

**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.

(each, an “**Applicant**”, and collectively, the “**Applicants**”)

**AMENDED NOTICE OF MOTION**

**Bentall Kennedy (Canada) LP, QuadReal Property Group, Primaris Management Inc.,  
Westcliff Management Ltd., Tanurb (Festival Marketplace) Inc., and Cogir Real Estate** (collectively  
the “**Moving Landlords**”) will make a motion to the Court on September 20, 2018, at 10:00 a.m., or as  
soon after that time as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

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

**THE MOTION IS FOR:**

- (a) an Order varying the Claims Procedure Order of the Honourable Justice Hainey, dated December 8, 2017, by suspending the deadlines for the litigation of the disputed claims of the Moving Landlords until such time as the Deemed Trust motion (as discussed below)

is resolved or ~~subject to a final order~~ disposed of by an Order of the Honourable Justice Hainey;

- (b) security for costs in favour of the Moving Landlords to secure the costs to be incurred in the claims process dispute, in priority to all other charges on the estate of Sears and *pari passu* with the Administration Charge granted in these proceedings to the Monitor;
- (c) an Order sealing from the public record the commercially-sensitive information and documents in the Moving Landlords' claims briefs;
- (d) costs of this motion, including costs incurred, if any, related to the case conference scheduled by the Monitor without consent before the Claims Officer, to be paid personally by the Monitor or its counsel; and
- (e) such further and other relief as this Honourable Court may permit.

**THE GROUNDS FOR THE MOTION ARE AS FOLLOWS:**

- (a) The Applicants filed for CCAA protection on June 22, 2017;
- (b) Initially, the Applicants proceeded with their CCAA process in an attempt to restructure and continue their business;
- (c) In the Fall of 2017, the Applicants advised that they had moved from attempting to restructure their business and instead would liquidate their assets. In the course of the liquidation, the Applicants attempted to sell effectively all of their assets including, where available, its leases to various premises;
- (d) However, the Applicants were unable to sell the certain of its leases. As a result, the Applicants disclaimed a multitude of leases and operating agreements;
- (e) Among the leases disclaimed were leases and/or operating agreements in respect of the premises' leased by the Moving Landlords, including,
  - (i) Cataraqui Town Centre Inc. in regards to Cataraqui Town Centre;
  - (ii) McAllister Place Holdings Inc. in regards to McAllister;

- (iii) Medicine Hat Mall Ltd. in regards to Medicine Hat Mall;
- (iv) Kildonan Place Limited in regards to Kildonan Place Mall;
- (v) Park Place Mall Holdings Inc. in regards to Park Place Mall;
- (vi) Regent Mall Holdings Inc. in regards to Regent Mall;
- (vii) Stone Road Mall Holdings Inc. in regards to Stone Road Mall;
- (viii) BCIMC Realty Corp. in regards to Bower Place Shopping Centre;
- (ix) BCIMC Realty Corp. in regards to Capilano Mall;
- (x) BCIMC Realty Corp. in regards to Willowbrook Shopping Centre;
- (xi) BCIMC Realty Corp. in regards to Meridian Place, Winnipeg;
- (xii) Eastgate Square L.P., managed by Bentall Kennedy (Canada) L.P., in regards to Eastgate Shopping Mall;
- (xiii) ITF Hillside Central LP and Hillside Centre LP, managed by Bentall Kennedy (Canada) L.P., in regards to Hillside Centre;
- (xiv) BIM North Hill Inc. and Westpen North Hill LP, managed by Bentall Kennedy (Canada) L.P., in regards to North Hill Shopping Centre;
- (xv) Sun Life Assurance Company of Canada, managed by Bentall Kennedy (Canada) L.P., in regards to the Village at Vaughan Mills;
- (xvi) PenRetail III Ltd., managed by Bentall Kennedy (Canada) L.P., in regards to Westmount Shopping Centre;
- (xvii) Tanurb Festival Marketplace Inc. in regards to Festival Marketplace;
- (xviii) Cogir (Montez) in regards to Corner Brook;
- (xix) Montez (Sorel) Inc. in respect to a shopping centre known as “Promenade Sorel” and managed by Societe de Gestion Cogir s.e.n.c;

- (xx) I.G. Investment Management, Ltd. as trustee for Investors Real Property Fund; and Westcliff Realities (Levis) Inc.;
- (xxi) Westcliff Development Ltd. in regards to a shopping mall in Granby, Quebec;
- (xxii) Place Vertu Nominee Inc./Fiduciaire Place Vertu Inc. in regards to Place Vertu;
- (xxiii) Les Immeubles Carrefour Richelieu Ltee in regards to a shopping centre in Drummondville;
- (xxiv) Les Immeubles Carrefour Richelieu Ltee in regards to a shopping centre in St. Jean, Quebec;
- (xxv) Les Immeubles Carrefour Richelieu Ltee in regards to a shopping centre in St. Jerome; and
- (xxvi) Les Immeubles Carrefour Richelieu Ltee in regards to Carrefour Angrignon (the “**Moving Landlords**”).

### **Claims Procedure**

- (f) In the course of the CCAA proceedings, a Claims Procedure Order was sought by Sears to identify claims.
- (g) The Order circulated by Sears in advance of the motion was amended to include the following provision,

57. THIS COURT ORDERS that any General Creditor Claimant who intends to dispute a Notice of Revision of Disallowance hereof shall:

- b. in the event that a dispute raised in a Notice of Dispute of Revision or Disallowance is not settled within a time period or in a manner satisfactory to the Monitor, in consultation with the Sears Canada Entities and the applicable Directors and Officers in respect of any D&O Claim, the Monitor shall refer the dispute raised in the Notice of Dispute of Revision or Disallowance to a Claims Officer or the Court for adjudication at its election. **For greater certainty, any**

**party may file additional evidence, documentation, reports or information on any hearing to resolve the issues raised in a Notice of Dispute of Revision or Disallowance and no party will object to the filing of such additional evidence on the basis that such evidence, documentation, report or information was not included in the initial Proof of Claim, D&O Proof of Claim or Notice of Revision or Disallowance.** [emphasis added]

- (h) Justice Hainey granted the Order, with the inclusion of the amended section 57(b), on December 8, 2018 (the “**Claims Procedure Order**”);
- (i) In accordance with the Claims Procedure Order, the Moving Landlords filed 27 claims on or before the deadline for filing Proof of Claims, which was April 4, 2018;
- (j) Thereafter, the Monitor provided disallowances with respect to all of the Moving Landlords’ filed Proof of Claims.
- (k) On multiple occasions, the Moving Landlords and other landlords advised the Monitor that it was inappropriate to proceed with any further substantive portion of the claims bar procedure until the Deemed Trust Claim, as defined in below, was resolved or subject to a final order;
- (l) Counsel for the Moving Landlords wrote to this Court and attended at the case conference on July 24, 2018. At the case conference, the Moving Landlords advised the Court of their intention to bring a motion to modify the Claims Procedure Order by extending the deadlines in the claims procedure order requiring the settlement of the Moving Landlords’ claims;
- (m) The Monitor, through its counsel, advised the Court at the July 24<sup>th</sup> case conference that it was refusing to grant further extensions of the claims process in order to use leverage to force the Moving Landlords to agree to the settlement agreed to by other landlords.
- (n) This refusal by the Monitor to exercise their discretion to further extend the claims process for this collateral purpose is an abuse of power by the Court Officer;
- (o) The Monitor consented to the scheduling of this motion, returnable on September 20th, on July 27<sup>th</sup>;

- (p) Notwithstanding the fact that this motion was pending, the Monitor insisted that the Moving Landlords still file Notices of Dispute of Revision or Disallowance Regarding a Claim (“**Notices of Dispute**”) on July 31, 2018;
- (q) The Monitor took the position that any failure to file Notices of Dispute would be held with prejudice against the Moving Landlords;
- (r) Accordingly, on July 31, 2018, the Moving Landlords filed Notices of Dispute in respect of all of their claims;
- (s) In submitting the Notices of Disputes, the Moving Landlords expressly stated that they filed their Notices of Dispute without prejudice to their right to argue their position in this motion (that no notices should have been filed) and to provide further detailed support for their claims as required if the claims should proceed;
- (t) No evidence has been provided by Sears to support the dispute of the claims made by the Moving Landlords;
- (u) Notwithstanding that this Motion was pending, the Monitor unilaterally scheduled a case conference before His Honour Justice Farley, returnable September 7th, 2018, in order to attempt to proceed with its agenda. The Moving Landlords have not consented to attending the case conference;

#### **Deemed Trust Claim**

- (v) At the case conference on July 24, 2018, the scheduling of a motion was discussed with respect to the resolution of the Sears pensioners’ deemed trust claim under the Pension Benefits Act and certain related claims (the “**Deemed Trust Claim**”);
- (w) Sears holds proceeds from the sale of its business which may have to be applied to satisfy the Deemed Trust Claims, or which may be available to satisfy the creditors of the estate, or there may be some middle result possible.
- (x) Under the theory of law advanced by the beneficiaries to the Deemed Trust Claim, all of the available proceeds from the Applicants’ restructuring will be payable to the Deemed Trust Claim;

- (y) The Moving Landlords, among others, have advised the Monitor at various times that no further material expense should be incurred with respect to disputed claims in this estate until such time as the extent of the entitlement for the Deemed Trust Claim has been heard and a final order has been granted;
- (z) Proceeding with the litigation will only serve to further deplete the estate over what could be a moot issue. The parties are more likely to be able to reach a resolution once the Deemed Trust Claim is resolved;

**No Disruption to the Sears Matter Generally**

- (aa) The Monitor advised the Court on July 24th, that several other landlords have reached an agreement on their claims with the Monitor, based on a formula which is beneficial to those landlords and prejudicial to the Moving Landlords;
- (bb) The Monitor has advised that it does not require the resolution of the Moving Landlord claims in order to proceed with its negotiations with the other stakeholders towards a global resolution of issues in the Sears case generally;
- (cc) There is no pending plan of arrangement or any expectation that any dividend will be paid to any creditors at any time in the foreseeable future.
- (dd) There is no requirement that the Moving Landlords' claims be dealt with on an accelerated basis;
- (ee) There is no reason to suspect the Notices of Dispute could be resolved prior to the determination of the Deemed Trust motion, which is scheduled to be heard less than 45 days after this motion is to be heard;
- (ff) One of the disputed components of the Moving Landlords Claim is a claim that claims against Moving Landlords by tenants under co-tenancy provisions in their leases is a claim for which Sears is responsible to the Moving Landlords.
- (gg) This issue is one which is properly to be determined by this Court.
- (hh) The co-tenancy issue, or part of it, is to be considered by this Court on a motion brought by certain tenants on October 16, 2018.

### **Prejudice to the Moving Landlords**

- (ii) The Moving Landlords' claims involve subjective but legitimate and complex claims related to issues ranging from environmental to repair maintenance to the calculation of rental arrears, property taxes and/or third-party claims such as co-tenancy claims;
- (jj) In effect, each of the disallowances received by the Moving Defendants' constitutes a free-standing multi-million dollar lawsuit in which the parties cannot reach an agreement;
- (kk) The complexity of the Moving Landlords' claims should not in any way limit their right to have those claims fairly determined on a full record and the Moving Landlords object to the Monitor taking a position to the contrary;
- (ll) In order to avoid any prejudice or unfairness, the Moving Landlords require all regular procedural and evidentiary rules to be applied in order to deal with their significant claims;
- (mm) The Claims Process should not procedurally favour the Monitor's position over claims of creditors;
- (nn) The fees of the Monitor and Sears are to be paid from the dwindling estate proceeds whereas the costs of the Moving Landlords have to be paid by the Landlords;
- (oo) The costs payable to the Moving Landlords should be secured by those same charges in priority to all other claims to the estate. In addition, the costs of the Monitor should not be paid until their reasonableness and appropriateness can be assessed upon knowing the outcome of the claims disputes, which is the same basis upon which the Moving Landlords have to proceed;
- (pp) The costs of this motion should be borne personally by the Monitor, as the Motion was unnecessary and caused by the Monitor's conduct and therefore should not be paid by the estate;
- (qq) It was within the Monitor's discretion under the Claims Procedure Order to resolve the matter at issue on this Motion and extend the deadlines in question without requiring this motion;



(rr) The Monitor had previously granted such extensions but now refuses to do so;

**Sealing Order**

(ss) The claims briefs filed by the Moving Landlords contain confidential business information (the “**Confidential Information**”);

(tt) If the Confidential Information is made public, the Confidential Information will provide pertinent business information to competitors and customers of the Moving Landlords which will result in the Moving Landlords suffering material prejudice in the operation of their business;

(uu) Other than sealing the information, there are no other reasonable alternatives to protect the Confidential Information;

(vv) Rules 37.14(4), 56, and 57 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194;

(ww) Subsection 11.52(1)(c) and 11.52(2) of the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36; and

(xx) For such further and other grounds as counsel may advise and this Honourable Court may permit.

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

(a) Affidavit of Jessica Wuthmann, sworn August 31, 2018;

(b) Claims Procedure Order of the Honourable Justice Hainey dated December 8, 2017; and

(c) such further and other evidence as counsel may advise and this Honourable Court permit.

September 18, 2018	<p><b>BLANEY McMURTRY LLP</b> 1500 - 2 Queen Street East Toronto, ON M5C 3G5</p> <p><b>David T. Ullmann</b> (LSO #42357I) Tel: (416) 596-4289 Fax: (416) 594-2437</p> <p><b>John C. Wolf</b> (LSO #30165B) Tel: (416) 593-2994 Fax: (416) 596-2044</p> <p>Lawyers for the Moving Landlords</p>
<b>TO:</b>	<b>SERVICE LIST</b>

**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. ET AL.**

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Proceeding commenced at Toronto

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