

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

IN THE MATTER OF THE *COMPANIES' CREDITORS  
ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT  
OF SEARS CANADA INC., 9370-2751 QUÉBEC 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**")

**REPLY FACTUM**

**(Replying to facta of ESL and SH Re: Litigation Trustee,  
returnable March 2, 2018)**

March 1, 2018

**KOSKIE MINSKY LLP**

20 Queen Street West, Suite 900, Box 52  
Toronto, ON M5H 3R3

**Andrew J. Hatnay (LSUC# 31885W)**

Tel: 416-595-2083 / Fax: 416-204-2872

Email: ahatnay@kmlaw.ca

**Amy Tang (LSUC #70164K)**

Tel: 416-542-6296 / Fax: 416-204-4936

Email: atang@kmlaw.ca

Representative Counsel to the Retirees of Sears  
Canada Inc.

**TO: THE SERVICE LIST**

1. Sears Holdings Corporation ("**SH**") and ESL Investments ("**ESL**") both self-described "equity holders" of Sears Canada, Inc. ("**Sears Canada**"), have each submitted a factum objecting to certain aspects of the motion to appoint a Litigation Trustee.

2. This Reply Factum makes two submissions:

(a) SH and ESL do not have standing to object to the motion; and,

(b) SH and ESL mischaracterize the Litigation Trustee process and advance untenable arguments.

3. In this motion, a coalition of the major retiree, employee, and landlord creditors of Sears Canada, the Financial Services Commission of Ontario ("**FSCO**") and Morneau Shepell Ltd., the pension plan administrator, have collaborated to bring forward a motion to appoint a Litigation Trustee for the benefit of all creditors for the estate of Sears Canada.

4. The financial circumstances of the demise of Sears Canada are egregious:

(a) From 2005 to 2013, almost \$3 billion in dividends were paid by the company to shareholders;

(b) The Sears Canada Pension Plan is underfunded by \$270 million;

(c) In June, 2017, Sears Canada obtained CCAA protection and proceeded to liquidate and shut down its business; and,

(d) Unsecured creditors are facing a recovery of \$0.00 to \$0.10 cents on the dollar of their claims (Monitor's 13<sup>th</sup> Report, para. 23).

5. In its 11<sup>th</sup> Report, the Monitor reported that it is investigating certain potential reviewable transactions, including certain of the dividend payments, as well as the sale of the Craftsman trademark. The Monitor reported that "further review of [these] Transactions is appropriate". (para. 53)

6. The Litigation Trustee process sought in this motion would proceed in two stages. Stage One would authorize the Litigation Trustee to investigate and report on all potential claims, including the above-noted transactions that are being investigated by the Monitor, that could be pursued for the benefit of all creditors of the estate of Sears Canada. Stage Two would see the Litigation Trustee returning to court for authorization to pursue litigation, again, for the benefit of all creditors of Sears Canada.

***SH and ESL are not creditors***

7. As shareholders, SH and ESL are not creditors. In *Nelson Financial Group Ltd.*, Justice Pepell held:

[25] Historically, the claims and rights of shareholders were not treated as provable claims and ranked after creditors of an insolvent corporation in a liquidation. As noted by Laskin J.A. in *Central Capital Corp., Re.*, on the insolvency of a company, the claims of creditors have always ranked ahead of the claims of shareholders for the return of their capital. This principle is premised on the notion that shareholders are understood to be higher risk participants who have chosen to tie their investment to the fortunes of the corporation. In contrast, creditors choose a lower level of exposure, the assumption being that they will rank ahead of shareholders in an insolvency...

*Nelson Financial Group Ltd., Re.*, 2010 ONSC 6229, Reply Book of Authorities of Representative Counsel ("**Reply BOA**"), Tab 1, at para. 25

8. In *Central Capital Corp., Re.*, Laskin J. stated: "[T]he selling stockholder is not a creditor in the sense of a person who loans money to a corporation, and therefore is not entitled to parity with the general creditors..."

*Central Capital Corp., Re.*, [1996] O.J. No. 359, 132 D.L.R. (4th) 223 (Ont. C.A.),  
Reply BOA, Tab 2, at para. 137

9. This concept is also reflected in section 6(8) of the CCAA:

**Payment — equity claims**

6(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

***Shareholders do not have standing***

10. The courts have held that shareholders have no standing to object to certain proceedings of insolvent companies. In *Cable Satisfaction International Inc. v. Richter & Associés Inc.*, shareholders attempted to interfere with a plan of arrangement on the basis that their equity participation was being reduced, while noteholders' participation was being increased. The court held that shareholders had no standing:

[53]...in the case of an arrangement proposed under the C.C.A.A., the shareholders of the debtor company cannot expect any advantage from the arrangement. As the company is insolvent, ***the shareholders have no economic interest to protect***. More so when, as in the present case, the shareholders are not contributing to any of the funding required by the Plan. Accordingly, ***they have no standing*** to claim a right under the proposed arrangement. [emphasis added]

*Cable Satisfaction International Inc. v. Richter & Associés inc.*, [2004] Q.J. No. 5461, C.B.R. (4<sup>th</sup>) 205 (Que. S.C.J.), Reply BOA, Tab 3, at para. 53.

11. The court cited the reasons of Paperny, J. in the *Canadian Airlines Corp.*:

[143] *Where a company is insolvent, only the creditors maintain a meaningful stake in its assets.* Through the mechanism of a liquidation of insolvency legislation, the interests of *shareholders are pushed to the bottom rung of the priority ladder.* The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. *Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where the creditors' claims are not being paid in full.* [emphasis added]

*Canadian Airlines Corp., Re*, (2000), 20 C.B.R. (4<sup>th</sup>) 1 (Alta. Q.B.), Reply BOA, Tab 4, at para. 143.

***Defendants in BIA section 38 assignment actions do not have standing***

12. Similar court rulings can be found in decisions involving section 38 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, ("**BIA**"), where the transfer of a right of action from the trustee in bankruptcy to a creditor was unsuccessfully challenged by potential defendants. In addition to being shareholders without standing, SH and ESL are also potential defendants and for that reason as well, lack standing on this motion.

13. Section 38 of the BIA permits the court to make an order authorizing the trustee in bankruptcy to assign its right to an action to a creditor, where the creditor believes that the claim would benefit the estate and the trustee refuses to pursue it. The courts have held that defendants have no standing to interfere at that stage:

[44]...as a general rule, neither the bankrupt nor the proposed defendant has standing to be heard on a s. 38 motion. This rule recognizes that so long as the s. 38 order in question merely authorizes the proceeding to be brought, *the rights of the intended defendant will not be affected and no prejudice will be suffered*... [emphasis added]

*Shaw Estate (Trustee of) v. Nicol Island Development Inc.*, 2009 ONCA 276 (Ont C.A.) ("*Shaw Estate*"), Reply BOA, Tab 5, at para. 44.

14. In *Coroban Plastics Ltd., Re*, the Federal Crown sought to pursue claims of fraudulent conveyance against the bankrupt company and the transferee of those conveyances. An order under section 38 was granted to the Crown, and the potential defendants appealed. The British Columbia Court of Appeal cited a long line of jurisprudence and stated:

These decisions, taken together, seem to me to establish clearly that on a s. 38 application, such as that which resulted in the present order, ***neither the bankrupt nor any other proposed defendant in the intended action has a right either to notice or to be heard on the application, and that neither the bankrupt nor any other proposed defendant will have standing to appeal any order made on such an application***, provided that it goes no further than to authorize action to be brought – this being for the reason that their rights will not be affected by a s. 38 order so long as it goes no further than that...[emphasis added]

*Coroban Plastics Ltd., Re*, [1994] B.C.J. No. 3253, 34 C.B.R. (3d) 50 (BCCA), Reply BOA, Tab 6, at para. 8.

15. This reasoning was followed in *Nesi Energy Marketing Canada Inc., Re*, where claims of misrepresentation were filed by Nesi's creditors against its majority shareholder. In a decision related to one such claim brought by Refco Alberta Inc., Moore C.J.Q.B. stated the following:

I conclude that the proposed defendants do not have standing at this application under section 38 of the BIA. The only parties with standing are the trustee and Refco....the rights of the proposed defendants are *not* affected by the order sought; Refco is ***simply asking for leave to commence a proceeding for a pre-existing cause of action*** which the trustee determined not to pursue...[emphasis added]

*Nesi Energy Marketing Canada Inc., Re*, 1998 ABQB 912 (Alta. Q.B.), Reply BOA, Tab 7, at para. 18.

16. In this motion, there is no transfer of an action to the Litigation Trustee. The rights of SH and ESL are not impaired at all since the motion only seeks the commencement of an investigative process. It thereby facilitates the CCAA's goal of a single proceeding to coordinate

all potential actions and determine the best means of advancing all claims for the benefit of the creditors of the estate.

17. The conclusion that SH and ESL have no standing is sufficient to dispense with their arguments in their factum. Nevertheless, the substance of their arguments, if heard, are without merit.

***SH and ESL mischaracterize the Litigation Trustee two-stage process***

18. SH and ESL argue that it is improper for the Litigation Trustee to be appointed as a court officer to advance litigation of individual creditors' claims. That is both a conflation and mischaracterization of the two-stage process to be followed by the Litigation Trustee. As noted, in Stage One, the Litigation Trustee is only investigating and reporting. It is not seeking authorization to bring litigation. It will seek court approval to bring litigation in the future for the benefit of the estate, not individual creditors.

19. SH and ESL also complain that the appointment of the Litigation Trustee as a court officer is improper. The appointment of a Litigation Trustee in CCAA proceedings has been ordered in numerous cases, including *Hollinger* where the litigation trustee was expressly appointed as a court officer. The court in *Hollinger* held:

[41] The position of *Hollinger* is that the settlement funds will be used in part to fund the litigation and that the supervision by the Court with the assistance of the Litigation Trustee, the CRO, and the Monitor will enable the court to be satisfied that the litigation will be conducted for the benefit of all creditors and will enable a distribution to entitled creditors. This position is supported by creditors other than Black.

...

[46] I am satisfied at this time that consideration of the settlements *is an appropriate exercise of jurisdiction with the assistance of the aforementioned court officers*. In particular, as noted, the litigation has

the support of the major creditor group which advanced more than \$200 million to Hollinger and has not been repaid.[emphasis added]

*Hollinger Inc., Re*, 2012 ONSC 5107, Reply BOA, Tab 8, at paras 41, 46

20. In *D'Angelo Estate, Re* the court described the duties and responsibilities of an officer of the court:

[35] [O]ne may describe the duties and responsibilities of an officer of the court by analogy to those historically identified with receivers. Consequently, I consider the primary responsibilities of an appointed officer of the court to be threefold: (1) to act fairly, honestly, impartially and as a fiduciary, ***on behalf of all persons having a financial interest in the subject-matter of the appointment***; (2) to comply with the powers granted in the order of appointment; and, (3) to be accountable both to the court that made the appointment and to those persons in (1). [emphasis added]

*D'Angelo Estate, Re*, 2010 ONSC 7244, Reply BOA, Tab 9, at para. 8

21. It is entirely appropriate that the Litigation Trustee be appointed a court officer. Under its mandate, the Litigation Trustee as a court officer would be acting for the benefit of all the creditors of the estate of Sears Canada pursuant to a court-ordered mandate. The motion does not seek authorization for the Litigation Trustee to act as a litigator for the purpose of advancing specific individual claims, as SH and ESL erroneously suggest.

22. SH and ESL also argue that the court should not approve the Litigation Trustee to act for individual creditors as that would give rise to "inter-creditor" disputes that the CCAA court has no jurisdiction to decide. Although there is no inter-creditor dispute arising from this motion at all, the CCAA court in *U.S. Steel* held that the court *can* decide inter-creditor disputes if necessary:

I do, however, think that the discretion or authority of a court under section 11 of the CCAA extends to the determination of inter-creditor

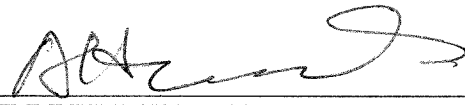


matters within a CCAA proceeding if, on balance, such action would appear to further the remedial purpose of the CCAA.

*U.S. Steel Canada Inc. (Re)*, 2015 ONSC 5103, Reply BOA, Tab 10, para. 80

23. The objections of SH and ESL should be dismissed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 1<sup>st</sup> day of March, 2018.



---

**ANDREW J. HATNAY**



---

**AMY TANG**

**SCHEDULE "A"**

**LIST OF AUTHORITIES**

1. *Cable Satisfaction International Inc. v. Richter & Associés inc.*, [2004] Q.J. No. 5461, C.B.R. (4<sup>th</sup>) 205 (Que. S.C.J.)
2. *Canadian Airlines Corp., Re*, (2000), 20 C.B.R. (4<sup>th</sup>) 1 (Alta. Q.B.)
3. *Central Capital Corp., Re*, [1996] O.J. No. 359, 132 D.L.R. (4th) 223 (Ont. C.A.)
4. *Coroban Plastics Ltd., Re*, [1994] B.C.J. No. 3253, 34 C.B.R. (3d) 50 (B.C. Sup. Ct.)
5. *D'Angelo Estate, Re*, 2010 ONSC 7244 (Ont. S.C.J.)
6. *Hollinger Inc., Re*, 2012 ONSC 5107 (Ont. S.C.J.)
7. *Nelson Financial Group Ltd., Re*, 2010 ONSC 6229 (Ont. S.C.J.)
8. *Nesi Energy Marketing Canada Inc., Re*, 1998 ABQB 912 (Alta. Q.B.)
9. *Shaw Estate (Trustee of) v. Nicol Island Development Inc.*, 2009 ONCA 276 (Ont C.A.)
10. *U.S. Steel Canada Inc. (Re)*, 2015 ONSC 5103

**SCHEDULE "B"**  
**RELEVANT STATUTES**

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3**

**Proceeding by creditor when trustee refuses to act**

**38 (1)** Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.

**Transfer to creditor**

**(2)** On an order under subsection (1) being made, the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject-matter of the proceeding, including any document in support thereof.

**Benefits belong to creditor**

**(3)** Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.

**Trustee may institute proceeding**

**(4)** Where, before an order is made under subsection (1), the trustee, with the permission of the inspectors, signifies to the court his readiness to institute the proceeding for the benefit of the creditors, the order shall fix the time within which he shall do so, and in that case the benefit derived from the proceeding, if instituted within the time so fixed, belongs to the estate.

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

**Compromises to be sanctioned by court**

**6 (1)** If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding...

**(8)** No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., CORBEIL ÉLECTRIQUE INC., S.L.H. TRANSPORT 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")

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE -**  
**COMMERCIAL LIST**  
Proceeding commenced at TORONTO

**REPLY FACTUM**

**KOSKIE MINSKY LLP**  
20 Queen Street West, Suite 900, Box 52  
Toronto, ON M5H 3R3

**Andrew J. Hatnay – LSUC No. 31885W**  
Tel: 416-595-2083 / Fax: 416-204-2872  
Email: ahatnay@kmlaw.ca

**Amy Tang (LSUC #70164K)**  
Tel: 416-542-6296 / Fax: 416-204-4936  
Email: atang@kmlaw.ca

Representative Counsel to the Retirees of Sears  
Canada Inc.