Court File No. 4114/15

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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*

FACTUM OF THE PLAINTIFF
(Motion for Certification Returnable April 17, 2019)

April 5, 2019

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PART I - INTRODUCTION

1. This is a motion to certify this action as a class proceeding pursuant to the *Class Proceedings Act, 1992* (the "**CPA**") on behalf of approximately 340 "Sears Hometown" dealers throughout Canada.

2. This action relates to the payment of an extraordinary $509 million dividend by Sears Canada Inc. ("**Sears**") in late-2013. At the time the dividend was declared, Sears was a defendant in a class proceeding brought on behalf of the Hometown dealers relating to breaches of each dealer's dealer agreement with Sears and provincial franchise laws. That class action was certified as a class proceeding.

3. Before the resolution of that class action, Sears paid the extraordinary dividend, primarily for the benefit of its US-parent corporations. The extraordinary dividend was authorized by the defendant directors of Sears.

4. This action alleges that the authorization and payment of the extraordinary dividend was oppressive to the creditors of Sears, including the class members in the original class action.

5. The case meets each of the five criteria in section 5 of the CPA and ought to be certified:

(a) the Fresh as Amended Statement of Claim discloses a cause of action for oppression;

(b) there is an identifiable class of "Sears Hometown" dealers;

(c) the action discloses common issues, the resolution of which will significantly advance the litigation for the proposed class members;

(d) a class proceeding is the preferable procedure (no alternative to a class proceeding has been proposed by the Defendants); and

(e) the representative plaintiff, being the same representative plaintiff that was approved in the original class action, is suitable.

PART II - SUMMARY OF FACTS

(1) THE PARTIES

6. This action is brought by 1291079 Ontario Limited ("**129**") on behalf of all "Sears Hometown" stores operating under a Dealer Agreement with Sears (the "**Hometown Dealers**") at any time from July 5, 2011 to November 19, 2013 ("**proposed class members**").[1]

7. The Defendant, Sears, was one of Canada's largest retailers, selling goods and services to the public through retail outlets and direct-to-customer distribution channels. On June 22, 2017, Sears and a number of its operating subsidiaries obtained an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**").[2] This motion is not proceeding against Sears.

8. The Defendant, ESL Investments Inc. ("**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 the Defendant, Sears Holdings Corporation ("**SHS**").[3]

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[1] Amended Notice of Motion, Supplementary Motion Record, Tab 1, p. 1.
[2] Affidavit of James Kay sworn January 18, 2019 ("**Kay Affidavit**"), Motion Record, Tab 2, p. 13, para. 22.
[3] Fresh as Amended Statement of Claim, Supplementary Motion Record, Tab 2D, p. 40, para. 8. As set out in the Affidavit of Andy Seretis sworn March 11, 2018, the court file is currently in transfer from Milton to Commercial List. Once the transfer is completed, the Fresh as Amended Statement of Claim will be issued in Commercial List.

9. Until October, 2014, SHS owned 51% of the common shares of Sears, at which time its shareholdings were reduced to approximately 12% following a sale of its shares.[4] On October 15, 2018, SHS filed for relief under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court staying this action against it. This motion is not proceeding against SHS at this time.

10. The individual Defendants (the "**Directors**") were the directors of Sears in 2013.[5]

(2) THE FRANCHISE ACTION

11. On July 5, 2013, 129 commenced a proposed class proceeding against Sears, bearing Court File No. Court File No. 3769/13-CP (the "**Franchise Action**").[6]

12. The Franchise Action alleged that:[7]

(a) the dealer agreement between Sears and each Hometown Dealer created 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;

(b) Sears had duties, both under the Wishart Act and at common law, to deal fairly and act in good faith towards the Hometown Dealers;

(c) Sears breached the dealer Agreement and its duties in how it performed its obligations under the dealer Agreement during its years-long demise; and

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[4] Fresh as Amended Statement of Claim, Supplementary Motion Record, Tab 2D, p. 40, para. 4.
[5] Fresh as Amended Statement of Claim, Supplementary Motion Record, Tab 2D, p. 41, para. 9-15.
[6] Kay Affidavit, Motion Record, Tab 2, p. 9, para. 5.
[7] Fresh as Amended Statement of Claim, Ex. "A" to the Kay Affidavit, Motion Record, Tab 2A, p. 20.

(d) 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.

13. The Franchise Action was certified as a class action by the Order of the Honourable Justice Gray dated September 8, 2014.[8] In the certification order, 129 was appointed representative plaintiff for the class. 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 March 17, 2015 (the "**Franchise Action Class**").[9] The proposed class in this action is the same except that the cut-off period is November 19, 2013 (the date the 2013 dividend was declared).

(3) THE OPPRESSION ACTION

14. On October 21, 2015, while the Franchise Action was proceeding through the discovery stage, 129 commenced this action (the "**Oppression Action**") against the Defendants.[10]

15. The Oppression Action relates to the declaration of an extraordinary $509 million dividend by Sears on November 19, 2013 and the payment of such dividend on December 6, 2013 (the "**2013 Dividend**").[11]

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[8] Certification Order dated September 8, 2014, Ex. "C" to the Kay Affidavit, Motion Record, Tab 2C, p. 84; Reasons for Decision on Certification Motion, Ex. "B" to the Kay Affidavit, Motion Record, Tab 2B, p. 60.
[9] Certification Order dated September 8, 2014, Ex. "C" to the Kay Affidavit, Motion Record, Tab 2C, p. 85.
[10] Kay Affidavit, Motion Record, Tab 2, p. 12, para. 14.
[11] Kay Affidavit, Motion Record, Tab 2, p. 12, para. 15.

16. On November 26, 2013, after the declaration of the 2013 Dividend but prior to its payment, counsel for the plaintiff in the Franchise 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 Franchise Action be certified and succeed on the merits. No answer was provided.[12]

17. On December 3, 2013, counsel for the plaintiff in the Franchise Action 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 2013 Dividend may be jointly and severally liable with Sears for such damages. Again, no answer was provided.[13]

18. The Oppression Action alleges that the Defendants engaged in serial asset stripping of Sears' best assets, removing these from Sears and away from the claims of creditors, including the proposed class members, so as to monetize these assets and have those funds delivered to ESL and SHS by way of the 2013 Dividend and before its inevitable insolvency proceedings.

19. The Oppression Action alleges that the authorization and payment of the 2013 Dividend was oppressive or unfairly prejudicial to or unfairly disregarded the interests of the proposed class members.[14]

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[12] Kay Affidavit, Motion Record, Tab 2, p. 12, para. 17.
[13] Kay Affidavit, Motion Record, Tab 2, p. 13, para. 18; Letter to Directors dated December 3, 2013, Ex. "F" to the Kay Affidavit, Motion Record, Tab 2F, p. 127.
[14] Fresh as Amended Statement of Claim, Supplementary Motion Record, Tab 2D, p. 64-68, para. 84-89.

(4) SEARS' INSOLVENCY

20. On June 22, 2017, Sears obtained protection under the CCAA pursuant to the Order of the Honourable Justice Hainey.[15] As a result of the CCAA proceeding, the Franchise Action was stayed, as were the claims in this action against Sears and the directors. The stay against the Directors was lifted pursuant to the Order of Justice Hainey dated December 3, 2018 (the "**December 3 Order**").[16]

A. Joint trial

21. Pursuant to paragraph 18 of the December 3 Order, a case management judge was appointed for this action. If certified, 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**"). All of these actions focus on the payment of the 2013 Dividend.

22. In advance of the December 3 Order, the Litigation Investigator appointed by the court prepared a report setting out its findings in terms of litigation relating to the 2013 Dividend.[17] At paragraph 30 of its report, the Litigation Investigator stated:[18]

> The [Litigation Investigator] believes that it is important to co-ordinate the [Oppression 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.

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[15] Kay Affidavit, Motion Record, Tab 2, p. 13, para. 22.
[16] Order of Justice Hainey dated December 3, 2018, Ex. "H" to the Kay Affidavit, Motion Record, Tab 2H, p. 135.
[17] First Report of the Litigation Investigator dated November 4, 2018, Ex. "I" to the Kay Affidavit, Motion Record, Tab 2I, p. 146.
[18] First Report of the Litigation Investigator dated November 4, 2018, Ex. "I" to the Kay Affidavit, Motion Record, Tab 2I, p. 156, para. 30.

23. In its Report, the Litigation Investigator also recommended that the Oppression Action and the Other Actions be heard in a single "common issues trial" to be case managed by a single judge on the Commercial List.[19] This relief was adopted in the December 3 Order.[20] If certified, this action and the Other Actions will proceed to a joint trial in February, 2020.

B. Franchise Action claim in the CCAA

24. Pursuant to the claims procedure order issued in the Sears CCAA proceeding, 129 filed a proof of claim in respect of the Franchise Action, asserting a $101,100,446.77 contingent and unliquidated claim against Sears.[21]

25. Pursuant to an Amended and Restated Settlement Agreement among 129, Sears and the Monitor in the CCAA (the "**Claim Agreement**"), it was agreed that in the event a Plan of Proceeding is implemented in the Sears CCAA proceeding, 129, on its own behalf and on behalf of the Franchise Action Class, would have a proven affected unsecured claim against Sears of $80,000,000.[22]

(5) REPRESENTATIVE PLAINTIFF

26. 129 is the representative plaintiff in the Franchise Action and the proposed representative plaintiff in this action. Its principal is James Kay.

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[19] First Report of the Litigation Investigator dated November 4, 2018, Ex. "I" to the Kay Affidavit, Motion Record, Tab 2I, p. 157, para. 33.
[20] Order of Justice Hainey dated December 3, 2018, Ex. "H" to the Kay Affidavit, Motion Record, Tab 2H, p. 135.
[21] Kay Affidavit, Motion Record, Tab 2, p. 13, para. 23.
[22] Amended and Restated Settlement Agreement, Ex. "C" to the Affidavit of Andy Seretis sworn March 11, 2019 ("**Seretis Affidavit**"), Supplementary Motion Record, Tab 2C, p. 24.

27. Mr. Kay is aware of the duties of a class representative and is committed to devoting his time, knowledge, energy and leadership to bringing this case to a successful conclusion.[23]

28. 129 has no interest in conflict with any of the proposed class members.[24] Mr. Kay has reviewed and produced the Amended Litigation Plan prepared by class counsel setting out a method of advancing this case on a timely basis on behalf of the class and of notifying the class members of the action and developments in the case.[25]

PART III - THE LAW

(1) GENERAL PRINCIPLES ON CERTIFICATION

29. The sole issue on this motion is whether 129 has met the five-part test under section 5(1) of the CPA to have this action certified as a class proceeding.

30. Certification is mandatory where the requirements in s. 5(1) of the CPA are met. The CPA is remedial and is to be given a "generous, broad and purposive interpretation."[26] The question at certification is whether the action "can properly proceed as a class action."[27] Certification does not involve an assessment of the merits and is not intended to be a "pronouncement on the viability or strength of the action."[28] The outcome of certification is not predictive of the outcome of the common issues trial.[29]

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[23] Kay Affidavit, Motion Record, Tab 2, p. 17, para. 39-40.
[24] Kay Affidavit, Motion Record, Tab 2, p. 17, para. 41.
[25] Kay Affidavit, Motion Record, Tab 2, p. 17, para. 42; Amended Litigation Plan, Exhibit "A" to the Seretis Affidavit, Supplementary Motion Record, Tab 2A, p. 11.
[26] *Williams v. Canon Canada Inc.*, 2011 ONSC 6571 ("***Williams***") at para. 124(a), aff'd 2012 ONSC 3692 (Div. Ct.).
[27] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 99 ("***Pro-Sys***").
[28] *Pro-Sys* at para. 102.
[29] *Pro-Sys* at para. 105.

(2) 5(1)(A): THE PLEADINGS DISCLOSE A CAUSE OF ACTION

31. In *Williams v. Canon Canada*,[30] Justice Strathy (as he then was) summarized the principles applicable to the cause of action requirement under s. 5(1)(a):

> (a) the proper approach is to apply the "plain and obvious" test that is applied on a motion to strike a statement of claim under Rule 21, for failing to disclose a cause of action. There is a very low threshold to prove the existence of a cause of action.
>
> (b) no evidence is admissible. All allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and assumed to be true.
>
> (c) the pleadings will only be struck if it is plain and obvious and beyond doubt that the plaintiff cannot succeed and the action is certain to fail. The novelty of the cause of action will not militate against sustaining the plaintiff's claim. Matters of law which are not fully settled by the jurisprudence must be permitted to proceed.
>
> (d) the pleadings must be read generously to allow for drafting inadequacies or frailties and the plaintiff's lack of access to many key documents and discovery information.

32. The claims asserted against the Defendants are for oppression. The right to bring action for oppressive conduct is set out at section 241(2) of the *Canada Business Corporations Act*:[31]

> 241(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
>
> (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
>
> (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

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[30] *Williams* at para. 176.
[31] RSC 1985, c C-44 ("**CBCA**").

33. The Oppression Action pleads that the proposed class members are "complainants" within the meaning of the CBCA. The claim sets out the reasonable expectations of the proposed class members.[32]

34. The Oppression Action pleads, as fully particularized in the claim, that:

(a) by directing and authorizing Sears to pay the 2013 Dividend and its other actions as pleaded, the Defendants have:

i. effected a result;

ii. carried on their business and affairs and those of Sears in a manner; and

iii. exercised their powers in a manner,

that was oppressive and unfairly prejudicial to and that unfairly disregarded the interests of the proposed class members, contrary to section 241 of the CBCA.[33]

35. At the time of the alleged oppressive conduct, the proposed class members were each members of the prospective class in the Franchise Action, and thus contingent creditors for their respective share of any damages arising out of the Franchise Action. Courts have held that contingent creditors can be "complainants" for the purposes of the oppression remedy.[34] In one

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[32] Fresh as Amended Statement of Claim, Supplementary Motion Record, Tab 2D, p. 62, para. 79.
[33] Fresh as Amended Statement of Claim, Supplementary Motion Record, Tab 2D, p. 68, para. 89.
[34] *Levy-Russell Ltd. v. Shieldings Inc.*, [2004] O.J. No. 4291 (S.C.J.) ("***Levy-Russell***") at para. 72; *Manufacturers Life Insurance Company v. AFG Industries Ltd.*, [2008] O.J. No. 149 (S.C.J.) ("***AFG Industries***") at para. 30; *Dunn v. Interglobe Financial Services Corp.*, [2007] O.J. No. 5261 (S.C.J.) at para. 16.

case, claims of a contingent creditor were allowed to proceed and the determination of whether the creditor had standing as a "complainant" was to be made at the conclusion of the trial.[35]

36. The Oppression Action pleads particulars as to how each of ESL and the Directors have oppressed the proposed class members. Oppression claims can be brought against a corporation's directors, or its parent companies, when the alleged conduct goes to the affairs of the Canadian corporation that is subject to the CBCA.[36]

37. Whether or not oppression has occurred is a fact-specific exercise that is dealt with by the trial judge.[37]

38. The constituent elements of oppression have been properly pleaded for the purposes of s. 5(1)(a) of the Act.

A. Evidentiary burden on balance of section 5(1) test

39. Once it is determined that a plaintiff has pleaded valid causes of action, a plaintiff's evidentiary burden on the balance of the certification motion is low.[38] For sections 5(1)(b) through (e) of the CPA, the plaintiff need only show "some basis in fact."[39] The "some basis in fact" standard does not require the plaintiff to prove each of the 5(1)(b) through (e) elements on a balance of probabilities.[40] Rather, there must be sufficient facts to satisfy the motion judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a

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[35] *AFG Industries Ltd*. at para. 30.
[36] *AFG Industries Ltd*. at para. 24-25
[37] *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.*, [2006] O.J. No. 812 (S.C.J.) ("***J.S.M. Corp***") at para. 67.
[38] *Grant v. Canada (Attorney General)*, [2009] O.J. No. 5232 (S.C.J.) at para. 20-21.
[39] *Pro-Sys* at para. 99
[40] *Pro-Sys* at para. 101-102.

class basis without foundering at the merits stage by reason of the requirements not having been met.[41]

40. The "some basis in fact" standard does not require that the court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that at the certification stage "the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight."[42]

41. It is submitted that 129 has established some basis in fact for the remaining elements of certification.

(3) 5(1)(b): THERE IS AN IDENTIFIABLE CLASS

42. 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 November 19, 2013.[43]

43. The case law establishes the following requirements of a class definition:[44]

> (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;

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[41] *Pro-Sys* at para. 104.
[42] *Pro-Sys* at para. 102.
[43] Amended Notice of Motion, Supplementary Motion Record, Tab 1, p. 1, para. 2.
[44] [2012] O.J. No. 834 (S.C.J.) ("***TDL***") at para. 220.

> (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.

44. The proposed class is a subset of the class certified in the Franchise Action. The proposed class is limited to class members in the Franchise Action that operated as a Hometown Dealer at any time from July 5, 2011 to the declaration of the 2013 Dividend on November 19, 2013. Class members in the Franchise Action that became Hometown Dealers after November 19, 2013 (of which there are very few) are not included in the proposed class in this action.

45. The proposed class definition satisfies the requirements under s. 5(1)(b) of the CPA in that it is objective and not merits based; there is a rational relationship between the class and the common issues; it identifies the persons who have a potential claim against the Defendants and who will be bound by the court's judgment on the common issues; and it establishes a class which is not unlimited.

46. In the original Notice of Motion, 129 proposed a class of Hometown Dealers operating until June 22, 2017 (the date of the CCAA filing). Counsel for some of the Directors wrote to class counsel requesting that the proposed class should be cut off at November 19, 2013.[45] 129 agreed. The proposed class definition was changed accordingly.

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[45] Letter from Cassels Brock & Blackwell LLP to Sotos LLP and Blaney McMurtry LLP dated March 7, 2019, Ex. "A" to the Affidavit of John N. Birch sworn March 18, 2019, Directors Responding Motion Record, Tab 1A, p. 10.

47. 129 submits that the proposed class definition meets the requirement of section 5(1)(b).

(4) 5(1)(c): The Claim Raises Common Issues

A. Principles of law applicable to the common issues analysis

48. The CPA defines "common issues" 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."[46]

49. In *TDL*, Justice Strathy (as he then was) summarized the principles concerning the common issues:[47]

> (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;

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[46] CPA, Section 1.
[47] *TDL* at para. 229-230.

> (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 common issues, 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 [references omitted]; and
>
> (l) the common issues should be clear, neutrally-worded and fair to both parties.

50. 129's proposed common issues relate to the pleaded causes of action and to the damages available in this case. They focus entirely on the conduct of the Defendants and do not require an examination of the individual circumstances of the proposed class members.[48] Once resolved, they will substantially, and possibly entirely, resolve this action.

51. Below is a discussion of the specific common issues.

B. Common issue (a)

52. Common issue (a) asks:

> 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?

53. As set out in paragraph 35 above, each proposed class member is a contingent creditor of Sears through their claim in the Franchise Action. Each proposed class member would have been similarly oppressed by the conduct alleged in this action. As such, they are either all

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[48] *TDL* at para. 340.

"complainants" or none of them are. Common issue (a) asks the court to make this determination, which is common to all class members.

C. Common issue (b)

54. Common issue (b) asks:

> Did the defendants, or any of them, engage in conduct that was "oppressive" to the class members' interests within the meaning of section 241 of the CBCA in respect of the authorization and payment of an extraordinary cash dividend paid on December 6, 2013 (the "**Extraordinary Dividend**")?

55. As the class members were similarly affected by the alleged oppressive conduct and were all in the same position with respect to the contingent liability owing to them, the determination of this issue is common to all proposed class members.

56. In a letter to Class Counsel following service of the Notice of Motion, counsel for some of the Directors commented that the common issue as originally proposed should be amended to include "to the class members' interests".[49] 129 agreed with this proposed change to common issue (b).

(i) Determination of common issue (b) does not require adjudication of the Franchise Action

57. While the Defendants have not otherwise disputed that this is a proper common issue, they assert that a determination of this common issue necessarily requires the determination of the common issues in the Franchise Action.

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[49] Letter from Cassels Brock & Blackwell LLP to Sotos LLP and Blaney McMurtry LLP dated March 7, 2019, Ex. "A" to the Affidavit of John N. Birch sworn March 18, 2019, Directors Responding Motion Record, Tab 1A, p. 10.

58. The Defendants' assertion is incorrect. There is no need to establish predicate liability in the Franchise Action in order to establish liability in this action.

59. It is not disputed that, as of the date of payment of the 2013 Dividend, there was no judgment in the Franchise Action.

60. Whether or not the Franchise Action would ultimately result in a judgment some time after November 19, 2013 is not relevant to determining whether there was oppressive conduct in November, 2013. Courts have stated that hindsight should not be used to determine whether conduct was oppressive.[50] The Defendants' suggested approach of adjudicating the Franchise Action in order to determine, in hindsight, whether there was oppressive conduct is wrong. What the judgment amount (if any) would have been in the Franchise Action may be relevant to determining the quantum of compensation that the proposed class members may be entitled to; however, it does not play a part in the liability question that common issue (b) asks.

61. In order to establish oppression, the court must look at the reasonable expectations of the parties at the time of the alleged oppressive conduct.[51] At the time of the alleged oppressive conduct, the proposed class members were contingent creditors. The reasonable expectations of the proposed class members are set out at paragraph 79 of the Fresh as Amended Statement of Claim. The reasonable expectations are also set out in the contemporaneous letters sent to Sears and the Directors in 2013 by class counsel in the Franchise Action.[52] In short, the reasonable

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[50] *Levy-Russell* at para. 134.
[51] *Levy-Russell* at para. 76, 134; *AFG Industries* at para. 31; *J.S.M. Corp* at para. 67.
[52] Letter to Directors dated December 3, 2013, Ex. "F" to the Kay Affidavit, Motion Record, Tab 2F, p. 127; Kay Affidavit, Motion Record, Tab 2, p. 12-13, para. 17-18

expectations are that the Defendants would not engage in asset-stripping to the detriment of creditors, including the proposed class members.

62. Common issue (b) is a proper common issue to be determined on the basis proposed by 129 in the Amended Litigation Plan (further discussed below as part of the 5(1)(e) analysis).

D. Common issue (c)

63. Common issue (c) asks:

> 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?

64. Similar to the previous common issues, the determination of this issue is common to all class members. If common issue (b) is answered in the affirmative, then whether the proposed class members are entitled to compensation would be common for all class members. There are no individual considerations whereby some of the proposed class members would be entitled to compensation while others would not be.

E. Common issue (d)

65. Common issue (d) asks:

> In determining the compensation:
>
> i) Is the quantum of such compensation to be based on the Plaintiff's proven affected unsecured claim against Sears Canada Inc. ("**Sears**") of $80,000,000, as agreed by the court-appointed monitor in the filing by Sears under the *Companies' Creditors Arrangement Act* ("**CCAA**") and as set out in the Plan of Arrangement filed by the monitor in the CCAA ("**CCAA Claim Amount**")?

ii) If not, directions with respect to the calculation of the quantum of compensation to be determined at a subsequent hearing following the determination of common issues (a), (b) and (c);

66. This common issue seeks to determine whether the proven affected unsecured claim of $80,000,000 in respect of the claim in the Franchise Action set out in the Plan of Arrangement (if approved by the Court) can form the basis for the quantification of damages against the Defendants in this action. If so, then the quantum of damages in this case may be able to be determined on an aggregate basis at the joint trial.

67. As the $80,000,000 figure relates to the damages in the Franchise Action, determination of this issue will be common to all proposed class members.

68. Common issue (d)(ii) asks for directions in the event that common issues (a), (b) and (c) are answered in favour of the class at the joint trial, but the court determines at the joint trial that the $80,000,000 figure cannot be used as a basis for the compensation determination.

69. The Defendants' argument that the merits of the Franchise Action need to be determined at this stage would require the Plaintiff to go through the cost and delay of proving damages in the Franchise Action before: (i) determining whether there was oppression in relation to the 2013 Dividend; and (ii) determining whether the proven affected unsecured claim of $80,000,000 for the Franchise Action in the CCAA, as ultimately approved by the Court, is a complete or partial answer to the valuation question. Such a proposal is contrary to the overriding goals of access to justice and judicial economy that underlie the CPA and should be rejected.

70. 129's approach to the issue of damages under common issue (d)(ii) is further addressed in its Amended Litigation Plan (discussed in paragraphs 86-88 below).[53]

(5) 5(1)(d): A Class Proceeding Would be the Preferable Procedure

71. Section 5(1)(d) of the CPA requires that a class proceeding be the "preferable procedure for the resolution of the common issues." Justice Perell summarized the criteria for analysis of preferable procedure in *Bennett v. Lenovo (Canada) Inc.*,[54] including:

> (a) Preferability captures the ideas of whether a class proceeding would be an appropriate method of advancing the claims of class members, and whether a class proceeding would better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute.[55]
>
> (b) To satisfy the preferable procedure analysis, the class proceeding must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims. Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues.[56]
>
> (c) If the defendant relies on a specific non-litigation alternative, the defendant has the evidentiary burden of raising the non-litigation alternative.[57]

72. In *AIC Limited v. Fischer*,[58] the Supreme Court of Canada reiterated that the preferability analysis must be conducted through the lens of judicial economy, behaviour modification, and access to justice. However, this does not require proof that a class action "will *actually* achieve those goals in a specific case."[59]

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[53] Amended Litigation Plan, Exhibit "A" to the Seretis Affidavit, Supplementary Motion Record, Tab 2A, p. 11.
[54] 2017 ONSC 5853 ("***Lenovo***")
[55] *Lenovo* at para. 84.
[56] *Lenovo* at para. 86.
[57] *Lenovo* at para. 88.
[58] 2013 SCC 69 ("***Fischer***").
[59] *Fischer* at para. 22.

73. Certification of this case will advance the goals of the CPA. It will provide access to justice to a group of Hometown Dealers which would not otherwise have the financial resources to commence individuals claim against the Defendants for the alleged oppressive conduct. Judicial economy will also be achieved by avoiding the repetitious determination of the same issues of fact and law which would need to be proven for any proposed class member advancing the claims in this action.

74. Allowing the Oppression Action to proceed together with the Other Actions will also achieve judicial economy. In the December 3 Order, subject to this action being certified as a class proceeding, the Court ordered that this action should proceed with the Other Actions. This was also the recommendation of the court-appointed Litigation Investigator. The combining of the four actions relating to the 2013 Dividend greatly promotes judicial economy.

75. There is no other meaningful method to resolve the claims of the proposed class members other than through a class proceeding, nor has any alternative been proposed by the Defendants.

76. The preferable procedure is to have the common issues determined at the joint trial in February, 2020.

(6) 5(1)(E): THE REPRESENTATIVE PLAINTIFF IS SUITABLE

77. Under the *CPA*, for a class to be certified, there must be a representative plaintiff who:

(a) will fairly and adequately protect the interests of the class;

(b) 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

(c) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.[60]

78. In determining whether the proposed representative plaintiff is "adequate", the court can consider such factors as: the motivation of the plaintiff; the competence of the plaintiff's counsel; and whether the plaintiff will "vigorously and capably prosecute the interests of the class."[61] The proposed representative plaintiff need not be "typical" of the class, nor the "best" possible representative.[62]

79. 129 will fairly and adequately protect the interests of the proposed class members and it does not have any conflict with the proposed class members. As the approved representative plaintiff in the Franchise Action, 129 is in the best position to represent the interests of the proposed class members in this action.

80. The Defendants' primary concern with 129 is that it would not be able to satisfy an adverse costs award. This concern is not a relevant consideration on a certification motion.

81. A similar argument was made by Sears on the certification motion in the Franchise Action. Relying on the Court of Appeal's decision in *Pearson v. Inco Ltd.*,[63] Justice Gray rejected this argument, holding: "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" and "it is always open to the defendants to move under rule 56.01(1)(d) for security for

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[60] CPA, Section 5(1)(e).
[61] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 ("***Western Canadian***") at para. 41.
[62] *Western Canadian* at para. 41.
[63] [2005] OJ No 4918 (C.A.) at para. 95.

costs".[64] The ability to satisfy an adverse costs award is not a relevant factor for certification purposes. The Defendants' attempt to argue the same position that was asserted against 129 by Sears and rejected by Justice Gray should not be countenanced.

A. The litigation plan is workable

82. 129 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.

83. Preparing a litigation plan requires the plaintiff to "translate his or her analytical proposal for a class proceeding into practice by having to explain, in concrete terms, the process whereby the common issues, and any remaining individual issues, will be decided." The need for a clear explanation on how a proposed common issue would be resolved on a common basis serves as an important check in considering whether the plaintiff has met the common issues and preferable procedure requirements.[65]

84. At the certification stage, the litigation plan need only provide a reasonable framework for the issues reasonably expected to arise as the case proceeds. It is anticipated that the plan will require amendment as the litigation progresses.[66]

85. The litigation plan advanced by the proposed representative plaintiffs provides a "workable" means of advancing the proceeding through to completion, and satisfies the criteria outlined above. Specifically, the litigation plan describes:

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[64] *1291079 Ontario Limited v. Sears Canada Inc.*, 2014 ONSC 5190 at para. 82-83. Sears did not bring such a motion.
[65] *McCracken v. Canadian National Railway*, 2012 ONCA 445 at para. 146.
[66] *Waldman v. Thomson Reuters Corp*, 2012 ONSC 1138 at para. 131.

(a) methods for reporting to and communicating with class members;

(b) particulars of the notice program;

(c) a plan for pre-trial events, including the delivery of pleadings, documentary productions, examinations on discovery, and the exchange of expert reports, all of which are to be coordinated as part of a joint discovery plan with the Other Actions;

(d) how the proposed common issues would be resolved for the class; and

(e) litigation steps following the common issues trial, including the possibility of a phase-two damages assessment following the joint trial.[67]

86. The Defendants' criticism of the Amended Litigation Plan stems from the faulty premise that it "will inevitably be necessary to resolve" the Franchise Action in order to establish liability and/or damages in the Oppression Action.[68] The Defendants argue that the Amended Litigation Plan needs to address how 129 will establish liability in the Franchise Action and that, as a result, the Oppression Action must proceed under a different timetable and protocol than the Other Actions, in order to take into account the need for productions, discoveries, motions and a trial in relation to the common issues in the Franchise Action.

87. As set out in the Amended Litigation Plan and for reasons set out in paragraphs 57-62 above in the discussion of common issue (b), 129 does not intend, nor plan, to establish liability in the Franchise Action in order to establish that there was oppressive conduct. The Amended

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[67] Amended Litigation Plan, Exhibit "A" to the Seretis Affidavit, Supplementary Motion Record, Tab 2A, p. 11.
[68] Letter to David Sterns and Lou Brzezinski from Andrew Faith with prejudice dated February 28, 2019, Ex. "B" to the Affidavit of Diane Shnier affirmed March 15, 2019, ESL Responding Motion Record, Tab 1B, p. 25.

Litigation Plan sets out how the common issues will be determined. The Amended Litigation Plan does not include the determination of the merits of the Franchise Action at the joint trial. The Plaintiff intends to rely at the joint trial on the proven affected unsecured claim of $80,000,000 of the Franchise Action incorporated in the CCAA plan.

88. The Amended Litigation Plan also envisages the potential of a phase-two trial with respect to a damages determination if the court is unable to determine damages at the joint trial based on the $80,000,000 figure. A phase-two trial, however, may not be necessary. What is certain is that the joint trial, and the proposed common issues in this action, will significantly move forward the claims of the proposed class members.

PART IV - ORDER REQUESTED

89. 129 requests an order certifying this action as a class proceeding, together with the costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of April, 2019.

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SCHEDULE "A" - LIST OF AUTHORITIES

1 *Williams v. Canon Canada Inc.,* 2011 ONSC 6571

2 *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57

3 *Levy-Russell Ltd. v. Shieldings Inc*., [2004] O.J. No. 4291 (S.C.J.)

4 *Manufacturers Life Insurance Company v. AFG Industries Ltd*., [2008] O.J. No. 149 (S.C.J.)

5 *Dunn v. Interglobe Financial Services Corp*., [2004] O.J. No. 5261 (S.C.J.)

6 *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd*., [2006] O.J. No. 812 (S.C.J.)

7 *Grant v. Canada (Attorney General),* [2009] O.J. No. 5232 (S.C.J.)

8 *Fairview Donut Inc. v. The TDL Group Corp*., 2012 ONSC 1252

9 *Bennett v. Lenovo (Canada) Inc*., 2017 ONSC 5853

10 *AIC Limited v. Fischer*, 2013 SCC 69

11 *Western Canada Shopping Centres Inc. v. Dutton*, 2001 SCC 46

12 *Pearson v. Inco Ltd.*, [2005] OJ No 4918 (C.A.)

13 *1291079 Ontario Limited v. Sears Canada Inc*., 2014 ONSC 5190

14 *McCracken v. Canadian National Railway*, 2012 ONCA 445

15 *Waldman v. Thomson Reuters Corp*., 2012 ONSC 1138

SCHEDULE "B" - RELEVANT STATUTES

Class Proceedings Act, 1992, S.O. 1992, c. 6

Definitions

1. In this Act,

"common issues" means,

(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; ("questions communes")

Certification

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 interests 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. 1992, c. 6, s. 5 (1).

Idem, subclass protection

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members. 1992, c. 6, s. 5 (2).

Evidence as to size of class

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class. 1992, c. 6, s. 5 (3).

Adjournments

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence. 1992, c. 6, s. 5 (4).

Certification not a ruling on merits

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding. 1992, c. 6, s. 5 (5).

Certain matters not bar to certification

6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
2. The relief claimed relates to separate contracts involving different class members.
3. Different remedies are sought for different class members.
4. The number of class members or the identity of each class member is not known.
5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members. 1992, c. 6, s. 6.

Aggregate assessment of monetary relief

24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. 1992, c. 6, s. 24 (1).

Average or proportional application

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis. 1992, c. 6, s. 24 (2).

Idem

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members. 1992, c. 6, s. 24 (3).

Court to determine whether individual claims need to be made

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order. 1992, c. 6, s. 24 (4).

Procedures for determining claims

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims. 1992, c. 6, s. 24 (5).

Idem

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

(a) the use of standardized proof of claim forms;

(b) the receipt of affidavit or other documentary evidence; and

(c) the auditing of claims on a sampling or other basis. 1992, c. 6, s. 24 (6).

Time limits for making claims

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section. 1992, c. 6, s. 24 (7).

Idem

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court. 1992, c. 6, s. 24 (8).

Extension of time

(9) The court may give leave under subsection (8) if it is satisfied that,

(a) there are apparent grounds for relief;

(b) the delay was not caused by any fault of the person seeking the relief; and

(c) the defendant would not suffer substantial prejudice if leave were given. 1992, c. 6, s. 24 (9).

Court may amend subs. (1) judgment

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so. 1992, c. 6, s. 24 (10).

Individual issues

25. (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

(a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;

(b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and

(c) with the consent of the parties, direct that the issues be determined in any other manner. 1992, c. 6, s. 25 (1).

Directions as to procedure

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity. 1992, c. 6, s. 25 (2).

Canada Business Corporations Act, RSC 1985, c C-44, Sections 238, 239 and 241

Definitions

238 In this Part,

action means an action under this Act;

complainant means

(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(b) a director or an officer or a former director or officer of a corporation or any of its affiliates,

(c) the Director, or

(d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

Application to court re oppression

241 (1) A complainant may apply to a court for an order under this section.

Grounds

(2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3

Fair dealing

3.(1)Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement. 2000, c. 3, s. 3 (1).

Damages for misrepresentation, failure to disclose

7.(1)If a franchisee suffers a loss because of a misrepresentation contained in the disclosure document or in a statement of a material change or as a result of the franchisor's failure to comply in any way with section 5, the franchisee has a right of action for damages against,

(a) the franchisor;

(b) the franchisor's agent;

(c) the franchisor's broker, being a person other than the franchisor, franchisor's associate, franchisor's agent or franchisee, who grants, markets or otherwise offers to grant a franchise, or who arranges for the grant of a franchise;

(d) the franchisor's associate; and

(e) every person who signed the disclosure document or statement of material change. 2000, c. 3, s. 7 (1).

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

FACTUM OF THE PLAINTIFF
(Motion for Certification Returnable April 17, 2019)

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