

**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., 1001171 CANADA
INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD.,
4201531 CANADA INC., 16886 CANADA INC. AND 3339611
CANADA INC.

**NOTICE OF MOTION OF THE MOVING PARTIES/CREDITORS,
APM CONSTRUCTION SERVICES INC., 152610 CANADA INC. O/A LAURIN
COMPANY, TRAUGOTT BUILDING CONTRACTORS INC.,
DÉCOR CRAFT INC. O/A NELNOR CONSTRUCTION
AND ROSSCLAIR CONTRACTORS INC.
(Request to Lift the Stay of Proceedings)**

The moving parties/creditors, APM Construction Services Inc., 152610 Canada Inc. o/a Laurin Company, Traugott Building Contractors Inc., Décor Craft Inc. o/a Nelnor Construction and ROSSCLAIR Contractors Inc. (collectively the "General Contractors") will make a motion to Mr. Justice Hainey, presiding over the Commercial List, on a date to be established by the Commercial List Office, at the Courthouse, 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard:

- in writing under subrule 37.12.1(1) because it is on consent or unopposed or made without notice;
- in writing as an opposed motion under subrule 37.12.1(4);
- orally.

THE MOTION IS FOR:

- (a) an Order lifting the stay of proceedings referred to in paragraphs 14, 15, 16, and 17 of the Initial Order of the Honourable Mr. Justice Hainey dated June 22, 2017 (the "Initial Order");
- (b) an Order that the proposed litigation proceed in the manner as outlined at Schedule "A" attached hereto;
- (c) costs of this motion on a substantial indemnity scale as against any party opposing this motion; and
- (d) such further and other relief as this Honourable Court seems just.

THE GROUNDS FOR THE MOTION ARE:

- (e) the General Contractors were retained by Sears Canada Inc. ("SCI") to renovate in excess of 12 Sears 2.0 concept stores (the "Sears 2.0 Stores").
- (f) The Sears 2.0 Stores are fundamental and critical to the SCI restructuring plan and for the re-engineering of SCI's business for long term growth;

- (g) many of the contracts between the General Contractors and SCI were not entered into until April or May 2017 and payment terms under the contracts between the General Contractors and SCI were net 60 days;
- (h) prior to entering into the contracts with SCI, the General Contractors sought and obtained assurances from several of the proposed defendants that there was sufficient funding allocated to pay for the Sears 2.0 Store renovations. Furthermore, the highest level officers and directors of SCI approved each and every Sears 2.0 renovation contract and confirmed that funding was in place and represented that the General Contractors would be paid.
- (i) The General Contractors were concerned about the financial viability of SCI and were assured by several of the proposed defendants that there was no cause for concern in respect of the Canadian SCI operations and that any financial instability was restricted to the Sears US operations. The General Contractors relied on these representations and subsequently entered into the renovation contracts for the Sears 2.0 Stores;
- (j) at the time that the General Contractors received assurances that they would be paid, the General Contractors were advised that the renovation contracts had been approved by the highest level officers and directors of SCI and the General Contractors relied on these representations in entering into the renovation contracts with SCI;

- (k) on the basis of these representations, the General Contractors contracted and arranged for the Sears 2.0 Store renovations to be effected by certain subcontractors, who would be paid from the progress draws which several of the proposed defendants represented would be made;
- (l) The proposed defendants knew that SCI intended to seek protection under the CCAA prior to assuring the General Contractors that there was sufficient funding in place to pay for the renovation work;
- (m) as at June 22, 2017, the date of the Initial Order, the General Contractors received negligible payments from SCI and in fact, most of the monies were not yet due and payable pursuant to the 60 day net term. As at June 22, 2017, the General Contractors were collectively owed approximately \$14 Million Dollars;
- (n) in order to secure their interests, the General Contractors registered claims for lien against 12 Sears 2.0 Stores;
- (o) each General Contractor hired subcontractors to perform the renovation works. As a result of SCI's failure to pay the General Contractors, the subcontractors also remain unpaid. Consequently, many of the subcontractors also registered claims for lien against the Sears 2.0 Stores.
- (p) Several of the subcontractors are common throughout the Sears 2.0 renovation projects and many of them have advised the General

Contractors that they are suffering significant financial hardship resulting from SCI's failure to pay.

- (q) The subcontractors relied on representations made by several of the proposed defendants that sufficient funding was in place to ensure that the General Contractors and in turn, the subcontractors, would be paid for the work performed to renovate the Sears 2.0 Stores.
- (r) The SCI CCAA proceeding has had a devastating impact on the General Contractors and their subcontractors, many of whom may not be able to survive in the absence of receipt of payment.
- (s) There is urgency to this matter because SCI is attempting to compel the General Contractors to re-attend at the Sears 2.0 projects and complete the work. The General Contractors requested that they be deemed "critical suppliers" to Sears and to be paid for work performed, given that the new renovated stores are fundamental to SCI's restructuring plan;
- (t) SCI refused to consider the General Contractors request to be deemed "critical suppliers" and continue to attempt to compel the General Contractors to return to finish the work;
- (u) the General Contractors are unable to complete the renovation contracts because their subcontractors remain unpaid and are unwilling to finish their work in the absence of receipt of payment;

- (v) through the conduct of SCI and its unreasonable refusal to deem the General Contractors as "critical suppliers", the stores remain unfinished. There are significant life, safety and health concerns in respect of these unfinished stores since the stores are subject to final inspection and commissioning and there is other critical work to perform to ensure compliance with the *Ontario Building Code* and other relevant statutes;
- (w) contrary to the *Ontario Building Code*, SCI has wrongfully proceeded to occupy many of these Sears 2.0 Stores which could result in significant liability to the General Contractors should members of the general public be injured;
- (x) the General Contractors are required to keep their insurance and performance bonds in place until the projects are complete. Therefore, the General Contractors have suffered and will continue to suffer significant damages and prejudice;
- (y) the balance of convenience favours the General Contractors and the lifting of the stay of proceedings against the proposed defendants;
- (z) the General Contractors have suffered and will continue to suffer significant prejudice unless this Honourable Court lifts the stay of proceedings against the defendants;

- (aa) the General Contractors have a meritorious claim and pursuant to the principles of natural justice, leave ought to be granted to permit them to pursue their claims against the defendants;
- (bb) the defendants have engaged in conduct that is oppressive contrary to Section 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C.44;
- (cc) amounts have become payable under the renovation contracts to the General Contractors by SCI on certificates of payment certifiers and an amount that is equal to the amounts certified have come into SCI's hands or were received by SCI at or after the dates of the payment certificates. The funds that were in SCI's hands or received by SCI constitute trust funds for the benefit of the General Contractors and each of the defendants are either officers or directors of SCI or employees or agents of SCI, who had effective control of SCI and its relevant activities. Each of the proposed defendants assented to and acquiesced in, conduct that they knew or reasonably ought to have known amounted to breaches of trust by SCI and are liable for those breaches of trust. The General Contractors rely on Sections 7(2) and 13 of the CLA;
- (dd) the proposed defendants acted in bad faith in their dealings with the General Contractors and negligently and fraudulently misrepresented the ability of SCI to pay for the renovation works.

- (ee) such further and other grounds as counsel may advise and this Honourable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) affidavits of the General Contractors and several subcontractors, to be sworn;
- (b) such further and other evidence as counsel may advise.

August 17, 2017

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SCHEDULE "A"

1. The General Contractors propose to file a statement of claim naming all of the General Contractors as plaintiffs and the following parties as defendants:
 - (a) Mike Bellcourt;
 - (b) Greg Paliorous;
 - (c) Jon Key;
 - (d) Sears Canada Inc.'s ("SCI") directors and officers.

2. The relief requested would include the following:
 - (a) damages for negligent and fraudulent misrepresentation on the part of each and every defendant;
 - (b) damages for breach of trust contrary to Sections 7(2) and 13 of the *Construction Lien Act*, R.S.O. 1990, c. C.30, as amended (the "CLA");
 - (c) a claim under Section 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, that the defendants' conduct was oppressive as regards the plaintiffs;
 - (d) a declaration that the defendants wrongfully and/or fraudulently caused SCI to retain the plaintiffs to renovate the Sears 2.0 stores which they knew would not be paid for; and
 - (e) an order declaring the plaintiffs as critical suppliers to SCI.

3. Once defences are filed, the ordinary *Rules of Civil Procedure* regarding discovery (both documentary and oral examinations) would apply and the parties will be required to submit a discovery plan;
4. The Honourable Mr. Justice Hailey case manages the matter.

KM-2942321v1

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1984, c. C-36, AS AMENDED Court File No. CV-17-11846-00CL

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., 1001171 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 16886 CANADA INC. AND 3339611 CANADA INC.

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

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Proceeding commenced at TORONTO

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