

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

**IN THE MATTER OF THE NOTICE OF INTENTION TO  
MAKE A PROPOSAL OF SHOP.CA NETWORK INC.,** a  
corporation incorporated pursuant to the laws of the Canada,  
with a head office in the City of Toronto, in the Province of  
Ontario

**FACTUM OF THE APPLICANT  
(Approval of the Sale Transaction)**

July 13, 2016

**STIKEMAN ELLIOTT LLP**  
Barristers & Solicitors  
5300 Commerce Court West  
199 Bay Street  
Toronto, Canada M5L 1B9

**Elizabeth Pillon** LSUC#: 35638M  
Tel: (416) 869-5623  
Email: lpillon@stikeman.com

**Lee Nicholson** LSUC#: 66412I  
Tel: (416) 869-5604  
Email: leenicholson@stikeman.com  
Fax: (416) 947-0866

**Lawyers for Applicant**

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

IN THE MATTER OF THE NOTICE OF INTENTION TO  
MAKE A PROPOSAL OF SHOP.CA NETWORK INC., a  
corporation incorporated pursuant to the laws of the Canada,  
with a head office in the City of Toronto, in the Province of  
Ontario

PART I - INTRODUCTION

1. This motion is brought by SHOP.CA Network Inc. ("**SHOP.CA**" or the "**Company**") seeking an order substantially in the form of the draft Order (the "**Approval and Vesting Order**") located at Tab 3 of SHOP.CA's motion record, *inter alia*:

- (a) Authorizing SHOP.CA to execute the Asset Purchase Agreement (the "**APA**") between SHOP.CA and Transformational Capital Corporation (the "**Purchaser**" or "**TCC**");
- (b) Approving the APA for the sale of the Purchased Assets (as defined in the APA) and the transactions contemplated thereby (the "**Sale Transaction**");
- (c) Vesting all of the Purchased Assets in the Purchaser free and clear of any claims and encumbrances;
- (d) Approving the Proposal Trustee's (defined below) activities described in the First Report of the Proposal Trustee dated June 8, 2016 (the "**First Report**") and Second Report of the Proposal Trustee dated July 13, 2016 (the "**Second Report**"); and

(e) Extending the time for SHOP.CA to file a proposal and the corresponding stay of proceedings (the “**Stay Period**”) under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”) until July 20, 2016.

2. On July 9, 2016, SHOP.CA sought and obtained approval of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) of a sale process (the “**Bid Process**”) for SHOP.CA to be executed by the Proposal Trustee with the assistance of the Company. The Bid Process has culminated the Sale Transaction and execution of the APA. The Bid Process thoroughly canvassed the market for SHOP.CA. The APA represents the highest price available for the assets of SHOP.CA and the only going concern solution that will offer continued employment for some of SHOP.CA’s current employees.

3. SHOP.CA’s liquidity situation will not permit it to run an additional sale process and failing closing of the Sale Transaction, SHOP.CA will have no cash to fund its business and will have to cease operations. The Sale Transaction represents the best outcome for all stakeholders in the circumstances.

4. Capitalized terms not otherwise defined herein have the meaning ascribed to them in the APA.

## **PART II - THE FACTS**

### **A. BACKGROUND**

2. SHOP.CA is an e-commerce marketplace providing Canadian retailers with a platform to sell their products online directly to consumers.

**Affidavit of Anthony Chvala sworn on July 11, 2016 (the “Chvala Affidavit”) at para. 3; Motion Record of SHOP.CA, Tab 2.**

5. SHOP.CA has been operating at loss since its founding. Due to its financial difficulties, on June 7, 2016 SHOP.CA filed a Notice of Intention to Make a Proposal (the “NOI”) under the BIA and commenced these proposal proceedings (the “**Proposal Proceedings**”). Richter Advisory Group Inc. was appointed as proposal trustee of SHOP.CA (the “**Proposal Trustee**”).

**Chvala Affidavit at paras. 4 - 5; Motion Record of SHOP.CA, Tab 2.**

6. On June 9, 2016, the Court granted an order approving the Bid Process which contemplated that the Proposal Trustee would market SHOP.CA with assistance of the Company in a final effort to develop a going-concern solution.

**Chvala Affidavit at paras. 6; Motion Record of SHOP.CA, Tab 2.**

#### **B. MARKETING OF SHOP.CA**

3. In August 2015, SHOP.CA started exploring strategic alternatives, including the possibility of a sale of substantially all its assets or share capital or additional financing. Initially, two investment banks approached potential purchasers to develop a transaction but an actionable transaction failed to materialize. Prior to commencing the Proposal Proceedings, SHOP.CA’s management continued the sale effort and in response SHOP.CA received three non-binding letters of intent. Despite the interest, a transaction did not materialize in advance of filing the NOI.

**Chvala Affidavit at para. 8; Motion Record of SHOP.CA, Tab 2.**

7. The Bid Process was designed as a final attempt to preserve SHOP.CA’s business as a going-concern by exploring sale opportunities within the context of these Proposal Proceedings.

**Chvala Affidavit at para. 10; Motion Record of SHOP.CA, Tab 2.**

8. On June 8, 2016, immediately after filing the NOI, the Proposal Trustee sent marketing materials to 240 strategic potential purchasers and 153 financial potential purchasers. The list of potential purchasers was developed in conjunction with SHOP.CA's management and included parties that previously expressed an interest in SHOP.CA as part of its informal sales process.

**Chvala Affidavit at para. 11; Motion Record of SHOP.CA, Tab 2.**

9. After the initial solicitation, a total of 20 parties executed non-disclosure agreements provided by the Proposal Trustee and were given access to a data-room in order to perform due diligence.

**Chvala Affidavit at para. 12; Motion Record of SHOP.CA, Tab 2.**

10. Under the Bid Process, interested bidders were required to submit final binding offers on a "as is, where is" basis to the Proposal Trustee by 12PM EST June 30, 2016. At the bid deadline, the Proposal Trustee received two offers to purchase substantially all of SHOP.CA's assets. TCC submitted one of the two bids received by the Proposal Trustee.

**Chvala Affidavit at para. 13; Motion Record of SHOP.CA, Tab 2.**

11. SHOP.CA and the Proposal Trustee subsequently continued to negotiate with TCC and the other bidder in effort to maximize the realization on the Company's assets for the benefit of all stakeholders. After continuing these negotiations, one of the bidders informed the Proposal Trustee that it intended to withdraw from the Bid Process.

**Chvala Affidavit at paras. 13 - 13; Motion Record of SHOP.CA, Tab 2.**

12. After evaluating the remaining bid from TCC, the Proposal Trustee and Company's management recommended the bid from TCC be declared the successful bid under the Bid Process. On July 8, 2016, after extensive negotiations, TCC and SHOP.CA agreed upon the

APA. The Board of SHOP.CA (the “**Board**”) has approved the Sale Transaction and APA, subject to final Court approval.

**Chvala Affidavit at paras. 15 - 16; Motion Record of SHOP.CA, Tab 2.**

**C. THE ASSET PURCHASE AGREEMENT**

13. The APA contemplates the sale of substantially all of the assets of SHOP.CA for a confidential cash purchase price plus the assumption of the Assumed Liabilities. The entire cash portion of the Purchase Price will be paid by applying the Deposit delivered by the Purchaser to the Company’s counsel during negotiation of the APA.

**Chvala Affidavit at paras. 18, 21; Motion Record of SHOP.CA, Tab 2.**

14. The Purchaser has agreed to offer employment to five employees of SHOP.CA effective upon the Closing Date.

**Chvala Affidavit at para. 30; Motion Record of SHOP.CA, Tab 2.**

15. There are minimal conditions to Closing under the APA and should the Approval and Vesting Order be granted, Closing is expected to occur on that date or the immediately following day.

**Chvala Affidavit at paras. 32 - 33; Motion Record of SHOP.CA, Tab 2.**

**PART III - ISSUES**

16. The issue on this motion is whether Court should grant the Approval and Vesting Order, which includes, among other things:

- (a) Approving the Sale Transaction and vesting of the Purchased Assets in the Purchaser free and clear of all claims and encumbrances;

- (b) Extending the Stay Period to July 20, 2016;
- (c) Sealing of the unredacted APA; and
- (d) Approving the Proposal Trustee's activities described in the First Report and Second Report.

#### **PART IV - LAW AND ARGUMENT**

##### **A. THE APA AND SALE TRANSACTION SHOULD BE APPROVED**

17. The jurisdiction of this Court to approve a sale of assets outside of the ordinary course of business is contained in section 65.13 of the BIA.

**BIA, s. 65.13.**

***Re Outdoor Broadcast Networks, Inc.*, 2010 ONSC 5647, 71 C.B.R. (5th) 311 (Ont. S.C.J.); SHOP.CA Book of Authorities, Tab 1.**

18. It is not a requirement under the BIA for a debtor in a proposal proceeding to present a proposal to creditors in order to obtain an order approving a sale of assets under s. 65.13 of the BIA.

***Re Komtech Inc.*, 2011 ONSC 3230 at paras. 25, 33, SHOP.CA's Book of Authorities, Tab 2.**

19. Section 65.13(4) sets out a non-exhaustive list of factors to be considered by the Court in deciding whether to authorize a sale transaction:

Factors to be considered

(4) 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 trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee 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.

**BIA, s. 65.13(4).**

20. These criteria are substantially identical to the criteria contained in s. 36 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), which governs the sale of assets outside the ordinary course in CCAA proceedings. CCAA courts have noted that the s. 36 criteria (and therefore, the s. 65.13(4) criteria) largely correspond with *Soundair* principles for approval of a sale of assets in an insolvency scenario, being:

(a) Whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;

(b) The interests of all parties;

(c) The efficacy and integrity of the process by which offers have been obtained; and

(d) Whether there has been unfairness in the working out of the process.

*Re Canwest Publishing Inc.* (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J. [Comm. List]) at para. 13, SHOP.CA's Book of Authorities, Tab 3.

*Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.) at para. 16; SHOP.CA's Book of Authorities, Tab 4.

21. In the present case and for the reasons that follow, each of the subsection 65.13(4) criteria and the *Soundair* principles have been satisfied.

**(i) The Bid Process was reasonable in the circumstances**

22. The Company had been the subject of an extensive marketing effort since August 2015. The Bid Process was a final attempt to preserve SHOP.CA's business as a going-concern after an extensive informal sales process prior to the filing of the NOI. The Bid Process was approved by the Court on July 9, 2016. It was specifically designed to be a fair and transparent sales process that would allow for the greatest realization on the assets of SHOP.CA.

**Chvala Affidavit at paras. 6, 8, 10; Motion Record of SHOP.CA, Tab 2.**

23. The Proposal Trustee was responsible for executing the Bid Process with the assistance of the Company. The Proposal Trustee extensively marketed SHOP.CA by approaching hundreds of potential purchasers, including parties that previously expressed an interest in SHOP.CA as part of its informal sales process.

**Chvala Affidavit at paras. 6, 11; Motion Record of SHOP.CA, Tab 2.**

24. A number of parties performed due diligence on SHOP.CA and the Proposal Trustee received two bids for SHOP.CA. The competing bids allowed for competitive tension during the Bid Process and the Proposal Trustee and the Company were able to continue negotiating the best possible transaction after the bid deadline.

**Chvala Affidavit at para. 13; Motion Record of SHOP.CA, Tab 2.**

25. The Proposal Trustee and the Company adhered to the timelines established in the Bid Process and implemented the Bid Process in accordance with the Court approved procedures. Though the timelines in the Bid Process were short, they were reasonable in light of the previous marketing effort and the Bid Process provided the maximum time frame available considering the Company's liquidity situation.

**Chvala Affidavit at paras. 10 - 16; Motion Record of SHOP.CA, Tab 2.**

**Endorsement of Justice Penny dated June 9, 2016, In the Matter of the Notice of Intention to Make a Proposal of SHOP Network Inc.; SHOP.CA's Book of Authorities, Tab 5.**

**(ii) The Proposal Trustee approved the Bid Process and was consistently involved in the Bid Process**

26. The Proposal Trustee was involved in the design and implementation of the Bid Process. In the First Report, the Proposal Trustee indicated its approval of the Bid Process and recommended that the Court approve the Bid Process.

**First Report at paras. 29, 52; Second Report, Appendix B.**

27. The Proposal Trustee was fully involved in all aspects of the Bid Process. The Proposal Trustee's involvement ensured that the process was fair and reasonable while resulting in the greatest possible realization on the assets of SHOP.CA.

**Second Report at para. 13.**

**(iii) The Proposal Trustee filed the Second Report stating the benefits of the Sale Transaction over a sale or disposition in a bankruptcy**

28. The Proposal Trustee has filed the Second Report which contains an analysis of the relative benefits of the Sale Transaction over liquidation. The Proposal Trustee states in the Second Report that "the [Sale] Transaction would be substantially more beneficial to the Company's creditors as compared to the alternatives (i.e. sale or liquidation under a bankruptcy)... absent the sale of the Purchased Assets to TCC, there is considerable risk that there would be minimal recovery to the Company's creditors from the Purchased Assets". It is further noted that the majority of SHOP.CA's assets are its intellectual property and other intangible assets which "may have limited market value in a liquidation."

**Second Report at para. 28.**

**(iv) Stakeholders were adequately consulted**

29. During the Bid Process, SHOP.CA and the Proposal Trustee advised employees, shareholders, merchants and creditors of the status of the Proposal Proceedings and the Bid Process. Further, the Board and the observers to the Board were consistently updated on the status of the Bid Process and any material developments. The Board and the observers represent the significant shareholders of SHOP.CA who primarily financed the Company through a series of equity investments. The consulting of creditors and other stakeholders during the Bid Process was adequate in the circumstances.

**Second Report at para. 8.**

**Chvala Affidavit at paras. 7 and 17; Motion Record of SHOP.CA, Tab 2.**

**(v) The effect of the Sale Transaction is positive**

30. The Sale Transaction and APA represents the highest price available for the assets of SHOP.CA and the only going concern solution that offers continued employment to some of SHOP.CA's current employees. It will also offer SHOP.CA's merchants an ongoing platform to showcase and sell their products.

**Chvala Affidavit at para. 34; Motion Record of SHOP.CA, Tab 2.**

31. Without the Sale Transaction there is considerable risk that there will be minimal recovery for the Company's creditors. SHOP.CA's liquidity situation will not permit it to run a future sales process while maintaining operations. In the circumstances, the Sale Transaction represents the best possible outcome that will have the greatest benefits for SHOP.CA's stakeholders.

**Second Report at para. 28.**

**Chvala Affidavit at para. 35; Motion Record of SHOP.CA, Tab 2.**

**(vi) The consideration payable under the APA is fair and reasonable**

32. The Court-approved Bid Process allowed the Proposal Trustee to widely canvass the market in order to achieve the highest realizable price for the assets of SHOP.CA. Prior to the Proposal Proceedings, SHOP.CA was widely marketed. It was fully marketed again by the Proposal Trustee as part of the Bid Process. All likely potential purchasers have been given an opportunity to bid on the assets. Taking into account the above, the Proposal Trustee noted in the Second Report that “the consideration received for the Purchased Assets in light of the Bid Process and the results thereof is reasonable and fair...”

**Second Report at para. 28.**

**(vii) Required payments under ss. 60(1.3)(a) and 60(1.5)(a) of the BIA**

33. The Company has continued to pay its obligations in the ordinary course throughout these Proposal Proceedings. The majority of employees were terminated on Friday, July 8, 2016 after it was learned the number of employees the Purchaser was able to assume. The terminated employees were paid for all wages and vacation pay up to the date of termination. The Company is able and will pay wages and vacation pay for the critical employees who will assist in closing the Sale Transaction. Therefore, the Company can and will be making the payments that are required by section 60(1.3)(a) of the BIA.

**Second Report at para. 24.**

**Chvala Affidavit at para. 38; Motion Record of SHOP.CA, Tab 2.**

34. The Company does not maintain a pension plan for its employees and therefore will have no payment obligations under section 60(1.5) of the BIA.

**Chvala Affidavit at para. 38; Motion Record of SHOP.CA, Tab 2.**

**B. THE COURT SHOULD SEAL THE UNREDACTED APA**

35. SHOP.CA is seeking to seal the unredacted APA contained in the Chvala Affidavit and the Second Report. Jurisdiction to grant an order sealing the unredacted APA is provided for in s. 137(2) of the *Courts of Justice Act*. In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that, on a request to grant a sealing order the Courts should consider whether:

(a) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and

(b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings

*Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137(2)

*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41; SHOP.CA's Book of Authorities at Tab 6.

36. The unredacted APA contains private personal information of SHOP.CA's employees which is appropriate to seal from the public record. Further, the cash component of the purchase price has been redacted because the process needs to remain competitive process if the Sale Transaction is not completed. The redactions in the APA are limited and the duration is limited as after the filing of the Proposal Trustee's certificate upon Closing of the Sale Transaction, the sealing order will terminate.

**Chvala Affidavit at para. 20; Motion Record of SHOP.CA, Tab 2.**

**Second Report at para. 18.**

37. The interest of SHOP.CA's stakeholders will be furthered by the sealing order and they will not suffer any prejudice as a result of the sealing. In the circumstances, it is appropriate for the sealing order to be granted.

**C. THE STAY PERIOD SHOULD BE EXTENDED**

38. This Court has authority to grant the extension of the Stay Period under section 50.4(9) of the BIA, which states that such an extension may be granted where the Court is satisfied that:

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

**BIA, s. 50.4(9).**

39. SHOP.CA is requesting a short extension of the Stay Period in order to close the Sale Transaction with the benefit of a stay of proceedings. The Proposal Trustee supports the extension of the Stay Period noting that SHOP.CA continues to act in good faith and with due diligence, the extension of the Stay Period will not prejudice or adversely affect any group of creditors and SHOP.CA has sufficient liquidity to continue operating during the Stay Period.

**Second Report at para. 27.**

**Chvala Affidavit at paras. 41 - 43; Motion Record of SHOP.CA, Tab 2.**

**D. THE PROPOSAL TRUSTEE'S ACTIVITIES SHOULD BE APPROVED**

40. The Approval and Vesting Order provides for the approval of the Proposal Trustee's activities described in the First Report and Second Report. In *Target*, Justice Morawetz provided that "there are good policy and practical reasons for the court to approve of Monitor's activities

and providing a level of protection for Monitors during the CCAA process.” The same policy and practicable reasons apply to approving the activities of a proposal trustee in proposal proceedings under the BIA.

*Re Target Canada Co., 2015 ONSC 7574 (“Target”) at para. 22;*  
**SHOP.CA’s Book of Authorities at Tab 6.**

41. Approving the Proposal Trustee’s activities will allow for certainty for the Proposal Trustee and protect creditors from a delay in distributions that would be caused by re-litigation of steps taken to date or potential indemnity claims by the Proposal Trustee.

*Target at para. 23.*

42. The suggested language from *Target* ensuring that only the Proposal Trustee may rely upon the approval of their activities has been added to the Approval and Vesting Order.

#### **PART V - ORDER REQUESTED**

43. SHOP.CA therefore requests that the Court grants the Approval and Vesting Order substantially in the form located at Tab 3 of SHOP.CA’s motion record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 13<sup>th</sup> day of July, 2016.

*/s/ Stikeman Elliott LLP*

---

Lawyers for the Applicant

**SCHEDULE "A"**  
**LIST OF AUTHORTIES**

1. *Re Outdoor Broadcast Networks, Inc.*, 2010 ONSC 5647, 71 C.B.R. (5th) 311 (Ont. S.C.J.)
2. *Re Komtech Inc.*, 2011 ONSC 3230
3. *Re Canwest Publishing Inc.* (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J. [Comm. List])
4. *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.)
5. Endorsement of Justice Penny dated June 9, 2016, In the Matter of the Notice of Intention to Make a Proposal of SHOP Network Inc.
6. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41
7. *Re Target Canada Co.*, 2015 ONSC 7574

**SCHEDULE "B"**  
**RELEVANT STATUTES**

**1. *Bankruptcy and Insolvency Act, RSC 1985, c B-3***

Extension of time for filing proposal

50.4 (9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.

...

Proposals by employers

60. (1.3) No proposal in respect of an employer shall be approved by the court unless

- (a) it provides for payment to the employees and former employees, immediately after court approval of the proposal, of amounts at least equal to the amounts that they would be qualified to receive under paragraph 136(1)(d) if the employer became bankrupt on the date of the filing of the notice of intention, or proposal if no notice of intention was filed, as well as wages, salaries, commissions or compensation for services rendered after that date and before the court approval of the proposal, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the bankrupt's business during the same period; and
- (b) the court is satisfied that the employer can and will make the payments as required under paragraph (a).

...

Proposals by employers – prescribed pension plans

(1.5) No proposal in respect of an employer who participates in a prescribed pension plan for the benefit of its employees shall be approved by the court unless

(a) the proposal provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

(b) the court is satisfied that the employer can and will make the payments as required under paragraph (a).

...

#### Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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.

#### Individuals

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

#### Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall 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

- (4) 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 trustee approved the process leading to the proposed sale or disposition;
  - (c) whether the trustee 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

- (5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), 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 insolvent person; 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

- (6) For the purpose of subsection (5), a person who is related to the insolvent person includes
- (a) a director or officer of the insolvent person;
  - (b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and
  - (c) a person who is related to a person described in paragraph (a) or (b).

#### Assets may be disposed of free and clear

(7) 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 insolvent person 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.

#### Restriction – employers

(8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

## **2. *Courts of Justice Act, RSO 1990, c C.43***

#### Sealing documents

137 (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF  
SHOP.CA NETWORK INC., a corporation incorporated pursuant to the laws of the Canada,  
with a head office in the City of Toronto, in the Province of Ontario

Estate/Court File No. 31-2131992

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

Proceedings commenced at Toronto

**FACTUM OF THE APPICANT  
(RETURNABLE JULY 15, 2016)**

**STIKEMAN ELLIOTT LLP**  
Barristers & Solicitors  
5300 Commerce Court West  
199 Bay Street  
Toronto, Canada M5L 1B9

**Elizabeth Pillon** LSUC#: 35638M  
Tel: (416) 869-5623  
Email: lpillon@stikeman.com

**Lee Nicholson** LSUC#: 66412I  
Tel: (416) 869-5604  
Email: leenicholson@stikeman.com  
Fax: (416) 947-0866

**Lawyers for Applicant**