

Court File No. CV-17-11846-00CL
Court File No. CV-18-611214-00CL
Court File No. CV-18-611217-00CL
Court File No. CV-18-611219-00CL
Court File No. CV-19-617792-00CL



**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE
JUSTICE HAINEY

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TUESDAY, THE 25TH
DAY OF AUGUST, 2020

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 QUEBEC 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.

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, and DONALD ROSS,
and SEARS HOLDINGS CORP.

Defendants

MORNEAU SHEPELL LTD. in its capacity as administrator of the
Sears Canada Inc. Registered Retirement Pension 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 and DOUGLAS CAMPBELL
and SEARS HOLDINGS CORPORATION
Defendants

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

1291079 ONTARIO LIMITED
Plaintiff

- and -

SEARS CANADA INC., SEARS HOLDING 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

**ORDER
(APPROVAL ORDER)**

THIS MOTION made by Sears Canada Inc. ("**Sears**") 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**"), FTI Consulting Canada Inc. in its capacity as Court-appointed monitor (the "**Monitor**"), Morneau Shepell Ltd., in its capacity as administrator of the Sears Canada Inc. Registered Retirement Plan (the "**Pension Administrator**") and 1291079 Ontario Limited ("**129**" and collectively with the Monitor, the Litigation Trustee and the Pension Administrator, the "**Plaintiffs**") for an order approving the settlement and release agreement between the Plaintiffs and Ephraim J. Bird, Douglas Campbell, William Crowley, William Harker, R. Raja Khanna, James McBurney, Donald Ross, and Deborah E. Rosati (the "**Former Directors**") and for an order releasing claims against the Former Directors as more particularly defined below was heard this day via videoconference.

ON READING the Motion Record of the Plaintiffs, the 38th Report of the Monitor dated August 14, 2020, and the Supplementary Motion Record of 129, and on hearing the submissions of counsel for the Plaintiffs and the Defendants, no one appearing for any other party although duly served and no one appearing nor any representations having been made on behalf of any class member of the 129 Settlement Class (as hereinafter defined) although notice of this hearing having been duly given to class members:

Sufficiency of Service and Definitions

1. **THIS COURT ORDERS** that the time for service and manner of service of the Notice of Motion and Motion Record of the Plaintiffs, the 38th Report of the Monitor dated August 14, 2020, and the Supplementary Motion Record of 129 on any Person are, respectively, hereby abridged and validated, and any further service thereof is hereby dispensed with so that this Motion was properly returnable August 25, 2020 in all proceedings set out in the styles of cause hereof.
2. **THIS COURT ORDERS** that capitalized terms not otherwise defined in this Order shall have the meaning attributed to those terms in the settlement and release agreement between the Plaintiffs and the Former Directors dated as of July 27, 2020, (the "**Settlement Agreement**").
3. **THIS COURT FINDS** that all applicable parties have adhered to, and acted in accordance with, the Notice Order and that the procedures provided for in the Notice Order have provided good and sufficient notice of the hearing of this Motion, and that all persons who failed to appear before the court today shall be and are hereby barred from objecting to the Settlement Agreement.

Approval of Settlement Agreement

4. **THIS COURT ORDERS** that the Settlement Agreement is hereby approved, and the parties thereto are hereby bound by this Order and by those terms of the Settlement Agreement that are conditional upon the granting of this Order and are authorized and directed to comply with their obligations thereunder.

Release

5. **THIS COURT ORDERS** that in accordance with the terms and conditions of the Settlement Agreement and without narrowing the scope of the Released Claims, the following Claims, are, as of the Effective Date, irrevocably, absolutely, and unconditionally fully, finally, and forever released, remised and discharged:

- a) D&O Claims;
- b) Other Insured Claims;
- c) Insurance Claims;
- d) all Claims of the Plaintiffs against the Former Directors in the Actions;
- e) all Claims of 129 and any member of the Class against the Former Directors;
- f) all Claims of the Plan against the Former Directors;
- g) all claims of the beneficiaries of the Plan ("**Plan Beneficiaries**") against the Former Directors related to the subject matter of the Actions;
- h) all Claims, including subrogated Claims, of the Pension Benefits Guarantee Fund (Ontario) against the Former Directors; and
- i) all claims over, cross claims, counter claims or related claims that could have been asserted against the Former Directors in (i) the Actions or (ii) any other action in any way related to the subject matter of the Actions and/or D&O Claims;

and for greater certainty, the Plaintiffs may advance the Actions against any Non-Settling Defendant.

6. **THIS COURT ORDERS** that the releases set out herein and in the Settlement Agreement shall apply to Claims contemplated by s. 5.1(2) and 19(2) of the CCAA, but shall not apply to:

- a) the obligations of any Person in respect of this Order, and the Settlement Agreement, including the obligation of the Insurers to pay the Settlement Funds;
- b) the rights of the Former Directors against the Insurers under the Insurance Policies except as affected by the declarations set out in paragraph 17 of this Order; and
- c) the liability of the defendants to the Actions other than the Former Directors for any Claims other than Other Insured Claims.

7. **THIS COURT ORDERS** that this Order, including the Settlement Agreement, is binding upon each class member in Court File No. CV-19-00617792-00CL (the "**129 Settlement Class**")

including those Persons who are minors or mentally incapable and the requirements of Rules 7.04(1) and 7.08(4) of the *Rules of Civil Procedure* are dispensed with in respect of the action in Court File No. CV-19-00617792-00CL.

8. **THIS COURT ORDERS** that the Settlement Agreement is fair, reasonable and in the best interest of the 129 Settlement Class.

9. **THIS COURT ORDERS** that the Settlement Agreement is hereby approved pursuant to s. 29 of the *Class Proceedings Act, 1992* and shall be implemented and enforced in accordance with its terms.

Bar Orders

10. **THIS COURT ORDERS** that no person not party to the Settlement Agreement (the "**Non-Parties**") shall now or hereafter institute, continue, maintain or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any other person, any action, suit, cause of action, claim or demand against any of the Released Parties (or any other person who may claim contribution or indemnity from any of the Released Parties) in respect of the Released Claims or any Claims related to the subject matter of the Actions. All claims for contribution or indemnity or other claims over (whether asserted or unasserted, tolled or not tolled, and relating to or arising from any of the Actions) which were or could have been brought in any of the Actions or in a separate proceeding by any Non-Party against the Released Parties are barred, extinguished, prohibited and enjoined by this Order. For greater certainty, the Plaintiffs may advance the Actions against any of the Non-Settling Defendants.

11. **THIS COURT ORDERS** that all Persons (regardless of whether or not such Persons are creditors or claimants), including the 129 Settlement Class, Sears, the Litigation Trustee, the Monitor, the Pension Administrator, the Pension Benefits Guarantee Fund (Ontario), the Plan Beneficiaries, the Former Directors, the Released Parties, and all beneficiaries of any of the foregoing, shall be permanently and forever barred, estopped, stayed and enjoined, as of the Effective Date, from:

- a) commencing, conducting, pursuing, instituting, intervening in, asserting, advancing, or continuing in any manner, directly or indirectly, any action or other related proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) which constitutes a Released Claim;

- b) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree, damages, or order in respect of a Released Claim, other than the enforcement of the Settlement Agreement;
- c) subject to paragraphs 5, 6, 10, 11 b) and 12, making, asserting, pursuing, instituting, intervening in, advancing, commencing, conducting or continuing in any manner, directly or indirectly, any Released Claim, including for contribution or indemnity or other relief, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes or asserts, or might reasonably be expected to make or assert, such a Claim, in any manner or forum, against one or more of the Released Parties;
- d) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien or encumbrance of any kind against the Released Parties or their property in respect of a Released Claim; or
- e) taking any actions to interfere with the implementation or consummation of the Settlement Agreement.

12. **THIS COURT ORDERS** that the bar order and injunctions set out herein and in the Settlement Agreement shall apply to Claims contemplated by s. 5.1(2) and 19(2) of the CCAA, but shall not apply to

- (a) the obligations of any Person in respect of this Order, and the Settlement Agreement; and
- (b) the rights of the Former Directors against:
 - (i) the Insurers to seek payment of the Settlement Funds and Defense Expenses; and
 - (ii) QBE in relation to the coverage proceeding involving the QBE Policy.

13. **THIS COURT ORDERS** that the Plaintiffs' recovery from the Non-Settling Defendants and with which any Former Director 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, as finally determined in the Actions.

14. **THIS COURT ORDERS** that the CCAA Plan and Sanction Order shall be supplementary to, and shall not derogate from, the releases and injunctions set out in this Order.

15. **THIS COURT ORDERS** that, notwithstanding:

- a) the pendency of these proceedings;
- b) any applications for a bankruptcy order now or hereafter issued pursuant to the Bankruptcy and Insolvency Act (Canada) in respect of any of the CCAA Parties and any bankruptcy order issued pursuant to any such applications; and
- c) any assignment in bankruptcy made in respect of any of the CCAA Parties,

the settlement approved pursuant to this Order and the releases and bar orders shall be binding on any trustee in bankruptcy that may be appointed in respect of any of the CCAA Parties and shall not be void or voidable by creditors of any of the Applicants in the CCAA Proceedings, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the Bankruptcy and Insolvency Act (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

16. **THIS COURT ORDERS** that releases, bar orders and injunctions set out herein shall be conditional upon the completion of the settlement set out in the Settlement Agreement.

Insurance Declarations

17. **THE COURT HEREBY DECLARES** that Payment of the Settlement Funds:

- a) is made by the Insurers in good faith;
- b) is fair and reasonable under the circumstances;
- c) does not violate the interests of any person who might have a claim against any person or entity potentially covered under the Insurance Policies;
- d) constitutes covered Loss (as defined in the Insurance Policies) regardless of any future determination of any court with respect to the conduct alleged in the Actions;

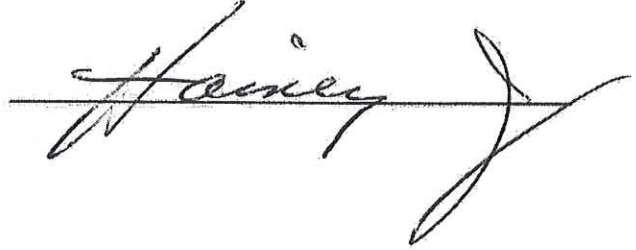
- e) reduces the Limits of Liability (as defined in the Insurance Policies) under the Insurance Policies;
- f) is without prejudice to any coverage positions or reservations of rights taken by the Insurers in relation to any other matter advised to the Insurers or any other Claim (as defined in the Insurance Policies) made or yet to be made against the Insured Persons, provided that neither coverage nor payment in respect of the settlement of the Actions, will be voided or impacted by any such coverage position or reservation of rights; and
- g) subject to payment in full of the Settlement Funds and the Defense Expenses of the Former Directors, fully and finally releases the Insurers from any further obligation, and from any and all claims against them under or in relation to the Insurance Policies, in respect of the matters set out in the Actions with respect to the Former Directors or any Other Insured.

Recognition and Enforcement

18. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body (collectively, "**Bodies**") having jurisdiction in Canada or in the United States or in any other jurisdiction to give effect to this order and to assist the Plaintiffs, the Litigation Trustee (as an officer of this Court) and the Monitor (as an Officer of this Court) and their respective agents in carrying out the terms of this order. All Bodies are hereby respectfully requested to make such orders and to provide such assistance to the Plaintiffs, the Litigation Trustee (as an officer of this Court) and the Monitor (as an officer of this Court) as may be necessary or desirable to give effect to this order or to assist the Plaintiffs, the Litigation Trustee (as an officer of this Court) and the Monitor (as an officer of this Court) and their respective agents in carrying out the terms of this order.

Appeals

19. **THIS COURT ORDERS** that the provisions of the *Companies' Creditors Arrangement Act* (Canada) and the *Rules of Civil Procedure* (Ontario) establishing the period within which any appeal or motion for leave to appeal this Order must be commenced shall apply without suspension to this Order, notwithstanding any provision of the *Emergency Management and Civil Protection Act* and any regulations thereunder including Ontario Regulation 73/20.



ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

AUG 26 2020

PER / PAR: *RW*

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.
 Defendants
 ESL INVESTMENTS INC. et al.
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-and-
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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., et al

ONTARIO
 SUPERIOR COURT OF JUSTICE
 COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

ORDER
 (Approval Order)

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