 members of the Class.<sup>1</sup>

7. The Hometown Dealers are independent businesses that operated in small towns and rural areas across Canada. Their relationship with Sears Canada was governed by Dealer Agreements (which are alleged to be ‘franchise agreements’ within the meaning of provincial franchise legislation) that had two fundamental characteristics: (i) they gave Sears Canada the unilateral and discretionary right to set dealer revenue levels; and (ii) they made Hometown Dealers responsible for all costs and risks of their business.<sup>2</sup>

8. Hometown Dealers primarily earned revenue through commissions paid by Sears Canada for products sold at a Hometown Dealers store. Most of the products that Sears Canada sold at Hometown stores were on consignment. Proceeds from sales flowed directly to Sears Canada and Hometown Dealers subsequently received a commission. Hometown Dealers could also earn other commissions for catalogue sales, or sales made at other retail locations or through a direct channel that are picked up at the Hometown store.<sup>3</sup>

9. Under the Dealer Agreements, the Hometown Dealers were responsible for paying the operating expenses relating to the business, including insurance, employees, lease costs and certain furniture, fixtures and equipment.<sup>4</sup>

10. The Hometown Dealers Class Action alleges that the Dealer Agreement creates a franchisor-franchisee relationship between the Hometown Dealer and Sears Canada that is

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<sup>1</sup> Affidavit of James Kay, sworn January 15, 2018 (“**Kay Affidavit**”), paras. 3-5, Moving Party’s Motion Record, Tab B.

<sup>2</sup> Kay Affidavit, *supra*, para. 6, Moving Party’s Motion Record, Tab B.

<sup>3</sup> Kay Affidavit, *supra*, para. 7, Moving Party’s Motion Record, Tab B.

<sup>4</sup> Kay Affidavit, *supra*, para. 8, Moving Party’s Motion Record, Tab B.

subject to the Wishart Act and other similar provincial franchise legislation. As such, the Hometown Dealers Class Action alleges that Sears Canada had statutory duties to deal fairly and in good faith with the Hometown Dealers, and to deliver a disclosure document to each dealer before that dealer entered into a Dealer Agreement with Sears Canada.<sup>5</sup>

11. The Hometown Dealers Class Action alleges that Sears Canada breached its statutory and contractual obligations to the Class by:

- a) setting and maintaining a compensation structure that resulted in the vast majority of Hometown Dealers being unable to make a living wage from the business, let alone realize a return on their investments and efforts;
- b) cannibalizing sales in the Hometown Dealer's market area by selling goods directly to customers in corporate stores, over the internet and telephone (and offering incentives to do so) and shipping those goods directly to the customer, bypassing the Hometown Dealer and avoiding paying compensation to the Hometown Dealer for sales in the dealer's 'Market Area' as defined under the Dealer Agreement;
- c) charging and retaining for itself an unauthorized "handling fee" on all goods purchased online or by telephone and shipped to the Hometown Dealer's store, thereby directing sales away from the Hometown Dealer stores;
- d) introducing new programs superficially designed to be revenue neutral, but that in actuality clawed back for many Hometown Dealers what little economic benefits the program delivered to them; and

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<sup>5</sup> Kay Affidavit, *supra*, paras. 10-11, Moving Party's Motion Record, Tab B.

- e) failing to disclose the truths about the economics of the network as would be required in a disclosure document, and misrepresenting the Hometown store system as “brilliant,” “better than a franchise,” and a “smart business model.”<sup>6</sup>

12. As a result of these breaches, the Hometown Dealers claim damages in the amount of \$100,000,000.00 for breach of contract, misrepresentation and breach of sections 3, 5 and 7 of the Wishart Act.<sup>7</sup>

### **The Oppression Action**

13. In addition to the Hometown Dealers Class Action, on October 21, 2015, 129 commenced a class proceeding against Sears Canada, its directors and its parent companies alleging oppression contrary to the *Canada Business Corporations Act* (the “**Oppression Action**”).<sup>8</sup>

14. The Oppression Action relates to the payment of a \$509 million extraordinary dividend by Sears Canada on December 6, 2013 (the “**Extraordinary Dividend**”). The primary beneficiaries of the Extraordinary Dividend were Sears Canada’s American parent corporations, Sears Holding Corporation and ESL Investments Inc. The Oppression Action alleges that the payment of the Extraordinary Dividend came at a time when Sears Canada was heading towards an inevitable insolvency filing.<sup>9</sup>

15. After the declaration of the Extraordinary Dividend on November 19, 2013 but prior to its payment on December 6, 2013, class counsel in the Hometown Dealers Class Action wrote to

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<sup>6</sup> Kay Affidavit, *supra*, paras. 11-13, Moving Party’s Motion Record, Tab B.

<sup>7</sup> Kay Affidavit, *supra*, para. 14, Moving Party’s Motion Record, Tab B.

<sup>8</sup> Kay Affidavit, *supra*, para. 15 and Exhibit “4,” Moving Party’s Motion Record, Tab B and B4.

<sup>9</sup> Kay Affidavit, *supra*, paras. 16-17, Moving Party’s Motion Record, Tab B.

counsel for Sears Canada requesting assurances that, having regard to the assets, liabilities (existing and contingent) and actual and likely future operating losses of Sears Canada, it had set aside a sufficient reserve to satisfy a judgment against Sears Canada should the Hometown Dealers Class Action be certified and succeed on the merits.<sup>10</sup>

16. On December 3, 2013, class counsel wrote to each director to put them on notice that should Sears Canada be unable to satisfy an eventual judgment in the Hometown Dealers Class Action, that each director who authorized the Extraordinary Dividend may be jointly and severally liable with Sears Canada for such damages. No answer was provided and Sears Canada subsequently paid out the Extraordinary Dividend.<sup>11</sup>

### **The Sears Claims Process**

17. On June 22, 2017, Sears Canada obtained protection under the *Companies' Creditors Arrangement Act* ("CCAA"), pursuant to the Order of the Honourable Justice Hainey ("**Initial Order**").<sup>12</sup> As a result of the CCAA proceeding, the Hometown Dealers Class Action has been stayed.

18. As at April 29, 2017, there were 65 Hometown Dealer stores remaining. Fourteen of those stores were identified for closure in the Initial Order, and have since been liquidated and closed. On October 13, 2017, the Court ordered the liquidation of all of Sears Canada's remaining stores and assets, including the Hometown Dealer stores, by January 21, 2018.<sup>13</sup>

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<sup>10</sup> Kay Affidavit, *supra*, para. 18, Moving Party's Motion Record, Tab B.

<sup>11</sup> Kay Affidavit, *supra*, paras. 19, Moving Party's Motion Record, Tab B.

<sup>12</sup> Kay Affidavit, *supra*, para. 22, Moving Party's Motion Record, Tab B.

<sup>13</sup> Kay Affidavit, *supra*, paras. 24-25, Moving Party's Motion Record, Tab B.

19. On December 8, 2017, the Court issued the Claims Procedure Order setting out the procedures to be followed for the filing and determination of claims against the Applicants (“**Claims Procedure Order**”). Under the Claims Procedure Order, the claims bar date is March 2, 2018.<sup>14</sup>

### **Appointment of MNP**

20. 129 Ontario has retained the services of MNP on behalf of the Class with respect to issues relating to the Claims Procedure Order. In particular, MNP’s mandate involves:

- a) assisting counsel in the preparation of a questionnaire for all Hometown Dealers to establish the types and quantum of claims of individual Hometown Dealers, including requests for financial information, lease obligations, owner salaries and efforts to mitigate damages;
- b) seeking the production of information and records from Sears Canada relating to the Hometown Dealers, including sales volumes and commissions paid;
- c) analyzing the financial statements of Hometown Dealers and other information and documents relating to their business and earnings;
- d) researching industry financial benchmarks to determine a reasonable expectation of return on investment for the Hometown Dealers;
- e) analyzing industry, economic and other factors affecting the business operated by the Hometown Dealers, as applicable; and

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<sup>14</sup> Kay Affidavit, *supra*, paras. 25-26, Moving Party’s Motion Record, Tab B.

- f) developing a matrix for the quantification of claims for damages advanced by the Class in accordance with the Claims Procedure Order.<sup>15</sup>

21. MNP will assist the Class in preparing and advancing an Omnibus Claim, which represents the only way that Hometown Dealers will receive any compensation from Sears Canada for their losses. It is anticipated that the Omnibus Claim will cover three types of damages claims:

- a) damages for the breach of obligations under the Dealer Agreements, including the asserted obligation to exercise contractual discretion in accordance with the common law duty of good faith and with the statutory duty of fair dealing under the Wishart Act;
- b) statutory misrepresentation damages under the Wishart Act, including damages for loss of profits/opportunity caused by the misrepresentation/failure to disclose, and in particular, sections 5 and 7 of the Wishart Act; and
- c) damages from the termination of the Dealer Agreements during the CCAA proceedings.<sup>16</sup>

### **Funding for MNP**

22. It is not possible for 129 to pay the reasonable fees and disbursements of MNP out-of-pocket. 129 has retained counsel to prosecute the Hometown Dealers Class Action on a

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<sup>15</sup> Kay Affidavit, *supra*, para. 28, Moving Party's Motion Record, Tab B. See also Affidavit of Jerry Henechowicz, sworn January 15, 2018 ("MNP Affidavit"), Exhibit "A", pgs. 4-5, Tab C.

<sup>16</sup> Kay Affidavit, *supra*, para. 29, Moving Party's Motion Record, Tab B. See also MNP Affidavit, Exhibit "A", pg. 3, Tab C.

contingency basis. MNP cannot be paid on a contingency basis, and requires an initial retainer of \$50,000 in order to undertake its mandate, outlined above.<sup>17</sup>

23. Additionally, the Hometown Dealers are a vulnerable group that cannot afford to pay for a financial advisor in the claims process.

24. The performance of 129 illustrates the dire situation faced by a typical Hometown Dealer. In 2012, after paying all expenses related to the business, 129 paid its principal \$329 in total compensation for full-time work as the store manager over the year. In 2013, 129 paid its principal \$54,102, from which he paid down \$48,000 on a personal line of credit that was used to finance the operations of 129 or against the personal loan taken out to purchase the shares of 129 in 2007. This left 129's principal with total net compensation of \$6,102 for full-time work over the entire year.<sup>18</sup>

25. Many members of the Class were in a similar financial situation to 129, and were forced to close their stores. When the Hometown Dealers Class Action was commenced, there were approximately 260 Hometown Dealers in operation. By April 2017, the number had fallen to approximately 65. It is, therefore, not possible for the other class members to pay the reasonable fees and disbursements of MNP out-of-pocket.<sup>19</sup>

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<sup>17</sup> Kay Affidavit, *supra*, para. 33, Moving Party's Motion Record, Tab B. See also MNP Affidavit, Exhibit "A", pg. 9, Tab C.

<sup>18</sup> Kay Affidavit, *supra*, para. 36, Moving Party's Motion Record, Tab B.

<sup>19</sup> Kay Affidavit, *supra*, para. 38, Moving Party's Motion Record, Tab 2.

### **PART III – ISSUES & LAW**

26. The issues for this Honourable Court to consider on this motion are as follows:

- a) Should MNP be appointed as financial advisor to the Hometown Dealers for the purposes of the valuation and quantification of the Omnibus Claim? The vulnerable Hometown Dealers require the assistance of MNP in order to advance a claim in accordance with the Claims Procedure Order. Additionally, MNP's involvement will simplify and add to the efficiency of the claims process, for the benefit of the Monitor and creditors. It is, therefore, fair and just for the Court to use its discretion to appoint MNP as financial advisor to the Hometown Dealers.
- b) If yes, should the reasonable fees and disbursements of MNP be paid from the Applicants' estate? The Hometown Dealers cannot afford to pay MNP, and MNP cannot be engaged on a contingency basis. Since it is contemplated that any advance provided by the Applicants for the fees and disbursements of MNP will be repaid to the estate from the distributions made to the Class, the estate and other creditors will not be prejudiced by this relief.
- c) Should MNP be granted a charge on the Applicants' current and future assets, undertakings and properties, including all proceeds thereof ("**Property**") to an aggregate amount of \$250,000 ("**MNP Charge**")? Yes. The MNP Charge is necessary to allow the Class to advance its Omnibus Claim, and will be subordinate to all other Charges set out in the Amended and Restated Initial Order.

- d) Should Sotos LLP and Blaney McMurtry LLP be appointed as representative counsel to the Hometown Dealers? Yes. The appointment of representative counsel will allow the Class to have representation in the CCAA proceedings for the purpose of advancing its claim against the Applicants.

**MNP should be appointed as financial advisor for the Class**

27. It is not disputed that this Honourable Court has a wide discretion under s. 11 of the CCAA to appoint representatives on behalf of different stakeholder groups, and to order that the fees of representative counsel be paid from the estate.<sup>20</sup> Section 11 also provides courts with the jurisdiction to appoint financial advisors and approve funding for these professional expenses from the estate.<sup>21</sup>

28. Representative orders have been granted for a variety of reasons, including for the purpose of allowing vulnerable stakeholders to participate in the debtor company's claims process.<sup>22</sup>

29. When appointing representative counsel, courts consider the following non-exhaustive list of factors:

- a) The vulnerability and resources of the group sought to be represented;
- b) Any benefit to the companies under CCAA protection;
- c) Any social benefit to be derived from representation of the group;

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<sup>20</sup> *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028, para. 12, Moving Party's Brief of Authorities, Tab 1.

<sup>21</sup> See, for example, *Target Canada Co. (Re)*, 2015 ONSC 1028, para. 35, 37, Moving Party's Brief of Authorities, Tab 2.

<sup>22</sup> *Target Canada Co. (Re)*, 2015 ONSC 1028, para. 35, 37, Moving Party's Brief of Authorities, Tab 2. See also Order of Justice Newbould, dated August 19, 2016 in the receivership of Arc Productions Ltd. et al., Court File No.: 16-CV-11472-00CL, Moving Party's Brief of Authorities, Tab 3.

- d) The facilitation of the administration of the proceedings and efficiency;
- e) The avoidance of a multiplicity of legal retainers;
- f) The balance of convenience and whether it is fair and just including to the creditors of the estate;
- g) Whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the ground seeking the order; and
- h) The position of other stakeholders and the monitor.<sup>23</sup>

30. The Class is made up of 351 members that are dispersed in rural areas across Canada. The majority of Hometown Dealers were unable to make a living wage from operating a Hometown store as a result of the compensation structure set out in the Dealer Agreements, and the actions of Sears Canada in actively undermining the Hometown Dealer network. The Hometown Dealers that were operational at the commencement of this CCAA proceeding have now been forced to liquidate and are set to close by January 21, 2018. The Hometown Dealers are, therefore, vulnerable stakeholders who have limited means to pursue their complex claims in this CCAA proceeding, and would benefit from the appointment of MNP.

31. Additionally, the appointment of MNP will assist the Class in quantifying its damages for the purposes of the Oppression Action. While the Oppression Action is brought on behalf of the Hometown Dealers, it may benefit other vulnerable creditors of the estate whose interests were unfairly prejudiced as a result of the payment of the Extraordinary Dividend.

32. The contemplated appointment of MNP will enhance the efficiency of the claims process. In particular, MNP will put forward an Omnibus Claim, which represents the most efficient and cost-effective means of resolving the Hometown Dealers' claims in the CCAA proceeding.

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<sup>23</sup> *Canwest Publishing Inc.*, 2010 ONSC 1328, para. 21, Moving Party's Brief of Authorities, Tab 4.

Absent the Omnibus Claim, each Hometown Dealer will be required to submit a claim with hundreds of pages of financial, tax and business information. The Monitor would then have to review approximately 340 individual claims, and claims hearings (if necessary) would proceed on an individual basis. The appointment of MNP will streamline the claims process, thereby reducing the cost and complexity of this process for the benefit of the Monitor and all stakeholders.<sup>24</sup>

33. The appointment of MNP also avoids the need for a multiplicity of retainers in that individual Hometown Dealers will not need to engage their own professionals to advance individual claims. It assists in preventing the Hometown Dealers from filing inconsistent claims and ensures that all claims are advanced in a timely and efficient manner.

34. Granting the relief requested will provide a social benefit by assisting the Hometown Dealers, the vast majority of whom would otherwise lack the expertise and the means to advance their own claims. As significant creditors of the estate, the Claims Procedure Order represents the only way in which Hometown Dealers will recover any damages for their losses from Sears Canada. The appointment of MNP promotes access to justice for the Class.<sup>25</sup>

35. Given the benefit served by MNP to the Hometown Dealers and the facilitation of the administration of the proceedings generally, it is fair and just that this Honourable Court exercise its jurisdiction under s. 11 of the CCAA to appoint MNP financial advisor for the Class.

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<sup>24</sup> Kay Affidavit, *supra*, para. 32, Moving Party's Motion Record, Tab B.

<sup>25</sup> Kay Affidavit, *supra*, para. 31, Moving Party's Motion Record, Tab B.

**Advance to MNP and MNP Charge are fair and reasonable**

36. 129 is seeking an Order on behalf of the Class to have the reasonable fees and disbursements of MNP paid from the estate. It is contemplated that any money advanced by the Applicants to MNP will be repaid to the estate from the distributions made to the Class.

37. 129 has retained counsel to prosecute the Hometown Dealers Class Action on a contingency basis. MNP cannot be paid on a contingency basis; its engagement is conditional on payment terms for MNP's accounts and an initial retainer of \$50,000. Due to the lack of financial resources of the Hometown Dealers, it is not possible for 129 or the other Class members to pay MNP out-of-pocket.<sup>26</sup>

38. The Applicants have already funded professional fees in the amount of approximately \$53 million during the seven months since the Initial Order, including almost \$14.1 million in fees for the Applicants' financial advisor.<sup>27</sup>

39. In comparison, the Hometown Dealers are seeking an advance for MNP's fees, which are not expected to exceed \$250,000, and which will be fully repaid to the estate from the distributions made to the Class.

40. Additionally, 129 is seeking a charge in favour of MNP as security for its outstanding fees and disbursements in the aggregate amount of \$250,000 ("**MNP Charge**"). It is contemplated that the MNP Charge will rank junior in priority to the Charges set out in the Amended and Restated Initial Order, after the Directors' Subordinated Charge.

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<sup>26</sup> Kay Affidavit, *supra*, paras. 33, 36-38, Moving Party's Motion Record, Tab B. See also MNP Affidavit, Exhibit "A", pg. 9, Tab C.

<sup>27</sup> See Eleventh Report of FTI Consulting Canada Inc., as Monitor, dated January 15, 2018, para. 59, pg. 19.

41. Section 11.52(1)(c) of the CCAA states that the Court may order a charge in favour of professional fees for financial advisors or other experts:

11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of

...

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.<sup>28</sup>

42. A charge under s. 11.52 may rank in priority to the claim of any secured creditor of the company.<sup>29</sup>

43. In determining whether a charge is appropriate in the circumstances, the following test has been developed:

- a) The size and complexity of the business being restructured;
- b) The proposed role of the beneficiaries of the charge;
- c) Whether there is unwarranted duplication of roles;
- d) Whether the quantum of the proposed charge appears to be fair and reasonable;
- e) The position of the secured creditors likely to be affected by the charge; and
- f) The position of the monitor.<sup>30</sup>

44. The Class is a creditor in these proceedings, and the MNP charge is necessary to allow the Class to advance its Omnibus Claim against the Applicants under the Claims Procedure Order. Given the complexity of the CCAA process, the Dealer Agreements and the damages

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<sup>28</sup> *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("CCAA"), s. 11.52(1)(c).

<sup>29</sup> CCAA, *supra*, s. 11.52(2).

<sup>30</sup> *Canwest Publishing Inc.*, 2010 ONSC 222, para. 54, Moving Party's Brief of Authorities, Tab 5.

being sought in the Hometown Dealers Class Action, the Class cannot effectively advance the Omnibus Claim without the assistance of MNP.

45. There is no unwarranted duplication of roles. The Class has not otherwise engaged another financial advisor to assist with the Omnibus Claim.

46. Pursuant to the Amended and Restated Initial Order, the Applicants' financial advisor, BMO Nesbitt Burns Inc., was granted a first-ranking charge in the amount of \$3.3 million, and other professionals in the CCAA proceedings were granted a first-ranking administration charge in the amount of \$5 million. Given the amount of these charges and the fact that the unsecured claims of the Hometown Dealers total \$100 million, it is submitted that the quantum of the MNP Charge is fair and reasonable.

47. Finally, the proposed MNP Charge does not otherwise seek to prime any existing Charges as set out in the Amended and Restated Initial Order.

#### **Appointment of Representative Counsel**

48. Pursuant to the Order of the Honourable Justice Gray, the class definition included all Hometown Dealers under a Dealer Agreement from July 5, 2011 to the date of the sending of the notice of certification, being March 17, 2015. 129 is seeking to appoint Sotos LLP and Blaney McMurtry LLP as representative counsel ("**Representative Counsel**") so that the Class may have representation in the CCAA proceedings, including for any Hometown Dealers that entered into Dealer Agreements after March 17, 2015.

49. 129 adopts and repeats the submissions made at paragraphs 28 to 35, above. In particular, it is submitted that it is appropriate to appoint Representative Counsel in light of the following *Canwest Publishing* factors<sup>31</sup>:

- a) The Hometown Dealers are a vulnerable and disparate group of creditors that would benefit from Representative Counsel assisting them in navigating the CCAA proceeding and advancing the Omnibus Claim;
- b) The appointment of Representative Counsel will benefit the Applicants and the Monitor in that it will promote efficiency, streamline the claims process as it relates to the Hometown Dealers, and ensure that the Hometown Dealers advance an Omnibus Claim, as opposed to individual claims;
- c) The existence of Representative Counsel in the CCAA proceedings also has a social benefit, namely promoting access to justice for the Class;
- d) Sotos LLP is already counsel for the Hometown Dealers Class Action. Blaney McMurtry has been retained to assist the Class navigate the CCAA process. Granting the relief requested will avoid a multiplicity of retainers, particularly for those Hometown Dealers that are not currently encapsulated within the class definition;
- e) No other representative order has been made for the Hometown Dealers; and

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<sup>31</sup> *Canwest Publishing Inc.*, 2010 ONSC 1328, para. 21, Moving Party's Brief of Authorities, Tab 4.

- f) Given the benefit afforded to the Hometown Dealers by having their interests represented in the Applicants' claim process, the balance of convenience favours the granting of the representation order.

**PART IV – ORDER REQUESTED**

50. 129 on its own behalf and on behalf of the Class respectfully requests an Order:

- a) Appointing Sotos LLP and Blaney McMurtry LLP as Representative Counsel;
- b) Appointing MNP as financial advisor for the Class;
- c) Directing that the reasonable fees and disbursements of MNP be paid from the estate, which advances will subsequently be repaid to the Applicants from any distributions made to the Class; and
- d) Granting a Charge in favour of MNP on the Applicants' Property as security for its fees and disbursements in the aggregate amount of \$250,000, which will rank behind all existing Charges.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 17<sup>th</sup> day of January, 2018.



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Lou Brzezinski

**SCHEDULE “A”**  
**List of Cases**

1. *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028
2. *Target Canada Co. (Re)*, 2015 ONSC 1028
3. Order of Justice Newbould, dated August 19, 2016, Court File No.: 16-CV-11472-00CL
4. *Canwest Publishing Inc.*, 2010 ONSC 1328
5. *Canwest Publishing Inc.*, 2010 ONSC 222

**SCHEDULE “B”  
(Text of Statutes)**

**10.01 of the *Rules of Civil Procedure*, RRO 1990, Reg 194**

10.01 (1) In a proceeding concerning,

- (a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
- (b) the determination of a question arising in the administration of an estate or trust;
- (c) the approval of a sale, purchase, settlement or other transaction;
- (d) the approval of an arrangement under the *Variation of Trusts Act*;
- (e) the administration of the estate of a deceased person; or
- (f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served. R.R.O. 1990, Reg. 194, [r. 10.01 \(1\)](#).

**s. 11 of the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36**

General power of court

**11** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

**s. 11.52(1)(c) of the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36**

Court may order security or charge to cover certain costs

- **11.52 (1)** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
  - (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor’s duties;

- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

**s. 11.52(2) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36**

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

**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., CORBEIL ELECTRIQUE INC.,  
S.L.H. TRANSPORT INC., THE CUT INC., SEARS CONTACT SERVICES  
INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS  
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**IN THE MATTER OF THE COMPANIES' CREDITORS  
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED**

and

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT  
OF SEARS CANADA INC. ET AL.**

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SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

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