

SCHEDULE "A"

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SEARS CANADA INC., 9370-2751
QUEBEC INC., 191020 CANADA INC., THE CUT INC.,
SEARS CONTACT SERVICES INC., INITIUM LOGISTICS
SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM
TRADING AND SOURCING CORP., SEARS FLOOR
COVERING CENTRES INC., 173470 CANADA INC., 2497089
ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA
INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD.,
4201531 CANADA INC., 168886 CANADA INC., AND 3339611
CANADA INC.

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

**ORDER
(APPOINTMENT OF LITIGATION TRUSTEE)**

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

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

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

SERVICE

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

TERMINATION OF LITIGATION INVESTIGATOR APPOINTMENT AND OF CREDITORS' COMMITTEE

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

APPOINTMENT OF LITIGATION TRUSTEE

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

LITIGATION TRUSTEE'S POWERS

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

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

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

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

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

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

INDEMNITY

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

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

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

LITIGATION TRUSTEE'S ACCOUNTS

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

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

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

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

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

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

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

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

LIMITATION ON ENVIRONMENTAL LIABILITIES

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

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

COMMON ISSUES TRIAL

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

GENERAL

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

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

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

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

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

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. **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.
3. **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, and counsel to the pension claimants
 - b. Prior to any production of documents by the Monitor or the Sears Canada Entities to the Litigation Trustee or the pension claimants, 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 or the pension claimants 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 or the pension claimants.
 - d. In the event that the Monitor and/or Sears Canada Entities intend to produce any Potentially Shared Privileged Documents to the Litigation Trustee or the pension claimants, 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.

4. 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

5. 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

6. Experts' reports:

- a. Plaintiffs' experts' reports to be served 12 weeks before trial
- b. Defendants' experts' reports to be served 6 weeks before trial

7. Common Issues Trial:

- a. Parties will file an Agreed Statement of Facts ("ASF")
- b. Parties will file a Joint Book of Documents ("JBD"), which will include all documents referred to in the ASF, plus any other documents the parties agree to include in the JBD
- c. Parties will deliver written opening submissions one week before trial
- d. Evidence in chief will be adduced by way of affidavits
 - i. Plaintiffs' affidavits to be delivered 4 weeks before trial
 - ii. Defendants' affidavits to be delivered 2 weeks before trial
- e. The trial will be conducted electronically pursuant to a protocol to be agreed upon by the parties and approved by the trial judge no later than 8 weeks before trial
- f. All plaintiffs' witnesses will testify first
- g. Then all defendants' witnesses
- h. Oral examinations-in-chief will be limited to a 10-minute "warm-up"
- i. Oral closing submissions will be heard 3 weeks after the last day of evidence, or as soon as possible thereafter
- j. Parties will agree to exchange written closing submissions on the same day (1 week before oral closing submissions)
 - i. In the alternative, the Plaintiffs will deliver their written closing submissions 10 days before oral closing submissions, then Defendants will deliver responding closing submissions 5 days before oral closing submissions, then Plaintiffs will deliver reply closing submissions 2 days before oral closing submissions

- k. All documents referred to in written closing submissions will be compiled in an electronic joint compendium
- l. Parties will prepare a joint book of authorities for all cases relied upon in closing submissions

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985 c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUEBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041, ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC. (each, an “**Applicant**” and collectively, the “**Applicants**”)

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COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

**ORDER
(APPOINTMENT OF LITIGATION TRUSTEE)**

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