Court File No. CV-19-617792-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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*

RESPONDING FACTUM OF THE DEFENDANTS WILLIAM C. CROWLEY, WILLIAM R. HARKER, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, JAMES MCBURNEY and DOUGLAS CAMPBELL

(MOTION FOR CERTIFICATION RETURNABLE APRIL 17-18, 2019)

April 12, 2019

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TO: **SERVICE LIST ATTACHED**

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PART I - OVERVIEW

1. In this proposed class action, the Plaintiff, a former owner of a Sears Hometown dealer store, seeks damages of up to $80 million for oppression (the "Oppression Class Action") on behalf of a proposed class of all persons carrying on business as Sears Hometown stores under a dealer agreement with Sears Canada Inc. ("Sears Canada" or the "Company") at any time from July 5, 2011 to November 19, 2013 (the "Proposed Class").

2. The Proposed Class alleges oppression as contingent creditors pursuant to another class action proceeding brought by the Plaintiff on behalf of Sears Hometown dealers against Sears Canada[1] alleging, among other things, breach of contract and breach of the statutory duty of fair dealing under the *Arthur Wishart Act*[2] and seeking damages of $100 million (the "Franchise Class Action").

3. The Defendants William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, James McBurney, and Douglas Campbell (collectively, the "Former Directors" or the "Defendants"), who were former directors of Sears Canada, object to the certification of this proposed class proceeding as it is currently framed by the Plaintiff. In particular, the Former Directors raise the following issues regarding the proposed certification framework:

(a) the proposed common issue in respect of damages is not appropriate and should not be certified as a common issue;

(b) the common issues in the Franchise Class Action must be included for the proposed class action to proceed in an efficient, effective, and fair manner;

[1] The Franchise Class Action was also brought against Sears, Roebuck and Co., a company that held several Sears trademarks. The claim against Sears, Roebuck and Co. was discontinued by the Plaintiff.
[2] The statutory claims were brought under the *Arthur Wishart Act (Franchise Disclosure), 2000*, SO 2000, c. 3 (the "*Wishart Act*") and other similar provincial franchise legislation.

(c) the proposed litigation plan is inadequate and unworkable in certain respects. In particular, the proposed litigation plan fails to address the complexity arising from the Franchise Class Action which is inextricably linked to this proceeding, as already acknowledged by the Plaintiff; and

(d) the suitability of the Plaintiff as a representative plaintiff to fairly represent the interests of the proposed class.

PART II - SUMMARY OF FACTS

4. The Plaintiff, 1291079 Ontario Limited ("129"), is an Ontario corporation that formerly operated a Sears Hometown store in Woodstock, Ontario. The Plaintiff has no assets or revenue[3] and is "essentially a shell company, with no ability to satisfy a costs order."[4] 129 has not received indemnification for costs, including any adverse costs awards, from class counsel, the Class Proceedings Fund, or any third party funder.[5]

5. On June 22, 2017, Sears Canada obtained protection under the *Companies' Creditors Arrangement Act* and an initial order was granted (the "*CCAA* Order").[6]

[3] Cross-Examination of Mr. James Kay on March 29, 2018 ("Kay Transcript"), Q. 43-54, pp. 15-16, Supplementary Record of the Defendants, Tab A.
[4] *1291079 Ontario Limited v. Sears Canada Inc*., 2014 ONSC 5190 ("Certification Decision") at para. 75, Book of Authorities, Tab 1.
[5] Exhibit C to the Affidavit of Diane Shnier sworn March 15, 2019 (the "Shnier Affidavit"), Responding Motion Record of ESL Investments Inc. ("ESL Motion Record"), Tab 1C, p. 30 -32. "You asked if the [representative plaintiff] is being indemnified by our firm, has sought funding assistance from the Class Proceedings Fund, or made other arrangements with respect to funding, including funding adverse costs awards. The answer to all of three questions is no."
[6] Affidavit of James Kay sworn January 18, 2019 ("Kay Affidavit"), Plaintiff's Motion Record, Tab 2, page 13, para. 22.

A. The Franchise Class Action and the Companion Oppression Class Action

(i) *Franchise Class Action*

6. The Franchise Class Action was commenced in July 2013 and certified as a class proceeding in September 2014.[7] There were four common issues certified in the Franchise Class Action relating to liability and damages. A list of these common issues is attached as **Schedule "D"** to this Factum.

7. The certified class in the Franchise Class Action is composed of entities carrying on business as Sears Hometown Stores under dealer agreements with Sears Canada between July 5, 2011 and March 18, 2015 and overlaps entirely with the Proposed Class.

8. Sears Canada provided a substantive defence to the Franchise Class Action on both a factual and legal basis and consistently evaluated the claim as having no merit.[8] The parties completed the document discovery phase with voluminous productions,[9] participated in an unsuccessful mediation in October 2015 and established a litigation timetable with a common issues trial to be held in September 2017, approximately three years after certification.[10] The Former Directors were not parties to this litigation and have not received access to the documentary production.

9. The Franchise Class Action was stayed as a result of the *CCAA* Order. There has been no determination of the merits of the Franchise Class Action, no determination of damages, if any,

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[7] Certification Decision, Book of Authorities, Tab 1.
[8] See the Officer's Certificate for the Solvency Tests under Section 42 of the *CBCA* of Sears Chief Financial Officer E.J. Bird dated November 18, 2013, where Bird affirmed that: "...it is unlikely that the Corporation will be required to make payment in respect of any contingent liability within a reasonably foreseeable period." Exhibit D to the Shnier Affidavit, ESL Motion Record, Tab 1D, pp.52-53; Sears Statement of Defence, Exhibit L to the Affidavit of John Birch sworn March 18, 2019 (the "Birch Affidavit"), Responding Motion Record, Tab 1L, pp. 298-315.
[9] *1291079 Ontario Limited v Sears Canada Inc.*, 2016 ONSC 7451 ("Summary Judgment Decision"), at paras. 7, 33-34, Book of Authorities, Tab 2.
[10] Summary Judgment Decision, *supra*, at para. 8, Book of Authorities, Tab 2.

and no judgment against Sears Canada. The claims of these class members remain unproven and speculative.

(i) *Oppression Class Action*

10. The Oppression Class Action was commenced on October 21, 2015 and asserts that the payment of a dividend in the amount of $509 million by Sears Canada in December 2013 (the "Dividend") was oppressive to the Proposed Class as contingent creditors.

11. On March 29, 2016, the Plaintiff and Sears Canada consented to an order staying the Oppression Class Action pending the resolution of the Franchise Class Action, which at that time was scheduled to proceed to a common issues trial in September 2017.[11] This decision to have the Oppression Class Action stand down until there was a determination of the merits of the Franchise Class Action and an assessment of damages, if any, recognizes the inextricable link between these actions and in particular the necessity of establishing predicate liability an damages in the Franchise Class Action.

12. The Oppression Class Action was also subsequently stayed as a result of the *CCAA* Order, which was lifted by the court on December 3, 2018 to permit this action to proceed.[12] Contrary to the assertion of the Plaintiff in its factum, the court did not grant any relief regarding a joint trial as recommended by the litigation investigator. Rather, the court ordered that the appointment of a case management judge for the claims and that the procedure shall be determined by the case management judge.

13. As part of the claims process in the *CCAA* proceedings for Sears Canada, the Plaintiff filed proofs of claim for contingent and unliquidated claims in respect of both the Franchise Class

[11] Exhibit G to the Kay Affidavit, Plaintiff's Motion Record, Tab 2G, pp. 120-132.
[12] Exhibit H to the Kay Affidavit, Plaintiff's Motion Record, Tab 2H, pp. 135-144.

Action and the Oppression Class Action (the "Class Actions") in the amounts of $101,100,466.77 and $509,000,000, respectively.

14. On December 14, 2018, the Plaintiff, on behalf of all class members in both the Franchise Class Action and the Oppression Class Action, and the Monitor and Sears Canada entered into an agreement (the "Agreement") on the treatment of these claims in the *CCAA* proceedings for the purposes of voting on, and receiving distributions, in respect of a plan of arrangement or compromise to Sears Canada creditors (the "Plan").[13] The Agreement provided, among other things, that only for the purposes of any Plan implemented, the Franchise Class Action class members have a proven affected unsecured claim of $80 million.

15. There is no information regarding the process leading up to such agreement to set the *CCAA* claims of the Proposed Class at $80 million. Further the Plaintiff has refused to provide any further information in this regard.[14] The basis for such quantum remains opaque.

16. In any event, the Former Directors are not a party to the Agreement, are not bound by its terms, and the Agreement has no effect on the issues of liability or damages in the Class Actions contractually or otherwise. The Agreement explicitly provides that "nothing in the agreement shall constitute an admission by Sears Canada or a finding by the Monitor concerning any alleged conduct by the defendants to the Class Actions" and is not binding on anyone beyond the signatories to the Agreement.[15]

17. The Agreement provides for the payment of $334,495 to Plaintiff's counsel upon implementation of a Plan. The Agreement contains no further information regarding the quantum,

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[13] Settlement Agreement, Tab C to the Affidavit of Andy Seretis sworn March 11, 2019 (the "Seretis Affidavit"), Plaintiff's Supplementary Motion Record, Tab 1C, pp. 24-31.
[14] Kay Transcript, Q. 186-303, pp. 46-84, Supplementary Record of the Defendants, Tab A; Cross-Examination of Mr. Andy Seretis on March 29, 2018 ("Seretis Transcript"), Q. 38-58, pp. 14-23, Supplementary Record of the Defendants, Tab B.
[15] Clauses 10 and 13 of the Settlement Agreement, Tab C to the Seretis Affidavit, Plaintiff's Supplementary Motion Record, Tab 1C, pp. 24-31.

nature or purpose of such payment and the Plaintiff refused to provide any further information regarding the Agreement and in particular this payment.[16]

18. Finally, the Agreement also provides that that Plaintiff, on its own behalf and on behalf of all class members in the Class Actions, agreed not to pursue any further claims against Sears Canada (other than the entitlement to the amounts above), agreed not require any discovery or production from Sears Canada if a Plan is implemented and gave up any right to vote on the Plan.

B. History of the Certification Motion

19. The Plaintiff delivered its Certification motion record in mid-January 2019. The common issues set out in this motion record are attached at **Schedule "E"** to this Factum.

20. In an effort to reach agreement on the certification framework and avoid the necessity of a hearing of the certification motion, the Former Directors approached the Plaintiff regarding certain concerns in respect of the certification framework and proposed amendments as follows:

(a) an amended class definition, which the Plaintiff adopted;

(b) revised wording for proposed common issue number 2 relating to oppression, which the Plaintiff adopted;

(c) revised wording for proposed common issue number 4 regarding damages, as outlined below, which the plaintiff rejected:

> 4. (i) Can damages or compensation be assessed on an aggregate class-wide level? (ii) If so, what is the quantum of any aggregate damages or compensation owed to the Class Members?

(d) revisions to the litigation plan to include certain steps contained in the litigation plan for the Franchise Class Action, and in particular an adjudication of the

[16] Kay Transcript, Q. 186-303, pp. 46-84, Supplementary Record of the Defendants, Tab A; Seretis Transcript, Q. 38-58, pp. 14-23, Supplementary Record of the Defendants, Tab B.

common issues relating to liability and damages in the Franchise Class Action, which the Plaintiff rejected.[17]

21. The Defendant ESL Investments Inc. ("ESL") also requested similar revisions to the litigation plan to address the Plaintiff's failure to include an adjudication of the common issues in the Franchise Class Action, which the Plaintiff rejected.[18]

22. Following this, the Plaintiff delivered a supplementary motion record with an amended notice of motion which incorporated the amended class definition and the amended common issue for oppression requested by the Former Directors, a draft fresh as amended statement of claim and an amended litigation plan.[19]

23. The draft fresh as amended statement of claim, among other things, included a reduction of the claim for damages from $100 million to $80 million and a new allegation that the Former Directors are bound by the Agreement solely on the basis that they filed proofs of claim for indemnity in the *CCAA* proceedings.[20]

24. The Plaintiff amended the proposed common issue in respect of damages from a determination of the quantum of compensation the Former Directors are required to pay to the Proposed Class to a determination of whether the quantum of compensation is the sum of $80 million as set out in the Agreement. [21]

25. The Plaintiff also amended the proposed litigation plan to remove several necessary procedural steps for pleadings, document exchange and management, examinations for

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[17] Letter from Cassels Brock & Blackwell ("Cassels") to Sotos LLP dated March 7, 2019 and Email from Sotos LLP to Cassels dated March 8, 2019, Exhibits A and B to the Birch Affidavit, Responding Motion Record, Tab 2A, pp. 11-13 and Tab 2B p15.
[18] Exhibits B and C to the Shnier Affidavit, ESL Motion Record, Tab 1B, pp. 26-28 and 30-50.
[19] Notice of Motion, Plaintiff's Supplementary Motion Record, Tab 1, pp. 1-7; Exhibits A, B, and D to the Seretis Affidavit, Plaintiff's Supplementary Motion Record, Tabs 2A, 2B, 2D, pp. 10-15, 16-22, and 32-74.
[20] Exhibit D to the Seretis Affidavit, Plaintiff's Supplementary Motion Record, Tab 2D, pp. 32-74. The Plaintiff subsequently filed and served a Fresh as Amended Statement of Claim in Toronto on April 9, 2019.
[21] Amended Notice of Motion, Plaintiff's Supp. MR, Tab 1, pp. 1-7.

discovery, expert reports, and motions. Even without the amendments, the proposed litigation plan already was missing key information on timing regarding notice, pleadings, document production, undertakings and refusals, motions, mediation, pre-trial conferences, and notice of the resolution of the common issues (see **Schedule "F"** to this Factum). The proposed litigation plan further fails to provide a process for dealing with the significant document production discussed by Justice Gray on the earlier partial summary judgment motion, and is silent on the issue of calculating aggregate damages (if available) in respect of the Franchise Class Action claims.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

26. The motion for certification as currently framed should not be granted. In particular:

(a) the proposed common issue in respect of damages is not appropriate for certification as it presupposes a damage amount based on the Agreement and circumvents the requirement to prove the quantum of any harm suffered;

(b) the proposed common issues are insufficient and fail to meet the requirements of fairness and efficiency for certification. By failing to include the common issues on liability and damages as certified in the Franchise Class Action, the proposed common issue on oppression will not meaningfully advance the matter as the determination of liability in the Oppression Class Action is entirely dependent on a finding of liability and an assessment of damages in the Franchise Class Action;

(c) the proposed litigation plan is inadequate and fails to provide a comprehensive and workable method advancing the matter which addresses the complexity of the claims proposed for certification, including the complexities arising from underlying the Franchise Class Action; and

(d) the Plaintiff is not an appropriate representative plaintiff as it is a shell company with no ability to fund costs, including adverse costs awards, and has taken no steps to arrange for any indemnification funding. Further, the Plaintiff may have compromised the rights of the Proposed Class in the *CCAA* proceedings, both in terms of the quantum of their claims and their entitlement to vote on the Plan and to obtain discovery of information from Sears Canada, without apparent notice to the Proposed Class or court approval.

A. The Test for Certification

27. To obtain an order certifying this action, the plaintiff has the burden of establishing that the requirements of s. 5(1) of the *CPA* are met. Namely: (1) the pleadings disclose a cause of action; (2) there is an identifiable class; (3) the claims of the class members raise common issues; (4) a class proceeding would be the preferable procedure for a resolution of the common issues; and (5) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.[22]

28. The Plaintiff bears the evidentiary burden of proving that the proposed class action satisfies each of the prerequisites of certification. In particular, the Plaintiff must show "some basis in fact" for each of the certification criteria other than the requirement that the pleadings disclose a cause of action.[23] The Plaintiff has fallen short of this evidentiary burden in respect of the proposed common issues, the proposed representative plaintiff and the proposed litigation plan.

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[22] *Class Proceedings Act, 1992,* SO 1992, c 6, s. 5(1) ("*CPA*").
[23] *Hollick v. Toronto (City),* 2001 SCC 68 at para. 25, Book of Authorities, Tab 3.

29. The proposed common issues and litigation plan will not meaningfully, fairly, or efficiently advance the Oppression Class Action. The procedure of a class action is meant to level the playing field, not tip the field in the favour of plaintiffs.[24]

B. The Proposed Common Issues

30. The Plaintiff's proposed common issues are listed in **Schedule "C"** and the certified common issues in the Franchise Class Action are listed in **Schedule "D"**

(i) The Common Issues Are Not Appropriate and Insufficient

Common Issue relating to oppression

31. The Oppression Claim asserts various allegations that the conduct of the Former Directors in approving and authorizing the payment of the Dividend unfairly prejudiced the Proposed Class as contingent creditors and precluded them from recovering the damages suffered as a result of the claims asserted in the Franchise Class Action. The issues of liability and damages in the Oppression Class Action are inextricably linked to the issues of liability and damages in the Franchise Class Action. These are gatekeeper issues to the Oppression Claim that have not been addressed in the proposed common issues.

32. The contingent nature of the Oppression Class Action requires a substantive analysis of the strength of their underlying claims in the Franchise Class Action. In limited circumstances, courts have permitted contingent creditors to pursue an oppression claim as complainants provided the contingent creditors demonstrated the validity of their underlying claim[25] and in

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[24] *2038724 Ontario Limited v. Quizno's Canada Restaurant Corporation*, 2010 ONSC 5390 at para. 18, Book of Authorities, Tab 4.

[25] *Tas-Mari Inc. v. DiBattista*Gambin Developments Ltd*., [2009] 97 O.R. (3d) 579 ("*Tas-Mari*") at paras. 94, 123-125 (Sup. Ct.), Book of Authorities, Tab 5, aff'd *Tas-Mari Inc. v. DiBattista*Gambin Developments Ltd*., 2011 ONCA 189, Book of Authorities, Tab 6; *Canadian Opera Co. v. 670800 Ontario Inc.*, [1989] 69 O.R. (2d) 532 (S.C.),Book of Authorities, Tab 7, aff'd *Canadian Opera Co. v. 670800 Ontario Inc.,* [1990] O.J. No. 2270 (Div. Ct.), Book of Authorities, Tab 8.

particular showed that they were more than holders of an uncertain, speculative claim.[26] The Plaintiff must do so here. Further, the reasonable expectations of the Proposed Class, a requisite element of any oppression claim, are determined through a reasonable assessment of the merits of the underlying contingent claim. [27]

33. The Oppression Class Action can only be meaningfully advanced by including in any certification order the common issues on liability and damages as certified in the Franchise Class Action.

Common Issue Related to Damages

34. The assessment of damages in the Oppression Class Action will involve complex legal and factual issues, including an assessment of the damages suffered, if any, in the Franchise Class Action.

35. The court in certifying the Franchise Class Action acknowledged the complexity of damages calculations and held:

> Assuming the plaintiff succeeds on the common issues, or some of them, the measure of damages for each member of the class will depend not only on the effect of Sears' conduct, but on the individual circumstances of each dealer....There will likely also be damages that must be determined individually."[28]

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[26] *Gestion Trans-Tek Inc. v. Shipment Systems Strategies Ltd*, [2001] O.J. No. 4710 at para. 33 (Sup. Ct.), Book of Authorities, Tab 9; *Tannis Trading Inc. v. Coldmatic Refrigeration of Canada Ltd.*, 2008 CarswellOnt 9688 at paras. 33-35 (Sup. Ct.), Book of Authorities, Tab 10, aff'd *Tannis Trading Inc. v. Coldmatic Refrigeration of Canada Ltd*., 2010 ONSC 5747 at para. 21, Book of Authorities, Tab 11; *AE Realisations (1985) Ltd. v. Time*, [1994] S.J. No. 684 (Q.B.) ("*AE Realisations*"), Book of Authorities, Tab 12.

[27] *Stabile v. Milani*, [2004] O.J. No. 2804 at para. 46 (C.A.), Book of Authorities, Tab 13; *Levy-Russell Ltd. v. Shieldings Inc.*, [2004] O.J. No. 4291("*Levy-Russell*") at. paras. 163-165 (Sup. Ct.) (Commercial List), Book of Authorities, Tab 14.

[28] Certification Decision at para. 64, Book of Authorities, Tab 1.

36. The Plaintiff's proposed common issue in respect of damages is not appropriate for certification because it presupposes a damage amount, $80 million, based on the Agreement, circumvents the requirement to prove the quantum of damages and does not meaningfully advance the determination of the complex damages in the Oppression Class Action.

37. The Agreement set the Franchisee Class Action class members claims in the *CCAA* proceeding at $80 million and *only* for the purposes of any Plan implemented. The Former Directors are not parties to the Agreement, are not bound by its terms and the Agreement has no effect on the issues of liability or damages in the Class Actions.

38. Accordingly, the Former Directors propose that the following common issue, as they previously proposed to the Plaintiff, be certified:

> Can damages or compensation be assessed on an aggregate class-wide level? If so, what is the quantum of any aggregate damages of compensation owed to the Class Members.

C. The Litigation Plan Is Unworkable

39. The requirement of a workable litigation plan serves a two-fold purpose: it assists the court in determining whether the class proceeding is indeed the preferable procedure; and it allows the court to determine whether the litigation itself is manageable in its constituted form. The manageability must be assessed in the context of the entirety of the litigation, not just a common issue trial. A workable plan must set out a comprehensive plan for advancing the action and provide sufficient detail which corresponds to the complexity of the action.[29]

40. The proposed litigation plan fails to account for the complexity arising from the related Franchise Class Action. The Plaintiff has made clear that it does not intend to litigate the underlying claim in the Franchise Class Action, which is fatal for the viability of the proposed

[29] *Carom v. Bre-X Minerals Ltd*., [1999] O.J. No. 1662 at para. 100 (Sup. Ct.), Book of Authorities, Tab 15.

litigation plan. The Plaintiff cannot simply piggy-back on the three other Sears insolvency proceedings in respect of the litigation plan and any proposed joint trial. The factual and legal issues in this proceeding are distinct from and more complex than those in the other three cases. The document production required to answer the Franchise Class Action common issues, as discussed by Justice Gray, is voluminous and addresses dealer-related inquiries that are not part of the other three proceedings. The Plaintiff cannot simply punt the substance of the procedural steps to an unknown joint trial protocol for an inapplicable joint trial. There must be substance to the litigation plan that reflects the unique nature of the class action. Proposing to remedy the deficiencies in a future judicial conference is not appropriate where the deficiencies are substantial, as they are here, as it renders the purpose of section 5(1)(e)(ii) of the *CPA* ineffective.[30]"

41. A workable litigation plan provides a schedule for each procedural step, the notice program, the document production and examinations for discovery will be governed, an orderly exchange of expert reports and cross-examination thereon, as well as other class proceeding steps, including but not limited to motions arising from all of the steps addressed above.

42. The proposed litigation seeks to have the common issues, except damages, tried together with three other actions without any regard for the unique procedural aspects of a class action or the necessary relationship with the Franchise Class Action. Many of these steps were previously included in either the Plaintiff's initial litigation plan from January 2019[31] or the Plaintiff's litigation plan for the Franchise Class Action.[32] Their absence from the current proposed litigation plan, and particularly the absence of any discussion of timing for those steps, makes the plan unworkable.

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[30] *Robinson v. Saskatoon (City)*, 2010 SKQB 98 at para. 76, Book of Authorities, Tab 16.
[31] Exhibit K to the Kay Affidavit, Plaintiff's Motion Record, Tab 2K, pp. 184-189.
[32] Exhibit K to the Birch Affidavit, Responding Motion Record, Vol. I, Tab K, pp. 256-262.

43. Complex franchise-related class actions take a significant amount of time to be managed to resolution. The Franchise Class Action was not ready for trial after three years. The Pet Valu class action took over seven years to be resolved by way of summary judgment.[33] The General Motors class action took roughly five years to be resolved at trial. The unrealistic timelines in the perfunctory proposed litigation plan demonstrate that the Plaintiff has not met its obligation under section 5(1)(e)(ii) of the *CPA*. The litigation plan should not condense timelines or abrogate important procedural steps to rush the litigation process at the expense of fair, efficient, and effective litigation management.

D. The Concerns Regarding The Plaintiff Being An Appropriate Representative Plaintiff

44. Under section 5(1)(e) of the *CPA*, a court shall only certify a class proceeding if there is a representative plaintiff who would fairly and adequately represent the interests of the class, has no conflicting interest with the interests of other class members, and has produced a workable litigation plan.

45. The Plaintiff does not satisfy the requirements for a representative plaintiff since it has not produced a workable litigation plan, has failed to ensure proper notice and approval of the Agreement which compromises certain rights of the members of the Proposed Class and lacks any ability to bear any costs, including any adverse costs award.

46. In assessing the adequacy of the proposed representative plaintiff to fairly represent the interests of the class, the court may look to a number of factors, including conduct, motivation and the capacity of the plaintiff to bear any costs.[34]

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[33] *1250264 Ontario Inc. v. Pet Valu Canada Inc*., 2016 ONCA 24, Book of Authorities, Tab 17. The case was resolved when the Ontario Court of Appeal granted the defendant franchisor's appeal.

[34] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 41, Book of Authorities, Tab 18; *Fehringer v. Sun Media Corp*., [2002] O.J. No. 4110 at para. 35 (Sup. Ct.), Book of Authorities, Tab 19, aff'd *Fehringer v. Sun Media Corp*., [2003] O.J. No. 3918 (Div. Ct.), Book of Authorities, Tab 20. See also

47. It is undisputed that the proposed representative plaintiff is a defunct company that has no assets or revenue, has not availed itself of any funding for costs, has no means of satisfying an adverse costs award and can provide no explanation as to how it will pay any adverse costs award.[35]

48. Although the court at the certification motion in the Franchise Class Action declined to disqualify the Plaintiff as an appropriate representative plaintiff on the basis that it does not have the ability to pay costs,[36] the court specifically noted that "[i]t is always open to the defendants to move...for security for costs, subject to any special considerations that apply to class proceedings."

49. However, unlike the Franchise Class Action, it is not open to the Former Directors to pursue security for costs against the Plaintiff in the Oppression Class Action because this remedy is prohibited by statute.[37]

50. Further, in light of developments in other cases following the certification decision in the Franchise Class Action, the capacity of a representative plaintiff to bear costs has become a more pressing issue. There have been a number of other franchise class actions commenced by corporate representative plaintiffs, also represented by Class Counsel, where successful franchisor defendants have been unable to collect substantial cost awards due to the representative plaintiff being judgment-proof and without third party indemnification.[38]

Poulin v. Ford Motor Co. of Canada Ltd., [2006] O.J. No. 4625 at para. 93 (Sup. Ct.), Book of Authorities, Tab 21; *Dumoulin v. Ontario*, [2005] O.J. No. 3961 at para. 46 (Sup. Ct.), Book of Authorities, Tab 22.

[35] Kay Transcript, Q. 95, p. 24, Supplementary Record of the Defendants, Tab A; Exhibit C to the Shnier Affidavit, ESL Motion Record, Tab 1C, pp. 30-32.

[36] Certification Decision at paras. 80-83, Book of Authorities, Tab 1.

[37] Section 242(3) of the *Canada Business Corporations Act*, RSC 1985, c. C-44 provides that "complainant is not required to give security for costs in any application made or action brought or intervened in under [the oppression remedy]."

[38] Birch Affidavit, Responding Motion Record, Tab 1, paras. 22-30, pp. 5-7, and Exhibits G, H, I, J to the Birch Affidavit, Responding Motion Record, Tabs 1G, 1H, 1I, and 1J, pp. 70-121.

51. Finally as regards the Agreement, the Plaintiff has not sought or obtained court approval of the Agreement, which comprises the rights of the class members, as required under the CPA[39] and there is no evidence that the Plaintiff has provided the required notice to the Proposed Class.

52. Notwithstanding that the Plaintiff represented in the Agreement that it had the authority to enter into, execute and deliver the Agreement, that no further consent was required, that it had explained the effects of the Settlement Agreement to the Oppression Class Action class members, and that the Oppression Class Action class members had received the benefit of counsel, there is no evidence that this occurred and the Plaintiff refused under cross-examination to respond to any questions regarding notice, explanation of the effects or authorization, or provide any further information.[40]

53. Further, the Agreement provides for the payment of $334,495 to Plaintiff's counsel upon implementation of a Plan. The nature and the purpose of such payment remains unknown and the Plaintiff refused to provide any further information regarding this payment.[41]

54. If the payment is for the benefit of the Plaintiff, either wholly or partially, this places the Plaintiff in a conflict of interest with the members of the Proposed Class. If the payment is meant to be distributed among the Proposed Class, it is a partial settlement of the Oppression Class Action as against Sears Canada which requires court approval under the CPA, which was not obtained. Finally, if the payment is for the benefit of class counsel, it is a fee or disbursement that requires court approval under the CPA, which was not obtained. In all cases, the Plaintiff should

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[39] *CPA,* s. 29(2) and (4)*; Robertson v. ProQuest Information and Learning Company*, 2011 ONSC 1647 at para. 8, Book of Authorities, Tab 23; *Keyton v Canada Lithium Corp*., 2016 ONSC 7354, Book of Authorities, Tab 24.

[40] Kay Transcript, Q. 186-303, pp. 46-84, Supplementary Record of the Defendants, Tab A; Seretis Transcript, Q. 38-58, pp. 14-23, Supplementary Record of the Defendants, Tab B.

[41] Kay Transcript, Q. 186-303, pp. 46-84, Supplementary Record of the Defendants, Tab A; Seretis Transcript, Q. 38-58, pp. 14-23, Supplementary Record of the Defendants, Tab B.

ensure it has proper authority to agree to such payment and provides adequate disclosure to the Proposed Class and any failure to do so is a serious concern.

55. The competence, ability to comply with duties, and frankness of the Plaintiff is an important factor in determining its suitability as a representative plaintiff.[42] If the Plaintiff has misstated its authority and not obtained court approval or failed to adequately inform class members, it cannot be an appropriate representative plaintiff.

56. As a result of the inability of the Plaintiff to bear any costs, the circumstances of the Agreement and the unworkable litigation plan, the Plaintiff may not be an appropriate representative plaintiff to fairly and adequately represent the interest of the Proposed Class and the Oppression Class Action cannot therefore not be certified as framed.

PART IV - ORDER REQUESTED

57. For the above reasons, the Former Directors submit that this action cannot be certified as a class proceeding as proposed. The Former Directors request that this Honourable Court dismiss the Plaintiff's motion for certification and award costs in favour of the Former Directors

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of April, 2019.

Cassels Brock & Blackwell LLP

CASSELS BROCK & BLACKWELL LLP

[42] *6323588 Canada Ltd. v. 709528 Ontario Ltd.*, 2012 ONSC 2985 at para. 100, Book of Authorities, Tab 25.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *1291079 Ontario Ltd. v. Sears Canada Inc.*, 2014 ONSC 5190
2. *1291079 Ontario Limited v Sears Canada Inc.*, 2016 ONSC 7451
3. *Hollick v. Toronto (City),* 2001 SCC 68
4. *2038724 Ontario Limited v. Quizno's Canada Restaurant Corporation*, 2010 ONSC 5390
5. *Tas-Mari Inc. v. DiBattista*Gambin Developments Ltd.*, [2009] 97 O.R. (3d) 579 (Sup. Ct.)
6. *Tas-Mari Inc. v. DiBattista*Gambin Developments Ltd.*, 2011 ONCA 189
7. *Canadian Opera Co. v. 670800 Ontario Inc.*, [1989] 69 O.R. (2d) 532 (S.C.)
8. *Canadian Opera Co. v. 670800 Ontario Inc.*, [1990] O.J. No. 2270 (Div. Ct.)
9. *Gestion Trans-Tek Inc. v. Shipment Systems Strategies Ltd*, [2001] O.J. No. 4710 (Sup. Ct.)
10. *Tannis Trading Inc. v. Coldmatic Refrigeration of Canada Ltd.*, 2008 CarswellOnt 9688 (Sup. Ct.)
11. *Tannis Trading Inc. v. Coldmatic Refrigeration of Canada Ltd.*, 2010 ONSC 5747
12. *AE Realisations (1985) Ltd. v. Time*, [1994] S.J. No. 684 (Q.B.)
13. *Stabile v. Milani*, [2004] O.J. No. 2804 (C.A.)
14. *Levy-Russell Ltd. v. Shieldings Inc.*, [2004] O.J. No. 4291 (Sup. Ct.) (Commercial List)
15. *Carom v. Bre-X Minerals Ltd.*, [1999] O.J. No. 1662 (Sup. Ct.)
16. *Robinson v. Saskatoon (City)*, 2010 SKQB 98
17. *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2016 ONCA 24
18. *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46
19. *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110 (Sup. Ct.)
20. *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918 (Div. Ct.)
21. *Poulin v. Ford Motor Co. of Canada Ltd.*, [2006] O.J. No. 4625 (Sup. Ct.)
22. *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (Sup. Ct.)
23. *Robertson v. ProQuest Information and Learning Company*, 2011 ONSC 1647
24. *Keyton v Canada Lithium Corp.*, 2016 ONSC 7354
25. *6323588 Canada Ltd. v. 709528 Ontario Ltd.*, 2012 ONSC 2985

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

CLASS PROCEEDINGS ACT, 1992
S.O. 1992 c. 6

Certification
5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings disclose 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.

Discontinuance, abandonment and settlement
29 (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate. 1992, c. 6, s. 29 (1).

Settlement without court approval not binding
(2) A settlement of a class proceeding is not binding unless approved by the court. 1992, c. 6, s. 29 (2).

Effect of settlement
(3) A settlement of a class proceeding that is approved by the court binds all class members. 1992, c. 6, s. 29 (3).

Notice: dismissal, discontinuance, abandonment or settlement
(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

(a) an account of the conduct of the proceeding;
(b) a statement of the result of the proceeding; and
(c) a description of any plan for distributing settlement funds.

CANADA BUSINESS CORPORATIONS ACT
R.S.C. 1985, c. C-44

Definitions
238 In this Part,

action means an action under this Act; (*action*)

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. (*plaignant*)

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.

Powers of court
(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;
(b) an order appointing a receiver or receiver-manager;
(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
(d) an order directing an issue or exchange of securities;
(e) an order appointing directors in place of or in addition to all or any of the directors then in office;
(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;
(g) an order directing a corporation, subject to subsection (6), or any other person, to pay a security holder any part of the monies that the security holder paid for securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 or an accounting in such other form as the court may determine;
(j) an order compensating an aggrieved person;
(k) an order directing rectification of the registers or other records of a corporation under section 243;
(l) an order liquidating and dissolving the corporation;
(m) an order directing an investigation under Part XIX to be made; and
(n) an order requiring the trial of any issue.

Duty of directors
(4) If an order made under this section directs amendment of the articles or by-laws of a corporation,

(a) the directors shall forthwith comply with subsection 191(4); and
(b) no other amendment to the articles or by-laws shall be made without the consent of the court, until a court otherwise orders.

Exclusion
(5) A shareholder is not entitled to dissent under section 190 if an amendment to the articles is effected under this section.

Limitation
(6) A corporation shall not make a payment to a shareholder under paragraph (3)(f) or (g) if there are reasonable grounds for believing that

(a) the corporation is or would after that payment be unable to pay its liabilities as they become due; or
(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

Alternative order
(7) An applicant under this section may apply in the alternative for an order under section 214.

No security for costs

242 (3) A complainant is not required to give security for costs in any application made or action brought or intervened in under this Part.

SCHEDULE "C"

PROPOSED COMMON ISSUES FOR OPPRESSION CLASS ACTION

1) 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?

2) 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**")?

3) 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?

4) 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).

SCHEDULE "D"

CERTIFIED COMMON ISSUES FROM THE FRANCHISE CLASS ACTION

(a) Has Sears Canada at any time since July 5, 2011 breached their obligations under the Dealer Agreements with each of the class members, including the asserted obligation to exercise contractual discretion in good faith, by:

i. Failing to increase commission paid to class members;
ii. Changing commissions paid to class members in August 2012;
iii. Selling directly to customers located within the class members' Market Areas (as defined in their respective Dealer Agreements), or, alternatively, by failing to pay commission to the class members for goods sold directly to customers located within the class members' Market Areas through direct channels;
iv. Changing local store advertising subsidies;
v. Failing to provide a monthly accounting of how compensation was calculated; or
vi. Imposing handling fees payable by customers on catalogues sales made by dealers?

(b) Has Sears Canada been unjustly enriched by any of the acts or omissions in (a) (i) to (vi) above?

(c) If liability is established, what is the appropriate measure of damages or compensation, if any, for the class?

(d) Is Sears Canada a "franchisor" of "franchisor's associate" within the meaning of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (*Arthur Wishart Act)*? If so:

i. Did Sears Canada breach the duty of fair dealing under s. 3 of the *Arthur Wishart Act* by any of the acts or omissions set out in (a) (i) to (vi) above, and, if so, what are the damages for the class?
ii. Was Sears Canada required to deliver to each class member a disclosure document within the meaning of s. 5 of the *Arthur Wishart Act* at least fourteen days before the class member signed a Dealer Agreement or any material amendment thereof, and if so, were the provisions of s.5(3) of the *Act* otherwise complied with? If s.5 was not complied with, what are the damages for the class under s.7?

SCHEDULE "E"

ORIGINAL COMMON ISSUES PROPOSED BY PLAINTIFF (JANUARY 2019)

1) 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?

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

3) 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?

4) If so, what is the quantum of such compensation?

SCHEDULE "F"

NECESSARY STEPS IN THE OPPRESSION CLASS ACTION LITIGATION PLAN

Event	Proposed Timing
Settlement of Certification Order	*TBD*
Provision of Contact Information for Class Members	*Within ten (10) days of Certification Order*
Delivery of Notice	*Not discussed.*
Statement of Defence	*Not discussed.*
Reply	*Not discussed*
Discovery Plan	*Within thirty (30) days of Certification Order*
Notice Period for Opting Out	*Not discussed* ***[***
Document Production	*Not discussed.*
Examinations for Discovery	*Not discussed.*
Undertakings and Refusals	*Not discussed, does not account for motions concerning undertakings and refusals*
Exchange of Expert Reports	*Not discussed*
Cross-Examinations on Expert Reports	*Not discussed.*
Motions	*Not discussed.*
Mediation.	*Not discussed.*
Pre-Trial Conference	*Not discussed.*
Common Issues Trial	*Not discussed.*
Notice of Resolution of the Common Issues	*Not discussed.*
Conference on Individual Issues Trial	*Within 45 days of a decision on the common issues trial.*
Individual Issues Trial	*Unknown*

1291079 ONTARIO INC. Plaintiff	and	SEARS CANADA INC. ET AL. Defendant

Court File No. CV-19-617792-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

RESPONDING FACTUM OF THE DEFENDANTS WILLIAM C. CROWLEY, WILLIAM R. HARKER, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, JAMES MCBURNEY and DOUGLAS CAMPBELL
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