Court File No.

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

APPLICANTS

FACTUM OF THE APPLICANTS

June 22, 2017

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TO: **SERVICE LIST**

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PART I - NATURE OF THIS APPLICATION

1. This Factum is filed in support of an application by Sears Canada Inc. ("**Sears Canada**"), Corbeil Électrique Inc. ("**Corbeil**") and the other applicants listed above (together, the "**Applicants**" or the "**Sears Canada Group**") for relief under the *Companies' Creditors Arrangement Act*[1] (the "**CCAA**"), including an initial stay of proceedings. The Applicants also seek to have a stay of proceedings and other benefits of an Initial Order under the CCAA extended to Sears Connect LP (the "**Partnership**"), which is related to or carries on operations that are integral to the business of the Applicants.

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[1] RSC 1985, c C-36, as amended.

2. In recent years, the Sears Canada Group has experienced a sustained decline in its performance, including substantial declines in revenue, as well as recurring operating losses and net losses, and an erosion of its cash position, which has now resulted in significant liquidity pressures. While the Sears Canada Group has taken a number of steps to transform its business in an attempt to address the serious challenges facing the company and the retail industry more generally, due to recent developments discussed in greater detail below, there is now significant doubt as to the company's ability to continue as a going concern, and uncertainty as to Sears Canada's ability to continue to satisfy its obligations as they come due and implement its business plan in the ordinary course. Without additional liquidity, the Sears Canada Group can no longer continue to transform its business and rationalize its store footprint outside of a CCAA proceeding.

3. The Sears Canada Group is entering these proceedings with the intention of emerging as a strong, more focused competitor in the Canadian retail industry. It plans to continue to operate a large number of stores, continue to maintain significant employment, and to service its customers across Canada. However, to achieve that goal and to right-size its business, the Sears Canada Group anticipates that a number of stores will have to be closed, operating costs reduced, business lines exited, and headcount reductions implemented. Management expects that the company that emerges from this CCAA proceeding will be well-positioned to capitalize on the opportunities that exist in the Canadian retail marketplace. In order to achieve that objective and to continue their restructuring efforts, the Applicants require a stay of proceedings and related relief under the CCAA.

PART II -FACTS

4. The facts with respect to this Application are more fully set out in the Affidavit of Billy Wong.[2] Capitalized terms in this Factum not otherwise defined have the same meanings as in the Wong Affidavit.

A. Structure of the Sears Canada Group's Business

5. The Sears Canada Group is one of Canada's largest multi-format retailers, with approximately 17,000 employees and 225 stores across Canada.[3] In addition to its employees, stakeholders in the Sears Canada Group's business also consist of customers, inventory vendors, suppliers of services, franchisees operating Corbeil stores, dealer operators of Hometown stores, retirees, landlords, tenants to whom the Sears Canada Group leases space, and others.[4]

6. Sears Canada is a public company listed on the Toronto Stock Exchange and NASDAQ. Its corporate headquarters are in Toronto, Ontario.[5]

7. Sears Canada is the ultimate parent of the Sears Canada Group. The other Applicants are all direct or indirect wholly-owned subsidiaries of Sears Canada,[6] including:

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2 Affidavit of Billy Wong, sworn June 22, 2017 [Wong Affidavit].

3 Wong Affidavit, para. 4.

4 Wong Affidavit, para. 5.

5 Wong Affidavit, para. 4.

6 Wong Affidavit, para. 16. See Wong Affidavit, Exhibit A for an organizational chart showing the structure of the Sears Canada Group, as well as its relationship with its major shareholders. See also Wong Affidavit, Schedule A for a list of Sears Canada's additional subsidiaries.

(a) **Corbeil** – A Quebec corporation that carries on the Corbeil specialty retail business from Corbeil branded corporate and franchised stores. Corbeil has a separate management structure from the rest of the Sears Canada Group's business.[7]

(b) **S.L.H. Transport Inc. ("SLH") and 168886 Canada Inc**. – SLH is a Canadian corporation that transports merchandise to and from stores and merchandise pick-up locations for Sears Canada. It also provides transportation services to various third-party customers. SLH wholly-owns 168886 Canada Inc.[8]

(c) **The Cut Inc.** – A Delaware corporation that operates as a procurement agent for sourcing off-price inventory for Sears Canada's new off-price brand that launched in Spring 2017.[9]

(d) **Sears Contact Services Inc. ("Sears Contact")** – A Canadian corporation that operates call centres in New Brunswick related to Sears Canada's business.[10]

(e) **173470 Canada Inc.** – A Canadian corporation that owns 1% of the Partnership, which sells mobile phones, phone plans and long distance plans with various third parties out of Sears Canada's stores and online platform. Sears Canada owns 99% of the Partnership.[11]

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7 Wong Affidavit, para. 17(a).

8 Wong Affidavit, para. 17(b).

9 Wong Affidavit, para. 17(c).

10 Wong Affidavit, paras. 17(d) and 85.

11 Wong Affidavit, paras. 17(e) and 20.

B. Relationship with ESL and Sears Holdings

8. ESL Investments, Inc. and affiliates ("**ESL**") is Sears Canada's largest direct and indirect shareholder. Its indirect holdings are held through Sears Holdings Corporation ("**Sears Holdings**", a U.S. public company). Collectively, ESL and Sears Holdings hold approximately 57% of the issued and outstanding shares of Sears Canada.[12]

9. The daily operations of the business of the Sears Canada Group, including those of Sears Canada, are not dependent upon the operation of the business of Sears Holdings. Rather, the two businesses are operated independently of one another, by separate management teams.[13]

10. Sears Canada's most significant agreement with Sears Holdings is a royalty-free license from Sears Holdings' wholly-owned subsidiary to use the name "Sears" as part of its corporate name, as well as a royalty-free license to use certain other brand names (the "**Trademark License Agreement**").[14]

11. Additionally, Sears Canada and ESL are parties to an agreement where ESL will provide, at Sears Canada's request and without charge, investment, business and real estate consulting services.[15]

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[12] Wong Affidavit, para. 22. Further detail regarding major shareholdings is set out at paragraphs 21 and 22 of the Wong Affidavit.

[13] Wong Affidavit, para. 30.

[14] Wong Affidavit, para. 24. Copies of the Trademark License Agreement and amendments thereto are attached as Exhibit "B" to the Wong Affidavit.

[15] Wong Affidavit, para. 29.

C. Retail Operations

12. The principal activities of Sears Canada and its subsidiaries consist of the sale of goods and services through the following channels:[16]

(a) **Full-Line Department Stores** – Sears Canada's 95 full-line department stores are located primarily in suburban enclosed shopping centres and range in size from approximately 30,000 to 300,000 square feet. The merchandise sales mix tends to be approximately 60% Apparel & Accessories and 40% Home & Hardlines. Full-line department stores include a Sears catalogue and online merchandise pick-up location, as well as Sears Travel offices and other licensed businesses, such as optical centres and portrait studios.[17]

Sears Canada is often the anchor tenant in a mall or shopping centre for these stores, which are located in all regions of Canada.[18]

(b) **Sears Home Stores** – The 23 Sears Home stores are typically located in large unenclosed shopping centres and carry an extensive selection of furniture, mattresses box-springs, and major appliances. The majority of these stores range in

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16 Wong Affidavit, paras. 4 and 33.

17 Wong Affidavit, paras. 33 and 37.

18 Wong Affidavit, para. 37. A chart showing a breakdown of the number of full-line stores by geographic region is included in this paragraph.

size from 35,000 to 60,000 square feet.[19] They are located in all regions of Canada, except Atlantic Canada.[20]

(c) **Sears Hometown stores** – Almost all 65 Hometown stores are independently owned and operated through a network of independent dealers (the "**Hometown Dealers**"), which have been appointed by Sears Canada for a specified period and subject to the terms and conditions of a dealer agreement. Most Hometown stores, which range in size from 2,000 to 10,000 square feet, are located in markets that lack the population to support a full-line department store. These stores offer major appliances, furniture, mattresses and box-springs, outdoor power equipment as well as a catalogue and online merchandise pickup location.[21] These stores are located in all regions of Canada.[22]

(d) **Outlet stores** – Ten Outlet stores provide Sears Canada's customers with in-store access to a broad assortment of surplus merchandise at prices that are significantly lower than Sears Canada's retail prices.[23] Each region of Canada has at least one Outlet store.[24]

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19 Wong Affidavit, paras. 33 and 37.

20 Wong Affidavit, para. 37. A chart showing a breakdown of the number of Sears Home Stores by geographic region is included in this paragraph.

21 Wong Affidavit, paras. 33 and 37.

22 Wong Affidavit, para. 37. A chart showing a breakdown of the number of Sears Hometown stores by geographic region is included in this paragraph.

23 Wong Affidavit, paras. 33 and 37.

24 Wong Affidavit, para. 37. A chart showing a breakdown of the number of Outlet stores by geographic region is included in this paragraph.

(e) **Corbeil** – Corbeil is a chain of major appliance specialty stores located throughout Québec, the Greater Toronto Area and Eastern Ontario. There are 32 stores in the chain, which average approximately 6,500 square feet, 16 of which are independently owned and operated through a network of franchisees (the "**Corbeil Franchisees**"). The chain also includes two liquidation centres.[25] All of the Corbeil stores are anticipated to remain operational during the CCAA proceeding.[26]

13. As part of the operational restructuring to be implemented as part of these CCAA proceedings, the Applicants intend to close 59 stores (20 full-line stores, 15 Sears Home stores, 10 Outlet stores, and 14 Hometown stores) after liquidating the inventory and implementing an orderly wind-down of these stores.[27] After these store closures, it is anticipated that the Sears Canada Group will have 75 full-line department stores (including one pop-up shop), 8 Sears Home stores, 49 Hometown stores, 32 Corbeil stores, and 0 Outlet stores.[28]

14. The Applicants have a number of other sources of revenue, including service revenue (e.g., from logistic and transportation services that SLH provides to third parties), commissions on revenue generated by other product offerings within Sears Canada stores and under the Sears brand (e.g., travel services, home improvement services, insurance, and wireless and long distance plans), and a percentage of sales of licensees operating within its stores (such as optical service

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25 Wong Affidavit, para. 33.

26 Wong Affidavit, para. 45.

27 Wong Affidavit, para. 39.

28 Wong Affidavit, para. 40. See Wong Affidavit, Exhibit C for a list of the stores that are scheduled for closure.

centres). The Sears Canada Group expects as part of these proceedings to exit some or all of its commission- and license-generating businesses. [29]

15. Sears Canada also intends to discontinue some or all of its royalty arrangements pursuant to which it sells branded merchandise from various third parties.[30]

D. Merchandising and Distribution

(a) Merchandising

16. Sears Canada purchases its merchandise from approximately 3,300 domestic and international suppliers, many of which have long-standing relationships with Sears Canada.[31] Corbeil has a separate merchandise purchasing program.[32]

17. Sears Canada is dependent upon a significant amount of products that originate from non-Canadian markets. For the twelve months ended April 29, 2017, Sears Canada paid approximately USD $118.8 million for direct purchases of overseas merchandise (excluding commissions paid for merchandise purchasing services).[33]

18. Title to goods purchased by Sears Canada passes based on the terms of the agreement with the specific vendor. For direct purchases of merchandise that are shipped from outside of North America, title generally passes to Sears Canada once the merchandise is loaded onto ships or airplanes for transit to Sears Canada. For other purchases of merchandise, title generally passes

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29 Wong Affidavit, para. 36.

30 Wong Affidavit, para. 127.

31 Wong Affidavit, para. 60.

32 Wong Affidavit, para. 64.

33 Wong Affidavit, para. 61.

when SLH or a third-party transportation service picks up merchandise from the manufacturer, or when it is delivered to Sears Canada's NLCs or stores.[34] As of May 30, 2017, Sears Canada estimates that merchandise with a cost value of approximately $23 million was in transit to North America.[35]

(b) Logistics and Distribution

19. All merchandise sold through the Retail and Direct Channels are distributed from Sears Canada's National Logistics Centres ("**NLCs**"). Corbeil has a separate distribution centre.[36] As of May 30, 2017, the NLCs held Sears Canada merchandise with a cost value of approximately $174 million.[37]

20. Sears Canada's wholly-owned subsidiary, SLH, provides logistics services for Sears Canada and is responsible for transporting merchandise to Sears Canada's NLCs, stores and catalogue/internet merchandise pick-up locations. SLH also provides some transportation and distribution services to Corbeil.[38] SLH has seven strategically-located terminals across Canada. SLH owns and operates a fleet of more than 268 trucks and 2,700 trailers to provide its carrier services. SLH also works with approximately 185 independent contractors which own and operate their own trucks.[39]

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34 Wong Affidavit, para. 65.

35 Wong Affidavit, para. 72.

36 Wong Affidavit, para. 67.

37 Wong Affidavit, para. 68.

38 Wong Affidavit, para. 69.

39 Wong Affidavit, paras. 70 and 71.

E. Real Estate Holdings and Leases

(a) Stores

21. The Sears Canada Group owns eight full-line department stores, two Outlet stores, and one Sears Home store.[40] The majority of the other stores are held under long-term leases with Sears Canada or Corbeil as tenant.[41] As at April 29, 2017, the gross square footage for corporate store locations (both owned and leased) and Sears Canada's NLCs was approximately 19.7 million square feet.[42]

22. Many of Sears Canada's store leases are held or managed by large landlords. Several of these landlords lease multiple locations to Sears Canada. The leases are generally for a term of one to ten years, with some leases granting Sears Canada multiple options to renew after that date.[43]

23. A significant number of Sears Canada store leases contain operating covenants requiring Sears Canada, during normal operating hours, to operate a store continuously and consistently with the identified format in the lease agreement. These operating covenants have remaining terms of between less than one year and 28 years, with an average of approximately five years, excluding options to extend leases. In addition, many of the retail leases include use and other similar restrictions.[44]

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40 Wong Affidavit, para. 46.

41 Wong Affidavit, para. 47. This paragraph includes a chart showing the breakdown between leased and owned stores in each retail channel. The chart does not include catalogue and online merchandise pick-up locations because they located in other Sears Canada stores or local businesses.

42 Wong Affidavit, para. 48.

43 Wong Affidavit, para. 49.

44 Wong Affidavit, para. 50.

24. Certain of Sears Canada's store leases contain restrictions that relate to going out of business sales, including in certain cases blanket prohibitions on "bankruptcy sales", "going out of business sales", "liquidation sales", and other similar terms. Additionally, many leases provide that Sears Canada will be in default if it becomes insolvent.[45]

(b) Other Owned and Leased Property

25. Sears Canada owns one NLC in Belleville, Ontario[46] as well as certain other real estate assets with no operating activity and a fair value (as of April 29, 2017) of $2.8 million.[47] Sears Canada also leases (i) four NLCs across Canada;[48] (ii) its corporate headquarters in Toronto; and (iii) two call centres in New Brunswick used by Sears Contact.[49]

26. Corbeil leases a multipurpose distribution center/warehouse/liquidation center/office space in Montreal.[50] SLH leases seven shipping terminals across Canada and office premises in Kingston, Ontario.[51]

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45 Wong Affidavit, para. 51.

46 Wong Affidavit, para. 53.

47 Wong Affidavit, para. 57.

48 Wong Affidavit, para. 53. As noted in the Wong Affidavit, footnote 5, Sears Canada also leases an additional NLC in Calgary, Alberta that is operated by a third party. Sears Canada has terminated this contract and will no longer be using this facility as of August 18, 2017.

49 Wong Affidavit, para. 55.

50 Wong Affidavit, para. 54.

51 Wong Affidavit, para. 56.

(c) Subleases and Licenses

27. Sears Canada subleases store premises to certain other parties, e.g., the Hudson's Bay Company in Burlington, Ontario.[52] During Fiscal 2016, total sub-lease income from leased premises was $2.0 million. As at January 28, 2017, the total future minimum lease payments receivable from third party tenants were $12.9 million.[53]

F. Employees

28. As of May 30, 2017, the Sears Canada Group employed approximately 17,000 people, of whom approximately 6,500 were full-time and 10,500 were part-time. In addition, the Sears Canada Group has relationships with approximately 775 independent contractors.[54]

29. The Sears Canada Group intends to eliminate 500 non-store level positions immediately upon filing. Additional headcount reductions in the amount of approximately 2,400 will result from store closures. At this time, it is expected that some or all of these store level employees will be provided with working notice of termination. Further, it is anticipated that adjustments to compensation arrangements for certain store level employees will be made during the CCAA proceedings.[55]

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52 Wong Affidavit, para. 58.

53 Wong Affidavit, para. 59.

54 Wong Affidavit, para. 75. See also paragraph 76 for a Chart showing a breakdown of employees by province and in the U.S. as of May 30, 2017.

55 Wong Affidavit, para. 77.

(a) Sears Canada

30. The majority of Sears Canada's employees are store-level "associates". As of May 30, 2017, Sears Canada employed approximately 11,062 associates at the store level.[56]

31. Each store also has management employees known as "leaders". A total of approximately 1,072 leaders were employed by Sears Canada as of May 30, 2017.[57]

32. A small number of Sears Canada employees (approximately 2% of the total Sears Canada employee population) are represented by unions and are governed by various collective bargaining agreements.[58]

33. As of May 30, 2017, Sears Canada employed approximately 1,185 people at its headquarters in Toronto, Ontario, and approximately 107 people in its other local offices.[59]

(b) Corbeil

34. Corbeil has approximately 60 head office and warehouse employees, and approximately 120 corporate store employees.[60]

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56 Wong Affidavit, para. 78.

57 Wong Affidavit, para. 79.

58 Wong Affidavit, para. 80.

59 Wong Affidavit, para. 81.

60 Wong Affidavit, para. 83.

(c) Other Employees

35. Other employees in the Sears Canada Group include: (i) approximately 300 employees of Sears Contact who operate the call centres in New Brunswick;[61] (ii) approximately 27 employees of The Cut who are located in the U.S.;[62] (iii) 380 employees of SLH located in Ontario and Quebec; and (iv) approximately 240 employees of 168886 Canada Inc., SLH's subsidiary, located outside Ontario and Quebec.[63]

(d) Pension and Post-Retirement Benefits

(i) Sears Pension Plan

36. The Sears Canada Inc. Registered Retirement Plan (the "**Sears Pension Plan**") is registered under the Ontario *Pension Benefits Act*[64] (the "**PBA**") and the *Income Tax Act*[65] (the "**ITA**") with a defined benefit component (the "**DB Component**") and a defined contribution component (the "**DC Component**"), for employees of Sears Canada, Sears Contact, Corbeil and SLH.[66] Sears Canada acts as both the "sponsor employer" and the "administrator" of the Sears Pension Plan for the purposes of the PBA.[67]

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61 Wong Affidavit, para. 17(d).

62 Wong Affidavit, para. 87.

63 Wong Affidavit, para. 17(b).

64 RSO 1990, c P-8.

65 RSC 1985, c 1 (5th Supp).

66 Wong Affidavit, para. 94(a).

67 Wong Affidavit, para. 97.

37. The DB Component of the Sears Pension Plan was closed to new entrants as of June 30, 2008.[68] Service accruals under the DB Component of the Sears Pension Plan ceased effective July 1, 2008, and, as a result, no normal cost contributions are required.[69]

38. As at December 31, 2015, the hypothetical wind up deficit under the DB Component of the Sears Pension Plan was $266,805,000 and the transfer (wind-up) ratio was 81%.[70] As a result, the Sears Canada Group is required to make special payments in equal monthly installments of approximately $3.7 million at the end of each month (the "**Sears Special Payments**").[71] These special payment obligations may be modified pursuant to the next valuation report for the DB Component of the Sears Pension Plan, which is required to be performed no later than as at December 31, 2018.[72]

39. Eligible active employees of Sears Canada, Sears Contact, Corbeil and SLH are eligible to participate in the DC Component of the Sears Pension Plan. Employees can select a contribution level from 1% to 7% of earnings, 50% of which is matched by the participating employer. In Fiscal 2016, the Sears Canada Group made contributions of $4.8 million to the DC Component of the Sears Pension Plan.[73]

40. All contributions that are due under the Sears Pension Plan have been paid.[74]

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68 Wong Affidavit, para. 97.

69 Wong Affidavit, para. 100.

70 Wong Affidavit, para. 98.

71 Wong Affidavit, para. 99.

72 Wong Affidavit, para. 99.

73 Wong Affidavit, para. 102.

74 Wong Affidavit, para. 103.

(ii) Other Pension Arrangements

41. The Sears Canada Group also maintains a number of other pension arrangements, which are described in further detail in the Wong Affidavit:[75]

(a) a non-registered supplemental pension plan maintained to provide benefits to eligible participants in the DB component of the Sears Pension Plan (the "**Supplemental Plan**");

(b) two pension plans registered under the *Pension Benefits Standards Act*[76] (the "**PBSA**") and the ITA which provide defined contribution pension benefits to eligible employees in the Eastern Division and the Western Division of 168886 Canada Inc., respectively (the "**168886 Eastern Plan**" and the "**168886 Western Plan**"); and

(c) a U.S. defined contribution pension plan for the employees of The Cut Inc. (the "**401K Plan**") that is provided through a third party administrator, Trinet.

42. The Sears Canada Group has satisfied its funding requirements in respect of the benefits under the Supplemental Plan and is current on its payment of benefits under the Supplemental Plan,[77] and has paid all contributions to each of the 168886 Eastern Plan, the 168886 Western Plan, and the 401K Plan that are due with respect to those plans.[78]

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75 Wong Affidavit, paras. 94, 104–111 and 116–117.

76 RSC 1985, c 32 (2nd Supp).

77 Wong Affidavit, para. 107.

78 Wong Affidavit, paras. 109, 111, and 117.

(iii) PRB Plan

43. Sears Canada also maintains a post-retirement benefit plan, which provides life insurance, medical and dental benefits to eligible retired employees of the Sears Canada Group (the "**PRB Plan**").[79] Benefits under the PRB Plan are provided through a health and welfare trust on a pay-as-you-go basis.[80]

44. As of January 31, 2017, Sears Canada' post-retirement benefit liabilities under the PRB Plan on an accounting basis totaled approximately $196 million. Sears Canada is current on its payment of post-retirement life, health and dental benefits under the PRB Plan.[81]

45. As a result of the significantly constrained liquidity position of the Applicants, the Applicants intend to serve a motion in the near term, on notice to affected parties, including to all participants of the DB Component of the Sears Pension Plan and to the Ontario Superintendent of Financial Services (the "**Superintendent**"), in order to request that the obligation of Sears Canada to make the Sears Special Payments be stayed and the post-retirement benefits under the PRB Plan be suspended, during the course of this CCAA proceeding, or until further order of this Court. Sears Canada cannot afford to make these payments as it attempts to restructure under the CCAA and the cash forecasts do not contemplate that they will be made beyond June 2017.[82]

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79 Wong Affidavit, paras. 96 and 112.

80 Wong Affidavit, para. 112.

81 Wong Affidavit, para. 114.

82 Wong Affidavit, paras. 101 and 115.

G. Financial Position of the Canadian Business

(a) Current Financial Profile

46. As a publicly traded company, Sears Canada files consolidated financial statements with the Canadian Securities Administrators and with the Securities and Exchange Commission in the United States.[83]

47. Certain information contained in the audited financial statements is summarized in the Wong Affidavit. Briefly:

(a) As at April 29, 2017, the Sears Canada Group had total assets of approximately $1.187 billion. This included current assets of approximately $942 million and non-current assets of approximately $245 million.[84]

(b) As at April 29, 2017, the Sears Canada Group had total liabilities of approximately $1.108 billion. This included current liabilities of approximately $528 million and non-current liabilities of approximately $580 million.[85]

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83 Wong Affidavit, para. 136. A copy of the Sears Canada Group's audited financial statements as of January 28, 2017 is attached as Exhibit "D" to the Wong Affidavit. These are the most recent set of annual audited financial statements prepared and filed by Sears Canada. In addition, a copy of the Sears Canada Group's unaudited financial statements for the first quarter ending April 29, 2017 is attached as Exhibit "E" to the Wong Affidavit. These are the most recent set of unaudited quarterly financial statements prepared and filed by Sears Canada.

84 Wong Affidavit, para. 138.

85 Wong Affidavit, para. 142.

48. The Sears Canada Group's long-term liabilities consist primarily of the approximately $120.4 million obligation in respect of long-term debt and the approximately $294.9 million obligation in respect of Sears Canada's retirement plans.[86]

49. As of June 17, 2017, the Sears Canada Group had cash on hand of approximately $125.3 million. As of June 17, 2017, the Sears Canada Group had inventory with a cost value of approximately $648.1 million.[87]

(b) Secured Debt and Credit Facilities

(i) Wells Fargo Credit Agreement

50. On September 10, 2010, Sears Canada entered into a Credit Agreement (as amended, the "**Wells Fargo Credit Agreement**") with Wells Fargo Capital Finance Corporation Canada ("**Wells Fargo**") as Administrative Agent and Co-Collateral Agent together with a number of other lenders (the "**Revolving Facility Lenders**"). The obligations of Sears Canada under the Wells Fargo Credit Agreement are guaranteed on a secured basis by Corbeil (and together with Sears Canada, the "**Loan Parties**").[88]

51. The Wells Fargo Credit Agreement currently provides a $300 million senior secured revolving credit facility (the "**Revolving Credit Facility**") with a maturity date of May 28, 2019.

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86 Wong Affidavit, para. 145.

87 Wong Affidavit, para. 140.

88 Wong Affidavit, para. 150.

Advances under the Revolving Credit Facility are available by way of direct advances or letters of credit.[89]

52. Availability under the Revolving Credit Facility is determined pursuant to a borrowing base formula which is linked to the value of 85% of the Loan Parties' eligible credit card receivables plus 85% of the Loan Parties' eligible inventory less the amount of reserves relating to liens or charges that could rank *pari passu* or in priority to Wells Fargo's liens. This includes a reserve in respect of estimated net pension deficits in the event of a wind-up of the DB Component of the Sears Pension Plan (the "**Pension Reserve**").[90]

53. Sears Canada calculates its borrowing base monthly to determine the amount of financing availability (as supported by collateral) that it can draw upon under this facility.[91]

54. On June 5, 2017, Sears Canada drew $33 million under the Revolving Credit Facility and there is currently no material additional availability after application of the reserves.[92] In addition, there are 35 letters of credit (each an "**LOC**") outstanding as of May 26, 2017 in the aggregate principle amount of $117.3 million, as well as merchandise LOCs outstanding in the aggregate principal amount of approximately US$14.3 million.[93]

55. The Revolving Credit Facility includes a requirement for mandatory repayments to the extent the loans outstanding exceed the line cap or if Sears Canada's liquidity falls below a

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89 Wong Affidavit, para. 151. A copy of the Wells Fargo Credit Agreement, including the amendments thereto, is attached as Exhibit "F" to the Wong Affidavit.

90 Wong Affidavit, para. 152.

91 Wong Affidavit, para. 153.

92 Wong Affidavit, para. 154.

93 Wong Affidavit, para. 155.

specified level. Such mandatory repayments do not reduce the credit limit. Advances and unused commitments under the Revolving Credit Facility may be optionally prepaid or reduced.[94]

56. Due primarily to the Pension Reserve, the Revolving Credit Facility provides insufficient liquidity for Sears Canada.[95]

(ii) GACP Term Loans

57. On March 20, 2017, in order to fund its operation restructuring initiatives,[96] Sears Canada entered into a Credit Agreement (the "**GACP Credit Agreement**" and, together with the Wells Fargo Credit Agreement, the "**Credit Agreements**") with GACP Finance Co., LLC ("**GACP**") as Administrative Agent and Syndication Agent and the lenders currently participating in the syndicate (the "**Term Loan Lenders**").[97]

58. The GACP Credit Agreement is a term loan credit facility with two available tranches. An initial term loan of approximately US$93.9 million (CDN $125 million) was advanced on March 20, 2017 (the "**Initial Term Loan**") against a borrowing base of 10% of the Loan Parties' eligible credit card receivables plus 20% of the Loan Parties' eligible inventory, less the amount of reserves, including the Pension Reserve under the Revolving Credit Facility.[98]

59. The second tranche is a delayed draw term loan which is available at Sears Canada's option subject to the grant of a first charge on certain owned and leased real property (the "**Delay Draw**

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94 Wong Affidavit, para. 156.

95 Wong Affidavit, para. 157.

96 Wong Affidavit, para. 8.

97 Wong Affidavit, para. 158. A copy of the GACP Credit Agreement, including amendment thereto, is attached as Exhibit "G" to the Wong Affidavit.

98 Wong Affidavit, para. 159.

Term Loan" and, together with the Initial Term Loan, the "**Term Loans**"). The amount of the Delayed Draw Term Loan cannot exceed the lesser of (a) the U.S. dollar equivalent of CDN $175 million and (b) a borrowing base of 50% of the fair market value of owned real property and 30% of the fair market value of leasehold real property, in each case with a first priority charge in favour of the Term Loan Lenders, less reserves (including the Pension Reserve). The anticipated closing date with respect to the Delay Draw Term Loan was extended from May 4, 2017 to June 30, 2017.[99]

60. Subsequently, it became apparent that the Delay Draw Term Loan would not be available. As discussed below, the Term Loan Lenders informed Sears Canada that they were only willing to lend up to $109.1 million, and Sears Canada concluded that it was not prudent to encumber its remaining real estate assets for borrowings of only $109.1 million.[100]

61. The GACP Credit Agreement includes a requirement for mandatory repayments to the extent the loans outstanding exceed the loan cap or if Sears Canada's liquidity falls below a specified level (but subject to an aggregate $20 million threshold before such repayment is required).[101]

62. The GACP Credit Agreement may impact on the availability of financing under the Revolving Credit Facility. If the amount advanced in the Term Loans exceeds the borrowing base, the difference between those amounts becomes a reserve against the Revolving Credit Facility (the

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99 Wong Affidavit, para. 160.

100 Wong Affidavit, para. 163.

101 Wong Affidavit, para. 161.

"**Push Down Reserve**"). The Push Down Reserve consequently reduces the amount of financing available to Sears Canada under the Revolving Credit Facility.[102]

63. The GACP Credit Agreement will terminate on the earliest of (i) March 20, 2022, (ii) the termination date of the Wells Fargo Credit Agreement if it is not refinanced under certain terms, and (iii) the date that an earlier termination event occurs. The obligations of Sears Canada under the GACP Credit Agreement are guaranteed on a secured basis by Corbeil.[103]

(c) Collateral for Credit Facilities

64. The obligations of Sears Canada and Corbeil under or in connection with the Credit Agreements are secured by certain of Sears Canada's and Corbeil's assets (the **"Collateral**").[104]

65. The respective priorities of Wells Fargo and GACP with respect to the Collateral are governed by an Intercreditor Agreement dated as of March 20, 2017 made between Wells Fargo and GACP and acknowledged by Sears Canada and Corbeil. Subject to two limited inventory suppliers, (i) Wells Fargo has first priority over the Wells Fargo Priority Collateral and has second priority over the GACP Priority Collateral, and (ii) GACP has first priority over the GACP Priority Collateral and has second priority over the Wells Fargo Priority Collateral. [105]

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[102] Wong Affidavit, para. 162.

[103] Wong Affidavit, para. 158.

[104] Wong Affidavit, para. 164. A copy of the Amended and Restated Wells Fargo Collateral Agreement is attached as Exhibit "H" to the Wong Affidavit. A copy of the Amended and Restated GACP Collateral Agreements is attached as Exhibit "I" to the Wong Affidavit.

[105] Wong Affidavit, para. 167. A copy of the Intercreditor Agreement is attached as Exhibit "J" to the Wong Affidavit.

H. Cash Management

66. The details of the Applicants' cash management systems and banking arrangements are summarized in the Wong Affidavit. It is proposed during the CCAA proceeding that these arrangements remain in place.[106]

I. Urgent Need for Relief

67. The Sears Canada Group has experienced declining sales and significant losses, with net losses beginning in 2014.[107]

68. Factors contributing to this decline in financial performance include (i) a general weakening of the traditional Canadian retail industry; (ii) unsustainable fixed costs from an overly-broad footprint; (iii) the decline of the catalogue business; (iv) lower than expected conversion of catalogue customers to online customers; (v) the inability to secure an agreement with a financial institution for the management of the Sears Canada Group's credit and financial services operations; and (vi) the weakening of the Canadian dollar.[108]

69. As a result of the Sears Canada Group's poor financial performance and considerable negative press, vendors supplying inventory to Sears Canada have increasingly been imposing reduced terms on the company. This has further exacerbated liquidity issues.[109]

70. Additionally, the Sears Canada Group faces certain challenges with respect to its pension and post-retirement benefit obligations. While the Sears Canada Group is up-to-date with the

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106 Wong Affidavit, paras. 169–191.

107 Wong Affidavit, para. 193.

108 Wong Affidavit, para. 194.

109 Wong Affidavit, para. 197.

current required contributions to the Sears Pension Plan, the DB Component of the Sears Pension Plan has a large funding deficit when calculated on a wind-up basis and the yearly special payments place a significant strain on the liquidity available to conduct ongoing operations. The funding deficit has become a significant risk and impediment to the Sears Canada Group's ongoing business.[110]

71. The Sears Canada Group has taken a number of steps to re-engineer its business for long-term growth, including leveraging technology to transform from a bricks-and-mortar retail platform to an e-commerce retailer with supporting stores. To this end, Sears Canada launched Initium Commerce Lab, an innovation hub, to design and implement a modernized technology platform for Sears Canada. Sears Canada has also reduced square footage and changed store product mix, launched a new off-price retail business called "The Cut", closed certain underperforming stores, improved logistics, and consolidated distribution operations and reduced costs.[111]

72. The Sears Canada Group has been funding these initiatives through monetization of real estate assets, sale of joint venture interests, and, as noted above, the Initial Term Loan under the GACP Credit Agreement that was advanced on March 20, 2017.[112]

73. It has become apparent that the second tranche of the Term Loans – the Delay Draw Term Loan – of up to the U.S. dollar equivalent of CDN $175 million cannot be funded in a timely manner or at all. The Term Loan Lenders recently communicated to Sears Canada that they are

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110 Wong Affidavit, para. 198.

111 Wong Affidavit, paras. 6–7 and 210. The details of these initiatives are set out in paras. 211–218 of the Wong Affidavit.

112 Wong Affidavit, para. 8.

only willing to lend an amount up to $109.1 million under the Delay Draw Term Loan, which is significantly less than the $175 million originally expected. Ultimately, Sears Canada concluded that it was not prudent to encumber its remaining real estate assets for borrowings of only $109.1 million.[113]

74. The inability to access the Delay Draw Term Loan has resulted in increased strain on Sears Canada's liquidity. In addition, Sears Canada's management recently noted that there was significant doubt as to the company's ability to continue as a going concern in its consolidated quarter-end financial statements filed on June 13, 2017. Management also noted that Sears Canada's ability to continue to satisfy its obligations as they became due and implement its business plan in the ordinary course was uncertain due to Sears Canada's inability to borrow the full amount of the second tranche of funding and the lack of timely, available alternative sources of liquidity.[114] The Applicants cannot complete the implementation of their operational restructuring without additional liquidity and the stability created by a stay of proceedings under the CCAA.[115]

PART III -ISSUES AND THE LAW

75. This Application addresses the following issues:

(a) The Applicants are entitled to seek protection under the CCAA:

(i) The Applicants are insolvent;

(ii) The Applicants' chief place of business is Ontario;

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[113] Wong Affidavit, para. 163.

[114] Wong Affidavit, paras. 10 and 163.

[115] Wong Affidavit, para. 10.

(b) The Applicants are entitled to a broad stay of proceedings:

(i) The stay should be extended to the Partnership;

(ii) The stay should extend to "co-tenancy" rights of third party tenants; and

(iii) The stay should extend to the Hometown Dealers and the Corbeil Franchisees;

(c) This Court has the jurisdiction to permit the postponement of the Applicants' annual general meeting of shareholders;

(d) This Court should approve protections for employees, including a KERP and KERP Charge:

(i) The KERP secures continued service of key employees, as required, throughout this CCAA proceeding;

(e) This Court has the jurisdiction and the discretion to authorize the payment of pre-filing amounts to "critical" suppliers;

(f) This Court should exercise its discretion to approve the other Court-ordered charges:

(i) The DIP Facility and the DIP Lenders' Charges will provide essential liquidity;

(ii) The Administration Charge and FA Charge will ensure the continued engagement of the advisors; and

(iii) The Directors' Charge will ensure the continued services of the directors and officers.

A. The Applicants are Entitled to Seek Protection Under the CCAA

(a) The Applicants Are Insolvent

76. The CCAA applies to a "debtor company" or affiliated debtor companies where the total of claims against the debtor or its affiliates exceeds five million dollars. Pursuant to section 2 of the CCAA, a "debtor company" means, *inter alia*, a company that is insolvent.[116]

77. Whether a company is insolvent for the purposes of this definition is evaluated by reference to the definition of "insolvent person" in the *Bankruptcy and Insolvency Act*[117] ("**BIA**"). The definition of "insolvent person" in the BIA is as follows:

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> > (a) who is for any reason unable to meet his obligations as they generally become due,
> >
> > (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
> >
> > (c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;[118]

78. In *Stelco,*[119] Farley J. held that the test for "insolvency" under the CCAA should be given an expanded meaning in order to give effect to the objectives of the CCAA of allowing the debtor company to obtain some breathing room in order to restructure. Under the *Stelco* approach, a Court will determine whether there is a reasonably foreseeable expectation at the time of filing that there

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116 CCAA, ss. 2 and 3(1).

117 RSC 1985, c B-3.

118 BIA, s. 2.

119 *Re Stelco Inc*., 2004 CarswellOnt 1211 (Sup Ct) [*Stelco*], leave to appeal to CA refused, 2004 CarswellOnt 2936, leave to appeal to SCC refused, 2004 CarswellOnt 5200.

is a looming liquidity crisis that will result in the applicant running out of money to pay its debts as they generally become due in the future without the benefit of a stay of proceedings. As Farley J. wrote:

> It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. [120] [Emphasis added.]

79. The Applicants are all affiliated debtor companies with total claims against them that far exceed $5 million.

80. Moreover, the Applicants are insolvent. When CCAA applicants form part of a significantly intertwined group of affiliated debtor companies, it may not be legally necessary to find that each and every applicant is insolvent on a stand-alone basis.[121] In any event, the Applicants in these proceedings are either currently insolvent under the BIA test for insolvency, or facing the kind of imminent liquidity crisis that clearly satisfies the expanded *Stelco* test.

81. Due to, among other things, Sears Canada's inability to draw on the full amount of the Delayed Draw Term Loan, and the continuing and mounting operating losses being faced by the company, the Sears Canada Group is facing a looming liquidity crisis and will be unable to meet its obligations as they become due without court protection. Further, the Sears Canada Group does not have sufficient liquidity to pay the claims that will be triggered through the last phase of the operational restructuring described above.[122]

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[120] *Stelco*, above at note 119 at para. 26. *Stelco* has been consistently applied by subsequent CCAA courts, including recently by this Court in *Re Target Canada Co*., 2015 ONSC 303 at paras. 26 and 27 [*Target*].

[121] *Re First Leaside Wealth Management Inc.,* 2012 ONSC 1299 at paras. 28 to 30 [*First Leaside*].

[122] Wong Affidavit, para. 206.

82. The Applicants are therefore insolvent and will be unable to meet their obligations as they come due without the benefit of an Initial CCAA Order and the receipt of DIP financing. If the Applicants are not permitted the opportunity to restructure under the CCAA or are not able to successfully restructure and instead proceed to bankruptcy, the expected proceeds of the Applicants' assets and business would in all likelihood be insufficient to pay in full the claims of their creditors (including those claims arising by virtue of the Applicants' ceasing to operate).[123]

83. The Applicants are therefore insolvent and are debtor companies to which the CCAA applies under either the BIA or the *Stelco* test.

(b) This Court Has Jurisdiction

84. Section 9(1) of the CCAA permits an application under the CCAA to be made in the province within which the head office or chief place of business of the company in Canada is situated.[124]

85. The chief place of business of the Sears Canada Group is Ontario. Sears Canada's head office and corporate headquarters is located in Toronto, Ontario. Approximately 7,500 employees work in Ontario. There are 65 operating Sears Canada retail stores located in Ontario as of April 29, 2017, which is the largest number of stores in any province where Sears Canada operates. Two of Sears Canada's five primary distribution centers are also located in Ontario.[125]

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123 Wong Affidavit, para. 207.

124 CCAA, s. 9(1).

125 Wong Affidavit, para. 31.

86. The Applicants therefore submit that this Court has jurisdiction over this proposed CCAA proceeding.

B. The Applicants Are Entitled to a Broad Stay of Proceedings

87. In order to prevent a rapid erosion of enterprise value and to permit the Sears Canada Group to continue to operate as a going concern, the Applicants require a stay of proceedings.

88. The Applicants require an immediate and realistic dialogue to ensue with and among their stakeholders with the goal of maximizing the ongoing value of the Applicants' business, and continuing employment for as many of their employees as is reasonably possible. The requested stay of proceedings will maintain the "status quo" and permit an orderly restructuring and analysis of Sears Canada's affairs.[126]

89. The Applicants are concerned about the potential termination of contracts by key suppliers and the inability to require suppliers to provide future product in accordance with contractual arrangements. It would be detrimental to the Sears Canada Group's ability to restructure if proceedings were commenced or continued or rights and remedies were exercised against the Applicants.[127]

90. The requested stay will forestall manoeuvres among creditors and stakeholders and create a level-playing field while the Applicants seek to maximize recoveries for all stakeholders and achieve a going-concern solution to their financial difficulties.

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[126] Wong Affidavit, para. 271.

[127] Wong Affidavit, para. 221.

(a) Stay Should Be Extended to the Partnership

91. While the Partnership that operates the Sears Canada Group's wireless, phone and long distance business is not an Applicant in this proceeding, the Applicants seek to have a stay of proceedings and other benefits of an Initial Order under the CCAA extended to the Partnership in order to maintain stability through this restructuring process.[128]

92. The CCAA expressly applies, by its terms, to debtor companies, but not partnerships.[129] Where the operations of partnerships are integral and closely related to the operations of applicants, it is well-established that the CCAA Court has the jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved.[130]

93. The business and operations of the Applicants are heavily intertwined with that of the Partnership, as it is wholly owned by the Applicants. The Partnership operates out of Sears Canada's stores and through its online platform.[131]

94. The Applicants therefore submit that it is appropriate to extend the stay of proceedings to the Partnership in order to achieve the objectives of the CCAA in relation to the Applicants' business as a whole.

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128 Wong Affidavit, para. 20.

129 CCAA, s. 2, "debtor company".

130 See, for example, *Re Lehndorff General Partner*, 1993 CarswellOnt 183 at paras. 16 to 21 (Sup Ct) [*Lehndorff*]; *Re Priszm Income Fund*, 2011 ONSC 2061 at paras. 26 and 27 [*Priszm*]; *Re Urbancorp Toronto Management Inc*., 2016 ONSC 3288 at paras. 43 and 44; *Target*, above note 120 at paras. 42 and 43.

131 Wong Affidavit, para. 20.

(b) Landlord Protection in Relation to Third Party Tenants

95. Many third party retail leases provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. For tenants of commercial properties where Sears Canada's stores, offices or warehouses are located, the Applicants are asking the Court to stay rights (the "**Co-tenancy Stay**"), including but not limited to termination rights and reduction or abatement of rent, that these third party tenants may have against the landlords, owners, operators or managers of these commercial properties that arise as a result of the Applicants' insolvency, or as a result of any steps taken by the Applicants pursuant to the proposed Initial Order.[132]

96. This Court's authority to grant the Co-tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on "any terms that [the Court] may impose."[133] Such a stay of proceedings was recently granted in the Target CCAA proceeding in order to preserve the *status quo* while the debtor company engaged in a sale process that could preserve value in the debtor's leases. It was appropriate in these circumstances to prohibit the third party tenants from exercising their contractual rights for a finite period. In granting this relief in *Target*, Morawetz J. relied upon the fact that a similar stay was granted in Eaton's second CCAA proceeding.[134]

97. In *Eaton's*, the Court invoked the broad jurisdiction of the CCAA Court to make orders against third party non-creditors, where their actions would potentially jeopardize the success of a

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132 Wong Affidavit, para. 52.

133 CCAA, s. 11.02(1). See also CCAA, s. 11.

134 *Target*, above note 120 at paras. 44 to 48.

plan.[135] This Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay period, the claims of the landlords against the debtor company could greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor.[136]

98. The Court in *Eaton's* also concluded that any allegations of prejudice by the affected tenants were premature, given the considerable uncertainty regarding the outcome of the proceeding and its effect on particular leases. If Eaton's could not achieve its restructuring with the landlords, the economic harm could be far-reaching and devastating. Furthermore, an exodus of tenants from the affected malls could have significant ripple effects in the local economies, thereby causing further job losses. Finally, a bankruptcy of Eaton's would have had an even more devastating impact on all stakeholders.[137]

99. In these proceedings, as submitted further below, the Applicants intend to return to Court, if the Initial Order is granted, to seek approval of a sales process for some or all of the business. It is premature to determine whether this process will be successful, whether (for example) any leases will be conveyed to third party purchasers for value and whether the Applicants can successfully develop and implement a plan that their stakeholders, including their landlords, will accept.

100. While this process is being resolved, the Co-tenancy Stay postpones the contractual rights of these tenants for a finite period. Any prejudice to those tenants is therefore significantly outweighed by the benefits of the Co-tenancy Stay to all of the stakeholders of the Applicants.

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135 *Re T. Eaton Co.*, 1997 CarswellOnt 1914 at para. 6 (Gen Div) [*Eaton's*], citing *Norcen Energy Resources Ltd v Oakwood Petroleums Ltd*, 1988 CarswellAlta 318 (QB); see also, *Lehndorff*, above note 130.

136 *Eaton's*, above note 135 at para. 4.

137 *Eaton's*, above note 135 at para. 7.

101. The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances. This relief is necessary to mitigate the effect of Sears Canada's insolvency on its landlords and to maintain the status quo while the restructuring is underway.[138]

(c) Third Party Stay Protecting Hometown Dealers and Corbeil Franchisees

102. In the proposed Initial Order, the Applicants seek to extend the CCAA stay of proceedings to protect Hometown Dealers and the Corbeil Franchisees (together, the "**Protected Dealers**") from the effects of the insolvency of the Applicants.

(i) Jurisdiction to Grant the Protected Dealer Stay

103. The Applicants submit that this Court has the jurisdiction to extend the protection of the stay to the Protected Dealers and that it is appropriate to do so.

104. This Court's jurisdiction to extend the CCAA stay to protect third parties arises as a matter of its broad jurisdiction under section 11 of the CCAA to make any order that the Court thinks fit.[139] The CCAA case law contains numerous examples where the Court has extended the benefit of the CCAA stay to a third-party non-applicant, thereby affecting the rights of other third parties who are not creditors of the CCAA applicant, where actions by those third parties could detrimentally affect the debtor company's ability to restructure.

105. A number of cases have imposed a stay of proceedings affecting the rights of creditors to recover against a non-applicant that acts as guarantor for obligations of a CCAA debtor. For

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138 Wong Affidavit, para. 52.

139 CCAA, s. 11.

example, in *Tamerlane Ventures*, the applicants requested that the CCAA stay of proceedings be extended to two non-applicant parties on the basis that the operations of the applicants and the non-applicants were intertwined and that the stay was necessary to maintain stability and value in the CCAA process. The non-applicant parties included a U.S. subsidiary of the applicants that had guaranteed the applicants' secured loans.[140]

106. Courts also frequently grant stays of proceedings in favour of directors and officers of the CCAA debtor.[141] The rationale for such a stay is that it prevents the debtor company from having to devote significant time and resources to defending litigation that inevitably requires involvement by key personnel of the debtor at critical stages in the restructuring. Such stays also preserve the *status quo*, preventing derivative claims from being brought against the debtor company until it can be determined whether a successful plan of compromise or arrangement can be achieved.

107. Finally, courts have extended a stay of proceedings to protect third-party insurers of the debtor company in circumstances where the insurers' exposure to claims could have a detrimental impact on the debtor company's CCAA proceeding. In granting this relief, the Courts have noted that the inherent jurisdiction of the CCAA court to extend the benefit of stay of proceedings to third parties is not limited to the categories of third parties (e.g., partners of a partnership) to whom the CCAA stay has previously been extended.[142]

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[140] *Re Tamerlane Ventures Inc.*, 2013 ONSC 5461 at paras. 20 and 21. See also *Re Cinram International Inc.*, 2012 ONSC 3767 at paras. 61 to 65 [*Cinram*] (stay extended to a number of non-applicant entities, including subsidiaries of the debtor company that were parties to an agreement with an applicant as surety, guarantor or otherwise).

[141] See, for example, *Re Nortel Networks Corp*., 2009 CarswellOnt 4806 at paras. 20, 27 and 36 (Sup Ct) [*Nortel Networks (ERISA Litigation)*].

[142] See, for example, *Re 4519922 Canada Inc*., 2015 ONSC 124 at paras. 68 to 72.

(ii) The Protected Dealer Stay Should Be Granted

108. The Applicants submit that it is therefore both permissible and appropriate to extend the CCAA stay to the Protected Dealers who are not Applicants in this proceeding. Further, the proposed extension of the CCAA stay is limited to matters arising out of the making of the proposed Initial Order or the insolvency of the Applicants.

109. In the case of the Hometown Dealers, they independently own and operate 62 of Sears Canada's Hometown stores. Sears Hometown Dealer stores allow Sears Canada to operate in smaller markets that cannot support a full-line department store.[143] Sears Canada makes a profit on the sale of inventory in Hometown stores.[144]

110. Hometown stores are an integral part of Sears Canada's go-forward plan, and the businesses of Sears Hometown Dealers and the Sears Canada Group are intertwined in a number of ways, including the following:

(a) Hometown Dealers exclusively sell Sears Canada inventory;

(b) Since Sears Canada continues to hold title to the Hometown Dealers' inventory, this inventory is taken into account when calculating the borrowing base under Sears Canada's credit facilities; and

(c) Sears Canada provides information technology, point of sale (or "POS") systems, and marketing and branding services.[145]

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143 Wong Affidavit, at paras. 41 and 223.

144 Wong Affidavit, para. 41.

145 Wong Affidavit, para. 43.

111. In the case of the Corbeil franchisees, Corbeil adopted a franchise model to facilitate the company's expansion. In consideration for the license to use the "Corbeil Appliances Concept" and the receipt of certain services from Corbeil, Corbeil franchisees pay Corbeil: (i) an initial franchise fee; (ii) a royalty based on gross income (iii) marketing fees, and (iv) accounting and IT charges. All products and services sold at the franchise stores must be supplied by Corbeil.[146]

112. Corbeil franchisees account for half of the Corbeil store footprint and are integral to the continued success of the Corbeil business going forward. The Corbeil franchisees are a key part of the Sears Canada plan going forward.[147]

113. Any proceedings commenced by third parties against the Protected Dealers would also necessarily require the participation of key personnel of the Applicants – for example, to provide evidentiary support for the claim through witnesses or documents. The need to provide such support could be a very significant distraction for the Applicants' key personnel during the restructuring and would materially detract from the paramount goal of achieving the timely going-concern restructuring of the business. Additionally, it would negatively affect the Sears Canada Group's plan to continue with its Hometown Dealer stores and Corbeil franchisees, and would hamper ongoing business relations at this critical time.[148]

114. The "balancing of prejudices" favours this relief in the circumstances of this case. As a general matter, CCAA courts have held that subjecting plaintiffs to a temporal stay of their rights to bring legal actions causes no prejudice to such plaintiffs because their actions are not being

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146 Wong Affidavit, para. 44.

147 Wong Affidavit, para. 223.

148 Wong Affidavit, para. 224.

precluded, but simply postponed.[149] If the Applicants are successful in achieving a going-concern restructuring, some or all such third parties may no longer have reason to exercise any rights against the Protected Dealers. In any event, any prejudice associated with the extension of the third-party stay to the Protected Dealers is far outweighed by the benefits to the Applicants' stakeholders as a whole of providing the necessary breathing space to achieve a going-concern solution to the Applicants' financial difficulties.

C. Postponement of Annual Shareholder Meeting

115. Sears Canada is required under the *Canada Business Corporations Act*[150] ("**CBCA**") to call, and pursuant to the TSX rules, to hold an annual meeting of its shareholders by no later than July 28, 2017, being six months after the end of its preceding financial year which ended on January 28, 2017. Sears Canada's annual meeting (the "**Meeting**") was scheduled to be held on June 14, 2017. On June 13, 2017, Sears Canada announced that, in light of recent developments, it was postponing the annual meeting to a date to be determined.[151]

116. This Court has jurisdiction to order that this meeting be postponed and has made similar orders in a number of other CCAA proceedings. For example, this Court exercised its broad jurisdiction and permitted the debtor company to postpone its annual meeting in *Canwest*, on the basis that preparations for calling and holding the meeting would distract the debtor company's key personnel at a time when they need to focus on the restructuring.[152] In another case, the fact

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149 *Nortel Networks (ERISA Litigation)*, above note 141 at para. 36, citing *Campeau v Olympia & York Developments Ltd.* (1992), 14 CBR (3d) 303 at para. 24 (Ont Gen Div).

150 RSC 1985, c C-44, s. 133(1)(b).

151 Wong Affidavit, para. 264.

152 *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 at paras. 53 and 54 (Sup Ct) [*Canwest Global (Initial Order)*].

that the shareholders have no economic interest in an insolvent company was stated to be a factor supporting the postponement of the annual meeting while the debtor's affairs are being restructured.[153]

117. The Applicants submit that it would not be in the best interests of the restructuring to hold the Meeting as scheduled. The management of Sears Canada are presently devoting their efforts to stabilizing the business of the Sears Canada Group with a view to implementing a going concern and value maximizing restructuring. Holding the Meeting during the CCAA proceedings would divert the attention of senior management away from the restructuring.[154]

118. The proposed postponement of the Meeting will not cause undue prejudice or unduly disrupt corporate steps that are required to be taken under the CBCA. One of the key purposes of an annual meeting is to elect directors.[155] However, if directors of Sears Canada are not elected at an annual meeting, the CBCA contemplates that the incumbent directors will continue to hold office until their successors are elected.[156] The incumbent directors are knowledgeable about the business and it is appropriate that they continue in office at least until the business is stabilized.

119. A further purpose of an annual meeting is to place financial information before the shareholders.[157] However, considerable financial and other information is and will continue to be available to the public, including the shareholders, through the Applicants' court filings which will

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153 *Re Cline Mining Corp.*, 2014 ONSC 6998 at paras. 53 to 55.

154 Wong Affidavit, para. 265.

155 CBCA, s. 106(3).

156 CBCA, s. 106(6).

157 CBCA, s. 155.

be easily accessible on the proposed Monitor's website (cfcanada.fticonsulting.com/searscanada) and through other public records.[158]

120. The Applicants submit that it is impractical for Sears Canada to call and hold the Meeting during this CCAA proceeding.[159] It is both permissible and appropriate for this Court to order that the Applicants can postpone the Meeting.

121. The articles of Sears Canada require a minimum of seven directors. As a result of recent resignations, Sears Canada currently has six directors. Nevertheless, Sears Canada's by-laws permit the board of directors to act as such provided there is a quorum in place (for which only three directors are required).[160]

122. The Applicants submit that Sears Canada ought to be relieved of the requirement in its by-laws that there be a minimum of seven directors, pending further order of this Court. As Sears Canada can still conduct business pursuant to its by-laws, relieving it from that requirement will allow the Applicants to remain focused on their restructuring.

D. Protections for Employees

(a) Approval of the KERP

123. The Applicants seek the approval of a key employee retention plan ("**KERP**") and the granting of a Court-ordered charge (the "**KERP Charge**") up to the aggregate amount of $9.2 million as security for payments under the KERP. A portion of the KERP Charge is proposed to

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158 Wong Affidavit, para. 265.

159 Wong Affidavit, para. 265.

160 Wong Affidavit, para. 267.

rank immediately below the Administration Charge and FA Charge and immediately above the Directors' Priority Charge (the "**KERP Priority Charge**"). The remainder of the KERP Charge is proposed to rank immediately below the DIP Lenders' Charges and immediately above the Directors' Subordinated Charge (the "**KERP Subordinated Charge**").

124. The approval of a KERP and related KERP Charge is within the discretion of the CCAA court under its powers to make any order that the court thinks fit.[161] KERPs have been approved in numerous CCAA proceedings.[162] In *Nortel Networks,* for example, this Court approved a proposed KERP on the basis that the commitment and retention of key employees was "essential to the execution of a restructuring of Nortel and the completion of a plan of arrangement".[163] In *US Steel*, this Court approved a KERP for employees whose continued services were critical for the stability of the business and for the implementation of the marketing process and whose services could not easily be replaced due, in part, to the significant integration between the debtor company and its US parent.[164]

125. The factors justifying a KERP vary from case to case.[165] In *Grant Forest Products,* Justice Newbould upheld the provisions of an Initial Order granting a KERP and related KERP Charge, taking into account, among other things (a) the approval of the Monitor; (b) whether the beneficiaries of the KERP are likely to consider other employment opportunities if the KERP

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161 *Re US Steel Canada Inc.*, 2014 ONSC 6145 at para. 27 [*US Steel*].

162 See, for example, *Re Nortel Networks Corp.*, 2009 CarswellOnt 1330 (Sup Ct) [*Nortel Networks (KERP)*]; *Re Grant Forest Products Inc*., 2009 CarswellOnt 4699 (Sup Ct) [*Grant Forest*]; *Re Essar Steel Algoma Inc.*, 2015 ONSC 7656 [*Algoma*] at paras. 10 and 11.

163 *Nortel Networks (KERP),* above note 162 at para. 4.

164 *US Steel,* above note 161 at paras. 28 to 33.

165 *Re Walter Energy Canada Holdings Inc.*, 2016 BCSC 107 at para. 58 [*Walter*].

charge is not approved;[166] (c) whether the beneficiaries of the KERP are crucial to the successful restructuring of the debtor company; (d) whether a replacement could be found in a timely manner should the beneficiary elect to terminate his or her employment with the debtor company; and (e) the business judgement of the board of directors of the debtor company.[167]

126. The KERP in this case was developed by the Applicants with the involvement of the proposed Monitor.[168] The KERP will provide the participants with additional payments to incent them to continue their employment through the CCAA proceedings. The details regarding the circumstances that will entitle the beneficiaries of the KERP to payment – which are generally based on the fulfillment of certain milestones – are set in the Wong Affidavit.[169]

127. The KERP is designed to facilitate and encourage the continued participation of senior management and other key employees of the Applicants who are required to guide the business through the restructuring and preserve value for stakeholders. These employees have significant experience and specialized expertise that cannot be easily replicated or replaced. Additionally,

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166 In *Re Nortel Networks Corp*., 2009 CarswellOnt 1519 (Sup Ct) [*Nortel Networks (KEIP)*], a companion decision to the *Nortel Networks (KERP)* decision, Morawetz J. approved a key executive incentive plan arrangement ("KEIP") in circumstances in which there was a "potential" loss of management at the time who were sought after by competitors.

167 *Grant Forest*, above note 162. Note that in *Grant Forest*, the Monitor's view that the KERP was necessary to retain the key employee in question and appropriate in quantum was given considerable weight: see para. 19. In *Algoma*, above note 162 at para. 12, and *US Steel*, above note 161, the Court also indicated that it would defer to the business judgment of the debtor company and its board in determining that a KERP was necessary to retain key employees.

168 Wong Affidavit, para. 252. A chart showing the number of employees who are intended to benefit from the KERP and the KERP Charge is set out at para. 253 of the Wong Affidavit.

169 Wong Affidavit, paras. 251 to 258.

certain senior store level employees are included in the KERP in order to facilitate a successful liquidation of the closing stores and an orderly exit from the premises.[170]

128. All of the employees who are protected by the KERP are those whose continued service throughout the restructuring is essential to the stability of operations during this period and to the ability of the Applicants to pursue a going-concern solution to their current financial difficulties.

129. The Applicants submit that the size of the KERP is reasonable relative to KERPs granted in complex restructurings.[171]

130. The proposed Monitor is of the view that the terms of the proposed KERP and the quantum of the proposed KERP Charge are reasonable in the circumstances. The Applicants therefore submit that the KERP and the KERP Charge should be granted.

E. Authority to Permit Pre-Filing Payments to "Critical" Suppliers

131. During the course of this CCAA proceeding, the Applicants intend to make payments for goods and services supplied post-filing in the ordinary course as set out in the cash flow projections and as permitted by the draft Initial Order. The Applicants also seek authorization, if necessary and with the consent of the Monitor, to make payments for pre-filing amounts owing in arrears to

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[170] Wong Affidavit, para. 252. In *Target*, above note 120, at paras. 58 and 59, Morawetz J. approved a KERP that, in part, benefited store-level management employees and accepted that it was important to have stability among key employees during the liquidation process that was going to follow in that proceeding.

[171] *Nortel Networks (KERP)*, above note 162 at para. 8; *Nortel Networks (KEIP)*, above note 166 at para. 6 (two plans benefitted 5% of Nortel's global workforce, and covered 300 employees of the Canadian debtors; the Canadian component of these two plans was valued at approximately $13 million, with the KERP component representing approximately $6.2 million); see also *Target*, above note 120 (the KERP covered between 21 and 26 management employees and approximately 520 store level employees, supported by a charge of $ 6.5 million); *US Steel*, above note 161 (the KERP covered 28 employees, supported by a charge of $2.5 million).

certain critical third parties that provide services that are integral to the Applicants' ability to operate during the restructuring period.[172]

132. Ample authority decided prior to the 2009 amendments to the CCAA supports the Court's general jurisdiction to permit the payment of pre-filing obligations to persons whose services are deemed "critical" to the ongoing operations of the debtor.[173]

133. Section 11.4 of the CCAA, which was enacted as part of the 2009 amendments to the CCAA, gives the Court the specific authority to declare a person to be a critical supplier and to grant a charge on the debtor's property to secure amounts owing to that supplier for services provided after the filing. However, section 11.4 of the amended CCAA does not oust the court's inherent jurisdiction to make provision for the payment of pre-filing amounts to suppliers whose services are viewed as critical to the post-filing operations of the debtor, even where the debtor does not propose to secure payment of post-filing supplies with a critical supplier charge.[174]

134. As noted by Pepall J. in *Canwest Global*, the 2009 amendments, including under s. 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern.[175] The Supreme Court of Canada has also affirmed in *Century Services* that: "[t]he

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172 Wong Affidavit, paras. 268 to 270.

173 See for example *Re Smurfit-Stone Container Canada Inc*, 2009 CarswellOnt 391 at para. 21 (Sup Ct).

174 *Re Canwest Publishing Inc./Publications Canwest Inc.*, 2010 CarswellOnt 212 at para. 50 (Sup Ct) [*Canwest Publishing (Initial Order)*]; *Re Performance Sports Group Ltd.*, 2016 ONSC 6800 at para. 24 [*Performance Sports*].

175 *Canwest Global (Initial Order)*, above note 152 at para. 24.

general language of the *CCAA* should not be read as being restricted by the availability of more specific orders."[176]

135. Case law under both section 11.4 of the CCAA and under the inherent jurisdiction of the CCAA to authorize payment of pre-filing amounts demonstrates that a supplier is viewed as "critical" to the debtor company's post-filing operations where the particular goods or services are sufficiently integrated into the debtor company's operations that it would be materially disruptive to the debtor's operations and restructuring for the particular supplier to cease providing such services and/or difficult to secure an alternate supplier.[177]

136. The Applicants seek authorization to pay pre-filing amounts to certain specific categories of suppliers that they rely on in operating their businesses. These include, for instance:

(a) key logistics or other supply chain providers, customs brokers and clearing houses, fuel providers, repair, maintenance and parts providers, and armoured truck carriers;

(b) third parties that process credit cards, debit cards, and other forms of electronic payment that are essential to the ability of Sears Canada to accept such payment mechanisms in stores;

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176 *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 at para. 70.

177 See, for example, *Priszm*, above note 130. In *Priszm*, the suppliers who were declared to be "critical" to the debtor's operations were suppliers of food and other consumables that were necessary to the continued operation of the debtors' restaurant business, as well as utility service providers, suppliers of waste disposal services, providers of appliance repair and information technology services. Similarly, in *Canwest Global (Initial Order)*, above note 152 at para. 43, this Court recognized certain suppliers as critical to the debtor companies' operations for the purposes of paying pre-filing amounts, including television programming suppliers, newsprint suppliers, as well as the American Express Corporate Card Program and Central Billed Accounts that enabled the debtors' employees to perform their job functions. See also *Cinram*, above note 140 at paras. 67 and 68.

(c) certain overseas and domestic suppliers of both Sears Canada's branded and private label merchandise; and

(d) such other suppliers as are deemed necessary[178]

137. Such payments will only be made with the consent of the proposed Monitor.[179]

F. DIP Financing and Charges

(a) Nature of DIP Facility

138. The Applicants urgently need to secure access to interim financing to successfully restructure their business. Because of its current liquidity challenges, and as demonstrated in the 13-week cash flow forecast prepared by the Applicants with the assistance of the proposed Monitor (the "**Cash Flow Forecast**"), the Sears Canada Group requires interim financing to provide stability, continue going concern operations and to restructure its business as a part of this CCAA proceeding.[180] While the Applicants have implemented a number of steps to transform their business outside of CCAA protection, they simply do not have sufficient liquidity to continue their restructuring initiatives in the absence of the breathing space represented by court protection under the CCAA.[181]

139. Subject to certain terms and conditions, the Term Loan Lenders and the Revolving Facility Lenders (collectively, the "**DIP Lenders**") have agreed to provide two interim financing facilities (collectively, the "**DIP Facility**"). The DIP Facility consists of a $300 million revolving credit

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178 Wong Affidavit, paras. 129, 269 and 270.

179 Draft Initial Order, para. 6.

180 Wong Affidavit, para. 227.

181 Wong Affidavit, para. 10.

facility (the "**DIP Revolver**") as well as a term loan in the amount of the USD equivalent of CDN$150 million (the "**DIP Term Loan**"). The DIP Facility is guaranteed, jointly and severally, by the Applicants.[182]

140. The funds available under the DIP Facility will be used to meet the Sears Canada Group's funding requirements during the CCAA proceedings in accordance with the Cash Flow Forecast, including the payment of professional fees and other costs and expenses in connection with the CCAA proceedings.[183]

141. The DIP Facility includes the following commercial terms:

(a) **Interest**: DIP Term Loan: LIBOR + 11.0% (with a floor of 1%) or U.S. prime rate + 10.0%. DIP Revolver (on cash advances): LIBOR + 4.50% or Prime rate + 3.50%. DIP Revolver (on LOCs): (a) 4.50% per annum, in the case of a Standby LOC; and (b) 4.00% per annum, in the case of a merchandise (commercial) LOC.

(b) **Commitment Fee**: DIP Term Loan: 3.5%. DIP Revolver: 1.25%.

(c) **Unused Line Fee**: DIP Revolver: 0.375%.

(d) **Exit Fee**: DIP Term Loan 1.5%.[184]

142. As discussed above, there are a number of outstanding and undrawn LOCs under the Revolving Credit Facility. In the event that a beneficiary draws on an LOC from and after the

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[182] Wong Affidavit, para. 229. The related credit agreements are defined herein as the "**DIP Revolving Credit Agreement**" and the "**DIP Term Loan Credit Agreement**" (collectively, the "**DIP Credit Agreements**"). Copies of the DIP Credit Agreements are attached as Exhibit "K" to the Wong Affidavit.

[183] Wong Affidavit, at para. 230.

[184] Wong Affidavit, para. 232.

commencement of these CCAA proceedings, Sears Canada's obligation to reimburse the Revolver Lenders is triggered (the "**Reimbursement Obligation**"). The DIP Facility provides that from and after the comeback hearing, the amount of any outstanding Reimbursement Obligation will be deemed to be an advance under the DIP Revolver secured by the DIP Revolver Charge (as described below).[185]

143. Undrawn LOCs remain obligations of Sears Canada under the Revolving Credit Facility. Pursuant to the DIP Agreement, the undrawn LOCs will be cash collateralized by Sears Canada following the comeback hearing from cash on hand or through the use of the DIP Facility. The funds to cash collateralize the undrawn LOCs will be deposited into the L/C Collateral Account (as defined in the DIP Revolving Credit Agreement).[186]

144. As part of the Sears Canada Group's consideration of strategic alternatives, Sears Canada's current lenders were canvassed on their willingness to provide DIP financing. In the view of the Financial Advisor, the Sears Canada Group's existing lenders were in the best position to provide DIP financing in a timely manner as they were already familiar with the Sears Canada Group, its complex business, and its collateral base. Although discussions were held with another potential financier, the Financial Advisor was of the view that, given the rapidly deteriorating financial position of the Applicants, any non-current lender would likely be unable to conduct due diligence and provide committed DIP financing in the urgent timeframe required. Further, a DIP facility provided by Sears Canada's current lenders will avoid potentially distracting litigation involving a third party priming DIP facility.[187]

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185 Wong Affidavit, para. 234.

186 Wong Affidavit, para. 235.

187 Wong Affidavit, para. 228.

145. The DIP Revolver and the DIP Term Loan are proposed to be secured by Court-ordered security interests, liens and charges (the "**DIP Revolver Charge**" and the "**DIP Term Loan Charge**" respectively and, collectively, the "**DIP Lenders' Charges**") on all of the present and future assets, property and undertaking of the Applicants, including any cash on hand at the day of the filing (the "**Property**"). The DIP Lenders' Charges will not secure any obligation that exists before the Initial Order is made. The DIP Lenders' Charges are to have priority over all other security interests, charges and liens other than the Administration Charge, the FA Charge, the KERP Priority Charge and the Directors' Priority Charge (all terms as defined below). The DIP Revolver Charge is to have priority over the DIP Term Loan Charge with respect to the Wells Fargo Priority Collateral. The DIP Term Loan Charge is to have priority over the DIP Revolver Charge with respect to all other Property.[188]

146. Notwithstanding any other provision of the proposed Initial Order, the L/C Collateral Account shall be deemed to be subject to a lien, security, charge, and security interest in favour of Wells Fargo in its capacity as Agent under the DIP Revolving Credit Agreement (the "**DIP Revolver Agent**"). The charges as they may attach to the L/C Collateral Account, including by operation of law or otherwise (a) shall rank junior in priority to the lien, security, charge, and security interest in favour of the DIP Revolver Agent in respect of the L/C Collateral Account; and (b) shall attach to the L/C Collateral Account only to the extent of the rights, if any, of any Sears Canada Group entity to the return of any cash from the L/C Collateral Account in accordance with the DIP Revolving Credit Agreement.[189]

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188 Wong Affidavit, paras. 239 and 240.

189 Wong Affidavit, para. 241.

147. It is a condition precedent to the availability of the DIP Facility that the Initial Order be in form and substance satisfactory to the DIP Lenders, including in respect of the granting of the DIP Lenders' Charges. The maturity date of the DIP Facility is the earliest of (i) December 21, 2017; (ii) termination of the DIP Facility by Sears Canada; and (iii) the occurrence of an "Event of Default" to be defined in each applicable DIP Credit Agreement.[190] The DIP Credit Agreements also contain a series of milestones that are required to be met.[191]

(b) Jurisdiction to Approve DIP Financing and Related Charge

148. Section 11.2 of the CCAA gives the Court the statutory authority and discretion to grant a debtor-in-possession ("**DIP**") financing charge:

> **11.2(1)** ***Interim Financing*** – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> **11.2(2)** ***Priority*** – ***Secured Creditors*** – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

149. Section 11.2(4) of the CCAA sets out the following factors to be considered by the Court in deciding whether to grant a DIP financing charge:

> **11.2(4)** ***Factors to be considered*** – In deciding whether to make an order, the court is to consider, among other things:
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> (a) the period during which the company is expected to be subject to proceedings under this Act;
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> (b) how the company's business and financial affairs are to be managed during the proceedings;

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190 Wong Affidavit, para. 237.

191 Wong Affidavit, para. 238.

> (c) whether the company's management has the confidence of its major creditors;
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> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.

150. As noted above, a condition precedent to the DIP Lenders' agreement to extend DIP financing to the Applicants in their financially distressed circumstances is that the DIP Facility be secured by the DIP Lenders' Charges, which will have priority over all other security interests, charges and liens other than the Administration Charge, the FA Charge, the KERP Charge (all as defined below) and the Directors' Charge (as defined below). Such a condition is typical of DIP financings and commercially reasonable in the circumstances.[192]

151. The following factors also support the approval of the DIP Facility and the granting of the DIP Lenders' Charges, many of which satisfy the considerations enumerated in s. 11.2(4) above:

(a) In compliance with s. 11.2(1) of the CCAA, the DIP Lender's Charge will not secure any pre-filing obligations. The DIP Facility contemplates that – after the comeback hearing – it can be used to reimburse the Revolving Facility Lenders for any amounts drawn by beneficiaries on LOCs after the Applicants' CCAA filing on the basis that the Applicants' reimbursement obligations are a post-filing obligation. As submitted further below, the DIP Facility also contemplates that certain post-filing receipts and cash on hand be used to pay down all amounts owing under the Credit Agreements after the comeback hearing.

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[192] See, for example, *US Steel*, above note 161 at para. 7.

(b) The ability to make draws from the DIP Facility will stabilize the business.

(c) Based on the Applicant's cash flow requirements, the DIP Facility will provide the Borrower with the liquidity necessary to continue operations in the CCAA proceedings while it seeks a going-concern solution that maximizes recoveries for stakeholders.

(d) The proposed Monitor supports the Applicants' request for an order authorizing them to enter into the DIP Agreements and granting the DIP Lenders' Charges.

(e) The Applicants have no right to draw on the DIP Facility until after the proposed comeback hearing.

(c) Payments of Cash on Hand and Post-Filing Receipts to Pre-Filing Lenders

152. As described above, cash on hand and proceeds from the Applicants' post-filing operations will be used to reduce all amounts outstanding under the Credit Agreements. In addition, the draft Initial Order contains a provision permitting the Applicants to make such payments.

153. As long as the DIP Facility in question does not secure pre-filing amounts, CCAA Courts have permitted DIP facilities to contain provisions similar to these. Such provisions make commercial sense in circumstances where the debtor's assets are already substantially encumbered. This feature of the DIP facility frees up collateral to protect the DIP financier, who is taking a significant risk in investing further in an already financially-distressed enterprise.

154. It is for this reason that numerous CCAA courts have given a narrow interpretation to the restriction in section 11.2(1) of the CCAA (which precludes a DIP charge from securing pre-filing indebtedness).

155. In *Cow Harbour*, for example, the Alberta Court of Queen's Bench held that a DIP facility that contemplated repayment of pre-filing indebtedness with post-filing receipts does not infringe s. 11.2(1) of the CCAA. Justice Yamayuchi stated:

> In other words, [the creditors] complain that [the DIP lender] is bootstrapping itself. From a strict statutory interpretation perspective, that interpretation is incorrect because the interim financing security does not secure the previous indebtedness. The term sheet says that. And I approved the initial order on that basis. The super-priority secures only the interim financing and no more. From a practical perspective, however, the creditors complain that the [lender's] non-primed security is becoming primed security because as [the lender] gets its initial money order paid it turns around and lends that money to the debtor under the interim financing. That would be a strong argument, except that the debtor is using the interim money financing to pay for its ongoing operations such as payroll. The payments to [the DIP lender] are coming out of cash-flow, not interim financing.[193] [Emphasis added.]

156. Justice Yamayuchi also concluded that the creditor's objections were inconsistent with the CCAA policy objective of facilitating the restructuring and the rehabilitation of insolvent corporations, which must guide the interpretation of s. 11.2(1) of the CCAA.[194]

157. In *Comark*,[195] the DIP agreement provided that the proceeds from the applicant's operations would be used to reduce pre-filing obligations under an existing credit facility with the DIP lender. It was anticipated that Comark's cash from business operations would be deposited into a blocked account, and that account would be swept by the DIP lender to reduce pre-filing amounts outstanding under its credit facility. Regional Senior Justice Morawetz accepted the Monitor's view that the DIP charge did not secure any pre-filing obligations because "the pre-filing [credit

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193 *Re Cow Harbour Construction Ltd*, (April 28, 2010), Alta QB, Action No 1003-05560 (Transcript) at pp. 31-32 [*Cow Harbour*].

194 *Cow Harbour*, above note 193 at p. 33 citing *Canwest Global (Initial Order)*, above note 152 at para. 24, *per* Pepall J.

195 *Re Comark Inc.*, 2015 ONSC 2010 [*Comark*].

facility] is being reduced by the use of the Applicant's cash generated from its business." He therefore approved the requested DIP charge.[196]

158. Similarly, in *Performance Sports*, this Court approved and granted a charge for a DIP facility provided by a group of pre-filing lenders. It was anticipated that all receipts of the applicants would be applied to progressively replace the pre-filing debt owed to the DIP lenders.[197] However, no advances under the ABL DIP Facility would be used to pay pre-filing obligations.[198] Justice Newbould granted the requested order as it did not violate s. 11.2(1).[199]

159. In this case, the DIP Facility and the DIP Lenders' Charges are entirely consistent with s. 11.2(1) of the CCAA, and are consistent with the CCAA's primary objective as they will help facilitate the restructuring of the Sears Canada Group. The DIP Lenders' Charges will not secure any pre-filing obligations and will only secure post-filing advances under the DIP facility. By its terms, the DIP Facility cannot be used to repay any pre-filing obligations of the Applicants. Any pre-filing obligations owed to the DIP lender will be paid down using only receipts from the Applicant's business operations and cash on hand. Moreover, there will not be any advances made under the DIP Facility until after the proposed comeback hearing.

(d) DIP Lenders' Charges and Pension Priorities

160. The DIP Lenders have required that the DIP Lenders' Charges have priority over any deemed trust that may subsequently arise in relation to the Sears Canada Group's pension plans.

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196 *Comark*, above note 195 at paras. 28 to 29.

197 *Performance Sports*, above note 174 at para. 19(a).

198 *Performance Sports*, above note 174 at para. 22.

199 *Performance Sports*, above note 174 at para 22. See also *Re Angiotech Pharmaceuticals, Inc.*, (January 28, 2010), BC Sup Ct, Action No-S110587 (Initial Order), at para. 47A.

It is well-established that this Court can grant such a super-priority charge over a deemed trust under the PBA. In *Indalex*, the Supreme Court of Canada held that a CCAA order granting a DIP charge in priority "to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" superseded a deemed trust under the PBA:

> Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the CCAA has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.[200]

161. To be clear, no deemed trust exists with respect to any of the Sears pension plans as of the date of filing. The pension plans have not been wound up, and the Applicants are up to date in making all required pension contributions.[201]

162. Given the severe liquidity constraints under which they are currently operating, the Applicants anticipate that they will seek in due course this Court's approval to discontinue the Sears Special Payments on notice to affected parties, including individuals who are members, former members or retired members with entitlements under the DB Component of the Sears Pension Plan, and individuals who are surviving spouses of a deceased member, former member or retired member where such surviving spouse has an entitlement to a benefit under the DB Component of the Sears Pension Plan.[202]

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[200] *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 at para. 60, *per* Deschamps J. Although Cromwell J. and LeBel J. provide separate sets of reasons, they agreed that the DIP super-priority prevailed over a deemed trust as a result of the doctrine of federal paramountcy for the reasons provided by Deschamps J. (paras. 242 and 265).

[201] Wong Affidavit, paras. 103, 109, 111, and 117

[202] Wong Affidavit, paras. 101 and 119 to 122.

163. In particular, if this Court grants the requested Initial Order, the Applicants intend to (i) immediately engage with counsel representing a group formed by former Sears Canada executives to advance their interests in respect of the Sears Pension Plan; and (ii) send e-mail communications to all members of the DB Component who are employees of Sears Canada, and a letter to all other participants of the DB Component described above, advising them of the comeback hearing and the fact that issues relating to the Sears Pension Plan will be dealt with at the hearing. The notice will also direct recipients to the Monitor's website. The Applicants will also provide notice of the comeback hearing to the Superintendent.[203]

164. Sears Canada intends to make the Sears Special Payments owing for the month of June.[204] Further, the DIP Credit Agreements do not contemplate, or permit the Sears Canada Group to make, any draws on the DIP Facility until after the comeback hearing.[205] As a result, there will be no deemed trust or any advances secured by the DIP Lenders' Charges until sometime after the comeback hearing, when all interested parties will have an opportunity to make submissions to the Court on the suspension of the Special Payments.

165. This approach is similar to the one accepted by this Court in the recent CCAA proceeding of Essar Steel Algoma Inc. In the initial order granted in that proceeding, this Court authorized the applicant to borrow up to $50 million from the DIP lenders and provided a super-priority charge for those advances in circumstances where the applicants indicated that they intended to suspend special payments under various pension plans, subject to further arguments on this issue at the

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[203] Wong Affidavit, para. 121.

[204] Wong Affidavit, para. 101.

[205] Wong Affidavit, para. 231

comeback hearing.[206] The Court adopted this approach as a result of the demonstrated need for immediate cash by the applicants.[207]

166. In this case, even though the Applicants are not permitted to draw on the DIP Facility until after the comeback hearing, it is essential that the DIP Facility be approved at the commencement of the CCAA proceeding in order to provide stability and certainty to the CCAA proceedings and to send a positive market signal to the Sears Canada Group's stakeholders.[208] As recognized by this Court in *US Steel (DIP Extension)*, even a DIP facility that is not drawn upon can provide significant benefits, including stability and confidence to an applicant's employees, customers, suppliers, and participants in a SISP.[209]

167. Absent the ability to access additional liquidity through the DIP Facility, the Sears Canada Group may be forced to shut down.[210] It goes without saying that the demise of the Applicants business would be catastrophic for the approximately 17,000 active employees and multiple other stakeholders that depend on the Applicants' business for their own economic survival.

168. Therefore, this Court can and should approve the DIP Facility and order that the DIP Lenders' Charges will rank ahead of all other interests (with the exception of certain other Court-ordered Charges), including any deemed trust that may later arise (but does not currently exist) in relation to unpaid pension contributions.

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206 *Re Essar Steel Algoma Inc* (November 9, 2015), Ont Sup Ct, CV-0011169-00CL (Initial Order) at paras. 38, 41, and 49; *Re Essar Steel Algoma Inc*, Ont Sup Ct, CV-0011169-00CL, Affidavit of Rajah Marwah, sworn November 9, 2015 at para. 124.

207 *Re Essar Steel Algoma Inc* (November 9, 2015), Ont Sup Ct, CV-0011169-00CL, (Endorsement).

208 Wong Affidavit, para. 231

209 *Re US Steel Canada Inc.*, 2016 ONSC 4838 at paras. 17 and 18 [*US Steel (DIP Extension)*].

210 Wong Affidavit, at para. 242.

G. Other Court-Ordered Charges

(a) Administration Charge and Financial Advisor Charge

169. Sears Canada has recently taken steps to engage a number of professional advisors to assist in formulating and executing on restructuring strategies and to prepare for this CCAA application. Additionally, the Board of Directors of Sears Canada recently constituted a special committee of independent directors (the "**Special Committee**") to consider various strategic alternatives, including obtaining sources of capital, the recapitalization or restructuring of Sears Canada or the sale of material assets or all of its business, or any alternatives to the aforementioned transactions, which may include insolvency-related proceedings.[211]

170. Sears Canada has engaged: (i) Osler, Hoskin & Harcourt LLP ("**Osler**"), counsel to the Sears Canada Group; (ii) FTI Consulting Canada Inc. ("**FTI**"), as prospective CCAA Monitor (in such capacity and if so appointed by the Court, the "**Monitor**"); (iii) Bennett Jones LLP ("**Bennett Jones**"), as independent counsel to the Special Committee of Sears Canada's board of directors; and (iv) BMO Capital Markets, as investment banker and financial advisor (the "**Financial Advisor**") to assist the Applicants in developing a contingency plan and implementing it in the event of any restructuring.[212]

171. Under the draft Initial Order, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Applicants, and Bennett Jones and be protected by a Court-ordered charge on all of the property of the Applicants up to a maximum amount of $5 million as security for their respective fees and disbursements (the "**Administration Charge**").

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211 Wong Affidavit, paras. 204 and 205.

212 Wong Affidavit, para. 204.

172. The Administration Charge is proposed to rank *pari passu* with the FA Charge and to have first priority over all other court-ordered charges and over all other Encumbrances (as defined in the Initial Order).

173. The Applicants are also asking, as part of the proposed Initial Order, for the Court to approve Sears Canada's engagement of BMO Capital Markets as its financial advisor and are seeking a charge in the amount of $3.3 million (the "**FA Charge**") to secure the amounts payable under the BMO Engagement Letter. The FA Charge is proposed to rank *pari passu* with the Administration Charge.

174. As described in the Wong Affidavit, Sears Canada recently paid BMO Capital Markets $4.2 million as a prepayment of amounts payable under the BMO Engagement Letter. To the extent that the FA Charge exceeds $3.3 million, BMO Capital Markets is obliged to return to Sears Canada an amount equal to the difference between the FA Charge and $3.3 million.[213]

175. Section 11.52 of the CCAA expressly provides that the Court has jurisdiction to grant a charge for the fees and expenses of financial, legal and other advisors or experts:

> **11.52(1)** ***Court may order security or charge to cover certain costs*** – 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.

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[213] Wong Affidavit, para. 250.

> **11.52(2) *Priority*** – This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

176. This section is permissive, and does not contain any specific criteria for a court to consider in granting such a charge.

177. In *Canwest Global* and *Canwest Publishing*, administration charges were granted pursuant to s. 11.52(1). In *Canwest Publishing*, Pepall J. provided a non-exhaustive list of factors to be considered in approving an administration charge, including: (a) the size and complexity of the businesses being restructured; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an 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.[214]

178. These factors have been applied in numerous subsequent proceedings.[215]

179. The sheer magnitude of the Applicants' business and the number of affected stakeholders means that the restructuring will be complex and will require the robust involvement of a number of professional advisors. The Applicants submit that the amounts of the proposed Administration Charge and FA Charge are commensurate with the complexity of the Applicants' businesses and the tasks required to achieve a going-concern restructuring for the benefit of all stakeholders.

180. The magnitude of the proposed Charges are also consistent with similar charges granted in other large or complex CCAA proceedings.[216]

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214 *Canwest Publishing (Initial Order)*, above note 174 at para. 54.

215 See for example *Target*, above note 120 at paras. 74 and 75; *US Steel*, above note 161 at paras. 23 and 24.

216 *Canwest Global (Initial Order)*, above note **152** at para. 39 (charge of up to $15 million to cover usual advisors and a number of financial advisors); *Canwest Publishing* (Initial Order), above note 174 at para. 52 (charge of up to $3 million for the usual advisors, as well as $10 million for the financial advisor that provided investment banking services to the debtor companies); *US Steel*, above note 161 at para. 19 (charge of up to $13 million); *Re*

181. The proposed Monitor is of the view that the size and scope of the Administration Charge is reasonable in the circumstances. Further, the Proposed Monitor is of the view that the quantum of the FA Charge is appropriate in view of the terms of the Engagement Letter.

(b) Directors' Charge

182. A successful restructuring of Sears Canada will only be possible with the continued participation of its directors (the "**Directors**"), management and employees. These personnel are essential to the viability of the Applicants' continuing business and the preservation of enterprise value.[217]

183. Pursuant to s. 11.51 of the CCAA, the Court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain statutory obligations.

> **11.51(1)** ***Security or charge relating to director's indemnification*** – On application by a debtor company and 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 the company is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> **11.51(2)** ***Priority*** – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> **11.51(3)** ***Restriction – indemnification insurance*** – The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> **11.51(4)** ***Negligence, misconduct or fault*** – The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross

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Target Canada Co. (January 15, 2015), Ont Sup Ct CV-15-10832-00CL (Initial Order) at para. 54 [*Target (Initial Order)*] (charge of up to $6.75 million).

217 Wong Affidavit, para. 260.

> negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

184. In *Canwest Global,* Pepall J. set out some of the factors to be considered by the court when applying s. 11.51. In approving the requested directors' charge, Pepall J. stated:

> The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities they could incur during the restructuring: *Re General Publishing Co.* [(2003), 39 C.B.R. (4th) 216)]. Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.[218]

185. With the assistance of the Monitor, the Applicants have estimated the potential exposure of the Applicants' present and former directors and officers for unpaid statutory amounts, including unpaid accrued wages, unpaid accrued vacation pay and unpaid sales and services taxes at approximately $64 million. The proposed amount of the Directors Charge is based on this estimate.[219]

186. Sears Canada's present and former directors and officers who are or were employed by Sears Canada are among the potential beneficiaries under liability insurance policies that cover an aggregate annual limit of USD $50 million. The Applicants do not believe that this insurance policy provides sufficient coverage against the potential liability that the directors and officers could incur in relation to this CCAA proceeding.[220]

187. This Court has also held that the presence of exclusions and limitations in an insurance policy creates uncertainty regarding coverage for directors and officers and supports the granting

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[218] *Canwest Global (Initial Order)*, above note 152 at para. 48. See also *US Steel,* above note 161 at para. 24.

[219] Wong Affidavit, para. 261.

[220] Wong Affidavit, para. 262.

of a Directors Charge, as well as the fact that alternate insurance coverage is likely unavailable from any other source at a reasonable cost.[221]

188. The Applicants' directors and officers have indicated that, due to the potential for significant personal liability associated with the CCAA proceeding, they cannot continue their service and involvement during the stay period unless the Initial Order includes the Directors' Charge.[222]

189. The Applicants therefore seek a directors' and officers' charge (the "**Directors' Charge**") in an amount of up to $63.5 million. The Directors' Charge is bifurcated into a "**Directors' Priority Charge**" in the amount of $44 million and the "**Directors' Subordinated Charge**" in the amount of $19.5 million. The Directors' Priority Charge is proposed to stand in priority to the proposed DIP Lenders' Charges and the KERP Subordinated Charge, but would be subordinate to the proposed Administration Charge, FA Charge, and KERP Priority Charge. The Directors' Subordinate Charge is proposed to be subordinate to the DIP Lenders' Charges and the KERP Subordinated Charge.[223]

190. The requested Directors' Charge is reasonable given the nature of the Applicants' retail business, the number of employees and the corresponding potential exposure of the directors and officers to personal liability. The magnitude of the Directors Charge is consistent with the directors' charges granted other large and/or complex CCAA proceedings.[224] The proposed

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221 *Re Redstone Investment Corp.*, 2014 ONSC 2004 at para. 60; see also *Cinram*, above note 140 at para. 89.

222 Wong Affidavit, para. 263.

223 Wong Affidavit, para. 263.

224 *Canwest Global (Initial Order)*, above note 152 at para. 44 (charge of up to $20 million); *Canwest Publishing (Initial Order)*, above note 174 at paras. 56 and 57 (charge of up to $35 million); *US Steel*, above note 161, at para. 19 (a charge of up to $39 million); and *Target (Initial Order)*, above note 120, at para. 40 (a charge of up to $64 million).

Monitor is of the view that that the granting of the Directors' Charge is necessary in the circumstances and that the quantum and scope of the charge is both fair and reasonable.

PART IV -NATURE OF THE ORDER SOUGHT

191. The Applicants therefore request an Order substantially in the form of the draft Order attached as Schedule "A" to the Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

per / Marc Wasserman

per / Jeremy Dacks

per / Michael De Lellis

Karin Sachar

Schedule "A"

LIST OF AUTHORITIES

Case Law

1. *Campeau v Olympia & York Developments Ltd.* (1992), 14 CBR (3d) 303 (Ont Gen Div)
2. *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60
3. *Norcen Energy Resources Ltd v Oakwood Petroleums Ltd*, 1988 CarswellAlta 318 (QB)
4. *Re 4519922 Canada Inc.*, 2015 ONSC 124
5. *Re Angiotech Pharmaceuticals, Inc.*, (January 28, 2010), BC Sup Ct, Action No-S110587 (Initial Order)
6. *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 (Sup Ct)
7. *Re Canwest Publishing Inc./Publications Canwest Inc.*, 2010 ONSC 222
8. *Re Cinram International Inc.*, 2012 ONSC 3767
9. *Re Cline Mining Corp*., 2014 ONSC 6998
10. *Re Comark Inc.*, 2015 ONSC 2010
11. *Re Cow Harbour Construction Ltd*., (April 28, 2010), Alta QB, Action No. 1003-05560 (Transcripts)
12. *Re Essar Steel Algoma Inc.*, 2015 ONSC 7656
13. *Re Essar Steel Algoma Inc*. (November 9, 2015), Ont Sup Ct, CV-0011169-00CL (Initial Order)
14. *Re Essar Steel Agloma Inc,* Ont Sup Ct, CV-0011169-00CL, Affidavit of Rajah Marwah, sworn November 9, 2015
15. *Re Essar Steel Algoma Inc* (November 9, 2015), Ont Sup Ct, CV-0011169-00CL, (Endorsement)
16. *Re First Leaside Wealth Management Inc.*, 2012 ONSC 1299
17. *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Sup Ct)
18. *Re Lehndorff General Partner*, 1993 CarswellOnt 183 (Sup Ct)
19. *Re Nortel Networks Corp.*, 2009 CarswellOnt 1330 (Sup Ct) [*Nortel Networks* (*KERP*)]
20. *Re Nortel Networks Corp.*, 2009 CarswellOnt 1519 (Sup Ct) [*Nortel Networks* (*KEIP*)]

21. *Re Nortel Networks Corp.*, 2009 CarswellOnt 4806 (Sup Ct) [*Nortel Networks* (*ERISA Litigation*)]
22. *Re Performance Sports Group Ltd.*, 2016 ONSC 6800
23. *Re Priszm Income Fund*, 2011 ONSC 2061
24. *Re Redstone Investment Corp.*, 2014 ONSC 2004
25. *Re Smurfit-Stone Container Canada Inc*., 2009 CarswellOnt 391 (Sup Ct)
26. *Re Stelco Inc.*, 2004 CarswellOnt 1211 (Sup Ct), leave to appeal to CA refused, 2004 CarswellOnt 2936, leave to appeal to SCC refused, 2004 CarswellOnt 5200
27. *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen Div)
28. *Re Tamerlane Ventures Inc.*, 2013 ONSC 5461
29. *Re Target Canada Co.*, 2015 ONSC 303
30. *Re Target Canada Co.* (January 15, 2015), Ont Sup Ct, CV-15-10832-00CL (Initial Order)
31. *Re Urbancorp Toronto Management Inc.*, 2016 ONSC 3288
32. *Re US Steel Canada Inc*., 2014 ONSC 6145
33. *Re US Steel Canada Inc.,* 2016 ONSC 4838 [*US Steel (DIP Extension)*]
34. *Re Walter Energy Canada Holdings Inc.*, 2016 BCSC 107
35. *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6

Schedule "B"

BANKRUPTCY AND INSOLVENCY ACT

R.S.C. 1985, c. B-3, as amended

2. [...]

"insolvent person"

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(*a*) who is for any reason unable to meet his obligations as they generally become due,

(*b*) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(*c*) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

CANADA BUSINESS CORPORATIONS ACT

R.S.C. 1985, c. C-44, as amended

Election of directors

106 (3) Subject to paragraph 107(b), shareholders of a corporation shall, by ordinary resolution at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term expiring not later than the close of the third annual meeting of shareholders following the election.

[...]

Incumbent directors

106 (6) Notwithstanding subsections (2), (3) and (5), if directors are not elected at a meeting of shareholders the incumbent directors continue in office until their successors are elected.

[...]

Calling annual meetings

133 (1) The directors of a corporation shall call an annual meeting of shareholders

(a) not later than eighteen months after the corporation comes into existence; and

(b) subsequently, not later than fifteen months after holding the last preceding annual meeting but no later than six months after the end of the corporation's preceding financial year.

[...]

Annual financial statements

155 (1) Subject to section 156, the directors of a corporation shall place before the shareholders at every annual meeting

(a) comparative financial statements as prescribed relating separately to

(i) the period that began on the date the corporation came into existence and ended not more than six months before the annual meeting or, if the corporation has completed a financial year, the period that began immediately after the end of the last completed financial year and ended not more than six months before the annual meeting, and

(ii) the immediately preceding financial year;

(b) the report of the auditor, if any; and

(c) any further information respecting the financial position of the corporation and the results of its operations required by the articles, the by-laws or any unanimous shareholder agreement.

Exception

(2) Notwithstanding paragraph (1)(a), the financial statements referred to in subparagraph (1)(a)(ii) may be omitted if the reason for the omission is set out in the financial statements, or in a note thereto, to be placed before the shareholders at an annual meeting.

COMPANIES' CREDITORS ARRANGEMENT ACT

R.S.C. 1985, c. C-36, as amended

2.(1) [...]

"debtor company"

"debtor company" means any company that

(*a*) is bankrupt or insolvent,

(*b*) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(*c*) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(*d*) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

[...]

Application

3. (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

[...]

Jurisdiction of court to receive applications

9. (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

[...]

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.

[...]

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

[...]

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

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

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(*a*) the period during which the company is expected to be subject to proceedings under this Act;

(*b*) how the company's business and financial affairs are to be managed during the proceedings;

(*c*) whether the company's management has the confidence of its major creditors;

(*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(*e*) the nature and value of the company's property;

(*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and

(*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

[...]

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

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

[...]

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and 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 the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

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

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation

or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

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.

Priority

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

[...]

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., *et al.*

Applicants

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
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