

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

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., INITIUM COMMERCE LABS 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.

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

**MOTION RECORD
(Re Appointment of Litigation Trustee, Lifting of Stay, and Other Relief)
(Returnable December 3, 2018)**

November 21, 2018

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Litigation Investigator

TO: **THE SERVICE LIST**

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TAB 1

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

**ONTARIO
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**NOTICE OF MOTION
(Re Appointment of Litigation Trustee, Lifting of Stay, and Other Relief)
(Returnable December 3, 2018)**

The Litigation Investigator (as defined below) will make a Motion to a Judge on December 3, 2018, at 10:00 a.m., or as soon after that time as the Motion can be heard at the court house, 330 University Avenue, Toronto, Ontario, M5G 1E6.

PROPOSED METHOD OF HEARING: The Motion is to be heard

orally.

THE MOTION IS FOR:

1. An Order in the draft form attached to this Notice of Motion as Schedule “A”; and
2. Such further and other Relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:**The CCAA Proceedings**

1. On June 22, 2017, the Applicants made an application pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the “CCAA”), and this Court issued an order commencing these proceedings (the “**Initial Order**”).
2. The Initial Order stayed all proceedings against the Applicants, and their representatives and employees acting in those capacities, until July 22, 2017 (the “**Stay**”). The stay was subsequently extended many times by this Court. The most recent extension to December 18, 2018, was granted by order of this Court dated July 24, 2018.

Appointment and Mandate of the Litigation Investigator

3. On March 2, 2018, this Court issued an order (as amended, the “**Litigation Investigator Order**”) appointing Lax O’Sullivan Lissus Gottlieb LLP as Litigation Investigator for the benefit of the Applicants and their creditors in this proceeding. The Court amended the Litigation Investigator Order on April 26, 2018.
4. The Litigation Investigator Order directed the Litigation Investigator to investigate, consider, and report on any rights or claims that the Applicants and/or their creditors may have against any other parties, including their current and former directors, officers, shareholders and advisors (the “**LI Mandate**”).

5. The Litigation Investigator Order also provided for the establishment of a committee of the Applicants' creditors (the "**Creditors' Committee**") to consult with and provide input to the Litigation Investigator in connection with the LI Mandate. The Litigation Investigator Order required the Litigation Investigator to report to the Creditors' Committee regarding its investigation and analysis under the LI Mandate.

6. The Litigation Investigator carried out the LI Mandate between April and September 2018. The steps taken by the Litigation Investigator are set out in detail in the First Report of the Litigation Investigator, dated November 5, 2018 (the "**LI Report**"), and the Supplement to the LI Report, dated November 16, 2018 (the "**LI Report Supplement**").

7. The LI Mandate has now concluded. Consequently, the Litigation Investigator's role in the proceeding is complete, and the appointment of the Litigation Investigator should be terminated, effective immediately.

Claims to be Brought by or on Behalf of the Applicants and their Creditors

8. Over the course of the LI Mandate, the Litigation Investigator identified a number of claims that could be brought by the Applicants and others (the "**Claims**").

9. The Creditors' Committee has reviewed and approved the Litigation Investigator's recommendations regarding the prosecution of the Claims.

10. The Litigation Investigator Order permits the Litigation Investigator to seek an order from this Court authorizing it to pursue any claims identified while carrying out the LI Mandate.

11. The Litigation Investigator recommends that separate Claims be brought and/or continued by four sets of plaintiffs (the "**Plaintiffs**"), specifically:

- (a) claims by a court-appointed trustee (the “**Litigation Trustee**”) on behalf of the Applicants, as described more fully in the LI Report and the LI Report Supplement (the “**Litigation Trustee Claims**”);
- (b) a claim by FTI Consulting Canada Inc. (the “**Monitor**”), the Monitor appointed by this Court under the CCAA (the “**Monitor Claim**”);
- (c) claims by certain creditors of the Applicants on behalf of members of the Sears Canada pension plan (“**Pension Claims**”); and
- (d) a class action claim by a number of former franchisees of Sears Canada (the “**Class Action Claim**”).

Basis for the Claims

12. The Claims are based on the payment of a \$509 million dividend by Sears Canada in late 2013 (the “**2013 Dividend**”).

13. The 2013 Dividend was not in the best interests of Sears Canada. Instead it was carried out at the behest of, and for the benefit of, Sears Canada’s largest shareholders: ESL Investments Inc., its affiliates, and Edward S. Lampert (collectively, the “**Shareholders**”), and Sears Holdings Corp. (“**Holdings**”).

14. Sears Canada’s Board of Directors (the “**Sears Board**”) failed to conduct even a minimum degree of due diligence before authorizing the 2013 Dividend, despite the fact that Sears Canada was facing obvious and severe financial difficulties at the time. The 2013 Dividend crippled Sears Canada’s ability to remain in business as a going concern.

15. At the relevant time, the members of the Sears Board were William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, Deborah E. Rosati, R. Raja Khanna, James McBurney and Douglas Campbell (collectively, the “**Former Directors**”).

16. The facts surrounding the 2013 Dividend are set out in further depth at pages 8-12 of the Twenty-Seventh Report of the Monitor, dated November 5, 2018.

Appointment of Litigation Trustee

17. The Applicants have claims against the Shareholders and the Former Directors. Prosecution of these claims is in the best interests of the Applicants. Any funds recovered through these claims will be returned to the Applicants and their creditors, excluding any creditors who opt out of participation in the litigation.

18. A Litigation Trustee should be appointed as an officer of the Court to prosecute the Litigation Trustee Claims. The appointment of an experienced trustee would allow these claims to be prosecuted in as cost-effective and expedient a manner as possible.

19. The Honourable J. Douglas Cunningham, Q.C. should be appointed as Litigation Trustee. Mr. Cunningham is highly experienced and eminently qualified to serve in this role. The Creditors’ Committee and the Monitor support this recommendation.

20. The Litigation Trustee Claims include claims against the Former Directors for breach of fiduciary duty, breach of the duty of care, oppression, and conspiracy.

21. The Applicants also have claims against the Shareholders for oppression, conspiracy, unjust enrichment, knowing receipt, and knowing assistance.

22. The Applicants have claims against Holdings, but due to that company's recent insolvency filing in the United States, will not be bringing any claims against Holdings at this time.

23. In order for the Litigation Trustee Claims to proceed, the Stay must be lifted as against the Former Directors.

24. In addition, in order to effectively prosecute the Litigation Trustee Claims, the Litigation Trustee should be invested with all of the powers necessary to do so, including:

- (a) to engage, give instructions to, and pay counsel and other agents and professionals;
- (b) to execute documents of all kinds on behalf of the Applicants for any purpose pursuant to the trusteeship;
- (c) to consider and waive privilege over any communications of the Applicants; and
- (d) to pursue the Litigation Trustee Claims and any appeals or applications for judicial review relating thereto.

25. The reasonable fees and disbursements of the Litigation Trustee and his counsel (the "**Litigation Trustee Parties**") should be paid by the estates of the Applicants, including but not limited to Sears Canada.

26. The Litigation Trustee and his agents should be indemnified from any losses that they might suffer in connection with their role as such by the Applicants, including but not limited to Sears Canada, except for any losses resulting from their own gross negligence or willful misconduct.

27. Permitting the Litigation Trustee to pursue the Claims will usefully further efforts to avoid the social and economic losses resulting from liquidation of the Applicants.

Other Claims

28. The Monitor has a claim against certain Former Directors and the Shareholders under section 36.1 of the *CCAA*, which incorporates the cause of action for transfer at undervalue set out by section 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

29. Two of the Applicants' creditors, Morneau Shepell Ltd. (the administrator of Sears Canada's pension plan) and the Superintendent of the Financial Services Commission of Ontario (collectively, the "**Pension Claim Plaintiffs**") have claims against the Former Directors and the Shareholders for breach of fiduciary duty, conspiracy, oppression, knowing assistance, and knowing receipt.

30. Through a proposed representative plaintiff, a group of approximately 260 former franchisees of Sears Canada (the "**Class Action Plaintiffs**") commenced a proposed class action claim against the Former Directors and the Shareholders for oppression under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 on October 21, 2015.

31. The Class Action Claim has not been certified as a class action. The Litigation Investigator recommends that the Class Action Claim be transferred to this Court so that if that claim is certified, common issues in the Class Action Claim and the other Claims can be tried together.

Procedure for Hearing a Common Issues Trial

32. The Claims are almost entirely based on a common set of facts. A single discovery and fact-finding process should be implemented for the prosecution of the claims to eliminate needless duplication of proceedings and wasted costs.

33. As part of the Mandate, the Litigation Investigator also proposed a procedure for hearing a common issues trial for all of the Claims to avoid a multiplicity of proceedings concerning common issues (the “**Common Issues Trial Procedure**”).

34. The Creditors’ Committee, which includes counsel for the Pension Claims and the Class Action Claim, and the Monitor have reviewed and approved of the Common Issues Trial Procedure.

35. The Common Issues Trial Procedure is set out in detail in Schedule “A” to the proposed Order attached hereto.

36. In particular, the following procedures, among others, should be adopted:

- (a) the Claims will be commenced (or, in the case of the Class Action Claim, will be transferred to the Commercial List of the Superior Court of Justice) as four separate actions, each commenced by a separate Statement of Claim, and to be defended by a separate Statement of Defence;
- (b) each of the Claims will be jointly case managed by this Court;
- (c) the Plaintiffs will each deliver a separate affidavit of documents, but document production will be made via a single document database;

- (d) the Plaintiffs in all of the Claims will co-ordinate examinations for discovery, and the majority of questioning at each examination will be conducted by a single designated Plaintiff;
- (e) a common issues trial will be held for all of the Claims; and
- (f) any issues unique to any particular Claim will be heard in subsequent separate hearings.

37. Approval and implementation of the Common Issues Trial Procedure will allow the Claims to be brought in the most cost-effective and expeditious manner possible, while protecting the rights of all parties to the Claims.

Statutes and Regulations

38. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-44, sections 11, 11.02, 11.03, 19, 23, 36.

39. *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 138.

40. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rules 1.04, 3.02, 6.01, 16.08, 37.

41. Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

43. The Twenty-Seventh Report of the Monitor, dated November 5, 2018;

44. The First Report of the Litigation Investigator, dated November 5, 2018; and

45. Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

November 21, 2018

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Litigation Investigator

TO: **THE SERVICE LIST**

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE)
)
MR. JUSTICE HAINEY) DAY OF DECEMBER, 2018

IN THE MATTER OF THE *COMPANIES' CREDITORS
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(each, an “**Applicant**”, and collectively, the “**Applicants**”)

**ORDER
(APPOINTMENT OF LITIGATION TRUSTEE, LIFTING OF STAY, AND OTHER
RELIEF)**

THIS MOTION, made by the Litigation Investigator, for an Order pursuant to section 11 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36,, as amended (the “**CCAA**”) and Rule 6.01 of the *Rules of Civil Procedure*, RRO 1990, Reg. 194, as amended (the “**Rules**”) for an order, among other things, appointing a Litigation Trustee to pursue certain claims on behalf of the Applicants and/or any creditors of the Applicants and providing for the process by which a

common issues trial will be heard, was heard this day at 330 University Avenue, 8th Floor, Toronto, Ontario.

ON READING the Monitor's 27th Report to the Court dated November 5, 2018 and the Litigation Investigator's First Report to the Court dated November 5, 2018 (the "**First Report**"), and on reading and hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for the Litigation Investigator, and such other counsel for various creditors and stakeholders as were present, no one else appearing although duly served as appears from the Affidavit of Service.

SERVICE

1. THIS COURT ORDERS that this motion is properly returnable today and hereby dispenses with further service thereof.

TERMINATION OF LITIGATION INVESTIGATOR APPOINTMENT

2. THIS COURT ORDERS that the appointment of the Litigation Investigator pursuant to the Amended Litigation Investigator Order dated April 26, 2018 (the "**Amended Litigation Investigator Order**"), is hereby terminated, effective immediately.

APPOINTMENT OF LITIGATION TRUSTEE

3. THIS COURT ORDERS that the Honourable J. Douglas Cunningham, Q.C. is hereby appointed as an officer of this Court to be the Litigation Trustee over and in respect of the Applicants' claims identified in the First Report of the Litigation Investigator (the "**Litigation Assets**" or the "**Claims**") on the terms described herein.

LITIGATION TRUSTEE'S POWERS

4. THIS COURT ORDERS that the Litigation Trustee is hereby empowered, authorized and directed to do all things and carry out all actions necessary to prosecute the Claims, including:

- (a) to engage, give instructions and pay counsel as well as consultants, appraisers, agents, advisors, experts, auditors, accountants, managers and such other persons from time to time on whatever basis the Litigation Trustee may agree, in consultation with the Monitor, to assist with the exercise of his powers and duties. Notwithstanding such authority, the Litigation Trustee shall be under no obligation to consult with its counsel, consultants, appraiser, agents, advisors, experts, auditors, accountants, managers and its good faith determination not to do so shall not result in the imposition of liability on the Litigation Trustee, unless such determination is based on gross negligence or willful misconduct;
- (b) to execute, assign, issue and endorse documents of whatever nature in the name of and on behalf of Sears Canada for any purpose in connection with the Claims or otherwise pursuant to this Order;
- (c) to consider and waive privilege over any communication, including written communication, of Sears Canada without further Order of the Court; and
- (d) to pursue the Claims, defend any counter claim, third party claim or other claim brought against Sears Canada, and subject to further Order of the Court, and in consultation with the Monitor, to settle or compromise, abandon, dismiss or otherwise dispose of such proceeding. The authority hereby conferred shall extend

to any appeals or applications for judicial review in respect of any order or judgment pronounced in such proceeding.

5. THIS COURT ORDERS that, notwithstanding the generality of paragraph 5(d) above, the Litigation Trustee is hereby authorized and empowered to commence claims, in his own name or on behalf of the Applicants, against ESL Investments Inc. (and certain affiliates), Edward Lampert, William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, Deborah E. Rosati, R. Raja Khanna, James McBurney and Douglas Campbell.

6. THIS COURT ORDERS that the stay of proceedings provided for in paragraph 25 of the Initial Order dated June 22, 2017 (the “**Initial Order**”), is hereby lifted as against William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, Deborah E. Rosati, R. Raja Khanna, James McBurney and Douglas Campbell for the purposes of permitting the claims referred to in the First Report, including those of the Litigation Trustee, to be commenced and pursued against those persons.

7. THIS COURT ORDERS that any recoveries received from any current and former directors and officers of Sears Canada pursuant to an action brought by the Litigation Trustee will be net of any distributions that would have been payable to such directors and officers on account of such directors’ and officers’ corresponding valid unsecured claims against Sears Canada, if any.

INDEMNITY

8. THIS COURT ORDERS that the Litigation Trustee and his designated agents, representatives and professionals, shall incur no liability or obligation as a result of his appointment or in carrying out of any of the provisions of this Order, save and except for any gross negligence or any willful misconduct. Sears Canada shall indemnify and hold harmless the

Litigation Trustee and his designated agents, representatives and professionals with respect to any liability or obligations as a result of his appointment or the fulfillment of his duties in carrying out the provisions of this Order, save and except for any gross negligence or willful misconduct. For clarity, in no event shall the Litigation Trustee be personally liable for any costs awarded against Sears Canada in the action. Any such costs awarded shall be a claim solely against Sears Canada estate. No action, application or other proceeding shall be commenced against the Litigation Trustee as a result of, or relating in any way to his appointment, the fulfillment of his duties or the carrying out of any Order of this Court except with leave of this Court being obtained. Notice of any such motion seeking leave of this Court shall be served upon Sears Canada, the Monitor and the Litigation Trustee at least seven (7) days prior to the return date of any such motion for leave.

9. THIS COURT ORDERS that the indemnity pursuant to paragraphs 4-8 above shall survive any termination, replacement or discharge of the Litigation Trustee. Upon any termination, replacement or discharge of the Litigation Trustee, on not less than 10 business days' notice, all claims against the Litigation Trustee, his designated agents, representatives and professionals for which leave of the Court has not already been sought and obtained shall be, and are hereby forever discharged, other than claims for which a party seeks leave prior to the discharge date to bring a claim against the Litigation Trustee and (i) such leave has been obtained; or (ii) the request for leave remains outstanding.

LITIGATION TRUSTEE'S ACCOUNTS

10. THIS COURT ORDERS that the Litigation Trustee and counsel to the Litigation Trustee (collectively, the "**Litigation Trustee Parties**") shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by Sears Canada as part of the costs of these proceedings. Sears Canada is authorized and directed to pay the accounts of the Litigation

Trustee Parties on a bi-weekly basis (or such other interval as may be mutually agreed upon) and, in addition, Sears Canada is hereby authorized to pay to the Litigation Trustee Parties retainers not exceeding \$50,000.00 each, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

11. THIS COURT ORDERS that the Litigation Trustee Parties shall pass their accounts from time to time, and for this purpose the accounts of the Litigation Trustee Parties are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

12. THIS COURT ORDERS that the Litigation Trustee Parties shall be entitled to the benefit of and are hereby granted a charge in the maximum amount of \$500,000.00 (the "**Litigation Trustee's Charge**") on the "**Property**" of Sears Canada as defined by paragraph 4 of the Initial Order, ranking *pari passu* with the Administration Charge (as defined in the Initial Order), in priority to all other security interests, trusts (statutory or otherwise), liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any person, including all charges granted by the Initial Order (other than the Administration Charge) and all other Orders of this Court granted in these proceedings.

13. THIS COURT ORDERS that the filing, registration or perfection of the Litigation Trustee's Charge shall not be required, and that the Litigation Trustee's Charge shall be valid and enforceable for all purposes, notwithstanding any such failure to file, register, record or perfect.

14. THIS COURT ORDERS that the granting of the Litigation Trustee's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Litigation Trustee's Charge shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declaration of insolvency herein; (b) any application(s) for

bankruptcy order(s) issued pursuant to *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**"), or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; or (d) the provisions of any federal or provincial statutes, and notwithstanding any provision to the contrary in any agreement.

15. THIS COURT ORDERS that the payments made by Sears Canada pursuant to this Order and the granting of the Litigation Trustee's Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

LIMITATION ON ENVIRONMENTAL LIABILITIES

16. THIS COURT ORDERS that nothing herein contained shall require the Litigation Trustee to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Litigation Trustee from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Litigation Trustee shall not, as a result of this Order or anything done in pursuance of the Litigation Trustee's duties and powers under this Order, be deemed to be in Possession of

any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

COMMON ISSUES TRIAL

17. THIS COURT ORDERS that the common issues arising out of claims brought by the Monitor, the Litigation Trustee, the Pension Administrator, and the Class Action plaintiffs, will be heard together in a common issues trial to commence on a date as is fixed by this Court, pursuant to the common issues trial protocol attached hereto as Schedule “A” (the “**Common Issues Trial Protocol**”).

GENERAL

18. THIS COURT ORDERS that, without limiting any other provisions of this Order, the Litigation Trustee may from time to time apply to this Court for advice and directions in the discharge of his powers and duties hereunder.

19. THIS COURT ORDERS that the Monitor and the Litigation Trustee may report to the Court on their activities from time to time as any of them may see fit or as this Court may direct.

20. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Litigation Trustee and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Litigation Trustee, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Litigation Trustee and its agents in carrying out the terms of this Order.

21. THIS COURT ORDERS that the Litigation Trustee be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Litigation Trustee is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

22. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Litigation Trustee and the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

HAINES, J.

SCHEDULE "A"

COMMON ISSUES TRIAL PROTOCOL

1. **Pleadings:** Plaintiffs will commence actions through issuance of separate statements of claim, to be defended with separate statements of defence.
2. **Transfer of Franchisee Class Action to Commercial List:** The Franchisee Class Action will be transferred to the Commercial List and a certification motion will be heard on an expedited basis.
3. **Documents:**
 - a. Plaintiff(s) in each claim will serve separate affidavits of documents
 - b. Documents will be produced in one document production set, to be produced electronically from the document database that the Monitor's counsel is currently maintaining.
4. **Privilege:**
 - a. There shall be no waiver of privilege as a result of the sharing of Sears Canada Inc. documents between the Monitor, the Litigation Trustee, counsel to the pension claimants and the Class Action plaintiffs.
 - b. Prior to any production of documents by the Monitor or the Sears Canada Entities to the Litigation Trustee, the pension claimants, or the Class Action plaintiffs, the Monitor or the Sears Canada Entities, as the case may be, shall take reasonable steps to review such documents to identify any:
 - i. documents that contain any communication that is between a lawyer and the ESL parties and/or Sears Holdings Corporation;
 - ii. documents containing any communication by or to the ESL parties and/or Sears Holdings Corporation and/or any current or former directors or officers of the Sears Canada Entities (a "**Current or Former D&Os**") created on or after November 26, 2013 and related to the 1291079 Ontario Ltd and Sears Canada Inc. et. al. class action of November 6, 2015 (Ontario Superior Court of Justice) File No. 4114/15); and
 - iii. documents containing communications between a law firm and a Current or Former D&O for which privilege could reasonably be asserted, or documents that reflect legal advice or litigation work product prepared for the benefit of a Current or Former D&O, whether alone or as part of a joint retainer.
 - c. Hereafter, items i), ii), and iii) shall be referred to collectively as the "**Potentially Shared Privileged Documents**". No waiver of any privilege shall have occurred by the inadvertent delivery of documents to the Litigation Trustee, the pension claimants, or the Class Action plaintiffs should a Potentially Shared Privileged Document not be identified or if any other document subject to privilege (including solicitor-client privilege, litigation privilege, and common interest privilege) is produced or disclosed to the Litigation Trustee, the pension claimants, or the Class Action plaintiffs.

- d. In the event that the Monitor and/or Sears Canada Entities intend to produce any Potentially Shared Privileged Documents to the Litigation Trustee, the pension claimants, or the Class Action plaintiffs, the Monitor or the Sears Canada Entities, as the case may be, shall provide a list of such documents on reasonable notice, which shall be no less than seven days, to the ESL parties, Sears Holdings Corporation and/or the Current or Former D&Os to the extent that such parties may be able to assert privilege over the documents, so that any issue regarding privilege may be resolved by the parties or determined by this Court.
5. **Examinations for Discovery of Defendants:**
- a. Plaintiffs will coordinate examinations for discovery to avoid overlap
 - b. One examination (and transcript) for each witness
 - i. One plaintiff takes lead
 - ii. Witness to attend second examination for follow up questions by other plaintiffs regarding questions specific to those claims
6. **Discovery-Related Motions:**
- a. The parties will jointly appoint a single arbitrator to determine any documentary or oral discovery motions.
 - b. All discovery motions will be heard in writing, unless the arbitrator determines that oral submissions are necessary to decide the motion.
 - c. Appeals of the arbitrator's decisions may be brought to the case management judge, to be heard summarily in chambers
7. **Experts' reports:**
- a. Plaintiffs' experts' reports to be served 12 weeks before trial
 - b. Defendants' experts' reports to be served 6 weeks before trial
8. **Common Issues Trial:**
- a. Parties will file an Agreed Statement of Facts (“**ASF**”)
 - b. Parties will file a Joint Book of Documents (“**JBD**”), which will include all documents referred to in the ASF, plus any other documents the parties agree to include in the JBD
 - c. Parties will deliver written opening submissions one week before trial
 - d. Evidence in chief will be adduced by way of affidavits
 - i. Plaintiffs' affidavits to be delivered 4 weeks before trial
 - ii. Defendants' affidavits to be delivered 2 weeks before trial
 - e. The trial will be conducted electronically pursuant to a protocol to be agreed upon by the parties and approved by the trial judge no later than 8 weeks before trial
 - f. All plaintiffs' witnesses will testify first
 - g. Then all defendants' witnesses
 - h. Oral examinations-in-chief will be limited to a 10-minute “warm-up”
 - i. Oral closing submissions will be heard 3 weeks after the last day of evidence, or as soon as possible thereafter
 - j. Parties will agree to exchange written closing submissions on the same day (1 week before oral closing submissions)

- i. In the alternative, the Plaintiffs will deliver their written closing submissions 10 days before oral closing submissions, then Defendants will deliver responding closing submissions 5 days before oral closing submissions, then Plaintiffs will deliver reply closing submissions 2 days before oral closing submissions
- k. All documents referred to in written closing submissions will be compiled in an electronic joint compendium
- l. Parties will prepare a joint book of authorities for all cases relied upon in closing submissions

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., INITIUM COMMERCE LABS 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.

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

ORDER

**(APPOINTMENT OF LITIGATION TRUSTEE,
LIFTING OF STAY, AND OTHER RELIEF)**

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Litigation Investigator

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
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CANADA INC.

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

**NOTICE OF MOTION
(RE APPOINTMENT OF LITIGATION TRUSTEE,
LIFTING OF STAY, AND OTHER RELIEF)
(RETURNABLE DECEMBER 3, 2018)**

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TAB 2

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

**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
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3339611 CANADA INC.

Applicants

**FIRST REPORT OF LAX O'SULLIVAN LISUS GOTTLIEB LLP
IN ITS CAPACITY AS LITIGATION INVESTIGATOR
NOVEMBER 5, 2018**

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Litigation Investigator

TO: **THE SERVICE LIST**

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I. OVERVIEW

1. This is the first report of Lax O’Sullivan Lisus Gottlieb LLP (“**LOLG**”), in its capacity as Litigation Investigator (“**LI**”). It outlines the background to its appointment, the terms of the LI Order (defined below), the work done by the LI, and relief sought by the LI pursuant to the LI’s recommendation.

II. BACKGROUND TO APPOINTMENT

2. On June 22, 2017, Sears Canada Inc. (“**Sears Canada**”) and a number of its operating subsidiaries (collectively, with Sears Canada, the “**Applicants**”) sought and obtained an initial order (as amended and restated on July 13, 2017, the “**Initial Order**”), under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“**CCAA**”). The relief granted under the Initial Order was later extended to SearsConnect, a partnership forming part of the operations of the Applicants (together with the Applicants, the “**Sears Canada Entities**”). The proceeding commenced under the CCAA by the Applicants are referred to in this report as the “**CCAA Proceeding**”.

3. Among other things, the Initial Order:

- (a) appointed FTI Consulting Canada Inc. as monitor of the Sears Canada Entities (the “**Monitor**”) in the CCAA Proceeding; and
- (b) granted an initial stay of proceedings against the Sears Canada Entities until July 22, 2017.

4. The Court has subsequently extended the stay period, most recently by order dated July 24, 2018, to December 18, 2018.

5. Pursuant to an order of this Court dated March 2, 2018, LOLG was appointed as LI to investigate, identify and report on certain potential rights and claims of the Sears Canada Entities and/or creditors of the Sears Canada Entities. The order was amended on April 26, 2018 (the “**LI Order**”).

6. The LI Order provides, among other things, that the LI shall be an officer of this Court.

III. PURPOSE OF THIS REPORT

7. The purpose of this first report is to provide the Court with information regarding:

- (a) the work done by the LI to discharge its Mandate under the LI Order;
- (b) the LI’s recommendation of a course of action in accordance with its Report to the Creditors’ Committee (the “**Report**”) provided pursuant to the LI Order; and
- (c) the LI’s request for an order authorizing the appointment of a litigation trustee to pursue the relief recommended in the Report, and related relief.

IV. LI’S MANDATE AND REPORT UNDER THE LI ORDER

8. The LI Order required the LI to do the following:

- (a) Investigate claims and possible claims that the Sears Canada Entities and/or their creditors may have against any parties (“**Mandate**”); and
- (b) Report to the Creditors’ Committee with such details as the LI considers advisable, with such reporting to include recommendations regarding a proposed litigation plan that includes (but is not limited to):
 - (i) the potential rights or claims of Sears Canada Entities or their creditors that should be pursued, if any; and
 - (ii) a description of how and by whom such rights and claims, if any, can best be pursued or continued, including:

- (1) the coordination of the prosecution of such rights or claims with other rights or claims that may be asserted by different parties;
- (2) if necessary or desirable, a proposed governance structure for the Creditors' Committee for the purpose of providing input to the LI in the prosecution of such rights, claims or causes of action; and
- (3) consideration of various options for funding the prosecution of such rights, claims or causes of action.

9. As set out below, the LI has now completed its Mandate and the Report.

V. THE WORK OF THE LI

10. Pursuant to the LI Order, a Creditors' Committee was established. The members of the Creditors' Committee executed confidentiality agreements and the persons to whom they reported signed non-disclosure agreements.

11. Following its appointment, and in accordance with the LI Order and the Mandate, the LI investigated claims and possible claims of the Sears Canada Entities and/or their creditors and the Monitor. During the course of this investigation, the LI:

- (a) met with the Monitor and its counsel for the purpose of receiving a confidential briefing from the Monitor, as contemplated in the LI Order;
- (b) reviewed documents provided to it by the Applicants concerning possible claims the Sears Canada Entities may have against various potential defendants;
- (c) met with the Applicants and their counsel;
- (d) conducted extensive legal research;

- (e) met with members of the Creditors' Committee, both individually and as a group, to discuss the members' views of possible claims the Applicants or creditors might advance;
- (f) met with the Creditors' Committee, the Monitor and the Monitor's counsel on multiple occasions to keep them apprised of the progress of the LI's investigation; and
- (g) considered how claims and possible claims may best be pursued, and how to coordinate various streams of potentially overlapping claims by different claimants.

12. On July 5, 2018, the LI presented a confidential interim report to the Creditors' Committee. On September 11, 2018, the LI presented a confidential final report to the Creditors' Committee ("**Report to Committee**"). At these meetings, the LI provided recommendations, discussed the basis for those recommendations, and answered questions. The members of the Creditors' Committee also discussed the recommendations and Report to Committee.

13. The Creditors' Committee unanimously accepted the LI's recommendation as set out in its Report to Committee.

VI. LI'S RECOMMENDATION CONCERNING FURTHER STEPS

A. The LI Order Contemplates Further Steps

14. The LI Order expressly provides that the LI shall be at liberty, and is authorized, at any time, to apply to the Court for advice and directions in respect of its Mandate or any variation or expansion of the powers and duties of the LI.

15. The LI Order also provides that, following delivery of a Report to the Creditors' Committee in accordance with its Mandate, the LI shall not take any further steps without a further order of

the Court. The LI Order expressly provides that nothing in it shall prevent the LI from seeking an order of the Court authorizing it to pursue any claims identified pursuant to the Mandate.

B. Litigation Should Be Pursued on Behalf of the Sears Canada Entities and Their Creditors

16. The LI recommends that litigation should be pursued on behalf of and for the benefit of the Sears Canada Entities and their creditors. As set out below, it is recommended that the defendants to the claims be the members of the Sears Canada Board of Directors as of November 2013 (the “**Directors**”), Edward Lampert (“**Lampert**”) and ESL Investments Inc., and certain of its affiliates who were shareholders of Sears Canada (collectively, “**ESL**”). But for the recent Chapter 11 filing of Sears Holdings Corp. (“**Holdings**”), the LI would recommend that Holdings also be a defendant in the litigation. Given the filing, the LI recommends that, at this time, litigation not be commenced against Holdings but that the Monitor consider the steps that should or could be taken regarding Holdings in the Chapter 11 proceeding or otherwise.

17. The LI’s view is that this litigation should be co-ordinated with the parties and counsel, to the extent practicable, for the sake of fairness to the parties, including the proposed defendants, and efficiency.

18. As a result of the recommendations contained herein, the LI believes and recommends that its mandate as LI should come to an end.

1. Appointment of Litigation Trustee to Pursue Sears Canada Claims

19. The LI recommends that a litigation trustee should be appointed with a mandate to pursue certain claims on behalf of and for the benefit of the Sears Canada Entities and their creditors (the “**LT Claims**”) with respect to the \$509 million dividend declared by Sears Canada’s Board of

Directors in November 2013 and paid to its shareholders, including Holdings and ESL, in December 2013 (the “**Dividend**”).

20. The LT Claims would be for oppression, breach of fiduciary duty and breach of the standard of care (against the Directors), conspiracy (against the Directors, ESL and Lampert, the principal of ESL), and unjust enrichment, knowing assistance, and knowing receipt.

21. In the LI’s view, appointment of an experienced litigation trustee would likely facilitate the efficient management and prosecution of litigation for the benefit of the Sears Canada Entities and their creditors.

22. The litigation trustee would be a court officer whose role would be to act on behalf of the Sears Canada Entities to prosecute and, where appropriate, resolve claims. The litigation trustee would also coordinate with other stakeholders.

23. The LI recommends that the Honourable J. Douglas Cunningham, Q.C. be appointed as the litigation trustee. The Creditors’ Committee and the Monitor support this recommendation.

24. The LI further recommends that LOLG be appointed as counsel to the LT to pursue the LT Claims and to co-ordinate the pursuit of claims with other counsel. The Creditors’ Committee and the Monitor also support this recommendation.

25. The reasonable fees and disbursements of the LT and his counsel would be paid by the Sears Canada Entities from the fund described below.

2. The Monitor Should Pursue a Transfer at Undervalue Claim

26. The LI recommends that the Monitor pursue a transfer at undervalue (“**TUV**”) claim under section 96 of the *Bankruptcy and Insolvency Act*, as incorporated into the CCAA pursuant to

section 36.1 with the respect to the CCAA (the “**Monitor’s Claim**”). Through this Claim, the Monitor would seek to set aside the Dividend on the basis that it was a gratuitous transfer to non-arm’s-length parties (specifically, ESL, Lampert, and Holdings) and that Sears Canada intended to defraud, defeat or delay creditors by paying it.

3. Pension Administrator and Superintendent of FSCO to Pursue Pension Claims

27. The LI recommends that certain creditors pursue claims directly. In particular, the LI understands that the Pension Administrator (defined below) and the Superintendent of the Financial Services Commission of Ontario wish to and intend to pursue pension claims, as follows:

- (a) A claim by Sears Canada’s pension administrator, Morneau Shepell Ltd. (the “**Pension Administrator**”) for breach of fiduciary duty, knowing assistance, knowing receipt and conspiracy. This claim would be brought against those persons who were directors of Sears Canada at the time the Dividend was declared, for breach of their obligations in their capacity as directors of the pension administrator of the Sears Canada pension plan at that time. The claim against ESL and Lampert would be for knowing assistance, knowing receipt and conspiracy; and
- (b) A claim for oppression, breach of fiduciary duty, breach of standard of care, knowing assistance, knowing receipt and conspiracy to be brought by Sears Canada’s Pensioners against the directors of Sears Canada at the time the 2013 Dividend was declared. The claim against ESL and Lampert would be for knowing assistance, knowing receipt and conspiracy.

28. The LI recommends that these claims be pursued in concert with the LT Claims and the Monitor’s Claim.

4. Franchisee Class Action Should be Transferred to the Commercial List

29. The LI recommends that an existing proposed class proceeding commenced in October 2015 by former “Sears Hometown” store franchisees (the “**Proposed Class Action**”) for oppression on the basis of the payment of the Dividend in the face of their previous suit for breaches of contract and the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3, for damages continue. It is recommended that Sotos LLP/Blaney McMurtry LLP, as class action counsel, in conjunction with the recommendation and the support of the LI, and with the support of the Monitor, seek an order of the Court transferring the Proposed Class Action (Court File No. 4114/15 commenced in Milton, Ontario) to the Commercial List and promptly seek an Order certifying the action as a class action under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6.

30. The LI believes that it is important to co-ordinate the Proposed Class Action with the other proposed proceedings referred to herein as all of the proceedings deal with a significant overlap of critical facts. It would be inefficient for the Proposed Class Action to proceed in a different forum and could potentially lead to inconsistent findings on the same issues.

C. Claims Should Be Pursued in a Common Issues Trial

31. The LI recommends that the claims listed above (the “**Claims**”) be heard by this Court—to the extent possible—in a single joint issues trial to ensure efficiency in cost and time.

32. The LI proposes that the Claims be pursued through four separate actions (i.e., separate statements of claim), in which the Monitor, Pension Administrator, Litigation Trustee and the representative plaintiff are the respective plaintiffs, each to be represented by separate counsel. It is recommended that the Pension Administrator and Pensioners have one counsel appointed to deal with pension claims, with an assignment of claims being made as necessary.

33. Because an overwhelming majority of the facts and legal issues in the Claims overlap, the Claims should be joined into a single “common issues trial” to be case managed by a single judge on the Commercial List of the Superior Court of Justice. The LI’s proposed order seeks this relief.

34. It is recommended that meetings be convened by the Litigation Trustee on a periodic basis with the Creditor’s Committee and the Monitor to discuss the progress of the Claims and matters related to the Claims.

35. Other elements of the Claims which are specific to particular claims, claimants, or defendants should be heard separately as required.

D. LT Claims and Monitor’s Claim to be Funded by the Estate

36. The LI recommends that the LT Claims and the Monitor’s Claim be funded by the Estate, and that a fund totalling \$12 million be established for this purpose. The LI and the Monitor both agree that this amount represents a conservative estimate, including a buffer, for the contemplated fees and disbursements to be incurred by the LI, the Litigation Trustee, and the Monitor.

37. Management of Sears Canada, with oversight by the Monitor, would review the accounts and arrange for payment of those accounts.

38. This would necessarily include a mechanism to allow creditors to opt out of litigation funding. The Litigation Investigator has reviewed and supports the Monitor’s proposed opt-out mechanism.

39. The LI recommends that the remaining claims *not* be funded by the estate.
40. The LI respectfully submits to the Court this, its First Report.

Dated this 5th day of November, 2018.

A handwritten signature in blue ink, appearing to read "Jay O'Sullivan", is written over a horizontal line. To the right of the signature, the initials "LLP/MLG" are written in blue ink.

LAX O'SULLIVAN LISUS GOTTLIEB LLP
In its capacity as court-appointed Litigation
Investigator

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

FIRST REPORT TO THE COURT
OF LAX O'SULLIVAN LISUS GOTTLIEB LLP
IN ITS CAPACITY AS LITIGATION INVESTIGATOR
NOVEMBER 5, 2018

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Litigation Investigator

TAB 3

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

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

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
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3339611 CANADA INC.

Applicants

**SUPPLEMENT TO THE FIRST REPORT OF LAX O'SULLIVAN LISUS GOTTLIEB
LLP IN ITS CAPACITY AS LITIGATION INVESTIGATOR
NOVEMBER 16, 2018**

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Litigation Investigator

TO: **THE SERVICE LIST**

I. OVERVIEW

1. This is the supplemental report of Lax O'Sullivan Lisus Gottlieb LLP ("LOLG"), in its capacity as Litigation Investigator ("LI"). It supplements the first report of the LI dated November 5, 2018 (the "First Report").
2. Defined terms in this supplemental report have the same meaning as in the First Report.

II. PURPOSE OF THIS REPORT

3. The purpose of this supplementary report is to provide the Court with information regarding:
 - (a) further detail about the Hon. Douglas Cunningham, Q.C., the proposed Litigation Trustee;
 - (b) the LI's expectation that the claim of the Litigation Trustee will be based on the same facts as set out in the Monitor's Draft Statement of Claim (attached to the Monitor's Twenty-Seventh report), although the final decision on the claim will be the Litigation Trustee's;
 - (c) confirmation that in the course of the review of documents described in the First Report, the LI was not provided with, and did not review, any Potentially Shared Privileged Documents (as defined in the Amended Litigation Investigator Order); and
 - (d) a revised draft order to correct some oversights contained in the draft order attached to the First Report.
4. Each of these points is addressed in more detail below.

III. REPORT

A. Proposed Litigation Trustee

5. The First Report, among other things, recommended the appointment of the Hon. Douglas Cunningham Q.C. as litigation trustee. It noted that the Creditors' Committee and the Monitor support this recommendation.

6. Mr. Cunningham has the necessary experience and expertise to act as litigation trustee. He is an experienced former trial judge of this Court, serving from 1991 to 2012, the latter ten years as Associate Chief Justice. He also served as President of the Ontario Superior Court Judges' Association and as Regional Senior Judge for the East Region. He was actively involved in mediating complex and high-stakes cases.

7. Prior to his appointment to the bench, Mr. Cunningham was a prominent civil litigation lawyer, focusing on complex civil litigation.

8. Since leaving the bench in 2012, he has conducted a civil arbitration and mediation practice. In 2015, Mr. Cunningham was appointed mediator in the insolvency proceeding of Stelco resolving the road block between the company, employees, current owner, and the prospective purchaser.

9. A copy of Mr. Cunningham's biography is attached as Appendix "A" to this supplemental report.

10. Mr. Cunningham has consented to the proposed appointment.

B. Anticipated Litigation Trustee Claim

11. The LI anticipates that the LT Claims (as defined in the LI's First Report) will be based largely on the same facts as those alleged in the Monitor's draft statement of claim (attached to the Monitor's Twenty-Seventh Report) concerning the Monitor's Claim.

12. Since the delivery of the LI's motion record, some stakeholders have asked the LI why it did not attach a draft statement of claim to its First Report. Based on its review of the Amended Litigation Investigator Order, the LI's view is that it would not be appropriate to do so, and that in any event it is ultimately up to the Litigation Trustee to decide which claims he should advance.

C. No Review of Potentially Shared Privileged Documents

13. Concerns have been raised with the LI in relation to its review of documents during the course of its investigation, including Potentially Shared Privileged Documents.

14. The LI can confirm that in the course of the document review described in the First Report, the LI did not review any Potentially Shared Privileged Documents as defined in the Amended Litigation Investigator Order. As a result, the process contained in the Amended Litigation Investigator Order to address Potentially Shared Privileged Documents was not engaged.

D. Revised Draft Order

15. The First Report attached a draft order. Since then, the LI has identified some aspects of the draft order that require correction or clarification, and attaches a revised draft order to this supplemental report. The main revisions contained in the revised order are set out below:

16. First, the draft order contained a heading (above paragraph 2) providing for the termination of the Creditors' Committee. This was an error. The body of the draft order itself does not provide

for the Creditors' Committee to be terminated. The heading has been amended accordingly in the revised draft order.

17. Second, the Common Issues Trial Protocol provided for and appended to the draft order did not address the Proposed Class Action. This was an oversight. The revised draft order and Common Issues Trial Protocol addresses the Proposed Class Action.

18. The LI respectfully submits to the Court this, its supplemental report.

Dated this 16th day of November, 2018.


LAX O'SULLIVAN LISUS GOTTLIEB LLP
In its capacity as court-appointed Litigation
Investigator

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SUPPLEMENTAL REPORT TO THE COURT
OF LAX O'SULLIVAN LISUS GOTTLIEB LLP
IN ITS CAPACITY AS LITIGATION INVESTIGATOR
NOVEMBER 16, 2018

LAX O'SULLIVAN LISUS GOTTLIEB LLP

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Litigation Investigator

Doug Cunningham, an experienced and highly respected litigator, was appointed to the Superior Court in 1991. For eleven years, he served in Ottawa, the last two and a half years as the Regional Senior Judge for the East Region. Doug is also a Past-President of the Ontario Superior Court Judges' Association.

In December 2002, Doug was appointed Associate Chief Justice of the Superior Court, based in Toronto, a position he held until his early retirement from the Court on September 30th, 2012. As a member of the Canadian Judicial Council, Doug served as a member of the Executive Committee, and chaired the Administration of Justice Committee. He was appointed to the Court Martial Appeals Court in 2010 and continues to serve as a member of the Pension Appeals Board, to which he was appointed in 1999.

Throughout his judicial career, Doug focused on complex civil litigation matters and was regularly called upon to mediate challenging, high stakes cases. His reputation for success in settling cases is well known throughout the Ontario Bar.

Doug is a problem solver. While he firmly believes that some cases are destined to be tried, he has never shied away from getting involved in even the most complex cases to determine if a better way might exist.

As an experienced mediator, Doug Cunningham has a unique ability to not only understand the legal issues, but also to quickly appreciate the dynamics and the interests of the parties involved in the dispute. A quick study, he is patient, an excellent listener and someone whose creativity in fashioning results in complex cases is well-known and appreciated. Simply put, he is a skilled (masterful) communicator.

Doug Cunningham has attended the Cornell and Harvard University mediation programs and is constantly in search of new and more productive and efficient resolutions in attempting to solve disputes. As a trial judge for over 20 years, he presided over all types of civil disputes and is well-known and respected for his firm but even-handed approach. As well, Doug conducted the Mississauga Judicial Inquiry and his report, released in October 2011, was universally praised as being fair and balanced, with very much a forward-looking approach to ethical issues at the municipal level. Rather than point fingers, Doug took the longer term approach, making some very significant recommendations as to how conflicts could be avoided in the future.

As a mediator, Doug's primary interests are:

- Commercial and corporate disputes
- Professional liability
- Serious personal injury/insurance litigation
- Employment law
- Product liability matters
- Class action lawsuits

Credentials

- BA - University of Western Ontario
- LL.B – Queen’s Law School
- Queen’s Counsel – appointed in 1980
- Specialist in Civil Litigation – designated by the LSUC in 1990
- LL.D (Hon.)

Doug is pleased to be able to offer his assistance in any of the following areas:

- Mediation * Neutral Evaluation
- Arbitration * Speedy Trials
- Mediation/Arbitration * Mentorship

SCHEDULE "A"

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE)
)
MR. JUSTICE HAINEY) DAY OF NOVEMBER, 2018

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., INITIUM COMMERCE LABS 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.

(each, an "**Applicant**", and collectively, the "**Applicants**")

**ORDER
(APPOINTMENT OF LITIGATION TRUSTEE)**

THIS MOTION, made by the Litigation Investigator, for an Order pursuant to section 11 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36., as amended (the "**CCAA**") and Rule 6.01 of the *Rules of Civil Procedure*, RRO 1990, Reg. 194, as amended (the "**Rules**") for an order, among other things, appointing a Litigation Trustee to pursue certain claims on behalf of the Applicants and/or any creditors of the Applicants and providing for the process by which a

common issues trial will be heard, was heard this day at 330 University Avenue, 8th Floor, Toronto, Ontario.

ON READING the Monitor's 27th Report to the Court dated November 5, 2018 and the Litigation Investigator's First Report to the Court dated November 5, 2018 (the "**First Report**"), and on reading and hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for the Litigation Investigator, and such other counsel for various creditors and stakeholders as were present, no one else appearing although duly served as appears from the Affidavit of Service.

SERVICE

1. THIS COURT ORDERS that this motion is properly returnable today and hereby dispenses with further service thereof.

TERMINATION OF LITIGATION INVESTIGATOR APPOINTMENT

2. THIS COURT ORDERS that the appointment of the Litigation Investigator pursuant to the Amended Litigation Investigator Order dated April 26, 2018 (the "**Amended Litigation Investigator Order**"), is hereby terminated, effective immediately.

APPOINTMENT OF LITIGATION TRUSTEE

3. THIS COURT ORDERS that the Honourable J. Douglas Cunningham, Q.C. is hereby appointed as an officer of this Court to be the Litigation Trustee over and in respect of the Applicants' claims identified in the First Report of the Litigation Investigator (the "**Litigation Assets**" or the "**Claims**") on the terms described herein.

LITIGATION TRUSTEE'S POWERS

4. THIS COURT ORDERS that the Litigation Trustee is hereby empowered, authorized and directed to do all things and carry out all actions necessary to prosecute the Claims, including:

- (a) to engage, give instructions and pay counsel as well as consultants, appraisers, agents, advisors, experts, auditors, accountants, managers and such other persons from time to time on whatever basis the Litigation Trustee may agree, in consultation with the Monitor, to assist with the exercise of his powers and duties. Notwithstanding such authority, the Litigation Trustee shall be under no obligation to consult with its counsel, consultants, appraiser, agents, advisors, experts, auditors, accountants, managers and its good faith determination not to do so shall not result in the imposition of liability on the Litigation Trustee, unless such determination is based on gross negligence or willful misconduct;
- (b) to execute, assign, issue and endorse documents of whatever nature in the name of and on behalf of Sears Canada for any purpose in connection with the Claims or otherwise pursuant to this Order;
- (c) to consider and waive privilege over any communication, including written communication, of Sears Canada without further Order of the Court; and
- (d) to pursue the Claims, defend any counter claim, third party claim or other claim brought against Sears Canada, and subject to further Order of the Court, and in consultation with the Monitor, to settle or compromise, abandon, dismiss or otherwise dispose of such proceeding. The authority hereby conferred shall extend

to any appeals or applications for judicial review in respect of any order or judgment pronounced in such proceeding.

5. THIS COURT ORDERS that, notwithstanding the generality of paragraph 5(d) above, the Litigation Trustee is hereby authorized and empowered to commence claims, in his own name or on behalf of the Applicants, against ESL Investments Inc. (and certain affiliates), Edward Lampert, William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, Deborah E. Rosati, R. Raja Khanna, James McBurney and Douglas Campbell.

6. THIS COURT ORDERS that the stay of proceedings provided for in paragraph 25 of the Initial Order dated June 22, 2017 (the “**Initial Order**”), is hereby lifted as against William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, Deborah E. Rosati, R. Raja Khanna, James McBurney and Douglas Campbell for the purposes of permitting the claims referred to in the First Report, including those of the Litigation Trustee, to be commenced and pursued against those persons.

7. THIS COURT ORDERS that any recoveries received from any current and former directors and officers of Sears Canada pursuant to an action brought by the Litigation Trustee will be net of any distributions that would have been payable to such directors and officers on account of such directors’ and officers’ corresponding valid unsecured claims against Sears Canada, if any.

INDEMNITY

8. THIS COURT ORDERS that the Litigation Trustee and his designated agents, representatives and professionals, shall incur no liability or obligation as a result of his appointment or in carrying out of any of the provisions of this Order, save and except for any gross negligence or any willful misconduct. Sears Canada shall indemnify and hold harmless the

Litigation Trustee and his designated agents, representatives and professionals with respect to any liability or obligations as a result of his appointment or the fulfillment of his duties in carrying out the provisions of this Order, save and except for any gross negligence or willful misconduct. For clarity, in no event shall the Litigation Trustee be personally liable for any costs awarded against Sears Canada in the action. Any such costs awarded shall be a claim solely against Sears Canada estate. No action, application or other proceeding shall be commenced against the Litigation Trustee as a result of, or relating in any way to his appointment, the fulfillment of his duties or the carrying out of any Order of this Court except with leave of this Court being obtained. Notice of any such motion seeking leave of this Court shall be served upon Sears Canada, the Monitor and the Litigation Trustee at least seven (7) days prior to the return date of any such motion for leave.

9. THIS COURT ORDERS that the indemnity pursuant to paragraphs 4-8 above shall survive any termination, replacement or discharge of the Litigation Trustee. Upon any termination, replacement or discharge of the Litigation Trustee, on not less than 10 business days' notice, all claims against the Litigation Trustee, his designated agents, representatives and professionals for which leave of the Court has not already been sought and obtained shall be, and are hereby forever discharged, other than claims for which a party seeks leave prior to the discharge date to bring a claim against the Litigation Trustee and (i) such leave has been obtained; or (ii) the request for leave remains outstanding.

LITIGATION TRUSTEE'S ACCOUNTS

10. THIS COURT ORDERS that the Litigation Trustee and counsel to the Litigation Trustee (collectively, the "**Litigation Trustee Parties**") shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by Sears Canada as part of the costs of these proceedings. Sears Canada is authorized and directed to pay the accounts of the Litigation

Trustee Parties on a bi-weekly basis (or such other interval as may be mutually agreed upon) and, in addition, Sears Canada is hereby authorized to pay to the Litigation Trustee Parties retainers not exceeding \$50,000.00 each, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

11. THIS COURT ORDERS that the Litigation Trustee Parties shall pass their accounts from time to time, and for this purpose the accounts of the Litigation Trustee Parties are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

12. THIS COURT ORDERS that the Litigation Trustee Parties shall be entitled to the benefit of and are hereby granted a charge in the maximum amount of \$500,000.00 (the "**Litigation Trustee's Charge**") on the "**Property**" of Sears Canada as defined by paragraph 4 of the Initial Order, ranking *pari passu* with the Administration Charge (as defined in the Initial Order), in priority to all other security interests, trusts (statutory or otherwise), liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any person, including all charges granted by the Initial Order (other than the Administration Charge) and all other Orders of this Court granted in these proceedings.

13. THIS COURT ORDERS that the filing, registration or perfection of the Litigation Trustee's Charge shall not be required, and that the Litigation Trustee's Charge shall be valid and enforceable for all purposes, notwithstanding any such failure to file, register, record or perfect.

14. THIS COURT ORDERS that the granting of the Litigation Trustee's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Litigation Trustee's Charge shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declaration of insolvency herein; (b) any application(s) for

bankruptcy order(s) issued pursuant to *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**"), or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; or (d) the provisions of any federal or provincial statutes, and notwithstanding any provision to the contrary in any agreement.

15. THIS COURT ORDERS that the payments made by Sears Canada pursuant to this Order and the granting of the Litigation Trustee's Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

LIMITATION ON ENVIRONMENTAL LIABILITIES

16. THIS COURT ORDERS that nothing herein contained shall require the Litigation Trustee to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Litigation Trustee from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Litigation Trustee shall not, as a result of this Order or anything done in pursuance of the Litigation Trustee's duties and powers under this Order, be deemed to be in Possession of

any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

COMMON ISSUES TRIAL

17. THIS COURT ORDERS that the common issues arising out of claims brought by the Monitor, the Litigation Trustee, the Pension Administrator, and the Class Action plaintiffs, will be heard together in a common issues trial to commence on a date as is fixed by this Court, pursuant to the common issues trial protocol attached hereto as Schedule “A” (the “**Common Issues Trial Protocol**”).

GENERAL

18. THIS COURT ORDERS that, without limiting any other provisions of this Order, the Litigation Trustee may from time to time apply to this Court for advice and directions in the discharge of his powers and duties hereunder.

19. THIS COURT ORDERS that the Monitor and the Litigation Trustee may report to the Court on their activities from time to time as any of them may see fit or as this Court may direct.

20. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Litigation Trustee and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Litigation Trustee, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Litigation Trustee and its agents in carrying out the terms of this Order.

21. THIS COURT ORDERS that the Litigation Trustee be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Litigation Trustee is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

22. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Litigation Trustee and the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

HAINES, J.

SCHEDULE "A"

COMMON ISSUES TRIAL PROTOCOL

1. **Pleadings:** Plaintiffs will commence actions through issuance of separate statements of claim, to be defended with separate statements of defence.
2. **Transfer of Franchisee Class Action to Commercial List:** The Franchisee Class Action will be transferred to the Commercial List and a certification motion will be heard on an expedited basis.
3. **Documents:**
 - a. Plaintiff(s) in each claim will serve separate affidavits of documents
 - b. Documents will be produced in one document production set, to be produced electronically from the document database that the Monitor's counsel is currently maintaining.
4. **Privilege:**
 - a. There shall be no waiver of privilege as a result of the sharing of Sears Canada Inc. documents between the Monitor, the Litigation Trustee, counsel to the pension claimants and the Class Action plaintiffs.
 - b. Prior to any production of documents by the Monitor or the Sears Canada Entities to the Litigation Trustee, the pension claimants, or the Class Action plaintiffs, the Monitor or the Sears Canada Entities, as the case may be, shall take reasonable steps to review such documents to identify any:
 - i. documents that contain any communication that is between a lawyer and the ESL parties and/or Sears Holdings Corporation;
 - ii. documents containing any communication by or to the ESL parties and/or Sears Holdings Corporation and/or any current or former directors or officers of the Sears Canada Entities (a "**Current or Former D&Os**") created on or after November 26, 2013 and related to the 1291079 Ontario Ltd and Sears Canada Inc. et. al. class action of November 6, 2015 (Ontario Superior Court of Justice) File No. 4114/15); and
 - iii. documents containing communications between a law firm and a Current or Former D&O for which privilege could reasonably be asserted, or documents that reflect legal advice or litigation work product prepared for the benefit of a Current or Former D&O, whether alone or as part of a joint retainer.
 - c. Hereafter, items i), ii), and iii) shall be referred to collectively as the "**Potentially Shared Privileged Documents**". No waiver of any privilege shall have occurred by the inadvertent delivery of documents to the Litigation Trustee, the pension claimants, or the Class Action plaintiffs should a Potentially Shared Privileged Document not be identified or if any other document subject to privilege (including solicitor-client privilege, litigation privilege, and common interest privilege) is produced or disclosed to the Litigation Trustee, the pension claimants, or the Class Action plaintiffs.

- d. In the event that the Monitor and/or Sears Canada Entities intend to produce any Potentially Shared Privileged Documents to the Litigation Trustee, the pension claimants, or the Class Action plaintiffs, the Monitor or the Sears Canada Entities, as the case may be, shall provide a list of such documents on reasonable notice, which shall be no less than seven days, to the ESL parties, Sears Holdings Corporation and/or the Current or Former D&Os to the extent that such parties may be able to assert privilege over the documents, so that any issue regarding privilege may be resolved by the parties or determined by this Court.
5. **Examinations for Discovery of Defendants:**
- a. Plaintiffs will coordinate examinations for discovery to avoid overlap
 - b. One examination (and transcript) for each witness
 - i. One plaintiff takes lead
 - ii. Witness to attend second examination for follow up questions by other plaintiffs regarding questions specific to those claims
6. **Discovery-Related Motions:**
- a. The parties will jointly appoint a single arbitrator to determine any documentary or oral discovery motions.
 - b. All discovery motions will be heard in writing, unless the arbitrator determines that oral submissions are necessary to decide the motion.
 - c. Appeals of the arbitrator's decisions may be brought to the case management judge, to be heard summarily in chambers
7. **Experts' reports:**
- a. Plaintiffs' experts' reports to be served 12 weeks before trial
 - b. Defendants' experts' reports to be served 6 weeks before trial
8. **Common Issues Trial:**
- a. Parties will file an Agreed Statement of Facts (“**ASF**”)
 - b. Parties will file a Joint Book of Documents (“**JBD**”), which will include all documents referred to in the ASF, plus any other documents the parties agree to include in the JBD
 - c. Parties will deliver written opening submissions one week before trial
 - d. Evidence in chief will be adduced by way of affidavits
 - i. Plaintiffs' affidavits to be delivered 4 weeks before trial
 - ii. Defendants' affidavits to be delivered 2 weeks before trial
 - e. The trial will be conducted electronically pursuant to a protocol to be agreed upon by the parties and approved by the trial judge no later than 8 weeks before trial
 - f. All plaintiffs' witnesses will testify first
 - g. Then all defendants' witnesses
 - h. Oral examinations-in-chief will be limited to a 10-minute “warm-up”
 - i. Oral closing submissions will be heard 3 weeks after the last day of evidence, or as soon as possible thereafter
 - j. Parties will agree to exchange written closing submissions on the same day (1 week before oral closing submissions)

- i. In the alternative, the Plaintiffs will deliver their written closing submissions 10 days before oral closing submissions, then Defendants will deliver responding closing submissions 5 days before oral closing submissions, then Plaintiffs will deliver reply closing submissions 2 days before oral closing submissions
- k. All documents referred to in written closing submissions will be compiled in an electronic joint compendium
- l. Parties will prepare a joint book of authorities for all cases relied upon in closing submissions

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., INITIUM COMMERCE LABS 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. (each, an "Applicant" and collectively, the "Applicants")

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

**ORDER
(APPOINTMENT OF LITIGATION TRUSTEE)**

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The Litigation Investigator and Counsel for the Proposed
Litigation Trustee

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., INITIUM COMMERCE LABS INC., INITIUM
TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA
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CANADA INC.

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

MOTION RECORD

**(Re Appointment of Litigation Trustee, Lifting of Stay, and
Other Relief)
(Returnable December 3, 2018)**

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