

**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 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.

Applicants

**MOTION RECORD  
(DIRECTORS' MOTION RE: FEES MOTION TO STRIKE)**

September 14, 2018

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

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3339611 CANADA INC.

Applicants

**MOTION RECORD INDEX**

<b>TAB</b>	<b>DOCUMENT</b>
1	Notice of Motion (Motion to Strike)

# TAB 1

**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

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OF SEARS CANADA INC., 9370-2751 QUEBEC INC., 191020 CANADA INC.,  
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SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING  
AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC.,  
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10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA  
LTD., 4201531 CANADA INC., 168886 CANADA INC. and 3339611 CANADA  
INC.

Applicants

**NOTICE OF MOTION OF SHC  
(MOTION TO STRIKE)**

The Respondent, Sears Holdings Corporation (“SHC”), will make a Motion to a Judge presiding over the Commercial List on October 18, 2018 at 10:00 a.m., or as soon after that time as the Motion can be heard at the court house, 330 University Avenue, 7th Floor, Toronto, Ontario, M5G 1R7.

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

**THE MOTION IS FOR:**

- (a) An Order striking the motion of Klaudio Leshnjani, William R. Harker, William C. Crowley, Donald C. Ross, James McBurney, Ephraim J. Bird, Calvin R. McDonald, Ronald Boire, Deidra C. Merriwether, and Douglas Campbell (collectively, the “**Former Directors**”) returnable October 18, 2018 for, *inter alia*,

an interim order directing SHC to reimburse and pay the legal fees incurred by the Former Directors in connection with the Application made pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985 c. C-36 bearing Court File No. CV-17-11846-00CL (the "**CCAA Proceeding**");

- (b) The costs of this Motion; and,
- (c) Such further and other relief as to this Honourable Court may seem just.

**THE GROUNDS FOR THE MOTION ARE:**

**The CCAA Proceeding**

- (d) On June 22, 2017, the Applicants commenced an application and were granted protection pursuant to the *CCAA*;
- (e) SHC and the Former Directors are each Respondents to the *CCAA* Proceeding and none, obviously, is an Applicant;
- (f) On December 8, 2017, the Court issued an order (the "**Claims Procedure Order**") approving a claims process (the "**Claims Process**") for the purpose of identifying, determining and adjudicating claims of creditors against the Applicants and their current and former officers and directors;
- (g) On February 22, 2018, the Court issued a further order establishing a claims procedure (the "**E&R Claims Process**") for the identification and quantification of Employee Claims and Retiree Claims (as defined therein) against the Applicants

and the Applicants' current and former directors (the "**E&R Claims Procedure Order**");

- (h) Since the Claims Procedure Order and the E&R Claims Procedure Order were issued, claims have been submitted to the Monitor against the Former Directors in (the "**Former D&O Claims**");
- (i) The Former D&O Claims are based on alleged acts and omissions of the Former Directors while such Former Directors were acting as directors and/or officers of Sears Canada;

#### **The Cooperation Agreement**

- (j) On October 1, 2014, Sears Canada Inc. ("**Sears Canada**") and SHC entered into a cooperation agreement (the "**Cooperation Agreement**") setting out terms and conditions on which Sears Canada would cooperate with SHC to facilitate SHC's potential offering to its existing shareholders of rights to acquire common shares of Sears Canada (the "**Offering**");
- (k) The Cooperation Agreement provides, *inter alia*, that:
  - (i) SHC will agree to indemnify and hold harmless each of Sears Canada, its subsidiaries and their respective directors, officers, employees and representatives from and against all liabilities, claims, damages and costs (including settlement costs and reasonable fees of counsel) arising out of or based upon:  
  
[...]
  - all actions taken in connection with the Offering or at the request of SHC, provided such actions are taken in good faith and without negligence or wilful misconduct; and

- any breach by SHC of this letter agreement.

(hereafter, the “**Indemnification Obligation**”); and

- (ii) For a period of 6 years following the closing of the Offering, SHC will continuously maintain directors’ and officers’ liability and fiduciary liability coverage for current and former directors and officers of Sears Canada for acts and omissions in their capacity as such occurring at or prior to the closing of the offering with insurer(s) that have at the time such coverage is written the same or higher A.M. Best rating as the current primary insurer on terms no less favourable to such directors and officers in any material respect than those of the insurance policies providing such coverage in effect on the date hereof; provided that this requirement shall be deemed to be satisfied if SHC elects to obtain prepaid policies (i.e. “tail coverage”) which in the aggregate provide such directors and officers with the coverage described herein for an aggregate period of 6 years following closing of the Offering with respect to claims arising from acts or omissions that occurred at or before the closing.

(hereafter, the “**Insurance Obligation**”).

#### **The Directors’ and officers’ Insurance Policies**

- (l) XL Specialty Insurance Company (“**XL**”) is the issuer of primary director and officer coverage for both SHC (the “**SHC XL Policy**”) and Sears Canada (the “**Sears Canada XL Policy**”) and, with the SHC XL Policy, the “**XL Policies**”);
- (m) The XL Policies may each relate to a different policy period with the Sears Canada XL Policy covering claims based on facts occurring after October 15, 2014 and the SHC XL Policy covering claims based on events occurring before October 15, 2014;



**The Former Directors' Insurance Claim is Denied**

- (n) On or about February 24, 2018, the Former Directors retained Canadian counsel, Cassels Brock & Blackwell LLP. This was done without obtaining approval from XL. They assert that fees to date already exceed \$300,000;
- (o) On March 8, 2018 and March 19, 2018, the Former Directors provided notice of the Former D&O Claims to XL under the XL Policies (the “**XL Notices**”);
- (p) On May 4, 2018, XL issued coverage letters under the XL Policies (the “**Coverage Letters**”) denying that XL has any obligation to provide coverage and reimbursement of defence costs to the Former Directors in respect of the Former D&O Claims. SHC has engaged counsel and has worked vigorously, and continues to do so to persuade XL to reverse its coverage position;
- (q) Following receipt of the Coverage Letters, the Former Directors demanded that SHC reimburse the legal costs they have incurred to date and pay all amounts to cover all further legal costs incurred in connection with the D&O Claims, in Canada and in the U.S., without limitation;
- (r) SHC has declined to pay the Former Directors' legal costs as claimed;
- (s) The Former Directors assert that they have engaged U.S. counsel, Covington & Burling LLP (“**Coverage Counsel**”), to pursue coverage under the SHC XL Policy; and

- (t) The Former Directors have advised SHC that Coverage Counsel intends to commence a proceeding against XL to pursue coverage (a “**Coverage Proceeding**”). As of the date of this Notice of Motion, the Former Directors have not in fact commenced any such proceeding;

**The Former Directors Commence an Application and a Motion**

- (u) On August 10, 2018, the Former Directors served a Notice of Motion in the *CCAA* Proceeding seeking, *inter alia*, an interim order directing SHC to reimburse and pay the legal fees incurred by the Former Directors in connection with the D&O Claims (the motion that this motion seeks to strike);
- (v) On September 4, 2018, the Former Directors commenced a separate application seeking substantially the same relief bearing Court File No. CV-18-604470-00CL;

**Entitlement to Relief**

- (w) It is plain and obvious that the Former Directors cannot obtain the relief they seek pursuant to a purported motion in the *CCAA* Proceeding;
- (x) The Former Directors’ motion does not facilitate compromises and arrangements between companies and their creditors and in fact has nothing to do with such compromises;
- (y) This Honourable Court does not have jurisdiction to grant the relief sought by the Former Directors in the *CCAA* Proceeding;

- (z) The interim relief sought by the Former Directors should be determined in the Coverage Proceeding;
- (aa) Sections 106, 107, 110 and 138 of the *Courts of Justice Act*;
- (bb) Rules 25.11, 37 and 57.03 of the *Rules of Civil Procedure*; and
- (cc) Such further and other grounds as the lawyers may advise.

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

- (a) The Notice of Application of the Former Directors in Court File No. CV-18-604470-00CL dated September 4, 2018;
- (b) The Amended Notice of Motion in the *CCAA Proceeding* dated September 5, 2018;
- (c) The affidavit of William Harker sworn August 10, 2018 together with the exhibits thereto;
- (d) The cross-examination of William Harker; and
- (e) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

September 14, 2018

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Merriwether, and Douglas Campbell

AND TO: **SERVICE LIST**

**ONTARIO**

**SUPERIOR COURT OF JUSTICE  
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PROCEEDING COMMENCED AT TORONTO

**NOTICE OF MOTION OF SHC  
(STRIKE MOTION IN CCAA)**

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SEARS CANADA INC. et al.  
Applicants

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

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