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 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.

Applicants

RESPONDING FACTUM OF THE ESL PARTIES

November 27, 2018

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TO: THE SERVICE LIST

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PART I - INTRODUCTION

1. In 2013 Sears Canada declared a dividend amounting to $509.4 million. After the dividend was paid, Sears Canada had $513.8 million in cash on hand. Five years later, the creditors of Sears Canada propose to advance various causes of action through the initiatives of two officers of the Court, namely the Monitor and the Litigation Investigator. Many of these causes of action have not been particularized in the materials filed for these motions, and they are, at best, dubious. The Litigation Investigator has not offered this Court a single reason why a claim can be commenced now, five years after the declaration of the dividend, and three years after the expiration of the applicable limitation period. The Monitor proposes a claim based on a wholly novel interpretation of a provision of the *Bankruptcy and Insolvency Act*,[1] which even on its face demonstrates fatal weaknesses.[2] As support for this untenable claim the Monitor points to a single 1983 decision of the Quebec Superior Court which relied on an entirely different 1960s-era predecessor to the current provision.

2. The moving parties each seek an order that would authorize the commencement of various proceedings against the ESL Parties and certain other defendants (the "**Proposed Defendants**"). The moving parties recognize that the relief they are seeking is discretionary and is appropriate where it advances the policy goals of the *Companies' Creditors Arrangement Act*.[3] The result of these orders, which purport to advance the policy goals of the CCAA, will result in four concurrent actions against the Proposed Defendants brought by five sets of counsel, with the Sears Canada estate funding at least two of those actions.

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[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA].
[2] For example, to read s. 96 as the Monitor would do renders purposeless s. 101 (which is specific to the recovery of dividends) and also writes out of the statute the protections for dividend-holders and corporate directors provided for in that section.
[3] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA]; Factum of the Litigation Investigator at para. 37 [LI Factum]; Factum of the Monitor at para. 37 [Monitor Factum].

3. Despite their overarching concerns, the ESL Parties recognize that these motions are not the appropriate forum for a determination on the legal and factual infirmities in the causes of action that are vaguely alleged against the Proposed Defendants. At the proper time, the ESL Parties intend to defend vigorously against these claims, and they reserve their rights to move to strike the intended actions once commenced. The ESL Parties appear on these motions to make four submissions:

1. **Waiver of privilege** - The moving parties' claims put in issue solicitor-client and other privileged communications between Sears Canada and its advisors. The moving parties have not demonstrated to this Court that they have obtained a waiver of privilege over these documents from Sears Canada's board of directors. Neither the Monitor nor the Litigation Investigator, can, in law, waive Sears Canada's privilege. They should not be permitted to commence claims that put privileged communications in issue unless and until they have obtained waiver from the board.

2. **Immediate production of documents** - Once the moving parties have demonstrated that they have lawfully obtained Sears Canada's waiver over its privileged documents, they must, as a matter of procedural fairness, produce to the Proposed Defendants all of the Sears Canada documents reviewed by the Litigation Investigator during its appointment. Just as the Monitor and Litigation Investigator had access to these third party documents prior to pleading, so should the Proposed Defendants.

3. **Appointment of a case management judge** - This Court should not accede to the moving parties' premature request for a "Common Issues Trial Protocol" as proposed in Schedule A to the Litigation Investigator's draft order. In the absence of two of the four proposed claims, and without knowing the identity of all potential parties and the intentions of the parties regarding preliminary motions, this Court is in no position to set a procedural framework at this stage. Instead, this Court should refer the actions to a case management judge.

4. **Reserve for Proposed Defendants' costs** - This Court should require that the Sears Canada estate set aside at least $6 million as a reserve for the Proposed Defendants' costs. While the moving parties' proposed order sets aside a reserve for their own legal fees, it fails to establish a reserve for a potential costs award in favour of the Proposed Defendants.

PART II - SUMMARY OF FACTS

Background

4. On November 28, 2013, Sears Canada Inc. declared an extraordinary dividend of $5.00 per share, amounting to $509.4 million.[4] Sears Canada paid the dividend to shareholders on December 9, 2013. After the 2013 dividend was paid, Sears Canada had $513.8 million in cash on hand,[5] an amount greater than its cash on hand following the payment of its 2012 dividend of $101.2 million,[6] which the moving parties do not seek to challenge. In addition, as part of a rights offering on October 26, 2014, the ESL Parties paid approximately USD $168.5 million to Sears Holdings in exchange for additional equity interest in Sears Canada.[7]

5. On October 21, 2015, 1291079 Ontario Ltd., a Sears Hometown Store operator, commenced a claim against Sears Canada, ESL Investments Inc., Sears Holdings Corporation, and certain directors of Sears Canada. The claim, brought on behalf of a putative class of hometown store operators, alleges that Sears Canada and its affiliates oppressed the interests of the putative class (the "**Hometown Oppression Claim**"). The Hometown Oppression Claim is not yet certified as a class action and no step beyond the service of the statement of claim has been taken to advance that action.

6. On June 22, 2017, Sears Canada and a number of its operating subsidiaries sought and obtained an initial order under the CCAA. This had the effect of staying the Hometown Oppression Claim as against Sears Canada.

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[4] Affidavit of Jonathan Wypych, sworn March 1, 2018, Responding Record of the ESL Parties [RR] Tab 1 at para. 5. See also Exhibit "C" to the Affidavit of Jonathan Wypych, RR at 41.
[5] *Ibid.*, at para. 5.
[6] *Ibid.*, at para. 5.
[7] *Ibid.*, at para. 9.

7. The Monitor, FTI Consulting Inc., has enjoyed substantial access to Sears Canada documents for many months. In its 12th Report of February 2018, the Monitor reported that it had undertaken research related to certain "Transactions of Interest" …"for very specific purposes in fulfilling the Monitor's statutory mandate."[8] In its 11th report of January 2018, the Monitor described its review in more detail:

> The Monitor has obtained and reviewed documents and information from Sears Canada. The Monitor has obtained access to a large database of potentially relevant documents from the electronic records of Sears Canada and has identified a subset of the documents for comprehensive review based on their *prima facie* relevance to the Transactions of Interest.[9]

8. On March 2, 2018, this Court appointed the Litigation Investigator to consider litigation against various entities, including the ESL Parties. In particular, the Litigation Investigator was appointed for the purpose of:

> investigating, considering, and reporting to the Creditors' Committee (defined below), regarding any rights or claims, whether legal, equitable, statutory or otherwise, that the Sears Canada Entities and/or any creditors of any of the Sears Canada Entities may have as against any parties, including but not limited to current and former directors, officers, shareholders and advisors of any of the Sears Canada Entities.[10]

9. Under an amendment to the order appointing the Litigation Investigator, the Creditors' Committee was to comprise no more than eight members from the following creditor groups:

(i) Retiree Representative Counsel;

(ii) Employee Representative Counsel;

(iii) two landlords;

(iv) Hometown Dealers Class Action plaintiff counsel;

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[8] Twelfth Report of FTI Consulting Canada Inc., as Monitor, February 13, 2018 at para. 43.
[9] Eleventh Report of FTI Consulting Canada Inc., as Monitor, January 15, 2018 at para. 52.
[10] Amended order appointing the Litigation Investigator, pronounced April 26, 2016, RR Tab 2, at para. 2.

> (v) Morneau Shepell Ltd. in its capacity as Administrator for the Sears Canada Inc. Registered Retirement Plan;
>
> (vi) the Ontario Superintendent of Financial Services as Administrator of the Pension Benefits Guarantee Fund; and
>
> (vii) such other unsecured creditors of the Sears Canada Entities not represented in (i) through (vi) above as the majority of the Creditors' Committee may agree be included, in consultation with the Monitor, or as may be directed by the Court.[11]

10. Under its mandate as an officer of the Court, the Litigation Investigator gained substantial access to Sears Canada documents and received an initial report from the Monitor.[12] The Litigation Investigator could request and receive documents or information from Sears Canada provided the information requested was consistent with its mandate.[13] It was entitled to receive Sears Canada documents both directly from Sears Canada and indirectly from the Monitor.[14]

11. The Order appointing the Litigation Investigator permitted it to provide Sears Canada documents to the Creditors' Committee, with a requirement that it maintain a detailed list of these documents.[15]

These motions

12. The Monitor and Litigation Investigator bring separate motions in support of the commencement of separate causes of action against various defendants, including the ESL Parties. The Monitor seeks leave to commence a claim for "transfer at undervalue" under s. 96 of the BIA.[16] The Litigation Investigator recommends the appointment of a Litigation Trustee to pursue

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[11] *Ibid.*, at para. 5.
[12] *Ibid.*, at para. 7.
[13] *Ibid.*, at para. 7.
[14] *Ibid.*, at at para. 8. It is not clear to the ESL Parties which entity or entities provided information to the Litigation Investigator.
[15] *Ibid.*, at para. 11.
[16] Section 96 of the BIA is incorporated in to the CCAA by virtue of s. 36.1 of the CCAA.

claims "on behalf of and for the benefit of the Sears Canada Entities and their creditors".[17] Those 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."[18]

13. The Monitor has particularized its claim by way of a draft statement of claim included with the First Supplement to the 27th Report of the Monitor.[19] The Monitor's claim alleges that it can use s. 96(1)(b)(ii) of the BIA to attack the 2013 dividend as a "transfer at undervalue". The Monitor's position is that this section entitles it to a five-year look back, as opposed to the one-year limit that ordinarily applies to the recovery of dividends under s. 101 of the BIA.

14. The Litigation Investigator has offered virtually no support for the relief it seeks. The Litigation Investigator has not followed the ordinary protocol of providing a draft claim prior to seeking to lift the stay against certain former directors. Nor has it particularized the facts relevant to the causes of action. It asserts, baldly and unhelpfully, that its proposed unparticularized causes of action are "*prima facie* meritorious."[20]

15. The Litigation Investigator also seeks to convert its role from a neutral officer of the Court to partisan counsel, operating at the direction of a Litigation Trustee. It, like the Monitor, has enjoyed access to Sears Canada documents for months, and it too would afford no reciprocal right of access to these documents to its adversaries, the Proposed Defendants. Neither the Litigation

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[17] First Report Of Lax O'Sullivan Lisus Gottlieb LLP in its Capacity as Litigation Investigator, November 5, 2018 at para. 19 [First Report of the Litigation Investigator].
[18] First Report of the Litigation Investigator at para. 20.
[19] Supplement to Twenty-Seventh Report of FTI Consulting Canada Inc., as Monitor, Appendix "A".
[20] LI Factum at para. 60.

Investigator nor the Monitor have demonstrated that they have obtained Sears Canada's waiver of privilege over the documents on which their claims will have to rely.[21]

16. The moving parties also propose, before all of the proposed statements of claim have been provided to the Court or to the Proposed Defendants and before all the defendants have been identified, that this Court impose a "Common Issues Trial Protocol" (the "**Protocol**").[22] The Litigation Investigator's draft order ensures that the Litigation Trustee will recover its own costs of conducting the proceeding against the Proposed Defendants without any reserve for the costs of the Proposed Defendants should they be successful.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

17. The ESL Parties reserve their positions on the merits of the proposed claims. They appear on these motions to address four specific concerns. Namely, they seek:

1) to ensure that before this Court permits the moving parties to issue claims against the ESL Parties, it requires them to demonstrate that they have obtained the appropriate waiver from Sears Canada's board of directors over the privileged documents that they will put in issue;

2) to ensure that before the Proposed Defendants are required to take any substantive steps in the proceeding the Court grants them the same access to Sears Canada documents as the Litigation Investigator had during its mandate, and to which the moving parties will now be entitled;

3) to ensure that this Court declines to endorse the "Common Issues Trial Protocol" in Schedule "A" of the Litigation Investigator's draft order, instead referring the issued claims to case management; and

4) to ensure that this Court's Order includes a minimum $6 million reserve of estate funds for any potential award of costs in favour of the Proposed Defendants.

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[21] There may also be claims of privilege between and among Sears Canada, Sears Holdings Corporation, and/or the ESL Parties that have not been waived.

[22] Common Issues Trial Protocol being Schedule "A" to the Litigation Investigator's Draft Order [Protocol].

1) The Court should require the Monitor and Litigation Investigator to demonstrate that they have obtained consent to waive Sears Canada's privilege

18. The proposed claims put squarely in issue Sears Canada's privileged communications. The Monitor intends to claim, for example, that Sears Canada declared the 2013 dividend "without the benefit of any independent legal advice regarding the directors' duties in the circumstances."[23] The proposed claim pleads that this alleged lack of advice is in "stark contrast"[24] to the legal and professional advice Sears Canada's board received in relation to the 2005,[25] 2010,[26] and 2012[27] dividends. By making reference to the legal and other professional advice obtained by the Sears Canada board, the Monitor has put Sears Canada's "state of mind" in issue. It is well established that pleading that legal advice has informed a party's state of mind waives privilege over the advice.[28] Here, the Monitor purports to put Sears Canada's state of mind in issue without demonstrating that it has the authority to waive privilege over the documents that the Monitor has access to and has put in issue, including all of the privileged communications from advisors related to and surrounding the 2005, 2010, 2012 and 2013 dividends.

19. Further, the Litigation Investigator proposes in its draft Order that the Court permit all of the plaintiffs to have access to Sears Canada's privileged information.[29] As with the Monitor, the Litigation Investigator has not demonstrated that it has the right to waive or maintain Sears Canada's privilege over the documents.

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[23] Monitor's Draft Claim, Monitor's Motion Record [MMR] Tab 2(A), at para. 55.
[24] *Ibid.*, at para. 55.
[25] *Ibid.*, at para. 51. See particularly para. 51(d).
[26] *Ibid.*, at para. 53. See particularly para. 53(c).
[27] *Ibid.*, at para. 54. See particularly para. 54(c).
[28] Adam M. Dodek, *Solicitor-Client Privilege*, (Markham: Lexis, 2018) at 7.131 [Dodek]. *Bank Leu AG v. Gaming Lottery Corp.*, [1999] OJ No 3949 at paras. 5-6 (S.C.J.).
[29] Protocol at para. 4(a).

20. The Court should not give the Monitor and a Litigation Trustee, both officers of the court, the right to commence claims against the ESL parties if such relief would be an abuse of process. Permitting the moving parties to issue claims that rely on the privilege of a third party would constitute an abuse of process if, as it seems they claim, the moving parties are able to plead, use, and rely upon the documents but are not required or able to produce them.

Privilege belongs to Sears Canada, not the Monitor

21. The moving parties improperly seek to exert power over Sears Canada's privilege in its documents. At paragraph 4 of the "Common Issues Trial Protocol", the moving parties seek this Court's protection against waiver of Sears Canada's privilege in the "sharing of Sears Canada Inc. documents between the Monitor, the Litigation Trustee, counsel to the pension claimants and the Class Action plaintiffs." At paragraph 4(c) of its draft order, the Litigation Investigator asks that this Court give the Litigation Trustee the power to "waive privilege over any communication, including written communication, of Sears Canada without further Order of the Court". The moving parties act, that is to say, as if the privilege belonged to them, and with it the power either to withhold or to disclose relevant documents, at their own discretion.

22. By seeking to take control of Sears Canada's privilege, the moving parties attempt to reserve for themselves the right to withhold documents from the Proposed Defendants on this basis. This is improper as a matter of law.

23. The privilege in Sears Canada's solicitor-client and other confidential communications belongs to the company and continues to belong to it during the insolvency proceedings. It cannot be waived by the Monitor. It can be waived only by the Sears Canada board of directors.[30]

24. It is established authority in Canada that a trustee in bankruptcy cannot waive the bankrupt's privilege.[31] What applies to a bankruptcy necessarily applies to proceedings under the CCAA, given the more limited authority of the Monitor as compared to a bankruptcy trustee. In particular, unlike the Monitor, which acts alongside the insolvent company as the Court's "eyes and ears",[32] a bankruptcy trustee has broad statutory powers to assume conduct of the bankrupt's affairs and take possession of its property.[33] Despite its much greater power, the bankruptcy trustee has no power to waive privilege on the company's behalf. Clearly the Monitor can have no greater right, as it appears now to claim.

25. The Monitor's power to compel the insolvent company to produce to it privileged documents under s. 24 of the CCAA does not grant it authority over the company's privilege. Nor does the exercise of that power in and of itself waive the company's privilege. The use to which the Monitor can put these documents is, therefore, necessarily limited. It cannot, for example, disclose them to third parties. It also cannot, as it appears to seek to do on this motion, initiate an action that implicates the state of mind of the insolvent company, making Sears Canada's privileged documents relevant and producible.

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[30] Amended order appointing the Litigation Investigator, pronounced April 26, 2016, RR Tab 2, at para. 7, provides that the Sears Entities shall cooperate with the Monitor in providing documents to the Litigation Investigator "subject to the resolution of issues of privilege and confidentiality" [emphasis added].
[31] *Bre-X Minerals Ltd., Re*, 2001 ABCA 255 [*Bre-X*].
[32] *Nelson Education Limited (Re)*, 2015 ONSC 3580 at para. 35.
[33] *Bre-X* at para. 24. BIA ss. 16(3), 16(5), 18, 20, 21, 67, and 71.

The Monitor has no authority to provide privileged documents to third parties

26. Thus, unless the board of directors has waived the privilege, it would be improper for the Monitor to provide Sears Canada's privileged documents to third parties, including the Litigation Investigator. It follows also that it would not now be proper for the Monitor to initiate its proposed claim, which puts the company's and its directors' state of mind in issue, in such a way as to make otherwise privileged documents producible.

The Monitor must establish that it has obtained a waiver of privilege

27. The ESL parties do not know whether the Sears Canada board of directors has waived any subsisting privilege in documents for the moving parties' use in the proposed litigation. In particular, the ESL parties do not know whether the Monitor proceeded properly to obtain a waiver over privilege of the documents that it shared with the Litigation Investigator. The Monitor should be ordered to disclose whether or not this has occurred.

28. <u>If the Monitor has not obtained waiver through resolution of the board</u>, the Court should deny leave to the moving parties to commence the proposed claims. The proposed claims will place privileged communications of the company and its directors in issue, making these communications producible. At the same time, the Monitor lacks the power to produce the communications because the privilege belongs to Sears Canada. This dilemma can be resolved only by a waiver of privilege made by the body with authority to do so – the Sears Canada board of directors. Approval of the moving parties' motions should be conditioned upon a resolution of the board waving privilege over the documents the moving parties have put in issue. Further, if the Monitor has disclosed Sears Canada's privileged documents to the Litigation Investigator without

the consent of the Sears Canada board, it should be obligated to provide this Court an account of its conduct.

29. If the Monitor has obtained a waiver from the Sears Canada board, the Monitor should be required to produce evidence of the nature and scope of the waiver. Further, none of the moving parties should be entitled, as they propose, to any special right to preserve or waive the company's privilege at their discretion. All of the formerly privileged documents must be produced to the Proposed Defendants.

2) The Court should order the moving parties to produce the Sears Canada documents now

30. The moving parties unfairly seek an order that the Proposed Defendants should file statements of defence to the various proposed claims without first receiving production of the Sears Canada documents. It should be noted that these documents are not the ordinary productions of a party. They are third-party documents, to which the moving parties have gained access by virtue of being officers of the Court. In the interest of procedural fairness, the Proposed Defendants must have the same access to third party documents as is enjoyed by the proposed plaintiffs.

31. By the prior order of this Court, the Monitor and the Litigation Investigator have had unfettered access to Sears Canada's documents for many months. They have had the advantage of having them in investigating their claims and in drafting pleadings. Yet the Litigation Investigator, in its proposed Common Issues Trial Protocol, asks this Court to force the Proposed Defendants to deliver statements of defence without having similar access to the Sears Canada documents. Such a result would be fundamentally unfair and would provide the moving parties with a special advantage arising from their roles as officers of the Court. In the case of the Litigation Investigator, this unfairness is particularly pronounced: it seeks to turn the special access to Sears Canada

documents it enjoyed as a Court-appointed neutral into a strategic advantage it will use as counsel to a partisan litigant in its proposed action.

32. The ESL parties ask this Court to order the immediate and full disclosure of the Sears Canada documents in the possession of the Monitor and the Litigation Investigator as a precondition of the relief they seek.

3) The Court should refer all procedural issues to case management

33. This Court should deny the moving parties' request that the Court establish a case management protocol at this stage. A timetable should be set by a judge only once all the claims are drafted and filed, all defendants and prospective third parties are identified, and all preliminary issues can be considered by the Proposed Defendants. This can reasonably be done only by a case management judge, and only after the issuance of the proposed statements of claim.

This position is consistent with the Practice Direction

34. Part XIII of the *Consolidated Practice Direction Concerning the Commercial List* (the **"Practice Direction"**) provides for case management on movement of a party or at the direction of a judge of the Commercial List. According to Part XIII, a Scheduling Conference is to be held not more than 30 days after the making of an order for case management or the close of pleadings "to process the case in a timely and reasonable fashion and to deal with any matters of a procedural nature which should be addressed at an early stage of the proceedings."[34] The Practice Direction thus recognizes that a Scheduling Conference will not generally be appropriate until after the close of pleadings, at which time the pleadings will have identified the parties and framed the issues for the litigation. The Practice Direction also reflects the fact that only some, but not all, case

[34] Practice Direction at para. 35 [emphasis added].

management matters, such as the setting of a discovery plan and case timetable,[35] are suitable for determination in the early stages of litigation.

35. According to the Practice Direction, a further Case Conference is to occur within a month of the completion of discoveries, in part "to provide whatever directions as may be necessary or appropriate with respect to the disposition of the matter."[36] The Practice Direction thus recognizes that some issues are best left to be determined when a proceeding has reached a more advanced stage, when matters such as the identity of potential witnesses at trial, the scope of expert witness testimony, and the appropriateness of the available pre-trial procedures will be clearer.

36. The case management framework the Practice Direction sets out would be appropriate for the proposed proceedings. The ESL Parties do not oppose an order to place these proceedings into case management.

The proposed Common Issues Trial Protocol is unworkable and premature

37. The ESL Parties oppose the imposition of the Protocol that forms Schedule "A" to the Litigation Investigator's draft order. The Protocol goes well beyond proposing case management, under which a case management judge would set timetables and decide issues at sensible junctures in the proceedings. Instead, the Protocol would usurp the functions of a case management judge and impose the plaintiffs' preferred procedure on other parties – known and unknown, named and unnamed – when those parties do not even know the details of all the claims they expect to face.

38. At the current pre-pleadings stage of the litigation, the proposed Protocol goes so far as to:

[35] *Ibid.*, para. 36.
[36] *Ibid.*, para. 37.

- call on the Court in this motion to decide on matters of common-interest privilege, before the Court can even see the pleadings in all the litigation in which the proposed plaintiffs purportedly share a common interest;[37]

- determine the attendance obligations of defendants' representatives at examinations for discovery;[38]

- eliminate the first-instance jurisdiction of the Court over discovery-related motions (including, presumably, motions relating to claims of privilege), instead conferring such jurisdiction on an arbitrator who is presumptively to hear all discovery-related motions in writing;[39]

- set up a summary appeal procedure for appeals from the arbitrator's decisions on discovery-related motions to the Court;[40]

- impose an extremely abbreviated schedule for the exchange of expert reports that is contrary to the timelines set out in rule 53.03, and that is completely out of accord with the likely complexity and contentiousness of the litigation;[41]

- require the parties to agree, before trial, to an agreed statement of facts and joint book of documents, even though at present the parties have not even set out the constituent allegations of the causes of action and defences through the pleadings, revealed to each other what relevant documents are in their possession, or developed the evidence through discoveries;[42]

- require the parties to adduce their cases in chief through affidavit evidence other than what the plaintiffs call a "10-minute 'warm-up'" of oral evidence, even though at present the defendants have not had a reasonable opportunity to consider the nature, contents or sources of the evidence they or the plaintiffs will wish to adduce at trial;[43]

- mandate a common-interest trial;[44] and

- impose on the parties a schedule for closing submissions.[45]

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[37] Protocol at para. 4(a).
[38] *Ibid.*, para. 4.
[39] *Ibid.*, paras. 5(a) and (b).
[40] *Ibid.*, para. 5(c).
[41] *Ibid.*, para. 6.
[42] *Ibid.*, para. 7(a) and (b).
[43] *Ibid.*, paras. 7(d) and (h).
[44] *Ibid.*, para. 7.

39. Some of the multiple problems with the Protocol are outlined in the summary provided directly above. There are additional, more general problems that make it plain that imposing a Protocol like the one the Litigation Investigator proposes in this motion would be premature and unfair:

- Among the at least four proposed proceedings, only one statement of claim has been issued, this being the statement of claim in the Hometown Oppression Claim class action.

- The contents of the statements of claim of the Litigation Trustee and the Pensioners are unknown. "It is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings."[46] Until the statements of claim are drafted and finalized, therefore, the Proposed Defendants are left uncertain about what they are to face or what defences will be appropriate. In these circumstances, it would be unfair to impose a Protocol for the entire progress of the multiple proceedings. Compounding the unfairness is the fact that the Protocol has been devised and is being proposed by a moving party that has far more knowledge of the form the claims will take than do the respondents to this motion.

- Exacerbating the current uncertainty about the nature of the issues in the proposed litigation is the fact that in its supplementary report the Litigation Investigator expressly declines to limit itself to the causes of action it vaguely sets out in its first report.[47]

- It is not even clear who all the defendants to the litigation will be. The Litigation Investigator's draft order includes a list of possible defendants,[48] but stipulates that this list is not exhaustive. It would not be fair to impose a litigation protocol in the absence of some of the parties – as yet unknown – that will later be bound by it.

- Preliminary motions, including motions to strike, may be required depending on the contents of the pleadings.

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[45] *Ibid.*, para. 7(j).
[46] *Rodaro v. Royal Bank of Canada*, 2002 CanLII 41834, fourth page (Ont. C.A.).
[47] Supplement to the First Report of Lax O'Sullivan Lisus Gottlieb LLP in its Capacity as Litigation Investigator, November 16, 2018 at para. 12.
[48] Litigation Investigator's Draft Order at para. 5.

- The defendants to the litigation may wish to name third parties, such as the professional advisors of Sears Canada, among others. Until the defendants have had a chance to review the statements of claim and conduct their own investigations, they will not be able to determine with any certainty whether any potentially viable third party claims exist. And yet, before potential third parties have been identified – let alone been served with third-party claims or been provided with any chance to make submissions on procedural matters – the Litigation Investigator is proposing a Protocol which will affect them, and which does not take any possible third party claims into account.

- It is not clear what is to happen to the 2013 class action, *1291079 Ontario Limited v. Sears Canada Inc.*, Ontario Superior Court (Milton) File No. 3769/13 (the "**Hometown Franchise Claim**"), on which the Hometown Oppression Claim depends. The Protocol does not address the fact that the Hometown Franchise Claim must be resolved before the Hometown Oppression Claim can be determined. Moreover, the Protocol does not indicate whether Sears Canada intends to defend the Hometown Franchise Action.

- There has been no opportunity for a case management judge to become adequately familiar with the parties and issues in the proposed litigation. The Litigation Investigator proposes a highly individualized process of a type that should be tailored to particular procedural challenges in the proceedings at issue. But the proceedings have not even been commenced and the Court is not in the position to assess whether the Protocol will lead to an efficient, just resolution of these particular major pieces of litigation. A case management judge will be in that position later on.

40. The Court should decline, so early in these proceedings, to approve a protocol that would impose a procedure that extends all the way to the timing of closing submissions at the end of trial. As in in *Dasti v. DTE Industries*,[49] in which the Court assigned a number of related actions to case management, "[i]t is premature to worry about how the Case Management Judge would organize the ongoing situation. … Deciding what was fair in any given circumstance would be the job of the Case Management Judge after he had heard the submissions of counsel." And, as the New Brunswick Court of Queen's Bench wrote in the context of case management of complex tobacco litigation, "it is premature to set a schedule for the next several years at such an early stage in this

[49] *Dasti v. DTE Industries*, 2009 CanLII 16738 at para. 5 (Ont. S.C.J.).

massive and complex lawsuit. It would be unwise to schedule for the entire matter at the outset…."[50] These statements apply equally to this litigation.

41. For all the above reasons, the ESL Parties request that this Court decline to impose the Litigation Investigator's proposed Protocol.

4) The Court should create a reserve for the Proposed Defendants' costs

42. The Litigation Investigator's draft order creates an unjust imbalance in respect of costs. It grants the Litigation Trustee access to an amount secured on Sears Canada's estate that will permit it to fund its own litigation costs, but does nothing to secure any obligation that Sears Canada may incur to pay the defendants' costs in the event the proposed actions are unsuccessful. This is in contrast with the Monitor's draft order, which specifically contemplates an adverse costs order against the Monitor and provides for an amount secured against Sears Canada's property to indemnify the Monitor in such an event.[51]

43. The Litigation Investigator's draft order contains the following relevant provisions:

- Paragraph 4(b) permits the Litigation Trustee to commence claims in his own name or in the name of Sears Canada.
- Paragraph 8 provides:
    - that the Litigation Trustee will incur no liability as a result of his appointment or carrying out the provisions of the order, other than for gross negligence or wilful misconduct;
    - that Sears Canada will indemnify and hold the Litigation Trustee harmless for liability incurred as a result of his appointment or carrying out the provisions of the order, other than for gross negligence or wilful misconduct – that is, Sears Canada

[50] *R. v. Rothmans Inc.*, 2009 NBQB 9 at para. 24.
[51] Monitor's draft order, MMR Tab 3, at paras. 8 and 9.

will indemnify and hold the Litigation Trustee harmless for the same liability that is apparently released in the bullet point directly above; and

- that "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."[52]

- Paragraph 10 orders that Sears Canada pay the Litigation Trustee and his counsel at their standard rates. The order directs this to be on a biweekly basis. Paragraph 10 also orders that Sears Canada pay each of the Litigation Trustee and his counsel a $50,000 retainer.

- Paragraph 12 orders that, in addition, the Litigation Trustee and his counsel benefit from a charge on Sears Canada's property in the amount of $500,000 (the **"Litigation Trustee's Charge"**), to rank equally with the Administration Charge above all other security interests, trusts, liens, etc.

44. The Litigation Investigator's first report and the Monitor's 27th report refer to a recommendation by the Litigation Investigator, approved by the Creditors' Committee, that $12 million be set aside from Sears Canada's estate to cover the litigation expenses of the Litigation Trustee and the Monitor.[53] The proposed orders of the Litigation Investigator and the Monitor nowhere make reference to this $12 million fund, require that Sears Canada set it aside, or create any charge to cover potential adverse costs awards.

45. The combined effect of the provisions of the order regarding the payment of litigation expenses is that the Litigation Trustee and his chosen counsel will receive payment regularly from Sears Canada's estate. As a result of the $12 million fund that will likely be set aside, pursuant to the recommendations of the Monitor and the Litigation Investigator, there will remain sufficient funds in the estate to cover the plaintiffs' anticipated fees. In any event, because of the Litigation

[52] What "the action" refers to is unclear. It may mean "any action commenced against the Litigation Trustee in respect of his work", or it may main "any of the proceedings the Litigation Trustee is permitted to commence under the order". This factum will assume that the Litigation Investigator intends the latter meaning.
[53] First Report of the Litigation Investigator at para. 36; Monitor's 27th Report at para. 89.

Trustee's charge of $500,000 and the retainers of $50,000 to be paid to each of the Litigation Trustee and his counsel, the they will be able to incur unpaid fees of $600,000 at any one time and be sure of payment.

46. It will not, however, be in the interests of the insolvent Sears Canada or of its creditors to retain enough in Sears Canada's estate to cover potential adverse costs awards. Nothing in the draft orders requires Sears Canada to do so. The prospective defendants' substantive right to costs in the instance they are successful is therefore in jeopardy.

47. The unfairness of the present situation is similar to the one that existed in *1511419 Ontario Inc. v. Canaccord Genuity Corp*,[54] a case about security for costs. In that case, a company under protection of the CCAA had commenced major litigation for the ultimate benefit of its creditors, which had provided funds for a litigation trust that would cover the plaintiff's litigation expenses. Myers J. wrote as follows:

> There is an imbalance in an action that is being pursued by a shell company for the benefit of creditors who are not parties. The creditors are quite properly realizing on the plaintiff's causes of action. They will be entitled to the benefit of costs awards if they win. But as things currently stand, the creditors will not be liable for costs if the plaintiff loses.[55]

This unfairness led Myers J. to grant the defendants' motion for security for costs.

48. The unfairness in this case is similar. Sears Canada and its creditors have an interest in retaining in Sears Canada's estate enough to fund the proceedings of the Litigation Trustee and the Monitor, but no more. There is, as things presently stand, no reason for Sears Canada or its creditors to ensure that Sears Canada's estate is sufficiently funded to cover an eventual adverse

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[54] *1511419 Ontario Inc. v. Canaccord Genuity Corp.*, 2017 ONSC 3448.
[55] *Ibid.* at para. 7; see also *Proxema Ltd. v. Birock Investments Inc.*, et al, 2016 ONSC 5686 at para. 25.

costs award in the Litigation Trustee's proceeding. Nor is Sears Canada a going concern with assets that the defendants can rely on to be available to cover such an award at the conclusion of proceedings.

49. In the circumstances, the appointment of the Litigation Trustee should be conditional upon the creation of a charge against the assets of the estate sufficient to cover potential adverse costs orders payable to the Proposed Defendants in the Litigation Trustee's action. Sears Canada and its creditors cannot have the benefit of the use of the estate to fund litigation without the obligation to ensure adverse costs awards are paid. The Monitor itself has made clear in its materials that at least $12 million is available to be set aside from Sears Canada's estate for the purpose of litigation.[56] Half of this amount, $6 million, should be specifically designated as a reserved, secured amount available to cover any obligation Sears Canada may incur to pay adverse costs awards in the future. If, later in the litigation, the Proposed Defendants' fees have accumulated beyond $6 million, they should be entitled to move for an order increasing the fund. Given that the Litigation Investigator and Monitor estimate their potential litigation costs at $12 million, that possibility is real.

PART IV - ORDER REQUESTED

50. The ESL Parties request:

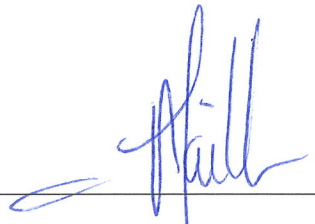
(a) as a condition of the relief the moving parties seek in their draft orders, that immediate production be made of all Sears Canada documents to which the Monitor and Litigation Investigator have had and will have access;

(b) that this Court decline to make any procedural orders at this stage other than to refer these matters to case management; and

[56] Twenty-Seventh Report of FTI Consulting Canada Inc., as Monitor at paras. 87-88.

(c) that the appointment of the Litigation Trustee be made conditional on the creation of a charge against, or reserve over, the estate in the amount of $6 million to cover potential adverse costs orders payable to the Proposed Defendants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of November, 2018.



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SCHEDULE “A” — LIST OF AUTHORITIES

Jurisprudence

1. *1511419 Ontario Inc. v. Canaccord Genuity Corp.*, 2017 ONSC 3448
2. *Bank Leu AG v. Gaming Lottery Corp.*, [1999] OJ No 3949 (S.C.J.)
3. *Bre-X Minerals Ltd., Re*, 2001 ABCA 255
4. *Dasti v. DTE Industries*, 2009 CanLII 16738 (Ont. S.C.J.)
5. *Nelson Education Limited (Re)*, 2015 ONSC 3580
6. *Proxema Ltd. v. Birock Investments Inc, et al.*, 2016 ONSC 5686
7. *R. v. Rothmans Inc.*, 2009 NBQB 9
8. *Rodaro v. Royal Bank of Canada*, 2002 CanLII 41834 (Ont. C.A.)

Secondary Sources

1. Adam M. Dodek, *Solicitor-Client Privilege*, (Markham: Lexis, 2018)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

***Bankruptcy and Insolvency Act*, RSC 1985, c B-3**

Trustee to take possession and make inventory

> **16 (3)** The trustee shall, as soon as possible, take possession of the deeds, books, records and documents and all property of the bankrupt and make an inventory, and for the purpose of making an inventory the trustee is entitled to enter, subject to subsection (3.1), on any premises on which the deeds, books, records, documents or property of the bankrupt may be, even if they are in the possession of an executing officer, a secured creditor or other claimant to them.

Right of trustee to books of account, etc.

> **16 (5)** No person is, as against the trustee, entitled to withhold possession of the books of account belonging to the bankrupt or any papers or documents, including material in electronic form, relating to the accounts or to any trade dealings of the bankrupt or to set up any lien or right of retention thereon.

...

Conservatory measures

> **18** The trustee may when necessary in the interests of the estate of the bankrupt
>
> > **(a)** take conservatory measures and summarily dispose of property that is perishable or likely to depreciate rapidly in value; and
> >
> > **(b)** carry on the business of the bankrupt until the date fixed for the first meeting of creditors.

Divesting property by trustee

> **20 (1)** The trustee may, with the permission of the inspectors, divest all or any part of the trustee's right, title or interest in any real property or immovable of the bankrupt by a notice of quit claim or renunciation by the trustee, and the official in charge of the land titles or registry office, as the case may be, where title to the real property or immovable is registered shall accept and register in the land register the notice when tendered for registration.
>
> *Registration of notice*
>
> **(2)** Registration of a notice under subsection (1) operates as a discharge or release of any documents previously registered in the land register by or on behalf of the trustee with respect to the property referred to in the notice.

Verifying bankrupt's statement of affairs

21 The trustee shall verify the bankrupt's statement of affairs referred to in paragraph 158(d).

…

Property of bankrupt

67 (1) The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person;

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;

(b.1) goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);

(b.2) prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or

(b.3) without restricting the generality of paragraph (b), property in a registered retirement savings plan or a registered retirement income fund, as those expressions are defined in the *Income Tax Act*, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that

(i) is not subject to the operation of this Act, or

(ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the *Family Orders and Agreements Enforcement Assistance Act*, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

Deemed trusts

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

Exceptions

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4)of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a ***province providing a comprehensive pension plan*** as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a ***provincial pension plan*** as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

…

Vesting of property in trustee

71 On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

…

Transfer at undervalue

96 (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

Establishing values

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

Meaning of *person who is privy*

(3) In this section, a *person who is privy* means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

…

Inquiry into dividends and redemptions of shares

101 (1) Where a corporation that is bankrupt has paid a dividend, other than a stock dividend, or redeemed or purchased for cancellation any of the shares of the capital stock of the corporation within the period beginning on the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, the court may, on the application of the trustee, inquire into the transaction to ascertain whether it occurred at a time when the corporation was insolvent or whether it rendered the corporation insolvent.

Judgment against directors

(2) If a transaction referred to in subsection (1) has occurred, the court may give judgment to the trustee against the directors of the corporation, jointly and severally, or solidarily, in the amount of the dividend or redemption or purchase price, with interest on the amount, that has not been paid to the corporation if the court finds that

(a) the transaction occurred at a time when the corporation was insolvent or the transaction rendered the corporation insolvent; and

(b) the directors did not have reasonable grounds to believe that the transaction was occurring at a time when the corporation was not insolvent or the transaction would not render the corporation insolvent.

Criteria

(2.1) In making a determination under paragraph (2)(b), the court shall consider whether the directors acted as prudent and diligent persons would have acted in the same circumstances and whether the directors in good faith relied on

(a) financial or other statements of the corporation represented to them by officers of the corporation or the auditor of the corporation, as the case may be, or by written reports of the auditor to fairly reflect the financial condition of the corporation; or

(b) a report relating to the corporation’s affairs prepared pursuant to a contract with the corporation by a lawyer, notary, accountant, engineer, appraiser or other person whose profession gave credibility to the statements made in the report.

Judgment against shareholders

(2.2) Where a transaction referred to in subsection (1) has occurred and the court makes a finding referred to in paragraph (2)(a), the court may give judgment to the trustee against a shareholder who is related to one or more directors or to the corporation or who is a director not liable by reason of paragraph (2)(b) or subsection (3), in the amount of the dividend or redemption or purchase price referred to in subsection (1) and the interest thereon, that was received by the shareholder and not repaid to the corporation.

Directors exonerated by law

(3) A judgment pursuant to subsection (2) shall not be entered against or be binding on a director who had, in accordance with any applicable law governing the operation of the corporation, protested against the payment of the dividend or the redemption or purchase for cancellation of the shares of the capital stock of the corporation and had thereby exonerated himself or herself under that law from any liability therefor.

Directors' right to recover

(4) Nothing in this section shall be construed to affect any right, under any applicable law governing the operation of the corporation, of the directors to recover from a shareholder the whole or any part of any dividend, or any redemption or purchase price, made or paid to the shareholder when the corporation was insolvent or that rendered the corporation insolvent.

Onus of proof — directors

(5) For the purposes of subsection (2), the onus of proving

> **(a)** that the corporation was not insolvent at the time the transaction occurred and that the transaction did not render the corporation insolvent, or
>
> **(b)** that the directors had reasonable grounds to believe that the transaction was occurring at a time when the corporation was not insolvent or that the transaction would not render the corporation insolvent

lies on the directors.

Onus of proof — shareholder

(6) For the purposes of subsection (2.2), the onus of proving that the corporation was not insolvent at the time the transaction occurred and that the transaction did not render the corporation insolvent lies on the shareholder.

***Companies' Creditors Arrangement Act*, RSC 1985, c C-36**

24 For the purposes of monitoring the company's business and financial affairs, the monitor shall have access to the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company, to the extent that is necessary to adequately assess the company's business and financial affairs.

…

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

Interpretation

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

(a) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";

(b) to "trustee" is to be read as a reference to "monitor"; and

(c) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company".

Consolidated Practice Direction Concerning the Commercial List, effective July 1, 2014

Part XIII: Case Management

34. It is expected that most matters of substance and of an ongoing nature on the Commercial List shall be subject to a form of case management by a Commercial List judge. Paragraph 33 already provides for significant informal case management for each case on the Commercial List. When a matter is transferred to the Commercial List, when the trial of an issue is directed or in any other matter where a party moves for case management and a Commercial List judge so directs, a specific case management judge may be appointed.

35. Where a Commercial List matter is subject to specific case management, a Scheduling Conference (if not already held at the time of transfer or otherwise) shall be held with the case management judge not later than one month after the close of pleadings or the date of the order (referred in paragraph 34) to determine a plan to process the case in a timely and reasonable fashion and to deal with any matters of a procedural nature which should be addressed at an early stage of the proceedings. The prospects for settlement should also be addressed. The results of a Scheduling Conference will be recorded in a Case Timetable.

36. Counsel will be expected to have conferred among themselves, prior to the Scheduling Conference, for the purpose of preparing a plan to process the case, including a discovery plan pursuant to rule 29.1 and a Case Timetable, for review with the case management judge.

37. Unless otherwise ordered, a Case Conference shall also be held with the case management judge not later than one month after the completion of discoveries. The plaintiff or applicant shall have the onus of arranging the Case Conference. The purpose of the Case Conference is to monitor the progress of the matter, to canvass settlement or other disposition of all or as many of the issues as possible, and to provide whatever directions as may be necessary or appropriate with respect to the disposition of the matter.

38. A Case Conference may be held at any other time during the proceeding where the parties consent or where a party moves for the scheduling of a Case Conference and the case management judge so directs.

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 OF 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.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

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