

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SEARS CANADA INC., CORBEIL ELECTRIQUE INC.,
S.L.C. TRANSPORT INC., THE CUT INC., SEARS CONTACT SERVICES INC.,
INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM
TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC.,
173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711
CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531
CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

Applicants

**FACTUM OF THE RESPONDENTS SEARS HOLDINGS CORPORATION and
SEARS, ROEBUCK AND CO.**

(Motion re Litigation Trustee Order, returnable March 2, 2018)

DATE: March 1, 2018

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Corporation, Sears, Roebuck and Co. et al.

PART I - OVERVIEW

1. On February 9, 2018 representative counsel for the retirees and former employees (the “**Representative Counsel**”) of certain debtors companies (the “**Sears Canada Entities**”) in the *Companies’ Creditors Arrangement Act* proceedings (the “**CCAA Proceedings**”) brought a motion for the appointment of a litigation trustee with an extraordinarily broad mandate (the “**Litigation Trustee**”). The motion met with resistance from stakeholders such as the Superintendent and the Administrator of the Sears Canada Pension Plan, who filed a joint factum in opposition. The Monitor, in its 12th Report, similarly indicated that the proposed motion was premature, due to a lack of consensus among creditor groups and ambiguity surrounding the mandate of the Litigation Trustee.

2. At a chambers hearing on February 15, 2018, counsel for all stakeholders were encouraged by Justice Hainey to consult and reach agreement on a form of order agreeable to stakeholders. Notwithstanding the Court’s express encouragement, counsel for the Equity Holders (as defined below) were not invited to participate in any discussions to achieve a consensus order.

3. On February 22, 2018 the Court was advised that the motion for the proposed Litigation Trustee (the “**Litigation Trustee Motion**”) would be brought back on, returnable March 2, 2018. Stakeholders were not given advance notice of this development, and there was no discussion of the motion in the 13th Report of the Monitor.

4. On the evening of February 28, 2018, a revised form of proposed order was circulated to counsel for the Sears Holdings Corporation (“**SHC**”) and Mr. Edward Lampert and ESL Investments et al. (collectively with SHC, the “**Equity Holders**”).

5. In response to the Litigation Trustee Motion, and on the basis of the revised form of Order, SHC makes the following submissions:

- i) SHC does not oppose the ability of various creditors to organize an *ad hoc* committee to consider and pursue the individual claims of creditors against third parties in the

context of the CCAA Proceeding, or the appointment of one or more persons to serve as litigation advisors to the committee for that purpose;

ii) However, SHC opposes the conferral of the imprimatur of being a court officer on the “trustees” sought by the Litigation Trustee Motion. As the trustees will have the express mandate of acting as a partial creditor advisors for the pursuit of litigation against certain third party stakeholders, including potentially the Equity Holders, they cannot simultaneously be court officers, possessing a duty to be impartial;

iii) SHC also opposes the Litigation Trustee Motion’s request that the trustees be empowered to investigate claims that do not belong to, or are derivative of the estates of the Sears Canada Entities, but rather may only be asserted by individual creditors; and

iv) The Monitor and creditors have been candid that the Litigation Trustee Motion is aimed primarily at facilitating litigation against third parties, such as the Equity Holders. In this circumstance, the proposed order ought to contain procedural safeguards to assure the Equity Holders minimum guarantees of substantive and procedural fairness in the context of any litigation that may ensue.

6. SHC accordingly submits that, should the Court determine that it is just to grant an order as requested by Representative Counsel, that order should follow the form of Order attached hereto at Schedule “A”, constituting the revised form of order provided on February 28, 2018, blacklined to show the changes that SHC submits are necessary to protect its substantive and procedural rights, and which provides for the appointment of advisors without the powers and duties of a court officer.

PART II - APPLICABLE LEGAL PRINCIPLES

7. SHC agrees with the elaboration of legal principles contained in the ESL Entities factum. In brief, these are as follows:

i) The appropriateness of Section 11 relief extends not only to the purpose of the order, in advancing the policy objectives of the CCAA, but also to the means it employs. Stakeholders are to be treated as advantageously and fairly as the circumstances permit, and the Court must be cognizant of the various interests at stake, including those of shareholders¹;

ii) The CCAA court is charged with addressing compromises and arrangements between companies and their creditors, and in keeping with the policy objectives of the CCAA. The purpose of the CCAA Proceeding is not to adjudicate disputes between creditors and other third parties;² and

iii) An officer of the Court, such as the Monitor or the proposed Litigation Trustees, must be independent and impartial, and must treat all parties reasonably and fairly.³

8. Taken as a whole, these well-established principles argue against any effort by aggrieved creditors to obtain an order providing for a court officer to articulate, and ultimately pursue, a litigation strategy against third parties.

PART III - THE PROPOSED ORDER

9. The relief sought in the revised Litigation Trustee Order is unprecedented. There is no authority for an order in the CCAA Proceedings to arm a partial advisor with the powers of a court officer to investigate, advise on, and potentially pursue creditor claims against the Equity Holders. If the proposed Litigation Trustees are to be court officers, their mandate ought to be

¹ *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379 at paras 60, 70, ESL Authorities at Tab 10

² *Re Stelco Inc.* [2005] O.J. No. 4883 at para 32, ESL Authorities, Tab 9

³ While it is conceded that the Monitor may advance claims in certain narrow circumstances, as articulated by the Court of Appeal in *Essar*, for the reasons set out in the ESL Entities factum this is of no assistance to the Representative Counsel in the present circumstances.

confined to advising on “derivative” and/or estate claims otherwise possessed by the Sears Canada Entities.⁴

10. To the extent the proposed Litigation Trustees assume the role of court officers possessing the mandate to advise on, investigate and potentially pursue third party claims, SHC will be significantly prejudiced. The substantive and procedural rights of defendants in any resulting litigation may be compromised by granting a litigant the investigative powers of a court officer. In the event the trustees ultimately serve as plaintiffs, SHC would be unfairly prejudiced by having its adversaries bear the special status of officers of the Court. If the trustees are to act as advocates, they should be advisors to the Creditors Committee, and not officers of the Court.

11. The assertion most recently made by Representative Counsel at the February 23, 2018 chambers appointment, to the effect that the Equity Holders possess no standing to address the Order, is without merit in the current context. In short, the Representative Counsel cannot have it both ways. If the Order is intended merely to organize and aid creditors (as putative plaintiffs), SHC agrees that it need not have a say on the terms of that relationship. However, as the Order as revised seeks the appointment of an officer of this Court, SHC as a stakeholder in the proceedings should have a right to be heard on its terms.

12. Either the Litigation Trustee Order puts in place officers of the Court, with the duties and responsibilities that entails, including strict impartiality, or partisan advisors. The Representative Counsel cannot have both.

The Suggested Form of Order

13. As indicated above, SHC does not oppose a form of order that is consistent with the applicable legal principles, and protects the substantive and procedural rights of the Equity

⁴ *Re Stelco supra*, “*Litigation Trusts in CCAA Proceedings*”, 2017 ANNREVINSOLV 16 (Janis Sarra, Ed.), p. 5, ESL Authorities, Tab 5. The creation of a litigation trustee in the *Hollinger* matter is distinguishable, and provides no support for the relief sought by Representative Counsel. In that case, Justice Ground assumed the role of litigation trustee by virtue of a multi-party settlement, and was charged as an officer of the court with pursuing existing claims in the hands of the debtor company itself. As the board was no longer in existence, the estate of the company could not pursue them. What *Hollinger* does not stand for is the proposition that a trustee may be put in place to advance as of yet undefined creditor claims against third parties.

Holders as prospective defendants. To that end, SHC puts forward a form of Order, attached for convenience at Schedule "A" that provides for the appointment of litigation advisors to aid a creditor committee.

14. Importantly, the order proposed by SHC carefully constrains the mandate of the litigation advisors to investigating, advising and reporting to the committee regarding claims that the Sears Canada Entities may have against other parties.

PART IV - ORDER REQUESTED

15. SHC respectfully requests that should this Court determine that it is just to grant an order, as requested by Representative Counsel, that form of order should follow the Order as attached at Schedule "A" hereto.

March 1, 2018

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



SCHEDULE "A"

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE MR.)
FRIDAY, THE 2nd
JUSTICE HAINEY)
DAY OF MARCH, 2018

IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SEARS CANADA INC., 9370-2751
QUÉBEC INC., 191020 CANADA INC., THE CUT INC., SEARS
CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES
INC., INITIUM COMMERCE LABS INC., INITIUM TRADING
AND SOURCING CORP., SEARS FLOOR COVERING
CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO
INC., 6988741 CANADA INC., 10011711 CANADA INC.,
1592580 ONTARIO LIMITED, 955041 ALBERTA LTD.,
4201531 CANADA INC., 168886 CANADA INC., AND 3339611
CANADA INC.

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

LITIGATION TRUSTEE ORDER

THIS MOTION, made by Representative Counsel to the court-appointed
Representatives of employees and retirees with respect to pension and post-retirement benefits of
the Applicants (“**Retiree Representative Counsel**”) pursuant to the *Companies' Creditors
Arrangement Act*, RSC 1985, c C-36, (the “**CCAA**”) for an order appointing a Litigation Trustee
to identify and report on certain rights and claims of the Applicants and SearsConnect

(collectively, the “Sears Canada Entities”) [and/or any creditors of the Sears Canada Entities¹], was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Affidavit of William Turner sworn on February 14, 2018, the Affidavit of William Turner sworn on February 12, 2018 including the exhibits thereto, the Affidavit of William Turner sworn on August 11, 2017, including the exhibits thereto, the Consent of [XXX] dated February [XXX], 2018, the Monitor’s Twelfth Report to the Court dated February 13, 2018, Supplement to the Monitor’s Twelfth Report to the Court, dated ●, all filed, and on hearing the submissions of Retiree Representative Counsel, Representative Counsel for the employees of the Sears Canada Entities (“Employee Representative Counsel”), counsel for the Applicants, counsel for the Monitor, and such other counsel for various creditors and stakeholders as were present, no one else appearing although duly served as appears from the Affidavit of Service of Veronica de Leoz, sworn February 12, 2018:

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that [XXX] are hereby appointed as Litigation Trustees (collectively the “Litigation Trustee”)² in these CCAA proceedings for the benefit of the estates of the Sears Canada Entities [and its creditors]. The Litigation Trustee ~~shall be an officer of this Court, and~~ is appointed for the purpose of investigating, considering, and reporting to the Creditors’ Committee (defined below), regarding any rights or claims, whether legal, equitable, statutory or otherwise, that the Sears Canada Entities [and/or any creditors of any of the Sears

¹ To the extent the Litigation Trustee is a “court officer”, we oppose such a person’s authorization to investigate, consider and report on claims on behalf of creditors.

² The Litigation Trustee as an advisor to the Creditors’ Committee should not be appointed as an a “court officer”.

Canada Entities] may have as against any parties, including but not limited to current and former directors, officers, shareholders and advisors of any of the Sears Canada Entities (the “**Mandate**”). For greater certainty, the Litigation Trustee may investigate any and all claims regardless of whether such claims have been included in creditors' proofs of claim filed pursuant to the Claims Procedure Order and E&R Claims Procedure Order (each as defined below), however, the Litigation Trustee shall have no role in determining, advising on, opposing, supporting, or articulating any claim of any creditor or stakeholder in the Claims Process, as defined in the Order of this Court dated December 8, 2017 as amended by Order dated February 22, 2018 or as further amended by Order of the Court (as amended, the “**Claims Procedure Order**”) or any Claim as defined in the Employee and Retiree Claims Procedure Order dated February 22, 2018 (the “**E&R Claims Procedure Order**”) and shall have no role in the distribution or allocation of estate funds.

Litigation Trustee Reporting

3. **THIS COURT ORDERS** that the Litigation Trustee’s Mandate shall include reporting to the Creditors’ Committee with such details as the Litigation Trustee considers advisable (all such reporting being collectively defined herein as the “**Report**”), taking into account any concerns of privilege and confidentiality. All Reports by the Litigation Trustee and all communications among the Creditors’ Committee members and the Litigation Trustee shall be subject to common interest privilege. A Report by the Litigation Trustee will include recommendations regarding a proposed litigation plan that includes, but is not limited to:

- (a) those potential rights or claims of the Sears Canada Entities or any creditors of the Sears Canada Entities that should be pursued (if any); and

- (b) describing how and by whom such rights or claims (if any) can best be pursued or continued, including, but not limited to:
- (i) the coordination of the prosecution of such rights or claims with similar or related facts, rights or other claims that may be asserted by different parties;
 - (ii) if necessary or desirable, a proposed governance structure for the Creditors' Committee created pursuant to this Order (or as same may be amended, expanded or reconstituted in future, in accordance with the terms of this Order) for the purpose of providing input to the Litigation Trustee in the prosecution of such rights, claims or causes of action; and
 - (iii) consideration as to the various options available for funding the prosecution of such rights, claims or causes of action.

A confidential briefing ("Trustee **Briefing**") regarding all Reports prepared by the Litigation Trustee shall be given to the Monitor; provided that such Trustee Briefing shall be kept confidential by the Monitor and shall remain subject to privilege.

4. **THIS COURT ORDERS** that following delivery of a Report to the Creditors' Committee in accordance with its Mandate, the Litigation Trustee shall not take any further steps without a further Order of the Court. For greater certainty, nothing herein shall prevent the Litigation Trustee from seeking an Order of the Court authorizing it to pursue any claims identified pursuant to the Mandate.

The Committee

5. **THIS COURT ORDERS** that the Litigation Trustee shall fulfil his Mandate in consultation with a creditors' committee (the "**Creditors' Committee**") comprised of no more than [●] members at any one time appointed by, or on behalf of the following creditor groups of the Sears Canada Entities: [TBD]; and such other unsecured creditors of the Sears Canada Entities not represented above as the majority of the Creditors' Committee may agree be included, in consultation with the Monitor, or as may be directed by the Court. The Creditors' Committee and the Litigation Trustee shall cooperate with the Monitor, and the Monitor shall cooperate with the Litigation Trustee and the Creditors' Committee in connection with the Mandate. The Creditors' Committee shall consult with and provide input to the Litigation Trustee with respect to the Mandate.

6. **THIS COURT ORDERS** that each member of the Creditors' Committee (including any alternates or replacements from the same stakeholder group as may be appointed by an existing member) may be a creditor itself or counsel/advisor representing that stakeholder interest, but in either case each member shall execute a Confidentiality Agreement in a form acceptable to the Litigation Trustee, the Sears Canada Entities and the Monitor prior to being entitled to participate in any discussions or meetings of the Creditors' Committee, receive any information from the Monitor, the Litigation Trustee or any other member of the Creditors' Committee, or to receive the Report. The Litigation Trustee will meet with the Creditors' Committee at least monthly, or such other times as may be agreed by the Litigation Trustee and the Creditors' Committee. Meetings will only be conducted in person, to ensure the confidentiality of all discussions.

7. **THIS COURT ORDERS** that the Monitor shall provide to the Litigation Trustee (and, upon execution of appropriate Confidentiality Agreements, for delivery by the Litigation Trustee to the Creditors' Committee) a confidential briefing regarding the "Transactions of Interest" as

identified in the Monitor's 11th Report to the Court (the "**Monitor Briefing**"). The Monitor's delivery of the Monitor Briefing pursuant to the terms of this Order shall be subject to common interest privilege and strict confidentiality, and the Monitor is protected for so doing pursuant to section 142 of the *Courts of Justice Act* (Ontario). In the event of any concerns being raised regarding the delivery by the Monitor of any particular aspect of the Monitor Briefing that cannot be resolved without breaching the underlying basis for the concern, such concerns shall be resolved following a review by an independent party appointed by the Monitor and the Litigation Trustee (or, absent agreement on the identity of such party, by the Court).

8. **THIS COURT ORDERS** that, for greater certainty, any right, claim or cause of action identified by the Litigation Trustee as capable of being advanced and that is advanced with approval of the Court, whether by the Litigation Trustee or otherwise, may be removed from the claims process established under the Claims Procedure Order or the E&R Claims Procedure Order.

9. **THIS COURT ORDERS** that the Claims Procedure Order is hereby amended as follows:

- (i) subparagraph (vii) in the definition of "Excluded Claim" is hereby amended to read as follows: "Claim that may be asserted by any of the Sears Canada Entities or that are advanced by the Litigation Trustee or any creditors, in each case, as may be permitted or directed by further Order of the Court, against the Sears Canada Entities or any Directors and/or Officers, which for greater certainty shall include any Claim that may be identified, reviewed or investigated as part of the Litigation Trustee's Mandate (as defined in an Order of the Court dated March 2, 2018)".

10. **THIS COURT ORDERS** that the E&R Claims Procedure Order is hereby amended as follows:

- (i) the definition of “Excluded Claim” is hereby amended to add a new subparagraph (vi) that shall read as follows: “Claim that is advanced by the Litigation Trustee or any creditors, in each case, as may be permitted or directed by further Order of the Court, against the Sears Canada Entities or any Directors and/or Officers, which for greater certainty shall include any Claim that may be identified, reviewed or investigated as part of the Litigation Trustee’s Mandate (as defined in an Order of the Court dated March 2, 2018)”.

Litigation Trustee Costs

11. **THIS COURT ORDERS** that the Litigation Trustee shall be paid from the funds of the Applicants its reasonable fees and disbursements, including the fees of any counsel retained by the Litigation Trustee in respect of the Mandate, the amount of which is not to exceed a budget approved by the Creditors’ Committee in consultation with the Monitor prior to the Litigation Trustee commencing work in respect of fulfilling its Mandate in accordance with this Order. The Litigation Trustee and any counsel it retains shall be paid forthwith upon rendering fully-redacted versions of their accounts to the Applicants and the Monitor. Un-redacted versions of accounts rendered by the Litigation Trustee shall be made available to the Creditors’ Committee and, upon request of the Court and subject to a sealing order to protect privilege and confidentiality, to the Court. In the event of any disagreement with respect to a proposed budget, any requested increased to such budget, or any accounts rendered by the Litigation Trustee, such disagreement may be remitted to this Court for determination.

12. **THIS COURT ORDERS** that the Litigation Trustee shall be entitled to the benefit of the Administrative Charge, as defined in the Initial Order issued by the Court dated June 22, 2017 as amended, for the Litigation Trustee's costs, as security for its professional fees, taxes, and disbursements reasonably incurred.

13. **THIS COURT ORDERS** that the Litigation Trustee is hereby authorized to take all appropriate steps and do all appropriate acts necessary ~~or desirable~~ to carry out its Mandate pursuant to in accordance with the terms of this Order.

14. **THIS COURT ORDERS** that the Litigation Trustee shall be at liberty, and is hereby authorized, at any time, to apply to this Court for advice and directions in respect of its Mandate or any variation or expansion of the powers and duties of the Litigation Trustee, which shall be brought on at least seven (7) business days' notice to the Service List in these CCAA proceedings, unless this Court orders otherwise.

15. **THIS COURT ORDERS** that the Litigation Trustee shall have no personal liability or obligations as a result of the performance of its duties in carrying out the provisions of this Order, save and except for liability arising out of gross negligence or wilful misconduct. The Creditors' Committee members shall have no liability or obligations as a result of their participation on the Creditors' Committee or in providing input to the Litigation Trustee, save and except for liability arising out of gross negligence or wilful misconduct.

16. **THIS COURT ORDERS** that no action or proceeding may be commenced against the Litigation Trustee or any Creditors' Committee member in respect of the performance of its or their duties under this Order without leave of this Court on seven (7) business days' notice to the Litigation Trustee and the Creditors' Committee.

17. **THIS COURT ORDERS** that notwithstanding:

- (a) the pendency of these proceedings;
- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA**”) in respect of any of the Applicants and any bankruptcy order issued pursuant to such applications; or
- (c) any assignment in bankruptcy made in respect of any of the Applicants;

the provisions of this Order shall be binding on any trustee in bankruptcy or receiver that may be appointed in respect of any of the Applicants and any payments of fees and disbursements made to the Litigation Trustee in accordance with this Order shall not be void or voidable by creditors of any of the Applicants, nor shall any such payments constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or any reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

18. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative bodies having jurisdiction in Canada or in the United States of America, to give effect to this Order and to assist the Litigation Trustee in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Litigation Trustee as may be necessary or desirable to give effect to this Order, or to assist the Litigation Trustee in carrying out the terms of this Order.

HAINY, J.

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., CORBEIL ÉLECTRIQUE INC., S.L.H. TRANSPORT INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041, ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

(each, an "Applicant", and collectively, the "Applicants")

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

LITIGATION TRUSTEE ORDER

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Sears Canada Entities

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., et al.**

Applicants

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDINGS COMMENCED AT TORONTO

**FACTUM OF THE RESPONDENTS SEARS HOLDINGS
CORPORATION and SEARS, ROEBUCK AND CO.
(Motion Returnable March 2, 2018)**

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