

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

BETWEEN:

1291079 ONTARIO LIMITED

Plaintiff

and

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

MOTION RECORD

January 18, 2019

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Court File No. 4114/15CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

1291079 ONTARIO LIMITED

Plaintiff

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

NOTICE OF MOTION (CERTIFICATION)

THE PLAINTIFF will make a motion to the Honourable Justice Thomas McEwen on a date and at a time to be fixed, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. An order certifying this proceeding as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“CPA”);
2. An order that the class be defined as:

All corporations, partnerships, and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement with Sears at any time from July 5, 2011 to June 22, 2017 (the “**class members**”)

or such further and other definition as counsel may advise or the Court may determine upon this motion;

3. An order designating the plaintiff as the representative plaintiff;
4. An order that this proceeding be certified on the basis of the following common issues, or such further and other common issues as counsel may advise or the Court may determine upon this motion:
 - a) Are the class members “complainants” within the meaning of section 238(d) of the *Canada Business Corporations Act*, RSC 1985, c C-44 (“**CBCA**”) in respect of the claims made in the action as against the defendants, and each of them?
 - b) Did the defendants, or any of them, engage in conduct that was “oppressive” conduct within the meaning of section 241 of the CBCA in respect of the payment of an extraordinary cash dividend paid on December 6, 2013 (the “**Extraordinary Dividend**”)?
 - c) If so, are those defendants jointly and severally required to pay compensation pursuant to s. 241(3)(j) of the CBCA or otherwise to the class members?
 - d) If so, what is the quantum of such compensation?
5. An order approving the Plan of Proceeding proposed by the plaintiff;
6. An order that Sears Canada Inc. or its monitor provide to class counsel the last known mailing and email addresses of all class members;

7. An order that Notice of Certification to the class be delivered by regular mail or email to the last-known mailing or email addresses, as the case may be, for the class members provided by Sears Canada Inc. or its monitor;
8. An order that the opt-out period run for a period of thirty (30) days from the date on which the Notices are sent by regular mail;
9. Costs of this motion; and
10. Such other order respecting the conduct of this proceeding and its fair and expeditious determination as this Court deems just.

THE GROUNDS FOR THE MOTION ARE:

1. The statement of claim discloses causes of action against the defendants;
2. There is an identifiable class of approximately 351 corporations which will be represented by the representative plaintiff;
3. The claims of the class members raise common issues;
4. A class proceeding is the preferable procedure for resolving the common issues;
5. The representative plaintiff will fairly and adequately represent the interests of the class members, has a workable plan for advancing the proceeding on behalf of the class members and notifying the class members, and does not have any interest in conflict with the interests of the other class members;

6. *Class Proceedings Act, 1992*, S.O. 1992, c. 6 and in particular section 5 thereof;
7. Rules 1, 2 and 12 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194; and
8. Such further and other grounds as counsel may advise.

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

1. The affidavit of James Kay sworn January 18, 2019;
2. The pleadings and proceedings herein; and
3. Such further and other material as counsel may advise.

DATE: January 18, 2019

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Court File No. 4114/15CP

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Plaintiff

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**AFFIDAVIT OF JAMES KAY
SWORN JANUARY 18, 2019**

I, JAMES KAY, of the Town of Woodstock, in the Province of Ontario, **MAKE OATH
AND SAY:**

1. I am the President of 1291079 Ontario Limited (“**129**”), the plaintiff in this action. 129 operated a Sears “Hometown store” in Woodstock, Ontario during the class period. In addition to being the proposed representative plaintiff in this action (the “**Oppression Action**”), 129 is the representative plaintiff in a certified class proceeding against the defendant, Sears Canada Inc. (“**Sears**”), bearing Court File No. Court File No. 3769/13-CP (the “**Franchise Action**”).
2. The Oppression Action relates to the payment of a \$509 million extraordinary dividend by Sears on December 6, 2013 (the “**Extraordinary Dividend**”). The Oppression Action

alleges that, as contingent creditors of Sears through the claims made in the Franchise Action, the class members were oppressed by the payment of the Extraordinary Dividend.

3. I have personal knowledge of the matters stated in this affidavit, except where I have acquired such information from others or from documents attached hereto, in which case I believe such information to be true.

4. This affidavit is sworn in support of a motion to certify the Oppression Action as a class proceeding.

A. The Franchise Action

5. The Franchise Action was commenced on July 5, 2013. Attached as Exhibit "A" is a copy of the Fresh as Amended Statement of Claim in the Franchise Action.

6. The Franchise Action was certified as a class action by the Order of the Honourable Justice Gray dated September 8, 2014. Copies of the Reasons for Decision and Certification Order are attached as Exhibits "B" and "C", respectively.

7. The class that was certified pursuant to the Certification Order includes "all corporations, partnerships, and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement with Sears at any time from July 5, 2011 to June 22, 2017 (the "**Hometown Dealers**").

8. The Hometown Dealers are independent businesses that operated in small towns and rural areas across Canada. Their relationship with Sears was governed by their respective dealer agreement (which are alleged to be franchise agreements within the meaning of provincial

franchise legislation) that had two fundamental characteristics - they gave Sears the unilateral and discretionary right to set dealer revenue levels, and they made Hometown Dealers responsible for all costs and risks of their business. Attached as Exhibit "D" to this affidavit is a copy of the dealer agreement (the "**Dealer Agreement**") entered into by 129 and Sears.

9. The Franchise Action alleged that the Dealer Agreement creates a franchisor-franchisee relationship between the Hometown Dealer and Sears that is subject to the *Arthur Wishart Act (Franchise Disclosure)*, 2000, SO 2000, c 3 ("**Wishart Act**") and other similar provincial franchise legislation.

10. As such, there is a statutory duty of "fair dealing" in the performance and enforcement of the Dealer Agreement pursuant to section 3 of the Wishart Act. The Franchise Action alleges that Sears had duties, both under the Wishart Act and at common law, to deal fairly and act in good faith towards the Hometown Dealers in the way it exercised its discretion to set compensation for the Hometown Dealers. The Franchise Action alleges that Sears breached the Dealer Agreement and its duties in how it performed its obligations under the Dealer Agreement by:

- (a) setting and maintaining a compensation structure that results in the vast majority of Hometown Dealers being unable to make a living wage from the business, let alone realize a return on its investment and efforts;
- (b) cannibalizing sales in the Hometown Dealer's market area by selling goods directly to customers in corporate stores, over the internet and telephone (and offering incentives to do so) and shipping those goods directly to the customer, bypassing the Hometown Dealer and avoiding paying compensation to the Hometown Dealer for sales in the dealer's 'Market Area' as defined under the Dealer Agreement;

(c) charging and retaining for itself an unauthorized “handling fee” on all goods purchased online or by telephone and shipped to the Dealer’s store, thereby directing sales away from the Dealer stores; and

(d) introducing new programs superficially designed to be revenue neutral, but that in fact claw back for many Hometown Dealers what little economic benefits the program delivers to the dealers.

11. In addition, the Franchise Action alleged that, starting in 2014, Sears failed in its duties to reasonably support and protect the Hometown Dealer network by cutting financial support and personnel directly supporting the Hometown store network.

12. The Franchise Action also alleged that Sears breached the obligation under section 5 of the Wishart Act to deliver a disclosure document to any dealer before that dealer entered into a Dealer Agreement, entitling the Hometown Dealers to damages for statutory misrepresentation under section 7 of the Wishart Act. Instead of disclosing the truth about the economics of the network as would be required in a disclosure document, it provided a common information package to prospective Hometown Dealers which touted the Hometown store system as “brilliant,” “better than a franchise,” and a “smart business model.”

13. As a result of these breaches, the Hometown Dealers claimed damages in the amount of \$100,000,000.00 for breach of contract and breach of sections 3, 5 and 7 of the Wishart Act.

B. The Oppression Action

14. On October 21, 2015, while the Franchise Action was proceeding through the discovery stage, 129 commenced the Oppression Action against Sears, its directors and its parent companies alleging oppression contrary to the *Canada Business Corporations Act*. A copy of the Statement of Claim in the Oppression Action is attached as Exhibit "E".

15. As stated above, the Oppression Action relates to the payment of the Extraordinary Dividend by Sears on December 6, 2013. The Oppression Action alleges that the payment of the Extraordinary Dividend came at a time when Sears was heading towards an inevitable insolvency filing.

16. The Extraordinary Dividend followed steps taken by Sears in 2013 to liquidate many of its most valuable assets, including hundreds of millions of dollars realized by giving up valuable below-market long-term leases in prime Canadian shopping centres such as Toronto's Eaton Centre and Yorkdale Shopping Centre. The primary beneficiaries of the Extraordinary Dividend were Sears' American parent corporations, Sears Holding Corporation and ESL Investments Inc. Sears' directors elected to pay out the Extraordinary Dividend to Sears Holding Corporation and ESL Investments Inc.

17. After the declaration of the Extraordinary Dividend on November 19, 2013 but prior to its payment on December 6, 2013, class counsel in the Franchise Action, Sotos LLP, wrote to counsel for Sears requesting assurances that, having regard to the assets, liabilities (existing and contingent) and actual and likely future operating losses of Sears, it had set aside a sufficient reserve to satisfy a judgment against Sears should the Franchise Action be certified and succeed on the merits. No answer was provided.

18. On December 3, 2013, class counsel wrote to each director to put them on notice that should Sears be unable to satisfy an eventual judgment against Sears in the Franchise Action, that each director who authorized the Extraordinary Dividend may be jointly and severally liable with Sears for such damages. A copy of this letter is attached as Exhibit “F”. No answer was provided and Sears subsequently paid out the Extraordinary Dividend.

19. Sears’ financial performance continued to deteriorate following the payment of the Extraordinary Dividend.

20. The Oppression Action seeks damages from Sears, Sears Holding Corporation, ESL Investments Inc. and each director that authorized the Extraordinary Dividend for conduct contrary to the *Canada Business Corporations Act*.

21. On March 29, 2016, the parties in the Oppression Action agreed to a consent order staying the Oppression Action. Attached as Exhibit “G” is a copy of the Order of the Justice Gray dated March 29, 2016. The stay was to be automatically lifted if, among other things, Sears made a formal insolvency filing under the *Companies’ Creditors Arrangement Act* (“CCAA”).

C. Sears’ Insolvency

22. On June 22, 2017, Sears obtained protection under the CCAA, pursuant to the Order of the Honourable Justice Hailey. As a result of the CCAA proceeding, the Franchise Action was stayed, as were the claims in this action against Sears and the directors.

23. Pursuant to the claims procedure order issued in the Sears CCAA proceeding, 129 filed proofs of claims in respect of each of the Franchise Action and this action, asserting, in the case of the Franchise Action, a \$101,100,446.77 contingent and unliquidated claim against Sears, and

in the case of the Oppression Action, a \$509,000,000 contingent and unliquidated claim against the Oppression Action defendants.

D. Requirements for the Lawsuit to be Certified

24. I understand that certain requirements must be satisfied for an action to be certified as a class proceeding. These requirements are that:

- (a) the statement of claim makes out a **claim(s) recognizable in law**;
- (b) the class that the plaintiff proposes to represent is **identifiable**;
- (c) the claims of the class members raise **common but not necessarily identical issues of fact or law**;
- (d) a class proceeding is the **preferable procedure** for the resolution of the common issues; and
- (e) the representative plaintiff will (i) **fairly and adequately represent the class**, (ii) **does not have any interests in conflict with the class**, and (iii) presents a **workable plan of proceeding** for resolving the common issues.

25. In the following paragraphs, I provide facts addressing the requirements in subparagraphs (b) to (e) above. I understand that the requirement in subparagraph (a) above is determined based on the statement of claim, without reference to external evidence.

The “Identifiable Class” Requirement

26. The proposed class consists of: All corporations, partnerships, and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement with Sears at any time from July 5, 2011 to June 22, 2017 (the “**class members**”). June 22 is the date that Sears obtained protection under the CCAA.

27. To the best of my knowledge, information and belief, there are over 350 proposed class members.

28. Every proposed class member would know by reading the class definition whether or not they are in the class.

The “Common Issues” Requirement

29. The following common issues are proposed:

(a) Are the class members “complainants” within the meaning of section 238(d) of the *Canada Business Corporations Act*, RSC 1985, c C-44 (“CBCA”) in respect of the claims made in the action as against the defendants, and each of them?

(b) Did the defendants, or any of them, engage in conduct that was “oppressive” conduct within the meaning of section 241 of the CBCA in respect of the payment of the Extraordinary Dividend?

(c) If so, are those defendants jointly and severally required to pay compensation pursuant to s. 241(3)(j) of the CBCA or otherwise to the class members?

(d) If so, what is the quantum of such compensation?

30. These issues are common to all proposed class members.

The “Preferability of a Class Action” Requirement

31. As mentioned above, all proposed class members are class members in the Franchise Action. The remedies sought in this action are the same for all proposed class members.

32. Each class member is an individual contingent creditor of Sears through their respective claim in the Franchise Action. It is my belief that it would be impractical for any proposed class member to bring an individual action for the claims in the Oppression Action. The proposed class members are small, independently-owned retailers located from coast to coast throughout Canada. Most lack the resources and time necessary to devote to complex litigation such as this.

33. The efficiencies which I understand are available to the Dealers under a class action are necessary, in my view, to create a more level playing field with the defendants.

34. I can think of no benefit in requiring each proposed class member to assert its rights with respect to the common issues in multiple individual trials. Conversely, there would be tremendous benefit in allowing the proposed class members to combine their inputs to bring a single action against the defendants for the benefit of all of them.

35. Further, I understand that, pursuant to paragraph 18 of the Order of Justice Hainey dated December 3, 2018 (the “**December 3 Order**”), a case management judge was appointed for the Oppression Action. A copy of the December 3 Order is attached as Exhibit “H”. If certified, I understand that this action will proceed in tandem with the claims brought by the Monitor, Litigation Trustee and the Pension Administrator (all as defined in the December 3 Order) (collectively, the “**Other Actions**”). Each of the Other Actions focuses on the payment of the Extraordinary Dividend.

36. In support of the December 3 Order, the Litigation Investigator, Lax O’Sullivan Lissus Gottlieb LLP prepared a report setting out its findings. A copy of the First Report of the Litigation Investigator dated November 5, 2018 is attached as Exhibit “I”. A copy of the

Supplement to the First Report of the Litigation Investigator dated November 16, 2018 is attached as Exhibit “J”.

37. In those reports, the Litigation Investigator set out a Common Issues Trial Protocol (the “Protocol”). The Protocol sets out a procedure for the hearing of the Oppression Action and the Other Actions. While I understand that the Protocol did not make it into the December 3 Order, I am advised by David Sterns, lawyer at Sotos LLP, that it is anticipated that a similar plan will be put to the case management judge for approval.

The “Suitability of Class Representative” requirement

38. 129 was approved as the class representative in the Franchise Action.

39. 129 has a real and genuine interest in prosecuting this lawsuit for itself and for the benefit of all proposed class members and will vigorously litigate this action to its conclusion.

40. I am aware of the duties owed by the class representative to the class and am committed to contributing my time, knowledge, energy and leadership to bringing this case to a successful conclusion.

41. Neither 129 nor I have any interest in conflict with any of the members of the proposed class.

42. Attached as Exhibit “K” is a Plan of Proceeding which sets out a method of advancing this case on a timely basis on behalf of the class and of notifying class members of the action and developments in the case. The Plan was prepared by my counsel. I have reviewed the Plan and, subject to the limitations of my legal knowledge, believe that it is workable plan for advancing

the common issues and for notifying class members. I anticipate that the Plan of Proceeding will be revised in accordance with the litigation protocol established jointly with the Other Actions.

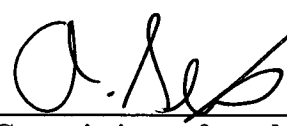
43. I make this affidavit in support of a motion for an order certifying this action under the *Class Proceedings Act, 1992*, and for no other or improper purpose.

Sworn before me at the
City of Toronto,
in the Province of Ontario
this 18 day of January, 2019

)
)
)
) JAMES KAY
)

A. Lewis
Commissioner for taking affidavits etc.
Andy Serets (LSO: 572590)

This is Exhibit "A" referred to in the
Affidavit of James Kay sworn before me this
18th day of January, 2019



A Commissioner for taking Affidavits

Court File No. 3769/13 CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

1291079 ONTARIO LIMITED

Plaintiff

- and -

SEARS CANADA INC.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

AMENDED / MODIFIÉ

March 8 2016

PURSUANT TO / CONFORMÉMENT A

Order of Justice Gray dated March 4 2016

Jewett

LOCAL REGISTRAR / GREFFIER LOCAL
SUPERIOR COURT OF JUSTICE (ONTARIO)

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

M. TOMCZYK

July 5, 2013
:
:
:

Issued by M. TOMCZYK
Local Registrar

Address of court office Milton Courthouse
491 Steeles Avenue East
Milton, ON L9T 1Y7

TO: SEARS CANADA INC.
290 Yonge Street, Suite 700
Toronto, Ontario
M5B 2C3

CLAIM

1. The plaintiff claims as against the defendant, Sears Canada Inc. :
 - (a) damages not exceeding \$100,000,000 for:
 - (i) breach of contract;
 - (ii) breach of sections 3 and 7 of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 (“**Wishart Act**”);
 - (iii) breach of sections 7 and 9 of the *Franchises Act*, S.A. 1995, c. F-17 (“**Alberta Act**”), sections 3 and 7 of *The Franchises Act*, C.C.S.M., c. F156 (“**Manitoba Act**”), sections 3 and 7 of the *Franchises Act*, S.N.B. 2007, c. F-23.5 (“**NB Act**”), and sections 3 and 7 of the *Franchises Act*, R.S.P.E.I. 1988, c. F-14.1 (“**PEI Act**”), in respect of class members carrying on business in Alberta, Manitoba, New Brunswick and Prince Edward Island, respectively;
 - (iv) breach of articles 6, 7 and 1375 of the *Civil Code of Quebec*, S.Q. 1991, c. 64 (“**Civil Code**”) in respect of class members carrying on business in Quebec;

or, alternatively, an order directing individual hearings in respect of such damages;
 - (b) further, and in the alternative, compensation and restitution for unjust enrichment in the amount of \$100,000,000;

- (c) an accounting of all products sold by either of the defendants through direct channels (as defined herein) and delivered directly to customers within each class member's defined market area since the inception of each class member's Dealer Agreement (as defined herein) and judgment in an amount equal to Retail Commissions (as defined herein) on all such sales;
- (d) a mandatory order directing the defendants to pay to the class members Retail Commissions in respect of all products sold by either of the defendants through direct channels and delivered directly to customers within each class member's defined market area;
- (e) an accounting of all commissions paid to each class member in accordance with section D of Schedule "A" to the Dealer Agreement since the inception of each class member's Dealer Agreement, and judgment for any shortfall arising therefrom;
- (f) a declaration that the defendant is a "franchisor" within the meaning of the Wishart Act, Alberta Act, Manitoba Act, NB Act and PEI Act (collectively, the "**Franchise Acts**");
- (g) a declaration that each class member is entitled to the benefit of the Wishart Act pursuant to the choice of law provision in the Dealer Agreement, and further that each class member carrying on business in Ontario, Alberta, Manitoba, New Brunswick and Prince Edward Island is entitled to the protection of the Franchise Act applicable in its province;

- (h) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
- (i) costs of this action on a substantial-indemnity scale, plus applicable goods and services and harmonized sales taxes; and
- (j) such further and other relief as this Honourable Court deems just, including all further necessary or appropriate accounts, inquiries and directions.

Summary of Claim

2. The class members comprise a network of approximately 260 "Sears Hometown" stores operating in every province and territory of Canada pursuant to a standard dealer agreement ("**Dealer Agreement**") with the Sears defendants. The Dealer Agreement is a franchise agreement within the meaning of the Franchise Acts, although Sears does not comply with any applicable franchise legislation.

3. Sears uses its discretionary powers under the Dealer Agreement to make it virtually impossible for a dealer to realize a profit unless it achieves exceptionally high, and generally unattainable, revenues. The Hometown store program dooms dealers to financial ruin while Sears reaps the rewards of the dealers' hard work and investment. The principal of the average class member labours 50-60 hours per week in its store for the equivalent of minimum wage and receives no return on its investment. Many dealers cannot afford to pay their principal any wage at all. Sears is well aware that the Hometown store program is not economically viable for the dealers.

4. On the other hand, the Hometown store program is a very profitable distribution channel for Sears. Sears realizes high profit margins on sales made through the Hometown stores while downloading the high retail and handling costs onto the dealers who operate on a subsistence compensation model. Even though Sears maintains unilateral, discretionary power under the Dealer Agreement to adjust the dealers' financial compensation in order to make the Hometown store model a successful one for the dealers and Sears alike, Sears has ignored repeated pleas from the dealer body to exercise its discretion to increase compensation to a sustainable level. Instead, Sears squeezes ever more profit from the Hometown store program and leaves dealers to languish and then fail. After a dealer finally exhausts its resources and gives up its store, Sears reacquires and resells the store to a new dealer by misrepresenting the truth about the system.

5. Sears perpetuates this predatory scheme through a number of means. First, it conceals the economic reality about the Hometown store program from prospective dealers. It does so by disregarding provincial franchise disclosure laws designed, among other things, to provide full disclosure of all material facts related to the franchise system. Instead of disclosing the truth about the economics of the network, it provides a common information package to prospective dealers which touts the Hometown store system as "brilliant," "better than a franchise," and a "smart business model."

6. Once the dealer has signed the Dealer Agreement, often tying itself into a long-term lease, the exploitation of the dealer continues:

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- (a) Sears maintains a compensation structure that results in the vast majority of dealer-principals being unable to make a living wage from the business, let alone realize a return on its investment and efforts.
- (b) Sears poaches sales in the dealer's market area by selling goods directly to customers over the internet and telephone and ships those goods directly to the customer, bypassing the dealer and avoiding paying compensation to the dealer for sales in the dealer's 'Market Area' as defined under the Dealer Agreement.
- (c) Sears charges and retains for itself an unauthorized "handling fee" on all goods purchased online or by telephone and shipped to the dealer's store.
- (d) Sears has introduced new programs superficially designed to be revenue neutral, but that in fact claw back for many dealers what little economic benefits the program delivers to the dealers.

7. Additionally, beginning in 2014, Sears has failed in its obligation to reasonably support and protect the Hometown store network by cutting financial support and personnel directly supporting the Hometown store network. Sears has exacerbated this failure by eroding the "Sears" brand in the public eye. It has done so by selling the leases for many of its prime corporate "Sears" locations and other cuts to the support of its retail business. These sales and cuts did not result in any funds being used to support or protect the Hometown store network, but were instead used to pay extraordinary dividends to Sears US-parent corporations.

8. Contrary to its duty of good faith and statutory duty of fair dealing, Sears carries out these acts solely to maximize its own profits, and in complete disregard of the dealers' economic well-being, reasonable commercial interests and contractual expectations.

9. Through these systemic actions, Sears has destroyed the right of dealers to enjoy the fruits of the Dealer Agreement and has deprived the dealers of the opportunity to fairly participate in revenues and profits generated by the Hometown store program.

Parties

10. The plaintiff, 1291079 Ontario Limited, is incorporated under the laws of Ontario and carries on business in the Town of Woodstock, Ontario, as a retailer under the "Sears Hometown" store program.

11. The defendant, Sears Canada Inc. ("**Sears**"), is incorporated under the federal laws of Canada and has its head office in the City of Toronto, Province of Ontario. Sears is one of Canada's largest retailers of home appliances, furnishings, mattresses, electronics and apparel, among other things.

12. In addition to Hometown stores, Sears owns and operates its own retail outlets, including full-line department stores and other smaller, specialty retail outlets. Sears also sells products to customers through catalogue ordering, telephone ordering through its 1-800 telephone number, and online through www.sears.ca (collectively, the "**direct channels**"). Sears distributes catalogues across Canada where customers can order goods from the catalogues, which are then either delivered directly to the customer or picked up

at a Sears retail outlet. Similarly, customers can order products directly from Sears online from Sears' website or through Sears' 1-800 telephone number for direct delivery or pickup at a Sears outlet.

13. At the end of 2012, there were approximately 260 Hometown stores, 118 full-line department stores, as well as other Sears retail stores.

14. The proposed class consists of all persons carrying on business as a Hometown store under a Dealer Agreement with Sears at any time on or after January 1, 2011 ("dealers" or "class members").

The Sears Hometown Store Program

15. Hometown stores typically offer for sale major appliances, furniture, home electronics, and outdoor power equipment among other things, and include a catalogue merchandise pick-up location. Most Hometown stores are located in small towns and more rural areas that lack the market size to support a full-line department store, which are generally located in large urban and suburban shopping centres.

16. Dealers do not pay any upfront fees to Sears to be part of the Hometown stores program, but must pay for the fixturing and design of their stores. Dealers are also responsible for securing a lease for the premises for the Hometown store and the costs of leasehold improvements. While Sears provides some of the equipment used in the operation of the Hometown store (such as the POS system so Sears can track sales), a dealer purchases all the other equipment and fixtures not provided by Sears. Typically, a

dealer is required to spend between \$50,000 - \$100,000 to get its Hometown store up and running in addition to its lease commitments.

17. Under the Dealer Agreement, with the exception of purchasing most inventory, a dealer is responsible for all expenses in running its Hometown store. The dealer is responsible for securing the premises, paying staff, utilities, and all other business expenses that are required to operate the Hometown store.

18. With respect to most inventory, according to the Dealer Agreement, the dealer acts as bailee for Sears, which places the inventory with the dealer on consignment. When an item is sold at the Hometown store, according to the Dealer Agreement, title to the inventory transfers directly from Sears to the customer and all payments for merchandise by the customer are the property of Sears. All credit card payments are directed to Sears. All cash payments are deposited into Sears' bank account.

19. Sears controls what merchandise is offered for sale at each Hometown store and at what price. A dealer has little input on what merchandise is sold at its Hometown store. Sears also controls what inventory is on display and the general layout of the Hometown store.

Dealer's Revenue Streams

20. A dealer does not earn revenue directly from the customers that shop at the Hometown store (except from the sale of parts and accessories, as to which see paragraph 72 below). Rather, Sears pays the dealer a commission for merchandise sold at the Hometown store. Each category of items offered (for example, major appliances) has a

set commission rate. On average, the commission paid by Sears is about 10% of the retail price of the merchandise (the "**Retail Commissions**"). Therefore, if a dealer sells \$1,000,000 of merchandise at its Hometown store, Sears will pay the dealer approximately \$100,000 in Retail Commissions.

21. In addition to Retail Commissions, a dealer earns 4.5% of the retail price of goods ordered through the direct channels that are picked-up at the dealer's Hometown store ("**Direct Channel Commissions**").

22. A dealer also earns a 3% commission of the retail price of goods if a catalogue order is made from the dealer's Hometown store ("**Catalogue Commissions**").

23. A dealer also earns \$25 for an item that is purchased at another Sears' retail location (including other Hometown stores) and picked up at the dealer's Hometown store, and an additional \$10 for each additional item in a multi-piece order ("**Retail Handling Commissions**").

24. Retail Commissions, Direct Channel Commissions, Catalogue Commissions and Retail Handling Commissions are hereinafter collectively referred to as "**commissions**" or "**compensation**".

25. The majority of a dealer's revenue comes from Retail Commissions.

26. If a customer cancels or returns an item purchased from the dealer's Hometown store, the dealer's commission is reduced by the commission originally paid on the sale

of the good without compensation for handling. The dealer is also responsible to pay Sears for unpaid goods in certain cases where a customer does not make proper payment.

Hometown Store Program Is Not Viable for Dealers

27. Hometown stores are a very profitable business segment for Sears. On the sale of a typical good at a Hometown store, Sears realizes a gross margin of approximately 36%. Out of that 36%, Sears pays the dealer approximately 10% for the Retail Commissions and keeps the remaining 26% for itself, despite the fact that virtually all of the costs of selling the good are borne by the dealer. Out of the dealer's 10% Retail Commissions, it must pay rent, employees, utilities and all other expenses needed to keep the Hometown store operating.

28. The effect of the Sears Hometown Program is that the vast majority of dealers barely earn enough commissions to cover their expenses and pay their principals minimum wage. Many dealers are unable to pay their principals more than a token amount for their 50-60 hour work week. Very few dealers generate enough income to pay their principals a living salary and earn a return on their investment. Many dealers hang on out of fear that by closing their store, they will be forced into bankruptcy due to lease obligations and employee obligations.

29. Sears, on the other hand, profits handsomely from the Hometown store program. By realizing an approximately 36% gross margin from the sale of goods (and even after covering its own expenses for distribution and maintaining the Hometown Sears program), the Hometown store program has been a huge boon to Sears' profitability

while the dealers struggle to stay in business and not lose their initial investment and be exposed to claims from landlords, employees and the like.

30. Sears knows that the Hometown store program is unsustainable for the dealers. After a dealer eventually runs out of money, Sears simply appoints a new dealer operator to run the Hometown store.

31. The commissions under the Dealer Agreement, which directly impact the viability of the dealer network, can be changed by Sears in its sole discretion on 90 days' notice to the dealers. Because of this unilateral discretion to change the commissions, Sears has a duty of good faith and a statutory duty of fair dealing under section 3 of the Wishart Act to exercise its discretion in a manner which is fair and commercially reasonable taking into account the interests of both Sears and the dealership network at large. Sears has instead breached such unilateral and discretionary powers by perpetuating a predatory system of under-compensation which forces dealer-principals to labour 50-60 hours per week in return for subsistence compensation which Sears knows is insufficient to meet their basic financial needs, and which provides no return on the dealers' financial investment and efforts.

32. Sears is fully aware of that the commissions structure of the Dealer Agreement is unsustainable and that Retail Commissions need to be increased to at least 15% of sales on average in order for the dealership network to be viable. However, instead of increasing commissions pursuant to its unilateral and discretionary powers, Sears has:

- (a) *lowered* dealers' commission rates;

- (b) unlawfully competed for sales by selling and shipping directly to customers within the dealers' market area through the direct channels without compensation to the dealers and offered lower prices through the direct channels while prohibiting dealers from price matching;
- (c) implemented a handling fee on catalogue sales for its sole benefit and without sharing of such fee with the dealers who do the actual handling; and
- (d) removed local store advertising subsidies and converted such advertising to national advertising.

33. Further particulars of these actions are provided in the following paragraphs.

(a) Lowering of dealers' commissions

34. In August 2012, Sears reduced the average Retail Commission rates paid to dealers.

35. Under the Dealer Agreement, Sears reserves the right to modify the Retail Commissions paid to dealers by providing no less than 90 days' written notice to the dealers. In light of the vulnerability of the dealers, whose only compensation are the commissions set by Sears, modifications to the Retail Commissions must be carried out fairly, in good faith and in accordance with reasonable commercial standards. Such modifications must also be made with proper motive and taking into account the dealers' reasonable expectations of profit.

36. At the same time, in order to offset the reduction in Retail Commissions, Sears introduced a 1% bonus commission if the customer purchases the item using a Sears-branded credit card (the “**Cardshare Program**”). Under the Cardshare Program, if a customer purchases an item at the Hometown store using its Sears’ credit card, Sears pays the dealer a 1% bonus commission, in addition to the Retail Commission regularly paid on the sale of the item.

37. When Sears introduced the Cardshare Program, Sears represented to the dealers that the reduction in Retail Commissions would not have a negative effect on a dealer’s commissions, and would result in an increase in revenue for the dealers. Sears sent to every dealer a customized report summarizing the net effects on total commission under the Cardshare Program.

38. Through the Cardshare Program, Sears encourages dealers to push customers to buy their products using the Sears’ credit card. Sears does this because it has an agreement with the underwriter for the Sears credit card that pays Sears a substantial undisclosed rebate on goods bought using the Sears’ credit card (“**Credit Card Rebates**”). Sears then uses a small part of the Credit Card Rebates to pay the dealer the 1% bonus under the Cardshare Program. A dealer has little control over whether a good is purchased using a Sears credit card other than to try to promote and encourage the use of the card. The change in Retail Commission has had a net negative effect on many dealers’ revenue to the benefit of Sears.

39. Section 16.07 of the Dealer Agreement states: “[t]he Dealer **shall not be required to pay additional costs** for Sears established credit plans or approved third party credit plans” (Emphasis added).

40. The Credit Card Rebates is money that is properly payable to the dealers as the dealers are the merchants who transact with the customers. To the extent that such amounts would otherwise have been payable to the dealers but, through negotiation, Sears has directed the third party credit provider to pay such amounts to itself, then such amounts are “additional costs” and are in breach of section 16.07 of the Dealer Agreement.

41. Further, the lowering of Retail Commissions in August 2012 was an additional cost to the dealer for approved third-party credit plans in breach of section 16.07 of the Dealer Agreement.

42. The lowering of the Retail Commissions in August 2012 and the receipt of Credit Card Rebates by Sears, individually and together, in circumstances where Sears is aware that the Hometown dealer program is unsustainable for the dealers, have been carried out in complete disregard of the interests of the dealers and in a purely self-preferential manner by Sears. Such conduct is a breach of the duty of good faith and the statutory duty of fair dealing under the Wishart Act.

43. The Credit Card Rebates are not disclosed to a prospective dealer before it enters into the Dealer Agreement in a disclosure document or otherwise, contrary to section 5(4) of the Wishart Act and section 6(8) and the general regulation thereto, O. Reg. 581/00.

The dealers claim damages in respect of such non-disclosure under section 7 of the Wishart Act.

44. Further, and in the alternative, Sears has been unjustly enriched through the receipt of the Credit Card Rebates and the lowering of the Retail Commissions in August 2012.

45. Further, because the dealers are the merchants who transact with the customers directly as independent businesses, the Credit Card Rebates are ordinarily payable to them, but have been redirected through negotiation between Sears and the third-party credit card underwriters to be paid entirely to Sears. Accordingly, the Credit Card Rebates are indirect payments by the dealer to Sears or its associate within the definition of "franchise" under section 1(1) of the Wishart Act as discussed more fully below under the heading "Sears is a Franchisor under the Franchise Acts."

(b) Sears directly competes within dealers' market area

46. Sears undercuts the dealers' revenues by competing with Hometown stores through the direct channels and shipping directly to customers in the dealer's market area. Hometown stores are generally located in small towns or rural areas. Under section 4.01 of the Dealer Agreement, Sears reserves the right to "acquire, own, license, operate or authorize others to operate and advertise other Sears stores **physically located** within the [dealer's] Market Area," but only if, "in Sears [sic] sole discretion, acting reasonably, the Market Area can support such expansion" (emphasis added). "Market Area" is defined in the plaintiff's Dealer Agreement as Woodstock, Ontario.

47. Unlike with respect to the placement of physical stores, Sears did not reserve to itself the right to compete with the dealers' stores through the direct channels and direct-to-customer shipping. The Dealer Agreement does not permit Sears to compete in the dealer's Market Area using direct shipping through the direct channels. Despite this, Sears actively competes in the dealer's Market Area by selling through the direct channels and shipping directly to customers residing in the dealers' Market Area. Sears also sends promotional emails and flyers to customers in the dealer's Market Area encouraging them to order products through the direct channels. Sears does not pay commissions to the dealers in respect of direct channel sales shipped directly to a customer in the dealer's Market Area.

48. The effect of Sears competing through its direct channels has been a material decrease in dealers' revenues, as customers are increasingly purchasing products through the direct channels and Sears is actively encouraging them to do so.

49. In addition to unlawfully encroaching upon the dealers' Market Area, Sears undercuts the dealers through its online business by incentivizing the customer to buy the item online through such things as "free shipment" promotions, "daily deals" and other online promotions. This results in greater profits to Sears than if the customer bought from a dealer's store as it results either in lower commissions to be paid to the dealer (if the online customer picks up the product from the dealer's store), or bypasses the dealer completely if the product is shipped directly to the customer. If the customer returns to a dealer store a good purchased online that was shipped directly, the dealer store receives no compensation for handling.

50. Sears sells online directly into the dealers' Market Area. Sears competes through www.sears.ca.

51. The sale of products by Sears through direct channels shipped directly to customers in the dealers' Market Areas is a breach of the Dealer Agreement.

52. Alternatively, if Sears is permitted to compete in the dealer's Market Area through the direct channels by shipping directly to customers (which is strictly denied), then, by analogy to section 4.01 of the Dealer Agreement, Sears can only compete in the dealers' Market Area in such manner if it can reasonably establish that the Market Area can support such competition. Because the Hometown store program is, to Sears' knowledge, unsustainable for the dealers, Sears is not permitted to compete with the Hometown stores through its direct channels unless it pays full Retail Commissions to the dealers for all direct channel sales within the dealer's Market Area.

53. Further and in the alternative, by engaging in such competition, Sears has failed to take the dealers' reasonable commercial interests into account or comply with the duties of good faith and fair dealing, and has been unjustly enriched by not paying Retail Commissions to the dealer in respect of direct channel sales into its Market Area.

54. Accordingly, the dealers request a mandatory order requiring Sears to pay Retail Commissions to the dealers in respect of direct channel sales into its Market Area and an accounting of all direct channel sales into their Market Area since the inception of their respective Dealer Agreement.

(c) Sears imposes unlawful "handling fee" on catalogue sales

55. Sears charges a \$3.95 flat "handling fee" for Hometown store customers that purchase items through a direct channel and choose to ship to a Hometown store for pick-up. Customers generally purchase items through a direct channel because the specific item is not offered for sale at the Hometown store.

56. Although it is the dealer which handles the item when the customer picks it up from the Hometown store, Sears keeps the entire handling fee for itself and does not share the fee with the dealer.

57. The effect of the handling fee is to discourage customers from having items purchased through a direct channel shipped to a Hometown store for pickup and to encourage customers to have the item shipped directly.

58. The handling fee is not permitted by the Dealer Agreement. Indeed, Sears highlights on its website page devoted to "Business Opportunities" for "Dealer Store Owners" that one of the benefits of the Hometown stores program is that there is "no merchandise shipping or handling fee." The imposition of the handling fee is a breach of the Dealer Agreement. Alternatively, the imposition of the handling fee in circumstances where Sears is aware that the dealer compensation is systemically inadequate constitutes a breach of the duties of good faith and fair dealing and/or unjust enrichment on the part of Sears.

59. Further, because the dealers handle the merchandise and transact directly with the customer, any handling fee is earned by the dealers, not by Sears. Because Sears directs the customer to pay the entire handling fee to Sears, the handling fees are indirect

payments by the dealer to Sears or its associate within the definition of “franchise” under section 1(1) of the Wishart Act as discussed more fully below under the heading “Sears is a Franchisor under the Franchise Acts.”

(d) Removal of local store advertising subsidies

60. Pursuant to section 19.01 of the Dealer Agreement, Sears is required to share advertising costs undertaken by a dealer. Until August 2012, after a dealer performed local advertising, which included distributing flyers, placing radio ads or other forms of local advertising, the dealer would submit the invoice to Sears who would reimburse the dealer for 50% of the cost pursuant to section 19.01 and Part H of Schedule “A” of the Dealer Agreement.

61. As part of this local advertising, Sears would create, at its own cost, advertising templates for flyers that dealers could distribute. A dealer would only be required to pay for the distribution costs of the flyer (usually through the local newspaper) and Sears would reimburse 50% of the distribution costs.

62. Beginning in August 2012, Sears implemented fundamental changes to the local advertising reimbursement program. The changes included three components:

- (a) With respect to flyers, Sears agreed to pay 100% of the production and distribution costs of a flyer. However, Sears maintained the discretion whether to distribute the flyer in a particular dealer’s market area. If Sears did not distribute the flyer in the dealer’s market area, the dealer would be responsible for 100% of the distribution costs;

- (b) With respect to radio and newspaper ads, Sears agreed to pay 100% of producing radio scripts and the production of the newspaper advertisement. The dealer would then be responsible for 100% of the costs of running the radio or newspaper advertisements; and
- (c) Periodically, Sears agreed to pre-approve various subsidies with respect to other local advertising, which a dealer was permitted to take advantage of. Otherwise, the dealer was required to request pre-approval from Sears for other local advertising, for which Sears would then decide whether to offer any reimbursement.

63. The net result of these changes is that dealers are now paying more for local advertising. Further, all of the flyers or advertising templates created by Sears for use by dealers are for national advertising and often include items that are not even offered for sale at the dealer's Hometown store. Such flyers also encourage customers to order through a direct channel and thereby completely bypass the dealers if products are shipped direct-to-customer. As such, in addition to the increase in direct costs placed on dealers through the changes to the advertising programs, Sears now charges dealers for what amounts to the right to advertise for Sears' other distribution channels. It is a detriment to the dealers to advertise products which are unavailable at their stores.

64. The changes initiated in August 2012 are a breach of section 19.01 and Part H of Schedule "A" of the Dealer Agreement. Alternatively, in circumstances where Sears is aware that the dealer compensation is systemically inadequate, such changes constitute a

breach of the duties of good faith and fair dealing and/or unjust enrichment on the part of Sears.

65. Further, to the extent that dealers are or were at any time under their current Dealer Agreements required to pay for:

- (a) part or all of the advertising of items not generally offered for sale at Hometown stores, or
- (b) advertising which, in whole or in part, constitutes national advertising,

such payments are or were indirect payments by the dealer to Sears or its associate within the definition of “franchise” under section 1(1) of the Wishart Act as discussed more fully below under the heading “Sears is a Franchisor under the Franchise Acts.”

Sears is a Franchisor under the Franchise Acts

66. Throughout this statement of claim, any reference to a section in the Wishart Act shall mean and include such equivalent section in the other Franchise Acts, as applicable, in accordance with the following table:

Wishart Act section	Manitoba Act, NB Act and PEI Act sections	Alberta Act section
1(1)	1(1)	1(1)
3	3	7
5	5	4
7	7	9
11	11	17

67. The Sears Hometown dealer program meets the criteria of a “franchise” under section 1(1) of the Wishart Act, namely: (i) the sale of goods associated with the

franchisor's name; (ii) the exercise of significant control by the franchisor over the business of the franchisee, and (iii) direct or indirect payments by the franchisee to the franchisor or its associate. Each of these criteria is discussed in the following subparagraphs:

(a) **Sale of goods associated with the Sears name:** The Dealer Agreement grants the dealer the right to sell, offer for sale or distribute goods or services that are substantially associated with Sears' trade-mark, service mark, trade name, logo or advertising or other commercial symbols.

(b) **Significant control:** Sears exercises significant control over a dealer's method of operation, including building design and furnishings, locations, business organization, marketing techniques or training. To take but a few examples, the dealer must carry only Sears products (s. 6.01); must sell products at the selling price determined by Sears (s. 6.09); must comply with Sears' operations manual (s. 5.08); and, may only advertise using approved advertising materials (s. 19.0); and

(c) **Payments to Sears or its associates:** The dealer is required by contract or otherwise to make direct or indirect payments to Sears or its associate in the course of operating the business or as a condition of acquiring the franchise or commencing operations. The types of payments which the dealer is required to make are set out in the following paragraphs.

(i) *Consignment sale is indirect payment by dealer to Sears*

68. Sears has structured the Dealer Agreement so that the payments required to be made by the dealer for inventory are ostensibly made by the retail customer directly to Sears. Using the artifice of a consignment contract, payment for inventory purchased from a dealer is deemed by the Dealer Agreement to be a payment made by the customer directly to Sears. Such payment, however, is for all intents and purposes an indirect form of payment of inventory by the dealer to Sears via the customer. Such payments qualify as indirect payments to Sears by the dealer in the course of operating the business and therefore satisfy the “payments” requirement under the definition of “franchise.”

69. Although the Dealer Agreement states that title to the inventory does not pass to the dealer but passes directly from Sears to the retail customer, Section 26 of the Dealer Agreement reveals that transactions between the dealer and its customer are made by the dealer as principal and not as a mere agent or bailee of Sears. Section 26 provides, among other things:

- a. “The Dealer agrees that all purchases and contracts, made by it in connection with the operation of the Dealer Store and this Agreement shall be made solely in the name of the Dealer...”
- b. “The Dealer further agrees not to do any act or make any statement that may imply that the Dealer or the Dealer Store is a branch of Sears or, that Sears in any manner owns, controls or operates the Dealer Store or, that any relationship exists between Sears and the Dealer other than that of the Dealer being an independent contractor of Sears.”

- c. "Nothing in this Agreement shall be construed to create a partnership, joint venture or agency relationship between Sears, Sears Roebuck, the Dealer, the Guarantor or any agent, employee or affiliate of the Dealer. The parties agree that the Dealer is an independent contractor."
- d. "the Dealer must clearly display on or near the principal entrance of to the Dealer Store a decal provided by Sears, which states 'SEARS AUTHORIZED RETAIL DEALER independently owned and operated by [dealer name]'".

70. Pursuant to sections 16.10 and 16.11 of the Dealer Agreement, the dealer is responsible to pay Sears for unpaid goods in certain cases where a customer does not make proper payment.

71. Such provisions indicate that the dealer transacts the sale of goods with its customer in its own name, as principal and not as agent. The consignment provisions in the Dealer Agreement are a transparent attempt to avoid the application of the Wishart Act. The plaintiff pleads and relies on section 11 of the Wishart Act to the extent that such provisions would otherwise have the effect of depriving the class members of their rights under the Wishart Act.

(ii) Purchase of products by dealer from Sears are direct payments

72. In addition to taking inventory ostensibly on consignment, dealers are required to purchase certain inventory, primarily parts and accessories, directly from Sears. The dealer must purchase such parts and accessories only from Sears pursuant to section 6.01 of the Dealer Agreement (unless Sears authorizes a dealer to purchase from a person

other than Sears). Such purchases constitute direct payments by the dealer to Sears within the meaning of section 1(1) of the Wishart Act.

(iii) *Credit Card Rebates are indirect payments by the dealer to Sears*

73. As stated in paragraph 45 above, Credit Card Rebates are indirect payments by the dealer to Sears or its associate.

(iv) *Handling fees are indirect payments by the dealer to Sears*

74. As stated in paragraph 59 above, handling fees are indirect payments by the dealer to Sears.

(v) *Advertising payments are indirect payments by the dealer to Sears*

75. As stated in paragraph 65 above, to the extent that the dealers pay for advertising which is, for all intents and purposes, national advertising, such payments are indirect payments by the dealer to Sears or its associate.

76. Accordingly, the Dealer Agreement is a “franchise agreement” within the meaning of the Wishart Act.

77. All class members are entitled to the protection of the Wishart Act pursuant to the choice of law in section 33.01 of the Dealer Agreement.

78. Alternatively, all class members carrying on business in Ontario, Alberta, Manitoba, New Brunswick and Prince Edward Island are entitled to the protection of their province’s respective Franchise Act.

Breach of Duties of Good Faith and Fair Dealing

79. Sears is a “franchisor” within the meaning of the Wishart Act.

80. Sears owes the class members a duty of fair dealing in the performance and enforcement of the Dealer Agreement under section 3 of the Wishart Act.

81. Further and in the alternative, Sears owes a duty of utmost good faith in the performance and enforcement of the Dealer Agreement particularly in the exercise of all discretionary rights affecting dealer compensation. Further, Sears owes dealers in the Province of Quebec a duty of good faith in the performance of its obligations under the Dealer Agreement pursuant to articles 6, 7 and 1375 of the Civil Code.

82. The Dealer Agreement grants Sears the discretion to modify the commissions under the Hometown store program. Such discretionary rights must be exercised not solely for Sears’ goal of profit maximization, as it has done, but in order to maintain a dealership network that fairly compensates both Sears and the dealers for their respective investments of labour and capital.

83. Sears’ contractual rights and obligations must be considered and applied in light of the vulnerability and the dependence of dealers, who, by virtue of the Dealer Agreement, sell only the products that Sears provides them at prices set by Sears, and whose compensation is set by Sears.

84. Sears’ contractual rights to set and modify dealer compensation imposes an obligation on it to set and maintain commission rates that afford the dealers a reasonable

opportunity to pay their expenses including a reasonable salary for their dealer-principals and realize a reasonable return on their investment. By refusing to do so, Sears has breached the Dealer Agreement including the duty to perform its obligations thereunder in good faith and has breached the statutory duty of fair dealing under the Wishart Act.

85. Sears has a continuing duty to act reasonably, and to adjust dealer compensation, including Retail Commissions, to reflect the economic realities in which the dealers operate. Sears cannot use its unilateral and discretionary powers to condemn the dealers to a compensation structure which Sears itself has acknowledged is "broken" and unsustainable for the dealers while Sears itself realizes significant profits from the Hometown stores system.

86. In carrying out its discretionary powers in respect of dealer compensation, Sears has acted with improper motive and without taking the dealers' reasonable commercial interests and contractual expectations into account by:

- (a) maintaining a compensation structure that results in the vast majority of dealers working for subsistence compensation and not realizing any return on their investment and sweat equity;
- (b) introducing new programs such as the Cardshare Program superficially designed to be revenue neutral to the dealers, but that, in fact, further claw back what little economic benefits the program delivers to the dealers;
- (c) unlawfully competing in the dealers' Market Areas through direct channel sales shipped directly to the customer as pleaded above;

- (d) receiving the Credit Card Rebates as pleaded above;
- (e) charging an unauthorized "handling fee" on all direct channel sales shipped to the dealer's store as pleaded above; and
- (f) clawing back payments for local advertising as pleaded above.

87. In so doing, Sears has breached the Dealer Agreement including the duty to perform its obligations thereunder in good faith, has breached the statutory duty of fair dealing under the Wishart Act, and has acted contrary to the duties contained in articles 6, 7 and 1375 of the Civil Code.

Breach of Statutory Disclosure Obligations

88. Sears is required under the Wishart Act to deliver to prospective dealers a statutorily prescribed disclosure document at least 14 days before a dealer signs any agreement or pays any money related to a Hometown store dealership.

89. The disclosure obligations under the Wishart Act apply to all class members pursuant to the choice of law provision in section 33.01 of the Dealer Agreement.

90. Alternatively, the disclosure obligations under the Franchise Acts apply to all class members carrying on business in the province in which the respective Franchise Act applies.

91. The disclosure document required under each of the Franchise Acts must contain complete and truthful information about the franchise system, supported by a certificate signed by two of Sears' officers or directors. The purpose of the disclosure document is

to ensure that a franchisee can decide whether to enter into the proposed franchise agreement with full and complete information.

92. Sears has failed to provide a disclosure document to any dealer. Had it done so, it would have had to disclose all "material facts" regarding its franchise system, as defined in the Franchise Acts and their corresponding regulations. In addition to the prescribed material facts set out in the Franchise Acts and their corresponding regulations, Sears would have had to disclose such material facts as:

- (a) the percentage of dealers that were not profitable because of the inadequate compensation structure;
- (b) the percentage of dealers that exhaust their resources and cease operating within a few years of opening;
- (c) whether revenues of Hometown stores have been steadily declining;
- (d) Sears competes directly with the dealers by selling into their Market Area through direct channel sales shipped directly to the customer in respect of which Sears pays no commissions to the dealers;
- (e) Contrary to the statement on Sears website devoted to "Business Opportunities" for "Dealer Store Owners" that there is "no merchandise shipping or handling fee," Sears charges and keeps for itself a "handling fee" of \$3.95 for items purchased through a direct channel for shipment to a Hometown store, even though the dealer handles the item when the customer picks it up from the Hometown store; and

- (f) Sears does not share the costs of local advertising undertaken by the dealer contrary to section 19.01 and Part H of Schedule A of the Dealer Agreement.

93. Sears did not provide a disclosure document to any class member.

94. By failing to provide a disclosure document, Sears has breached section 5 of the Wishart Act entitling the dealers to damages under section 7 thereof.

95. Further, each of the omissions pleaded at paragraph 92 above constitutes a misrepresentation within the meaning of sections 1(1) of the Wishart Act entitling the dealers to damages under section 7 thereof.

96. Sears further breached its disclosure obligations by providing prospective dealers with a franchise brochure (the "**Brochure**") that made the following misrepresentations about the Hometown store system:

- (a) "[t]his business model is brilliant. You partner with Sears and own one of our prestigious community stores";
- (b) "... we have created an opportunity to move up the escalator of business ownership and have concentrated on the elements that are critical to success";
- (c) "Sears wants you, our partner, to succeed. In fact, we take a personal and financial interest in your success";
- (d) "Better than a Franchise"

- (e) "A Smart Business Model;" and
- (f) "as a Sears Hometown Store owner, you will have a competitive advantage not normally associated with small businesses."

97. Each of these representations contained in the Brochure was false and misleading. Sears was negligent, reckless or careless in making such representations and in failing to disclose any of the material facts set out in paragraph 92 above to prospective Hometown dealers.

98. Sears knew and intended at all material times that the information contained in the Brochure would be used to induce members of the public to become Hometown dealers.

99. Sears knew and intended at all material times that prospective dealers would rely reasonably to their detriment upon the Brochure in making their decision to become a Hometown dealer.

100. Prospective Hometown dealers were entitled to, and did, reasonably rely on the Brochure and the lack of disclosure of the material facts set out in paragraph 92 in making a decision to become Hometown dealers.

101. The plaintiff pleads and relies on article 1375 of the Civil Code.

Failure to Support and Protect the Brand

102. It is a fundamental obligation of Sears under the Dealer Agreements that Sears would take proper measures and reasonable steps to support and protect the Hometown store network and the Sears brand by:

- (a) providing proper support to the Hometown store network and Sears brand;
- (b) promoting the ongoing success of the Hometown store network and Sears brand; and
- (c) meeting and addressing market challenges facing the Hometown store network and Sears brand.

103. In addition to the particular conduct described above, beginning in 2014 and continuously since then, Sears has breached the obligations set out in paragraph 102 above by:

- (a) eliminating support staff positions for the Hometown stores;
- (b) nearly doubling the number of Hometown stores that a district manager is responsible for overseeing;
- (c) reducing or not conducting any product education sessions for Sears products for Hometown store dealers;
- (d) having constant turnover of management and other Sears personnel responsible for the oversight, strategy and direction of the Hometown store network; and
- (e) reducing advertising and promotion of the Hometown stores.

104. In addition to its failure to support and protect the Hometown store network, Sears has eroded the “Sears” brand and failed to promote the ongoing success of the “Sears” brand by selling the leases and closing its flagship corporate Sears locations across Canada, including the locations at Toronto’s Yorkdale Shopping Centre and Mississauga’s Square One Shopping Centre in June, 2013 and Toronto’s Eaton Centre in October, 2013. These closures have had an immediate negative effect on the “Sears” brand and in turn, the Hometown store network. Additionally, Sears has engaged in other cost-cutting measures, including eliminating head office personnel and support staff for its Parts and Service department, transferring customer service support overseas, and outsourcing the fulfillment of catalogue orders to third parties and no longer owning or operating the warehouse that was used to fulfill catalogue orders resulting in missed or delayed customer orders, all to the detriment of the Hometown store dealers.

105. Rather than reinvesting the proceeds from the sale of the leases and other cost-cutting measures into supporting or promoting the the Hometown store network or “Sears” brand, Sears used such funds to pay out extraordinary dividends to its shareholders, with the primary beneficiaries being Sears’ American parent corporations who owned a majority shareholding in Sears.

106. As a result of the aforementioned conduct, Sears has failed to take reasonable steps to support and protect the Hometown store network and has: (i) breached the Dealer Agreements, including the duty to perform its obligations thereunder in good faith; (ii)

breached the statutory duty of fair dealing under the Wishart Act; and (iii) acted contrary to the duties contained in articles 6, 7 and 1375 of the Civil Code.

Harm to Dealers

107. As a direct result of the aforementioned acts and omissions, Sears has realized significant revenues and profits on the Hometown stores program while the dealers' revenues and profits have declined. Sears has deliberately kept commission rates low even though it was aware that commission rates were insufficient to cover the basic costs of running a Hometown store and that the dealers must use their dwindling revenues to pay for significantly increased costs of operation. By virtue of its acts and omissions pleaded above, Sears has destroyed the right of dealers to enjoy the fruits of the Dealer Agreement and has deprived the dealers of the opportunity to fairly participate in the revenues and profits generated by the Hometown store program.

108. Sears' aforementioned breaches have caused a drastic reduction in the number of Hometown stores from approximately 260 at the end of 2012 to less than half of that by the fourth quarter of 2015.

109. As a direct and foreseeable consequence of the acts and omissions pleaded above, dealers are entitled to substantial damages for:

- (a) breach of contract, including breach of the duty of good faith;
- (b) breach of the statutory duty of fair dealing under section 3 of the Wishart Act (or, in the event that the Wishart Act does not apply to class members carrying on business outside of Ontario, under the corresponding section of

the Franchise Acts and articles 6, 7 and 1375 of the Civil Code in respect of each class member carrying on business in a province in which a Franchise Act applies or in Quebec as the case may be); and

- (c) statutory misrepresentation under section 7 of the Wishart Act (or, in the event that section 7 of the Wishart Act does not apply to class members carrying on business outside of Ontario, under the corresponding section of the Franchise Acts and article 1375 of the Civil Code in respect of each class member carrying on business in a province in which a Franchise Act applies or in Quebec as the case may be);

110. Further and in the alternative, Sears must account for and disgorge all profits unreasonably retained as a result of its acts and omission described above. Sears has retained these profits unjustly, to the detriment of dealers and without juristic reason.

Accounting of Catalogue Sales Commissions

111. Section D of Schedule "A" to the Dealer Agreement provides that the dealer "will be provided with a statement each month which outlines how the Compensation was calculated". In breach of this section, Sears provides the dealers with a lump sum amount on their monthly statements showing commissions paid but no accounting of how the commissions were calculated. Dealers are unable to verify the amounts or the basis for such calculations. Despite requests from the dealers or their representatives, Sears has failed to properly account to the class members for commissions.

112. Sears has breached the Dealer Agreements by failing to account. Accordingly, the dealers request a complete account of all commissions since the inception of their Dealer Agreements and judgment for any shortfall arising therefrom.

July 5, 2013

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1291079 ONTARIO LIMITED
Plaintiff

-and-

SEARS CANADA INC. et. al.
Defendants

Court File No. 3769/13 CP

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT MILTON

FRESH AS AMENDED STATEMENT OF CLAIM

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Lawyers for the plaintiff

This is Exhibit "B" referred to in the
Affidavit of James Kay sworn before me this
18th day of January, 2019

A handwritten signature in black ink, appearing to be "A. Sep", written over a horizontal line.

A Commissioner for taking Affidavits

CITATION: 1291079 Ontario Limited v. Sears Canada Inc., 2014 ONSC 5190
COURT FILE NO.: 3769/13
DATE: 2014-09-08

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
1291079 ONTARIO LIMITED)	
)	David Sterns and Andy Seretis, Counsel for
Plaintiff)	the Plaintiff
)	
- and -)	
)	
SEARS CANADA INC. and SEARS,)	Peter F.C. Howard and Samaneh Hosseini,
ROEBUCK AND CO.)	Counsel for the Defendants
)	
Defendants)	
)	
)	
)	HEARD: June 11, 2014

2014 ONSC 5190 (CanLII)

REASONS FOR JUDGMENT

GRAY J.

[1] The plaintiff was a “Sears Hometown Store” operator. Sears is a well-known, large retailer.

[2] This case has to do with the relationship between operators of Hometown Stores and Sears. In substance, it is alleged that Sears has taken inappropriate and undue advantage of its position, to the unlawful disadvantage of the store operators.

[3] In this motion to certify an action as a class proceeding, the plaintiff seeks to represent a class of persons who had, or have, Hometown Store contracts with Sears. It is said that the contractual arrangements constitute the members of the class as “franchisees” and the defendants as “franchisors”, thus making applicable the provisions of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3. If so, the provisions of that *Act* bring into play certain

disclosure obligations that have not been fulfilled, and a number of substantive provisions that give rise to statutory causes of action and potential damages. In the alternative, it is alleged that the defendants have breached their common-law obligation of exercising discretion under the agreements in good faith, thus giving rise to damages.

[4] For the reasons that follow, the motion is granted and this action is certified as a class proceeding.

Background

[5] As I will discuss more fully later, the plaintiff is required to satisfy the requisites of section 5(1) of the *Class Proceedings Act*, S.O. 1992 c.6, as amended. With respect to the issue of whether a cause of action is disclosed, only the pleadings are to be examined. Regarding the other criteria, it is incumbent on the plaintiff to show that there is some basis in fact to support the conclusion that each criterion has been met.

[6] With these requirements in mind, I will discuss the basis of the claim and the defences as outlined in the pleadings, and some of the evidence that is relevant to the other criteria.

[7] The plaintiff alleges that the members of the class comprise a network of approximately 260 “Sears Hometown Stores” pursuant to a standard Dealer Agreement. The plaintiff alleges that the Dealer Agreement is a franchise agreement within the meaning of the *Arthur Wishart Act*.

[8] The plaintiff alleges that Sears uses its discretionary powers under the Dealer Agreement to make it virtually impossible for a dealer to realize a profit unless it achieves unattainable revenues. The plaintiff alleges that Sears is aware that the Hometown Store program is not economically viable for the dealers.

[9] The plaintiff alleges that the Hometown Store program is profitable for Sears. It is alleged that Sears realizes high profit margins on sales made through the Hometown Stores while downloading high costs onto the dealers. While Sears maintains unilateral, discretionary power under the agreement to adjust the dealers’ financial compensation, Sears has ignored repeated pleas to exercise its discretion to increase compensation to a sustainable level.

[10] The plaintiff alleges that Sears conceals the economic reality about the Hometown Store program from prospective dealers. It disregards franchise disclosure laws designed, among other things, to provide full disclosure of all material facts related to the franchise system. Instead of disclosing the truth about the economics of the system, it provides a common information package to prospective dealers which touts the system as “brilliant”, “better than a franchise”, and “a smart business model”.

[11] The plaintiff alleges that once the Dealer Agreement is signed, Sears exploits the dealer by maintaining a compensation structure that does not allow the dealer to make a living wage, let alone a return on its investment and efforts; Sears poaches sales in the dealers’ Market Areas by selling goods directly to customers; Sears charges an unauthorized “handling fee” on goods purchased online or by telephone and shipped to the dealers’ stores; and Sears has introduced new programs that actually claw back for many dealers what little economic benefits the program delivers to the dealers.

[12] The plaintiff alleges that these actions of Sears are contrary to its contractual duty of good faith and statutory duty of fair dealing.

[13] The plaintiff alleges that on goods sold through a Hometown Store, Sears realizes a gross margin of approximately 36 per cent. It is alleged that out of that amount, Sears pays the dealer approximately 10 per cent. Out of that commission, the dealer must pay rent, its employees, utilities and all other expenses. It is alleged that the vast majority of dealers barely earn enough commissions to cover their expenses and pay minimum wage to the principals.

[14] The plaintiff alleges that under the Dealer Agreement, the commissions can be changed by Sears in its sole discretion on 90 days notice. The plaintiff alleges that Sears has a duty of good faith and a statutory duty of fair dealing under the *Arthur Wishart Act* to exercise its discretion in a manner which is fair and commercially reasonable. Instead, it is alleged that Sears has perpetuated a predatory system of under-compensation. The plaintiff alleges that the commissions need to be increased to at least 15 per cent in order for the network to be viable. Instead, Sears has lowered commission rates and unlawfully competed within the dealers’

Market Areas by shipping directly to customers, and offered lowered prices through direct selling channels while prohibiting dealers from matching prices.

[15] Specifically, the plaintiff alleges that in August 2012, Sears reduced the average retail commission rates paid to dealers.

[16] The plaintiff alleges that the Dealer Agreement does not permit Sears to compete in the dealers' Market Areas using direct shipping through direct channels. Despite this, it is alleged that Sears actively competes by selling through direct channels and shipping directly to customers in the dealers' Market Areas. In the event that the Dealer Agreement does not specifically prohibit Sears from acting in this way, it is alleged that Sears has failed to take the dealers' reasonable commercial interests into account or comply with the duties of good faith and fair dealing.

[17] The plaintiff alleges that Sears charges a \$3.95 flat handling fee for customers that purchase items through a direct channel and choose to ship to a Hometown Store for pick up. This fee is kept by Sears and not by the dealer. The plaintiff alleges that the imposition of the fee is a breach of the Dealer Agreement or alternatively it constitutes a breach of the duties of good faith and fair dealing.

[18] The plaintiff alleges that Sears has changed the method of sharing advertising costs with the dealer, the result of which is that dealers are now paying more for local advertising. It is alleged that these changes are a breach of the Dealer Agreement, or alternatively they constitute a breach of the duties of good faith and/or fair dealing.

[19] The plaintiff alleges that Sears is a franchisor under the *Arthur Wishart Act*, and each dealer is a franchisee. Thus, it is alleged that Sears owes the class members a duty of fair dealing in the performance and enforcement of the Dealer Agreement under section 3 of *Act*. It is alleged that the actions of Sears constitute violations of these duties.

[20] The plaintiff alleges that pursuant to the *Arthur Wishart Act*, Sears was required to deliver to prospective dealers a statutorily prescribed disclosure document. It is alleged that

Sears did not do so. Had it done so, Sears would have to had to disclose materials facts, including:

- a) over 70 per cent of dealers are not profitable;
- b) many dealers exhaust their resources and cease operating within a few years;
- c) revenues of Hometown Stores have been steadily declining;
- d) Sears competes directly by selling into dealers' Market Areas through direct channels;
- e) Sears charges an improper handling fee of \$3.95 for items purchased through a direct channel for shipment to a Hometown Store;
- f) Sears does not share the cost of local advertising undertaken by the dealer.

[21] The plaintiff claims that each dealer is entitled to damages pursuant to sections 3 and 7 of *Arthur Wishart Act*.

[22] In the event that the *Arthur Wishart Act* does not apply, the plaintiff claims that the members of the class are entitled to damages for breach of contract, including breach of the duty of good faith; and disgorgement of profits unreasonably retained as a result of Sears' unjust enrichment. It is pleaded that Sears has retained those profits unjustly, to the detriment of dealers and without juristic reason.

[23] The plaintiff claims that Sears has violated the Dealer Agreements by failing to account for commissions, and now claims a complete accounting of all commissions since the inception of the Dealer Agreements, and judgment for any shortfall arising therefrom.

[24] In the statement of defence, it is asserted that Sears Canada Inc. is a leading retailer of general merchandise in Canada. It is asserted that Sears, Roebuck and Co. does not carry on business in Canada. It is asserted that Sears, Roebuck is only a party to the Dealer Agreements because it is the owner of several Sears trademarks. Otherwise, Sears, Roebuck has no other duties or obligations under the Dealer Agreements.

[25] The defendants assert that the *Arthur Wishart Act* does not apply to the Sears Hometown Stores. It is asserted that the operators of the Hometown Stores are not franchisees within the meaning of the *Act*.

[26] The defendants deny that dealer commissions have been reduced. In fact, it is asserted that the August, 2012 changes to the compensation structure resulted in an increase to the average commission. It is asserted that direct sales have been part of Sears' business for many years, and there is nothing in the Dealer Agreement that precludes Sears from engaging in this practice. It is asserted that Sears provides a 4.5 per cent commission to dealers on catalogue and internet sales shipped to their stores. It is asserted that the changes to advertising subsidies led to the reduction of advertising expense for the dealers.

[27] The defendants deny that any amendments to the dealer compensation structure and advertising subsidies were detrimental to the dealers, or amounted to a breach of contract, breach of a duty of good faith (or breach of the statutory duty of fair dealing in the event that the *Arthur Wishart Act* applies, which is denied) or unjust enrichment.

Section 5(1) of the *Class Proceedings Act*

[28] As noted earlier, the plaintiff must satisfy the requisites of section 5(1) of the *Class Proceedings Act*. That subsection provides as follows:

5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interest of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[29] I will discuss each requirement of section 5(1) in turn.

i. Do the pleadings disclose a cause of action?

[30] Under this requirement, all that is to be examined are the pleadings. No evidence is to be considered. With respect to the other requirements of section 5(1), the plaintiff must show that there is some basis in fact for each of those requirements.

[31] It is not in dispute that the test under section 5(1)(a) of the *Class Proceedings Act* is the same as the test under Rule 21.01(1)(b), as to whether a pleading discloses a reasonable cause of action: that is, whether it is “plain and obvious” that the pleading does not disclose a reasonable cause of action: see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; and *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.). In assessing the claims made in the pleading, it is to be read generously, with allowances for deficiencies: see *Healey v. Lakeridge Health Corp.* (2006), 38 C.P.C. (6th) 145 (Ont. S.C.J.), at para. 26.

[32] The assertion that the *Arthur Wishart Act* applies to the relationship between Sears and the plaintiff is clearly a proper cause of action. The defendants do not contend otherwise, and indeed they concede that this allegation is properly a common issue. If the *Act* applies, the claims for damages under sections 3 and 7 of the *Act* are clearly appropriate as well.

[33] The defendants also do not deny that the plaintiff has pleaded valid causes of action based on the implied duty of good faith, and unjust enrichment.

[34] I should note that the plaintiff has asserted a cause of action based on negligent misrepresentation, but counsel advised me at the hearing of the motion that that cause of action will be abandoned and the statement of claim amended accordingly. I also note that it is agreed that if the *Arthur Wishart Act* applies, it will be applicable to all operators of stores, both within and outside Ontario.

[35] In the final analysis, the plaintiff has pleaded valid causes of action and accordingly section 5(1)(a) has been satisfied.

[36] I note that while Sears alleges that there is no cause of action against Sears, Roebuck, that is best determined on a motion for summary judgment if one is brought.

(ii) Is there an identifiable class of two or more persons?

[37] The class proposed by the plaintiff consists of all corporations, partnerships, and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement with Sears at any time from July 5, 2011 to the date of sending of the notice of certification.

[38] The requirements of a class capable of certification were summarized by Strathy J. (as he then was), in *Fairview Donut Inc. v. The TDL Group Corp*, [2012] O.J. No. 834 (S.C.J.), at para. 220, as follows:

- (a) membership in the class should be determinable by objective criteria without reference to the merits of the action;
- (b) the class criteria should bear a rational relationship to the common issues asserted by all class members, but all class members need not share the same interest in the resolution of the asserted common issues;
- (c) the class must be bounded and not of unlimited membership;
- (d) there is a further obligation, although not onerous, to show that the class is not unnecessarily broad and could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues;
- (e) membership in a class may be defined by those who make claims in respect of a particular event or alleged wrong, without offending the rule against the class description being dependent on the outcome of the litigation; and
- (f) a proper class definition does not need to include only those persons whose claims will be successful.

[39] The defendants attack the proposed class definition, primarily on the basis that it does not distinguish between dealers who signed Dealer Agreements before and after August, 2012 when changes were made to the commission structure and advertising subsidies. Specifically, the defendants assert that claims based on the August, 2012 changes are not tenable for the following groups of dealers:

- (a) dealers who terminated Dealer Agreements prior to August, 2012;
- (b) dealers who had Dealer Agreements as of 2012, and have allowed their agreements to be renewed since then; and
- (c) dealers who entered into Dealer Agreements after August, 2012.

[40] The defendants also argue that the class definition should exclude dealers who entered into Dealer Agreements with knowledge of this action.

[41] I disagree with the defendants, and in my view the class definition as proposed is satisfactory.

[42] I do not read the claim based on the August 2012 amendments in the same way as the defendants appear to read it. Putting aside issues under the *Arthur Wishart Act*, assuming it applies, I read the allegations respecting the August 2012 amendments as examples of Sears' breaches of the obligation of good faith. As I read it, the statement of claim alleges that prior to the August 2012 amendments, Sears was already in breach of its obligation to exercise its discretion under the Dealer Agreements in good faith, and the August 2012 amendments simply resulted in further detriment to the dealers. Fundamentally, the plaintiff alleges that any dealer who was subject to a Dealer Agreement suffered in the same way, although the amount of harm at any particular point in time might have been different.

[43] I think the class as proposed is satisfactory and meets the criteria set out by Strathy J. in *Fairview Donut*, even though all class members do not share exactly the same interest in the resolution of one or more of the common issues.

(iii) Are there appropriate common issues?

[44] The term "common issues" is defined in section 1 of the *Class Proceedings Act* as

- a) common but not necessarily identical issues of fact, or
- b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[45] The principles concerning the definition of appropriate common issues were summarized by Strathy J. in *Fairview Donut, supra*, at paras. 229 and 230, as follows:

- a. the underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis;
- b. an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution;
- c. there must be a basis in the evidence before the court to establish the existence of common issues;
- d. there must be a rational relationship between the class identified by the plaintiff and the proposed common issues;
- e. the proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim;
- f. a common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class;
- g. the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation in the same manner, to each member of the class;
- h. a common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant;

- i. where questions relating to causation or damages are proposed as a common issue, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis;
- j. common issues should not be framed in overly broad terms;
- k. the core of a class proceeding is the element of commonality – there must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this; and
- l. the common issues should be clear, neutrally-worded and fair to both parties.

[46] At the argument of the motion, I was furnished with revised proposed common issues by counsel for the plaintiff. They are as follows:

- a. Have Sears Canada and Sears Roebuck, or either of them, at any time since July 5, 2011 breached their obligations under the Dealer Agreements with each of the class members, including the obligation to exercise contractual discretion in good faith by:
 - i. Failing to increase commissions paid to class members;
 - ii. Reducing commissions paid to class members in August 2012;
 - iii. Selling directly to customers located within the class members' Market Areas (as defined in their respective Dealer Agreements), or, alternatively, by failing to pay commissions to the class members for good sold directly to customers located within the class members' Market Areas through direct channels (as described below);
 - iv. Removing or reducing local store advertising subsidies required under Schedule A, paragraph H of the Dealer Agreement;

- v. Failing to provide a monthly accounting of how compensation was calculated as required under Schedule A, paragraph D of the Dealer Agreement; or
 - vi. Imposing handling fees payable by customers on catalogues sales made by dealers?
- b. Has Sears Canada or Sears Roebuck been unjustly enriched by any of the acts or omissions in (a) (i) to (vi) above?
- c. If Sears Canada or Sears Roebuck has breached its contractual duties, or been unjustly enriched, what is the appropriate measure of past damages or compensation?
- d. Are Sears Canada and Sears Roebuck, or either of them, a “franchisor” or “franchisor’s associate” within the meaning of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 (“*Wishart Act*”) and similar provisions under franchise legislations otherwise governing any such class member? If so:
- i. Are all class members entitled to the benefit of the *Wishart Act* by virtue of the choice of law provisions in the Sears standard Dealer Agreement?
 - ii. Did Sears breach the duty of fair dealing under s. 3 of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such class member by any of the acts or omission set out in (a) (i) to (vi) above and, if so, what are the damages?
 - iii. Was Sears required to deliver to each class member a disclosure document within the meaning of s. 5 of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such class member), at least fourteen days before the class member signed a Dealer Agreement or any material amendment thereof?

- e. Did Sears fail to disclose the material facts particularized in paragraph 93 of the statement of claim to each dealer before the dealer signed the Dealer Agreement?
- i. If so, directions pursuant to s. 25(2) of the CPA for the calculation of individual damages for misrepresentation or under s.7(1) of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such class member); and
- f. What scale and quantum of costs should be awarded?

[47] The plaintiff must show, through evidence, that there are appropriate common issues. The test is not a high one. The plaintiff must show that there is “some basis in fact” for the proposition that there are appropriate common issues: see *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 S.C.R. 477, at para. 99.

[48] It is clear from *Cloud, supra*, that the resolution of the common issue or issues need not resolve the entire action. It is sufficient if it resolves an issue or issues that will move the action some distance. The fact that there may be many individual issues left to be determined does not mean that common issues should not be certified. As Goudge J.A. stated in *Cloud* at para. 53:

In other words, an issue can constitute a substantial ingredient of the claims and satisfy s.5(1)(c) even if it makes up a very limited aspect of the liability questions and even though many individual issues remain to be decided after its resolution. In such a case the task posed by s.5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than elucidate the various individual issues which may remain after the common trial.

In my view, the question of whether the individual issues will unduly dominate the action is more properly part of the preferability inquiry: *Cloud*, at paras. 73-76; and *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158.

[49] Both parties have filed extensive evidence, primarily on the commonality issue.

[50] While Sears asserts that there are some differences in the contractual arrangements, in that there were a variety of supplementary agreements with individual dealers, Sears does not argue that those differences are sufficient to disqualify reliance on the Dealer Agreement by the

plaintiff as a basic common feature. Sears' argument, in the main, rests on the assertion that the plaintiff's allegations are founded on the effect of Sears' conduct on the members of the class, which will differ from dealer to dealer.

[51] Sears points out that, in its simplest terms, the plaintiff's allegation is that dealers do not make enough money. Sears asserts that each of the allegations under proposed common issue (a) involves business practices by Sears that are alleged to be breaches of the duty of good faith or unjust enrichment because they contribute to or exacerbate the inadequate state of dealer compensation.

[52] Sears submits that "adequacy" of dealer compensation is vague and subjective. In each case, what will be required is a determination of the negative impact of the alleged conduct by Sears, which is clearly an individual issue for each dealer. Determining whether there is negative impact would involve examining each dealer's revenues, expenses, and regional and local factors affecting each dealer, to determine whether the dealer is not making the requisite amount of profit, whatever that might be, and if so, whether that is due to Sears' business practices, to the dealer's own inadequate business practices, or to factors external to both parties.

[53] Alternatively, if the plaintiff is attempting to say that Sears' alleged conduct had a negative impact on the whole class, the plaintiff must adduce evidence that such harm can be determined on a class-wide basis and has failed to do so.

[54] The defendants primarily rely on *Fairview Donut*, *supra*; *Spina v. Shoppers Drug Mart Inc.*, [2013] O.J. No. 4979 (S.C.J.); and *909787 Ontario Ltd. v. Bulk Barns Food Ltd.* (2000), 138 O.A.C. 180 (Div. Ct.).

[55] In my view, Sears' reliance on *Fairview Donut* is misplaced. While it is true that Strathy J. held that some of the common issues were not certifiable, he did say that an issue as to whether franchisees were required to sell baked goods at "commercially unreasonable" prices could be certified if structured properly. He relied on the decision of the Divisional Court in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, (2009), 96 O.R. (3d) 252 (Div. Ct.), a decision that was affirmed by the Court of Appeal, 100 O.R. (3d) 721 (C.A.). At paras. 256 and 257 of *Fairview Donut*, Strathy J. stated:

256. On the other hand, in *Quizno's*, the Divisional Court was not concerned about the fact that the amount of loss or damage sustained by class members might vary from region to region or from time to time because of the “systemic” nature of the conduct potentially giving rise to liability. The system included a common contract, a common pricing system and a common distribution system. It included the addition of mark-ups and sourcing fees by the franchisor on every single product, with an additional mark-up being added by the distributor. In *Quizno's*, the complaint was not just in relation to some products acquired by franchisees; it related to all the products they sold. Moreover, the plaintiff alleged that some forty percent of *Quizno's* franchisees were operating at a loss.

257 The majority of the Divisional Court held in *Quizno's* that the breach of contract claim gave rise to common issues. The issue of the commercial reasonableness of the defendants' mark-ups and sourcing fees could be addressed in common by examining the franchisor's conduct, the services it provided and industry standards.

[56] I think Strathy J.'s reasoning as to the common features arising from the conduct of the defendant in that case is applicable here. As noted, the Divisional Court's decision in *Quizno's* was affirmed by the Court of Appeal.

[57] In *Spina*, Perell J. certified a number of issues as common issues but declined to hold that Shopper's Drug Mart's budgeting process gave rise to a common issue. The process itself involved setting a specific budget for each store. There was simply insufficient commonality, even on the part of the defendant's conduct, to say that there was a certifiable common issue.

[58] The Divisional Court's decision in *Bulk Barn* was considered by Strathy J. in *Fairview Donut*, at paras. 254 and 255, but he found more persuasive the Divisional Court's decision in *Quizno's*.

[59] Closer to the facts of this case is *Ontario v. Mayotte* (2010), 99 C.P.C. (6th) 229 (Ont. S.C.J.). In that case, it was alleged that the Province of Ontario had under-compensated private issuers of driver's licences.

[60] Perell J. held that the following issues were proper common issues:

- a. Does the contractual relationship between Ontario and the private issuers include a duty on Ontario to ensure that Issuer compensation is, and remains fair, rational,

- objectively determined, and proportional to the effort required to do each transaction?
- b. Does Ontario have one or more of the following contractual obligations to the private issuers in respect of compensation:
- i. to adequately increase the standard commission rate table,
 - ii. to update the time series analysis on which compensation was and continues to be based,
 - iii. to take into consideration all steps required to perform the required transactions, and
 - iv. to sufficiently increase the annual stipend?
- c. If so, has Ontario breached and is it continuing to breach any such contractual obligation?
- d. Was Ontario under a duty to increase compensation to the private issuers following the conclusions of the report of the Ministry of Transportation dated August 28, 2003?
- e. Has Ontario satisfied its duties by the increases in compensation which it has put into effect since August 28, 2003?
- f. If Ontario has not breached its contractual duties to the private issuers in respect of compensation, has Ontario been unjustly enriched by having under-compensated the private issuers?

[61] The defendant in *Mayotte* argued that to determine all or some of these questions it would be required that individual findings of fact be made about the circumstances of each contractual relationship. Perell J. disagreed. At para. 75, he stated “A trial judge might conclude that in the circumstances Ontario breached its contracts with all of the private issuers as of

August 28, 2003 when it is alleged that Ontario knew that the compensation rate paid to the private issuers was not fair, proportional, rational, or objective.”

[62] In the action before me, it is alleged that there is a common Dealer Agreement; dealers’ compensation is fixed by a common formula; advertising subsidies are commonly fixed, with a few exceptions; and Sears sells directly into each dealer’s Market Area. It is alleged that Sears knows that these features result in unreasonable rates of remuneration to dealers, which violates Sears’ obligation to exercise its discretion under the dealers’ agreements in good faith. In the alternative, it is alleged that Sears is unjustly enriched. If the *Arthur Wishart Act* applies, there are common questions as to whether it has been complied with. The resolution of the common issues will move the action a long way: *Cloud* at para. 82.

[63] As did Perell J. in *Mayotte*, I think the questions set out in proposed common issues (a) and (b) are suitable common issues. However, there are amendments I will make in order to make them more neutral and fair to both sides.

[64] As was the case in *Cloud*, there will be individual issues that must be determined. Assuming the plaintiff succeeds on the common issues, or some of them, the measure of damages for each member of the class will depend not only on the effect of Sears’ conduct, but on the individual circumstances of each dealer. However, the common issues trial judge will have ample tools at his or her disposal to determine appropriate damages on a class-wide basis, or an individual basis, or both: see *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.). As was the case in *Markson*, damages can be certified as a common issue, but might also be determined individually. The common effect of Sears’ conduct may give rise to damages that can be attributed to the class as a whole. There will likely also be damages that must be determined individually. That is something to be determined by the common issues trial judge after deciding the common issues.

[65] Costs are not a common issue.

[66] I have revised the proposed common issues, and they are attached to these reasons as Appendix A.

[67] I am prepared to consider further revisions, which will be discussed at the next case conference.

iv. Is a class proceeding the preferable procedure for resolving the common issues?

[68] The preferability inquiry involves answering two questions: first, would the class action be a fair, efficient and manageable method of advancing the claim? Second, would the class action be preferable to other reasonably available means of resolving the claims of class members? See *Cloud, supra*; and *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.).

[69] As noted earlier in my discussion of *Cloud*, the preferability inquiry largely involves a determination of whether individual issues will overwhelm the common issues.

[70] For the reasons discussed earlier, I do not think the individual issues will overwhelm the common issues. Undoubtedly, there will be a number of individual matters that need to be addressed after the resolution of the common issues, assuming the plaintiff is successful. As noted, damages will need to be assessed, and to some extent at least this will involve individual determinations.

[71] However, as pointed out in *Markson*, the common issues trial judge has many tools at his or her disposal to deal with such issues once the common issues have been addressed.

[72] I am not persuaded that the individual issues will overwhelm the common issues. As noted earlier, I think the resolution of the common issues will move the action a long way.

[73] Assuming the common issues are proper and that the individual issues will not overwhelm them, the defendants do not suggest that there is any other reasonably available means of resolving the claims of class members. There is no alternative procedure required by legislation. The only issue is whether a common issues trial is the preferable method, or whether individual trials commenced by individual members of the class are preferable. In my view, a common issues trial is the preferable method.

v. Is the plaintiff an appropriate representative plaintiff?

[74] The plaintiff no longer operates a Hometown Store. Thus, it has no ongoing stake in the result of the litigation. At most, it will have a right to past damages.

[75] The defendants point out that the plaintiff is now essentially a shell company, with no ability to satisfy a costs order.

[76] James Kay, the principal of the plaintiff, swears that the plaintiff operated a Hometown Store from June, 2007 until it gave notice of termination of the Dealer Agreement in August, 2013, and the Agreement terminated effective December 14, 2013. He swears he has a real and genuine interest in resolving the issues in the lawsuit for himself and for the benefit of all dealers. He swears that the termination of the Dealer Agreement in no way affects his willingness and ability to be the class representative.

[77] Mr. Kay swears that he is aware of the duties owed by the class representative to the class and he is committed to contributing his time, knowledge, energy and leadership to bringing the case to a successful conclusion.

[78] Mr. Kay swears that neither he nor the corporate plaintiff have any interest in conflict with any of the members of the proposed class.

[79] Mr. Kay has proposed a plan for proceeding with the action. He sets out a plan of proceeding which sets out a method of advancing the case on a timely basis, including notice to be sent to the class members; the furnishing of affidavits of documents and productions; examinations for discovery and motions arising therefrom; the exchange of expert reports; mediation; a pre-trial conference; and a common issues trial. Individual hearings, if any, would be conducted after the common issues trial.

[80] Counsel for the defendants submits that the plaintiff is not a proper representative plaintiff. Counsel submits that the plaintiff has a conflict with other members of the class, in that it is no longer the operator of a Hometown Store. Counsel also submits that the plaintiff has no ability to satisfy a costs award. Counsel relies on *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 S.C.C. 46, at para. 41, where McLachlin C.J.C. stated:

In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). [Emphasis added]

[81] In my view, that statement by McLachlin C.J.C. must be considered in light of the decision of the Court of Appeal in *Pearson, supra*, and the decision of Cullity J. in *Mortson v. Ontario Municipal Employees Retirement Board*, [2004] O.J. No. 4338 (S.C.J.).

[82] At para. 95, of *Pearson*, Rosenberg J.A. stated:

[95] I agree with the comments of Cullity J. in *Mortson v. Ontario Municipal Employees Retirement Board*, [2004] O.J. No. 4338. In referring to the reasons of the motions judge in this case and the statement from Western Canadian Shopping Centres about the capacity of the representative plaintiff to bear costs orders, Cullity J. said the following, at paras. 91 and 94:

The statements in [*Western Canadian Shopping Centres*] and *Pearson* are routinely relied on by defendants' counsel on motions for certification under the CPA. The interpretation placed on them by defendant's counsel in this case would have the result of defeating, or frustrating, the legislative objective of access to justice. It would, in effect, limit recourse to class proceedings to cases where the proposed representative plaintiffs were either wealthy or could demonstrate that a commitment for funding assistance was in place – a sort of halfway house towards requiring security for costs. Until further authoritative guidance is provided, I do not believe I am compelled to accept such an interpretation of s.5(1)(e) of the CPA.

If the plaintiffs were suing as individuals they would not be compelled to demonstrate that they have concrete and specific funding arrangements in place to satisfy an award of costs that might be awarded against them in the future and, in the circumstances of this case, I do not believe the fact that they seek to represent a class – or the specific terms of s.5(1)(e) – should be considered to require them to demonstrate this.

[83] It is always open to the defendants to move under rule 56.01(1)(d) for security for costs, subject to any special considerations that may apply to class proceedings: see *Peter v. Medtronic Inc.* (2008), 66 C.P.C. (6th) 274 (Ont. S.C.J.); and *Dean v. Mister Transmission (International)*

Ltd. (2009), 79 C.P.C. (6th) 181 (Ont. S.C.J.). In the meantime, I do not think the plaintiff should be disqualified as an appropriate representative plaintiff in a class proceeding simply on the basis that it does not have the ability to pay costs.

[84] I do not think the plaintiff has any conflict of interest with the other class members. Its interests may not go as far as those of some other class members, but there is no conflict.

[85] As far as the litigation plan is concerned, the defendants have not made any particular criticism of it, other than to submit that it is generic. It is clear that a motion to certify a class proceeding should not be defeated simply on the basis of deficiencies in a litigation plan. I am prepared to entertain any suggestions for amendments to the plan at the next case conference.

[86] I am satisfied that the plaintiff is an appropriate representative plaintiff.

Disposition.

[87] For the foregoing reasons, this action is certified as a class proceeding.

[88] I assume that the parties can agree on the form and content of the formal order. If so, they should bring it to the next case conference and I will sign it. If they cannot agree, I will deal with any issues at the case conference.

[89] I will entertain written submissions with respect to costs, not to exceed five pages together with a costs outline. Counsel for the plaintiff shall have five days to file submissions, and counsel for the defendants shall have an additional five days to respond. Counsel for the plaintiff shall have three days to reply.

Gray J.

APPENDIX A
COMMON ISSUES

- (a) Have Sears Canada and Sears Roebuck, or either of them, at any time since July 5, 2011 breached their obligations under the Dealer Agreements with each of the class members, including the asserted obligation to exercise contractual discretion in good faith, by:
- i. Failing to increase commission paid to class members;
 - ii. Changing commissions paid to class members in August 2012;
 - iii. Selling directly to customers located within the class members' Market Areas (as defined in their respective Dealer Agreements), or, alternatively, by failing to pay commission to the class members for goods sold directly to customers located within the class members' Market Areas through direct channels;
 - iv. Changing local store advertising subsidies;
 - v. Failing to provide a monthly accounting of how compensation was calculated; or
 - vi. Imposing handling fees payable by customers on catalogues sales made by dealers?
- (b) Has Sears Canada or Sears Roebuck been unjustly enriched by any of the acts or omissions in (a) (i) to (vi) above?
- (c) If liability is established, what is the appropriate measure of damages or compensation, if any, for the class?
- (d) Are Sears Canada and Sears Roebuck, or either of them, a "franchisor" of "franchisor's associate" within the meaning of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (*Arthur Wishart Act*)? If so:
- i. Did Sears breach the duty of fair dealing under s. 3 of the *Arthur Wishart Act* by any of the acts or omissions set out in (a) (i) to (vi) above, and, if so, what are the damages for the class?
 - ii. Was Sears required to deliver to each class member a disclosure document within the meaning of s. 5 of the *Arthur Wishart Act* at least fourteen days before the class member signed a Dealer Agreement or any material amendment thereof, and if so, were the provisions of s.5(3) of the *Act* otherwise complied with? If s.5 was not complied with, what are the damages for the class under s.7?

CITATION: 1291079 Ontario Limited v. Sears Canada Inc., 2014 ONSC 5190
COURT FILE NO.: 3769/13
DATE: 2014-09-08

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

1291079 ONTARIO LIMITED

Plaintiff

– and –

SEARS CANADA INC. and SEARS, ROEBUCK AND
CO.

Defendants

REASONS FOR JUDGMENT

Gray J.

Released: September 8, 2014

2014 ONSC 5190 (CanLII)

This is Exhibit "C" referred to in the
Affidavit of James Kay sworn before me this
18th day of January, 2019



A Commissioner for taking Affidavits

Court File No. 3769/13 CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE)
JUSTICE D.K. GRAY) MONDAY, THE 8th
DAY OF SEPTEMBER, 2014

BETWEEN:

1291079 ONTARIO LIMITED

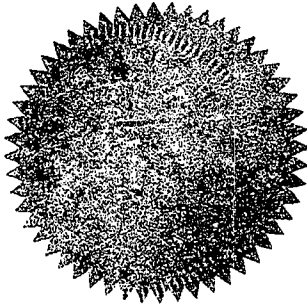
Plaintiff

- and -

SEARS CANADA INC. and SEARS, ROEBUCK AND CO.

Defendants

Proceeding under the *Class Proceedings Act, 1992*



ORDER

THIS MOTION, made by the plaintiff for an order certifying this action as a class proceeding, appointing 1291079 Ontario Limited as representative plaintiff and providing for notice to the class was heard on June 11, 2014, at Milton, and the decision reserved to this day.

ON READING the material filed including the notice of motion, the affidavit of James Kay sworn November 14, 2013, the affidavit of Greg Wallace sworn March 3, 2014, the transcript of the cross-examination of James Kay conducted on May 6, 2014, the transcript of the cross-examination of Greg Wallace conducted on May 7, 2014, the parties' respective facts, the statement of claim, filed, the statement of defence, filed, and on being advised by the plaintiff

that it was not proceeding with the cause of action in negligent misrepresentation and on hearing the submissions of counsel for the plaintiff and the defendants,

AND UPON being advised that the parties had reached an agreement in respect of the quantum of costs to be paid to the plaintiff by the defendants,

1. **THIS COURT ORDERS** that this action be and is hereby certified as a class proceeding as against Sears Canada.
2. **THIS COURT ORDERS** that the class be and is hereby defined as all corporations, partnerships, and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement with Sears at any time from July 5, 2011 to the date of sending of the notice of certification.
3. **THIS COURT ORDERS** that the plaintiff be and is hereby appointed as the representative plaintiff on behalf of the Class.
4. **THIS COURT ORDERS** that the following common issues be and are hereby certified for the purposes of this proceeding:
 - (a) Has Sears Canada, at any time since July 5, 2011 breached its obligations under the Dealer Agreements with each of the class members, including the asserted obligation to exercise contractual discretion in good faith, by:
 - (i) Failing to increase commission paid to class members;
 - (ii) Changing commissions paid to class members in August 2012;

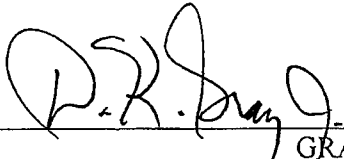
- (iii) Selling directly to customers located within the class members' Market Areas (as defined in their respective Dealer Agreements), or, alternatively, by failing to pay commission to the class members for goods sold directly to customers located within the class members' Market Areas through direct channels;
 - (iv) Changing local store advertising subsidies;
 - (v) Failing to provide a monthly accounting of how compensation was calculated; or
 - (vi) Imposing handling fees payable by customers on catalogues sales made by dealers?
- (b) Has Sears Canada been unjustly enriched by any of the acts or omissions in (a) (i) to (vi) above?
- (c) If liability is established, what is the appropriate measure of damages or compensation, if any, for the class?
- (d) Is Sears Canada a "franchisor" within the meaning of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 (*Arthur Wishart Act*)? If so:
- (i) Did Sears Canada breach the duty of fair dealing under s. 3 of the *Arthur Wishart Act* by any of the acts or omissions set out in (a) (i) to (vi) above, and, if so, what are the damages for the class?
 - (ii) Was Sears Canada required to deliver to each class member a disclosure document within the meaning of s. 5 of the *Arthur Wishart Act* at least fourteen days before the class member signed a Dealer Agreement or any material amendment thereof, and if so, were the provisions of s. 5(3) of the *Act* otherwise complied with? If s. 5 was not complied with, what are the damages for the class under s. 7?

5. **THIS COURT ORDERS** that Sears Canada shall deliver to counsel for the plaintiff a list of names and last known addresses, email addresses and telephone numbers of the Class Members in electronic spreadsheet format within 30 days of the date of this order.

6. **THIS COURT ORDERS** that a notice of certification to the Class in a form attached as Schedule "A" (English) and Schedule "B" (French) to this order (the "Notice to the Class") is hereby approved.
7. **THIS COURT ORDERS** that the English Notice to the Class shall be mailed to all Class Members by counsel for the plaintiff and published on the website of Sotos LLP on or before March 20, 2015.
8. **THIS COURT ORDERS** that the French version of the Notice to the Class shall be posted on the website of Sotos LLP and mailed to all Class Members in the Provinces of Quebec and New Brunswick on or before March 20, 2015.
9. **THIS COURT ORDERS** that the cost of mailing the Notice to the Class shall be paid by the plaintiff.
10. **THIS COURT ORDERS** that a Class Member may opt out of the class proceeding by sending to Sotos LLP either the Opt-Out Coupon attached to the Notice to the Class, or some other legible, written, signed request to opt out containing substantially the same information as the Opt-Out Coupon, on or before the expiry of the 90th day after the Notice to the Class is sent, which date shall be specified in the Notice to the Class.
11. **THIS COURT ORDERS** that Sotos LLP shall advise defendants' counsel of any Notices to the Class returned as undeliverable forthwith upon the return of the Notices to the Class, after which counsel for the defendants shall make best efforts to provide class

counsel with updated information for the affected dealers so that the Notice to the Class can be re-sent to such class members.

12. **THIS COURT ORDERS** that a Class Member may not opt out of the class proceeding after the expiry of the 90th day after the Notice to the Class is sent, which date shall be specified in the Notice to the Class.
13. **THIS COURT ORDERS** that Sotos LLP shall serve on Sears Canada, within 7 days after the end of the opt-out period described in paragraph 10 hereof, an affidavit containing a list of persons who have opted out of the class proceeding and attaching copies of all Opt-Out Coupons, or other legible, written, signed request to opt out containing substantially the same information as the Opt-Out Coupon, received from Class Members.
14. **THIS COURT ORDERS** that Sears Canada shall pay to the plaintiff costs of this motion in the amount of \$70,000.00, which amount is inclusive of fees, disbursements and HST, on or before October 9, 2014.



GRAY, J.

77-54

FEB 27 2015

**SUPERIOR COURT OF JUSTICE
MILTON**

This is Exhibit "D" referred to in the
Affidavit of James Kay sworn before me this
18th day of January, 2019

A handwritten signature in black ink, appearing to read "A. Kelly". The signature is written in a cursive style with a large, sweeping flourish at the end.

A Commissioner for taking Affidavits

Store Name: Woodstock, ON
Store Number: 7536/7425

SEARS CANADA INC.
AUTHORIZED DEALER AGREEMENT

This Agreement made this 30th day of June, 2007

AMONG:

SEARS CANADA INC., a company incorporated pursuant to the laws of Canada, and having its head office in the City of Toronto, in the Province of Ontario

(hereinafter called "Sears")

-and- **SEARS, ROEBUCK AND CO.**, a company incorporated pursuant to the laws of the state of New York, and having its head office in Hoffman Estates, in the State of Illinois, in the United States of America

(hereinafter called "Sears, Roebuck")

-and- **1291079 ONTARIO LTD.**, a company incorporated pursuant to the laws of Ontario, and having its head office in the town of Freelton, in the Province of Ontario

(hereinafter called the "Dealer")

-and- **James Kay** residing at 32 Peeble Drive, in the **Town** of Freelton, in the Province of Ontario

(hereinafter called the "Guarantor")

WHEREAS Sears is a retailer of merchandise, including merchandise which bears its private brand names, and has established a retail system comprised in part by independently owned and operated businesses known as Sears Authorized Dealer Stores and Sears Catalogue Agencies;

AND WHEREAS the Dealer wishes to own and operate a Sears Authorized Dealer Store incorporating a Catalogue Agency, selling and distributing to customers Sears Merchandise in accordance with Sears high standards of quality and customer service;

AND WHEREAS the Guarantor executes this Agreement guaranteeing the performance of the Dealer pursuant to this Agreement;

NOW THEREFORE, in consideration of the mutual obligations and agreements hereinafter contained, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1.0 DEFINITIONS

1.01 **"Authorized Selling Price"** is the price indicated in the PLU.

"Bank Account" means the commercial bank account established by Sears in Sears name to be used by the Dealer for the deposit of all Sears Funds.

"Business Day" means any day other than a statutory holiday unless otherwise specified in Part "G" of Schedule "A" hereto.

"Catalogue Agency" means an independently owned and operated business which sells and distributes Sears Merchandise from Sears Catalogues.

"Compensation" has the meaning set out in Section 15.0.

"Confidential Information" means any information relating to the business, operations, policies or processes of Sears or the Dealer Store, including, but not limited to, all customer lists, customer information, Manuals, operating methods, marketing plans, Sears credit policies and computer software.

"Dealer Store" means an independently owned and operated business which sells and distributes Sears Merchandise, including Sears Merchandise from Sears catalogues.

"Dealer Store Name" has the meaning set out in Section 14.06.

"Landlord's Acknowledgement" means the acknowledgement of the Dealer's landlord referred to in Section 5.0, in the form attached as Schedule "C".

"Manuals" has the meaning set out in Section 5.08 of this Agreement.

"Normal Business Hours" has the meaning set out in Part "G" of Schedule "A".

"Operator" is the person, as appointed in Section 2.03 of this Agreement, who manages, and is personally and actively involved in, the day-to-day operations of the Dealer Store.

"PLU" is the prompted price or Price Look Up on the Sears Point of Contact terminals.

"Sears Agreement" means any agreement between or among Sears, Sears, Roebuck, the Dealer, the Guarantor or any "Affiliate" or "Associate" of the Dealer, as those terms are defined in the *Canada Business Corporations Act*, including, but not limited to, this Agreement, a Sears Card Merchant Agreement, a Catalogue Sales Merchant Agreement, or other Authorized Dealer Agreement.

"Sears Authorized Services" means the services authorized by Sears to be provided to customers of and by the Dealer, which includes Home Delivery Services as hereinafter defined and authorized maintenance and installation services.

"Sears Equipment" has the meaning set out in Section 9.01.

"Sears Funds" means all funds resulting from the sale of Sears Merchandise or provision of Sears Authorized Services and any other amounts owing to Sears which have been collected from Sears customers, including, but not limited to, cash, cheques, money orders, gift certificates, gift cards, payments on Sears credit accounts and C.O.D. collections.

"Sears Merchandise" means merchandise provided to the Dealer by Sears for display and sale in the Dealer Store, including merchandise which bears Sears private brand names.

"Sears Property" means all property owned by Sears including, but not limited to, Sears Equipment, Confidential Information, Sears Merchandise, Manuals, signs, furniture, fixtures, sales forms, sales receipts, audit tapes and distribution reports.

"Trade Marks" means the private brand names or trade marks of Sears (including the trade mark and the trade name SEARS) and/or Sears, Roebuck as set out in Schedule "E", or any other trade mark or name of Sears or Sears, Roebuck which may be authorized for use from time to time in writing, together with such type styles, colour schemes and design matter as Sears may designate.

2.0 APPOINTMENT OF THE DEALER AND OPERATOR

- 2.01 Sears hereby grants to the Dealer and the Dealer hereby accepts from Sears the right to operate a Dealer Store located within **Woodstock, Ontario** (the "Market Area") in association with the Trade Marks for the term.
- 2.02 If the Dealer is not personally going to be actively involved in the day-to-day operations of the Dealer Store, then the Dealer must appoint an Operator in Section 2.03 below. The Operator must be approved by Sears and have the skills, business experience and integrity necessary, in Sears sole judgment, to operate the Dealer Store.
- 2.03 Subject to Section 2.02 above, the Dealer hereby appoints _____ as the Operator of the Dealer Store.
- 2.04 If the designated Operator becomes unwilling or unable to continue acting as the Operator of the Dealer Store, then Sears and the Dealer may agree upon another individual to be the Operator, and if no such Operator can be agreed to, Sears shall have the right to terminate this Agreement in accordance with the provisions of Section 23.04 hereof.
- 2.05 If the Dealer is a corporation, Dealer shall provide Sears with a copy of Certificate of Status or Certificate of Compliance evidencing existence and validity thereof.

3.0 TERM

- 3.01 The term of this Agreement shall be five (5) years from the date of this Agreement (the "Term"), unless earlier terminated in accordance with the terms hereof.

- 3.02 This Agreement shall be renewed for successive one (1) year periods, (each one (1) year period being referred to as the "Renewal Term") commencing on the expiry of the Term or the immediately preceding Renewal Term, as the case may be, provided that each of the following conditions are met prior to the expiration of the Term or Renewal Term being renewed:
- (i) none of the parties have given written notice to the other parties of its intention not to renew this Agreement at least ninety (90) days prior to the end of the Term or Renewal Term being renewed;
 - (ii) neither Sears nor Sears, Roebuck have given the Dealer notice of termination pursuant to any provision of this Agreement or any other Sears Agreement; and
 - (iii) the Dealer has executed the then current Authorized Dealer Agreement or an amendment to this Agreement, at Sears option.

4.0 MARKET GROWTH

- 4.01 Sears reserves the right to acquire, own, license, operate or authorize others to operate and advertise other Sears stores physically located within the Market Area if, in Sears sole discretion, acting reasonably, the Market Area can support such expansion. Such stores may include a Sears general merchandise retail store, a furniture and/or appliance store, a Catalogue Agency, an additional Dealer Store and/or an additional format store, which may offer any and all types of merchandise and/or services, including the same types of merchandise and/or services offered in the Dealer Store.
- 4.02 If Sears decides to expand by adding an additional Dealer Store or Catalogue Agency in the Market Area which carries the same types of merchandise and/or services offered in the Dealer Store (the "Additional Store"), Sears will grant to the Dealer, provided it is in good standing, a right of first refusal in the following manner:
- (i) Sears shall give written notice (the "Notice") to the Dealer of this intention and advise the Dealer of the terms on which Sears is prepared to open the Additional Store.
 - (ii) The Dealer shall have the right, for a period of ninety (90) days after receipt of the Notice, to provide Sears with written notice of its intention to own and operate the Additional Store on the terms contained in the Notice.
 - (iii) If the Dealer fails to so exercise such right within the said ninety (90) day period, Sears shall be free to offer the Additional Store to a third party upon terms and conditions which are no more favourable to such third party than those contained in the Notice.
- 4.03 If Sears decides to expand by adding a Sears general merchandise retail store and/or furniture and/or appliance store in the Market Area (which is owned and operated by Sears), Sears may terminate this Agreement in accordance with Section 23.05 hereof.

5.0 GENERAL DEALER STORE LOCATION, LAYOUT, OPERATION AND MANAGEMENT

Location

- 5.01 In accordance with Sears standards and subject to the prior written approval of Sears, the Dealer shall, at its expense, locate a clean and safe facility from which to operate one (1) Dealer Store within the Market Area.
- 5.02 If requested by Sears at any time during the Term, the Dealer shall use best efforts to deliver to Sears an acknowledgment from its landlord in the form attached hereto as Schedule "C" (the "Landlord's Acknowledgment").
- 5.03 The Dealer shall obtain and install, at its expense, furniture and fixtures for the Dealer Store as determined by Sears including approved counter, storage binning and display fixtures. Any furniture or fixtures provided by Sears will at all times remain the exclusive property of Sears. The Dealer shall have no right, title or interest in any such Sears furniture or fixtures.

Lease Disclosure

- 5.04 Sears must be provided with a copy of any offer to lease or new lease agreement for informational purposes. If, at any time, the Dealer amends, extends or renews the lease, the Dealer must advise Sears in writing providing Sears with a copy of such amendment, extension or renewal agreement, as may be applicable, for informational purposes. The Dealer must give Sears notice of an expiring lease three (3) months before its scheduled expiration.

Layout

- 5.05 The Dealer shall maintain the sales floor layout based on Sears recommended layout and interior store layout including color schemes and any required fixtures needed to display the inventory, or such alternative plan as agreed to by the Dealer and Sears. Any modification of the sales floor or remodeling of the Dealer Store is subject to the prior written approval of Sears.
- 5.06 The Dealer shall maintain the Dealer Store including all furniture and fixtures, in a clean and safe condition.

Operation and Management

- 5.07 The Dealer shall be responsible for the direction, control and operation of the Dealer Store in accordance with the terms of this Agreement. The Dealer or the Operator, as the case may be, must be personally and actively involved in the day-to-day operations of the Dealer Store and physically present at the Dealer Store for a majority of the Normal Business Hours as defined in Part "G" of Schedule "A" attached. The Dealer shall ensure that all aspects of the Dealer Store, including the Catalogue Agency, are operating during Normal Business Hours without interruption.

Sears Operations Manuals

- 5.08 The Dealer Store Operations Manual, the Sears Agent Training and Operating Manual (or "ATOM Manual") and the directives and policies as Sears may establish from time to time, as amended from time to time (collectively the "Manuals") are designed to assist the Dealer in all matters relating to the set-up and ongoing operation of the Dealer Store. The Dealer shall comply with the Manuals. The Dealer will receive a copy of the Manuals prior to the store opening. Sears may amend the Manuals from time to time at Sears sole discretion by providing written notice to the Dealer of all amendments. Notwithstanding, any amendment to fees or charges (or the policies that relate thereto) in the Manuals that directly affect monetary payment or reimbursement to or from Dealer shall be amended by Sears with ninety (90) days prior written notice to Dealer. The Manuals are incorporated into this Agreement by reference and, to the extent of any inconsistency between this Agreement and the Manuals, this Agreement shall govern and supercede.

Non-Competition

- 5.09 During the Term and any Renewal Term, the Dealer shall not, directly or indirectly, have any interest in or provide services to any business in the Market Area offering for sale any merchandise in the same lines as Sears Merchandise unless they have received the prior written approval of Sears.

6.0 MERCHANDISE**Sale of Merchandise**

- 6.01 The Dealer agrees to exclusively receive and hold for sale only Sears Merchandise or merchandise by a person other than Sears which is authorized in writing for sale by Sears ("Authorized Merchandise") at the Dealer Store.
- 6.02 The Dealer shall collect from a customer who purchases Sears Merchandise an amount of money equal to the Authorized Selling Price for the Sears Merchandise, including applicable tax, shipping and other charges, as determined by Sears and/or as set out in the Manuals.
- 6.03 Title to Sears Merchandise shall remain with Sears until it has been sold and delivered to the customer; however, title is regained by Sears if and when the customer returns any Sears Merchandise to the Dealer Store.

Floor Samples

- 6.04 Sears shall provide floor samples of Sears Merchandise to the Dealer for the Dealer Store based on an approved floor plan as determined by Sears or, as otherwise agreed by Sears and the Dealer. The Dealer shall not display any Sears Merchandise which is not authorized by Sears. See Part A(i) of Schedule "A" for a list of authorized departments.

Physical Inventories

- 6.05 The Dealer agrees to conduct all physical inventories which are required by the Manuals. If requested by Sears, the Dealer agrees to conduct any inventories required by Sears in addition to the inventories described in the Manuals.

Dealer Acts as Bailee

- 6.06 The Dealer shall bear a bailee's responsibility of reasonable care and diligence for all Sears Merchandise received and held by the Dealer. In accordance with the Manuals, the Dealer shall be responsible for the full replacement cost or, if already paid for by a customer, the Authorized Selling Price, of all Sears Merchandise which is lost or damaged while in the Dealer's possession. The Dealer shall not hold, store or warehouse any Sears Merchandise in any location other than the Dealer Store unless the Dealer has obtained the prior written approval of Sears.

Confirmation of Receipt

- 6.07 In accordance with the Manuals, by electronic transmission on the same day, the Dealer shall confirm to Sears: (i) receipt of all shipments of Sears Merchandise by the Dealer, (ii) receipt of Sears Merchandise by customers, (iii) returns of Sears Merchandise by customers and, (iv) receipt of payments made by customers for Sears Merchandise.
- 6.08 The Dealer shall notify Sears immediately of all shortages and/or duplicated, misfilled and/or misdirected shipments of Sears Merchandise.

Authorized Selling Price

- 6.09 The Dealer shall use its best efforts to maximize the sale of Sears Merchandise but shall not sell Sears Merchandise at a price other than the Authorized Selling Price, unless the Dealer is authorized to do so by the Sears retail and catalogue marketing and pricing policies or they have obtained the prior approval of Sears. If the Dealer sells any Sears Merchandise for less than the Authorized Selling Price without approval, the difference in price will be deducted from the Dealer's Compensation pursuant to Schedule "A".

No Unauthorized Representations and Warranties

- 6.10 The Dealer shall not make any representations regarding Sears Merchandise and/or Sears Authorized Services other than the representations which appear in Sears written warranties.

Access to Dealer Store

- 6.11 The Dealer shall provide to Sears or its designate(s) with keys to the doors of the Dealer Store and any required access codes for the delivery of Sears Merchandise and pick up of returns outside of Normal Business Hours.

Freight Charges

- 6.12 Except where paid by a Sears customer, Sears will pay freight charges on all Sears Merchandise forwarded to the Dealer Store and all Sears Merchandise returned to Sears from the Dealer Store.

7.0 HOME DELIVERY SERVICES

- 7.01 The Dealer shall offer and make arrangements to provide customers with home delivery ("Home Delivery Services"). The Dealer shall pay all costs associated with providing such Home Delivery Services.
- 7.02 In accordance with the Manuals, the Dealer may charge customers a reasonable rate, approved by Sears, for Home Delivery Services and the amount paid by the customers to Sears for these services will be added to the Dealer's Compensation.
- 7.03 The Dealer shall provide the Home Delivery Services in a timely, professional manner and in keeping with Sears high standards.
- 7.04 Any subcontractors used by the Dealer to perform any Home Delivery Services shall comply with the relevant terms of this Agreement and the Manuals. The Dealer shall ensure that any subcontractor obtains and maintains insurance coverage as specified in Section 22.01 (vii) prior to allowing such subcontractor to perform any Home Delivery Services.
- 7.05 The Dealer agrees to enter or compel its subcontractor to enter into a Standard Delivery Contract, if requested.

8.0 MAINTENANCE AND INSTALLATION SERVICES

- 8.01 The Dealer shall not provide maintenance services, installation services or any other kind of services to customers other than Sears Authorized Services in accordance with the Manuals, unless the Dealer has obtained the prior written approval of Sears.

- 8.02 The Dealer shall ensure that all such authorized/approved services are performed by competent, trained and licensed contractors or installers (where applicable) in strict compliance with all applicable legislation, regulatory and licensing requirements in the jurisdiction where the services are performed.
- 8.03 The Dealer shall charge customers in accordance with the current maintenance and installation services rate book as established by Sears for its market. All maintenance and installation service sales are to be processed through Sears Point of Contact Terminals and all monies, either cash or credit, are to be processed in accordance with the Manuals. Sears will pay the Dealer a percentage of the monies collected which will be added to the Dealer's Compensation. All expenses related to the delivery of any authorized/approved maintenance and installation services are the sole responsibility of the Dealer.

9.0 EQUIPMENT

Use of Sears Equipment

- 9.01 The Dealer shall, in accordance with the Manuals, use equipment designated and/or provided by Sears for the purpose of recording transactions, transmitting funds, accounting for Sears Merchandise and Sears Funds, or as otherwise required by Sears. Such equipment may include software, supplies, SPOCs (Sears point of contact terminals) and HHTs (hand held terminals used for receiving merchandise) ("Sears Equipment"). The use of any software other than software provided by Sears in any Sears Equipment, is strictly prohibited. The use of any Sears Equipment for any purpose not authorized by Sears is strictly prohibited.

Ownership of Sears Equipment

- 9.02 The Dealer shall have no right, title or interest in any of the Sears Equipment which shall at all times remain the exclusive property of Sears.

Bailee's Responsibility

- 9.03 The Dealer shall have a bailee's responsibility of reasonable care and diligence for Sears Equipment in the Dealer's custody or control. The Dealer shall not hold, store or warehouse any Sears Equipment in any location other than the Dealer Store without obtaining the prior written consent of Sears.

Repair and Maintenance

- 9.04 Any required repair and maintenance of Sears Equipment shall be performed only by Sears or by a service organization approved by Sears. Sears shall have the right to enter the Dealer Store at such reasonable times as may be necessary to provide periodic preventative maintenance to Sears Equipment.

Lost Data

- 9.05 Sears shall use commercially reasonable efforts to retrieve any information or data which is lost due to a malfunction of Sears Equipment; however, Sears shall not be liable to the Dealer for any failure, malfunction or default of any Sears Equipment.

Sears Systems Policies

- 9.06 In connection with the use of the Sears Equipment and in accordance with the Manuals, the Dealer, the Operator and the Dealer's employees shall review and abide by the Sears System Policies which are detailed in the Computer Log-On Code Security Guidelines attached as Schedule "B" hereto.

Return of Sears Equipment

- 9.07 At any time, at the request of Sears or, on expiration or other termination of this Agreement, the Dealer shall return all Sears Equipment, including any related software, to Sears in its original condition, reasonable wear and tear only excepted.

10.0 COSTS AND EXPENSES

- 10.01 Except as otherwise stated in this Agreement or in the Manuals, the Dealer shall be responsible for all costs and expenses whatsoever relating to the operation of the Dealer Store including, but not limited to, fixtures, equipment (other than Sears Equipment), furnishings, office supplies, rent, utilities, telephone charges, maintenance costs, insurance costs, postage and communication expenses, salary, wages, applicable workers' compensation or workplace safety and insurance costs and any other employment expenses ("Costs and Expenses").
- 10.02 Pursuant to Section 26.03, all Costs and Expenses are to be billed directly to the Dealer using the Dealer's name (not Sears) and Dealer shall provide evidence to Sears of same at Sears request.

- 10.03 The Dealer shall promptly pay and discharge when due all Costs and Expenses including, but not limited to, invoices from suppliers and advertisers. If the Dealer is unable for any reason to pay any of the Costs and Expenses promptly when due, the Dealer shall immediately notify Sears and Sears shall have the right, but not the obligation, and only after discussion with the Dealer, to pay such Costs and Expenses (including any administrative costs and reasonable legal fees and disbursements) and deduct the amounts paid from any Compensation which may be payable to the Dealer.

Financing

- 10.04 In the event that Dealer obtains any financing of any nature in connection with the Dealer Store, or otherwise wherein the Dealer Store may become a collateral security, Dealer shall obtain and provide Sears with a written acknowledgment from the lender, mortgagee, assignee or any other party who may claim an interest in the Dealer Store, confirming its understanding and agreement that all Sears Merchandise and Sears Equipment in the possession of Dealer is and remains the property of Sears.

11.0 COMPLIANCE WITH LAWS

- 11.01 The Dealer shall obtain all permits and licenses which may be required by and comply with generally all federal, provincial and local laws, ordinances, rules and regulations pertaining to the Dealer Store including but not limited to federal and provincial privacy legislation, as may be applicable, and shall, at its expense, pay and discharge all license fees, business, use, income, property or other similar or different taxes or assessments which may be charged, levied, or payable in connection with the Dealer Store.

12.0 EMPLOYEES

- 12.01 The Dealer shall at all times staff the Dealer Store with competent, customer-friendly employees in sufficient number to maintain coverage for the business conducted in the Dealer Store including the Catalogue Agency. The Dealer shall ensure that all personnel strictly adhere to Sears dress codes and other conduct guidelines which are described in the Manuals.
- 12.02 The Dealer is responsible for hiring, managing and remunerating its employees. The Dealer shall make all necessary withholdings and contributions for the payment of taxes, assessments and levies which may be required for the Dealer and the Dealer's employees including, but not limited to, those required under the *Income Tax Act* (Canada), *Employment Insurance Act* (Canada), Canada and Quebec Pension Plans, and provincial workers' compensation or workplace safety and insurance plans. The Dealer shall, at Sears request, furnish Sears with proof that all remittances in respect of taxes, contribution and assessments have been duly made by the Dealer. The Dealer Store shall register as an employer under the applicable workers' compensation or workplace safety and insurance legislation either voluntarily or as required by law. The Dealer and the Dealer's employees are not eligible for any employee benefits from Sears and are not bound by Sears employment policies.

13.0 SIGNAGE

- 13.01 Sears shall provide such signs as Sears deems necessary for the operation of the Dealer Store and the Dealer shall display all such signs in the Dealer Store. The Dealer shall not display any other signs on the exterior or interior of the Dealer Store unless otherwise authorized by Sears.
- 13.02 The Dealer shall permit Sears to install interior and exterior signs bearing Sears name and Trade Marks at the Dealer Store. Sears shall retain ownership in such signs and be responsible for the cost of such installation but, the Dealer shall be responsible for any damage, other than reasonable wear and tear, caused to the signs.

14.0 TRADE MARKS

- 14.01 The Trade Marks (see "Schedule "E") used with respect to the Dealer Store and the Sears Merchandise are valid and enforceable and the sole and exclusive property of Sears, Roebuck or Sears. The Dealer acknowledges that Sears has the right to authorize the use of the Trade Marks in Canada.
- 14.02 The Dealer shall not, at any time, directly or indirectly, contest or aid in contesting Sears or Sears, Roebuck's ownership, title, right or interest in the Trade Marks and/or the Dealer Store Name, as defined below, or Sears or Sears, Roebuck's sole right to register, use or license others to use any Trade Marks.

Use of Trade Marks

- 14.03 Sears hereby authorizes the Dealer to use the Trade Marks in connection with Sears Merchandise which bear such Trade Marks and in connection with the Dealer Store Name. The Dealer shall not use the Trade Marks in any other manner.
- 14.04 The Dealer shall not use any of the Trade Marks in its corporate, or other business name.
- 14.05 The Dealer shall not establish an Internet web site using any of the Trade Marks as part of its marketing, advertising or promotional programs without obtaining specific written approval for the establishment of such a web site from Sears.
- 14.06 **Dealer Store Name**

Subject to the terms of this Agreement, the Dealer shall, during the Term and any Renewal Term, identify and refer in writing and orally to the Dealer Store and themselves as a "SEARS DEALER", as appropriate, or such other name as required by Sears (the "Dealer Store Name"). The Dealer Store Name shall be displayed on the main floor of the Dealer Store and in all advertising.

Remedies for Unauthorized Use

- 14.07 The Dealer recognizes that the Trade Marks possess a special, unique and extraordinary character which makes it impossible to calculate the harm which Sears, Roebuck and Sears would sustain in the event of unauthorized use of the Trade Marks by the Dealer, the Operator or any of the Dealer's employees. The Dealer recognizes and agrees that irreparable harm would be caused to Sears, Roebuck and Sears by such unauthorized use and agrees that both interim and permanent injunctive relief would be appropriate and should be granted in the event of a breach of this Agreement by the Dealer, the Operator or any of the Dealer's employees, in addition to any other legal or equitable remedies otherwise available to Sears, Roebuck and/or Sears.

Goodwill

- 14.08 The Dealer acknowledges that it is not purchasing the right to use the Dealer Store Name in connection with the operation of the Dealer Store and is not paying any consideration for such use, and that no right whatsoever in or to any goodwill associated with the Trade Marks, and/or the Dealer Store Name passes to or is conferred upon the Dealer by such use. The Dealer acknowledges that all goodwill generated by the Dealer Store Name and the Trade Marks shall enure to the sole and exclusive benefit of Sears, Roebuck and/or Sears. The Dealer does not now have, nor will it ever have any right, title or interest in said goodwill. The Dealer hereby unconditionally and irrevocably transfers and assigns to Sears, Roebuck and/or Sears any and all rights it may have or claim to have, now and in the future, to said goodwill. All goodwill in, or which may be generated by the Dealer's operation of the Dealer Store shall enure to the sole and exclusive benefit of the Dealer subject to the foregoing.

15.0 COMPENSATION

- 15.01 Sears will pay the Dealer the compensation set out in Schedule "A" (the "Compensation").
- 15.02 The Dealer acknowledges and confirms that no promises or representations whatsoever have been made to the Dealer by Sears as to the potential amount of business, revenue, profit, compensation or otherwise the Dealer can expect at any time during the term of this Agreement.

16.0 SEARS FUNDS

Banking Arrangements

- 16.01 The Dealer shall deposit all Sears Funds into the commercial bank account established by Sears in Sears name (the "Bank Account") as soon as practicable, but in no event later than the close of the Business Day immediately following the day on which the Dealer received the funds, unless the Dealer has obtained the prior written approval of Sears for alternative arrangements.
- 16.02 In accordance with the Manuals, Sears Funds shall be deposited in the exact amount and in the exact form of exchange collected by the Dealer from the customer, whether it be cash orders, payment on Sears credit accounts, approved third party credit, cash deposits or some other form, with the exception of debit card transactions which shall be deposited as directed by Sears.

Accounts and Supporting Documentation

- 16.03 An accounting of transactions and appropriate supporting documentation shall be transmitted to Sears by the Dealer at the time deposit is made to the Bank Account pursuant to the then current operating instructions contained in the Manuals, or as otherwise instructed by Sears.

Misappropriation of Sears Funds

- 16.04 The Dealer shall be strictly accountable for all Sears Funds at all times. Any shortages in or manipulation of the Sears Funds by the Dealer, the Operator or the Dealer's employees, or any failure to comply with the requirements of Sections 16.01, 16.02 and 16.03 shall constitute a misappropriation of the Sears Funds and be cause for termination under Section 23.04 hereof.

Authorized Use of Sears Funds

- 16.05 Notwithstanding Section 16.04 above, the Dealer may use the Sears Funds for:
- (i) customer cash refunds and allowances supported by Sears documents, as set out in the Manuals; and
 - (ii) incidental supply purchases as approved by Sears.

Credit

- 16.06 The Dealer shall offer and accept in the Dealer Store any Sears established credit plans or approved third party credit plans as set out in Part "F" of Schedule "A" attached, or as may be authorized by Sears from time to time in the Manuals or otherwise. The Dealer shall offer such credit in accordance with Sears Credit procedures and guidelines as set out in the Manuals and/or as otherwise communicated to the Dealer by Sears in writing.
- 16.07 The Dealer shall not be required to pay additional costs for Sears established credit plans or approved third party credit plans.

Debit

- 16.08 The Dealer shall accept debit cards in accordance with the Manuals.
- 16.09 The Dealer shall not be required to pay any additional costs for accepting debit cards.

Improper Cheques and Invalid Credit

- 16.10 The Dealer shall be responsible for the amount of any NSF, stale dated, fraudulent, third party or otherwise invalid cheques ("Improper Cheques"), and associated bank handling charges, which were not processed properly by the Dealer in accordance with the Manuals.
- 16.11 The Dealer shall be responsible for the amount of any credit charge which is not honoured by third party credit agencies ("Invalid Credit") and which was not offered or accepted in accordance with the Sears Credit procedures and guidelines contained in the Manuals.
- 16.12 Sears reserves the right to deduct the amount of any such Improper Cheques or Invalid Credit, plus a reasonable Dealer service charge, as set out in the Manuals, from the Dealer's Compensation. Sears shall assign its right to receive payment from the customer in respect to such Improper Cheques or Invalid Credit to the Dealer.

Remittance of Compensation

- 16.13 Sears will remit, on a monthly basis, Compensation payable to the Dealer under this Agreement, including applicable federal and provincial sales taxes, on or before the tenth (10th) Business Day following Sears fiscal month-end, unless stated otherwise in Schedule "A" attached.

Set Off

- 16.14 Sears shall have the right to set off any amounts owing to Sears under this Agreement against any Compensation payable to the Dealer. Sears will provide the Dealer a list, in writing, of all amounts set off from such Compensation.

17.0 CONFIDENTIALITY

- 17.01 The Dealer shall have no right, title or interest to any information relating to the business, operation, policies or processes of Sears or the Dealer Store, including, but not limited to, all customer lists, customer information, the Manuals, Sears operating methods, Sears marketing plans, Sears credit policies and/or computer software (the "Confidential Information"). The Dealer, the Operator and the Dealer's employees and agents shall not at any time disclose, copy, duplicate, record or otherwise reproduce any Confidential Information, in whole or in part, or otherwise make any Confidential Information available to any unauthorized person or source. Upon the expiry or earlier termination of this Agreement, all Confidential Information, including, without limitation, any back-up copies of any software, shall be immediately returned to Sears. The provisions of this Section 17.01 shall survive the expiration or termination of this Agreement.

18.0 TRAINING

- 18.01 Sears will make available to the Dealer training and support relating to the Dealer Store operations, product knowledge and sales. The Operator shall: (i) attend an initial training program of approximately forty (40) hours unless waived or modified by Sears and, (ii) attend or be appropriately represented at any additional training programs as may reasonably be required by Sears. The Dealer shall be responsible for the cost of all transportation, food and lodging incurred in connection with such training programs. Sears shall pay for the cost of the training program and any training consultants.

19.0 ADVERTISING

- 19.01 Sears will provide to the Dealer approved advertising formats. The Dealer may participate in such advertisements in which case such advertisements shall be consistent with Sears national retail advertising programs. The cost of this advertising will be shared by Sears and the Dealer in accordance with Part "H" of Schedule "A" attached. The Dealer shall comply with all Sears Retail and Catalogue Marketing and Pricing Policies.
- 19.02 The Dealer shall diligently promote the sale of Sears Merchandise and Sears Authorized Services, including, but not limited to the promotion of the Sears Card through the use of various marketing programs and display materials provided by Sears.
- 19.03 The Dealer may advertise, at the Dealer's expense, in any media, subject to Sears prior written approval of all advertising copy and any signs containing the Trade Marks.
- 19.04 The Dealer shall not issue any advertising material or conduct any sales promotional plan or device (including coupons and contests) without the prior written approval of Sears.
- 19.05 Sears and the Dealer may initiate mutually agreed upon, joint or co-operative advertising programs in the Market Area.

20.0 INSPECTION AND RECORDS

- 20.01 Sears or its designate(s) may enter the Dealer Store at any time during Normal Business Hours, without notice, to examine the Dealer Store, audit the Documentation as hereinafter defined, and confer with the Dealer, Operator and/or the Dealer's employees for the purpose of determining compliance with the terms of this Agreement and the Manuals.
- 20.02 During the Term, any Renewal Term and after the expiry or termination of this Agreement, the Dealer shall, in accordance with the Manuals, maintain documentation which will accurately reflect the receipt and distribution of Sears Merchandise, sales, provision of Sears Authorized Services, store reports, Compensation, allowances, Sears Funds, inventory, adjustments, cash refunds and any other expenses properly chargeable to Sears pursuant to this Agreement (the "Documentation"). The Dealer does not now have, nor will it ever have any right, title or interest to Documentation which is the property of Sears and as such shall not be removed from the Dealer Store at any time.

21.0 INDEMNIFICATION AND RELEASE

- 21.01 The Dealer agrees to protect, defend, hold harmless, and indemnify Sears, its directors, officers, agents, employees and assigns from and against:
- (i) any and all penalties, judgments or fines of any nature or kind which may be sought to be enforced by reason of the alleged or actual violation of any federal, provincial or municipal law, ordinance or regulation by the Dealer, the Operator or the Dealer's employees, subcontractors or agents;
 - (ii) any and all expenses, claims or damages, etc. connected to the operation of the Dealer Store including, without limitation: (a) goods sold, work done, services rendered, products utilized, (b) actual or alleged infringement of any patent, trade mark, copyright, confidential relationship, trade secret, or other proprietary right of any third party, (c) claims made by suppliers, third parties or customers including, but not limited to, failure to pay suppliers, lack of repair in or around the Dealer Store, the operation of or defects in any machinery, motor vehicles or equipment used in connection with the Dealer Store, or from the omission to act or commission of any act, lawful or otherwise, by the Dealer or its agents, employees or designees, whether or not such act was within the scope of the employment of such agents, employees or designees;
 - (iii) any and all expenses (including reasonable legal fees and disbursements), lawsuits, claims, demands, actions, causes of action, liabilities, damages, judgments, fines, penalties, fees, losses and proceedings of any kind whatsoever including, without limitation, death of or injury to persons and/or damage to property, actually or allegedly resulting from or connected to a breach by the Dealer of the terms of this Agreement;

- (iv) any and all claims, actions or costs (including legal costs, retroactive wages, awards, damages and penalties) made against Sears by any employee of the Dealer; and
 - (v) any and all claims for salary and wages, any benefits, compensation, arbitration, severance or relocation costs:
 - (a) under the applicable workers' compensation or workplace safety and insurance legislation or equivalent or similar legislation in the Province in question;
 - (b) arising out of any alleged negligence, acts or omissions of any person, including Sears, except where said act or omission by Sears is the sole cause of said claim;
 - (c) and arising out of any employee's employment or termination of employment for any reason whatsoever.
- 21.02 Notwithstanding anything to the contrary contained in this Agreement, such indemnification shall survive the termination of this Agreement. Sears shall have the right to set off or deduct from the Compensation, or any other amounts owing to the Dealer, the amount of any matter set out in Section 21.01.

22.0 INSURANCE

- 22.01 The Dealer hereby agrees and covenants that it will, at its sole expense, obtain and maintain, during the Term and any Renewal Term, insurance from a company or companies satisfactory to Sears which fully protects Sears and the Dealer from and against any and all expenses, claims, actions, liabilities and losses. At a minimum, the Dealer will obtain and maintain:
- (i) workers' compensation insurance or workplace safety and insurance coverage with the applicable provincial or territorial administrative board or body and/or employer's liability insurance covering all persons employed or working in the Dealer Store;
 - (ii) comprehensive general liability insurance, including, but not limited to, products and completed operations coverage with twenty-four (24) month indemnity periods and contractual liability endorsements specifically covering the Dealer's indemnification of Sears under this Agreement. This policy must also contain a cross liability clause and must have no exclusions for work done by subcontractors and/or sub-trades. The policy must also provide coverage for non-owned automobile liability as well as tenants' legal liability. The limit of liability shall not be less than Five Million Dollars (\$5,000,000.00) for bodily injury, death and/or property damage;
 - (iii) motor vehicle liability insurance with a non-owned liability endorsement covering all vehicles used by the Dealer or the Dealer's agent in connection with the Dealer's business hereunder with a combined single limit of not less than Two Million Dollars (\$2,000,000.00), for bodily injury, death and/or property damage per accident;
 - (iv) all risk property insurance upon Sears Property utilized in the operation of the Dealer Store. The Policy shall also cover any and all Sears Property and/or customer property and merchandise in the care, custody and/or control of the Dealer in an amount not less than the full replacement cost thereof;
 - (v) employee dishonesty coverage which includes the Dealer and those under his or her direction in an amount not less than Thirty Thousand Dollars (\$30,000.00);
 - (vi) bailee's legal liability insurance for the full replacement value of any and all customer property and Sears Merchandise in the possession of the Dealer; and
 - (vii) cargo liability insurance with limits of at least Twenty-five Thousand Dollars (\$25,000) for any one vehicle used for Home Delivery Services.
- 22.02 All policies of insurance mentioned above will name "Sears Canada Inc." as a named additional insured and such policies shall not be subject to material change or cancellation except upon at least thirty (30) days prior written notice to Sears, at 222 Jarvis Street, Department 765, Risk and Insurance Management, Toronto, Ontario, M5B 2B8. Said policies shall contain a waiver of subrogation clause and be prepared in such form that Sears shall not be liable for any premiums or any other costs relating thereto.
- 22.03 The Dealer shall furnish Sears with copies of all such policies or certificates of insurance as evidence of such insurance prior to the commencement of the operation of the Dealer Store under this Agreement. If, in Sears opinion, such policies do not afford adequate protection for Sears, Sears will so advise the Dealer and if the Dealer does not furnish evidence of such additional coverage within fifteen (15) days, Sears shall have the right, at its option, to obtain such additional insurance at the expense of the Dealer and deduct same from any payment to the Dealer as set out herein. On the anniversary dates of all of the policies described herein, the Dealer shall provide Sears with copies of the certificates of insurance including, but not limited to,

confirmation of workplace safety insurance coverage. In addition, upon the termination of this Agreement, the Dealer shall provide satisfactory evidence of compliance with all workplace safety and insurance and workers' compensation insurance requirements.

- 22.04 Any approval by Sears of any of the Dealer's insurance policies or additional insurance obtained by Sears on the Dealer's behalf shall not relieve the Dealer of any responsibility hereunder.

23.0 TERMINATION

- 23.01 (a) The Dealer may terminate this Agreement without cause, cost, penalty or damages during the Term or Renewal Term upon providing Sears with at least one hundred and twenty (120) days written notice.
- (b) In the event of a change that significantly affects the Dealer Store Program in whole or in part, Sears may terminate this Agreement without cost, penalty or damages during the Term or Renewal Term upon providing the Dealer with at least one hundred and twenty (120) days written notice.
- 23.02 If either the Dealer or Sears is unable to perform its obligations under this Agreement due to strike, fire, or other disabling condition, and such condition subsists for thirty (30) days, the other party, provided they are not the cause of the condition, may terminate this Agreement without cost or penalty by providing written notice of termination to the parties.
- 23.03 This Agreement may be terminated for cause at any time by Sears, without cost, penalty or damages, upon at least thirty (30) days prior written notice to the Dealer ("Default Notice") which shall provide the Dealer with fifteen (15) days to remedy the default or conduct giving rise to the notice. The termination shall be effective on the fifteenth (15th) day after such notice is given if the Dealer has failed to remedy the default or conduct. Sufficient cause for such a termination may include, among other things:
- (i) failure to have the Dealer Store and/or the Catalogue Agency open for business during Normal Business Hours for more than three (3) consecutive Business Days without the prior written consent of Sears;
 - (ii) failure by the Dealer to pay and discharge when due all invoices and other obligations with respect to the Dealer Store, including, but not limited to, all amounts the Dealer is required to pay or remit pursuant to this Agreement;
 - (iii) the Dealer's failure to adequately promote Sears Merchandise;
 - (iv) failure by the Dealer to comply with the provisions of this Agreement and/or the Manuals; or
 - (v) any circumstance which would constitute cause for termination on thirty (30) days notice or less under the terms of any other Sears Agreement.
- 23.04 Notwithstanding the foregoing, this Agreement may be terminated immediately by Sears and/or Sears, Roebuck without cost, penalty or damages under the following circumstances, upon the delivery of written notice of the termination to the Dealer:
- (i) insolvency or bankruptcy of the Dealer;
 - (ii) the Dealer's, Operator's or any of the Dealer's employees or subcontractors misappropriation or misuse of Sears Funds, Sears Property and/or Trade Marks or their commission of a fraudulent act or reasonable suspicion thereof;
 - (iii) failure by the Dealer, Operator or any of the Dealer's employees to comply with the terms of Sections 8.02, 11.01, 17.0 and 22.0 hereof;
 - (iv) any default which would constitute cause for immediate termination under the terms of any other Sears Agreement;
 - (v) failure by the Dealer to accurately report all sales in the Dealer Store to Sears;
 - (vi) if, in the sole discretion of Sears, the operations, conduct or business practices of the Dealer, the Operator or the Dealer's agents, employees or affiliates are detrimental to Sears reputation, goodwill, relationship with its customers and/or suppliers or otherwise adversely affects Sears operations, merchandise and/or property;
 - (vii) if any information provided to Sears by the Dealer in connection with an application to be approved as a Dealer of Sears is found to be incomplete, false or misleading in a material way, or if the Dealer has engaged at any time in criminal conduct, or disorderly conduct that offends moral value or which constitutes moral turpitude all as determined by Sears in Sears sole discretion;

- (viii) If the Dealer, for any reason, loses its right to occupy the Dealer Store and fails to secure an alternate location acceptable to Sears within the thirty (30) days before the last day of occupancy of the original Dealer Store;
 - (ix) If the Dealer becomes unable or unwilling to continue as a Dealer and Sears and the Dealer, acting reasonably, do not agree on an assignee;
 - (x) The Operator or Guarantor becomes unable or unwilling to continue acting as such hereunder, and Sears and the Dealer, do not agree on a replacement in accordance with the terms and conditions of this Agreement;
 - (xi) if the Dealer assigns, encumbers or transfers its right(s) under this Agreement without the prior written consent of Sears;
 - (xii) if there is a Change of Control (as defined in Section 25.05) which has not been approved in writing by Sears; or
 - (xiii) repeated occurrences (meaning three (3) or more occasions in any given calendar year or two (2) or more in any three (3) consecutive calendar years) of any default or conduct for which Sears has delivered Default Notice under Section 23.03 herein, that need not be identical in nature, type or circumstance, whether remedied or not.
- 23.05 If, during the Term or Renewal Term, Sears decides to open a Sears operated general merchandise retail store and/or furniture and/or appliance store in the Market Area pursuant to Section 4.03 hereof, this Agreement may be terminated at Sears option, on a date to be designated by Sears. Should Sears elect to terminate this Agreement pursuant to this Section 23.05, Sears shall pay the Dealer liquidated damages equal to the aggregate amount of commission (based on the flat rate) paid to the Dealer on Dealer merchandise Sales only as determined pursuant to Part A of the then current Schedule "A", in the twelve (12) month period immediately preceding the month prior to the effective date of termination. For the purpose of clarity, if the effective date of termination is November 15, 2005, the subject period will be November 1, 2004 to October 31, 2005. To clarify, no catalogue sales, commission paid for catalogue sales or income derived from delivery, maintenance or any other derivative income will be used in determining the amount of liquidated damages payable to the Dealer pursuant to this Section 23.05. In the event that a complete twelve (12) month period does not exist for the purpose of this calculation, the amount of liquidated damages to be paid shall be determined by averaging the amount of such commission paid monthly to the Dealer based on the number of months available, times twelve (12) equating to commission for full twelve (12) month period. The Dealer hereby agrees to accept the monies described above as payment in full for any damages claimed and releases Sears, and agrees to not pursue any further claim from Sears, for damages or any other amounts whatsoever in relation to such termination.
- 23.06 The exercise by Sears of any of its rights to terminate shall not affect any other legal remedies which may be available to Sears in law, equity or otherwise including, but not limited to, the commencement of civil or criminal proceedings against the Dealer.
- 24.0 CONSEQUENCES UPON TERMINATION**
- 24.01 Upon termination or expiration of this Agreement, the Dealer shall immediately discontinue the use of all intellectual property owned by Sears including, but not limited to, the Dealer Store Name, Trade Marks, Manuals and advertising and telephone directory listings, if applicable ("Sears Intellectual Property").
- 24.02 Upon termination or expiration of this Agreement, the Dealer shall immediately remove and return to Sears all Sears Property and any customer property and/or merchandise in its possession or control including all signs, printed materials, emblems or other identification bearing the Dealer Store Name and/or Trade Mark(s). Pursuant to the Landlord's Acknowledgment, Sears shall have the immediate right, to enter the Dealer Store to protect Sears Property, and remove any Sears Property which has not been promptly returned. By exercising this right, Sears shall not assume any of the obligations or liabilities of the Dealer under the lease of the Dealer Store.
- 24.03 The termination or expiration of this Agreement shall not relieve any party from the obligations which are intended to survive the termination of this Agreement including, but not limited to, the obligation to pay an amount due hereunder and the obligations of the Dealer set out in Section 17.0, Section 21.0, and Section 27.0
- 24.04 The Dealer confirms that Sears shall have no liability or obligation whatsoever to the Dealer, the Guarantor, the Dealer's agents, employees or affiliates or any of the Dealer's officers, directors or shareholders with respect to any action taken by Sears pursuant to Sections 23.0 and 24.0.
- 24.05 The Dealer agrees to protect, defend, hold harmless and indemnify Sears, its directors, officers, agents, employees, affiliates and assigns from and against any and all obligations of the Dealer under the lease of the Dealer Store.

- 24.06 For certainty, and without limiting the generality of Section 21.0, the indemnities set out in Section 21.0 shall apply with respect to any action taken by Sears under Sections 23.0 and 24.0.

25.0 TRANSFER

- 25.01 The Dealer shall not assign, encumber or transfer ("Transfer") this Agreement or any of the rights hereunder without the prior written consent of Sears, which is not to be unreasonably withheld provided the requirements under this Article 25.0 are met. Sears may Transfer this Agreement to any entity which arises out of a corporate restructuring which agrees to assume all obligations of Sears under this Agreement.
- 25.02 At a minimum, in order to obtain the consent of Sears to a Transfer, the Dealer must satisfy the following conditions:
- (i) the proposed transferee must have the skills, business experience, integrity and financial resources necessary, in Sears sole judgment, to operate the Dealer Store;
 - (ii) the Dealer must have complied with all of its obligations under this Agreement and not be in breach thereof;
 - (iii) the proposed transferee must agree to assume all obligations arising out of this Agreement;
 - (iv) the proposed transferee must execute an Authorized Dealer Agreement setting out the terms and conditions of Sears; and
 - (v) evidence must exist that the price and terms of the proposed Transfer do not include Sears goodwill in accordance with Section 14.08 herein and does not contravene this Agreement generally.

Request for Consent

- 25.03 To request the consent of Sears to Transfer the Dealer's interest in this Agreement, the Dealer shall provide to Sears: (i) a signed copy of any proposed agreement, arrangement or offer to Transfer, including a schedule of assets and the details of the Transfer as reasonably required by Sears (the "Offer"), (ii) a completed Sears Dealer Application form which includes the proposed transferee's credit and criminal records check form, their business plan and the details on their skills, business experience, integrity and financial resources and, (iii) anything else which Sears may reasonably require. Written consent must be obtained from Sears prior to any Transfer. Any such Transfer must be effected in accordance with the terms of the Transfer as approved by Sears and any such conditions imposed thereupon.
- 25.04 Any monies owed to the Dealer for Compensation or otherwise will be held by Sears until an audit has been completed by Sears and all invoices, returns and other banking adjustments have been made.

Change of Control

- 25.05 If the Dealer is a corporation or partnership, any actual or proposed Transfer or issue by sale, assignment, disposition, subscription, inheritance, assumption, mortgage, charge, security interest, operation of law or otherwise of any shares, voting rights or interests which would result in any change in the effective control of the Dealer in such corporation or partnership ("Change of Control") shall be deemed to be a Transfer or proposed Transfer of this Agreement, and shall be subject to all of the requirements of this Article 25.0, mutatis mutandis.
- 25.06 In the event that the Change of Control is as a result of inheritance, assumption, transmission on death or such other event that is not within the control of the proposed transferee such that prior written consent from Sears can be obtained, the proposed transferee shall immediately advise Sears in writing of any such intended or actual Change of Control.
- 25.07 Upon Sears request, the Dealer or the proposed transferee (as may be applicable) shall make available to Sears, or its designate, all of its corporate or partnership records and documents, as the case may be, for inspection, at all reasonable times, in order to ascertain whether a Change of Control has occurred.

Inheritance

- 25.08 (a) Notwithstanding anything to the contrary, in the event of death or legal incapacity of:
- (i) the Dealer in the case of an individual;
 - (ii) a shareholder of Dealer owning fifty percent (50%) or more of the capital stock or voting power of a corporate Dealer; or

- (iii) a general or limited partner owning fifty percent (50%) or more of the property, voting power, or profits or losses of the Dealer which is a partnership;

an individual that has assumed or inherited the interest under this Agreement as the controlling and operating party of the Dealer Store and can evidence same to the satisfaction of Sears within ten (10) Business days from the date of death or legal incapacitation ("Inherited Party"), subject to the approval of Sears which may be unreasonably withheld or conditioned, may continue to operate the Dealer Store for a period of up to six (6) months after such death or legal incapacity ("Inherited Term") provided such individual: (aa) is deemed appointed as Operator under Section 2.03 herein, (bb) complies with Section 18.0 herein with respect to Training, and (cc) complies with Section 25.02, subsections (i) and (iii). Sears may require that as a condition thereof, the Inherited Party execute an Authorized Dealer Agreement with Sears.

- (b) In the event that the Inherited Party is granted the approval to operate the Dealer Store for the Inherited Term in keeping with subsection (a) herein, and the Inherited Party: (i) is not permitted by Sears or fails to enter into an Authorized Dealer Agreement with Sears, or (ii) fails to effectively Transfer in accordance with the terms and conditions herein to an approved party as aforesaid then such failure shall be deemed to be an incurable breach of this Agreement and Section 23.04 shall apply.

Effect of Assignment not in Compliance

- 25.09 Any Transfer not in compliance with the requirements herein shall be null and void and Sears shall have the option to immediately terminate this Agreement upon notice without cost, penalty or damages.

26.0 INDEPENDENT CONTRACTOR

- 26.01 Nothing in this Agreement shall be construed to create a partnership, joint venture or agency relationship between Sears, Sears, Roebuck, the Dealer, the Guarantor or any agent, employee or affiliate of the Dealer. The parties agree that the Dealer is an independent contractor.
- 26.02 The Dealer, its agents and its employees and/or affiliates are not to be considered the agents, employees or affiliates of Sears for any purpose. The Dealer shall be solely responsible for its acts or omissions and for the acts and omissions of its agents, employees and/or affiliates.
- 26.03 The Dealer agrees that all purchases and contracts, made by it in connection with the operation of the Dealer Store and this Agreement shall be made solely in the name of the Dealer and under no circumstances shall any purchase order, lease, loan document, letterhead, cheque or other document, expense or obligation of any kind whatsoever, including any utility, tax or service provider invoice, be identified with Sears or Sears, Roebuck.
- 26.04 The Dealer must clearly display on or near the principal entrance to the Dealer Store a decal, provided by Sears, which states "**SEARS AUTHORIZED RETAIL DEALER Independently owned and operated by [insert numbered company/registered business name]**". The Dealer further agrees not to do any act or make any statement that may imply that the Dealer or the Dealer Store is a branch of Sears or, that Sears in any manner owns, controls or operates the Dealer Store or, that any relationship exists between Sears and the Dealer other than that of the Dealer being an independent contractor of Sears.
- 26.05 (i) All vehicles used by the Dealer in conjunction with Home Delivery Services or the Dealer Store shall utilize the Trademark "Sears" only and must include the following statement in a minimum one quarter inch (1/4") lettering and a maximum of one inch (1") lettering on the outside of the driver's door:

"This vehicle is owned and operated by:

[insert numbered company/registered business name]"

There shall be no other reference to the Dealer on the vehicle nor shall there be any reference to any other Sears logos e.g. Craftsman, Kenmore, etc. unless the prior written approval of Sears has been obtained.

- (ii) Upon expiration or other termination of this Agreement, or when such vehicles are no longer used in connection with Home Delivery Services or the Dealer Store, all Sears identification shall be removed immediately. The Dealer shall not sell or otherwise use or dispose of such vehicles or equipment until all Sears identification has been removed to Sears satisfaction.

27.0 GUARANTOR

- 27.01 The Guarantor unconditionally, absolutely and irrevocably covenants with Sears to observe, perform and be bound by all of the covenants, agreements and obligations of the Dealer under this Agreement and shall indemnify and save Sears and Sears, Roebuck harmless from all losses and expenses incurred if the Dealer is in default or fails to perform any of its covenants, agreements or obligations under this Agreement. In the enforcement of its rights hereunder, Sears may proceed against the Guarantor as if the Guarantor were named as the primary obligor hereunder and Sears shall not have to exhaust its remedies against the Dealer prior to proceeding against the Guarantor. If the Guarantor is more than one person, this guarantee shall be joint and several as between them. If the Guarantor resides in the Province of Alberta, he or she agrees to obtain a certificate in the form attached hereto as Schedule "D" which is required under the *Guarantees Acknowledgement Act* (Section 3.0) (Alberta).
- 27.02 In the event of death or incapacitation of the Guarantor, Dealer shall advise Sears in writing within thirty (30) days from first becoming aware of such death or incapacitation, in which case Sears and the Dealer may agree upon another individual to be Guarantor hereunder, and if no such Guarantor can be agreed to, Sears shall have the right to terminate this Agreement in accordance with the provisions of Section 23.04 hereof.

28.0 NOTICE

- 28.01 Any notice required hereunder shall be in writing and shall be given by personal delivery, facsimile transmission or by registered mail to the parties as follows:

To Sears at:

SEARS CANADA INC.
222 Jarvis Street
Toronto, Ontario
M5B 2B8

Attention: Department 7020M

Fax No.: (416) 941-3666

with a copy to:

SEARS CANADA INC.
222 Jarvis Street
Toronto, Ontario
M5B 2B8

Attention: Secretary, Department 766

Fax No.: (416) 941-2321

and with a further copy to:

SEARS, ROEBUCK AND CO.
c/o Sears Canada Inc.
222 Jarvis Street
Toronto, Ontario
M5B 2B8

Attention: Secretary, Department 766

Fax No.: (416) 941-2321

To the Dealer at:

1291079 ONTARIO LTD.
716 Dundas Street
Woodstock, ON
N4S 1E7

Attention: James Kay

Fax No.: (519) 421-1631

To the Guarantor at:

32 Peebles Drive
Freelton, ON
L0R 1K0

Attention: James Kay

Fax No.: (905) 659-5119

Any notice, if delivered personally or sent by facsimile transmission, shall be deemed to have been received on the date of delivery and, if mailed, shall be deemed to have been received on the third (3rd) business day following the date of mailing. When notice is delivered by facsimile transmission, the original notice must be delivered promptly thereafter, if requested.

29.0 INDEPENDENT LEGAL ADVICE

29.01 The Dealer and Guarantor acknowledge that they have been advised that they have the right to seek independent legal advice prior to the execution of this Agreement.

30.0 NON-WAIVER

30.01 The waiver by either party of any default or breach of any provision of this Agreement shall not operate or be construed as a waiver of any subsequent default or breach.

31.0 HEADINGS

31.01 The section headings in this Agreement have been inserted for convenience only and shall not be considered in any construction or interpretation of this Agreement.

32.0 SEVERABILITY

32.01 If any provision of this Agreement is invalid, illegal or unenforceable, such invalidity, illegality or unenforceability shall not affect any other provisions hereof, and the provision shall be severable from the remainder of this Agreement.

33.0 GOVERNING LAW

33.01 This Agreement shall be interpreted and governed by the laws of Ontario and the laws of Canada applicable therein.

34.0 ENTIRE AGREEMENT

34.01 This Agreement constitutes the entire agreement between the parties and supersedes all prior representations, negotiations and agreements. Except as otherwise noted, this Agreement may only be modified by an amendment in writing signed by all of the parties hereto.

35.0 LANGUAGE

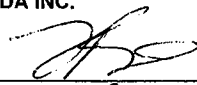
35.01 It is the express wish of the parties that this Agreement and any related documents be drawn up and executed in English. Il est la volonté expresse des parties que cette convention et tous les documents s'y rattachant soient rédigés en anglais.

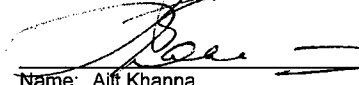
36.0 ENUREMENT

36.01 This Agreement shall enure to the benefit of and be binding upon all of the parties and their heirs, executors, legal personnel representatives, successors and permitted assigns.

IN WITNESS WHEREOF, the parties have executed this Agreement effective as of the day first written above.

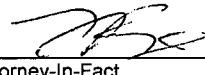
SEARS CANADA INC.

Per: 
Name: Franco Perugini
Title: Associate Corporate Counsel

Per: 
Name: Ajit Khanna
Title: Senior Vice-president,
Dealer and Service Sales

(We have authority to bind the Corporation.)

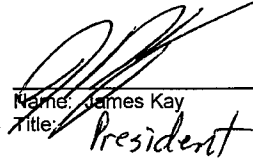
SEARS, ROEBUCK AND CO.

Per: 
Its Attorney-In-Fact
Sears Canada Inc.

(I have authority to bind the Corporation.)

1291079 ONTARIO LTD.

[DEALER COMPANY NAME - Please Print]

Per: 
Name: James Kay
Title: President

c/s

Per: _____
Name:
Title:

(I/We have authority to bind the Corporation.)

Witness: 

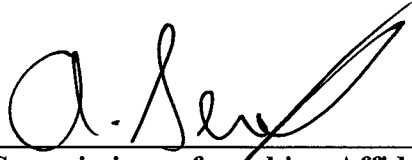
Print Name: DAVE PARK

Guarantor: 

Print Name: James Kay

[Guarantor signature must be witnessed]

This is Exhibit "E" referred to in the
Affidavit of James Kay sworn before me this
18th day of January, 2019

A handwritten signature in black ink, appearing to read "A. Sewell". The signature is written in a cursive style with a large, sweeping flourish at the end.

A Commissioner for taking Affidavits

Court File No. 4114/15

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

1291079 ONTARIO LIMITED

Plaintiff

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the Rules of Civil Procedure. This

will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

October 21, 2015

Issued by



Local Registrar

Address of
court office

Milton Courthouse
491 Steeles Avenue East
Milton, ON L9T 1Y7

TO: SEARS CANADA INC.
290 Yonge Street, Suite 700
Toronto, Ontario
M5B 2C3

AND TO: SEARS HOLDING CORPORATION
3333 Beverly Road
Hoffman Estates, IL 60179
United States of America

AND TO: ESL INVESTMENTS INC.
200 Greenwich Avenue
Greenwich, CT 06830
United States of America

AND TO: WILLIAM C. CROWLEY
146 Central Park West, Apartment 10E
New York NY 10023
United States of America

AND TO: WILLIAM R. HARKER
39 Remsen Street- Apt. L13
Brooklyn NY 11201
United States of America

AND TO: DONALD CAMPBELL ROSS
73 Donwoods Drive
Toronto ON M4N 2G6

AND TO: EPHRAIM J. BIRD
1017 N. Ridge Road
Salado TX 76571
United States of America

AND TO: DEBORAH E. ROSATI
11821 Lakeshore Road RR#2
Wainfleet ON L0S 1V0

AND TO: R. RAJA KHAMNA
31 Delaware Avenue
Toronto ON M6H 2S8

AND TO: JAMES MCBURNEY
4 Luxemburg Gardens
London W6 7EA
United Kingdom

AND TO: DOUGLAS CAMPBELL
13 Roxborough Street West
Toronto ON MSR 1T9

CLAIM

1. The plaintiff claims on behalf of itself and all members of the Proposed Class:
 - (a) a declaration that the plaintiff is a “complainant” under the *Canada Business Corporations Act*, R.S.C. 1985, c. C. 44 (the “CBCA”);
 - (b) a declaration that the plaintiff has been oppressed by the defendants under the CBCA;
 - (c) compensation pursuant to s. 241(3)(j) of the CBCA in an amount not exceeding \$100,000,000;
 - (d) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
 - (e) costs of this action on a substantial-indemnity scale, plus applicable goods and services and harmonized sales taxes; and;
 - (f) such further and other relief as this Honourable Court deems just, including all further necessary or appropriate accounts, inquiries and directions.

Parties

2. The plaintiff, 1291079 Ontario Limited (“129”), is incorporated under the laws of Ontario. Until December, 2013, 129 carried on business in the Town of Woodstock, Ontario, as a retailer under the “Sears Hometown” store program. 129 is the class representative in a certified class proceeding against Sears Canada Inc., bearing Court File No. CV- 3769 /13-CP (the “Class Action”) commenced in Milton, Ontario

3. The defendant, Sears Canada Inc. (“Sears”), is incorporated under the laws of Canada and has its head office in the City of Toronto, Province of Ontario. Sears’ stock is publicly traded on the Toronto Stock Exchange and on the NASDAQ.

4. The defendant, Sears Holding Corporation (“**Holding**”), is incorporated under the laws of the State of Delaware in the U.S.A. Until October, 2014, Holding owned 51% of the common shares of Sears, at which time its shareholdings were reduced to approximately 12% following a sale of its shares.

5. The defendant, ESL Investments Inc. (“ESL”), is incorporated under the laws of the State of Delaware in the U.S.A. ESL is a privately-owned hedge fund controlling over approximately \$9 billion in assets. Until October, 2014, ESL was a 27% shareholder of Sears, at which time it increased its shareholdings in Sears to approximately 48% through the acquisition of shares previously held by Holding.

6. The principal individual behind both Holding and ESL is hedge-fund billionaire Edward Lampert (“**Lampert**”). Lampert is the chairman and CEO of Holding and the founder, chairman and CEO of ESL. Lampert is also the largest individual shareholder of Holding.

7. Holding and ESL are affiliates of Sears as defined under section 2 of the CBCA.

8. The defendant, William C. Crowley (“**Crowley**”), is an individual residing in New York, New York in the United States of America. Crowley was a director of Sears in 2013.

9. The defendant, William R. Harker (“**Harker**”), is an individual residing in Brooklyn, New York in the United States of America. Harker was a director of Sears in 2013.
10. The defendant, Donald Campbell Ross (“**Ross**”), is an individual residing in Toronto, Ontario. Ross was a director of Sears in 2013.
11. The defendant, Ephraim J. Bird (“**Bird**”), is an individual residing in Salado, Texas in the United States of America. Bird was a director of Sears in 2013.
12. The defendant, Deborah E. Rosati (“**Rosati**”), is an individual residing in Wainfleet, Ontario. Rosati was a director of Sears in 2013.
13. The defendant, R. Raja Khanna (“**Khanna**”), is an individual residing in Toronto, Ontario. Khanna was a director of Sears in 2013.
14. The defendant, James McBurney (“**McBurney**”), is an individual residing in London, England. McBurney was a director of Sears in 2013.
15. The defendant, Douglas Campbell (“**Campbell**”), is an individual residing in Toronto, Ontario. Campbell was a director of Sears in 2013.
16. Crowley, Harker, Ross, Bird, Rosati, Khanna, McBurney and Campbell are hereinafter, collectively, referred to as the “**Directors**”.

Background

17. 129 is a Sears Hometown store dealer. On July 5, 2013, it commenced a class proceeding against Sears on behalf of all Hometown Dealer stores operating under a Dealer Agreement with Sears at any time on or after July 5, 2011 (the “Class”). The Class Action seeks \$100 million in damages on behalf of the Class for, *inter alia*, breach of contract and breaches of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (“Wishart Act”).

18. The Class Action was certified as a class proceeding on September 8, 2014.

19. 129 proposes that the class in this action be defined in the same manner as the class in the Class Action, namely:

all corporations, partnerships, and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement with Sears at any time from July 5, 2011 to the date of sending of the notice of certification

The Beginning of the End for Sears

20. Sears is a retailer of home appliances, furnishings, mattresses, electronics and apparel, among other things. It has operated in Canada for over 60 years. Sears’ retail network includes many different channels of retail, such as full-line department stores, furniture and appliance stores, Dealer Hometown stores, catalogue selling locations, and outlet stores. Sears also sells direct to customers through its website, www.sears.ca and its 1-800 telephone number.

21. Beginning in 2011, Sears began incurring large and growing operating losses. In the most recent fiscal year, Sears reported an operating loss of over \$400 million. The table below shows Sears' growing operating losses since 2011 (in CAD millions):

Year	Operating Profit (Loss)
2011	(\$50.9)
2012	(\$82.9)
2013	(\$187.8)
2014	(\$407.3)

22. By 2013, media and analyst reports began reporting that the end was near for Sears given the increasing losses and the absence of a viable plan for turnaround.

23. Even though Sears was losing substantial amounts of money through its operations, it held valuable capital assets, particularly long-term leases in prime shopping centres that were below fair market value rental rates.

24. Beginning in 2013, Sears, at the direction and under the control of Holding and ESL, took steps and made corporate decisions to liquidate these valuable assets in order to benefit Holding and ESL at the expense of creditors. These steps included liquidating Sears' prime assets. Rather than reinvesting these funds to offset the large and growing operating losses and attempt to turn the company around, the primary purpose of these steps was to siphon money out of Canada by paying substantial dividends to Holding and ESL prior to the inevitable bankruptcy filing for Sears.

The Path Towards Insolvency: A Chronology of Asset Stripping

25. In June, 2013, Sears announced that it was selling leases for two of its most prominent locations for \$191 million. The locations were in Toronto's highly-coveted Yorkdale Shopping Centre and Mississauga's Square One Shopping Centre.

26. In August, 2013, Sears announced that it was cutting 245 employees and outsourcing its information technology and financing work. This announcement followed Sears' cutting of over 700 employees earlier in 2013.

27. In September, 2013, Sears' CEO, Calvin MacDonald resigned from the company. Mr. MacDonald had become CEO in 2011 and was in the midst of a proposed three-year turnaround plan at the time of his resignation. Mr. MacDonald resigned because of disagreements with Lampert over commitment to Mr. MacDonald's turnaround plan. That same day, Sears announced that Douglas Campbell was appointed its CEO and President.

28. In October, 2013, Sears announced that it was selling five more of its prime leases, including its flagship location in Toronto's Eaton Centre, for \$400 million. At the same time, it announced the termination of 965 employees who worked at those locations.

29. In November, 2013, Sears announced that it was selling its 50% joint venture interest in eight properties for approximately \$315 million.

30. Also in November, 2013, Sears announced that it was laying off approximately 800 employees from its repair services and parts business.

Sears Declares Extraordinary Dividend Despite Significant Financial Losses

31. On November 19, 2013, Sears reported its third-quarter financial results. Sears' revenues for the third-quarter of 2013 were down 6.4% from the same quarter in 2012. Sears had a net loss of \$48.8 million for the third quarter of 2013.

32. Nevertheless, on that same day, despite these losses, the Directors declared an extraordinary cash dividend of \$5.00 per share on all common shares, or approximately \$509 million in the aggregate, to be paid on December 6, 2013 (the "**Extraordinary Dividend**"). The primary beneficiaries of the Extraordinary Dividend were Holding and ESL.

33. The Extraordinary Dividend was declared by the Directors and paid by Sears with knowledge by the defendants of the substantial claim against Sears by the Hometown dealers in the Class Action.

34. The Extraordinary Dividend was declared by the Directors and paid by Sears with knowledge by the defendants that:

- (a) Sears was aggressively liquidating its prime assets and would continue to do so in the future;

- (b) Sears was experiencing growing, unsustainable operating losses each quarter and would continue to do so in the future;
- (c) the defendants Holding and ESL were not prepared to allow Sears to commit the funds and resources necessary to implement a viable turnaround of Sears' operations, and that Mr. MacDonald and other executives had resigned as a result;
- (d) Sears was slashing its operating budget which would deprive it of the ability to effect a turnaround of its operations and would continue to do so in the future;
- (e) the Sears Hometown stores network was and would continue in the future to be abandoned by Sears. Every senior executive involved in the Sears Hometown store network either left the organization or would leave in the near future as a result of this abandonment and the growing despair of the independent dealer network; and
- (f) the class members, which are independent owner operators of Sears Hometown stores, were experiencing and would continue to experience massive, unsustainable losses which would lead to their financial demise.

35. The defendants knew that by paying the Extraordinary Dividend, they would strip the most valuable assets out of Sears and that Sears would likely be bankrupt or insolvent by the time the Class succeeded in the Class Action.

36. On November 26, 2013, after the declaration of the Extraordinary Dividend but prior to its payment, counsel for the plaintiff in the Class Action wrote to counsel for Sears requesting assurances that, having regard to the assets, liabilities (existing and contingent) and actual and likely future operating losses of Sears, it had set aside a sufficient reserve to satisfy a judgment against Sears should the Class Action be certified and succeed on the merits. No answer was provided.

37. On December 3, 2013, counsel for the plaintiff in the Class Action wrote to each Director to put them on notice that should Sears be unable to satisfy an eventual judgment against Sears in the Class Action, that each Director who authorized the Extraordinary Dividend may be jointly and severally liable with Sears for such damages. No answer was provided.

38. Sears paid the Extraordinary Dividend on December 6, 2013.

The Continuing Path Towards Insolvency

39. Following the payment of the Extraordinary Dividend on December 6, 2013, Sears continued aggressively down the path of winding-up operations in Canada and liquidating what remained of its valuable assets.

40. Having received the Extraordinary Dividend and facing its own financial issues, on May 14, 2014, Holding announced that it was exploring strategic alternatives for its shareholding in Sears, including a possible divestiture of its shares. Holding retained the firm of Bank of America Merrill Lynch for this purpose.

41. In May, 2014, Sears announced that it had sold its minority ownership interest in the Centre commercial Les Rivières shopping centre in Trois-Rivières, Quebec, for \$33.5 million.
42. In August, 2014, Sears announced that it had entered into an agreement to sell its interest in Kildonan Place, a shopping centre located in Winnipeg, for \$33.5 million.
43. In September, 2014, Sears announced that Mr. Campbell would resign as CEO by the end of the year.
44. In October, 2014, Ronald Boire was named as Mr. Campbell's replacement as CEO. Mr. Boire was Sears' third different CEO in just under two years.
45. In November, 2014, Sears and JPMorgan Chase Bank, N.A. announced that their agreement relating to the Sears-branded credit card would terminate on November 15, 2015.
46. In February, 2015, Sears released its financial results for the previous quarter and fiscal year. Sears suffered an operating loss of \$154.7 million for the last quarter of 2014. For the 2014 fiscal year, Sears suffered an operating loss of \$407.3 million.
47. In March 11, 2015, Sears announced that it had entered into an agreement to sell and lease back three of its properties for \$140 million. The locations include store space and adjacent property located at the Metropolis at Metrotown in Burnaby, British Columbia, Cottonwood Mall in Chilliwack, British Columbia and North Hill Shopping Centre in Calgary, Alberta.

48. On May 20, 2015, Sears released its financial performance for the first quarter of 2015. Sears suffered a \$59.1 million net loss for this quarter.

49. On July 2, 2015, Mr. Boire announced that he would be leaving his position as CEO of Sears by the end of the 2015 summer.

50. 25% of the Hometown Dealer stores have closed since 2013. More Hometown Dealer stores are closing weekly.

51. The value of Sears' shares has dropped significantly on the Toronto Stock Exchange and on NASDAQ in the past 24 months and there is widespread speculation that Sears will file for bankruptcy protection in the near future.

Defendants Have Oppressed Class

52. Sears' actions in paying the Extraordinary Dividend were done for the purpose of denuding Sears of its prime assets, and paying the funds from the realization of the assets to the primary benefit of Holding and ESL to the detriment of the Class.

53. At all material times, Holding and ESL controlled and directed Sears and directed the payment of the Extraordinary Dividend by Sears. The Directors voted for and consented to the resolution authorizing the payment of the Extraordinary Dividend. The defendants have interfered with the plaintiff's and the Class' rights as creditors of Sears.

54. Specifically, by directing and authorizing Sears to pay the Extraordinary Dividend and its other actions as described above, the defendants have:

- (a) effected a result;
- (b) carried on their business and affairs and those of Sears in a manner; and
- (c) exercised their powers in a manner,

that was oppressive and unfairly prejudicial to and that unfairly disregarded the interests of the Class, contrary to section 241 of the CBCA.

55. The plaintiff and the Class are complainants under ss. 238(d) of the CBCA.

56. The plaintiff pleads and relies on the CBCA, and particularly Part XX thereof.

Service Ex Juris

57. The plaintiff is entitled to serve Holding, FSL and certain of the Directors outside Ontario without a court order pursuant to the following rules of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 because:

- (a) Rule 17.02 (f)(i) – the claim relates to a contract made in Ontario;
- (b) Rule 17.02 (f)(iv) – the claim relates to a breach of a contract committed in Ontario;
- (c) Rule 17.02 (g) – the claim relates to a tort committed in Ontario;
- (d) Rule 17.02 (h) – the claim relates to damage sustained in Ontario arising from a tort and breach of contract; and
- (e) Rule 17.02 (o) – the defendants residing outside of Ontario are necessary and proper parties to this proceeding.

58. The plaintiff seeks to have this action tried immediately following the trial of the Class Action.

October 21, 2015

SOTOS LLP
Barristers and Solicitors
180 Dundas Street West, Suite 1200
Toronto, Ontario M5G 1Z8

David Sterns (LSUC # 36274J)
Louis Sokolov (LSUC #34483L)
Andy Seretis (LSUC # 57259D)
Rory McGovern (LSUC # 65633H)

Tel: (416) 977-0007
Fax: (416) 977-0717

Lawyers for the plaintiff

1291079 ONTARIO LIMITED
Plaintiff

-and-

SEARS CANADA INC., et al.
Defendants

Court File No. 4114/15

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT MILTON

STATEMENT OF CLAIM

SOTOS LLP


Barristers and Solicitors
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Toronto, ON M5G 1Z8

David Sterns (LSUC#: 36274J)
Louis Sokolov (LSUC#: 34483L)
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Rory McGovern (LSUC#: 65633H)

Tel: (416) 977-0007
Fax: (416) 977-0717

Lawyers for the Plaintiff

This is Exhibit "F" referred to in the
Affidavit of James Kay sworn before me this
18th day of January, 2019



A Commissioner for taking Affidavits



SOTOS LLP | LAWYERS & TRADE-MARK AGENTS

David Sterns
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Our File No. 20667

December 3, 2013

VIA EMAIL TO PHoward@stikeman.com FOR
DELIVERY TO:

William C. Crowley
146 Central Park West, Apartment 10E
New York NY 10023
United States of America

William R. Harker
39 Remsen Street- Apt. LB
Brooklyn NY 11201
United States of America

Donald Campbell Ross
73 Donwoods Drive
Toronto ON M4N 2G6

Ephraim J. Bird
1017 N. Ridge Road
Salado TX 76571
United States of America

Deborah E. Rosati
11821 Lakeshore Road RR#2
Wainfleet ON LOS 1 VO

R. Raja Khanna
31 Delaware Avenue
Toronto ON M6H 2S8

James Mcburney
4 Luxemburg Gardens
London W6 7EA
United Kingdom

Douglas Campbell
13 Roxborough Street West
Toronto ON MSR 1T9

Dear Sirs and Madam:

Re: 1291079 Ontario Limited v. Sears Canada Inc. et. al.
Court File No. 3769/13 CP

We are counsel for the plaintiff in the above-captioned action (the “**Action**”) brought against Sears Canada Inc. (“**Sears Canada**”) under Ontario’s *Class Proceedings Act, 1992* on behalf the “Sears Hometown” store dealers across Canada. A copy of the statement of claim in the Action is available at <http://www.sotosllp.com/wp-content/uploads/2013/07/Statement-of-claim-Final.pdf>.

We are writing to you as you are listed as a director of Sears Canada on the records of Industry Canada as of December 2, 2013.



On November 19, 2013, Sears Canada announced that its Board of Directors declared an extraordinary cash dividend of \$5.00 ("**Extraordinary Dividend**") per share on all common shares of Sears Canada (totaling approximately \$509 million), to be paid on December 6, 2013.

The declaration of the Extraordinary Dividend follows actions by Sears Canada to liquidate its most valuable assets and significantly reduce the scale of its operations. The declaration also follows the announcement of a loss by Sears Canada of approximately \$50 million this past quarter and the recent resignation of Sears Canada's CEO Calvin McDonald who had been publicly committed to the continued operations of Sears Canada.

Despite statements by Sears Canada's management to the contrary, the view of informed observers is that Sears Canada is in the process of liquidating all or a substantial portion of its Canadian operations and paying out the proceeds of the liquidation to its shareholders. There is concern that Sears Canada is denuding itself of assets without reinvesting the proceeds into the corporation, and that this will eventually lead to a formal insolvency of Sears Canada to the detriment of actual and contingent creditors.

The *Canada Business Corporations Act*, RSC 1985, c C-44 ("**CBCA**") provides that a corporation shall not declare a dividend if, after the payment, the corporation would be unable to pay its liabilities as they become due or the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities and stated capital of all classes. If a dividend is improperly declared, the directors of the company may face personal liability.

We have requested but have not received assurances from Sears Canada that, having regard to the assets and liabilities and actual and probable future losses of Sears Canada, it has set aside a sufficient reserve to satisfy a judgment against Sears Canada in the event that the Action will be certified as a class proceeding and will succeed on the merits, and satisfy other creditors.

The Action seeks damages of up to \$100 million on behalf of several hundred small business owners. Should the declaration of the Extraordinary Dividend or any subsequent dividend declared by the Board result in Sears Canada being unable to satisfy in full an eventual judgment against Sears Canada in the Action, we may seek to hold each board member who authorized such dividend(s) jointly and severally liable with Sears Canada.

Yours very truly

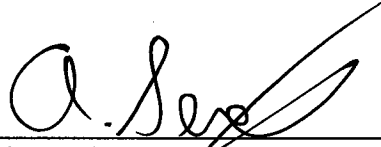
SOTOS LLP

A handwritten signature in black ink that reads "David Sterns". The signature is written in a cursive, flowing style.

David Sterns

c. Peter Howard, Stikeman Elliott LLP (counsel for Sears Canada in the Action)

This is Exhibit "G" referred to in the
Affidavit of James Kay sworn before me this
18th day of January, 2019

A handwritten signature in black ink, appearing to read "A. Seal". The signature is written in a cursive style with a large initial "A" and a long, sweeping flourish extending to the right.

A Commissioner for taking Affidavits

4114/15

Court File No. 4115/15CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE)
MR. JUSTICE D.K. GRAY)

TUESDAY., THE 29th
DAY OF MARCH..., 2016

BETWEEN:

1291079 ONTARIO LIMITED

Plaintiff

- and -

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

Defendants

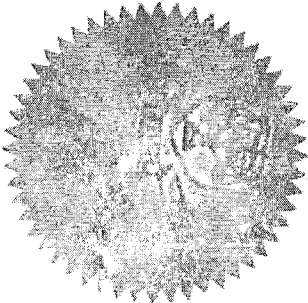
Proceeding under the *Class Proceedings Act, 1992*

ORDER

ON READING the Consent of the parties, filed,

1. **THIS COURT ORDERS** that this action be and is hereby stayed as against the defendants, ESL Investments Inc. and Sears Holdings Corporation, until the earlier of:

- (a) a judgment in favour of part or all of the class in *1291079 Ontario Limited v. Sears Canada Inc.*, Court File No.: 3769/13 CP notwithstanding any appeal therefrom;



-2-

- (b) a formal insolvency filing by Sears Canada Inc. either pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 or *Companies' Creditors Arrangement Act*, RSC 1985, c C-36; or
- (c) further order of the Court.

2. **THIS COURT ORDERS** that this action be and is hereby stayed as against the defendants, Sears Canada Inc. and (collectively, the “**Director Defendants**”) William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, Deborah E. Rosati, R. Raja Khanna, James McBurney and Douglas Campbell, until the earlier of:

- (a) judgment in favour of part or all of the class in *1291079 Ontario Limited v. Sears Canada Inc.*, Court File No.: 3769/13 CP notwithstanding any appeal therefrom;
- (b) in the case of the Director Defendants, subject to any order obtained pursuant to an insolvency filing staying the action against the Director Defendants, a formal insolvency filing by Sears Canada Inc. either pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 or *Companies' Creditors Arrangement Act*, RSC 1985, c C-36; or
- (c) further order of the Court.

3. **THIS COURT ORDERS** that this order is without prejudice to any position, objection or defence the parties may take or assert in this proceeding following the lifting of the stay, and no party shall assert prejudice arising from the delay while the within proceeding was stayed.

4. **THIS COURT ORDERS** that the costs of this motion be in the cause.



(Signature of Judge)

77-54
APR 25 2016
SUPERIOR COURT OF JUSTICE
MILTON

1291079 ONTARIO LIMITED
Plaintiff

-and-

SEARS CANADA INC. et al
Defendants

4114/15
Court File No. 4115/15-CP

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT MILTON

ORDER

SOTOS LLP

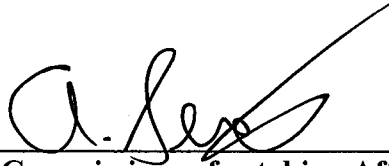
180 Dundas Street West
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David Sterns (LSUC # 36274J)
Andy Seretis (LSUC # 57259D)
Rory McGovern (LSUC # 65633H)

Tel: 416-977-0007
Fax: 416-977-0717

Lawyers for the Plaintiff

This is Exhibit "H" referred to in the
Affidavit of James Kay sworn before me this
18th day of January, 2019

A handwritten signature in black ink, appearing to read "A. Lee", written over a horizontal line.

A Commissioner for taking Affidavits

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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.

CONTINUATION AND EXTENSION OF LITIGATION CREDITORS' COMMITTEE

3. THIS COURT ORDERS that the Creditors' Committee established pursuant to the Amended Litigation Investigator Order dated April 26, 2018 shall continue as currently constituted thereunder to consult with and provide input to the Litigation Trustee Parties in respect of the claims brought by the Litigation Trustee in accordance with this Order.

4. THIS COURT ORDERS that the Litigation Trustee Parties shall meet with the Creditors' Committee on a monthly basis unless otherwise agreed for a particular month by said parties, and which meetings shall be subject to confidentiality and that privilege shall be maintained.

APPOINTMENT OF LITIGATION TRUSTEE

5. 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

6. 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;

-4-

- (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; and
- (c) 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.

7. THIS COURT ORDERS that, notwithstanding the generality of paragraph 15⁹(^{6(e)}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.

8. 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.

INDEMNITY

9. THIS COURT ORDERS that the Litigation Trustee 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.

10. THIS COURT ORDERS that the indemnity pursuant to paragraphs ⁵⁻⁹~~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

11. 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.

12. 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.

13. 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.

-7-

14. 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.

15. 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.

16. 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

17. 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.

PROCEDURE

18. THIS COURT ORDERS that a case management judge for the claims brought by the Monitor, the Litigation Trustee, the Pension Administrator, and the Class Action plaintiffs as referred to in the First Report will be appointed as soon as possible.

19. THIS COURT ORDERS that the procedure to be followed for the claims brought by the Monitor, the Litigation Trustee, the Pension Administrator, and the Class Action plaintiffs as referred to in the First Report shall be determined by the case management judge.

GENERAL

20. 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.

21. 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.

-9-

22. 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.

23. 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.

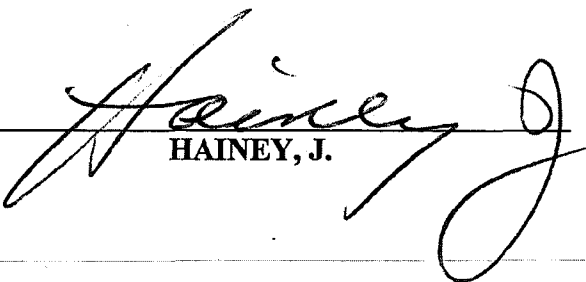
24. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Litigation Trustee and the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

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

DEC 04 2018

PER / PAR:

UM


HAINEY, J.

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)**

LAX O'SULLIVAN LISUS GOTTLIEB LLP

Counsel

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Litigation Investigator

This is Exhibit "I" referred to in the
Affidavit of James Kay sworn before me this
18th day of January, 2019

A handwritten signature in black ink, appearing to read "A. Sep". The signature is written in a cursive style with a long, sweeping line extending upwards and to the right from the end of the signature.

A Commissioner for taking Affidavits

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
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CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA
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CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD.,
4201531 CANADA INC., 168886 CANADA INC., AND
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 Lissus 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.

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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:

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- (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;

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- (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

-7-

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

-8-

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.

-10-

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.


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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 CANADA INC.

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**

LAX O'SULLIVAN LISUS GOTTLIEB LLP

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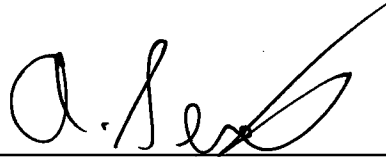
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Litigation Investigator

This is Exhibit "J" referred to in the
Affidavit of James Kay sworn before me this
18th day of January, 2019

A handwritten signature in black ink, appearing to read "A. Seal". The signature is written in a cursive style with a large, sweeping flourish at the end.

A Commissioner for taking Affidavits

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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CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD.,
4201531 CANADA INC., 168886 CANADA INC., AND
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

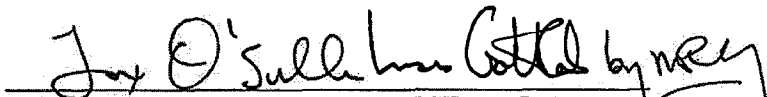
-6-

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 GOTTLEB 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 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.

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 COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

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

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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

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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

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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

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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

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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

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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.

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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.

HAINY, 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.

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- 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)

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- 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

This is Exhibit "K" referred to in
Affidavit of James Kay sworn before me this
18th day of January, 2019

A handwritten signature in black ink, appearing to be "A. Lee", written over a horizontal line. The signature is stylized and extends above and below the line.

A Commissioner for taking Affidavits

Court File No. 4114/15CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

1291079 ONTARIO LIMITED

Plaintiff

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

PLAINTIFF'S LITIGATION PLAN

SECTION 1 - GENERAL

DEFINED TERMS

1.1 In this plan, capitalized terms have the same meaning as given to them in the Statement of Claim, unless otherwise noted. Otherwise:

“**Class Action**” means Ontario Superior Court of Justice Court File No. 4114/15CP.

“**Plaintiff's Counsel**” means, collectively, Sotos LLP and Blaney McMurtry LLP.

“**Class**” means all of the Class Members.

“**Class Member**” or “**Class Members**” means one or more members of the proposed class comprised of:

*All corporations, partnerships, and individuals carrying on business as a
Sears Hometown Store under a Dealer Agreement with Sears at any time
from July 5, 2011 to June 22, 2017.*

“**CPA**” means the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

“**Website**” means <https://sotosclassactions.com/cases/current-cases/sears-canada-oppression/>.

REPORTING

1.2 Plaintiff's Counsel will report regularly to the Class Members through the Website it maintains for the Class Action. The information on the status of the Class Action will be updated regularly. Plaintiff's Counsel will designate a person or persons to manage the communications with Class Members.

SECTION 2 – CERTIFICATION MOTION

NOTICE

2.1 As part of the certification order, assuming success for the Plaintiff, the Plaintiff will ask the Court to:

- (a) Require Sears Canada Inc. ("**Sears**") or its monitor to provide contact information for all Class Members within 10 days of the certification Order, if not sooner.
- (b) Settle the form and content of the notice of certification (the "**Notice of Certification**"). The Notice of Certification will inform all Class Members of the nature of the claim and their right to opt out; and
- (c) Settle the means by which the Notice of Certification will be given to the Class Members (the "**Notice Program**").

2.2 The Plaintiff proposes that the Notice of Certification be distributed in accordance with the following Notice Program:

- (a) Email and/or regular mail distribution to the contact information of each Class Member provided by Sears or its monitor; and
- (b) Posted in English and French by Plaintiff's Counsel on Plaintiff's Counsel's Website; and provided by Plaintiff's Counsel to any person who requests it.

So long as the list of class members provided by Sears or its monitor is complete and accurate, the Plaintiff does not consider it necessary to cause the Notice to be published in a national newspaper or other medium. However, if such list is found to be materially incomplete or inaccurate, the Plaintiff will request that the defendants pay the cost of publishing the Notice of Certification in such media as is considered necessary in order to come to the attention of the omitted class members.

SECTION 3 – LITIGATION STEPS PRECEDING THE COMMON ISSUES TRIAL

CASE CONFERENCES

3.1 After disposition of the certification motion, assuming success for the Plaintiff, Plaintiff's Counsel will ask the Court to set a case conference to schedule the steps in the Class Action pending the common issues trial. The schedule will include the litigation steps set out below. It is anticipated that the litigation steps will be taken in conjunction with the claims being brought by

the Monitor, Litigation Trustee and the Pension Administrator (all as defined in the December 3 Order of the Honourable Justice Hainey) (collectively, the “**Other Claims**”). It is anticipated that the Class Action, together with the Other Claims, will create a common issues trial protocol (the “**Protocol**”) that will govern the steps leading up to the trial of all of these actions.

PLEADINGS

3.2 Subject to the Protocol, the Defendants shall provide Statements of Defence no later than 30 days following the date on which the Ontario Superior Court of Justice renders a decision with respect to the certification hearing.

3.3 The Plaintiff may seek an order from the Court requiring the Defendants to provide their Statements of Defence earlier.

DOCUMENT EXCHANGE AND MANAGEMENT

3.4 Subject to the Protocol, within 30 days of an order certifying the Class Action, the parties will agree on and implement a discovery plan in accordance with the Sedona Conference Principles and a schedule to engage in meet and confers, subject to this Court’s further orders. If there are areas of disagreement, any of the parties may seek direction from the Court.

3.5 Plaintiff’s Counsel anticipates and is able to handle the intake and organization of the number of documents that will likely be produced by the Defendants and will use data management systems to organize, code and manage the documents.

3.6 The same data management systems will be used to organize and manage all relevant documents in the possession of the Plaintiff.

EXAMINATIONS FOR DISCOVERY

3.7 Subject to the Protocol, the Plaintiff will conduct an examination for discovery of the individual Defendants and a representative from each of the corporate Defendants but cannot, until the production of documents has been completed, estimate the time required for each examination. Scheduling will also need to include time for receipt of responses to anticipated undertakings and refusals.

3.8 Subject to the Protocol, the Plaintiff may ask the Court for an order allowing examination of more than one representative of each corporate Defendant, if necessary.

3.9 Subject to the Protocol, within 120 days of receiving document production, the parties will complete examinations for discovery.

EXPERT REPORTS

3.10 Plaintiff’s Counsel anticipates the exchange of expert reports.

3.11 Subject to the Protocol, the Plaintiff proposes that all expert reports be exchanged within 60 days of the completion of examinations for discovery, unless the Court orders otherwise.

3.12 Subject to the Protocol, within 60 days of expert reports being filed, cross-examinations in respect of those reports will be completed.

MOTIONS

3.13 Subject to the Protocol, at any stage, the Plaintiff may bring a motion asking the Court to clarify or redefine the common issues, if required.

3.14 Although no motions other than those indicated in this plan are currently anticipated by the Plaintiff, additional motions may be required and will be scheduled as the case progresses.

SECTION 4 – TRIAL OF THE COMMON ISSUES

4.1 The common issues trial will determine the existence and scope of the Defendants' alleged misconduct. The common issues trial may also determine on a class-wide basis whether Class Members suffered loss, leading to a finding of liability and a determination of aggregate entitlement and/or damages.

SECTION 5 – LITIGATION STEPS FOLLOWING THE COMMON ISSUES TRIAL

5.1 Subject to the Protocol, within 45 days of a decision following the common issues trial, assuming success in favour of the Plaintiff, the parties shall attend a case planning conference to set a schedule and to confirm the process to be followed in bringing the Class Action to final resolution. The process which will be required is dependent on the nature of the decision at the common issues trial. Two examples of the process which the Court may direct are outlined below.

5.2 Subject to the Protocol, if liability and aggregate damages are determined at the common issues trial, a plan for distributing the aggregate damage award will be developed by the Plaintiff, in accordance with section 24 of the CPA, to provide fair compensation through an efficient, timely, and impartial distribution process.

5.3 Pursuant to subsections 24(2), 24(4) and 26(4) of the CPA, the Court, or a referee if one is appointed, will be asked to determine, based on such evidence as may be necessary, or approve:

- (a) The allocation of any aggregate damages recovery among the Class;
- (b) Whether part of the award of aggregate damages should be allocated to the Class in proportion to the economic harm suffered; and
- (c) Whether the claims of Class Members should be assessed in a summary claims procedure or in some other manner reasonably expected to benefit Class Members.

5.4 Once the division of any aggregate damages award between the Class has been determined and assuming claims may be assessed in a summary claims assessment procedure, the Plaintiff will ask that the Court implement and adopt a claims procedure pursuant to subsections 24(5)-(7) of the CPA, which includes the following steps:

- (a) Setting a claims deadline before which eligible Class Members will be required to file their claims for compensation;
- (b) Appointment of an administrator to implement the claims process, including the review and assessment of filed claims;
- (c) Appointment of a referee to review any issues as to eligibility or the value of claims determined by the administrator, if required;
- (d) The right to appeal the referee's decision to the Court for a final and binding decision; and
- (e) The creation of a report by the administrator at the conclusion of the claims procedure.

5.5 The Plaintiff will further propose that the claims assessment procedure, wherever practical, utilize:

- (a) A paperless, web-based claims and claims management system;
- (b) Standardized claims forms and filing procedures;
- (c) The Defendants' records as presumptive proof of a Class Member's membership in the class where the Class Member does not contest those records; and
- (d) Affidavit or other summary methods for introducing evidence, if necessary.

5.6 As soon as practicable following the expiration of the claims deadline and, if necessary, after any reviews performed by the referee have been completed and appeals resolved, and the amount and number of eligible claims is known, the administrator shall report to the Court on the name, address, and proposed distribution for each eligible Class Member, including his or her prorated share of any punitive damages award or pre- and post-judgment interest award.

5.7 Pursuant to section 26 of the *CPA*, Plaintiff's Counsel shall thereafter seek directions from the Court on a means of distributing any Class Members' awards.

5.8 If the Court determines certain common issues in favour of the Class but does not determine liability and award aggregate damages, the amount and distribution of damages would need to be determined in accordance with the provisions of section 25 of the *CPA*.

COSTS

5.9 The Plaintiff will ask the Court to order that the Defendants pay all administration costs, including the costs of the notice and the fees of the administrator and referees or alternatively that those costs be paid out of the total recovery after payment of counsel fees, disbursements, and taxes or distribution to the eligible Class Members.

SECTION 6 – AMENDMENTS OF THIS PLAN

6.1 This plan may be amended from time to time by directions given at case management conferences or by further order of the Court.

1291079 ONTARIO LIMITED
Plaintiff

-and- **SEARS CANADA INC. et al.**
Defendants

Court File No. CV-19-617792-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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