DAVIES

DAVIES WARD PHILLIPS & VINEBERG LLP

44th Floor
1 First Canadian Place
Toronto Canada M5X 1B1

Tel 416 863 0900
Fax 416 863 0871
www.dwpv.com

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Luis Sarabia
Dir 416.367.6961
Dir. Fax 416.863.0871
lsarabia@dwpv.com

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DELIVERED

Mr. John Stevenson
Secretary to the Commission Secretary's Office
Ontario Securities Commission
P.O. Box 55, 19th Floor
20 Queen Street West
Toronto, ON M5H 3S8

Dear Mr. Stevenson:

Sears Holdings Corporation and Sears Canada Inc.

We act on behalf of Hawkeye Capital Management, LLC, Knott Partners Management LLC and Pershing Square Capital Management, L.P. (collectively the "Minority Shareholders") in connection with the pending take-over bid (the "Offer") for all of the common shares of Sears Canada Inc. ("Sears Canada") by SHLD Acquisition Corp., a wholly-owned subsidiary of Sears Holdings Corporation (collectively, "Holdings").

We are writing in response to the October 13, 2006 application by Holdings for a stay of the August 8, 2006 order of the Ontario Securities Commission (the "Commission") cease trading the Offer and any other offer made or to be made for Sears Canada by Holdings (the "Order"). The stay is requested in order to permit Sears Canada to hold a meeting of shareholders of Sears Canada (the "Meeting") prior to November 15, 2006 at which it is proposed that the shareholders of Sears Canada would vote on a transaction to acquire all common shares of Sears Canada not acquired by Holdings pursuant to the Offer (a "Subsequent Acquisition Transaction").

The Minority Shareholders are opposed to the application on the basis that it is premised on concerns arising from the legal interpretation of support agreements entered into by private parties and is therefore not a matter which warrants the intervention of the Commission. A granting of the stay requested will yield a perverse result: minority shareholders of Sears Canada will be forced to cast votes in respect of a transaction which was shaped by conduct that both this Commission and a full panel of the Divisional Court have unanimously found to be abusive, coercive and against the public interest. Moreover, shareholders would be forced to make voting decisions based on inadequate disclosure and speculation as to the outcomes of pending legal proceedings (and specific issues within those proceedings) all because Holdings failed to negotiate for itself contractual terms in the Support Agreements (as defined below) that provide it with the level of comfort that it desires. This is simply another in a series of attempts by Holdings to cram an undervalued, abusive and coercive bid down the throats of minority shareholders regardless of what this Commission and the Divisional Court have said about the Offer and the conduct in respect of the Offer.

Effect of the Cease Trade Order

The Order prohibits the calling and holding of the Meeting unless Holdings first complies with the specific terms of the Order itself and Ontario securities law. If Holdings wishes to cause the Meeting to be called and held a stay is required.

The Order cease trades the Offer and any other offer made or to be made for shares of Sears Canada by Holdings. Under the *Securities Act* (Ontario), a "trade" includes an act directly or indirectly in furtherance of a trade. The Meeting is in furtherance of the acquisition of shares of Sears Canada by Holdings and the Offer. It would be overly technical and artificial to argue that the Order does not prevent the Meeting on the basis that the Subsequent Acquisition Transaction to be considered at the Meeting is separate and distinct from the Offer or any other offer to be made for shares of Sears Canada by Holdings.

The Test for a Stay

In determining whether a stay should be granted the Commission has employed the same test articulated by the courts[1]. In order to succeed in its application for a stay Holdings must demonstrate that:

1. there is a serious question to be tried; and

2. if the application is refused it *will* suffer irreparable harm. It is insufficient to show that it *might* or that it *could* suffer irreparable harm[2]; and

3. the balance of convenience or inconvenience favours the granting of the stay. In the circumstances of this case the balance of convenience is to be assessed between Holdings on the one hand and the shareholders of Sears Canada together with the public interest on the other.[3]

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1 Attached at Tabs 1, 2, 3 and 4 are authorities describing the appropriate test for granting a stay.

2 See *Noble v. Noble*, [2002] O.J. No. 4997, Tab 4, para. 16.

3 *Marchand & McKay Ltd.* (Re) [1999] LNON OSC 528.

Analysis

The basis for Holdings' request is that it has entered into private contracts (the "Support Agreements") with the Bank of Nova Scotia, Scotia Capital and Royal Bank of Canada (the "Banks") pursuant to which Holdings has agreed to cause the Meeting to be held prior to November 15, 2006.

Holdings appealed the unanimous decision of the Commission to the Divisional Court. On September 19, 2006, the appeal was unanimously dismissed by the Divisional Court from the bench within ten minutes of the completion of submissions. Attached at Tab 5 is a copy of the Reasons of the Divisional Court. By appealing to the Divisional Court Holdings and losing, Holdings has exhausted its statutory right of appeal under section 9 of the *Securities Act* (Ontario). Holdings does not now have a right of appeal. Holdings has, however, filed a motion for leave to appeal to the Court of Appeal and that motion, which will be in writing, will be before the Court of Appeal in early November.

(a) A stay is not required to preserve Holdings' position pending the outcome of its motion for leave to appeal.

The basis of Holdings' application is that if the stay is not granted and Holdings ultimately succeeds in both obtaining leave to appeal and, ultimately, reversing the Commission's Order in the Court of Appeal, the benefit of that success would be vitiated. Though Holdings has not described exactly why this would occur in its application, it appears to be assuming that the Banks may attempt to terminate the Support Agreements if the Meeting is not held prior to November 15, 2006. This is entirely speculative. The Support Agreements do not expire on any specific date. Under the terms of the Support Agreements the Banks' obligation to vote in favour of the Subsequent Acquisition Transaction continues until such a transaction is completed or until the Banks and Holdings agree to terminate the Support Agreements in writing. The obligations of the Banks to support the Subsequent Acquisition Transaction are not expressly linked to the covenant of Holdings to cause the Meeting to be held prior to November 15, 2006. In order to preserve its right of appeal, Holdings simply needs to defend against any purported termination of the Support Agreements by the Banks. A copy of one of the Support Agreements in question is attached at Tab 6.

The Support Agreements provide in section 4.1 that, between the date of the Support Agreements *and the date the Subsequent Acquisition Transaction is implemented*, the Banks shall vote all of their Sears Canada shares that are subject to the Support Agreements at any meeting of Sears Canada shareholders in favour of a Subsequent Acquisition Transaction and the Banks shall not sell any such shares. The Support Agreements provide in section 6.1 that they will terminate on the date on which the Subsequent Acquisition Agreement is implemented or upon agreement of the parties in writing. The Support Agreements do not provide the Banks with any other termination rights. Unlike many support agreements, the Support Agreements do not provide the supporting shareholder with a termination right in the event that the relevant transaction is not completed by an end date. In light of the lack of an express termination right, any attempt by the Banks to terminate the Support Agreements must be based on general principles of contract law and the result is not assured if Holdings chooses to challenge any such purported termination. The Commission should not be obliged to speculate on the outcome of any such dispute between Holdings and the Banks. Holdings has made no attempt to obtain a declaration from a court as to its rights under the Support Agreements, as it would be entitled to do at any time. The onus is on Holdings to show that there will be actual, as opposed to speculative, irreparable harm it if the Meeting is not held by November 15, 2006. It has completely failed to do so.

The purpose of Holdings' application is to force Sears Canada to hold the Meeting before November 15, 2006 in order to ensure that the Banks vote in favour of the Subsequent Acquisition Transaction pursuant to their obligations under the Support Agreements and to preclude the Banks from ever taking the position that by not holding the Meeting before November 15, 2006 Holdings is in breach of its covenants to do so. Such a position, Holding fears, might lead the Banks to allege that, in light of Holdings' breach, they should receive damages or that they can terminate the Support Agreements such that they have no continuing obligation to support the Subsequent Acquisition Transaction under the Support Agreements.

At its core Holdings' position is that if the Meeting is not held before November 15, 2006, it does not have the degree of contractual certainty that it would like to have that the Banks will continue to abide by their obligations under the Support Agreements. In essence, Holdings does not now like the bargain it struck with the Banks and seeks to have the Commission ameliorate its position by forcing shareholders to participate in a vote the premise of which will be unclear to shareholders.

(b) *The Commission is being asked to intercede to prevent what is really a prospective contractual dispute between private parties.*

In the Reasons issued in support of the Order the Commission specifically acknowledged that the continued effectiveness of the Support Agreements is a matter "best left to the parties to deal with."[4] There is no reason to revisit that determination now.

The terms of the Support Agreements were freely negotiated between Holdings and the Banks. The fact that Holdings has put itself into a position of committing to a deadline by which to cause the Meeting to be held is its own affair and not one that the Commission should concern itself with. Holdings could have negotiated a deadline which took into account the possibility of regulatory impediments and the applicable appeals process but

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4 Reasons and Decision, paragraph 312.

did not do so. Many agreements in the take-over and mergers and acquisitions context provide for such extensions of deadlines in the event of regulatory impediments.

Further evidence that this is simply a contractual matter between private parties is that the stay would not have been required but for the refusal of the Bank of Nova Scotia and Scotia Capital to agree to amend the Support Agreements as requested by Holdings. But for their refusal Holdings would not now be before the Commission seeking to "preserve [their] rights pending the outcome of the appellate process".

(c) The consequences of Holdings' contractual concerns should not be visited upon the Shareholders of Sears Canada

Proceeding with the Meeting prior to November 15, 2006 will be confusing and unfair to shareholders and will not allow shareholders to be provided with adequate information on a timely basis.

(i) Which shares should shareholders assume will form part of the majority of minority calculation?

One of the critical factors that shareholders must assess in casting a vote or in deciding whether to cast a vote on the Subsequent Acquisition Transaction is the issue of which votes are going to be counted toward the majority of the minority calculation. By proceeding with a vote before November 15, 2006 the shareholders are deprived of knowing whether all or any combination of the votes of the Bank of Nova Scotia, Scotia Capital, Royal Bank of Canada and/or the votes attached to the shares tendered by Vornado are to be excluded or included for purposes of minority approval. In normal circumstances this is information which would be available to shareholders and there is no sufficient reason to justify asking shareholders to cast their votes in the absence of this information. Such information is critical to a shareholder as it directly impacts the percentage of the outstanding shares that are to be counted for purposes of the vote that are held by such shareholder (*i.e.*, it is similar to accurate disclosure of the outstanding voting securities of a company and of the principal holders of voting securities, for purposes of an ordinary vote).

The circumstances before the Commission should not be confused with other shareholders meetings in which the offeror and the target put before the shareholders the best information available and shareholders assess the facts before them and make a voting decision. In the present circumstances, Holdings has created an artificial or hypothetical situation in which shareholders are being asked to make voting decisions in the absence of information that they would otherwise have. Also unusual and artificial is that shareholders will be asked to speculate as to the likelihood of Holdings or the Minority Shareholders pursuing further appeals, and the likelihood of success of those appeals and their numerous possible outcomes.

One can anticipate that Holdings will prepare and distribute a circular in connection with the proposed Meeting. Because of the abusive behaviour of Holdings toward the members of the Special Committee of Sears Canada, there are no independent members of the Board of Directors of Sears Canada to properly assess and respond to a Holdings circular. This assessment and response is even more critical than is normally the case because shareholders would be asked to vote in the most unusual and artificial of circumstances with inadequate disclosure and a confusing array of factors to consider.

(ii) Will shareholders receive the benefit of both the Vornado Release, the Liquidity Consultation Provision or neither?

Shareholders will be asked to cast a vote in support of a transaction in circumstances where they do not know whether they will be receiving the Vornado Release and/or the benefit of the Liquidity Consultation Provision. In its disposition of Holdings' first stay application in August, the Commission determined that it would be inappropriate to allow Holdings to amend its circular to grant the Release and the Liquidity Consultation Provision to all shareholders. The same logic continues to apply today.

(iii) Inadequate disclosure

In its application to the Commission, Holdings has neglected to state how it proposes to deal with the inadequate disclosure identified by the Commission in its Reasons and addressed in its Order. Surely it is not proposed that Shareholders proceed to vote on the Subsequent Acquisition Transaction in the absence of full and proper disclosure by Holdings as required in the Order and, more fundamentally, under the *Securities Act*. It would hardly be adequate or appropriate for Sears Canada to be compelled by Holdings to compensate for Holdings' own disclosure failures in its own Take-Over Bid Circular.

(iv) Timing

As with its previous application for a stay, Holdings has waited until the last conceivable moment before bringing its application for a stay depriving both shareholders and the other parties of appropriate time to respond and despite the fact that it would have been plainly obvious for some time now that this application might be required. Moreover, the delay in bringing this application has significantly reduced the time available to other shareholders in which to prepare and mail dissident circulars, should they wish to do so, and for shareholders generally to receive and consider opposing views on why they should not vote in favour of the Subsequent Acquisition Transaction.

The Stay Application is a Tactical Application

The existence of any confusion associated with the vote that is being proposed by Holdings works in favour of Holdings and the Commission should not allow Holdings to benefit from any such confusion. Holdings benefits from the holding of the Meeting prior to the disposition of the appeal. If Holdings is ultimately successful on the appeal, it will be assured of success on the vote on the Subsequent Acquisition Transaction and any vote will not matter. If Holdings is ultimately not successful on the appeal, the holding of the Meeting in circumstances prior to the disposition of any further appeals may benefit Holdings, as some shareholders who would have otherwise voted against the Subsequent Acquisition Transaction may conclude that the very existence of a possibility that Holdings could succeed on the appeal (such that their votes would not matter) is sufficient to cause them not to vote. Other shareholders may potentially vote differently than they would have if it was clear which shareholders' votes would be counted for purposes of determining majority of the minority approval, as a result of the confusion created by possible alternative outcomes of an appeal. Any such possibility would be eliminated if the vote on the Subsequent Acquisition Transaction is postponed until all potential appeals have been exhausted.

If the vote proceeds before November 15, 2006, there is little doubt (given its previous stay application), that Holdings would seek to use the results of the vote to bolster its submissions in the Court of Appeal. This is the same tactic behind its first stay application in August which was rejected by the Commission.

Holdings is asking the Commission to help it "roll the dice", by holding the Meeting in circumstances where there is no possible detriment to Holdings and a chance of providing Holdings with results that it can try to turn to its advantage.

There is no need to put shareholders opposed to the transaction through the trouble and expense of a potential proxy battle in circumstances where one appeal by Holdings has already been decisively dismissed and leave for a second appeal has not been granted and may never be granted.

Test for a Stay: Analysis

Holdings' application for a stay fails to satisfy any one of the three part test accepted by this Commission as the appropriate test for granting a stay.

(a) There is No Serious Issue to be Tried

In deciding whether there is a serious issue to be tried the Commission must make a preliminary assessment of the merits of the case and consider the relative strength of each party's positions. In the circumstances now before the Commission this is very simple.

Holdings' submissions in connection with the Offer have been unanimously rejected by both this Commission and the Divisional Court sitting in its capacity as an appellate court. The Divisional Court stated that:

> "...it was eminently reasonable, and in fact almost inevitable, for the OSC to conclude that such heavy handed tactics were abusive of the minority shareholders of Sears Canada and of the capital markets and should not be condoned at least n the Canadian Capital markets"

The appeal was dismissed decisively from the bench. Holdings statutory right of appeal has been exhausted. Leave to appeal has not been granted and should not be granted. The public interest issues that were before this Commission and the Divisional Court are entirely fact driven and do not warrant any further analysis by the Court of Appeal. There is no serious issue to be tried.

(b) There is no Harm Much Less Irreparable Harm

Holdings advances the application for a stay in order to protect its Offer of $18 per share in circumstances where the market is trading the shares of Sears Canada at over $21. It is only protecting a windfall that it hopes to reap by enforcing the Support Agreements against the Banks and by cramming the Secondary Acquisition Transaction resulting from its abusive and coercive conduct down the throats of Minority Shareholders. Holdings' main concern is that all shareholders will actually be allowed to vote on the merits of the transaction after it has exhausted all avenues of appeal Holdings is determined to avoid this at all costs.

Holdings has led no evidence to demonstrate that if the Meeting does not proceed before November 15, 2006 it will suffer irreparable harm. At most the application filed by Holdings leads one to speculate that Holdings is simply *concerned* that it *might* lose the support of the Banks based on a very conservative legal interpretation of the Support Agreements. This *concern* does not constitute irreparable harm.

If the Banks ultimately refuse to comply with their obligations under the Support Agreements, the harm, if any, will sound in damages. This is not irreparable harm.

(c) The Balance of Convenience does not Favour Granting the Stay

Holdings' concern with its contractual exposure under the Support Agreements has driven it to bring this Application. Its exposure under the Support Agreements, if any, is a private contractual matter between Holdings and the Banks and should not be the Commission's concern.

The Commission should, however, be concerned with the impact of granting the stay on the public interest. This includes the appearance of forcing shareholders to proceed with a vote that is the result of a process which the Commission has found to be abusive and coercive of the very minority shareholders which are now being asked to cast votes and of the capital markets generally. The views of the Commission were echoed by the Divisional Court.

Holdings concerns or fears arising from its own perceived inadequacy of the contractual terms that it has bargained for in the Support Agreements does not justify forcing shareholders to proceed with a vote in the absence of important information which they would have, in ordinary circumstances, including information about which parties votes will be counted as part of the majority of the minority. Moreover, as matters now stand, shareholders will be asked to vote in the absence of fair, adequate and legally sufficient disclosure. At the time of writing Holdings has given no notice of any plan to deal with this obvious flaw in its application.

Given Holdings' previous attempt to abuse the stay provisions in the *Securities Act* to gain a tactical advantage in the Divisional, the Commission should extremely wary of granting the stay requested.

For all the reasons described above it is absolutely clear that the inconvenience and unfairness caused by forcing shareholders to proceed with a vote in the Subsequent Acquisition Transaction at this time significantly outweighs any inconvenience to Holdings of not proceeding with the vote, particularly since it is not at all clear that Holdings will suffer any harm if the vote does not proceed before November 15, 2006.

Yours very truly,

Luis Sarabia

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cc. Naizam Kanji, Michael Brown and Kelley McKinnon, *Ontario Securities Commission*
Mark Gelowitz, *Osler, Hoskin & Harcourt LLP*
Grant Haynen, *Bennett Jones LLP*
Patricia Olasker
Kent Thomson
Peter Hong