

**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 ÉLECTRIQUE INC., S.L.H. TRANSPORT INC.,
THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS
SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND
SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470
CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711
CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531
CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

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

**FACTUM OF EMPLOYEE REPRESENTATIVE COUNSEL
(Motions returnable July 13, 2017)**

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TO: SERVICE LIST

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PART I - INTRODUCTION

1. Ursel Phillips Fellows Hopkinson LLP was appointed as representative counsel for the active and former employees of the Applicants (“Employee Representative Counsel”), pursuant to the Court’s endorsement dated June 22, 2017.
2. Alongside the members of the pension plans, the employees are the most vulnerable stakeholders in these proceedings. They have the most at risk and, unlike other creditors, the consequences of the actions taken by the Applicants affects them in a personal way – impacting their jobs, their health benefits and their families’ financial security.
3. The Active and Former Employees are invested in ensuring a successful restructuring outcome for the Applicants, which maximizes the value in the business and provides for continuing operation of the business as a going concern.
4. At the current time, over 14,000 employees remain employed by the Applicants (the Active Employees).
5. Since the Initial Order date however, several groups of terminated employees have suffered significant hardships. Approximately 3000 employees were given notice of termination on June 22, 2017. In addition, there are between 800 and 1,000 employees who had been terminated prior to June 22, 2017 who were in receipt of salary continuance. These employees were notified on June 22, 2017 that their salary continuance would immediately cease notwithstanding any agreements made in relation to notice, termination or severance pay prior to the Initial Order.

6. The loss of employment and their various payments and other entitlements is extremely important to those Former Employees who have been severely impacted by the Applicants' insolvency. In addition to losing their continued employment, these employees have been deprived of access to notice, statutory severance and termination pay, health and dental benefits, and life insurance, as a result of the stay of proceedings. The insolvency has had a material and prejudicial impact on their standard of living and has created severe hardships for many of these individuals.

7. In order to protect the interests of the employees, Employee Representative Counsel has initiated discussions with the Monitor and the Applicants regarding possible mechanisms to alleviate the hardships caused by the stay of proceedings in the Initial Order, in particular the deprivation of access to statutory termination or severance pay for the 4,000 employees terminated on June 22, 2017 following the Initial Order and health and dental benefits. Employee Representative Counsel expressly reserves its right to return to Court to seek further relief in this regard in the event that an agreement cannot be reached with the Applicants and the Monitor.

8. In addition, Employee Representative Counsel has initiated discussions with the Monitor and the Applicants regarding methods by which the Employee Representatives and their Counsel can be provided with information about the SISP.

9. On the current motion, Employee Representative Counsel seeks the following relief:

- (a) if necessary, an order abridging the time for service and filing of this notice of motion, or in the alternative, dispensing with same;

- (b) an order directing the Applicants to continue or reinstate health benefits coverage for a reasonable notice period until October 5, 2017 for employees who were on long-term disability insurance benefits or parental leave at the time of the Initial Order and whose employment was terminated on June 22, 2017;
- (c) an order directing the Applicants to continue or reinstate health benefits coverage for a reasonable notice period until October 5, 2017 for employees whose employment was terminated effective immediately on June 22, 2017;
- (d) an order amending the KERP approved at paragraph 21 of the Initial Order in relation to the Headquarters Employees, as the amounts provided are excessive considering the extremely short time horizon for the KERP, and as the KERP is not sufficiently tailored to create incentives to preserve and enhance the value of the Applicants;
- (e) an order amending Paragraphs 22, 46, 47 and 49 of the Initial Order to grant priority for the Directors' Charge above the priority for the KERP Charge;
- (f) an order in respect of the proposed SISF that provides Employee Representative Counsel and the Employee Representatives (as defined in the Employee Representative Counsel Order), along with their financial advisors, with access to information about the identity of all bidders for the assets; and answers to questions posed by Employee Representative Counsel with respect to bids received and the terms thereof, bids which have been excluded; and the evaluation of the bids by the Sales Advisor, the Applicants, and the DIP Lenders, subject to confidentiality arrangements required by the bidders themselves; and

(g) such further and other relief as this Honourable Court deems just.

PART II - THE FACTS

10. Since the Initial Order date, several groups of employees have suffered significant hardships, including;

- a) approximately 400 employees from head office in Toronto immediately terminated effective June 22, 2017 without payment of statutory termination or severance pay;
- b) approximately 2,400 store employees who were given working notice until October 5, 2017 when their stores are set to close but will not receive full statutory termination or severance pay, including:
 - i. an unknown number of commission store employees given working notice until October 5, 2017, who were notified their compensation arrangements would change from commission based pay to hourly pay at the rate of \$15 per hour;
 - ii. an unknown number of store employees given working notice until October 5, 2017, who were on approved leave of absence or an approved disability leave;
- c) an unknown number of store employees who were working on commission who were immediately terminated as of June 22, 2017 without any notice, termination or severance pay; and,
- d) an unknown number of store employees who were in receipt of Long Term Disability benefits or on parental leave from stores that were previously closed, who were immediately terminated on June 22, 2017 without any notice, termination or severance pay.

e) between 800 and 1,000 employees who had been terminated prior to June 22, 2017 who were in receipt of salary continuance. These employees were notified on June 22, 2017 that their salary continuance would immediately cease; they were not provided with any notice, termination or severance pay.

11. It should be noted that with respect to almost all employees whose termination was effective immediately as of June 22, 2017, their health and dental benefits also ceased and were not continued for any notice period.¹

12. One of the most common concerns that has been raised by those employees who have contacted Employee Representative Counsel is the fact that they are being denied termination and severance pay.² These employees are faced with the unexpected loss not only of their employment income, but also their statutory termination and severance obligations which represent reasonable, fair and uniform minimum requirements established by the legislature of each province for the protection of employees.

13. The Courts have consistently held that termination and severance pay are pre-filing obligations of a debtor company, the payment of which is prohibited by the stay of proceedings under the *Companies' Creditors Arrangements Act*³ ("CCAA") and which are subject to compromise through the CCAA process.⁴

14. Recognising that the Initial Order prevents the immediate payment of termination and severance pay for terminated employees, Employee Representative Counsel has

¹ Affidavit of Ashley Schuitema affirmed July 12, 2017 at Exhibit B at paras. 14, 20, 26, 30, 32, and 35.

² Schuitema Affidavit at para. 6.

³ *Companies' Creditors Arrangements Act*, RSC 1985, c C-36

⁴ *Mirant Canada Energy Marketing Ltd. (Re)*, 2004 ABQB 214, [2004] AJ No 331 at paras. 28, 30; *Communications, Energy, Paperworkers Local 721G v. Printwest Communications Ltd.*, 2005 SKQB 331, [2005] SJ No 484 at paras. 13, 15; *Nortel Networks Corp. (Re)*, [2009] OJ No 2558, 55 CBR (5th) 68 at paras. 60, 67, 86; *Windsor Machine & Stamping Ltd. (Re)*, [2009] OJ No 3195 at para. 35; *Canwest Global Communications Corp. (Re)*, 2010 ONSC 1746, [2010] OJ No 2544 at paras. 32, 33.

engaged the Monitor and the Applicants in discussions on mechanisms to relieve against these hardships suffered by terminated employees.⁵

15. One potential mechanism to relieve against these hardships is the establishment of an employee hardship fund to provide partial advance distributions to certain employee creditors, along the lines of the hardship fund established in *Nortel Networks Corp (Re)*. In that case, although Justice Morawetz denied a request for immediate payment of claims for severance pay, vacation pay and other entitlements of former employees under the *Employment Standards Act* and their respective collective agreements, he nonetheless recognised the severe impact of the cessation of payments and the importance of the timing of any distribution for the affected individuals in the circumstances. A direction was issued to the Monitor in that case to consider the feasibility of a hardship fund.⁶ Justice Morawetz approved the proposed Employee Hardship fund by order and endorsement dated July 30, 2009.⁷

16. The details of any such hardship fund, including the quantum, timing, eligibility criteria and process for applications require significant information about the Applicants' financial situation and capacities that are outside the current knowledge of Employee Representative Counsel. For that reason, we have engaged with the Monitor and the Applicants with a view to assessing the feasibility of establishing such a fund in this case.

⁵ Schuitema Affidavit at para. 47.

⁶ *Nortel Networks Corp (Re)*, *supra* at paras. 87-88.

⁷ *Nortel Networks Corp (Re)*, [2009] OJ No 3280, 53 CBR (5th) 196 at para. 9. Similarly, in *Target Canada Co. (Re)*, 2015 ONSC 303, the Court approved the creation of a \$70 million employee trust to diminish the financial hardship for approximately 17,600 employees who were to be terminated in that company's wind-down process.

17. Another alternative to assist employees facing hardships as a result of the Initial Order, which is currently under discussion with the Monitor and the Applicants, is the appointment of a receiver to facilitate applications to the Wage Earner Protection Program.

18. The *Wage Earner Protection Program Act*,⁸ (“WEPPA”) was established to make payments to individuals in respect of unpaid wages, vacation pay, severance and termination pay owed to them by employers who are bankrupt or subject to a receivership. Under WEPPA, employees can claim the greater of \$3000 or an amount equal to four times the employee’s maximum weekly insurable earning under the *Employment Insurance Act*, S.C. 1996, c. 23. The current maximum weekly employment insurance benefit is \$543 per week.⁹

19. On June 22, 2017, approximately 4000 employees either had their employment terminated immediately or were given notice of the termination of their employment effective October 5, 2017. Many of them were not provided with their full statutory entitlement to termination pay, working notice and/or severance pay. A rough estimate of the maximum amount possible owed for these terminated employees under WEPP would be approximately \$9 million.¹⁰

20. Absent the appointment of a receiver under CCAA, those terminated employees of Sears Canada would not be able to enjoy the benefits of WEPPA as that program does not contemplate payment during CCAA proceedings.

⁸ *Wage Earner Protection Program Act*, SC 2005, c 47, s 1, s. 2(1), 4-7(1), and 36(1) [WEPPA]

⁹ Schuitema Affidavit at paras. 45-46.

¹⁰ Schuitema Affidavit at para. 46.

21. Nonetheless, it possible to have a receiver appointed under s. 101 of the *Courts of Justice Act*¹¹ (“CJA”) over certain assets of the Applicants, concurrent with the CCAA proceedings, in order to allow terminated employees to access WEPPA benefits. This mechanism was used in *Cinram International Inc.*¹² and *Victorian Order of Nurses for Canada (Re)*.¹³

22. The trajectory of these proceedings continues to develop, which may make the appointment of a receiver premature at this stage. Moreover, the Applicants’ business is complex and Employee Representative Counsel currently has limited information to assess which assets might be appropriate for a receiver to take control or possession of in order to facilitate employee access to WEPPA. For these reasons, Employee Representative Counsel is in consultation with the Company and the Monitor as to whether a receiver can be appointed for this purpose in the current proceedings, and if so, when and in respect of which assets of the Applicants.¹⁴

23. These discussions are ongoing. Should the parties be unable to come to an agreement, Employee Representative Counsel reserves its right to come before the Court to request further relief for terminated employees who are suffering significant hardship as a result of the stay of proceedings under the Initial Order.

24. Employee Representative Counsel has concerns about the terms of the proposed DIP and the proposed Sales and Investment Solicitation Process (“SISP”), and in particular, whether the DIP and the SISP will maximize value in the Applicants’

¹¹ *Courts of Justice Act*, RSO 1990, c C.43, s. 101

¹² *Cinram International Inc.* (October 19, 2012), Toronto CV-12-9767-00CL

¹³ *Victorian Order of Nurses for Canada (Re)*, 2015 ONSC 737, [2015] OJ No 6581 at paras. 50-551.

¹⁴ Schuitema Affidavit at para. 49.

business and favour a going concern solution for the Applicants' business. In light of these concerns, the proposed SISP should be amended as suggested in paragraph 8e above to ensure transparency into the process for core stakeholders, and in particular for Employee Representative Counsel, the Employee Representatives and their financial advisors.

25. In this regard, Employee Representative Counsel has also been in discussions with the Monitor and the Company about providing Employee Representative Counsel and the Employee Representatives, through their financial advisor, with what we have called a "window" into the Sale and Investor Solicitation Process ("SISP"). In the event that these discussions are not successful, Employee Representatives Counsel reserves its right to argue for the relief more fully set out under the section entitled Concerns About the SISP, below, either at the Comeback Motion or at a time and date to be set.

PART III - ISSUES AND THE LAW

A. Health Benefits Coverage Should be Reinstated for Employees of Previously Closed Stores who are on Long-Term Disability or Parental Leaves, for a Reasonable Notice Period

26. Following the issuance of the Initial Order, an unknown number of employees who had been on medical leave and in receipt of both insured long-term disability benefits and health and dental benefits provided by the Applicants, as well as an unknown number of employees who had been on approved parental leaves, were advised of the termination of their employment. These employees had been employed at

previously closed stores. Although we do not have information on the number of former employees in this group, it is expected to be relatively small.¹⁵

27. In addition to denying termination and severance pay, the Applicants have discontinued the health and dental benefits provided to these employees without notice. This has resulted in significant hardship on this group of former employees who, as a result of their disabilities, have particular reliance on their health benefits.¹⁶

28. Providing notice of the termination of health benefits would allow these employees to attend already scheduled appointments for paramedical services, schedule covered services within the notice period, obtain refills as necessary for vital medications, and, most significantly, arrange for alternative health benefits coverage.

29. This group of employees is being treated differently from other employees on such leaves who are employed at stores either remaining open or slated for closure on October 5, 2017. For this latter group, their health and dental benefits will be continuing until October 5, 2017.¹⁷

30. Although Employee Representative Counsel has not been able to determine the cost of reinstating health benefits coverage for the group of employees from stores previously closed, or of providing reimbursement for costs that would have been covered by the Applicants' health benefits policies, these costs are not expected to be significant given the small expected size of this category of former employees.

¹⁵ Schuitema Affidavit at para. 32.

¹⁶ Schuitema Affidavit at para. 34.

¹⁷ Schuitema Affidavit at para. 34.

31. The Court has a broad discretion under s. 11 of the CCAA to make “any order that it considers appropriate in the circumstances”, including an order to make payments in respect of pre-filing obligations to creditors including employees of an insolvent company.¹⁸ This broad discretion is to be exercised in furtherance of the CCAA’s purposes.

32. The central purpose of the CCAA is to avoid the devastating social and economic effects of bankruptcy and liquidation, particularly on employees and other creditors. The broad discretion provided by s. 11 allows the court to innovate and issue orders not explicitly referenced in the Act to further efforts to achieve these remedial purposes of the CCAA.¹⁹

33. In light of the severe and personal hardships that these proceedings have had on this vulnerable group of disabled former employees and former employees on parental leave from previously closed stores, this Court should direct the Applicants to forthwith either reinstate health benefits or reimburse these former employees for costs incurred that would have been covered by their health benefits for a period until October 5, 2017.

B. Health Benefits Coverage Should be Reinstated for Other Immediately Terminated Employees

34. In addition to those employees who were on long-term disability and parental leaves at previously closed stores, approximately 400 head office employees and an unknown number of store employees employed on commission were immediately terminated on June 22, 2017 with no working notice. They also had their health and

¹⁸ *Futura Loyalty Group Inc. (Re)*, 2012 ONSC 6403, [2012] OJ No 5362 at para. 10.

¹⁹ *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 at paras. 17-18, 59, 61, 70.

dental benefits terminated without notice. The 800 to 1000 employees on salary continuation also had both their salary continuance and benefits terminated effective immediately and without notice.

35. Although this larger group is likely to be more diverse in respect of their reliance on health benefits, it is reasonable to assume that they will similarly suffer hardships from the cancellation of their benefits without any notice. Providing notice of the termination of health benefits would allow these employees to attend already scheduled appointments for paramedical services, schedule covered services within the notice period, obtain refills as necessary for vital medications, and, most significantly, arrange for alternative health benefits coverage.

36. In the circumstances, it is appropriate for this Court to order the Applicants to reinstate health benefits for this group for a reasonable notice period until October 5, 2017.

C. The KERP Should be Amended

37. Employee Representative Counsel has no objection to the KERP terms as they relate to the closing store managers. As described in the Wong Affidavit sworn June 22, 2017, the KERP payments to closing store managers are directly related to ensuring a smooth liquidation of the closing stores, since the amount to be provided will depend on a certain realization rate with respect to the liquidation proceeds received minus expenses.²⁰

²⁰ Affidavit of Billy Wong, sworn June 22, 2017 at para. 256.

38. However, the KERP in respect of the headquarters employees should not be approved for five reasons.

39. First, no evidence has been provided to ensure that only true key employees are covered by the plan, and that no truly key employees have been inadvertently left out, which are important considerations for the Court's scrutiny.²¹ There is no information provided in relation to the job classifications or identities of the headquarters personnel covered by the KERP to permit the parties to assess whether all and only appropriate employees are covered.

40. Second, the timeframe is extremely short raising questions about the necessity of the KERP. A key factor in approving any KERP in a CCAA proceeding is whether the employees to whom the KERP applies would consider other employment options if the KERP were not put in place.²²

41. There is no evidence to support, nor is it reasonable to assume, that these employees will require an incentive to continue to work for the next 45-180 days. No evidence has been provided that any, never mind all, of these 43 employees are a flight risk in the immediate short term. Nor is it reasonable to assume, given the state of the retail industry generally and the current employment market, that these employees are likely to depart their employment within the next 45, 90 or 180 days.

42. Third, the quantum is very high: \$7.6 million for 43 employees. The quantum is especially excessive considering the short timeframe. Some employees will be receiving

²¹ *Grant Forest Products Inc. (Re)*, [2009] OJ No 3344, 57 CBR (5th) 128 at paras. 9-10 [*Grant Forest*].

²² *Grant Forest, supra* at paras. 8, 10.

up to 100% of their annual salary over 180 days. As discussed further below, this amount approaches the cost of the Applicants' satisfying the WEPPA claims of 3,000 employees terminated on the date of the Initial Order.

43. Fourth, the proposed KERP insufficiently ties the KERP payments to incentives to ensure a successful restructuring. Courts have approved KERP programs intended to ensure that key employees remain with the insolvent business until the completion of the restructuring process, and which defer compensation until after the restructuring or sale has been completed.²³

44. Under the Applicants' proposed KERP, 75% of the proposed KERP payment becomes payable in installments after 45, 90 and 180 days, regardless of whether a restructuring or sale transaction is completed, and seemingly regardless of whether key performance indicators have been met.²⁴ In this way, the proposed KERP fails to ensure that these bonus payments directly incentivize employee effort to ensure a successful restructuring.

45. Finally, and considering the above, the Court should decline to approve the KERP payments to these 43 headquarters employees where the Applicants are simultaneously asking 2,400 employees of the closing stores, who have been advised of their pending termination, to continue working during their notice periods notwithstanding that the Applicants have indicated that during the CCAA Proceedings

²³ *Grant Forest, supra* at para. 22.

²⁴ Affidavit of Billy Wong, sworn June 22, 2017 at para. 254.

they will not be paying their statutory obligations in respect of termination and severance pay in reliance on the stay of proceedings.²⁵

46. Effectively, the Applicants are suggesting that thousands of employees who are working to preserve value in the company through the liquidation of closing stores go without even their minimum statutory entitlements, while proposing to provide bonuses up to 100% of their salary to 43 employees on the basis of virtually no evidence that these payments are necessary to preserve the value of the business. For these reasons, the Court should amend the Initial Order and decline to approve the KERP in respect of the headquarters employees

D. The Directors' Charge Should Take Precedence over the KERP Charge

47. The Director's charge indemnifies the Directors of the Applicants for liabilities in respect of any failure to pay wages and source deductions, vacation pay, as well as severance and termination pay due in certain provinces, and other employment related obligations. In addition to the general liability of directors for wages under the *Canada Business Corporations Act*,²⁶ as well liability for vacation pay, holiday pay and other forms compensation under various provincial statutes, directors have specific liability for "pay instead of notice" under the relevant employment standards legislation in Saskatchewan.²⁷

48. As identified in the Pre-filing Report of the Monitor, the Monitor and the Applicants have estimated that the total potential liabilities of the Directors in respect of

²⁵ Schuitema Affidavit at paras. 19-20.

²⁶ *Canada Business Corporations Act*, RSC 1985, c C-44, s. 119.

²⁷ *The Saskatchewan Employment Act*, SS 2013, c S-15.1, s. 2-1 (v), 2-68(1).

these employment-related obligations as well as other obligations is significant, justifying a super-priority charge of \$63.5 million.²⁸

49. Any employment-related obligations recoverable against the Directors' Charge will relate to statutory entitlements of the employees including under the WEPP. These entitlements should rank above the entitlements of employees under the KERP, since the KERP payments are discretionary or contingent entitlements, dependent on the realization of certain outcomes.

50. For this reason, Employee Representative Counsel submits that the Initial Order should be amended to provide that each tranche of the Directors' Charge ranks in priority over the respective tranche of the KERP Charge.

E. Concerns regarding the Terms of the DIP Loan

51. The active and former employees of the Applicants have an interest in ensuring that capital and liquidity remain with the company to be used to support the business going forward and to ensure a distribution to unsecured creditors.

52. Employee Representative Counsel has concerns with the structure of the DIP Loan, and in particular are concerned that the DIP both impresses pre-petition debt with a super-priority status, and encumbers \$100 million of previously unencumbered assets with security for those pre-petition debts.

53. In addition, Employee Representative Counsel is concerned that the proposed roll-up DIP arrangement ensures that the Applicants will remain cash-constrained

²⁸ Pre-Filing Report of FTI Consulting Inc. at paras. 102-105.

throughout the CCAA proceedings, which could have a negative effect on ongoing operations and the viability of the business, to the detriment of active employees.

54. At the same time, Employee Representative Counsel understands the need for immediate DIP financing in order that the company be able to carry out its Sales and Investment Solicitation Process. In light of these concerns, the success of the Sales and Investment Solicitation Process takes on utmost importance to the Active and Former Employees.

55. For these reasons and as discussed further below, it is of vital importance that the employees have a window into the SISP process.

F. Concerns About the SISP

56. The Applicants' employees have a particularly acute interest in ensuring that the CCAA proceedings maximise the opportunities for a going concern solution to the insolvency, which will see the largest number of active employees retaining their jobs, and will ensure that the Applicants are able to obtain sufficient proceeds to meet all of their obligations to terminated employees.

57. Employee Representative Counsel is concerned that the terms of the SISP may fail to maximise the value of the Applicants' business and may skew the outcome of the CCAA proceeding away from a going concern solution.

58. In particular, the following terms of the proposed SISP are of concern, as they would appear to diminish the opportunities for bidders to purchase all, substantially all, or even portions of the business on a going concern basis:

(a) the timeframe for the SISP is extremely short. A one-stage process requiring the execution of NDAs, the conduct of all due diligence, the formulation of a binding bid, and the presentation of duly executed transaction documents within 7 weeks (assuming the SISP is approved on July 13, 2017 and immediately implemented) provides little opportunity to any outside bidder to actively consider a going-concern purchase or restructuring of a complex, national retail business of the size of Sears Canada;

(b) bids will be disqualified if they contain any conditions in relation to unperformed due diligence, which is problematic considering the extremely short time frame;

(c) bidders are required to provide “firm, irrevocable financial commitment for all required funding or financing in connection with the bid” within this timeframe, which will act as a significant limit on the number of potential purchasers considering the extremely short time frame for due diligence;

(d) bidders are required to provide a cash deposit of 10% of the total cash purchase price of their bid to the Monitor, which is an unnecessary requirement, particularly where the SISP contemplates a period of 20 business days following the submission date for selection of winning bids. Because this requirement is onerous, it may act as a disincentive for potential bidders to even consider engaging in the process; and

(e) bidders are prohibited from submitting bids that include any request for or entitlement to a break fee, expense reimbursement or similar type of payment.

59. Employee Representative Counsel is concerned that these terms could effectively preclude reasonable bidders from even engaging in this process and will favour bids that do not involve going concern purchases or restructuring of substantially all of Sears Canada's business.

60. Ultimately, the concern is that because of these obstacles, opportunities for going concern solutions that might otherwise be available will not be forthcoming and the ultimate purchase price for the Company, and resultant recovery for creditors including employees, may be lower than could be obtained through a process with a longer time frame and less restrictive conditions.

61. As a result of these concerns regarding the structure of the SISP, and as a result of the potential for the DIP arrangement to hamper the ongoing operations of the company, it is vital that Employee Representative Counsel and the Employee Representatives (as defined in the draft Employee Representative Counsel Order) have observer status in respect of the SISP.

62. As proposed, information concerning the SISP will not be provided even-handedly to all stakeholders. In particular, under the proposed SISP, the DIP Lenders will have access to information and input not available to other stakeholders at various stages, including: amendment of the SISP;²⁹ withdrawal of certain assets or leases from the SISP;³⁰ receipt of regular updates regarding the SISP, including information about bids received and parties involved;³¹ approval of transaction documents;³² deciding

²⁹ Schedule "A" – Sales Process, Exhibit "H" to the Affidavit of Billy Wong sworn July 5, 2017 [SISP] at para. 13.

³⁰ SISP, *supra* at para. 14.

³¹ SISP, *supra* at para. 16.

whether to continue negotiations with parties who have submitted binding bids;³³ and negotiation of final terms and approval of successful bids.³⁴

63. This Court should amend the requested SISP process to ensure that the Employee Representatives have a window into the SISP process. In particular, Employee Representative Counsel requests that counsel and the Employee Representatives (as defined in the draft Employee Representative Counsel Order), as well as their financial advisors, be granted access to the following information, subject to the terms of any confidentiality arrangements required by bidders themselves:

- (a) the identity of all bidders for the assets; and
- (b) answers to questions posed by Employee Representative Counsel with respect to bids received and the terms thereof; bids which have been excluded; and
- (c) the evaluation of the bids by the Sales Advisor, the Applicants, and the DIP Lenders.

64. Providing this transparency into the SISP for core stakeholders such as the active and former employees will enhance the fairness of the sales process to the benefit of the company and the stakeholders at large.

³² SISP, *supra* at para 5(a)(ii).

³³ SISP, *supra* at para. 10.

³⁴ SISP, *supra* at paras. 5(d), 10, 11.

PART IV - ORDER REQUESTED

65. For all of the foregoing reasons, Employee Representative Counsel requests orders as follows:

(a) an order directing the Applicants to continue or reinstate health benefits coverage for employees who were on long-term disability insurance benefits or parental leave at the time of the Initial Order and whose employment was terminated thereafter, for a reasonable notice period until October 5, 2017.

(b) an order directing the Applicants to continue or reinstate health benefits coverage for employees whose employment was terminated effective immediately on June 22, 2017, for a reasonable notice period until October 5, 2017.

(c) an order amending the KERP approved at paragraph 21 of the Initial Order in relation to the Headquarters Employees, as the amounts provided are excessive considering the extremely short time horizon for the KERP, and as the KERP is not sufficiently tailored to create incentives to preserve and enhance the value of the Applicants;

(d) an order amending Paragraphs 22, 46, 47 and 49 of the Initial Order to grant priority for the Directors' Charge above the priority for the KERP Charge.

(e) an order in respect of the proposed SISF that provides Employee Representative Counsel and the Employee Representatives, along with their financial advisors, with access to information the identity of all bidders for the

assets; and answers to questions posed by Employee Representative Counsel with respect to bids received and the terms thereof, bids which have been excluded, and the evaluation of the bids by the Sales Advisor, the Applicants, and the DIP Lenders, subject to confidentiality arrangements required by the bidders themselves.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of July, 2017.



Susan Ursel
Ursel Phillips Fellows Hopkinson LLP

Karen Ensslen
Ursel Phillips Fellows Hopkinson LLP

Employee Representative Counsel

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Mirant Canada Energy Marketing Ltd. (Re)*, 2004 ABQB 214, [2004] AJ No 331
2. *Communications, Energy, Paperworkers Local 721G v. Printwest Communications Ltd.*, 2005 SKQB 331, [2005] SJ No 484
3. *Nortel Networks Corp. (Re)*, [2009] OJ No 2558, 55 CBR (5th) 68
4. *Windsor Machine & Stamping Ltd. (Re)*, [2009] OJ No 3195
5. *Canwest Global Communications Corp. (Re)*, 2010 ONSC 1746, [2010] OJ No 2544
6. *Nortel Networks Corp (Re)*, [2009] OJ No 3280, 53 CBR (5th) 196
7. *Target Canada Co. (Re)*, 2015 ONSC 303
8. *Cinram International Inc.* (October 19, 2012), Toronto CV-12-9767-00CL
9. *Victorian Order of Nurses for Canada (Re)*, 2015 ONSC 7371, [2015] OJ No 6581
10. *Futura Loyalty Group Inc. (Re)*, 2012 ONSC 6403, [2012] OJ No 5362
11. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379
12. *Grant Forest Products Inc. (Re)*, [2009] OJ No 3344, 57 CBR (5th) 128

**SCHEDULE “B”
RELEVANT STATUTES**

Companies’ Creditors Arrangements Act, , RSC 1985, c C-36, s. 11, 11.2(1)

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. R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

.....

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.

Wage Earner Protection Program Act, SC 2005, c 47, s 1, s. s. 2(1), 4-6, 7(1)

2 (1) The following definitions apply in this Act.

eligible wages means

(a) wages other than severance pay and termination pay that were earned during the longer of the following periods:

(i) the six-month period ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer, and

(ii) the period beginning on the day that is six months before the day on which a proposal under Division I of Part III of the Bankruptcy and Insolvency Act is filed by or in respect of the employer or the day on which proceedings under the Companies’ Creditors Arrangement Act are commenced and ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer; and

(b) severance pay and termination pay that relate to employment that ended during the period referred to in paragraph (a). (salaire admissible)

wages includes salaries, commissions, compensation for services rendered, vacation pay, severance pay, termination pay and any other amounts prescribed by regulation. (salaire)

...

Establishment

4 The Wage Earner Protection Program is established to make payments to individuals in respect of wages owed to them by employers who are bankrupt or subject to a receivership.

Eligibility for Payments

Conditions of eligibility

5 An individual is eligible to receive a payment if

- (a) the individual's employment ended for a reason prescribed by regulation;
- (b) the former employer is bankrupt or subject to a receivership; and
- (c) the individual is owed eligible wages by the former employer.

(d) [Repealed, 2009, c. 2, s. 343] 2005, c. 47, s. 1 "5"; 2007, c. 36, s. 84; 2009, c. 2, s. 343.

Exceptions

6 An individual is not eligible to receive a payment in respect of any wages earned during, or that otherwise relate to, a period in which the individual

- (a) was an officer or director of the former employer;
- (b) had a controlling interest within the meaning of the regulations in the business of the former employer;
- (c) occupied a managerial position within the meaning of the regulations with the former employer; or
- (d) was not dealing at arm's length with

(i) an officer or director of the former employer,

(ii) a person who had a controlling interest within the meaning of the regulations in the business of the former employer, or

(iii) an individual who occupied a managerial position within the meaning of the regulations with the former employer. 2005, c. 47, s. 1 “6”; 2007, c. 36, s. 85; 2009, c. 2, s. 344.

Amounts Covered by Program

Amount of payment

7 (1) The amount that may be paid under this Act to an individual is the amount of eligible wages owing to the individual up to a maximum of the greater of the following amounts, less any amount prescribed by regulation:

(a) \$3,000; and

(b) an amount equal to four times the maximum weekly insurable earnings under the Employment Insurance Act.

Subrogation

- **36 (1)** If a payment is made under this Act to an individual in respect of unpaid wages, Her Majesty in right of Canada is, to the extent of the amount of the payment, subrogated to any rights the individual may have in respect of the unpaid wages against
 - (a) the bankrupt or insolvent employer; and
 - (b) if the bankrupt or insolvent employer is a corporation, a director of the corporation.

Courts of Justice Act, RSO 1990, c C.43, s. 101

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

Canada Business Corporations Act, RSC 1985, c C-44 , s. 119

Liability of directors for wages

119 (1) Directors of a corporation are jointly and severally, or solidarily, liable to employees of the corporation for all debts not exceeding six months wages payable to each such employee for services performed for the corporation while they are such directors respectively.

Conditions precedent to liability

(2) A director is not liable under subsection (1) unless

(a) the corporation has been sued for the debt within six months after it has become due and execution has been returned unsatisfied in whole or in part;

(b) the corporation has commenced liquidation and dissolution proceedings or has been dissolved and a claim for the debt has been proved within six months after the earlier of the date of commencement of the liquidation and dissolution proceedings and the date of dissolution; or

(c) the corporation has made an assignment or a bankruptcy order has been made against it under the Bankruptcy and Insolvency Act and a claim for the debt has been proved within six months after the date of the assignment or bankruptcy order.

Limitation

(3) A director, unless sued for a debt referred to in subsection (1) while a director or within two years after ceasing to be a director, is not liable under this section.

Amount due after execution

(4) Where execution referred to in paragraph (2)(a) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

Subrogation of director

(5) A director who pays a debt referred to in subsection (1) that is proved in liquidation and dissolution or bankruptcy proceedings is entitled to any priority that the employee would have been entitled to and, if a judgment has been obtained, the director is

- (a) in Quebec, subrogated to the employee's rights as declared in the judgment; and
- (b) elsewhere in Canada, entitled to an assignment of the judgment.

Contribution

(6) A director who has satisfied a claim under this section is entitled to contribution from the other directors who were liable for the claim.

R.S., 1985, c. C-44, s. 119; 1992, c. 27, s. 90; 2001, c. 14, ss. 47, 135(E); 2004, c. 25, s. 187; 2011, c. 21, s. 51.

The Saskatchewan Employment Act, SS 2013, c S-15.1, s. 2-1 (v), 2-68(1)

Interpretation of Part

2-1 In this Part and in Part IV:

- (v) “wages” means salary, commission and any other monetary compensation for work or services or for being at the disposal of an employer, and includes overtime, public holiday pay, vacation pay and pay instead of notice;

...

Corporate directors liable for wages

2-68(1) Subject to subsection (2), notwithstanding any other provision of this Act or any other Act, the corporate directors of an employer are jointly and severally liable to an employee for all wages due and accruing due to the employee but not paid while they are corporate directors.

(2) The maximum amount of a corporate director's liability pursuant to subsection (1) to an employee is six months' wages of the employee.

(3) Subject to subsections (4) and (5), a corporate director's liability pursuant to this section is payable in priority to any other unsecured claim or right in the corporate

director's property or assets, including any claim or right of the Crown.

(4) The payment priority set out in subsection (3) is subject to section 15.1 of The Enforcement of Maintenance Orders Act, 1997.

(5) A corporate director who is an employee of the corporation is not entitled to the benefit provided to employees by subsection (3). 2013, c.S-15.1, s.2-68.

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., CORBEIL ÉLECTRIQUE INC., S.L.H. TRANSPORT INC., THE CUT INC., SEARS CONTACT SERVICERS INC., INITIUM LOGISTICS SERVICE 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.

(each, an "Applicant", and collectively, the "Applicants")

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at TORONTO

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