

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

(Class Action)
SUPERIOR COURT

NO: 500-06-000769-154

LEON BERROS, 


Petitioner

-VS-

SEARS CANADA, INC., legal person having its
head office at 290 Yonge street, suite 700,
Toronto, Ontario, M5B 2C3

Respondent

**MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION AND TO ASCRIBE THE
STATUS OF REPRESENTATIVE
(ARTICLE 1002 AND FOLLOWING C.C.P)**

**TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT, SITTING IN AND FOR
THE DISTRICT OF MONTREAL, YOUR PETITIONER STATES AS FOLLOWS:**

I. GENERAL PRESENTATION

A) THE ACTION

1. Petitioner wishes to institute a class action on behalf of the following group, of which he is a member, namely:

All persons in Canada (subsidiarily Quebec) who ordered or purchased any goods or services from the Respondent online, by phone, by catalogue, in-store or by any means whatsoever (hereinafter the "Purchase"), whose Purchase was

subsequently cancelled by the Respondent who did not respect the price it advertised.

or any other group to be determined by the Court;

(hereinafter referred to as the "**Group**", or "**Consumer(s)**");

2. The Respondent is a chain of department stores across Canada;
3. The Respondent's online presence also enables it to enter into distance contracts with Consumers and thus carry on business across Canada;
4. In the course of its business it has occurred on many occasions that the Respondent advertises a good or service for a specific price (hereinafter the "**Advertised Price**"), processes Consumers' orders and Purchases at the Advertised Price and then unlawfully cancels the Consumers' Purchase, claiming that the Advertised Price was an error;
5. The Respondent has the obligation to deliver the goods or to perform the services stipulated in the contract;
6. Consequently, the Respondent violates Quebec's *Consumer Protection Act* (hereinafter the "**CPA**") every time that it cancels a Consumer's Purchase because of its own error in pricing;
7. Quebec consumer law is a matter of protective public order;
8. It is unlawful for Respondent to derogate from the provisions of the *CPA* in its Terms and Conditions, Petitioner disclosing as **Exhibit P-1** a copy of the Terms and Conditions as they appear on the Sears Canada website;
9. By reason of Respondent's unlawful conduct, the Petitioner and the members of the Group have suffered a prejudice, which they wish to claim, every time a Group member or Consumer made a Purchase which the Respondent unilaterally cancelled due to its own pricing error;

B) THE PARTIES

10. The Petitioner is a consumer within the meaning of the *CPA*;
11. The Respondent is carrying on the business of sales in department stores and by catalogue, as it appears from an extract of the enterprise's information statement from the enterprise register (CIDREQ), Petitioner disclosing **Exhibit P-2**;

12. The Respondent is a merchant within the meaning of the CPA and its activities are governed by this legislation, among others;

II. FACTS GIVING RISE TO THE PETITIONER'S CLAIM

13. On **October 1st, 2015**, Petitioner purchased one (1) King Size mattress (item #013595618), Festival model (hereinafter the "**Mattress**"), from the Respondent's website: <http://www.sears.ca/product/wholehome-md-festival-foam-mattress/601-000011593-57760>;

14. Petitioner paid Respondent **\$135.00** plus applicable taxes for said Mattress, Petitioner disclosing as **Exhibit P-3** a copy of the proof of purchase and order confirmation from the Respondent dated **October 1st, 2015**;

15. The regular price of said Mattress was listed at **\$1599.99** plus applicable taxes;

16. That same day, **October 1st, 2015**, Respondent cancelled the Petitioner's Mattress purchase, Petitioner disclosing as **Exhibit P-4** a copy of the email sent to him by Respondent which includes the following:

Hello Leon Berros,

There has been a change in the status of your followings Sears order. Only the items for which a change has occurred are listed.

Order Date: Oct 01 2015
Order #: 0803119470
Method of Payment: VISA Card

Pick Up Location:
Lasalle
[\(514\)364-7310](tel:5143647310)
GD -SEARS MAGASIN
7071 NEWMAN BOUL

Item#	Description	Qty	Price	Status
013595618	KN MAT,FESTIVAL	1	135.00	Unavailable

17. Respondent operates in the province of Quebec under the false impression that it may derogate from the *CPA* by private agreement or by invoking its own policies, as it appears from its communications to Consumers, Petitioner disclosing **Exhibit P-5:**

Please be advised that **your order was cancelled due to pricing error on the items.** The price of the item is \$715.95
But, you were only charged for \$135.00 for each items.

As explained below in **our policy, we are unable to honour this price as it was a website pricing error.**

“Errors, Inaccuracies or Omissions”

Sears makes every effort to ensure that the Content on this Internet Site is complete and current. However, Sears does not guarantee that the information contained on this Internet Site will not contain errors, inaccuracies or omissions. Such errors, inaccuracies or omissions may relate to price or to product description or availability. Sears reserves the right to correct any error, inaccuracy or omission or to change or update the Content without prior notice to you. Further, Sears reserves the right to refuse or cancel any orders containing any error, inaccuracy or omission, whether or not the order has been submitted, confirmed and/or your credit card has been charged. If your credit card has been charged for the purchase and your order is cancelled, Sears shall promptly issue a credit to your credit card.

[Emphasis added in bold].

18. For instance, in a recently publicized incident, the Respondent allegedly sold over 25,000 units of a *Little Tikes* children’s play set at the Advertised Price of \$12.99, but subsequently cancelled all Consumer Purchases because, as Respondent plead, a pricing error occurred and the play set should have been listed for \$129.99 instead of \$12.99, as it appears from a copy of the CJAD news article on August 12, 2015, Petitioner disclosing **Exhibit P-6;**
19. By proceeding in this manner, the Respondent unlawfully attempts to charge Consumers a higher price than the one it advertises for its goods or services;

20. The Respondent's conduct constitutes a prohibited business practices as defined in the *CPA*;
21. Moreover, the Respondent fails to fulfill the obligations imposed on it under sections 10 and 224 c) of the *CPA*;

III. DAMAGES

22. In light of the foregoing, the following damages may be claimed against the Respondent:
 - a) Reimbursement of the value Consumers unlawfully lost, being the difference between the subsequently requested price and the Advertised Price (hereinafter the "**Lost Value**");
 - b) A lump sum in punitive damages, to be determined, for the breach of obligations imposed on the Respondent by the *CPA* pursuant to section 272;

IV. THE GROUP

23. The Group for whom the applicant intends to act is described in the first paragraph of this Motion and includes any person in Canada (subsidiarily Quebec) who ordered or purchased any goods or services from the Respondent by any means whatsoever, and whose Purchase was subsequently cancelled by the Respondent who did not respect its Advertised Price;

V. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP

24. The claims of every member of the Group are founded on very similar facts to the Petitioner's claim;
25. Every member of the Group purchased a good or service from the Respondent, only to subsequently have their Purchase cancelled, allegedly due to a pricing error;
26. Consequently, each member of the Group lost value as a result of the Respondent's failure to fulfill its contractual obligations;
27. Every member of the Group has suffered damages equivalent to the difference between the requested price and Advertised Price;
28. All of the damages to the Group members are a direct and proximate result of the Respondent's misconduct;

29. The questions of fact and law raised and the recourse sought by this Motion are identical with respect to each member of the Group;
30. In taking the foregoing into account, all members of the Group are justified in claiming the sums which represent the Lost Value, as well as punitive damages;

VI. CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION

31. The composition of the class renders the application of articles 59 or 67 C.C.P. difficult or impractical;
32. Petitioner is unaware of the total number of the Respondent's clients whose legitimate Purchases were cancelled by Respondent due to a pricing error;
33. The number of persons included in the Group is estimated to be in the hundreds of thousands;
34. The names and addresses of all persons included in the Group are not known to the Petitioner, however, are in the possession of the Respondent;
35. Group members are very numerous and are dispersed across the province, country and elsewhere;
36. In these circumstances, a class action is the only appropriate procedure for all of the members of the class to effectively pursue their respective rights and have access to justice without overburdening the court system;
37. The recourses of the Group members raise identical, similar or related questions of fact or law, namely:
 - a) Did the Respondent cancel valid Consumer Purchases?
 - b) Can the Respondent charge Consumers a higher price than the price it advertised?
 - c) Can the Respondent contractually liberate itself from the consequences of its own act or the act of its representatives?
 - d) Did the Respondent have the principal obligation to deliver the goods or to perform the service stipulated in the contract?
 - e) If so, what is the appropriate remedy where the Respondent fails to deliver the goods or perform the service stipulated in the contract due to its own pricing error?

- f) Did Group members unlawfully lose value as a result of the Respondent's failure?
 - g) Are the Group members entitled to compensatory damages and, if so, in what amount?
 - h) Are the Group members entitled to punitive damages and, if so, in what amount?
38. The interests of justice favour that this motion be granted in accordance with its conclusions;

VII. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

39. The action that the Petitioner wishes to institute on behalf of the members of the Group is an action in damages;
40. The conclusions that the Petitioner wishes to introduce by way of a motion to institute proceedings are:

GRANT Plaintiff's action against Defendant;

DECLARE the Defendant liable for the damages suffered by the Plaintiff and each of the members of the Group;

CONDEMN the Defendant to pay to the members of the Group compensatory damages to be determined, plus interest as well as the additional indemnity since the date of purchase, and **ORDER** collective recovery of these sums;

CONDEMN the Defendant to a global lump sum payment on account of punitive damages to every member of the Group, in an amount to be determined by the Court, and **ORDER** collective recovery of this sum;

CONDEMN the Defendants to pay interest and the additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

GRANT the class action of the Plaintiff on behalf of all the members of the Group;

ORDER that the claims of individual Group members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendant to bear the costs of the present action including expert, expertise and notice fees;

RENDER any other order that this Honourable Court shall determine;

VIII. THE PETITIONER REQUESTS THAT HE BE ATTRIBUTED THE STATUS OF REPRESENTATIVE OF THE GROUP

41. Petitioner is a member of the Group;
42. Petitioner is ready and available to manage and direct the present action in the interest of the members of the Group that he wishes to represent and is determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the Group, as well as, to dedicate the time necessary for the present action and to collaborate with his attorneys;
43. Petitioner has the capacity and interest to fairly and adequately protect and represent the interest of the members of the Group;
44. Petitioner has given the mandate to his attorneys to obtain all relevant information with respect to the present action and intends to keep informed of all developments;
45. Petitioner, with the assistance of his attorneys, is ready and available to dedicate the time necessary for this action and to collaborate with other members of the Group and to keep them informed;
46. Petitioner is a general contractor in renovations who is disciplined, well-organized and determined to act as a leader for members of the Group;
47. Petitioner is in good faith and has instituted this action for the sole goal of having his rights, as well as the rights of other Group members, recognized and protected so that they may be compensated for the damages that they have suffered as a consequence of the Respondent's conduct;
48. Petitioner understands the nature of the action;
49. Petitioner's interests are not antagonistic to those of other members of the Group;
50. The Petitioner suggests that this class action be exercised before the Superior Court in the district of Montreal for the following reasons:
 - a) A great number of the members of the Group reside in the judicial district of Montreal;
 - b) Respondent conducts business and operates several large department stores in the District of Montreal;

- c) The Petitioner's attorneys practice their profession in the judicial district of Montreal;

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present motion;

AUTHORIZE the bringing of a class action in the form of a motion to institute proceedings in damages;

ASCRIBE the Petitioner the status of representative of the persons included in the Group herein described as:

All persons in Canada (subsidiarily Quebec) who ordered or purchased any goods or services from the Respondent online, by phone, by catalogue, in-store or by any means whatsoever (hereinafter the "**Purchase**"), whose Purchase was subsequently cancelled by the Respondent who did not respect the price it advertised.

or any other group to be determined by the Court;

IDENTIFY the principle questions of fact and law to be treated collectively as the following:

- a) Did the Respondent cancel valid Consumer Purchases?
- b) Can the Respondent charge Consumers a higher price than the price it advertised?
- c) Can the Respondent contractually liberate itself from the consequences of its own act or the act of its representatives?
- d) Did the Respondent have the principal obligation to deliver the goods or to perform the service stipulated in the contract?
- e) If so, what is the appropriate remedy where the Respondent fails to deliver the goods or perform the service stipulated in the contract due to its own pricing error?
- f) Did Group members unlawfully lose value as a result of the Respondent's failure?

- g) Are the Group members entitled to compensatory damages and, if so, in what amount?
- h) Are the Group members entitled to punitive damages and, if so, in what amount?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT Plaintiff's action against Defendant;

DECLARE the Defendant liable for the damages suffered by the Plaintiff and each of the members of the Group;

CONDEMN the Defendant to pay to the members of the Group compensatory damages to be determined, plus interest as well as the additional indemnity since the date of purchase, and **ORDER** collective recovery of these sums;

CONDEMN the Defendants to a global lump sum payment on account of punitive damages to every member of the Group, in an amount to be determined by the Court, and **ORDER** collective recovery of this sum;

CONDEMN the Defendants to pay interest and the additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

GRANT the class action of the Plaintiff on behalf of all the members of the Group;

ORDER that the claims of individual Group members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert, expertise and notice fees;

RENDER any other order that this Honourable Court shall determine;

DECLARE that all members of the Group that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;

FIX the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the Group that have not exercised their means of exclusion will be bound by any judgement to be rendered herein;

ORDER the publication of a notice to the members of the group in accordance with article 1006 C.C.P. within sixty (60) days from the judgement to be rendered herein in LA PRESSE and the MONTREAL GAZETTE;

ORDER that said notice be published on the Respondent's website, in a conspicuous place, with a link stating "Notice to Consumers who Purchased Goods or Services from Sears and whose Order was Cancelled due to a Pricing Error";

RENDER any other order that this Honourable Court shall determine;

THE WHOLE with costs including publications fees.

Montréal, October 13, 2015

COPIE CONFORME / TRUE COPY
Simon & Associés
SIMON & ASSOCIÉS

Simon & Associés
SIMON ET ASSOCIÉS
Attorneys for Petitioner

SCHEDULE 1
(s. 119, CCP)

NOTICE TO DEFENDANT

Take notice that the plaintiff has filed this action or application in office the Superior Court of the judicial district of Montreal.

To file an answer to this action or application, you must first file an appearance, personally or by advocate, at the courthouse of Montreal, located at 1 Notre-Dame St. East, within 10 days of service of this motion.

If you fail to file an appearance within the time limit indicated, a judgment by default may be rendered against you without further notice upon the expiry of the 10-day period.

If you file an appearance, the action or application will be represented before the court on **November 30, 2015, at 9:00 a.m., in room 2.16** of the courthouse. On that date, the court may exercise such powers as are necessary to ensure the orderly progress of the proceeding or the court may hear the case, unless you make a written agreement with the plaintiff or the plaintiff's advocate on a timetable for the orderly progress of the proceeding. The timetable must be filed in the office of the court.

In support of this motion to institute proceedings, the Petitioner discloses the following exhibits:

LIST OF EXHIBITS

- Exhibit P-1:** Copy of Sears Canada's Terms and Conditions;
- Exhibit P-2:** Extract of the enterprise's information statement from the enterprise register (CIDREQ) for Sears Canada, Inc.;
- Exhibit P-3:** Copy of the proof of purchase and order confirmation from Sears Canada dated October 1st, 2015;
- Exhibit P-4:** Copy of the email sent by Sears Canada on October 1, 2015, cancelling the order;
- Exhibit P-5:** Copy of communications sent by Sears to Consumers explaining that their "*order was cancelled due to pricing error on the items*";
- Exhibit P-6:** Copy of the CJAD news article dated August 12, 2015;

The exhibits in support of the motion are available on request.

Request for transfer of a small claim

If the amount claimed by the plaintiff does not exceed \$7,000 and if you could have filed such an action as a plaintiff in Small Claims Court, you may make a request to the clerk for the action to be disposed of pursuant to the rules of Book VIII of the Code of Civil Procedure (R.S.Q., c. C-25). If you do not make such a request, you could be liable for costs higher than those provided for in Book VIII of the Code.