

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

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**”)

**NOTICE OF MOTION  
(Re Appointment of Litigation Trustee)**

The Litigation Investigator (as defined below) will make a Motion to a Judge on November 19, 2018, at 2:00 p.m., or as soon after that time as the Motion can be heard at the court house, 330 University Avenue, Toronto, Ontario, M5G 1E6.

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

orally.

**THE MOTION IS FOR:**

1. An Order in the draft form attached to this Notice of Motion as Schedule “A”; and
2. Such further and other Relief as to this Honourable Court may seem just.

**THE GROUNDS FOR THE MOTION ARE:**

**The CCAA Proceedings**

1. On June 22, 2017, the Applicants made an application pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the “**CCAA**”), and this Court issued an order commencing these proceedings (the “**Initial Order**”).
2. The Initial Order stayed all proceedings against the Applicants, and their representatives and employees acting in those capacities, until July 22, 2017 (the “**Stay**”). The stay was subsequently extended many times by this Court. The most recent extension to December 18, 2018, was granted by order of this Court dated July 24, 2018.

**Appointment and Mandate of the Litigation Investigator**

3. On March 2, 2018, this Court issued an order (as amended, the “**Litigation Investigator Order**”) appointing Lax O’Sullivan Lissus Gottlieb LLP as Litigation Investigator for the benefit of the Applicants and their creditors in this proceeding. The Court amended the Litigation Investigator Order on April 26, 2018.
4. The Litigation Investigator Order directed the Litigation Investigator to investigate, consider, and report on any rights or claims that the Applicants and/or their creditors may have against any other parties, including their current and former directors, officers, shareholders and advisors (the “**LI Mandate**”).

5. The Litigation Investigator Order also provided for the establishment of a committee of the Applicants' creditors (the "**Creditors' Committee**") to consult with and provide input to the Litigation Investigator in connection with the LI Mandate. The Litigation Investigator Order required the Litigation Investigator to report to the Creditors' Committee regarding its investigation and analysis under the LI Mandate.

6. The Litigation Investigator carried out the LI Mandate between April and September 2018. The steps taken by the Litigation Investigator are set out in detail in the First Report of the Litigation Investigator, dated November 5, 2018.

7. The LI Mandate has now concluded. Consequently, the Litigation Investigator's role in the proceeding is complete, and the appointment of the Litigation Investigator should be terminated, effective immediately.

#### **Claims to be Brought by or on Behalf of the Applicants and their Creditors**

8. Over the course of the LI Mandate, the Litigation Investigator identified a number of claims that could be brought by the Applicants and others (the "**Claims**").

9. The Creditors' Committee has reviewed and approved the Litigation Investigator's recommendations regarding the prosecution of the Claims.

10. The Litigation Investigator Order permits the Litigation Investigator to seek an order from this Court authorizing it to pursue any claims identified while carrying out the LI Mandate.

11. The Litigation Investigator recommends that separate Claims be brought and/or continued by four sets of plaintiffs (the "**Plaintiffs**"), specifically:

- (a) claims by a court-appointed trustee (the “**Litigation Trustee**”) on behalf of the Applicants, as described more fully in the First Report of the Litigation Investigator (the “**Litigation Trustee Claims**”);
- (b) a claim by FTI Consulting Canada Inc. (the “**Monitor**”), the Monitor appointed by this Court under the *CCAA* (the “**Monitor Claim**”);
- (c) claims by certain creditors of the Applicants on behalf of members of the Sears Canada pension plan (“**Pension Claims**”); and
- (d) a class action claim by a number of former franchisees of Sears Canada (the “**Class Action Claim**”).

#### **Appointment of Litigation Trustee**

12. The Applicants have claims against certain of their shareholders and former directors. Prosecution of these claims is in the best interests of the Applicants. Any funds recovered through these claims will be returned to the Applicants and their creditors, excluding any creditors who opt out of participation in the litigation.

13. A Litigation Trustee should be appointed as an officer of the Court to prosecute the Litigation Trustee Claims. The appointment of an experienced trustee would allow these claims to be prosecuted in as cost-effective and expedient a manner as possible.

14. The Honourable J. Douglas Cunningham, Q.C. should be appointed as Litigation Trustee. Mr. Cunningham is highly experienced and eminently qualified to serve in this role. The Creditors’ Committee and the Monitor support this recommendation.

15. The Litigation Trustee Claims include claims against William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, Deborah E. Rosati, R. Raja Khanna, James McBurney and Douglas Campbell (collectively, the “**Former Directors**”) for breach of fiduciary duty, breach of the duty of care, oppression, and conspiracy.

16. The Applicants also have claims against ESL Investments Inc., its affiliates, and Edward S. Lampert (collectively, the “**Shareholders**”) for oppression, conspiracy, unjust enrichment, knowing receipt, and knowing assistance.

17. The Applicants have claims against Sears Holdings Corp. (“**Holdings**”), but due to that company’s recent insolvency filing in the United States, will not be bringing any claims against Holdings at this time.

18. In order for the Litigation Trustee Claims to proceed, the Stay must be lifted as against the Former Directors.

19. In addition, in order to effectively prosecute the Litigation Trustee Claims, the Litigation Trustee should be invested with all of the powers necessary to do so, including:

- (a) the power to engage, give instructions to, and pay counsel and other agents and professionals;
- (b) to execute documents of all kinds on behalf of the Applicants for any purpose pursuant to the trusteeship;
- (c) to consider and waive privilege over any communications of the Applicants; and

(d) to pursue the Litigation Trustee Claims and any appeals or applications for judicial review relating thereto.

20. The reasonable fees and disbursements of the Litigation Trustee and his counsel (the “**Litigation Trustee Parties**”) should be paid by the estates of the Applicants, including but not limited to Sears Canada.

21. The Litigation Trustee and his agents should be indemnified from any losses that they might suffer in connection with their role as such by the Applicants, including but not limited to Sears Canada, except for any losses resulting from their own gross negligence or willful misconduct.

22. Permitting the Litigation Trustee to pursue the Claims will usefully further efforts to avoid the social and economic losses resulting from liquidation of the Applicants.

### **Other Claims**

23. The Monitor has a claim against certain Former Directors and the Shareholders under section 36.1 of the *CCAA*, which incorporates the cause of action for transfer at undervalue set out by section 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

24. Two of the Applicants’ creditors, Morneau Shepell Ltd. (the administrator of Sears Canada’s pension plan) and the Superintendent of the Financial Services Commission of Ontario (collectively, the “**Pension Claim Plaintiffs**”) have claims against the Former Directors and the Shareholders for breach of fiduciary duty, conspiracy, oppression, knowing assistance, and knowing receipt.

25. Through a proposed representative plaintiff, a group of approximately 260 former franchisees of Sears Canada (the “**Class Action Plaintiffs**”) commenced a proposed class action claim against the Former Directors and the Shareholders for oppression under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 on October 21, 2015.

26. The Class Action Claim has not been certified as a class action. The Litigation Investigator recommends that the Class Action Claim be transferred to this Court so that if that claim is certified, common issues in the Class Action Claim and the other Claims can be tried together.

#### **Procedure for Hearing a Common Issues Trial**

27. The Claims are almost entirely based on a common set of facts. A single discovery and fact-finding process should be implemented for the prosecution of the claims to eliminate needless duplication of proceedings and wasted costs.

28. As part of the Mandate, the Litigation Investigator also proposed a procedure for hearing a common issues trial for all of the Claims to avoid a multiplicity of proceedings concerning common issues (the “**Common Issues Trial Procedure**”).

29. The Creditors’ Committee, which includes counsel for the Pension Claims and the Class Action Claim, and the Monitor have reviewed and approved of the Common Issues Trial Procedure.

30. The Common Issues Trial Procedure is set out in detail in Schedule “A” to the proposed Order attached hereto.

31. In particular, the following procedures, among others, should be adopted:

- (a) the Claims will be commenced (or, in the case of the Class Action Claim, will be transferred to the Commercial List of the Superior Court of Justice) as four separate actions, each commenced by a separate Statement of Claim, and to be defended by a separate Statement of Defence;
- (b) each of the Claims will be jointly case managed by this Court;
- (c) the Plaintiffs will each deliver a separate affidavit of documents, but document production will be made via a single document database;
- (d) the Plaintiffs in all of the Claims will co-ordinate examinations for discovery, and the majority of questioning at each examination will be conducted by a single designated Plaintiff;
- (e) a common issues trial will be held for all of the Claims; and
- (f) any issues unique to any particular Claim will be heard in subsequent separate hearings.

32. Approval and implementation of the Common Issues Trial Procedure will allow the Claims to be brought in the most cost-effective and expeditious manner possible, while protecting the rights of all parties to the Claims.

### **Statutes and Regulations**

33. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-44, sections 11, 11.02, 11.03, 19, 23, 36.

34. *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 138.



35. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rules 1.04, 3.02, 6.01, 16.08, 37.
36. Such further and other grounds as the lawyers may advise.

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

38. The Twenty-Seventh Report of the Monitor, dated November 5, 2018;
39. The First Report of the Litigation Investigator, dated November 5, 2018; and
40. Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

November 5, 2018

**LAX O'SULLIVAN LISUS GOTTLIEB LLP**  
Counsel  
Suite 2750, 145 King Street West  
Toronto ON M5H 1J8

**Matthew P. Gottlieb** LSO#: 32268B  
mgottlieb@counsel-toronto.com

Tel: 416 644 5353

**Andrew Winton** LSO#: 54473I

awinton@counsel-toronto.com

Tel: 416 644 5342

**Philip Underwood** LSO#: 73637W

punderwood@counsel-toronto.com

Tel: 416 645 5078

Fax: 416 598 3730

The Litigation Investigator and Counsel for the  
Proposed Litigation Trustee

TO: **THE SERVICE LIST**

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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

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PROCEEDING COMMENCED AT TORONTO

**ORDER  
(APPOINTMENT OF LITIGATION TRUSTEE)**

**LAX O'SULLIVAN LISUS GOTTLIEB LLP**

Counsel

Suite 2750, 145 King Street West  
Toronto ON M5H 1J8

**Matthew P. Gottlieb** LSO#: 32268B

mgottlieb@counsel-toronto.com

Tel: 416 644 5353

**Andrew Winton** LSO#: 54473I

awinton@counsel-toronto.com

Tel: 416 644 5342

**Philip Underwood** LSO#: 73637W

punderwood@counsel-toronto.com

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Fax: 416 598 3730

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