

**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., INITIUM LOGISTICS
SERVICES INC., INITIUM COMMERCIAL LABS INC., INITIUM
TRADING AND SOURCING CORP., SEARS FLOOR COVERING
CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC.,
6988747 CANADA INC., 10011711 CANADA INC., 1592580
ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA
INC., 168886 CANADA INC., AND 3339611 CANADA INC.**

**FACTUM OF THE LANDLORDS
(MOTION RETURNABLE MAY 7, 2019)**

May 2, 2019

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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., 9370-2751
QUEBEC INC., 191020 CANADA INC., THE CUT INC.,
SEARS CONTACT SERVICES INC., INITIUM LOGISTICS
SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM
TRADING AND SOURCING CORP., SEARS FLOOR
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CANADA INC.

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

FACTUM OF THE LANDLORDS

PART I - OVERVIEW

1. The Landlords (defined below) and the Monitor have been engaged in a year long process to try to resolve the 27 claims filed by the Landlords in the within CCAA proceedings.
2. In November and December 2018, the parties engaged in multiple days of judicial mediation. Through this mediation, the parties reached a settlement.
3. The settlement did not attach, list or refer to an agreed to claim-by-claim amounts. The settlement provided a five-day period in which the Landlords were to provide those amounts. They did so.

4. The Monitor and the Landlords both agree there has been a settlement. However, both parties disagree as to how the settlement is to be performed. At issue are essentially two questions:
 - 1) Were the Landlords entitled to contest the amounts that the Monitor valued their claims at after the settlement was executed; and
 - 2) How has the Monitor arrived at the value they seek to enforce for the Landlords' Claims?
5. These two issues present two different legal problems for this Honourable Court.
6. The first question requires the Court to investigate the terms of the settlement and the factual matrix surrounding the formation of that settlement. This presents a problem because the Monitor's counsel and the Landlords' counsel are the principal witnesses to those events and as such cannot be the counsel arguing this motion. It is for this reason that, to date, the Landlords have only provided a simple affidavit outlining the issues, without any of the key evidence the court will require to determine this issue. The Monitor has also not provided any evidence of the key events related to the formation of the settlement.
7. The second question only requires the Monitor to produce the backup evidence upon which it relies in arriving at its' valuation of the Landlords' claims. The Monitor has so far refused to do so. The Monitor has refused to even give an explanation for the difference between the Monitor's values and the Landlords' values.
8. It is respectfully submitted that only the second question can be reviewed and answered before the Court at this time. It is also suggested that the second question should render the first question moot. If the parties can agree on what is owed, they may find they no

longer have a dispute about how the settlement should operate. Neither party is attempting to achieve a windfall.

9. In light of the foregoing, it is respectfully submitted that the Monitor's motion should be adjourned *sine die* and instead, the Court should order the Monitor to produce the backup evidence which supports its position on the value of the claims (as the Landlords have already done). Once the Monitor has produced this information and it has been reviewed by the parties, the parties (to the extent there is a dispute) should be ordered to attend mediation to review those claims, on a claim-by-claim basis. If the mediation fails to produce a settlement, the parties should be directed to seek new counsel in order to then litigate the factual matrix question. In no event should the matter be decided on the factual record currently before the court.
10. There is no urgency to this matter as the Landlords have confirmed that they will vote the uncontested portion of their claims (being about 82% of the value at issue) in favour of the Sears Plan of arrangement. The remaining amount in dispute is not material to the progress of this CCAA proceeding and would not constitute a relevant holdback from any distribution, in the event a distribution was imminent, which it is not.
11. The Landlords are extremely interested in resolving this issue but cannot reasonably do so until the Monitor proves that the position it is taking on the claims is supported by the books and records of Sears. The Monitor's position on value is not supported by the books and records of the Landlords.

PART II - FACTS

Background

12. The Respondents, Bentall Kennedy (Canada) LP, QuadReal Property Group, Primaris Management Inc., Westcliff Management Ltd., Tanurb (Festival Marketplace) Inc., and

Cogir Real Estate (collectively, the “**Landlords**”), have filed 27 Proof of Claims in the within CCAA proceeding (the “**Landlords’ Claims**”).¹

13. Subsequently, the Monitor issued Notices of Revision and Disallowance (“**NORDs**”) for the Landlords’ Claims. The Landlords responded to the NORDs by filing Notices of Dispute (“**NODs**”) for each of their claims.²

The Settlement Agreement

14. Throughout October and November of 2018, counsel for the Landlords, Blaney McMurtry LLP (“**Blaneys**”), and counsel for the Monitor, Norton Rose Fulbright LLP (“**Norton Rose**”), engaged in discussions and judicial mediation to resolve the dispute between the parties regarding 22 of the 27 Landlords’ Claims.³
15. Through the judicial mediation process, the Landlords and the Monitor entered into a confidential settlement agreement consisting of (1) the Term Sheet, (ii) Schedule ‘A’ to the Term Sheet with the defined terms of the agreement, (iii) Schedule ‘B’ to the Term Sheet with the agreed amount of each claim blank (the “**Joinder Agreement**”), and (iv) a settlement agreement (the “**Settlement Agreement**”).⁴
16. The Settlement Agreement provided, *inter alia*, a formulaic approach to the valuation of each of the Landlords’ Claims on a property by property basis.⁵
17. In accordance with the Settlement Agreement, Blaneys, on behalf of the Landlords, provided the Monitor with executed Joinder Agreements on December 10, 2018. Each of

¹ Thirtieth Report of the Monitor, dated March 25, 2019, paras 26-27.

² Thirtieth Report of the Monitor, dated March 25, 2019, paras 26-27.

³ Thirtieth Report of the Monitor, dated March 25, 2019, para 29.

⁴ Thirtieth Report of the Monitor, dated March 25, 2019, para 40.

⁵ The Landlords’ Motion Record, Tab 2, Affidavit of Babita Ramkissoon, para 5.

the Joinder Agreements detailed the value of each claim in accordance with the Settlement Agreement, along with additional supporting documentation.⁶

18. The Monitor has refused to execute the Joinder Agreements completed and executed by the Landlords.

PART III – ISSUES

19. The issues before this Honourable Court are:
 - a. At this time, can the Court address the question of whether the Landlords were entitled to contest the amounts that the Monitor valued their claims at after the settlement was executed?
 - b. Should the Court order that the Monitor produce the documentary evidence to support its' valuation of the Landlords' Claims?

PART IV - LAW

ISSUE 1: At this Time, the Court Cannot Address the Question of Whether the Landlords Were Entitled to Contest the Amounts that the Monitor Valued Their Claims After the Settlement Was Executed

20. The parties are not in dispute as to whether an agreement was reached, but how to interpret the agreement that was reached between the parties.
21. For the Court to determine whether the Landlords were entitled to contest the amounts that the Monitor valued the Landlords' Claims after the settlement was executed will require the Court to review and interpret the Settlement Agreement.

⁶ The Landlords' Motion Record, Tab 2, Affidavit of Babita Ramkissoon, para 5.

22. The Supreme Court of Canada has held that a contract should be interpreted in a practical, common-sense manner in order to determine "the intent of the parties and the scope of their understanding". In order to complete this analysis, the Court:

...must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning. . . ."⁷

23. By reviewing the surrounding circumstances in forming the contract, the Court will deepen its' understanding of the mutual and objective intentions of the parties as expressed in the words of the contract.⁸

24. The factual matrix and surrounding circumstances is imperative to assist the Court ascertain the objective intention of the parties in these circumstances. Before the settlement was reached, Blaneys communicated to the Monitor that they believed the Landlords' Claims would be worth \$154 million based on an application of the Formula.⁹ It would make no commercial or business sense for the Landlords to then agree to be bound by a without prejudice calculation provided by the Monitor for half of the amount that the Landlords believe they are entitled to based on an application of the Formula.

25. In response to the without prejudice calculation provided by the Monitor **BEFORE** the parties entered mediation or executed the Settlement Agreement, Blaneys made a

⁷ *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, at para 47. Brief of Authorities ("BOA") of the Landlords, Tab 1.

⁸ *Sattva Capital*, *ibid*, para 57. BOA of the Landlords, Tab 1.

⁹ Thirtieth Report of the Monitor, dated March 25, 2019, Appendix C.

counter-offer based on the basis that the aggregate amount recovered for the Landlords would be more than what the Monitor had previously detailed.¹⁰

26. Further, when there are two reasonable interpretations of a contract, subsequent conduct can help determine which interpretation is correct and may help support an inference concerning the intentions of the parties at the time they made the agreement.¹¹
27. In this case, the Monitor's valuation of the Landlords' Claims was not produced until **AFTER** the agreement was reached. The Settlement Agreement was amended to provide five days to produce the Landlords' valuation of their claims. Consistent with that that provision, the Landlords did exactly that. In these circumstances, this evidence on the subsequent conduct of the parties will be necessary to resolve the ambiguity in the definition of 'Rent' in the Settlement Agreement.
28. Based on the prevailing law of contractual interpretation, the Court will only be able to address the Monitor's motion with a fulsome factual record before it that will allow it to investigate the terms of the Settlement and the factual matrix surrounding the formation of that Settlement.
29. There is not only no fulsome factual record explaining the surrounding circumstances of the execution of the Settlement Agreement before the Court, but Blaneys and Norton Rose would be unable to act as counsel on such a motion as they are the principal witnesses with the evidence of the surrounding circumstances and subsequent conduct.
30. Therefore, the Landlords respectfully request that this Honourable Court adjourn the Monitor's motion *sine die* at this time.

¹⁰ Thirtieth Report of the Monitor, dated March 25, 2019, Appendix C.

¹¹ *Shewchuk v Blackmont Capital*, 2016 ONCA 912 at paras 41, 46, 47-48. BOA of the Landlords, Tab 2.

ISSUE 2: The Monitor Should Produce the Documentary Evidence to Support Its' Valuation of the Landlords' Claims

31. The Monitor has disregarded the information provided by the Landlords in their Proofs of Claim and Joinder Agreements in favour of unilaterally fixing the value of each property in accordance with Sears' books and records. However, the Monitor has refused to provide the Landlords with any supporting financial documents or calculations for the value that it has assigned to the Landlords' Claims.
32. The Landlords should not be required to blindly accept the Monitor's valuation of the Landlords' Claims without documentation supporting those valuations. This is particularly the case since the Landlords have provided detailed documentation and calculations that indicate the Landlords' Claims are valued at \$18 million more than the Monitor alleges.¹²
33. Even where the Monitor now alleges to have relied on the amounts detailed by the Landlords in their Proof of Claims, the Monitor has failed to properly apply the Formula to the Landlords' Claims based on the information filed in the Proof of Claims. As one example, every Proof of Claim explicitly claimed taxes, however, the Monitor's current valuations appear to calculate many of the Landlords' Claims without HST, GST or QST.
34. Without any evidence from the Monitor, the Landlords cannot possibly be expected to understand why they should accept \$18 million less than what they calculate their claims are worth under the Formula.
35. If Sears' books and records support the Monitor's value of the Landlords' Claims, then the production of the books and records may reasonably explain the delta and lead to an

¹² The Landlords' Motion Record, Tab 2, Affidavit of Babita Ramkissoon, para 5.

easy resolution of the within issues. If the parties can agree on what is owed, they may find they no longer have a dispute about how the settlement should operate.

36. Further, there is no prejudice to the within CCAA proceedings if the Monitor's motion is adjourned and the Court orders the Monitor to produce the documentary evidence to support its valuation of the Landlords' Claims. In particular, there is no prejudice because:

- a. the \$18 million delta in dispute between the Monitor and the Landlords is immaterial and will not impact the restructuring of Sears in the within CCAA proceedings;
- b. the \$18 million delta will also result in an immaterial holdback in the event that a distribution is imminent;
- c. the Landlords have already agreed to vote the uncontested portion of their claims (being about 82% of the value at issue) in favour of the Sears Plan of Arrangement; and
- d. the books and records of Sears should be easily accessible given that the Monitor has already accessed and reviewed them to value the Landlords' Claims.

37. Based on the above, the Landlords respectfully request that this Honourable Court order the Monitor to produce the books and records of Sears to explain its' valuation of the Landlords' Claims.

PART IV - RELIEF REQUESTED

38. The Landlords respectfully request the following relief from this Honourable Court:

- a) an Order adjourning the Monitors' Motion *sine die*; and

- b) an Order requiring the Monitor to provide the Landlords with Sears' books and records supporting its' valuation of the Landlords Claims.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON MAY 2, 2019.

A handwritten signature in black ink, appearing to be 'DU', is written over a horizontal line.

David Ullmann

Counsel for the Landlords

SCHEDULE "A" - Case Law

1. *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53
2. *Shewchuk v Blackmont Capital*, 2016 ONCA 912

SCHEDULE "B" - STATUTE

Nil.

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