

**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.

**FACTUM OF THE MOVING PARTY/CREDITOR,  
BARRY PATRICK KENNY  
(Request to Lift the Stay of Proceedings)**

July 6, 2017

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**PART I – OVERVIEW**

1. This is a motion by the Creditor, Barry Patrick Kenny (“Kenny”), to lift the stay of proceedings as against Sears Canada Inc. (“Sears”) to allow the certification hearing of the Class Action to proceed as scheduled before Justice Leach on October 10-13, 2017.
2. There are several reasons that favour lifting the stay in these circumstances including the prejudice to the class members in the Class Action and the proper administration of justice. Further, lifting the stay to allow the certification hearing to continue will assist in determining complete and accurate class membership in the Class Action which is beneficial to the CCAA Proceedings.

## **PART II – THE FACTS**

### **Background**

3. On February 3, 2015, a proposed class action was commenced on behalf of Kenny with respect to allegations that SHS Services Management Inc. (“SHS”) and Sears Canada Inc. (“Sears”) breached the employment contract of and wrongfully dismissed Kenny and other putative class members in Canada (the “Class Action”).

**Reference:** Affidavit of Sabrina Lombardi sworn July 6, 2017 [“Lombardi Affidavit”] at paragraphs 2 and 3 and Exhibit “A” thereto, Motion Record of the Moving Party/Creditor (Request to Lift the Stay of Proceedings), Tab 2

### **History of the Sears/SHS Relationship**

4. In 2013, Sears sold its home services business to SHS. As part of the transaction, former Sears employees, including Kenny and putative class members in the Class Action, were offered employment with SHS commencing on or about March 2, 2013. Several hundred Sears employees became employees of SHS as of March 2, 2013.

**Reference:** Lombardi Affidavit at paragraphs 4 and 5 and Exhibit “B” thereto

5. Kenny was never notified of the termination of his employment with Sears and was not provided with any notice or pay in lieu thereof.

**Reference:** Lombardi Affidavit at paragraph 7

### **Receivership of SHS and Termination of Employees**

6. On December 13, 2013, PricewaterhouseCoopers Inc. (“PwC”) was appointed as interim receiver of SHS.

**Reference:** Lombardi Affidavit at paragraph 8

7. On December 13, 2013, PwC terminated the employment of all SHS employees, including Kenny. Kenny, as well as other SHS employees and putative class members were given no notice of such termination and were not paid any benefits under the applicable provincial employment standards legislation, including termination pay, severance pay or vacation pay.

**Reference: Lombardi Affidavit at paragraph 9**

8. On January 9, 2014, PwC was appointed as receiver of SHS and thereafter, SHS made an assignment in bankruptcy.

**Reference: Lombardi Affidavit at paragraph 10**

### **The Proposed Class in the Class Action**

9. SHS had approximately 601 employees as of December 13, 2013. The majority of these employees were former Sears employees who transferred to SHS as of March 2, 2013 and are putative class members in the Class Action.

**Reference: Lombardi Affidavit at paragraphs 11 and 12 and Exhibit "B" thereto**

### **Status of the Class Action Litigation**

10. The parties to the Class Action have been working diligently to efficiently litigate the Class Action. Justice Leach was appointed as case management Judge and has case managed the Class Action since June 2015.

**Reference: Lombardi Affidavit at paragraphs 13 and 14**

**Certification Motion**

11. The parties to the Class Action agreed to a tentative timetable regarding the delivery of certification materials and the scheduling of the certification hearing. On March 25, 2016, Kenny served a Motion Record regarding the certification hearing and on July 12, 2016, Sears served its Responding Motion Record regarding the certification hearing.

**Reference: Lombardi Affidavit at paragraphs 16-18 and Exhibits “C” and “D” thereto**

12. The certification hearing is scheduled to be heard on October 10-13, 2017 before Justice Leach.

**Reference: Lombardi Affidavit at paragraph 19**

**Request to Lift the Stay of Proceedings**

13. There are approximately 601 former SHS employees who are putative class members in the Class Action.

**Reference: Lombardi Affidavit at paragraph 20**

14. By lifting the stay of proceedings and allowing a determination on the certification hearing, the Court will determine the precise number of class members who have a claim in the CCAA Proceedings. A determination on the certification hearing will support an efficient administration of justice and streamline the number of creditors in the CCAA Proceedings.

**Reference: Lombardi Affidavit at paragraph 21**

15. Allowing the certification hearing to proceed will not cause any prejudice to Sears given the status of the Plan of Arrangement and the fact that the former employees will be identified therein. The certification hearing will allow a full adjudication of the claims of all former Sears employees, including those captured in the Class Action.

**Reference: Lombardi Affidavit at paragraph 22**

### PART III – STATEMENT OF ISSUES, LAW & AUTHORITIES

#### A. Any Interested Person May Seek to Lift a CCAA Stay of Proceedings

16. The Court has held that any interested person who wishes to set aside or vary an initial CCAA order is not constrained about relying on the comeback clause. Respectfully, Kenny has standing to bring this motion as a creditor in the CCAA Proceedings.

Reference: *Warehouse Drug Store Ltd., Re* (2005), 11 C.B.R. (5<sup>th</sup>) 323 (Ont. S.C.J. [Commercial List]), Moving Party's Book of Authorities, Tab 7

#### B. Purposes of the CCAA

17. The stay provisions in the CCAA are discretionary and very broad and the purpose of the CCAA must be considered on any motion to amend or vary the stay provisions. The purpose of the CCAA is “intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both.”

Reference: *Canwest Global Communications Corp., Re*, 2011 ONSC 2215 [Commercial List] at paragraphs 22-24, Moving Party's Book of Authorities, Tab 3

Reference: *Lehndorff General Partner Ltd., Re*, (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at paragraphs 6 and 10, Moving Party's Book of Authorities, Tab 5

#### C. Criteria for Lifting Stay of Proceedings

18. As there is no statutory test under the CCAA with respect to lifting the stay, in determining whether a stay should be lifted, the Court must have regard to the particular facts and to balance a number of interests.

Reference: *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4<sup>th</sup>) 1 (Alta. Q.B.) at paragraphs 14-15, Moving Party's Book of Authorities, Tab 2

19. The Court must consider whether there are “sound reasons” for lifting a stay and assess a general list of factors, including the following:

- a. The balance of convenience;
- b. The relative prejudice to the parties;
- c. The merits of the proposed action; and
- d. The good faith and due diligence of the debtor company.

**Reference:** *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKCA 72 at paragraphs 66-68, Moving Party’s Book of Authorities, Tab 4

**Reference:** *Timminco Ltd., Re*, 2012 ONSC 2515 at paragraphs 16-17, Moving Party’s Book of Authorities, Tab 6

20. Several situations have been identified where a stay will be lifted. In the circumstances of this case, the putative class members in the Class Action are prejudiced by the stay as their claims in the Class Action may not be recognized under the proposed Plan of Arrangement. However, by lifting the stay and allowing the certification hearing to proceed, a finding on the certification hearing will provide clarity as to the class membership under the Class Action. In turn, this will clarify class membership under the proposed Plan of Arrangement as a finding on the certification hearing will streamline the number of creditors in the CCAA Proceedings. In lifting the stay of proceedings, Sears will not suffer any prejudice as the number of eligible employees in the defined class under the proposed Plan of Arrangement will not impact the outcome of the proceedings.

**Reference:** *Canwest Global Communications Corp.*, *supra* at paragraph 26, Moving Party’s Book of Authorities, Tab 3

21. To date, the only list of class members in the Class Action as provided in the litigation is the redacted employee list attached as Exhibit “B” to Ms. Lombardi’s affidavit. Only after the Class Action is certified and class membership is confirmed will a complete and

accurate list of class members be available. Such a complete and accurate list is required for full administration of the CCAA Proceedings.

22. In fact, lifting the stay to allow the certification hearing to proceed will bring more clarity and finality to the employee class under the proposed Plan of Arrangement and will allow a full adjudication of the claims of all former Sears employees, including those in the Class Action. As such, it is in the interests of justice to lift the stay in these circumstances.

**Reference:** *Canwest Global Communications Corp., supra* at paragraph 26, Moving Party's Book of Authorities, Tab 3

#### **D. Complex Claims**

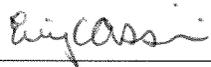
23. Where a claim is "complex" in nature, as is the case in the Class Action, such complexity will favour granting the lift of a stay as the matter cannot be disposed of in a summary fashion and should be litigated in the appropriate court context. In this case, Justice Leach has case managed the Class Action since its commencement and as such, the Court in the Class Action is in the best position to determine the fundamental issues in the Class Action, including membership in the class. A determinative finding on class membership in the Class Action will only support the administration of the CCAA Proceedings.

**Reference:** *382231 Ontario Ltd. v. Wilanour Resources Ltd., (1982), 43 C.B.R. 153 (Ont. S.C.J.)* at paragraph 10, Moving Party's Book of Authorities, Tab 1

**PART IV – ORDER REQUESTED**

24. The Moving Party/Creditor respectfully requests that the stay imposed by the Initial Order be lifted as against Sears to allow the certification hearing scheduled for October 10-13, 2017 to proceed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 6<sup>th</sup> day of July, 2017.

  
per. Michael J. Peerless

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## SCHEDULE "A"

### LIST OF AUTHORITIES

1. *382231 Ontario Ltd. v. Wilanour Resources Ltd.*, (1982), 43 C.B.R. 153 (Ont. S.C.J.)
2. *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4<sup>th</sup>) 1 (Alta. Q.B.)
3. *Canwest Global Communications Corp., Re*, 2011 ONSC 2215 [Commercial List]
4. *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKCA 72
5. *Lehndorff General Partner Ltd., Re*, (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List])
6. *Timminco Ltd. Re*, 2012 ONSC 2515
7. *Warehouse Drug Store Ltd., Re* (2005), 11 C.B.R. (5<sup>th</sup>) 323 (Ont. S.C.J. [Commercial List])

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Court File No. CV-17-11846-00CL

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PROCEEDING COMMENCED AT  
TORONTO

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