

**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, LP, EDWARD S. LAMPERT, WILLIAM R. HARKER
and WILLIAM C. CROWLEY

Defendants

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

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 COMPEL PARTICULARS)**

March 8, 2019

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TO: **THE LITIGATION SERVICE LIST**

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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Defendants

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
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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

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Proceeding under the Class Proceedings Act, 1992

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PART I - INTRODUCTION

1. The ESL Parties face four actions in connection with a dividend Sears Canada declared in 2013. The ESL Parties require particulars of each of the statements of claim of the Monitor and the Litigation Trustee to defend the claims.
2. The ESL Parties served demands for particulars on the plaintiffs on January 18, 2019. The Litigation Trustee and the Monitor provided inadequate responses.
3. The ESL Parties are entitled to the material facts underlying the causes of action alleged against them and to know the case they must meet. The plaintiffs' statements of claim—as supplemented by the responses to the demands for particulars—deprive them of that entitlement.

PART II - SUMMARY OF FACTS

A. Background

4. 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 (“**CCAA**”).
5. On December 19, 2018, the Litigation Trustee and the Monitor filed statements of claim against the ESL Parties alleging a number of causes of action related the Sears Canada board's unanimous authorization of a dividend in 2013 (the “**2013 Dividend**”).¹

B. Demands for Particulars

6. On January 18, 2019, the ESL Parties delivered demands for particulars to the Litigation Trustee and the Monitor. Specifically, the ESL Parties sought particulars respecting:

¹ Statement of Claim of the Litigation Trustee, issued December 19, 2018 and Statement of Claim of the Monitor, issued December 19, 2018. ESL Motion Record re Particulars from Litigation Trustee and Monitor, tabs 2 and 5 [MR].

- (a) **Litigation Trustee:** the identity and expectations of the “stakeholders” and “creditors” that were allegedly oppressed by the payment of the 2013 Dividend, the date of the alleged oppression, and whether those parties had claims as creditors at the time the oppression occurred that remain unpaid today.²
- (b) **Monitor:** the identity of the “creditors” that the Monitor alleges Sears Canada intended to defraud, defeat or delay through the payment of the 2013 Dividend, when those creditors’ claims originated, and whether those same claims remained unpaid as of the date of the CCAA proceeding.³

C. Responses to the Demands for Particulars

(a) Litigation Trustee

7. On January 31, 2019, the Litigation Trustee responded to the demand for particulars. Rather than particularizing the circumstances and interests of those allegedly oppressed, the response asserted the broadest possible definition of “stakeholder” to include virtually any person or entity with a financial connection to Sears Canada since December 2013 onward. The Litigation Trustee’s response included the following:

- (a) the “stakeholders” whose interests were oppressed by the payment of the 2013 Dividend are “all of Sears Canada’s stakeholders, including its creditors, landlords, employees,

² ESL Parties’ demand for particulars from the Litigation Trustee, served January 18, 2019 (“**Demand of Litigation Trustee**”). *MR re Particulars at Tab 3.*

³ ESL Parties’ demand for particulars from the Monitor, served January 18, 2019 (“**Demand of Monitor**”). *MR re Particulars at Tab 6.*

pensioners, and the holders of its securities” (excluding Sears Holdings Corporation and the ESL Parties);⁴

- (b) the “creditors” whose interests were oppressed by the payment of the 2013 Dividend are “all of the Stakeholders of Sears Canada”, including those detailed above;⁵
- (c) the “creditors” who will benefit from the return of the 2013 Dividend funds to the Sears Canada estate are “all of the unsecured creditors of Sears Canada”;⁶
- (d) the “creditors” reasonably expected “that the power of Sears Canada’s directors would be exercised [...] 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”;⁷ and
- (e) the interests of the creditors “included Sears Canada’s ability to satisfy the obligations and debts owed to the Stakeholders or that would be owing to them by Sears Canada and the preservation of capital for that purpose.”⁸

8. While the Litigation Trustee responded that the alleged oppression occurred in “later 2013, in particular in November 2013 and early December 2013”,⁹ no particulars were provided respecting which, if any, of the “creditors” had claims as creditors at the time the alleged oppression occurred that remain unpaid today.

⁴ Response to the demand for particulars by the Litigation Trustee, served January 31, 2019 at para 1.1(a) (“**Litigation Trustee’s Response**”). *MR re Particulars at Tab 4*, pp 47-48.

⁵ Litigation Trustee’s Response at para 2.1(b). *MR re Particulars at Tab 4*, pp 49-51. See also responses 4.1(a),(b) and 5.1(b), where the Litigation Trustee states “[t]he creditors referred to [...] are the Stakeholders”.

⁶ Litigation Trustee’s Response at para 5.1(a). *MR re Particulars at Tab 4*, p 51

⁷ Litigation Trustee’s Response at para 3.1(a). *MR re Particulars at Tab 4*, p 49.

⁸ Litigation Trustee’s Response at para 3.1(b). *MR re Particulars at Tab 4*, p 50.

⁹ Litigation Trustee’s Response at para 2.1(a). *MR re Particulars at Tab 4*, pp 48-49.

(b) Monitor

9. On January 31, 2019, the Monitor provided its response to the demand for particulars.

10. The Monitor responded that the “creditors” Sears Canada intended to defraud, defeat or delay through the payment of the 2013 Dividend were “the present and future general body of creditors as a whole of Sears Canada Inc. at the time the 2013 Dividend was declared, including pension beneficiaries, and not any specific creditor or single creditor”.¹⁰

11. The Monitor provided no particulars respecting the date from which any of those creditors’ claims originated and whether those same claims remain unpaid as of the CCAA proceeding.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

A. Litigation Trustee’s Claim

12. The Litigation Trustee’s statement of claim fails to particularize the alleged reasonable expectations of each allegedly oppressed “creditor”, the date those expectations arose, and whether those creditors have claims that remain unpaid.

13. In its response to the demand for particulars, the Litigation Trustee asserted that “creditors” included all “stakeholders” of Sears Canada existing at all times from the declaration of the 2013 Dividend to the present, namely “all of Sears Canada’s stakeholders, including its creditors, landlords, employees, pensioners, and the holders of its securities” (excluding Sears Holdings Corporation and the ESL Parties).¹¹ This is incoherent because this broadly defined group of stakeholders will not have identical reasonable expectations, nor will its members all have the same claim in damages. A creditor who extended credit on the day before the declaration of the

¹⁰ Response to the demand for particulars by the Monitor, served January 31, 2019 at para 1.1(a) (“**Monitor’s Response**”). *MR re Particulars at Tab 7*, p 94.

¹¹ Monitor’s Response at para 1.1(a). *MR re Particulars at Tab 4*, pp 47-48.

2013 Dividend will have different expectations than one who extended credit the day after. A creditor whose debt was entirely paid by Sears Canada is in a different position than one whose debt remains outstanding.

14. It is established authority that “particular circumstances give rise to particular expectations”.¹² Indeed, different stakeholders will often have conflicting expectations, and whether an expectation is reasonable depends in large part on the fact-specific relationship between the parties.¹³

15. The Litigation Trustee must particularize the unique position of the stakeholders it alleges have been oppressed so that the ESL Parties may assess and plead to their unique reasonable expectations.¹⁴ Consider the dramatically different expectations of the following groups of “stakeholders” identified in the Litigation Trustee’s claim:

- (a) **“Stakeholders” owed a debt on the date the 2013 Dividend was declared but who were later repaid.** These “stakeholders” could have no prejudiced interest or thwarted reasonable expectations, and therefore no recourse to the oppression remedy. A repaid creditor has suffered no loss and has no cause of action.¹⁵
- (b) **“Stakeholders” whose financial relationship with Sears Canada began *after* the 2013 Dividend.** These “stakeholders” may have a claim against the Sears Canada estate, but could have no reasonable expectations related to the 2013 Dividend since they conducted

¹² *BCE Inc, Re*, 2008 SCC 69 at para 63 [*BCE*]. Omitted from the Book of Authorities of the ESL Parties (“BOA”) pursuant to the Commercial List Authorities Book practice direction.

¹³ *BCE*, at paras 64, 70-88.

¹⁴ *Cohen v Cambridge Mercantile Corp*, [2007] OJ No 2305 (ON SCJ) at para 36 [*Cohen*]. BOA at Tab 2.

¹⁵ The oppression remedy seeks to put the plaintiff back in the position they were in before the oppression: *Nanef v Con-Crete Holdings Ltd*, 1995 OJ No 1377 (ONCA) at para 40. Omitted from the BOA pursuant to the Commercial List Authorities Book practice direction.

business with Sears Canada with full knowledge of the alleged “oppressive act”.¹⁶ These stakeholders would include suppliers who delivered goods and investors who acquired securities on the day before Sears Canada’s CCAA filing. Clearly, these stakeholders have no cause of action under the oppression remedy for a dividend paid nearly four years before their relationship with Sears Canada began.

- (c) **“Stakeholders” owed a debt on the date the 2013 Dividend was declared but who failed to demand accelerated payment.** “Stakeholders” with an option to call or accelerate their outstanding debt, or to otherwise mitigate their risk of loss, and who continued to conduct business with Sears Canada after the 2013 Dividend could have greatly reduced or no reasonable expectations related to the 2013 Dividend.

16. These examples illustrate that a number of considerations are material, including:

- (a) what each “stakeholder” knew about Sears Canada’s financial condition at the time the stakeholder’s claim arose;
- (b) what each “stakeholder” knew about the 2013 Dividend;
- (c) what each “stakeholder” knew about the risks associated with extending credit to the company; and
- (d) what steps each “stakeholder” could take to protect its own interests.

17. The Litigation Trustee must therefore particularize the **identity** of each allegedly oppressed party, **when** each party’s claim arose, whether the party’s debt has been **repaid**, and the particular alleged **reasonable expectations** of similarly situated parties.

¹⁶ *Apotex Inc v Laboratoires Fournier SA*, [2006] OJ No 4555 (ON SCJ) at paras 39-40. BOA at Tab 1.

B. Monitor's Claim

18. The Monitor's statement of claim omits material facts respecting whether the creditors it alleges Sears Canada intended to defraud, defeat or delay under s. 96(1)(b)(ii)(B)¹⁷ of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") are creditors with provable claims in the CCAA proceeding, and the date that those unpaid claims arose. As the Monitor has the burden of proving intent, it has an obligation under R. 25.06(8) of the *Rules of Civil Procedure* to provide full particulars:

Nature of Act or Condition of Mind

(8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.¹⁸

19. The Monitor alleges baldly at paragraph 64 of its statement of claim that "Sears knew or recklessly disregarded the fact that the 2013 Dividend would defraud, defeat or delay Sears' creditors."¹⁹

20. The Monitor's response to the ESL Parties' demand for particulars failed to particularize "creditors", instead only providing the following sweeping description: "the present and future general body of creditors as a whole of Sears Canada Inc. at the time the 2013 Dividend was declared, including pension beneficiaries, and not any specific creditor or single creditor".²⁰

21. The Monitor's claim under s. 96(1) cannot include every "present and future" creditor of Sears Canada at the time of the 2013 Dividend for several reasons.

¹⁷ The cause of action relied on by the Monitor.

¹⁸ *Rules of Civil Procedure*, RRO 1990, Reg 194, 25.06(8).

¹⁹ Statement of Claim of the Monitor, issued December 19, 2018 at para 64. *MR re Particulars at Tab 5*, p 80.

²⁰ Monitor's Response at para 1.1(a). *MR re Particulars at Tab 7*, p 94.

22. First, s. 96(1) of the BIA requires the Monitor to prove that Sears Canada, by paying the 2013 Dividend, intended to defraud, defeat or delay a creditor with a *claim provable* in the CCAA proceedings, i.e. a claim existing at the time of insolvency. Section 96(1)(b)(ii)(B) provides as follows:

Transfer at undervalue

96(1) [...]

(B) the debtor intended to defraud, defeat or delay a creditor.²¹

23. “Creditor” is a defined term under the BIA:

Definitions

creditor means a person having a claim provable as a claim under this Act;²²

24. A “claim provable” is identified at s. 121(1) of the BIA:

Claims provable

121 (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt’s discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.²³

25. The Sears Canada directors cannot have defrauded, defeated or delayed creditors in the instance that those creditors’ claims were satisfied after the company paid the 2013 Dividend. The ESL Parties are entitled to particulars as to which of the group of “present and future” creditors has been paid and who therefore does not have a *claim provable*.

²¹ BIA, s 96(1)(b)(ii)(B).

²² BIA, s 2.

²³ BIA, s 121(1). See also the definition in s. 2.

26. Second, the alleged “creditors” in the Monitor’s claim may include creditors with *claims provable* arising *after* Sears Canada declared the 2013 Dividend, and which may not have been known or foreseeable to the directors. The ESL Parties are entitled to the defence that such claims could not have figured in the contemplation of the directors at the time the 2013 Dividend was paid. In considering a transfer at undervalue allegation, a court must ascertain the transferor’s intention at the time of the transfer in light of the information known at that time.²⁴ A claim that is outside the contemplation of the directors, or that is too remote to be in the contemplation of the directors, cannot ground the intention requirement.²⁵ Accordingly, the date that particular creditors’ unpaid claims arose is a material fact.

27. The Monitor must therefore particularize **when** creditors’ claims arose and whether those claims were **outstanding** as of the commencement of the CCAA proceeding.

²⁴ *Montor Business Corp. (Trustee of) v. Goldfinger*, 2013 ONSC 6635 at para 272, varied on other grounds. BOA at Tab 6.

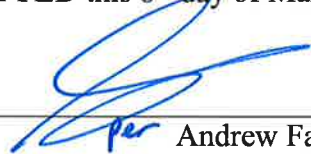
²⁵ See *Genereux v Carlstrom*, [2002] OJ No 1841 (ON SCJ) at para 39 citing *Buckland v Rose*, [1859] Ch 440 (UC Ch) at p 442 for a discussion of the intention in relation to known future creditors. BOA at Tab 3. See also *Polsinelli v Polsinelli*, [1991] WDFL 795 (OCJ Gen Div) at paras 38-39. BOA at Tab 7.

PART IV - ORDER REQUESTED

28. The ESL Parties seek an order compelling further and better particulars from the Litigation Trustee and the Monitor.

29. The ESL Parties also seek their costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of March, 2019.



per Andrew Faith



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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Apotex Inc v Laboratories Fournier SA*, [2006] OJ No 4555 (ON SCJ)
2. *Cohen v Cambridge Mercantile Corp*, [2007] OJ No 2305 (ON SCJ)
3. *Davidson v Canada (Attorney General)*, 2015 ONSC 8008
4. *Genereux v Carlstrom*, [2002] OJ No 1841 (ON SCJ)
5. *Montor Business Corp. (Trustee of) v Goldfinger*, 2013 ONSC 6635
6. *Pennyfeather v Timminco Ltd*, 2011 ONSC 4257
7. *Polsinelli v Polsinelli*, [1991] WDFL 795 (OCJ Gen Div)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Rules of Civil Procedure, RRO 1990, Reg 194

NATURE OF ACT OR CONDITION OF MIND

25.06(8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. O. Reg. 61/96, s. 1.

[...]

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3

DEFINITIONS

2 In this Act,

[...]

creditor means a person having a claim provable as a claim under this Act; (créancier)

[...]

TRANSFER AT UNDERVALUE

96 (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

- (a) the party was dealing at arm’s length with the debtor and
 - (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

- (ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and
- (iii) the debtor intended to defraud, defeat or delay a creditor; or
- (b) the party was not dealing at arm's length with the debtor and
 - (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or
 - (ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and
 - (A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or
 - (B) the debtor intended to defraud, defeat or delay a creditor.

[...]

CLAIMS PROVABLE

121 (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[...]

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. et al.

Defendants

Court File No. CV-18-00611219-00CL

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**

**FACTUM OF THE ESL PARTIES
(RE PARTICULARS MOTION)**

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