

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

B E T W E E N :

FTI CONSULTING CANADA INC., in its capacity as Court-appointed monitor in proceedings pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c. c-36

Plaintiff

- and -

ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, SEARS HOLDINGS CORPORATION, WILLIAM HARKER and WILLIAM CROWLEY

Defendants

B E T W E E N :

SEARS CANADA INC., by its Court-appointed Litigation Trustee, J. DOUGLAS CUNNINGHAM, Q.C.

Plaintiff

- and -

ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD LAMPERT, EPHRAIM J. BIRD, DOUGLAS CAMPBELL, WILLIAM CROWLEY, WILLIAM HARKER, R. RAJA KHANNA, JAMES MCBURNEY, DEBORAH ROSATI, DONALD ROSS, and SEARS HOLDINGS CORPORATION

Defendants

B E T W E E N :

MORNEAU SHEPELL LTD. in its capacity as administrator of the Sears Canada Inc. Registered Retirement Plan

Plaintiff

- and -

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, WILLIAM HARKER, WILLIAM CROWLEY, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH E. ROSATI, R. RAJA KHANNA, JAMES MCBURNEY, DOUGLAS CAMPBELL and SEARS HOLDINGS CORPORATION

Defendants

B E T W E E N :

1291079 ONTARIO LIMITED

Plaintiff

- and -

SEARS CANADA INC., SEARS HOLDINGS CORPORATION, ESL INVESTMENTS INC.,
WILLIAM C. CROWLEY, WILLIAM R. HARKER, DONALD CAMPBELL ROSS,
EPHRAIM J. BIRD, DEBORAH E. ROSATI, R. RAJA KHANNA, JAMES MCBURNEY
and DOUGLAS CAMPBELL

Defendants

Court File No.: CV-17-11846-00CL

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., 9370-2751 QUÉBEC INC., 191020 CANADA INC., THE CUT INC.,
SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., 9845488 CANADA
INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES
INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711
CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA
INC., 168886 CANADA INC. AND 3339611 CANADA INC.

Applicants

JOINT FACTUM OF THE PLAINTIFFS

(Motion re: Approval of Director Settlement returnable August 25, 2020)

August 20, 2020

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TO: SERVICE LIST

PART I - INTRODUCTION

1. By this motion, the Plaintiffs¹ seek an order (the “**Approval Order**”) under the *Companies’ Creditors Arrangement Act* (Canada) (the “**CCAA**”), among other things, giving effect to and approving the terms of an agreement regarding a \$50 million settlement (the “**Settlement Agreement**”) between the Plaintiffs and Ephraim J. Bird, Douglas Campbell, William Crowley, William Harker, R. Raja Khanna, James McBurney, Deborah Rosati and Donald Ross (collectively, the “**Director Defendants**”), being certain of the defendants in the Dividend Actions as defined and described in further detail below.

2. It is well established that a CCAA court has the jurisdiction to approve a settlement reached by a debtor provided that the settlement is beneficial to the debtor and its stakeholders, is fair and reasonable, and is consistent with the purpose and spirit of the CCAA.²

3. As described more fully herein, the Plaintiffs—with the support of the Director Defendants—submit that the Approval Order should be approved for the following reasons:
 - (a) The Settlement Agreement is the product of extensive negotiations conducted by experienced counsel and provides a substantial and immediate cash contribution to the Plaintiffs;

¹ Being (a) Sears Canada Inc. (“**Sears Canada**”) by its Court-Appointed Litigation Trustee, J. Douglas Cunningham, Q.C. (the “**Litigation Trustee**”) in proceedings pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. c-36 (the “**CCAA Proceedings**”), (b) FTI Consulting Canada Inc. in its capacity as Court-appointed monitor (the “**Monitor**”), (c) Morneau Shepell Ltd. (the “**Pension Administrator**”), in its capacity as administrator of the Sears Canada Inc. Registered Retirement Plan (the “**Sears Pension Plan**”) and 1291079 Ontario Limited

² *Labourers Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, [2013 ONSC 1078](#) at para. 49 [“**Sino-Forest**”].

(b) It constitutes a fair and reasonable compromise of the Plaintiffs' claims in light of the risks and merits of the claims, the costs of the Dividend Actions, and uncertainties regarding recoveries;

(c) The Settlement Agreement is consistent with the spirit and purpose of the CCAA because it benefits the Applicants' stakeholders and is an efficient and value generating resolution in the circumstances; and

(d) The terms of the proposed Approval Order will result in no prejudice to the non-settling defendants as the Plaintiffs' claims following the Approval Order will be limited to only those attributable to the liability of the non-settling defendants. In light of this limit, precluding the non-settling defendants from cross-claiming against the Director Defendants or other parties in respect of Released Claims (as defined and described below) causes them no harm. There is no risk of double recovery by the Plaintiffs, and the non-settling defendants continue to retain their other litigation rights.

4. The Plaintiffs submit that the motion should be granted. The Settlement Agreement should be approved and the proposed order should be issued.

PART II - THE FACTS

The Proceedings and Claims

5. This motion seeks settlement approval, releases and a claims bar order in four separate proceedings under the following case file numbers: CV-18-00611219-00CL, CV-18-00611214-00CL, CV-18-00611217-00CL, and CV-19-00617792-00CL (the "**Dividend Actions**") and in the proceedings of Sears Canada, among others, under the CCAA.

6. Three of the Dividend Actions were commenced on December 19, 2018 by the Litigation Trustee, the Monitor and the Pension Administrator against certain shareholders and former directors of Sears Canada.
7. The fourth Dividend Action — a proposed class action commenced in 2015 by a Sears Hometown Store franchisee under the *Class Proceedings Act, 1992* (Ontario) (the “CPA”, with such Dividend Action, being the “**Dealer Class Action**”) — was transferred to the Commercial List in 2019. It was also certified by order of Justice McEwen in June 2019.
8. The Actions concern a \$509 million dividend that Sears Canada declared in November 2013 and distributed to shareholders in December 2013. The Plaintiffs in the actions allege certain causes of action against the directors who authorized the dividend (being the Director Defendants) and certain major shareholders who benefited from it, and that the dividend should be unwound and/or damages should be paid on account of this.
9. The Monitor and the Litigation Trustee each claim \$509 million, plus interest and costs. The Pension Administrator claims for the amount of the wind up deficit of the Sears Pension Plan, estimated at approximately \$260 million when the claim was commenced. For its part, the Dealer Class Action seeks the sum of \$80 million. The claims allege that Director Defendants are jointly and severally liable for all amounts claimed.
10. To date, no defendant has made a cross-claim for contribution and indemnity against other defendants pursuant to the *Negligence Act* or otherwise. However, as discussed below, certain claims were made against the Director Defendants in the directors’ and officers’ claims process undertaken in the CCAA Proceedings relating to both the 2013 dividend and other matters.

11. On March 17, 2020, this Court granted an order approving a settlement of the Dividend Actions against Sears Holdings Corporation (“**SHC**”), one of the other defendants in the Dividend Actions, which order, like the proposed Approval Order, contained similar *Pierringer* provisions barring non-settling defendants from cross-claiming against the settling party.

Settlement Negotiations with Director Defendants and D&O Insurance

12. As detailed in the Monitor’s Thirty-Eighth Report, the Plaintiffs and the Director Defendants commenced a dialogue regarding potential settlement at and following a non-judicial mediation in February 2020. These discussions continued at a judicial mediation commencing on June 8, 2020.³
13. In connection with these settlement discussions, the Plaintiffs had to consider the following:
 - (a) the merits and risks of the Dividend Actions generally, and the litigation costs that would be required to be continue the Dividend Actions against the Director Defendants;
 - (b) the ability to recover any judgment from the Director Defendants personally;
 - (c) the amount of available insurance under the applicable director and officer insurance policies, which the Plaintiffs understood had been eroded in connection with prior claims and may be further diminished by other material claims against these same policies that provide coverage to directors and officers of SHC and other affiliates of SHC, particularly in the context of the Chapter 11 proceedings of SHC.⁴

³ Thirty-Eighth Report of the Monitor dated August 14, 2020 (the “**Thirty-Eighth Report**”), Motion Record of the Plaintiffs (the “**Plaintiffs MR**”) Tab 2, at paras. 23-26.

⁴ Thirty-Eighth Report, Plaintiffs MR Tab 2, at paras. 28(a) & 32.

14. Given these factors, there was incentive to the Plaintiffs to negotiate a reasonable settlement of the Dividend Actions as against the Director Defendants. As a result and following lengthy negotiations in the context of a judicial mediation, and consultation with the Sears Canada's committee of creditors, the Plaintiffs and Director Defendants agreed to enter into the Settlement Agreement:⁵
15. The material terms of the Settlement Agreement are as follows⁶:
- (a) Settlement Funds: The Director Defendants will cause the relevant insurers (the “**Insurers**”) to pay to the Plaintiffs the amount of \$50 million in full satisfaction of all Released Claims (as defined and described below).
- (b) Obligations Regarding Production and Assistance: If requested by the Plaintiffs, the Director Defendants shall appear and give sworn evidence as witnesses at the trials of the Dividend Actions against the remaining non-settling defendants. Sears Canada shall pay the legal costs of the Director Defendants' current counsel in connection with the Director Defendants' preparation for testimony at the trials of the Claims in an amount not to exceed \$100,000 in total.
- (c) Releases: The Settlement Agreement provides for releases in favour of (i) the Director Defendants; (ii) the Insurers (other than QBE Insurance Corporation) and (iii) all other Insured Persons solely in regard to claims with respect to Loss arising from one or more Wrongful Acts of that other Insured Person undertaken in that person's capacity as an Insured Person (as those capitalized terms are defined in the primary layer of the Director Defendants' relevant insurance policies) (the “**Released Claims**”).

⁵ Thirty-Eighth Report, Plaintiffs MR Tab 2, at para. 27.

⁶ This summary is provided for general information purposes only. In the case of any inconsistency between this summary and the terms of the Settlement Agreement, the Settlement Agreement shall govern.

(d) Effective Date & Court Approval: the settlement is conditional and shall become effective upon: (i) the Approval Order becoming a final, non-appealable order; (ii) releases in the form attached to the Settlement Agreement being signed; and (iii) receipt of the Settlement Funds by the Monitor.

(e) No Admission of Liability: Payment of the Settlement Funds will not in any manner constitute an admission of liability or wrongdoing on the part of the Director Defendants.

(f) CCAA Plan: Sears Canada agrees to amend its joint plan of compromise and arrangement (the "**Plan**") to provide for full and complete releases in favour of the Director Defendants consistent with those provided in the Settlement Agreement. However, effectiveness of the settlement is not conditional upon the prior implementation of the Plan.

(g) Director Defendant Indemnity Claims: the Director Defendants agree that they will waive any distribution on account of their indemnity claims and release any such indemnity claims filed in the CCAA Proceedings to the extent that those indemnity claims relate to the subject matter of the Dividend Actions.⁷

16. The Monitor considers the terms of the Settlement Agreement to be reasonable and consistent with the terms of settlement agreements typically entered into in proceedings under the CCAA. The Sears Canada creditors committee also supports the proposed settlement.⁸

⁷ Thirty-Eighth Report, Plaintiffs MR Tab 2, para. 36.

⁸ Thirty-Eighth Report, Plaintiffs MR Tab 2, paras. 29 & 37.

The Proposed Order

17. The proposed settlement is conditional on the Court granting the Approval Order substantially in the form of the order included in the Plaintiffs' motion record.
18. The Approval Order would, among other things:
 - (a) approve the Director Settlement Agreement, including for the purposes of the CPA in the case of the Dealer Class Action;
 - (b) approve releases and bar orders for the Released Claims, which releases, and bar orders shall apply to Released Claims asserted by all persons, including those not party to the Settlement Agreement;
 - (c) confirm that the Dividend Actions as against the non-settling defendants are not barred, which Dividend Actions are scheduled to go to trial on September 8, 2020;
 - (d) direct that the Plaintiffs' recovery from the non-settling defendants with which any Director Defendant is judicially determined to be jointly and severally liable shall be limited to only that proportion of damages attributable to the liability of the non-settling defendants; and
 - (e) make certain declarations in respect of the relevant insurance policies of the Director Defendants, which the Insurers have required as a condition of the Settlement Agreement.⁹

⁹ Thirty-Eighth Report, Plaintiffs MR Tab 2, para. 40.

19. In light of Ontario provincial regulations related to the COVID-19 pandemic¹⁰ that could have the effect of suspending the appeal periods for orders granted by the Court at this time, unless otherwise directed by the Court, the proposed order would also confirm that the appeal periods established under applicable legislation and the *Rules* will continue to apply to the proposed Approval Order without suspension.
20. 1291079 Ontario Limited has filed its own motion materials supporting approval of the Settlement Agreement pursuant to the CPA.

Releases and Bar Order

21. The Settlement Agreement provides a comprehensive release in favour of the Director Defendants, Insurers (other than QBE Insurance Corporation) and other Insured Persons in respect of the Released Claims. The proposed Approval Order also includes a bar of the Released Claims, which includes all claims against the Director Defendants contemplated in Sections 5.1(2) and 19(2) of the CCAA.
22. The Plaintiffs submit that these requests are reasonable in the circumstances to provide certainty and finality to the Director Defendants and the Insurers funding the settlement given that:
 - (a) A lengthy and comprehensive claims process was undertaken in the CCAA Proceedings to identify and determine claims against, among others, the current and former directors of Sears Canada;¹¹

¹⁰ See O. Reg. 73/20, s. 2, which provides that “[a]ny provision of any statute, regulation, rule, by-law or order of the Government of Ontario establishing any period of time within which any step must be taken in any proceeding in Ontario, included any intended proceeding, shall, subject to the discretion of the court, tribunal or other decision-maker responsible for the proceeding, be suspended, and the suspension shall be retroactive to Monday, March 16, 2020.”

¹¹ Thirty-Eighth Report, Plaintiffs MR Tab 2, at para. 45.

(b) The applicable bar dates in that claims process are now long past, and there are only two remaining unresolved claims that have been filed against current or former directors of Sears Canada that are unrelated to the subject matter of the Dividend Actions and advance a specified claim in a specified amount, being (i) a single claim by an individual creditor that is in the process of being resolved, and (ii) a claim by an equity holder of Sears Canada for oppression and breaches of duty by the directors and officers of Sears Canada in connection with the commencement of the CCAA Proceedings by Sears Canada;¹²

(c) Those claimants, and all other parties with unresolved claims against the Director Defendants, have received notice of this motion, and the proposed settlement;¹³ and

(d) Following the investigation by the court-appointed Litigation Investigator of any rights or claims that Sears Canada and/or any of its creditors may have against any parties, including the current and former directors of Sears Canada, no claims other than the Litigation Trustee's claim and the Monitor's claim have been pursued by Sears Canada or the Monitor against the Director Defendants or any other directors or officers.¹⁴

PART III - ISSUES, LAW & ARGUMENT

23. The sole issue on this motion is whether the Settlement Agreement should be approved and the Approval Order, including the proposed releases and claims bar, should be granted. For the reasons that follow, the Plaintiffs submit that the answer is "yes".

¹² Thirty-Eighth Report, Plaintiffs MR Tab 2, at para. 47.

¹³ Thirty-Eighth Report, Plaintiffs MR Tab 2, at para. 49.

¹⁴ Thirty-Eighth Report, Plaintiffs MR Tab 2, at para. 50.

This Court has Jurisdiction to Approve the Settlement Agreement

24. CCAA courts have the jurisdiction to approve pre-plan agreements, including settlements.¹⁵ This jurisdiction derives from section 11 of the CCAA, which provides the Court with broad powers to make any order that it considers appropriate, and section 11.02(2) which provides specific authority to vary a stay of proceedings.
25. Courts have repeatedly confirmed their jurisdiction to approve transactions, including settlements, during the course of CCAA proceedings prior to any plan of arrangement coming for a vote of creditors. Indeed, the courts have made clear that such settlements are to be encouraged:

[T]he chances of achieving a successful restructuring proceeding increase where the parties can agree on certain issues. Settlement agreements between the parties in these types of proceedings are very much encouraged where resolutions take place in the boardroom, as opposed to the courtroom. There is every reason to encourage such settlements, with approval and implementation subject to appropriate judicial oversight.¹⁶

26. This jurisdiction has been confirmed during the course of these proceedings, where this Court has approved the Plaintiffs' settlement with SHC in respect of the Dividend Actions on March 17, 2020.

The Settlement Agreement is Fair and Reasonable and Should be Approved

27. As between the Plaintiffs, Sears Canada's stakeholders and the Director Defendants, the settlement is fair and reasonable, and should be approved.
28. In approving a settlement under the CCAA, the Court must be satisfied that:

¹⁵ See e.g. *Calpine Canada Energy Ltd.*, Re, [2007 ABCA 266](#) at para. 23,

¹⁶ *Great Basin Gold Ltd.*, Re, [2012 BCSC 1773](#) at para. 15 [**"Great Basin"**]

- (a) the settlement would be beneficial to the debtor and its stakeholders generally;
- (b) the settlement is fair and reasonable; and
- (c) the settlement is consistent with the purpose and spirit of the CCAA.¹⁷

29. These requirements are satisfied here.

30. First, the benefits to Sears Canada and its stakeholders are substantial. The Settlement Agreement would result in the payment of \$50 million in immediately available funds to the Plaintiffs and reduce the scope of potentially protracted, costly and distracting litigation against the Director Defendants. That these benefits are significant to Sears Canada's stakeholders is evidenced as well by its creditor committee's support for this motion.

31. Second, the Settlement Agreement is fair and reasonable in view of, among other things:

- (a) the merits and risks associated with the Dividend Actions as against the Director Defendants;
- (b) the costs of continuing to pursue such litigation as against the Director Defendants;
- (c) uncertainties around amounts that would be recoverable from the Director Defendants personally,
- (d) the amount of available insurance as funds available under applicable policies continue to erode with the passage of time; and
- (e) as described further below, the completion of a comprehensive claims process and investigation of potential claims by the Litigation Investigator.

¹⁷ [Sino-Forest](#) at para. 49.

32. Third, the proposed settlement is entirely consistent with the principles and purpose of the CCAA in that:
- (a) it resolves the Dividend Actions against the Director Defendants consensually—rather than through protracted litigation;
 - (b) in the case of the Monitor’s claim, provides an opportunity for recovery on a claim advanced pursuant to Section 36.1 of the CCAA;¹⁸ and
 - (c) for the reasons outlined above, not only provides clear benefits (and substantial Settlement Funds) to Sears Canada’s stakeholders, but is fair and reasonable to all affected parties.
33. It should be noted that a non-party to a settlement can only make submissions in respect of that settlement insofar as the non-party is directly affected by it. It is otherwise a stranger to the settlement.¹⁹

***Pierringer* Order Should Be Approved**

(a) Public Policy Favours *Pierringer* Settlement Agreements

34. The proposed order to enact the settlement is a type of *Pierringer* arrangement, a familiar and common way for plaintiffs in multi-party litigation to settle with some but not all defendants in multi-party litigation. Under such arrangements, the settling defendant is released from the action on specific terms, while the remaining (non-settling) defendants continue in the action. Thereafter, the plaintiff may only seek recovery from the non-settling defendants on a several liability basis (although the non-settling defendants

¹⁸ See [Great Basin](#), at para. 15.

¹⁹ [Gariepy v Shell Oil Co.](#), [2002 CanLII 12911](#) at paras 37-41 (On. S.C.J.)

remain subject to joint liability amongst themselves). The ultimate effect of this is to let the settling defendants out of the action, and the non-settling defendants are not responsible for any loss that may be solely attributable to the liability of the settling defendants, being in this case the Director Defendants.²⁰

35. *Pierringer* agreements facilitate settlements by ensuring that where one defendant wants to settle, but others do not, the entire action need not proceed to trial. There is an overriding public interest in promoting and favouring settlements. They promote the interests of the parties, reduce the strain on the judicial system, and contribute to the effective administration of justice.²¹

36. In *Sable*, the Supreme Court of Canada confirmed that under a *Pierringer* agreement, the non-settling defendants can only be held liable for their share of the damages, and they are severally, not jointly, liable with the settling defendant(s); though—as mentioned—they remain jointly liable amongst each other.²²

37. The Settlement Agreement here meets the public policy objectives of partial settlement in complex multi-party proceedings. If this Court approves the claims bar orders, the settlement agreement will resolve disputes amongst the Plaintiffs and a substantial portion of the defendants, and reduce the scope of the remaining claims in the Dividend Actions.

(b) The Settlement Agreement and Order are Fair to the Non-Settling Defendants

38. *Pierringer* agreements must ensure that non-settling defendants are not prejudiced by partial settlement of litigation. Courts are naturally concerned that the fairness of the ongoing litigation process be preserved. Orders enacting *Pierringer* agreements facilitate

²⁰ *Gendron v Doug C Thompson Ltd (Thompson Fuels)*, [2019 ONCA 293](#) at para. 97.

²¹ *Sable Offshore Inc v Ameron International Corp*, [2013 SCC 37](#) at para 11 [“**Sable**”].

²² [Sable](#), at para 26.

a settlement between a plaintiff and defendant while maintaining a level playing field for the remaining non-settling defendants.²³

39. The Settlement Agreement and the Approval Order sought here are fair to the non-settling defendants, who are not prejudiced by them. The terms of the Settlement Agreement have been fully disclosed. The non-settling defendants retain their existing litigation rights. While the Approval Order would preclude them from continuing or commencing claims against the Director Defendants, among others, in reality there is no prejudice to them, because the Settlement Agreement and Approval Order provide that the Plaintiffs' recoveries from the non-settling defendants will be limited to only those losses attributable to the non-settling defendants.
40. In light of the Settlement Agreement, any cross-claim or other claim against the Director Defendants with respect to the Dividend Actions would have no legal basis. There is no prejudice therefore to the non-settling defendants if such claims, which to date have not been advanced, were to be barred by this Court as a condition of approving the Settlement Agreement. As the Court of Appeal noted in *Endean*, a non-settling defendant's need to cross-claim against a settling defendant (because it wants to recover the settling defendant's share of fault from it as indemnity) disappears under a *Pierringer* order. That is because the order "requires the plaintiff to effectively put the non-settling defendant in the same economic position as if it paid the plaintiff in full and recovered any indemnity from the settling defendant," by requiring the plaintiff to reduce what it can recover from the non-settling defendant.²⁴ In that scenario as in this one, the non-settling defendants

²³ *Endean v. St Joseph's General Hospital*, [2019 ONCA 181](#) at para. 52 [*"Endean"*].

²⁴ *Endean*, at para. 53.

are accordingly neither better nor worse off because of the Settlement Agreement and order enacting it.²⁵

41. Put otherwise, the effect of a *Pierringer* order is to make a non-settling defendant's cross-claim against a settling defendant unnecessary, because the recovery that such a cross-claim seeks to protect against is eliminated by the order itself. In this way, *Pierringer* orders ensure that non-settling defendants suffer no prejudice from the settlement, or from the release and bar order that extinguishes their claims against the settling defendant. The Court clearly has the jurisdiction to dismiss cross-claims and other claims to implement a *Pierringer* agreement on terms that minimize prejudice to non-settling defendants.²⁶
42. Under the Approval Order, the Plaintiffs' claims are limited to only those losses attributable to the non-settling defendants. Claims against the Director Defendants or other parties in respect of Released Claims (as defined in the Settlement Agreement) for contribution and indemnity thus disclose no reasonable cause of action and cannot logically survive approval of the Settlement Agreement and granting of the Approval Order sought.²⁷

Releases of other Parties in respect of Released Claims are Connected to the Settlement, Will Benefit Creditors Generally and are Consistent with Public Policy

43. In addition to releasing the Director Defendants', the proposed Approval Order contains a release of Released Claims (as defined in the Settlement Agreement) in favour of all of the Insurers (which for certainty, does not include QBE Insurance Corporation) and all other Insured Persons, as described above.

²⁵ *Taylor v Canada (Attorney General)*, [2009 ONCA 487](#) at para 33 [**"Taylor"**].

²⁶ *Allianz v Canada (Attorney General)*, [2017 ONSC 4484](#) at para 2 [**"Allianz"**].

²⁷ See [Taylor](#), at para. 33; and [Allianz](#), at paras. 16-18.

44. CCAA courts have approved settlements containing similar third-party releases.²⁸ In *Nortel*, Justice Morawetz approved third-party releases in the context of a settlement on the basis that the releases (a) were necessary and connected to a resolution of claims involving the debtor; (b) would benefit creditors generally, and (c) are not overly broad or offensive to public policy.²⁹ The same principles apply here.
45. First, the releases are reasonably connected to the settlement because they release Insurers who are the actual payors of \$50 million of settlement funds and who, in consideration for such amount, reasonably require that further claims will not be made against the insurance policies in connection with the subject matter of the Dividend Actions.
46. Second, the releases benefit creditors generally because they avoid the costs, delay and uncertainty associated with continuing to pursue the Dividend Actions as against the Director Defendants, and further collect substantial Settlement Funds from insurance policies whose coverage the Plaintiffs understand continues to be eroded.
47. Third, the third party releases are not overly broad or offensive to public policy because, as noted above:
- (a) a comprehensive claims process has been run; and
 - (b) following an investigation by the court-appointed Litigation Investigator of all rights or claims that Sears Canada and/or any of its creditors may have against, among others, the current and former directors of Sears Canada, the only claims that the Monitor or

²⁸ See *Nortel Networks Corporation, Re*, [2018 ONSC 6257](#) at para. 30 [“**Nortel**”]; *Sino-Forest* at paras. 46 & 66; and *The Cash Store Financial Services Inc. (Re)*, [2015 ONSC 7538](#) at paras. 20-21.

²⁹ *Nortel* at para. 31.

Litigation Trustee have sought to pursue are those that are the subject of the Settlement Agreement; and

(c) the releases are reasonably connected to the settlement and are required by the Director Defendants and the Insurers to provide them with the protections bargained for under the Settlement Agreement.

Sections 5.1(2) and 19(2) of the CCAA Do Not Prohibit the Release of the Released Claims

48. Finally, nothing in the CCAA prohibits the Court from approving a release of the Released Claims, even though they may encompass claims under sections under 5.1(2) and 19(2) of the CCAA.

49. This is clear from the wording of each of 5.1(2) and 19(2). Each applies their prohibition only in regards to a “compromise or arrangement made in respect of a debtor company”, and neither the Settlement Agreement nor the Approval Order constitute such a compromise or arrangement as contemplated under the CCAA. Debtors are entitled in CCAA proceeding to enter into commercial settlements that include releases of such claims as part of that settlement, subject to court approval in appropriate circumstances.³⁰

PART IV - ORDER REQUESTED

50. For all of the reasons above, the Plaintiffs submit that the Court should approve the Settlement Agreement and grant the Approval Order substantially in the form included as **Schedule “B”** of the Notice of Motion (Tab 1B of the Plaintiffs MR).

³⁰ *ATB Financial v Metcalfe and Mansfield Alternative Investments II Corp*, [2008 ONCA 587](#), at para 111. See also [Sino-Forest](#), at para 48.

51. The Settlement Agreement is fair, reasonable and consistent with the objectives of the CCAA and principles supported by Canadian courts promoting settlement and the efficient pursuit of litigation.

52. The releases and bar orders contemplated by the Approval Order are rationally connected to the settlement, will benefit Sears Canada's creditors generally and are consistent both with public policy and the provisions of the CCAA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of August, 2020.

FOR 

LAX O'SULLIVAN LISUS GOTTLIEB LLP

Lawyers for Sears Canada Inc., by its Court-Appointed Litigation Trustee, J. Douglas Cunningham, Q.C.



NORTON ROSE FULBRIGHT CANADA LLP

Lawyers for FTI Consulting Canada Inc., in its capacity as Court-Appointed Monitor

FOR 

BLAKE, CASSELS & GRAYDON LLP

Lawyers for Morneau Shepell Ltd., in its capacity as administrator of the Sears Canada Inc. Registered Retirement Plan

FOR 

SOTOS LLP

Lawyers for 1291079 Ontario Limited

**SCHEDULE “A”
LIST OF AUTHORITIES**

No.	Authority
1.	<u><i>The Cash Store Financial Services Inc. (Re)</i>, 2015 ONSC 7538</u>
2.	<u><i>Allianz v Canada (Attorney General)</i>, 2017 ONSC 4484</u>
3.	<u><i>ATB Financial v Metcalfe and Mansfield Alternative Investments II Corp</i>, 2008 ONCA 587</u>
4.	<u><i>Calpine Canada Energy Ltd., Re</i>, 2007 ABCA 266</u>
5.	<u><i>Endean v. St Joseph’s General Hospital</i>, 2019 ONCA 181</u>
6.	<u><i>Gendron v Doug C Thompson Ltd (Thompson Fuels)</i>, 2019 ONCA 293</u>
7.	<u><i>Gariepy v Shell Oil Co.</i>, 2002 CanLII 12911</u>
8.	<u><i>Great Basin Gold Ltd., Re</i>, 2012 BCSC 1773</u>
9.	<u><i>Labourers Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.</i>, 2013 ONSC 1078</u> , leave to appeal ref’d, <u>2013 ONCA 456</u> , leave to appeal ref’d, <u>SCCA No. 395</u>
10.	<u><i>Nortel Networks Corporation, Re</i>, 2018 ONSC 6257</u>
12.	<u><i>Sable Offshore Inc v Ameron International Corp</i>, 2013 SCC 37</u>
13.	<u><i>Taylor v Canada (Attorney General)</i>, 2009 ONCA 487</u>

**SCHEDULE “B”
RELEVANT STATUTES**

**REOPENING ONTARIO (A FLEXIBLE RESPONSE TO COVID-19) ACT, 2020, S.O. 2020, C. 17
O. Reg. 73/20: LIMITATION PERIODS**

Period of Time, steps in a proceeding

2. Any provision of any statute, regulation, rule, by-law or order of the Government of Ontario establishing any period of time within which any step must be taken in any proceeding in Ontario, including any intended proceeding, shall, subject to the discretion of the court, tribunal or other decision-maker responsible for the proceeding, be suspended, and the suspension shall be retroactive to Monday, March 16, 2020.

O. Reg. 73/20, s. 2; O. Reg. 258/20, s. 2.

COMPANIES’ CREDITORS ARRANGEMENT ACT (R.S.C., 1985, C. C-36)

COMPROMISES AND ARRANGEMENTS

Claims against directors – compromise – Exception

- 5.1 (2) A provision for the compromise of claims against directors may not include claims that
- (a) relate to contractual rights of one or more creditors; or
 - (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

1997, c. 12, s. 122.

JURISDICTION OF COURTS

General power of court

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11 1992, c. 27, s. 90 1996, c. 6, s. 167 1997, c. 12, s. 124 2005, c. 47, s. 128

Stays, etc. — other than initial application

- 11.02 (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

CLAIMS

Claims that may be dealt with by a compromise or arrangement – Exception

- 19 (2)** A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly **provides** for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:
- (a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;
 - (b) any award of damages by a court in civil proceedings in respect of
 - (i) bodily harm intentionally inflicted, or sexual assault, or
 - (ii) wrongful death resulting from an act referred to in subparagraph (i);
 - (c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;
 - (d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or
 - (e) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d).

R.S., 1985, c. C-36, s. 19; 1996, c. 6, s. 167; 2005, c. 47, s. 131; 2007, c. 36, s. 69.

PREFERENCES AND TRANSFERS AT UNDERVALUE

Application of sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act

- 36.1 (1)** Sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

Interpretation

- (2)** For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act
- (a) to “date of the bankruptcy” is to be read as a reference to “day on which proceedings commence under this Act”;
 - (b) to “trustee” is to be read as a reference to “monitor”; and
 - (c) to “bankrupt”, “insolvent person” or “debtor” is to be read as a reference to “debtor company”.

2005, c. 47, s. 131; 2007, c. 36, s. 78.

FTI CONSULTING CANADA INC.
Plaintiff
SEARS CANADA INC., by its Court-appointed Litigation Trustee,
J. Douglas Cunningham, Q.C.
Plaintiff
MORNEAU SHEPELL LTD.
Plaintiff
1291079 ONTARIO LIMITED
Plaintiff

ESL INVESTMENTS INC. et al. Court File No. CV-18-00611219-00CL
Defendants
-and- ESL INVESTMENTS INC. et al. Court File No. CV-18-00611214-00CL
Defendants
-and- ESL INVESTMENTS INC. et al. Court File No. CV-18-00611217-00CL
Defendants
-and- ESL INVESTMENTS INC. et al. Court File No. CV-19-00617792-00CL
Defendants

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, 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., et al

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding Commenced at Toronto

JOINT FACTUM OF THE PLAINTIFFS
(Motion re: Approval of Director Settlement
returnable August 25, 2020)

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