

**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

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**FACTUM OF THE APPLICANTS**

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July 7, 2017

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Lawyers for the Applicants

**TO: SERVICE LIST**

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**FACTUM OF THE APPLICANTS**

**PART I - OVERVIEW**

1. Sears Canada Inc. ("**Sears Canada**") and the other applicants listed above (together, the "**Applicants**" or the "**Sears Canada Group**") obtained an initial order dated June 22, 2017 (the "**Initial Order**") under the *Companies' Creditors Arrangement Act*<sup>1</sup> (the "**CCAA**").
2. This motion is for Orders (the "**Requested Orders**"), among other things:
  - (a) Authorizing the suspension of special solvency payments with respect to the defined benefit component of the Sears Pension Plan;<sup>2</sup>

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<sup>1</sup> RSC 1985, c C-36.

<sup>2</sup> Capitalized terms in this Overview are defined below.

- (b) Approving the suspension of payments with respect to the Supplemental Plan and other post-retirement and life insurance benefits;
- (c) Approving the SISP; and
- (d) Extending the CCAA stay until and including October 4, 2017.

### Suspension of Payments

3. Ample jurisprudence under the CCAA supports the authority and the discretion of this Court to suspend the obligation of a debtor company to make solvency payments under a pension plan or to make other payments in relation to post-retirement benefits while the debtor company seeks to restructure its business.

4. The payment obligations (the “**Payments**”) that are proposed to be suspended under the Requested Orders represent a significant strain on the liquidity required for the Applicants to continue to operate their business as a going-concern during this CCAA proceeding. As such, they are not part of the Applicants’ cash flows going forward and are not contemplated under the approved DIP Budget under the DIP Credit Agreements.

5. The DIP Facility is essential to maintain stability during the restructuring. The ability of the Applicants to draw under the DIP Facility depends on the Applicants’ compliance with the approved DIP Budget. A failure to remain within the budget (and permitted variances) would jeopardize the Applicants’ access to such financing, which would in turn significantly undermine the ability of the Applicants to achieve a successful restructuring. The risk that the Applicants will be unable to comply with the DIP Budget significantly increases if the Applicants are required to make the Payments.

6. On the other hand, a temporary suspension of the Payments merely places retirees on the same footing as other pre-filing creditors whose claims against the Applicants are subject to the CCAA stay while the Applicants seek to restructure for the benefit of all stakeholders. Any prejudice that may be experienced by these stakeholders is outweighed by the benefits to stakeholders as a whole if the Applicants can achieve a going-concern solution to their current difficulties.

7. The balancing of interests inherent in all CCAA proceedings therefore strongly supports the Requested Orders.

#### Protection of Directors and Officers

8. The involvement of the Applicants' directors and officers is essential for a successful restructuring. The Requested Orders therefore protect these individuals from any personal liability that could otherwise arise from the suspension of the Applicants' obligations to make the Special Payments.

9. CCAA courts have previously granted similar protection to a debtor company's directors and officers to ensure that these individuals do not feel compelled to resign in the face of the spectre of significant personal liability.

10. The Applicants submit that this Court has the jurisdiction to grant the requested protection in these circumstances, and that this protection is consistent with the CCAA objectives of assisting the debtors' restructuring.

### Approval of the SISP

11. The SISP has been developed by the Applicants in conjunction with the Financial Advisor and the Monitor and will be run by the Financial Advisor under the supervision of the Monitor and the Special Committee. The SISP is designed as a comprehensive and flexible process that will enable the Applicants to seek out and evaluate a broad range of potential transaction alternatives involving the Applicants' business, property and/or leases.

12. The Applicants submit that the SISP should be approved on the basis that it is a fair and reasonable process that will allow the Applicants to identify the best options for maximizing value for the Applicants' stakeholders.

### Extension of the Stay Period

13. The Applicants submit that the requested extension of the Stay Period is reasonable. It will provide sufficient time for the Applicants to implement the SISP, if approved, and the liquidation of inventory in the closed stores, if this Court approves the Applicants' proposed inventory sale process.

14. Since the date of the Initial Order, the Applicants have been acting with due diligence and in good faith to stabilize their businesses with the assistance of the Monitor, while engaging with stakeholders and taking the necessary steps to achieve a going-concern solution to their financial difficulties.

15. The Sears Canada Group entered these CCAA proceedings with the intention of emerging as a stronger, more focused enterprise that would continue operating a large number of stores, providing significant employment, and servicing its customers across Canada. The relief sought in this motion furthers the objectives of the CCAA by providing the "breathing space" and the level

playing field needed for a successful restructuring that will maximize value for all stakeholders. The Applicants submit that the Requested Orders should therefore be granted.

## **PART II - FACTS**

16. The facts with respect to this motion are more fully set out in the Affidavit of Billy Wong sworn July 5, 2017 (the “**Second Wong Affidavit**”)<sup>3</sup> and in the Affidavit of Billy Wong sworn June 22, 2017 (the “**Initial Order Affidavit**”).<sup>4</sup>

### **A. Background**

17. The Sears Canada Group is one of Canada’s largest multi-format retailers.<sup>5</sup> Over the past several years, it has experienced a sustained decline in performance – including substantial declines in revenue, recurring operating losses and net losses, and an erosion of its cash position – resulting in significant liquidity pressures.<sup>6</sup> These liquidity issues were further exacerbated by vendors imposing reduced terms,<sup>7</sup> and challenges with respect to the Sears Canada Group’s pension and post-retirement benefit obligations.<sup>8</sup>

18. Shortly before the Applicants applied for CCAA protection, Sears Canada filed consolidated quarter-end financial statements in which management observed that there was significant doubt as to the company’s ability to continue as a going concern. Management also

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<sup>3</sup> Affidavit of Billy Wong sworn July 5, 2017 [Second Wong Affidavit]. All capitalized terms not specifically defined below have the same meaning as in the Second Wong Affidavit.

<sup>4</sup> Affidavit of Billy Wong, sworn June 22, 2017 [Initial Order Affidavit], para. 12. A copy of the Initial Order Affidavit is attached as Exhibit “A” to the Second Wong Affidavit.

<sup>5</sup> Initial Order Affidavit, para. 4.

<sup>6</sup> Initial Order Affidavit, para. 6.

<sup>7</sup> Initial Order Affidavit, para. 197.

<sup>8</sup> Initial Order Affidavit, para. 198.

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.<sup>9</sup>

19. Against that backdrop, the Applicants applied for and were granted the Initial Order on June 22, 2017 (the "**Filing Date**"). In the Initial Order, this Court, among other things, granted the following relief:

- (a) Appointed FTI Consulting Canada Inc. to act as the "**Monitor**";
- (b) Approved the engagement of BMO Nesbitt Burns Inc. as financial advisor to the Sears Canada Group (the "**Financial Advisor**");
- (c) Granted a stay of proceedings in favour of the Sears Canada Group until and including July 22, 2017, or such later date as the Court may order (the "**Stay Period**"); and
- (d) Approved two debtor-in-possession loan facilities (together the "**DIP Facility**"), which provide that no draw can be made thereunder prior to the comeback hearing, and granted associated charges over the property of the Sears Canada Group.<sup>10</sup>

20. The Court also appointed: (i) Koskie Minsky LLP as representative counsel for active employees and retirees with respect to certain pension and post-employment benefit matters (the "**Pension Representative Counsel**"); and (ii) Ursel Phillips Fellows Hopkinson LLP as representative counsel for current and former employees whose rights are affected by the Initial

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<sup>9</sup> Initial Order Affidavit, paras. 10 and 163.

<sup>10</sup> Second Wong Affidavit, para. 5. A copy of the Initial Order is attached as Exhibit "B" to the Second Wong Affidavit.

Order with respect to matters not within the mandate of the Pension Representative Counsel (the “**Employee Representative Counsel**”).<sup>11</sup>

**B. Steps Taken Since Granting of the Initial Order**

21. The Sears Canada Group, in close consultation and with the assistance of the Monitor, has been working diligently to stabilize its businesses and operations.<sup>12</sup> Two hundred and twenty-two of the Sears Canada Group’s stores remain operational.<sup>13</sup> The Sears Canada Group has been responding to numerous creditor and stakeholder inquiries on a daily basis, and has worked closely with the Monitor to establish lines of communication with many of its stakeholders.<sup>14</sup>

22. As described in greater detail in the Second Wong Affidavit, significant steps have been taken in relation to each of the Applicants’ key stakeholder groups, including the following:

- (a) **Employees:** All employees were informed about and provided information regarding the CCAA proceedings on the Filing Date.<sup>15</sup> On June 22, 2017, the Sears Canada Group provided notices of termination to (i) approximately 2,500 store-level employees who work in stores that will be closed, the vast majority of whom will receive 15 weeks’ working notice of termination; and (ii) approximately 300 head office employees.<sup>16</sup> The Sears Canada Group has had numerous discussions and communications with the Employee Representative Counsel. The Employee

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<sup>11</sup> Second Wong Affidavit, para. 7.

<sup>12</sup> Second Wong Affidavit, para. 9.

<sup>13</sup> Second Wong Affidavit, para. 10.

<sup>14</sup> Second Wong Affidavit, paras. 9-10.

<sup>15</sup> Second Wong Affidavit, para. 13.

<sup>16</sup> Second Wong Affidavit, para. 14.

Representative Counsel has drafted a letter concerning the CCAA proceedings and its appointment that will be sent to current and former employees; established a dedicated webpage, toll-free phone line, and email address for employees to obtain information about the CCAA proceedings; and responded to inquiries from employees.<sup>17</sup>

- (b) **Pensioners:** The Sears Canada Group has sent a number of communications (the “**Notice Letters**”) to individuals entitled to receive benefits under its pension arrangements and other post-employment benefits (“**OPEBs**”).<sup>18</sup> The Notice Letters were sent following consultations with the Pension Representative Counsel, and enclosed a letter from the Pension Representative Counsel.<sup>19</sup> The Notice Letters provide notice that (i) the Sears Canada Group was granted creditor protection under the CCAA; (ii) Koskie Minsky was appointed as Pension Representative Counsel; and (iii) the comeback hearing will be on July 13, 2017, at which time the Court may deal with issues such as suspending the special payments, suspending retiree health and dental benefit payments, and suspending premium payments with respect to retiree life insurance.<sup>20</sup> The letters sent to the four individuals receiving a pension under the Supplemental Plan also noted that the comeback hearing may address the suspension of payments under the Supplemental Plan.<sup>21</sup> Copies of all

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<sup>17</sup> Second Wong Affidavit, para. 15.

<sup>18</sup> Second Wong Affidavit, paras. 16-19. Copies of the Notice Letters and the enclosed letter from the Pension Representative Counsel are attached as Exhibits “C” to “F” to the Second Wong Affidavit.

<sup>19</sup> Second Wong Affidavit, para. 20.

<sup>20</sup> Second Wong Affidavit, para. 21.

<sup>21</sup> Second Wong Affidavit, para. 21.

Notice Letters were also provided to the five unions described in the Initial Order Affidavit on June 29, 2017.<sup>22</sup>

- (c) **Customers:** The Sears Canada Group has communicated with its customers regarding these CCAA proceedings, including in a communication to customers from the Chief Executive Officer and through its customer call centre.<sup>23</sup>
  
- (d) **Suppliers and other third parties:** The Sears Canada Group, in close consultation with the Monitor, has been in contact with an extensive number and wide variety of creditors and suppliers.<sup>24</sup> The Sears Canada Group is working diligently with the Monitor to attempt to consensually resolve creditor and supplier issues as they arise.<sup>25</sup> A number of the Sears Canada Group's suppliers have continued to supply goods to the Sears Canada Group based on existing arrangements or variations negotiated between the Sears Canada Group and the suppliers.<sup>26</sup> The Sears Canada Group has begun the process of disclaiming agreements, including a variety of agreements relating to business lines that will no longer be continuing. These disclaimers will require the consent of the Monitor.<sup>27</sup>
  
- (e) **Regulators:** The Sears Canada Group notified the Investment Regulatory Organization of Canada, the Toronto Stock Exchange, and the NASDAQ Stock

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<sup>22</sup> Second Wong Affidavit, para. 23.

<sup>23</sup> Second Wong Affidavit, para. 24.

<sup>24</sup> Second Wong Affidavit, paras. 25-26.

<sup>25</sup> Second Wong Affidavit, para. 27.

<sup>26</sup> Second Wong Affidavit, para. 28.

<sup>27</sup> Second Wong Affidavit, para. 29.

Market LLC of these CCAA proceedings on the morning of the Filing Date.<sup>28</sup> Sears Canada also notified the Financial Services Commission of Ontario and the Superintendent of Financial Services of these CCAA proceedings, and has engaged in, and will continue to engage in, discussions with them.<sup>29</sup>

- (f) **Landlords:** The Sears Canada Group and the Monitor have engaged in discussions with various landlords and their counsel in respect of these CCAA proceedings, and these discussions are intended to continue throughout these CCAA proceedings.<sup>30</sup>

23. Consistent with the provisions of the Applicants' credit agreements with its DIP lenders (the "**DIP Credit Agreements**"), the Sears Canada Group has not drawn on the DIP Facility since the Filing Date. The issuance of orders satisfactory to the DIP Lenders on the comeback hearing is a condition precedent to the initial draws under the DIP Credit Agreements.<sup>31</sup>

24. The Sears Canada Group has been working with the Monitor and the Financial Advisor to develop a set of standard guidelines (the "**Sale Guidelines**") for a liquidation process (the "**Liquidation Process**") that will be conducted in the 59 stores identified for closure in the Initial Order Affidavit. The Sears Canada Group, in conjunction with the Financial Advisor and the Monitor, is evaluating its options for the best way to maximize the value of the Applicants'

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<sup>28</sup> Second Wong Affidavit, para. 30. Sears Canada has been notified that its common shares have been delisted from the NASDAQ and will be delisted from the TSX after the close of market on July 28, 2017.

<sup>29</sup> Second Wong Affidavit, para. 32.

<sup>30</sup> Second Wong Affidavit, para. 33.

<sup>31</sup> Second Wong Affidavit, para. 34.

inventory in the Liquidation Process, and expects to file a motion in the next few days seeking the Court's approval for the Liquidation Process.<sup>32</sup>

**C. The Sears Canada Group's Pension Arrangements and OPEBs**

25. The Sears Canada Group maintains a number of pension arrangements and provides OPEBs through an employee health and welfare trust (the "**PRB Plan**"). These arrangements are described in detail in the Initial Order Affidavit.<sup>33</sup> This section outlines certain key facts about the pension arrangements and OPEBs that are at issue in this motion.

**(a) The Sears Pension Plan and the Special Payments**

26. The Sears Pension Plan is registered under the Ontario *Pension Benefits Act*<sup>34</sup> (the "**PBA**") and the *Income Tax Act*<sup>35</sup> (the "**ITA**"). It has a defined benefits component (the "**DB Component**") and a defined contribution component (the "**DC Component**").<sup>36</sup>

27. As at December 31, 2015, the DB Component had a hypothetical wind up deficit in the amount of \$266.8 million and the transfer (wind-up) ratio was 81%. Sears Canada is currently required to make special solvency payments in monthly installments of approximately \$3.7 million (the "**Special Payments**"). The Sears Canada Group has met all of its contribution obligations to the Sears Pension Plan under the legislation to date, including making the Special Payment for

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<sup>32</sup> Second Wong Affidavit, paras. 62-64.

<sup>33</sup> Initial Order Affidavit, paras. 94-118.

<sup>34</sup> RSO 1990, c P-8.

<sup>35</sup> RSC 1985, c 1 (5th Supp).

<sup>36</sup> Second Wong Affidavit, para. 36. The Applicants are not seeking any relief in respect of the DC Component of the Sears Pension Plan on this motion.

June 2017.<sup>37</sup> For the reasons set out below, the Sears Canada Group is seeking a declaration approving the suspension of these payments.

**(b) The Supplemental Plan**

28. The Supplemental Plan provides benefits to certain members of the DB Component of the Sears Pension Plan that are in excess of the benefits permitted under the ITA. The Supplemental Plan is not subject to the solvency/wind-up funding requirements under the PBA.<sup>38</sup>

29. Benefits under the Supplemental Plan are paid in two ways. For individuals that terminated active service prior to January 1, 2010 (“**Pre-2010 SP Pensioners**”), benefits are provided from assets held in a trust fund or a retirement compensation arrangement (the “**RCA Trust**”). For individuals whose active service ended on or after January 1, 2010 (“**Post-2010 SP Pensioners**”), benefits are paid directly by Sears Canada from its general revenues on a pay-as-you-go basis.<sup>39</sup>

30. With respect to the Post-2010 SP Pensioners, the Sears Canada Group has continued to pay Supplemental Plan benefits following the granting of the Initial Order in the amount of approximately \$7,000 per month.<sup>40</sup> The Sears Canada Group is seeking a declaration approving the suspension of these payments.

31. With respect to the Pre-2010 SP Pensioners, the RCA trustee (the “**RCA Trustee**”) is required to continue paying benefits pursuant to the Supplemental Plan. The RCA Trustee provided notice on June 26, 2017 that these CCAA proceedings constitute an event of default,

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<sup>37</sup> Second Wong Affidavit, para. 37.

<sup>38</sup> Second Wong Affidavit, paras. 45-46.

<sup>39</sup> Second Wong Affidavit, para. 46.

<sup>40</sup> Second Wong Affidavit, para. 47.

which requires the trustee to take steps to terminate the RCA Trust and distribute the assets to the beneficiaries. As part of that process, an actuarial report will be prepared. If, after the report is prepared, it is determined that the RCA Trust's assets are insufficient to fund the wind-up liability related to each Pre-2010 SP Pensioner, then each Pre-2010 SP Pensioner will have a claim against Sears Canada for the amount of his or her resulting pension shortfall (the "**SP Shortfall Amount**").<sup>41</sup> The Sears Canada Group is seeking a declaration suspending any payment required in respect of any SP Shortfall Amount, should it arise.

(c) **The PRB Plan and OPEBs**

32. Certain Sears Canada Group employees are eligible for coverage for post-retirement benefits under the PRB Plan, which are provided through a health and welfare trust on a pay-as-you-go basis. There are currently no assets in the health and welfare trust.<sup>42</sup>

33. The OPEBs at issue on this motion fall into the following categories:

(a) **Post-Retirement Health and Dental Benefits:** Approximately 4,350 retirees and surviving spouses are entitled to post-retirement health and dental benefits under the PRB Plan. The average cost of continuing to pay post-retirement health and dental benefits is approximately \$765,000 monthly, plus tax, with an additional monthly payment of approximately \$39,000 for administration fees. These amounts fluctuate depending on the amount of claims made.<sup>43</sup>

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<sup>41</sup> Second Wong Affidavit, paras. 48-50.

<sup>42</sup> Second Wong Affidavit, para. 53.

<sup>43</sup> Second Wong Affidavit, para. 54.

- (b) **Life Insurance:** Approximately 3,700 individuals are entitled to life insurance benefits through a group life insurance policy under the PRB Plan. The cost of continuing to make life insurance premium payments under the policy is approximately \$245,000 monthly, plus tax.<sup>44</sup>

34. The Applicants seek a declaration approving the suspension of: (i) any further payments in respect of the post-retirement health and dental benefits effective July 31, 2017 for all claims submitted and received after such date; and (ii) any further payments in respect of the life insurance benefits, including premiums for life insurance coverage, effective immediately, which would result in life insurance coverage under the policy terminating as of August 31, 2017.<sup>45</sup>

#### **D. The Proposed Sale and Investment Solicitation Process**

35. The Applicants seek Court approval for a sale and investment solicitation process (the “**SISP**”).<sup>46</sup> The details of the proposed SISP are set out in greater detail in the Second Wong Affidavit and are summarized in the submissions below.

36. The SISP was developed by the Applicants in conjunction with the Financial Advisor and the Monitor.<sup>47</sup> It will be run by the Financial Advisor, under the supervision of the Monitor and a special committee of independent directors of the board of Sears Canada (the “**Special Committee**”).<sup>48</sup>

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<sup>44</sup> Second Wong Affidavit, para. 57.

<sup>45</sup> Second Wong Affidavit, paras. 56 and 60.

<sup>46</sup> Second Wong Affidavit, para. 66.

<sup>47</sup> Second Wong Affidavit, para. 65.

<sup>48</sup> Second Wong Affidavit, para. 66.

37. As discussed in greater detail below, the SISP provides for two types of bids (landlords who wish to make a proposal in connection with existing leases to which they are a party, and other parties interested in pursuing a transaction) that will allow the Applicants to explore the range of options available.<sup>49</sup> The anticipated completion date of the SISP is October 25, 2017.<sup>50</sup>

### **PART III - ISSUES AND THE LAW**

38. The Applicants make the following submissions:

- (a) This Court has the jurisdiction to suspend the Special Payments and should exercise its discretion to do so.
- (b) This Court has the jurisdiction to suspend the payments in respect of the Supplemental Plan and the PRB Plan and should exercise its discretion to do so.
- (c) It is permissible and appropriate to protect the Applicants' directors and officers from any liability arising out of the suspension of the Special Payments.
- (d) The SISP should be approved as fair and reasonable and consistent with the objectives of the CCAA.
- (e) The Stay Period should be extended to provide the Applicants with the "breathing space" necessary to take critical steps towards restructuring their businesses.

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<sup>49</sup> Second Wong Affidavit, para. 71.

<sup>50</sup> Second Wong Affidavit, para. 86.

**A. The Special Payments Should be Suspended**

**(a) This Court has the Jurisdiction to Suspend the Special Payments**

39. Numerous CCAA courts have granted orders suspending the obligation to make special solvency payments to a pension plan where making the payments would jeopardize or undermine the debtor company's ability to restructure.<sup>51</sup>

40. The Special Payments are unsecured, pre-filing obligations,<sup>52</sup> and therefore subject to the CCAA court's power to stay past debts to assist a company to make an arrangement with its creditors and continue its business.<sup>53</sup>

41. In *Timminco*, Morawetz J. concluded that the applicants lacked sufficient liquidity to make special payments. He therefore concluded that the doctrine of paramountcy allowed the CCAA Court to suspend the special payments to ensure that the objectives of the CCAA could be fulfilled.<sup>54</sup>

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<sup>51</sup> *Re Collins & Aikman Automotive Canada Inc*, 2007 CarswellOnt 7014 (Sup Ct J); *Re Fraser Papers Inc*, 2009 CarswellOnt 4469 (Sup Ct J) [*Fraser Papers*]; *Re Timminco Ltd*, 2012 ONSC 506 [*Timminco (Special Payments)*]; *Re Essar Steel Algoma Inc*, (January 13, 2016), Ont Sup Ct, CV-15-000011169-CL (Special Payments Order), at para. 2; *Re US Steel Canada Inc*, (October 9, 2015), Ont Sup Ct, CV-14-10695-00CL, (Cash Conservation and Business Preservation Order), at para. 23(b).

<sup>52</sup> *Fraser Papers*, at para. 20 ("In essence, the special payments are unsecured debts that relate to employment services provided prior to filing"); *Timminco (Special Payments)*, at para. 56 ("The courts have characterized special (or amortization) payments as pre-filing obligations which are stayed upon an initial order being granted under the CCAA"). These statutory payment obligations and any related trust arising under provincial legislation are ineffective to the extent that they conflict with the CCAA: *Bloom Lake*, 2015 QCCS 3064 [*Bloom Lake*] at para. 107, leave to appeal to the CA dismissed, 2015 QCCA 1351, citing *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 [*Indalex (SCC)*] at para. 56; see also *Indalex (SCC)*, at paras. 58- 60.

<sup>53</sup> *Re Nortel Networks Corp*, 2009 CarswellOnt 3583 (Sup Ct J) [*Nortel (Employee Claims)*] at paras. 47-48, aff'd, 2009 ONCA 833 at para. 16.

<sup>54</sup> *Timminco (Special Payments)*, at paras. 52 and 61-64.

**(b) This Court Should Exercise its Discretion to Suspend the Special Payments**

42. The Special Payment obligations are a significant strain on the liquidity available to the Applicants for conducting going concern operations. The 13-week cash flow appended to the Initial Order Affidavit (the “**Cash Flow Forecast**”) does not include any Special Payments after June 2017 and, even without such payments, currently projects a negative net operating cash flow for all forecast months.<sup>55</sup>

43. The Sears Canada Group generally requires a minimum of \$30 million in available cash in order to function with a sufficient cushion to meet its ongoing obligations and the contingencies that may occur in the regular course of business. For instance, the Sears Canada Group’s payroll payments result in the outflow of approximately \$27 million per month, which is only one of many significant transactions that occur throughout the month.<sup>56</sup>

44. The Applicants will depend on the DIP Facility to maintain a minimum cash balance each month and for their continued operation during the restructuring. The DIP Credit Agreements require that the Sears Canada Group (i) comply with a budget (the “**DIP Budget**”) that is based on the Cash Flow Forecast subject to permitted variances; and (ii) use any advances in accordance with the DIP Budget subject to permitted variances.<sup>57</sup>

45. When the DIP Budget was prepared, given the strain which the Special Payments place on the Applicants’ cash and credit availability, the DIP Budget did not provide for the continuation of Special Payments after June 30, 2017. The permitted variances were meant to provide for contingencies that may arise for a business the size and scope of the Sears Canada Group during

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<sup>55</sup> Second Wong Affidavit, para. 38.

<sup>56</sup> Second Wong Affidavit, para. 39.

<sup>57</sup> Second Wong Affidavit, para. 40.

the CCAA proceedings, and the continuation of the Special Payments would significantly increase the risk that the permitted variance thresholds will be exceeded. The DIP Lenders have advised that they will not agree to a modification of the DIP Budget that would include continuing the Special Payments.<sup>58</sup>

46. If the Applicants' actual performance varies from the DIP Budget in excess of the permitted variances during applicable testing periods, there will be an Event of Default under the DIP Credit Agreements (subject to a cure period). If this occurs, the Sears Canada Group would not be able to make any draws under the DIP Facility, thereby significantly jeopardizing its ability to maintain sufficient liquidity to achieve a going-concern restructuring for the benefit of stakeholders.<sup>59</sup>

47. Measured against the potentially severe detriment to stakeholders as a whole if the Applicants are unable to access their DIP financing and therefore to successfully restructure, the beneficiaries of the Sears Pension Plan will suffer comparatively lower prejudice as a result of an order temporarily suspending the Special Payments. Any such prejudice is outweighed by the benefits to stakeholders as a whole if the Applicants are able to successfully restructure.

48. The requested order would also treat the pension beneficiaries like most other pre-filing creditors whose claims are stayed (*i.e.*, postponed) during the restructuring period.<sup>60</sup>

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<sup>58</sup> Second Wong Affidavit, para. 40. The fact that the DIP Credit Agreements do not provide for the payment of the Special Payments is commercially reasonable. See *Bloom Lake*, at paras. 114-115; *Indalex (SCC)* at para. 59 ("The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries").

<sup>59</sup> Second Wong Affidavit, paras. 41-42.

<sup>60</sup> *Bloom Lake*, at para. 108.

49. Finally, any prejudice suffered by the Sears Pension Plan's beneficiaries may be ameliorated to the extent that they may also benefit from a successful restructuring.<sup>61</sup>

50. In *Fraser Papers*, Pepall J. (as she then was) acknowledged that suspending the special payments appeared unappealing. However, she concluded that the requested order should be granted because it did not extinguish or compromise the obligation to make the payments and benefited all stakeholders by supporting the applicant's restructuring efforts:

The relief requested by the Applicants, importantly in my view, does not extinguish or compromise or even permit the Applicants to compromise their obligations with respect to special payments. Indeed, the proposed order expressly provides that nothing in it shall be taken to extinguish or compromise the obligations of the Applicants, if any, regarding payments under the pension plans. Failure to stay the obligation to pay the special payments would jeopardize the business of the Applicants and their ability to restructure. The opportunity to restructure is for the benefit of all stakeholders including the employees. That opportunity should be maintained. [Emphasis added.]<sup>62</sup>

51. In *Fraser Papers* and *Bloom Lake*, the Court specifically cited the fact that the applicants would have defaulted under their DIP financing agreements as a factor supporting the suspension of the obligation to make the special payments.<sup>63</sup>

52. The balance of interests in this case therefore strongly favours the Requested Order suspending the Special Payments and the Applicants submit that it should therefore be granted.

## **B. The Other Payments Should be Suspended**

53. The Sears Canada Group has continued paying health and dental benefits under the PRB Plan, as well as the life insurance premiums since the granting of the Initial Order, and will make

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<sup>61</sup> *Fraser Papers*, at para. 21.

<sup>62</sup> *Fraser Papers*, at para. 21.

<sup>63</sup> *Fraser Papers*, at para. 21; *Bloom Lake*, at para. 112.

the life insurance premium payments owing for the month of July. However, the Sears Canada Group cannot continue making these payments.<sup>64</sup>

54. The Applicants are therefore seeking a declaration approving the suspension of (i) any further payments in respect of the Supplemental Plan to Post-2010 SP Pensioners; (ii) any payments required in respect of any Shortfall Amount in respect of the Pre-2010 SP Pensioners; and (iii) payments with respect to OPEBS under the PRB Plan (collectively, the “**Other Payments**”).

**(a) The Court has the Jurisdiction to Stay the Other Payments**

55. The Other Payments are pre-filing obligations that are subject to the general stay granted under the CCAA. A CCAA court has broad authority to grant orders staying a company’s pre-filing debts.<sup>65</sup> CCAA courts have previously granted orders suspending obligations similar to the Other Payments, including supplemental pension benefits<sup>66</sup> and OPEBs.<sup>67</sup> As noted by Morawetz J. in *Timminco*, “[t]he law in this area is clear. The courts have repeatedly found that termination and/or retirement benefits are pre-filing unsecured obligations of debtor companies undergoing CCAA proceedings.”<sup>68</sup>

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<sup>64</sup> Second Wong Affidavit, paras. 47, 55-56, and 59-60

<sup>65</sup> *Nortel (Employee Claims)*, at para. 47, aff’d, 2009 ONCA 833, at para. 16; *Bloom Lake*, at para. 109. See also, *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60, at para. 71 (“[W]hen an order is sought that does realistically advance the CCAA’s purposes, the ability to make it is within the discretion of a CCAA court”).

<sup>66</sup> *Re Indalex*, 2009 CarswellOnt 4465 (Sup Ct J) [*Indalex (Supplementary Plan Benefits)*]; *USSC (Business Preservation Order)* at para. 14.

<sup>67</sup> *Bloom Lake*, at paras. 123 and 132; *Nortel (Employee Claims)*, *USSC (Business Preservation Order)*, at paras. 14 and 19.

<sup>68</sup> 2012 ONSC 4471 [*Timminco (Letter Agreement)*], at para. 41.

56. Section 6(a) of the Initial Order provides that the Sears Canada Group is “entitled, but not required” to pay any outstanding or future pension benefits or contributions. This language is, in the Applicants’ submission, effective to authorize the Sears Canada Group to suspend the Other Payments.<sup>69</sup> For greater certainty, however, and to the extent that it is required, the case law clearly establishes that this Court has the jurisdiction to grant a further order specifically approving the suspension of the Other Payments.

**(b) The Court Should Exercise its Discretion to Stay the Other Payments**

57. Similar reasons that require the suspension of the Special Payments – the strain on liquidity, and the need to comply with the DIP Budget to access DIP financing – also compel the suspension of the Other Payments.<sup>70</sup>

58. In relation to the benefits under the Supplemental Plan, it would also be inequitable to make these payments while the Special Payments and the OPEBs are suspended.<sup>71</sup>

59. As Pepall J. held in *Canwest Global*, whether a particular pre-filing claim is small or large, it remains subject to the CCAA stay.<sup>72</sup> Suspending the Other Payments puts the beneficiaries on an equal footing with all other pre-filing creditors.<sup>73</sup> As noted by Morawetz J. in the *Indalex* proceeding in dealing with a similar request to stay supplementary pension payments, there is no basis for treating such claims differently from the claims of other unsecured creditors, and

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<sup>69</sup> Initial Order, para. 6(a).

<sup>70</sup> Second Wong Affidavit, paras. 51-52, 56, and 59.

<sup>71</sup> Second Wong Affidavit, para. 47.

<sup>72</sup> *Re Canwest Global Communications Corp*, 2010 ONSC 1746 [“*Canwest Global (Employee Claims)*”], at paras. 32-34 and 36.

<sup>73</sup> It is worth emphasizing that the Other Pension Payments are entirely unsecured, pre-filing claims. The Applicants are under no statutory obligation to make these payments, and they are not the subject of any deemed trust under the PBA.

permitting such payments would actually “represent an improper re-ordering of the existing priority regime”.<sup>74</sup>

60. The Applicants therefore submit that the same balancing of interests should lead this Court to order that the Other Payments should be suspended.

**C. Directors and Officers Should be Protected from Liability**

61. The Requested Orders grant the Applicants’ directors and officers protection from liability arising from the suspension of the Special Payments. As noted by Pepall J. in *Fraser Papers*, director and officer protection flows naturally from an order suspending special solvency payments:

Given that I am ordering that the special payments need not be made during the stay period pending further order of the Court, the Applicants and the officers and directors should not have any liability for failure to pay them in that same period. The latter should be encouraged to remain during the CCAA process so as to govern and assist with the restructuring effort and should be provided with protection without the need to have recourse to the Director’s Charge.<sup>75</sup>

62. The Sears Canada Group requires the assistance of its directors and officers to successfully restructure.<sup>76</sup> The requested protection from liability ensures that no significant additional disincentive to remain in office is created. In addition, it preserves the Directors’ Charges from potential liability claims arising from the suspension of the Payments, which is a further benefit to the Applicants’ estate, and therefore its stakeholders as a whole.

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<sup>74</sup> *Indalex (Supplementary Plan Benefits)*, at para. 10.

<sup>75</sup> *Fraser Papers*, at para. 22. See also *Timminco (Special Payments)*, at para. 70 (“[I]n order to encourage the officers and directors to remain during the CCAA proceedings, an order should be granted relieving them from any liability for the Timminco Entities’ failure to make pension contributions during the CCAA proceedings. At this point in the restructuring, the participation of its officers and directors is of vital importance”).

<sup>76</sup> Initial Order Affidavit, para. 260.

63. The Applicants submit therefore that the requested protection for its directors and officers should be granted.

**D. The SISP Should be Approved**

**(a) This Court has the Jurisdiction to Approve the SISP**

64. This Court has the jurisdiction to approve a sale process in relation to a CCAA debtor's business and assets prior to the development of a plan of compromise and arrangement.<sup>77</sup> This Court in *Nortel* identified a number of factors that should be considered when authorizing a sales process:

- (a) Is a sale transaction warranted at this time?
- (b) Will the sale benefit the whole economic community?
- (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
- (d) Is there a better viable alternative?<sup>78</sup>

65. In addition, a court may also indirectly consider the factors provided in s. 36(3) of the CCAA, which will apply when an applicant seeks approval for a sale after the sales process has concluded.<sup>79</sup> These considerations are as follows:

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<sup>77</sup> *Re Nortel Networks Corp*, 2009 CarswellOnt 4467 (Sup Ct J) [*Nortel (Sales Process)*] at para. 48.

<sup>78</sup> *Nortel (Sales Process)*, at para. 49. *Re Brainhunter Inc.*, 2009 CarswellOnt 8207 (Sup Ct J) [*Brainhunter*] at paras. 15 to 17, confirmed that the *Nortel* factors remain applicable even after the 2009 amendments to the CCAA.

<sup>79</sup> *Brainhunter*, at para. 17.

- (a) Whether the process leading to the proposed sale or disposition was reasonable in the circumstances.
- (b) Whether the Monitor approved the process leading to the proposed sale or disposition.
- (c) Whether the Monitor filed with the Court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy.
- (d) The extent to which the creditors were consulted.
- (e) The effects of the proposed sale or disposition on the creditors and other interested parties.
- (f) Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.<sup>80</sup>

**(b) Overview of the Proposed SISP**

66. The proposed SISP is a comprehensive and flexible process that will enable the Applicants to explore the market, and to seek out potential transaction alternatives involving the Applicants' business, property and/or leases.<sup>81</sup> The SISP is designed to assist the Applicants in identifying the best opportunities in the circumstances for maximizing value for the Applicants' stakeholders.<sup>82</sup>

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<sup>80</sup> CCAA, s. 36(3).

<sup>81</sup> Second Wong Affidavit, paras. 65-66.

<sup>82</sup> Second Wong Affidavit, para 68.

67. The SISP will be conducted by the Financial Advisor on behalf of the Applicants, under the supervision of the Monitor and the Special Committee.<sup>83</sup> The key aspects of this process are as follows:

- (a) **Solicitation of Bids.** The Financial Advisor and Sears Canada, with the assistance of their advisors and in consultation with the Monitor, will solicit interest from parties to enter into non-disclosure agreements, which will allow such parties to participate in the SISP and access an electronic data room with due diligence information.<sup>84</sup> The Financial Advisor may also, in consultation with Sears Canada and the Monitor, engage local market leasing agents or real estate brokers to solicit bids.<sup>85</sup>
- (b) **Submission of Bids.** The SISP provides for two types of bids / proposals:
  - (i) Landlords that wish to make a proposal in connection with existing leases to which they are a party may submit “**Binding Lease Proposals**” by no later than August 15, 2017; and
  - (ii) Other parties interested in pursuing a transaction may submit a “**Binding Bid**” by no later than August 31, 2017.<sup>86</sup>
- (c) **Selection of and Finalizing Successful Bid(s).** Following the deadlines noted above, Sears Canada will consult with the Financial Advisor, the Monitor and the DIP Lenders, and decide whether to continue negotiations with one or more bidders to select one or more non-overlapping Bindings Bids and/or Binding Lease

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<sup>83</sup> Second Wong Affidavit, para. 66.

<sup>84</sup> Second Wong Affidavit, para. 69.

<sup>85</sup> Second Wong Affidavit, para. 70.

<sup>86</sup> Second Wong Affidavit, para. 71. The requirements for a Binding Bid and a Binding Lease Proposal are set out in the Second Wong Affidavit, paras. 72-73.

Proposals (collectively, the “**Successful Bid(s)**”), upon approval of the board of directors of Sears Canada.<sup>87</sup> If one or more Successful Bids is selected, the Sears Canada Group and its advisors, in consultation with the Monitor, will finalize any necessary definitive agreements with respect to the Successful Bids in a form and substance acceptable to the DIP Lenders and the board of directors of Sears Canada. The Sears Canada Group will then apply for Court approval.<sup>88</sup> The SISP has an anticipated completion date of all transactions by October 25, 2017.<sup>89</sup>

68. The Sears Canada Group may amend the SISP at any time with the written consent of the Special Committee, the Monitor and the DIP Lenders, or by further order of the Court.<sup>90</sup> In addition, the Sears Canada Group, in consultation with the Financial Advisor, the Monitor and the DIP Lenders may withdraw any leases or assets from the SISP.<sup>91</sup>

69. The SISP contains several features designed to protect the integrity of the process. For example, the SISP provides that references to the Sears Canada Group in the SISP shall refer to the Special Committee in circumstances where the integrity of the process so requires, as determined by the Special Committee or any of the advisors, the Financial Advisor or the Monitor.<sup>92</sup>

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<sup>87</sup> Second Wong Affidavit, para. 75.

<sup>88</sup> Second Wong Affidavit, para. 77.

<sup>89</sup> Second Wong Affidavit, para. 86.

<sup>90</sup> Second Wong Affidavit, para. 79.

<sup>91</sup> Second Wong Affidavit, para. 80.

<sup>92</sup> Second Wong Affidavit, para. 67.

70. The SISP also contains a number of measures with respect to the dissemination of any confidential information provided to the DIP Lenders in relation to the SISP.<sup>93</sup> Certain highly sensitive information regarding the bids submitted in the SISP will be provided only to a list or categories of personnel on a list of “**Restricted Process Observers**”, and such personnel will not be allowed to share the sensitive information with persons not included in the list without the consent of the Monitor, in consultation with the Financial Advisor.<sup>94</sup>

71. In addition, any members of Sears Canada’s management team that are involved in a management-led Binding Bid will not be provided with any information about any other Binding Bids or Binding Lease Proposals.<sup>95</sup>

72. Finally, a communication protocol will govern when and under what circumstances members of the Sears Canada Group’s management team will be available to communicate with prospective bidders. Failure to adhere to the communication protocol may result in disqualification from the process and/or the rejection of any bid or proposal.<sup>96</sup>

**(c) The SISP Should Be Approved**

73. The *Nortel* criteria, when considered in light of the relevant s. 36(3) factors, support approving the SISP:

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<sup>93</sup> Second Wong Affidavit, para. 82.

<sup>94</sup> Second Wong Affidavit, para. 83.

<sup>95</sup> Second Wong Affidavit, para. 84.

<sup>96</sup> Second Wong Affidavit, paras. 84-85.

- (a) The SISP is a broad and flexible process that will permit the Applicants to explore and fully canvass the market. It will allow the Applicants to review a number of restructuring options within a single comparative framework.
- (b) The process contemplated in the SISP is fair and reasonable. The Financial Advisor will conduct the process, bringing to bear its independence and considerable expertise. The Financial Advisor is of the view that the timeframes set out in the SISP are reasonable in the circumstances. The SISP will be conducted under the supervision of the Monitor, and the Special Committee will participate in the process as necessary to ensure its integrity. The communication protocol and confidentiality measures ensure that all participants are treated fairly.<sup>97</sup>
- (c) The SISP has been designed to comply with the milestone dates set out in the DIP Credit Agreements, as described in the Initial Order Affidavit.<sup>98</sup>
- (d) The Monitor supports the Applicants' request to approve and implement the SISP.<sup>99</sup>

74. At the end of the SISP, any Successful Bids will be subject to court approval. At that stage, this Court will have a full opportunity to review the execution of the SISP and ensure compliance with all of the relevant s. 36(3) factors.

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<sup>97</sup> Second Wong Affidavit, paras. 67 and 81-86.

<sup>98</sup> Second Wong Affidavit, para. 86.

<sup>99</sup> Second Wong Affidavit, para. 68.

**E. The Stay Period Should be Extended**

75. The Sears Canada Group seeks to extend the Stay Period up to and including October 4, 2017, which is the deadline provided in the DIP Credit Agreements for the Sears Canada Group to obtain court approval of any Successful Bids.<sup>100</sup>

76. Under s. 11.02 of the CCAA, the Court may extend a stay of proceedings if satisfied that (a) circumstances exist that make the order appropriate; and (b) the debtor companies have acted and are acting in good faith and with due diligence.<sup>101</sup>

77. In *Canwest Global*, for example, Pepall J. granted a stay extension on the basis that (a) the extension would provide necessary stability to allow the debtors to continue working towards a going concern solution; (b) the debtors had acted and were continuing to act in good faith and with due diligence; (c) the cash flow forecast indicated that the debtors had sufficient cash to operate throughout the extension of the stay period; (d) the monitor supported the extension; and (e) there was a lack of opposition to the extension.<sup>102</sup>

78. The requested extension of the Stay Period is necessary and appropriate in the circumstances. These proceedings are in their infancy and the Applicants are seeking breathing space to achieve a value-maximizing solution to their current financial difficulties. The proposed extension will provide the Applicants with an opportunity to stabilize their businesses and take the necessary steps to restructure. In furtherance of this objective, the proposed stay extension will allow the Applicants to implement the SISP and their proposed inventory liquidation process if

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<sup>100</sup> Second Wong Affidavit, para. 87.

<sup>101</sup> CCAA, s. 11.02(3).

<sup>102</sup> *Re Canwest Global Communications Corp*, 2009 CarswellOnt 7169 (Sup Ct J) [*Canwest Global Corporation (Transaction and Reorganization Agreement)*], at para. 43.

subsequently approved by this Court – both processes that are intended to maximize recoveries for all stakeholders.<sup>103</sup>

79. The Sears Canada Group has acted and is continuing to act in good faith and with due diligence. The Sears Canada Group has been working with the Monitor to implement the SISP and Sale Guidelines for the Liquidation Process, and has been in ongoing discussions with key stakeholders, including landlords, employees, suppliers and creditors.<sup>104</sup>

80. Provided that the Court approves the suspension of the Payments and the Applicants have access to the DIP Facility, the Applicants will have sufficient liquidity to fund operations during the proposed extended Stay Period.<sup>105</sup> The Monitor and the DIP Lenders have expressed their support for the extension of the Stay to October 4, 2017.<sup>106</sup>

81. The Applicants submit that the requested stay extension should therefore be granted.

#### **PART IV -NATURE OF THE ORDER SOUGHT**

82. The Applicants therefore request that this Court grant the Requested Orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

  
For Marc Wasserman

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<sup>103</sup> Second Wong Affidavit, para. 87.

<sup>104</sup> Second Wong Affidavit, para. 88.

<sup>105</sup> Second Wong Affidavit, para. 89.

<sup>106</sup> Second Wong Affidavit, para. 90.

*Michael Michele*

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For Jeremy Dacks

*Michael Michele*

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For Michael De Lellis

*Michael Michele*

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For Karin Sachar

## Schedule “A”

### LIST OF AUTHORITIES

1. *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60
2. *Re Bloom Lake General Partner Ltd*, 2015 QCCS 3064, leave to appeal to CA refused, 2015 QCCA 1351
3. *Re Brainhunter Inc*, 2009 CarswellOnt 8207 (Sup Ct J)
4. *Re Canwest Global Communications Corp*, 2009 CarswellOnt 7169 (Sup Ct J) [*Canwest Global (Transaction and Reorganization Agreement)*]
5. *Re Canwest Global Communications Corp*, 2010 ONSC 1746 [*Canwest Global (Employee Claims)*]
6. *Re Collins & Aikman Automotive Canada Inc*, 2007 CarswellOnt 7014 (Sup Ct J)
7. *Re Essar Steel Algoma Inc*, (January 13, 2016), Ont Sup Ct, CV-15-000011169-CL (Special Payments Order)
8. *Re Fraser Papers Inc*, 2009 CarswellOnt 4469 (Sup Ct J)
9. *Re Indalex Ltd*, 2009 CarswellOnt 4465 (Sup Ct J) [*Indalex (Supplementary Plan Benefits)*]
10. *Re Nortel Networks Corp*, 2009 CarswellOnt 3583 (Sup Ct J) [*Nortel (Employee Claims)*], aff'd, 2009 ONCA 833
11. *Re Nortel Networks Corp*, 2009 CarswellOnt 4467 (Sup Ct J) [*Nortel (Sales Process)*]
12. *Re Timminco Ltd*, 2012 ONSC 506 [*Timminco (Special Payments)*]
13. *Re Timminco Ltd*, 2012 ONSC 4471 [*Timminco (Letter Agreement)*]
14. *Re US Steel Canada Inc*, (October 9, 2015), Ont Sup Ct, CV-14-10695-00CL (Cash Conservation and Business Preservation Order)
15. *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6

## Schedule “B”

### *COMPANIES’ CREDITORS ARRANGEMENT ACT*

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

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.

Stays, etc. — other than initial application

**11.02 (2)** A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- 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.

Burden of proof on application

**11.02 (3)** The court shall not make the order unless

- a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

[...]

Restriction on disposition of business assets

**36 (1)** A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

**36 (2)** A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

**36 (3)** In deciding whether to grant the authorization, the court is to consider, among other things,

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

Additional factors — related persons

**36 (4)** If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

- a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
- b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

**36 (5)** For the purpose of subsection (4), a person who is related to the company includes

- a) a director or officer of the company;
- b) a person who has or has had, directly or indirectly, control in fact of the company; and
- c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

**36 (6)** The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

**36 (7)** The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

**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  
TORONTO

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