Court File No. CV-18-00611214-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

SEARS CANADA INC., by its Court-appointed Litigation Trustee,
J. DOUGLAS CUNNINGHAM, Q.C.

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP,
SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP,
EDWARD S. LAMPERT, EPHRAIM J. BIRD, DOUGLAS CAMPBELL,
WILLIAM CROWLEY, WILLIAM HARKER, R. RAJA KHANNA, JAMES
MCBURNEY, DEBORAH ROSATI and DONALD ROSS

Defendants

FACTUM OF THE ESL PARTIES
(Motion to Strike Returnable April 17-18, 2019)

March 29, 2019

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TO: **THE LITIGATION SERVICE LIST**

Litigation Service List
Last Updated Mar. 8, 2019 at 11:27 AM

Court File No. CV-18-611219-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

FTI CONSULTING CANADA INC.,
in its capacity as Court-appointed monitor in proceedings
pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c. c-36

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, L.P., EDWARD S. LAMPERT, WILLIAM HARKER and WILLIAM CROWLEY

Defendants

Court File No. CV-18-611214-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

SEARS CANADA INC., by its Court-appointed Litigation Trustee,
J. DOUGLAS CUNNINGHAM, Q.C.

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS, LP,
SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, L.P.,
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DONALD ROSS

Defendants

Litigation Service List
Last Updated Mar. 8, 2019 at 11:27 AM

Court File No. CV-18-611217-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

MORNEAU SHEPELL LTD., in its capacity as administrator of the Sears Canada Inc. Registered Pension Plan

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, WILLIAM HARKER, WILLIAM CROWLEY, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH E. ROSATI, R. RAJA KHANNA, JAMES MCBURNEY and DOUGLAS CAMPBELL

Defendants

Court File No. 4114/15 (Milton)

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

1291079 ONTARIO LIMITED

Plaintiff

and

ESL INVESTMENTS INC., SEARS CANADA INC., WILLIAM C. CROWLEY, WILLIAM R. HAWKER, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH E. ROSATI, R. RAJA KHANNA, JAMES MCBURNEY and DOUGLAS CAMPBELL

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Proceeding under the Class Proceedings Act, 1992

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PART I - INTRODUCTION

1. In its statement of claim, the Litigation Trustee advances one cause of action that has no reasonable prospect of success and another that is an abuse of process.

2. The portion of the Litigation Trustee's claim that alleges that Sears Canada Inc. – as opposed to stakeholders in the company – was oppressed by its own directors discloses no reasonable cause of action, and should be struck under rule 21.01(1)(b). A corporation cannot itself be an oppressed person under the s. 241 oppression remedy. The Litigation Trustee claims relief on behalf of the company that is contrary to the express language of the statute, the purpose of the statute and the relevant judicial authority.

3. The Litigation Trustee's representative claim on behalf of the Pensioners should be struck under rules 21.01(3)(d) and 25.11(c). It is impermissibly duplicative and an abuse of process to seek relief on behalf of the Pensioners on a basis identical to that relied on by the Pensioners themselves in their separate claim.

PART II - SUMMARY OF FACTS

4. Sears Canada Inc. ("**Sears Canada**") was a Canadian retailer and publicly traded company. It is incorporated under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44 (the "***CBCA***"). On June 22, 2017, Sears Canada made an initial application and was granted protection from creditors under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the "***CCAA***").

5. This Court appointed the Litigation Trustee, J. Douglas Cunningham Q.C., to pursue claims on behalf of Sears Canada and its creditors. He commenced this action on December 19, 2018.

6. The defendants Edward S. Lampert, ESL Investments Inc., ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP and ESL Institutional Partners, LP (the "**ESL Parties**") are alleged to have been minority shareholders of Sears Canada at the time of the 2013 Dividend (defined below).[1] In his statement of claim the Litigation Trustee seeks, among other relief, "a declaration that the authorization and payment of the Dividend was oppressive and unfairly disregarded and was prejudicial to the interests of Sears Canada and its stakeholders and an Order setting aside the Dividend".[2]

7. On December 19, 2018, Morneau Shepell Ltd., in its capacity as administrator of the Sears Canada pension plan, brought an action against the same defendants to this action, alleging, among other things, that the Sears Canada board's unanimous declaration of a 2013 dividend (the "**2013 Dividend**") was oppressive to the Sears Canada pension plan and its beneficiaries (the "**Pensioners**").[3]

8. On January 18, 2019, the ESL Parties delivered a demand for particulars to the Litigation Trustee, seeking particulars as to the identity and expectations of the stakeholders on whose behalf the Litigation Trustee was bringing an oppression claim.[4]

9. On January 31, 2019, the Litigation Trustee provided its response to the demand for particulars. In it, the Litigation Trustee responded that it is bringing the oppression claim on behalf of "all of Sears Canada's stakeholders, including its […] pensioners".[5]

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[1] Statement of Claim of the Litigation Trustee, issued December 19, 2018 at para. 34 ("**Litigation Trustee Statement of Claim**"), *ESL motion record at Tab 2*, p. 19 [*MR*].
[2] Litigation Trustee Statement of Claim at para. 1(d), *MR at Tab 2*, p. 12.
[3] Statement of Claim of Morneau Shepell Ltd., issued December 19, 2018 at paras. 1(c) and 42 ("**Morneau Statement of Claim**"), *MR at Tab 5*, pp. 53 and 64-65.
[4] ESL Parties' demand for particulars from the Litigation Trustee, served January 18, 2019, *MR at Tab 3*.
[5] Litigation Trustee's response to the demand for particulars, served January 31, 2019 at para 1.1(a) ("**Litigation**

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

10. This motion raises two issues:

A. Sears Canada cannot itself be oppressed under s. 241 of the *CBCA*. This Court should strike the portions of the Litigation Trustee's statement of claim that make an oppression claim on behalf of the company as disclosing no reasonable cause of action under rule 21.01(1)(b) of the *Rules of Civil Procedure*.[6]

B. The Litigation Trustee's oppression claim on the Pensioners' behalf is impermissibly duplicative, in light of the separate claim of Morneau Shepell. This Court should strike the portions of the Litigation Trustee's response to the demand for particulars that state that the Litigation Trustee is bringing an oppression claim on behalf of the Pensioners as an abuse of process under rules 21.01(3)(d) and 25.11(c) of the *Rules of Civil Procedure*. This Court should also order that the Litigation Trustee may not pursue an oppression claim on behalf of the Pensioners.

A. The Litigation Trustee's oppression claim relating to Sears Canada's interest discloses no reasonable cause of action

11. The portions of the Litigation Trustee's statement of claim that allege that Sears Canada was oppressed disclose no reasonable cause of action. It is plain and obvious that a corporation cannot oppress itself or be oppressed under s. 241 of the *CBCA*.

Trustee Response"), *MR at Tab 4*, p. 41.
[6] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

i. Rule 21.01(1)(b)

12. Rule 21.01(1)(b) provides that "[a] party may move before a judge [...] to strike out a pleading on the ground that it discloses no reasonable cause of action".

13. The test on a motion to strike a pleading under rule 21.01(1)(b) is whether it is plain and obvious that the pleading discloses no reasonable cause of action, or whether the claim has no reasonable prospect of success.[7] Rule 21.01(1)(b) is not all or nothing: it permits the Court to strike portions of a statement of claim that disclose no cause of action, without striking the entire statement of claim.[8]

ii. The improper pleadings

14. At paragraphs 1, 86 and 87 of its statement of claim, the Litigation Trustee seeks relief on Sears Canada's behalf under s. 241 of the *CBCA*. In particular, the statement of claim alleges as follows:

> (1) paragraph 1(d): "[T]he Dividend was oppressive and unfairly disregarded and was prejudicial to the **interests of Sears Canada** and its stakeholders";
>
> (2) paragraph 86: "[T]he Former Directors and Bird acted in an oppressive manner **towards Sears Canada**" by "(a) disregarding the **reasonable expectation of Sears Canada**" and "(b) using their powers to authorize the Dividend, which […] disregarded **the interests of Sears Canada** and its creditors"; and

[7] *Hunt v. Carey*, [1990] 2 S.C.R. 959 at pp. 976-977 and 979, *ESL book of authorities at Tab 10* [*BOA*]; *R. v. Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 S.C.R. 45 at para. 17, *BOA at Tab 19*.

[8] See *Hunt v. Carey*, [1990] 2 S.C.R. 959 at p. 975, in which Wilson J. wrote: "[i]f it is plain and obvious that the action is certain to fail because it contains some such radical defect, then the relevant portions of the statement of claim may properly be struck out", *BOA at Tab 10*. See also *O'Mara v. Air Canada*, 2013 ONSC 2931 at para. 83, *BOA at Tab 17*; and *Dynasty Furniture Manufacturing Ltd. v. Toronto-Dominion Bank*, 2010 ONCA 514 at para. 10, *BOA at Tab 6*.

(3) paragraph 87: "It is appropriate for Sears Canada, by way of its Litigation Trustee, to be the complainant for an oppression claim **on its own behalf** and on behalf of its creditors".[9]

15. No other plaintiff in the related pieces of litigation has claimed that Sears Canada itself was oppressed.

iii. Subsection 241(2) of the *CBCA* does not include corporations in the group of stakeholders the oppression remedy protects

16. The *CBCA* draws a distinction between parties that are able to commence an oppression action and parties whose interests the oppression remedy protects. Section 238 of the *CBCA* defines the "complainants" that may commence an oppression action broadly:

> 238 In this Part,
>
> …
>
> *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**. [emphasis added]

17. In contrast, s. 241 of the *CBCA* makes clear that regardless of the identity of the complainant bringing the litigation, the oppression remedy protects the interests of only four specifically enumerated groups of stakeholders:

[9] Litigation Trustee Statement of Claim at paras. 1(d), 86 and 87, *MR at Tab 2*, pp. 12, and 29-30 [emphasis added].

> *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. [Emphasis added]

18. It is possible that Sears Canada may be a proper person under s. 238(d) of the *CBCA* to bring an oppression action on behalf of its creditors.[10] In appropriate cases, the Court has permitted a corporation to act as a complainant in an oppression action. However, even where it is a proper complainant, a corporation cannot claim relief on its own behalf on the basis that it has itself been oppressed under s. 241, because that provision limits the remedy to the protection of the four enumerated groups of stakeholders. Where a corporation commences an oppression action, that proceeding is limited to the protection of the interests of one or more of these four groups.

19. In *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*,[11] Farley J. permitted a trustee in bankruptcy that stood in the shoes of a corporation to act as a complainant in an oppression action. However, he emphasized that the action was brought on behalf of the corporation's creditors, and that the alleged oppression related to the creditors'

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[10] The ESL Parties do not, however, admit this.

[11] *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, 2001 CarswellOnt 2954 (S.C.J.), *BOA at Tab 16*, aff'd (2003), 68 O.R. (3d) 544 (C.A.).

interests.[12] Similarly, in *Ernst & Young Inc. v. Essar Global Fund Ltd et al.*,[13] in which the Court permitted a monitor to act as a complainant under s. 238(d) of the *CBCA*, the reasonable expectations that the Court explored in considering the monitor's oppression claim were those of the creditors on behalf of which the Monitor brought that claim. In line with these authorities, the Litigation Trustee's oppression claim can only be one that seeks to protect the interests of the enumerated corporate stakeholders. It is a representative claim, not a claim that belongs to the corporation itself.

20. Numerous authorities confirm that the oppression remedy protects the interests of only the four enumerated groups of stakeholders, further reinforcing a proposition that the clear language of s. 241 already places beyond doubt.

21. In *BCE Inc. v. 1976 Debentureholders*,[14] the Supreme Court distinguished between litigation intended to protect the rights of a corporation and the oppression remedy, which is intended to protect the interests of the enumerated stakeholders:

> Unlike the derivative action, which is aimed at enforcing a right of the corporation itself, the oppression remedy focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors. This remedy is available to a wide range of stakeholders — security holders, creditors, directors and officers.

22. The Court went on to emphasize that the protection of these stakeholders' interests is the foundation of the oppression remedy.[15]

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[12] *Olympia & York Developments Ltd (Trustee of) v. Olympia & York Realty Corp.*, 2001 CarswellOnt 2954 (S.C.J.) at paras. 30-31, *BOA at Tab 16*, aff'd (2003), 68 O.R. (3d) 544 (C.A.).
[13] *Ernst & Young Inc. v. Essar Global Fund Ltd et al.*, 2017 ONSC 1366 at paras. 61-75, *BOA at Tab 7*, aff'd 2017 ONCA 1014.
[14] *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560 at para. 45 [*BCE*].
[15] *BCE* at paras. 60-63.

23. In *Rea v. Wildeboer*,[16] a case that dealt with the materially similar provisions in Ontario's *Business Corporations Act*,[17] Blair J.A. set out the history that led to the creation of the derivative action and the oppression remedy, and described the difference between the two. The derivative action "is an action for 'corporate' relief, in the sense that the goal is to recover for wrongs done to the company itself."[18] In contrast, the oppression remedy provides a complainant:

> with the right to apply to the court, without obtaining leave, in order to recover for wrongs done to the individual complainant by the company or as a result of the affairs of the company being conducted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the complainant. **The oppression remedy is a personal claim.**[19]

24. The Court of Appeal wrote in *Naneff v. Con-Crete Holdings Ltd.*[20] that "the provision only deals with the interest of a shareholder, creditor, director or officer. It follows from a plain reading of the provision that any rectification of a matter complained of can only be made with respect to the person's interest as a shareholder, creditor, director or officer."

25. In *C.I. Covington Fund Inc. v. White*,[21] Swinton J. wrote as follows:

> To obtain an oppression remedy, a complainant must show that the business or affairs of the corporation in question are or have been carried on in a manner that is oppressive, or is unfairly prejudicial to or unfairly disregards the interests of a security holder or creditor. The oppression remedy protects the "reasonable expectations" of a corporate stakeholder, having regard to the particular facts.

26. In *Joncas v. Spruce Falls Power & Paper Co.*,[22] Cumming J. wrote that "reasonable expectations must derive from corporate conduct affecting a protected category of person: namely,

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[16] *Rea v. Wildeboer*, 2015 ONCA 373 at paras. 14-21 [*Rea*], *BOA at Tab 20*.
[17] *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 248.
[18] *Rea* at para. 18, *BOA at Tab 20*, emphasis added.
[19] *Rea* at para. 19, *BOA at Tab 20*, emphasis added. Like statements in some other authorities, this statement in *Rea* does not draw a clear distinction between complainants entitled to commence an oppression proceeding and stakeholders whose interests are protected by the oppression remedy, but the content of the statement makes clear that Blair J.A. had in mind claims brought by protected stakeholders themselves.
[20] *Naneff v. Con-Crete Holdings Ltd.*, 1995 CanLII 959 at para. 24 (C.A.). *Naneff* concerned the *OBCA*.
[21] *C.I. Covington Fund Inc. v. White*, 2000 CanLII 22676 at para. 21 (Ont. S.C.J.), *BOA at Tab 3*. *Covington* concerned the *OBCA*.

a creditor, director, officer or security holder." The Court of Appeal expressly approved this statement in upholding the decision.[23]

27. In *Harris v. Leikin Group Inc.*,[24] Brown J. (as he then was) wrote that "the reasonable expectations of specified stakeholders is the cornerstone of the oppression remedy."

28. The Alberta Court of Queen's Bench wrote in *Piikani Investment Corporation v. Piikani First Nation*,[25] that "[t]he oppression remedy is available to claimants for acts of the corporation or acts that are attributable to the corporation. The corporation itself cannot be a claimant. This is made clear in s. 241(1) and s. 241(2) of the CBCA."

29. Academic sources make the same point. In his book *Oppression and Related Remedies*,[26] Markus Koehnen writes:

> The concluding language of s. 241(2) states that a remedy is available where the conduct is oppressive or unfairly prejudicial to or unfairly disregards the interests of "any security holder, creditor, director or officer." Harm suffered in any other capacity is not subject to remedy.

30. In an article in the Canadian Bar Review,[27] Professor Jassmine Girgis writes that "the harm addressed by the oppression remedy must be harm suffered by the complainant in the enumerated capacities, as a security holder, creditor, director or officer," and, furthermore:

> [T]he harm addressed by the oppression remedy must be direct, personal and distinct to that shareholder or a small group of shareholders; it cannot be harm that affects every shareholder in the same way. In other words, as required by the legislation, it must be harm to the interests of the complainant. The limitation here

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[22] *Joncas v. Spruce Falls Power & Paper Co.*, 2000 CanLII 22359 at para. 36 (Ont. S.C.J.), *BOA at Tab 11*, aff'd 2001 CanLII 6156 (Ont. C.A.). *Joncas* concerned the *OBCA*.
[23] *Joncas v. Spruce Falls Power and Paper Company Ltd.*, 2001 CanLII 6156 at paras. 8-9 (Ont. C.A.), *BOA at Tab 12*.
[24] *Harris v. Leikin Group Inc.*, 2013 ONSC 1525 at para. 478, *BOA at Tab 9*.
[25] *Piikani Investment Corporation v. Piikani First Nation*, 2008 ABQB 775 at para. 224, *BOA at Tab 17*.
[26] Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson Carswell, 2004) at p. 41, *BOA at Tab 24*.
[27] Jassmine Girgis, "The Oppression Remedy: Clarifying Part II of the *BCE* Test" (2018) 96-3 Can. Bar Rev. 484 at pp. 509-510, citations omitted, *BOA at Tab 23*.

> is that it cannot be harm that affects the shareholder indirectly, such as that which would occur if the corporation were harmed, causing share prices to drop. Put differently, and following the rule in *Foss v Harbottle*, harm to the corporation (and indirectly to the shareholders as a collective) is not harm to the complainant shareholder; harm to the corporation should be addressed by the derivative action, which is brought in the name of or on behalf of a corporation and requires the leave of the court. The oppression remedy is intended to address harms done to the interests of stakeholders affected by the oppressive acts.

31. In an article in the Ottawa Law Review,[28] Professor P. M. Vasudev writes:

> Derivative actions are meant to protect the corporate interests when persons in control either harm the corporations or fail to prevent harm inflicted by others. Derivative actions are about safeguarding the corporation as a whole, rather than any particular group in it—shareholders, employees, suppliers and so on. **This feature distinguishes derivative actions from the oppression remedy.**

32. The authorities, then, are clear that the provision providing for the oppression remedy means what it says. It protects the interests of four enumerated stakeholders, and not the interests of the corporation itself.

33. It is noted that in one case, *Arend v. Boehm*,[29] the Ontario Superior Court made reference to the reasonable expectations of a corporation in the context of an oppression action. In *Arend*, the Court found that BitRush, a corporation, was a proper complainant to bring an oppression action under s. 245(c) of the *OBCA*.[30] The Court went on to find that a director of BitRush had caused the corporation to act in a manner that violated the reasonable expectations of "BitRush and its shareholders".[31]

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[28] P. M. Vasudev, "Corporate Stakeholders in Canada—An Overview and a Proposal" (2015) 45-1 Ottawa L. Rev.137 at p. 149, *BOA at Tab 25*, emphasis added.
[29] *Arend v. Boehm*, 2017 ONSC 3582 [*Arend*], *BOA at Tab 2*. The oppression proceeding was also brought by two directors of the corporation.
[30] *Arend* at para. 53, *BOA at Tab 2*. Section 245 of the *OBCA* is functionally identical to s. 238 of the *CBCA*.
[31] *Arend* at paras. 56-67, 61-62, 64, 77 and 84, *BOA at Tab 2*. However, at the beginning of both the "Oppression" (para. 54) and "Remedy" (para. 65) sections of the decision, the Court refers to the interests of only the "shareholders of BitRush" and "BitRush's shareholders".

34. The Court in *Arend* did not consider the issue of whether a corporation could be an oppressed person under s. 248(2) of the *OBCA*.[32] No party contested the idea that a corporation could be oppressed, as the application was unopposed and the respondent did not appear at the hearing. A case stands only for what it decides,[33] and *Arend* did not decide whether a corporation can be party whose interests the oppression remedy protects. In any event, the Court's language on this point is inconsistent with the clear statutory language under s. 248(2) of the *OBCA*, the same language in s. 241(2) of the *CBCA* and the numerous authorities and academic sources cited above.

35. Beyond the clear statutory wording and jurisprudence precluding a corporation from seeking a remedy for the oppression of itself, the historical purpose of the oppression remedy highlights the absurdity of the Litigation Trustee's claim. The oppression remedy is "designed to address […] the imbalance of power on the part of those in control with the vulnerability on the part of those having a genuine stake in the affairs of the corporation but no control over its conduct."[34]

36. The oppression remedy is a personal claim.[35] It was enacted in the *CBCA* in 1975 as a result of the recommendations of the Dickerson Committee, which took the view that the common law insufficiently protected minority shareholders.[36] The Dickerson Committee also recommended another remedy, the derivative action, the object of which was to "remedy a wrong to the corporation."[37] While both remedies aimed at protecting vulnerable shareholders, the former gave a personal cause of action to stakeholders whereas the latter allowed stakeholders to enforce

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[32] Section 248(2) of the *OBCA* is functionally identical to s. 242(2) of the *CBCA*.
[33] *R .v. Deur et al*., [1944] S.C.R. 435 at p. 440, *BOA at Tab 18*.
[34] *1413910 Ontario Inc. v. McLennan*, 2009 CanLII 22544 at para. 34 (Ont. Div. Ct.), *BOA at Tab 1*.
[35] *Rea* at para 19, *BOA at Tab 20*.
[36] *Proposals for a New Business Corporations Law for Canada*, Robert W. V. Dickerson, John L. Howard and Leon Getz, vol. 1 (Ottawa: Information Canada, 1971) [*Dickerson Report*], *BOA at Tab 22*. See p. 7: "The position of the minority shareholder has always been an exceptionally unenviable one."
[37] *Dickerson Report* at p. 162, *BOA at Tab 22*.

the rights of the corporation by suing through it.[38] The oppression remedy was not intended to address harms to a corporation.[39]

37. The absurdity of the Litigation Trustee's claim is more obvious in light of the factors the Court in *BCE* identified as relevant to determining whether reasonable expectations exist, including "whether the claimant could have taken steps to protect itself against the prejudice it claims to have suffered"[40] and the representations the corporation made to "stakeholders or to the public in promotional material."[41] These factors are unintelligible in the context of the corporation itself being oppressed.

iv. Permitting the improper pleading of Sears Canada as an oppressed party to stand would be unjust in this case and do harm to the law in general

38. The purpose of this motion to strike the Litigation Trustee's pleading of Sears Canada as an oppressed party is not simply to hold the Litigation Trustee to the clear language of the statute and to the numerous authorities that confirm its plain meaning. If the Litigation Trustee is permitted to carry on with a claim that Sears Canada itself can be an oppressed party under the meaning of s. 241(2) of the *CBCA*, he will be able to skate over the crucial question of exactly which reasonable expectations the 2013 Dividend is alleged to have frustrated. The upcoming steps in this litigation, including the delivery of statements of defence and replies, examinations for discovery, any motions for summary judgment and the eventual trial should not take place in the shadow of an impermissible pleading that muddies the waters to the Litigation Trustee's benefit.

39. In *BCE* the Supreme Court made clear that a Court faced with an oppression action must consider two questions: "(1) Does the evidence support the reasonable expectation asserted by the

[38] *Dickerson Report* at pp. 160-161, 163, *BOA at Tab 22*.
[39] *Rea* at paras. 18-19, 27 and 33-36, *BOA at Tab 20*.
[40] *BCE* at para. 78.
[41] *BCE* at para. 80.

claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms 'oppression', 'unfair prejudice' or 'unfair disregard' of a relevant interest?"[42] In an oppression action the onus to satisfy these factors is on the complainant.[43]

40. In this case, the Litigation Trustee must identify the reasonable expectations of the allegedly oppressed stakeholders, and establish that those reasonable expectations were frustrated in a manner amounting to oppression, unfair prejudice or unfair disregard. The case law makes clear that a complainant must identify the relevant reasonable expectations precisely and in light of the relevant context: "the remedy is very fact-specific – what is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play."[44] As the Supreme Court wrote in *BCE*:

> [62] … [T]he question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.
>
> [63] Particular circumstances give rise to particular expectations. …[45]

41. As in many cases concerning multiple groups of stakeholders, in this case the various stakeholders' reasonable expectations will vary depending on each stakeholder's particular circumstances. This will be so even though the Litigation Trustee purports to bring a claim on behalf of a wide range of stakeholders. Different stakeholders will have different reasonable expectations. For instance, the relevant reasonable expectations of the groups of creditors on behalf of whom the Litigation Trustee brings this claim will depend on the terms under which they extended credit, and whether they extended credit before or after the declaration of the 2013 Dividend, among other considerations. Whether the creditors' differing reasonable expectations

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[42] *BCE* at para. 68.
[43] *BCE* at paras. 70 and 137.
[44] *Harris v. Leikin Group Inc.*, 2013 ONSC 1525 at para. 476; see also para. 485, *BOA at Tab 9*.
[45] *BCE*; see also paras. 70-71.

have been unfairly disregarded will depend, among other things, on the terms governing the relationships between them and Sears Canada and on whether they had been paid back before the commencement of the *CCAA* proceeding.

42. The content of the different stakeholders' distinct reasonable expectations and the ways in which these differing expectations are said to have been violated will be crucial to the defence of the Litigation Trustee's oppression claim. If the Litigation Trustee is allowed to plead and rely on the alleged reasonable expectations of *Sears Canada itself*, the distinctions between stakeholders' expectations will be swallowed up into a generalized set of expectations that the company is said to have had. This result would be contrary to the statute and the case law that has elucidated it. It would also be unfair to the defendants.

43. Moreover, permitting the oppression remedy to protect the reasonable expectations or interests of corporations would dramatically expand the remedies open to them. In *Rea v. Wildeboer*,[46] the Court of Appeal outlined that the incorporation of the oppression remedy (and the derivative action) into the *CBCA* arose out of Parliament's desire to mitigate the harshness of the rule in *Foss v. Harbottle*, which states that only a corporation may bring an action for a wrong done to it, and of the indoor management rule, which permits a majority of shareholders to ratify corporate acts and thus make them immune from legal action.

44. The oppression remedy under s. 241 creates a new basis for legal redress that does not depend on the strict legal tests for recognized causes of action. Instead, the oppression remedy "gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair."[47]

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[46] *Rea* at paras. 14-21, *BOA at Tab 20*.
[47] *BCE* at para. 58.

45. The oppression remedy was designed to ensure the fair treatment of individual stakeholders whose options to redress wrongs were seriously lacking under the common law.[48] That purpose justified a new remedy – one that extended beyond the bounds of existing causes of action.

46. The position and circumstances of a corporation, however, did not justify the same broadening of the common law. A corporate claim does not suffer from the same impediments that face individual corporate stakeholders under the rule in *Foss v. Harbottle* and the indoor management rule. Instead, a corporation has always been free to commence proceedings for harm done to it within the frameworks of recognized causes of action – causes of action such as breach of contract, knowing assistance, knowing receipt, unjust enrichment and many others. The Litigation Trustee impermissibly seeks to claim the benefit of the generous reach of the oppression remedy for *Sears Canada* even though the statutory purpose behind the remedy does not apply to corporations.

47. For these reasons, it is plain and obvious that the claim at paragraphs 1(d), 86 and 87 of the Litigation Trustee's statement of claim to the effect that Sears Canada was an oppressed party disclose no reasonable cause of action. The clear language of the statute does not permit such a claim. It should be struck under rule 21.01(1)(b).

B. The Litigation Trustee's oppression claim on behalf of the Pensioners is an abuse of process

48. The portion of the Litigation Trustee's pleadings that alleges oppression on the Pensioners' behalf is impermissibly duplicative of the Pensioners' own claim and constitutes an abuse of process. The reference to such oppression must be struck.

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[48] *Rea* at paras. 14 and 19, *BOA at Tab 20*.

49. Rule 21.01(3)(d) provides that "[a] defendant may move before a judge to have an action stayed or dismissed on the ground that […] the action is frivolous or vexatious or is otherwise an abuse of the process of the court".[49] Rule 25.11(c) permits a court to strike out "part of a pleading or other document" on the ground that it "is an abuse of the process of the court."

50. A proceeding will be an abuse of process where it would serve no useful purpose or would be a waste of judicial resources.[50] One such example is where pleadings "essentially duplicate claims being advanced in another extant proceeding."[51]

51. The Pensioners have commenced a separate claim against the ESL Parties founded on the same subject matter in *Morneau Shepell Ltd. in its capacity as administrator of the Sears Canada Inc Registered Pension Plan v ESL Investments Inc et al*, Court file No CV-18-611217-00CL.[52]

52. Despite this extant claim, in his response to the demand for particulars dated January 31, 2019, the Litigation Trustee purports to bring an oppression claim on behalf of all "Stakeholders" of Sears Canada, and expressly includes the Pensioners among these "Stakeholders".[53] It is an abuse of process for the Litigation Trustee to duplicate a claim that the Pensioners are bringing themselves.[54]

53. The doctrine of abuse of process is used in a variety of legal contexts, including "where allowing the litigation to proceed would nonetheless violate such principles as judicial economy,

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[49] Rule 21.01(3)(d).
[50] *Currie v. Halton Regional Police Services Board*, 2003 CanLII 7815 at paras. 14-18 (Ont. C.A.), *BOA at Tab 5*; *Kikla v. Ayong*, 2016 BCSC 465 at para. 58 [*Kikla*], *BOA at Tab 13*.
[51] *Kikla* at para. 56, *BOA at Tab 13*. See also *Carbone v. DeGroote*, 2018 ONSC 109 at para. 33, *BOA at Tab 4*.
[52] Morneau Statement of Claim at paras. 1(c) and 42, *MR at Tab* 5, pp. 53 and 64-65.
[53] Litigation Trustee Response at para. 1.1(a), *MR at Tab 4*, p 41. The Litigation Trustee's response to the demand for particulars forms part of its pleadings and can be considered on a motion to strike: *McCreight v. Canada (Attorney General)*, 2013 ONCA 483 at para. 32, *BOA at Tab 14*; *Gaur v. Datta*, 2015 ONCA 151 at para. 5, *BOA at Tab 8*.
[54] *Kikla* at paras. 56 and 68, *BOA at Tab 2*.

consistency, finality and the integrity of the administration of justice."[55] Duplicative claims offend judicial economy and are an "affront to the integrity of the judicial system, given the burden that unnecessary litigation imposes on the parties."[56] They also threaten the principles of consistency and finality.[57] Allowing the Litigation Trustee to continue its oppression claim on behalf of the Pensioners would engage these concerns. The Litigation Trustee and Morneau Shepell, could, for instance, attempt to define the Pensioners' reasonable expectations differently. This concern is not merely theoretical: it has already happened. As set out above, in its response to the ESL Parties' demand for particulars the Litigation Trustee included the Pensioners in the group of stakeholders on behalf of which it claimed to be pursuing the oppression claim.[58] The Litigation Trustee also made clear that the "creditors" referred to in its statement of claim are all of Sears Canada's stakeholders.[59] It defined the reasonable expectations of the creditors, drawing no distinction among the Pensioners and other creditors, as follows:

> The creditors reasonably expected that the power of Sears Canada's directors would be exercised: (i) in the best interests of the company, rather than in a way that favoured the interests of the Significant Shareholders; and (ii) in such a way as to preserve capital for the use of Sears Canada and its business or to satisfy obligations to Stakeholders rather than diverting it to the company's shareholders.[60]

54. In contrast, in its answer to a demand for particulars in which the ESL Parties' requested particulars of the reasonable expectations of the Pensioners, Morneau Shepell defined the Pensioners' reasonable expectations differently:

> The Plan and its beneficiaries reasonably expected that Sears Canada (as administrator of the Plan) and the Defendants would act in accordance with their

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[55] *Toronto (City) v. CUPE, Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 at para. 37, *BOA at Tab 21*. The comment in *CUPE* is made in reference to relitigation, but the concerns apply to parallel duplicative litigation too.
[56] *Kikla* at paras. 56 and 66, *BOA at Tab 2*.
[57] *CUPE* at para. 51, *BOA at Tab 21*.
[58] Litigation Trustee Response at para. 1.1(a), *MR at Tab 4*, p. 41.
[59] Litigation Trustee Response at para. 4.1(a), *MR at Tab 4*, p. 41.
[60] Litigation Trustee Response at para. 3.1(a), *MR at Tab 4*, p. 41.

> and/or Sears Canada's duties to the Plan and Plan beneficiaries. In fulfilling these obligations, the Plan and Plan beneficiaries reasonably expected that Sears Canada, its affiliates, officers and directors would act in the same manner that an independent administrator would have acted in properly discharging the fiduciary duties and other duties owed to the Plan and Plan beneficiaries, including the duty to respect the priority of claims against Sears Canada.[61]

55. This answer focused on the Pensioners' expectations in relation to duties of Sears Canada as the administrator of the pension plan, and, notably, included the conduct of Sears Canada as a subject of the Pensioners' reasonable expectations, unlike the definition of the Litigation Trustee. This divergence at the pleadings stage provides a concrete example of the issues that duplicative litigation can cause.

56. Moreover, the only provision under which the Litigation Trustee could act as a complainant is s. 238(d) of the *CBCA*. The wording of this provision does not provide an absolute right to non-stakeholders to commence an oppression action. It is, instead, discretionary, referring to "any other person who, in the discretion of a court, is a proper person to make an application under this Part." A corporation can commence an oppression action on behalf of stakeholders in some cases. However, a corporation cannot possibly be a proper party to commence an oppression action on behalf of a stakeholder when that stakeholder has already commenced its own oppression action with the representation of able counsel. Striking the Litigation Trustee's claim insofar as it purports to represent the Pensioners' interests would therefore not only rectify a duplicative abuse of process, but also be in line with the discretionary nature of s. 238(d) of the *CBCA*.

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[61] Response to the demand for particulars by Morneau Shepell, served January 31, 2019 at para 1(a), *supplementary motion record at Tab 2*.

57. The ESL Parties should face only one claim in respect of the same cause of action. It is an abuse of process to force the ESL Parties to defend two actions that both allege oppression to the Pensioners.

PART IV - ORDER REQUESTED

58. The ESL Parties seek an order striking out, without leave to amend, the following full and partial paragraphs and subparagraphs of the Litigation Trustee's statement of claim alleging that Sears Canada was oppressed:

Paragraph	To Be Struck
1(d)	The words "Sears Canada and"
86	Entire paragraph
86(a)	Entire subparagraph
86(b)	The words "Sears Canada and"
87	The words "on its own behalf and" and "all similarly"

59. The ESL Parties also seek an order striking out, without leave to amend, the word "pensioners" at paragraph 1.1(a) of the Litigation Trustee's response to the demand for particulars, and an order declaring that the Litigation Trustee cannot bring an oppression claim on behalf of the Pensioners.

60. The ESL Parties also request their costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of March, 2019.

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SCHEDULE "A"

LIST OF AUTHORITIES

Case law

1. *1413910 Ontario Inc. v. McLennan*, 2009 CanLII 22544 (Ont. Div. Ct.)
2. *Arend v. Boehm*, 2017 ONSC 3582
3. *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560
4. *C.I. Covington Fund Inc. v. White*, 2000 CanLII 22676 (Ont. S.C.J.)
5. *Carbone v. DeGroote*, 2018 ONSC 109
6. *Currie v. Halton Regional Police Services Board*, 2003 CanLII 7815 (Ont. C.A.)
7. *Dynasty Furniture Manufacturing Ltd. v. Toronto-Dominion Bank*, 2010 ONCA 514
8. *Ernst & Young Inc. v. Essar Global Fund Ltd et al.*, 2017 ONSC 1366, aff'd 2017 ONCA 1014
9. *Gaur v. Datta*, 2015 ONCA 151
10. *Harris v. Leikin Group Inc.*, 2013 ONSC 1525
11. *Hunt v. Carey*, [1990] 2 S.C.R. 959
12. *Joncas v. Spruce Falls Power & Paper Co.*, 2000 CanLII 22359 (Ont. S.C.J.), aff'd 2001 CanLII 6156 (Ont. C.A.)
13. *Joncas v. Spruce Falls Power and Paper Company Ltd.*, 2001 CanLII 6156 (Ont. C.A.)
14. *Kikla v. Ayong*, 2016 BCSC 465
15. *McCreight v. Canada (Attorney General)*, 2013 ONCA 483
16. *Naneff v. Con-Crete Holdings Ltd.*, 1995 CanLII 959 (C.A.)

17. *O'Mara v. Air Canada*, 2013 ONSC 2931

18. *Olympia & York Developments Ltd, (Trustee of) v. Olympia & York Realty Corp.*, 2001 CarswellOnt 2954 (S.C.J.), aff'd (2003), 68 O.R. (3d) 544 (C.A.)

19. *Piikani Investment Corporation v. Piikani First Nation*, 2008 ABQB 775

20. *R. v. Deur et al*., [1944] S.C.R. 435

21. *R. v. Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 S.C.R. 45

22. *Rea v. Wildeboer*, 2015 ONCA 373

23. *Toronto (City) v. CUPE, Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77

Secondary sources

24. Robert W. V. Dickerson, John L. Howard and Leon Getz, *Proposals for a New Business Corporations Law for Canada*, vol. 1 (Ottawa: Information Canada, 1971)

25. Jassmine Girgis, "The Oppression Remedy: Clarifying Part II of the BCE Test" (2018) 96-3 Can. Bar Rev. 484

26. Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson Carswell, 2004)

27. P. M. Vasudev, "Corporate Stakeholders in Canada—An Overview and a Proposal" (2015) 45-1 Ottawa L. Rev.137

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194**

WHERE AVAILABLE

To Any Party on a Question of Law

21.01(1) A party may move before a judge,

[…]

> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

[…]

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

[…]

Action Frivolous, Vexatious or Abuse of Process

> (d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court, and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (3).

[…]

Striking out a pleading or other document

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court. R.R.O. 1990, Reg. 194, r. 25.11.

[…]

***Canada Business Corporations Act*, R.S.C., 1985, c. C-44**

Definitions

238 In this Part,

[…]

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.

Commencing derivative action

239 (1) Subject to subsection (2), a complainant may apply to a court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.

Conditions precedent

(2) No action may be brought and no intervention in an action may be made under subsection (1) unless the court is satisfied that

(a) the complainant has given notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the court under subsection (1) not less than fourteen days before bringing the application, or as otherwise ordered by the court, if the directors of

the corporation or its subsidiary do not bring, diligently prosecute or defend or discontinue the action;

(b) the complainant is acting in good faith; and

(c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.

[…]

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.

[…]

***Business Corporations Act*, R.S.O. 1990, c. B.16**

Definitions

245 In this Part,

[…]

"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 of any of its affiliates,

(c) any other person who, in the discretion of the court, is a proper person to make an application under this Part. ("plaignant") R.S.O. 1990, c. B.16, s. 245.

Derivative actions

246 (1) Subject to subsection (2), a complainant may apply to the court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate. R.S.O. 1990, c. B.16, s. 246 (1).

Idem

(2) No action may be brought and no intervention in an action may be made under subsection (1) unless the complainant has given fourteen days' notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the court under subsection (1) and the court is satisfied that,

(a) the directors of the corporation or its subsidiary will not bring, diligently prosecute or defend or discontinue the action;

(b) the complainant is acting in good faith; and

(c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued. R.S.O. 1990, c. B.16, s. 246 (2).

Notice not required

(2.1) A complainant is not required to give the notice referred to in subsection (2) if all of the directors of the corporation or its subsidiary are defendants in the action. 2006, c. 34, Sched. B, s. 38.

Application

(3) Where a complainant on an application made without notice can establish to the satisfaction of the court that it is not expedient to give notice as required under subsection (2), the court may make such interim order as it thinks fit pending the complainant giving notice as required. R.S.O. 1990, c. B.16, s. 246 (3).

Interim order

(4) Where a complainant on an application can establish to the satisfaction of the court that an interim order for relief should be made, the court may make such order as it thinks fit. R.S.O. 1990, c. B.16, s. 246 (4).

[…]

Oppression Remedy

248(1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section. 1994, c. 27, s. 71 (33).

Idem

(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. R.S.O. 1990, c. B.16, s. 248 (2).

SEARS CANADA INC., by its Court-appointed Litigation Trustee, J. DOUGLAS CUNNINGHAM, Q.C.
Plaintiff

-and-

ESL INVESTMENTS INC. et al.

Defendants

Court File No. CV-18-00611214-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE ESL PARTIES
(Motion to Strike Returnable April 17-18, 2019)

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