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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

SEARS CANADA INC., by its Court-appointed Litigation Trustee,
J. Douglas Cunningham, Q.C.

Plaintiff

and

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

Defendants

RESPONDING FACTUM OF THE PLAINTIFF
(Re Motions to Strike, Returnable April 17-18, 2019)

April 11, 2019

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PART I - INTRODUCTION

1. The issue on these motions is whether it is plain and obvious that certain claims brought by Sears Canada Inc. ("**Sears**") against its former shareholders, directors and officers are untenable at law and should be struck. Sears respectfully submits that the Defendants' motions to strike do not meet the high threshold for a motion under rule 21 of the *Rules of Civil Procedure*, R.R.O 1990, Reg. 194, and that the motions should be dismissed.

2. In this action, the court-appointed Litigation Trustee for Sears has brought claims against a number of Sears' former officers and directors[1] and its controlling shareholders in connection with the authorization and payment of an extraordinary $509 million dividend in late 2013 (the "**2013 Dividend**").[2]

3. The 2013 Dividend was funded by the sale of Sears' most valuable assets, and was authorized, without diligence, at a time when the company was facing serious financial pressure. The Litigation Trustee alleges that the authorization of the 2013 Dividend was tortious, a breach of duty, and oppressive. Sears is now insolvent, and the claims are being brought on behalf of Sears for the benefit of its creditors.

4. The Defendants have brought motions to strike narrow portions of the Statement of Claim. These motions are without merit. As set out below, the paragraphs in question properly and sufficiently plead the relevant causes of action and material facts.

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[1] William Harker, William Crowley, Donald Ross, Ephraim J. Bird, James McBurney, Douglas Campbell, R. Raja Khanna, and Deborah Rosati (collectively, the "**Former Directors**") and Ephraim J. Bird, Sears' former CFO and a director during an earlier time period.

[2] Edward Lampert, his company, ESL Investments Inc., and a number of its affiliates ("**ESL**", and, collectively with Lampert, the "**ESL Parties**").

5. Contrary to the Defendants' position, it is permissible and appropriate for the Litigation Trustee to bring an oppression claim under s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("***CBCA***"), on behalf of itself and all of its creditors, including the beneficiaries of its pension plan. Doing so is not unfair. Indeed, it is the only way to ensure that all of Sears' creditors are compensated for the injuries they have suffered as a result of the Defendants' misconduct.

6. Remarkably, notwithstanding the fact that the oppression claims are made only against the Former Directors (who approved the 2013 Dividend), the motion to strike those claims has been brought not by those defendants, but by the ESL Parties.

7. The Litigation Trustee has also brought a claim on the basis of the Defendants' conspiracy. As would be expected prior to the close of pleadings, many details of the alleged conspiracy are not yet known to the Litigation Trustee. He has nonetheless pleaded sufficient facts to make out a claim.

8. It is not plan and obvious that the impugned portions of the Statement of Claim are certain to fail, so the motions to strike should be dismissed.

PART II - SUMMARY OF FACTS

9. The facts set out below are summarized from the allegations in the Litigation Trustee's Statement of Claim, which, for the purposes of this motion, are assumed to be true.

(A) The 2013 Dividend

10. In late 2013, Sears' sales were falling, its e-commerce offering "substandard", its reputation "in decline", and its competitors pulling ahead.[3] These problems were borne out in the company's bottom line. Over the course of the year, Sears' revenues declined by more than $300 million and its operating losses reached almost $188 million.[4]

11. The root cause of Sears' decline was an underinvestment in its business. Despite a clear and urgent need for additional capital, Sears' board of directors (the "**Board**") failed to authorize the necessary investments. Instead, it sold the company's most valuable assets and paid dividends to its shareholders with the proceeds.[5]

12. This business strategy was orchestrated by Sears' controlling shareholders – Lampert and ESL, directly and indirectly through their influence over Sears Holdings Corp. ("**Sears Holdings**") – which together owned more than 78% of Sears shares in 2013.[6] Lampert and ESL used their own shareholdings in Sears, in combination with their control over Sears Holdings, to influence the appointment of a number of current and former ESL employees to Sears' management and Board.[7]

13. In 2013, ESL was facing challenges of its own. Billions of dollars of redemption requests were coming due, and the fund did not have the cash on hand to pay them.[8] To raise cash, ESL was forced to sell portions of its portfolio, pay in-kind redemption in shares, and monetize assets.[9]

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[3] Statement of Claim of the Litigation Trustee, issued December 19, 2018, paras. 38-42 (Motion Record of the Cassels Brock Directors, dated March 18, 2019 ("**CBDMR**"), at Tab 2, pgs. 19-20; Motion Record of the ESL Parties, dated March 18, 2019 ("**ESLMR**"), at Tab 2, pgs. 19-20).
[4] Statement of Claim, para. 6 (CBDMR, Tab 2, pg. 14; ESLMR, Tab 2, pg. 14).
[5] Statement of Claim, paras. 3-4 (CBDMR, Tab 2, pg. 13; ESLMR, Tab 2, pg. 13).
[6] Statement of Claim, para. 11 (CBDMR, Tab 2, pg. 15; ESLMR, Tab 2, pg. 15).
[7] Statement of Claim, paras. 33-36 (CBDMR, Tab 2, pg. 19; ESLMR, Tab 2, pg. 19).
[8] Statement of Claim, paras. 45-46 (CBDMR, Tab 2, pg. 21; ESLMR, Tab 2, pg. 21).
[9] Statement of Claim, para. 46 (CBDMR, Tab 2, pg. 21; ESLMR, Tab 2, pg. 21).

14. Among those assets were Sears' valuable long-term leases, for which it was paying under-market rent and which had become the "crown jewels" of its business.[10] The sale of Sears' key assets was carried out over the course of 2013. Despite the fact that he was not an employee, officer, or director of Sears, Lampert played a direct role in the negotiations, providing instructions to Sears' management about the terms of the sales.[11] By selling those leases, Sears generated approximately $590 million in cash.[12]

15. Even as the key asset sales were closing, Bird and two of the Former Directors, all of whom were former ESL executives installed at Sears by Lampert, worked to develop a plan to dividend out the proceeds as soon as possible.[13] The 2013 Dividend, which paid a total of more than $402 million to Sears Holdings and the ESL Parties, was authorized by the Board approximately a week after one of the major asset sale transactions closed, and paid about two weeks later.[14]

16. The Former Directors and Bird were aware that the sale of its key assets would harm Sears, and that the purpose of the sales and the resulting dividend was to benefit the ESL Parties and Sears Holdings.[15]

17. However, rather than fulfilling their duties to Sears by scrutinizing the dividend proposal, the Former Directors turned a blind eye to the obvious dangers that such a large distribution of funds would pose to Sears. The 2013 Dividend was not on the agenda of the Board meeting at which it was approved, and the Board did not have even basic financial information about its

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[10] Statement of Claim, para. 48 (CBDMR, Tab 2, pg. 21; ESLMR, Tab 2, pg. 21).
[11] Statement of Claim, paras. 50-52 (CBDMR, Tab 2, pgs. 21-22; ESLMR, Tab 2, pgs. 21-22).
[12] Statement of Claim, para. 50 (CBDMR, Tab 2, pgs. 21-22; ESLMR, Tab 2, pgs. 21-22).
[13] Statement of Claim, para. 54 (CBDMR, Tab 2, pg. 23; ESLMR, Tab 2, pg. 23).
[14] Statement of Claim, para. 56 (CBDMR, Tab 2, pg. 23; ESLMR, Tab 2, pg. 23).
[15] Statement of Claim, para. 53 (CBDMR, Tab 2, pg. 22; ESLMR, Tab 2, pg. 22).

expected effects on Sears' future operation. Nonetheless the Board rubber-stamped the 2013 Dividend without conducting the bare minimum of due diligence.[16]

18. As a result of the 2013 Dividend, Sears sold its most valuable assets without any offsetting capital investment in its business or retention of the proceeds. The sale of the leases caused a significant decline in Sears' capacity to generate revenue, and the company ultimately became insolvent in 2017.[17]

(B) The *CCAA* Proceeding

19. Following their insolvency, Sears and a number of its affiliates filed an application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, on June 22, 2017, (the "***CCAA* Proceeding**").[18]

20. In an order dated December 3, 2018, the *CCAA* court appointed J. Douglas Cunningham, Q.C. to serve as the Litigation Trustee and authorized him to commence an action to pursue claims on behalf of Sears and its creditors (the "**Litigation Trustee Action**").[19] The claims in the Litigation Trustee Action are brought against the Former Directors, Bird, and the ESL Parties for breach of fiduciary duty, oppression, conspiracy, knowing assistance, knowing receipt, and unjust enrichment.[20]

21. Morneau Shepell Ltd. (the "**Pension Administrator**"), which was appointed by the Superintendent of the Financial Services Commission of Ontario as the administrator of Sears'

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[16] Statement of Claim, paras. 56-73 (CBDMR, Tab 2, pgs. 23-26; ESLMR, Tab 2, pgs. 23-26).
[17] Statement of Claim, paras. 75, 77 (CBDMR, Tab 2, pgs. 26 and 27; ESLMR, Tab 2, pgs. 26 and 27).
[18] Statement of Claim, para. 78 (CBDMR, Tab 2, pg. 27; ESLMR, Tab 2, pg. 27).
[19] Statement of Claim, para. 16 (CBDMR, Tab 2, pgs. 15-16; ESLMR, Tab 2, pgs. 15-16).
[20] Statement of Claim, para. 1 (CBDMR, Tab 2, pgs. 12-13; ESLMR, Tab 2, pgs. 12-13).

Registered Pension Plan (the "**Plan**"), has also commenced an action (the "**Pension Administrator Action**") on behalf of the Plan's beneficiaries (the "**Pensioners**"), against the Former Directors, Bird, and the ESL Parties for negligence, breach of fiduciary duty, oppression, knowing assistance, and knowing receipt.[21]

(C) The Litigation Trustee Action

22. The Pension Administrator and Litigation Trustee commenced their actions on December 19, 2018. The Defendants have not yet filed statements of defence.

23. On January 18, 2019, the ESL Parties delivered a demand for particulars to the Litigation Trustee. The ESL Parties sought information about the creditors on behalf of whom the oppression claim was ultimately being brought and the nature of their expectations about Sears' management.[22]

24. The Litigation Trustee responded on January 31, 2019.[23] In his response, the Litigation Trustee explained that the creditors and stakeholders referred to in the Statement of Claim were all of the creditors and stakeholders of Sears and the other applicants in the *CCAA* Proceeding. The Litigation Trustee also explained that these creditors expected that the powers of Sears' directors would be exercised in the best interest of the company in order to preserve capital for the company's use and to satisfy obligations to its creditors.[24]

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[21] Statement of Claim of the Pension Administrator, issued December 19, 2018 ("**Pension SOC**"), paras. 1 and 4 (ESLMR, Tab 5, pgs. 52-53 and 54).
[22] Demand for Particulars of the ESL Parties, dated January 18, 2019 (ESLMR, Tab 3, pgs. 35-39).
[23] Litigation Trustee's Response to Demand for Particulars, dated January 31, 2019 ("**LT Response**") (ESLMR, Tab 4, pgs. 40-47).
[24] LT Response, para. 3.1(a) (ESLMR, Tab 4, pgs. 42-43).

25. The ESL Parties also delivered a demand for particulars to the Pension Administrator on January 18, 2019, seeking details regarding the nature of the Pensioners' expectations regarding the management of Sears.[25]

26. The Pension Administrator responded on January 31, 2019.[26] In its response, the Pension Administrator explained that the Pensioners' expectation was that the defendants in that action would act in accordance with their duties to the Plan and its beneficiaries, and that the promises made to the Pensioners under the Plan would be honoured.[27]

27. The ESL Parties and a group of the Former Directors, all of whom are represented by Cassels Brock & Blackwell LLP (the "**Cassels Brock Directors**"),[28] also delivered requests to inspect documents to the Litigation Trustee on February 1, 2019. The Litigation Trustee produced the requested documents on February 7, 2019.

28. The same day, the ESL Parties and the Cassels Brock Directors brought motions for pre-pleading discovery and further particulars in the Litigation Trustee and Monitor Actions. Those motions were heard on March 20, 2019, and dismissed by the Court the next day.

29. On March 18, 2019, two days before the hearing of their discovery and particulars motions, the ESL Parties and the Cassels Brock Directors brought these two further pre-pleading motions (the "**Motions**"). The Motions seek to strike portions of the Statement of Claim.

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[25] Demand for Particulars of the ESL Parties to the Pension Administrator, dated January 18, 2019 (Supplementary Motion Record of the ESL Parties ("**Suppl. ESLMR**"), at Tab 1, pgs. 1-3).
[26] Pension Administrator's Response to Demand for Particulars, dated January 31, 2019 (Suppl. ESLMR, Tab 2, pgs. 4-7).
[27] *Ibid.*
[28] The Cassels Brock Directors are William Harker, William Crowley, Donald Ross, Ephraim J. Bird, James McBurney, and Douglas Campbell.

30. The ESL Parties' motion seeks to strike out references to the interests of Sears asserted against the Former Directors and Bird in the Litigation Trustee's oppression claim. In particular, the motion seeks to strike out the references to Sears' interests in paragraphs 1(d), 86, 86(b), and 87 of the Statement of Claim, as well as the entirety of subparagraph 86(a), which alleges Sears' reasonable expectations.[29]

31. The ESL Parties' motion also seeks to strike the reference to the interests of the Pensioners in paragraph 1.1(a) of the Litigation Trustee's response to demand for particulars.[30] There is no reference to the Pensioners in the Statement of Claim itself, which refers only to the interests of Sears' creditors in general.

32. As noted above, the ESL Parties have brought this motion despite that fact that the oppression claim is made only against the Former Directors and Bird.[31] None of the parties whose conduct is alleged to have been oppressive have sought further particulars about the claim or have filed a motion to strike it.

33. The Cassels Brock Directors' motion seeks to strike the Litigation Trustee's conspiracy claim, which is specifically alleged in paragraphs 1(a), 1(b), 97, 98, and 99, although relevant factual allegations appear throughout the Statement of Claim.[32]

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[29] Factum of the ESL Parties, dated March 29, 2019, para. 58, pg. 19.
[30] LT Response, para. 1.1(a) (ESLMR, Tab 4, pg. 41).
[31] Statement of Claim, para. 8 (CBDMR, Tab 2, pg. 14; ESLMR, Tab 2, pg. 14).
[32] Factum of the Cassels Brock Directors, dated March 29, 2019, para. 44, pg. 11.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

(A) Issues Raised

34. The Motions raise two issues:

(a) Whether the Court should strike references in the Statement of Claim to the fact that the Litigation Trustee is bringing its oppression claim on behalf of, among others, Sears and the Pensioners; and

(b) Whether the Court should strike the Litigation Trustee's conspiracy claim.

(B) Test on a Motion to Strike

35. The test on a motion to strike under rule 21.01(1)(b) of the *Rules of Civil Procedure* is "stringent".[33] The moving party must satisfy the "very high threshold" of demonstrating a "radical defect" in the claim so serious that it is "certain to fail".[34]

36. A motion to strike can only be granted where, assuming the facts alleged in the statement of claim are true, it is "plain and obvious" that the claim cannot succeed.[35] If there is any chance that the claim may succeed, the plaintiff should not be "driven from the judgment seat" before being given the opportunity for discovery.[36]

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[33] *Rausch v. Pickering (City)*, 2013 ONCA 740 [*"Rausch"*], para. 34 (Book of Authorities of the Plaintiff, dated April 11, 2019 ("**BOA**"), Tab 1).
[34] *Ibid.*; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, paras. 14-15 (BOA, Tab 2).
[35] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, para. 36 (Book of Authorities of the ESL Parties, dated March 29, 2019 ("**ESL BOA**"), Tab 10).
[36] *Ibid.*

37. In contrast, the law imposes a "very low" threshold to state a claim.[37] A "germ" or "scintilla" of a cause of action will suffice.[38] In addition, a statement of claim must be read "as generously as possible", with a focus on the substance of the pleading, not its form.[39]

38. The Litigation Trustee submits that the impugned claims more than meet the minimal threshold set out by the *Rules*.

(C) No Basis to Strike References to Sears and Pensioners in the Oppression Claim

39. The Statement of Claim alleges that the development and authorization of the 2013 Dividend by Bird and the Former Directors was oppressive, given Sears' financial situation at the time.[40] Their conduct was unfairly prejudicial to and unfairly disregarded the interests of Sears and its creditors. It violated their expectations that Sears' resources would be used for the benefit of the company, rather than that of its majority shareholders.[41]

40. The ultimate beneficiaries of any recovery by Sears will be its creditors, who have brought claims against Sears' estate in the *CCAA* Proceeding. Sears' creditors, like the company itself, were injured by the oppressive conduct of Bird and the Former Directors.[42]

41. The Litigation Trustee has properly stated a claim on behalf of itself and its creditors, including the Pensioners. There is no reason for the Court to strike the references made in the

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[37] *Holley v. Northern Trust Co., Canada*, 2014 ONSC 889 ["*Holley*"], para. 98 (aff'd, 2014 ONCA 719) (BOA, Tab 3).
[38] *Cami International Poultry Inc. v. Chicken Farmers of Ontario*, 2013 ONSC 7142, para. 27 (BOA, Tab 4).
[39] *Rausch*, paras. 34, 96 (BOA, Tab 1).
[40] Statement of Claim, para. 1(d) (CBDMR, Tab 2, pg. 12; ESLMR, Tab 2, pg. 12).
[41] Statement of Claim, para. 86 (CBDMR, Tab 2, pg. 29; ESLMR, Tab 2, pg. 29); LT Response, para. 3.1(a) (ESLMR, Tab 4, pgs. 42-43).
[42] Statement of Claim, para. 87 (CBDMR, Tab 2, pg. 30; ESLMR, Tab 2, pg. 30).

Statement of Claim to the interests of Sears, or to the fact that its Pensioners will be among the beneficiaries of any recovery secured for the benefit of Sears' creditors generally.

(i) The Oppression Claim on Behalf of Sears is Appropriate

42. The references to Sears in the Litigation Trustee's oppression claim are appropriate, given the fact that the oppressive conduct of the Former Directors and Bird breached its expectations as well as those of its creditors. A corporation's right to bring an oppression claim to validate its own interests, in addition to those of its creditors, has been previously recognized by this Court. It is also consistent with the purpose of the oppression remedy, which is to provide a "broad and flexible remedy" for unfair conduct.[43]

43. The Litigation Trustee's oppression claim is brought on behalf of Sears and its creditors.[44] The Statement of Claim alleges that the Former Directors and Bird acted in an oppressive manner towards Sears and its creditors, all of whom reasonably expected that Sears' Board would act in the company's best interest.[45]

44. Any recoveries resulting from the oppression claim are for the benefit of Sears' creditors and will ultimately be distributed to them.[46]

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[43] *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014 ["*Essar*"], para. 140 (BOA, Tab 14).
[44] *Id.*, paras. 61, 63; *Olympia & York Developments Ltd., (Trustee of) v. Olympia & York Realty Corp*., 2001 CarswellOnt 2954 (S.C.J.) ["*Olympia & York*"], para. 63 (aff'd (2003), 68 O.R. (3d) 544 (C.A.)) (ESL BOA, Tab 16).
[45] Statement of Claim, para. 86 (CBDMR, Tab 2, pg. 29; ESLMR, Tab 2, pg. 29); LT Response, para. 3.1(a) (ESLMR, Tab 4, pgs. 42-43).
[46] Statement of Claim, para. 89 (CBDMR, Tab 2, pg. 30; ESLMR, Tab 2, pg. 30).

(a) The Appropriateness of an Oppression Claim on Behalf of a Corporation has Been Recognized

45. Extensive case law has established that an oppression claim is appropriate where the defendants' conduct has prejudiced both the interests of a corporation and its stakeholders.[47]

46. In its 2017 *Essar* decision, which involved a similar fact pattern to this one, the Court of Appeal found that the court-appointed monitor could bring an oppression claim on behalf of a group of creditors who had suffered "harm from a corporate wrong that affects both their interests as creditors and the interests of the corporation".[48] The Court further found that an oppression claim can be brought to remedy conduct that is "disadvantageous to the company".[49]

47. In *Malata*, the Court of Appeal explained that an oppression claim may be brought on the basis of harm to the corporation when there has been a "violation of corporate legal rights" that prejudices a complainant.[50] Similarly, the Court of Appeal recognized in *Rea* that an oppression claim may proceed when the "wrongs asserted were wrongs to the corporation", as long as they also affected its stakeholders.[51] This includes the case in which the wrongs being complained of caused the same type of harm to each similarly-situated member of a group of stakeholders.[52]

48. The Court of Appeal found that the plaintiffs had not stated an oppression claim in *Rea* because they alleged only harm done to the corporation and sought relief only for the corporation's

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[47] *Essar*, para. 131 (BOA, Tab 14).
[48] *Id.*, para. 144.
[49] *Id.*, para. 143.
[50] *Malata Group (HK) Ltd. v. Jung*, 2008 ONCA 111["*Malata*"], para. 34 (BOA, Tab 13).
[51] *Rea v. Wildeboer*, 2015 ONCA 373 ["*Rea*"], para. 29 (ESL BOA, Tab 20).
[52] *Essar*, para. 141 (BOA, Tab 14).

benefit.[53] That is not the case here: the Litigation Trustee alleges that the 2013 Dividend was contrary to the interests of Sears' creditors, and seeks to unwind it for their benefit.[54]

49. A 2017 decision of this Court, *Arend v. Boehm*, directly addressed the question of whether an oppression claim can be brought on the basis of the breach of a corporation's interests, answering in the affirmative.[55] There, a group of shareholders in a corporation named BitRush, and the corporation itself, brought an oppression claim against BitRush's CEO.[56] Justice Pattillo found that both the corporation, on behalf of all stakeholders, and two individual shareholders, on behalf of themselves, were appropriate complainants for an oppression claim.[57]

50. On the facts, Justice Pattillo found that the defendants had operated BitRush's affairs in a manner that was oppressive, unfairly prejudicial to, and in disregard of the best interests of BitRush and its shareholders, and in breach of the CEO's fiduciary duties to the corporation.[58]

51. Part of the defendants' misconduct was the unauthorized withdrawal of funds from BitRush in order to enrich themselves, similar to the allegations made in the Statement of Claim.[59] Justice Pattillo found that this misappropriation of funds was "extremely prejudicial to BitRush", in particular since the corporation was in poor financial shape at the time of the transfer, as Sears was

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[53] *Rea*, para. 27 (ESL BOA, Tab 20).
[54] Statement of Claim, paras. 74, 77, 87-89 (CBDMR, Tab 2, pgs. 26, 27 and 30; ESLMR, Tab 2, pgs. 26, 27 and 30).
[55] *Arend v. Boehm*, 2017 ONSC 3582 (ESL BOA, Tab 2).
[56] *Id.*, para. 40. That action proceeded under the Ontario *Business Corporations Act*, but the terms of the statutes are substantially similar.
[57] *Id.*, para. 53.
[58] *Id.*, para. 56.
[59] *Id.*, para. 83.

at the time of the 2013 Dividend.[60] As a result, Pattillo J. ordered that some of the defendants' shares be canceled in order to return the misappropriated funds to the corporation.[61]

52. The ESL Parties suggest that the court in *Arend* did not decide the issue of whether a corporation's interests are protected by the oppression remedy.[62] This is mistaken: Pattillo J. expressly granted a declaration that BitRush's former CEO "had caused the affairs of BitRush to be conducted in a manner that was oppressive, unfairly prejudicial and unfairly disregarded *BitRush and* its shareholders".[63]

53. A similar result was reached in the 2005 *Fiber Connections* decision of this Court.[64] There, the defendant argued that an oppression application brought by a corporation was doomed to fail because "there can be no oppression of the applicant … under s. 248 of the [Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16]", since that section, like s. 241 of the *CBCA*, does not specifically refer to the interests of a corporation.[65]

54. Colin Campbell J. rejected this argument, finding that it would be inappropriate to prevent a corporation from bringing an oppression claim on its own behalf when the defendant's actions were "oppressive to the Corporation and its stakeholders".[66]

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[60] *Ibid.*
[61] *Id.*, para. 84.
[62] Factum of the ESL Parties, para. 34, pg. 11.
[63] *Arend*, para. 84 (emphasis added) (ESL BOA, Tab 2).
[64] *Fiber Connections Inc. v. SVCM Capital Ltd.*, [2005] O.J. No. 3899 (S.C.J.) (lv. to appeal granted on other grounds, [2005] O.J. No. 1845 (C.A. [In Chambers])) ["*Fiber Connections*"] (BOA, Tab 5).
[65] *Id.*, para. 22.
[66] *Id.*, paras. 28, 29, 33.

55. To remedy the defendant's oppressive conduct, Justice Campbell ordered that the Company be permitted amend its own articles, by-laws, and/or shareholders' agreement.[67]

56. In appropriate circumstances, the courts have recognized that an oppression claim can be brought to protect the interests of both a corporation and its stakeholders from the oppressive conduct of its directors or management. On the current state of the law, there is no basis to say that it is plain and obvious that this claim cannot succeed. Indeed, previous decisions have recognized this cause of action.

(b) In the Alternative, the Claim on Behalf of Sears Involves a Novel Issue, and Should Proceed to Trial

57. The ESL Parties do not suggest that the *Arend* or *Fiber Connections* decisions have been overruled. Even setting those decisions aside, though, the capacity of the Litigation Trustee to state an oppression claim on behalf of Sears along with its creditors is, at worst, a novel issue, which should not be dismissed at this point in the proceeding.

58. The novelty of a claim cannot foreclose an action at the pleading stage. As then-Chief Justice McLachlin noted in *Imperial Tobacco*, "Actions that yesterday were deemed hopeless may tomorrow succeed".[68] As a result, the courts must adopt a generous approach and "err on the side of permitting a novel but arguable claim to proceed to trial".[69] The Court of Appeal has also recognized that, where a claim is novel, a factual record will be necessary to allow the court to make an appropriate judgment about the legal and policy issues raised.[70]

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[67] *Id.*, para. 34.
[68] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, para. 21 (ESL BOA, Tab 19).
[69] *Ibid.*
[70] *Paton Estate v. Ontario Lottery and Gaming Corp.*, 2016 ONCA 458, para. 48 (BOA, Tab 6).

59. Epstein J. (as she then was) made a similar point in *Dalex*, holding that the moving party "must show that there is an existing bar in the form of a decided case directly on point from the same jurisdiction demonstrating that the very issue has been squarely dealt with and rejected by our courts".[71] The proper development of the common law requires that motions to strike pleadings asserting new legal theories for failure to state a claim should be limited "the narrowest of cases".[72] Perell J. echoed this point in *Holley*, finding that "Matters of law that are not fully settled should not be disposed of on a motion to strike".[73]

60. The proper mechanism for bringing an oppression claim based on the interests of a corporation and its creditors remains unsettled. In *Malata*, Armstrong J.A. noted that "for every holding that the oppression remedy may not be enlisted in a derivative case, there is an opposite holding".[74] In *Essar*, Pepall J.A. reaffirmed the holding in *Malata* that "there is not a bright line distinction" between claims that may be brought as derivative actions and those that may be brought as oppression claims.[75]

61. Nor does the case law cited by the ESL Parties demonstrate that this issue is settled. None of those cases – unlike, for example, the *Arend* decision – involved an oppression claim brought by a corporation on the basis of its own interests. As a result, none of those decisions "squarely dealt with" the issue now facing this Court.

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[71] *Dalex Co. v. Schwartz Levitsky Feldman* (1994),19 O.R. (3d) 463 (Gen. Div.), para. 6 (BOA, Tab 7).
[72] *Ibid.*
[73] *Holley*, para. 97 (BOA, Tab 3).
[74] *Malata*, para. 25 (BOA, Tab 13).
[75] *Essar*, para. 132 (BOA, Tab 14).

62. In addition, none of those cases, except *Essar* and *Olympia & York*, involved a *CCAA* restructuring process. In both cases, an oppression claim was found to be appropriate.[76]

63. In *Essar*, the Court of Appeal upheld the trial court's oppression judgment, noting the value of "creative orders" to further the goals of a *CCAA* restructuring process.[77] The Court also found that the circumstances of the case, which included *prima facie* evidence of oppression and personal harm to creditors, justified "flexibility in the availability of the oppression remedy", and that the *CCAA* court's supervision reduced the need for additional procedural safeguards.[78] In this case, which involves similar circumstances, the fact that the Litigation Trustee Action is proceeding in connection with a *CCAA* process reinforces the appropriateness of the prosecution of an oppression claim on Sears' behalf.

64. An oppression claim on behalf of Sears is neither unfair nor contrary to the purpose of the *CBCA*. The Court of Appeal has repeatedly highlighted the need to give the oppression remedy a "broad and flexible" interpretation in order to achieve the statute's purpose.[79] This directive requires the courts to approach oppression claims with a focus on substance and achieving a fair outcome, rather than adhering to "technical legalities".[80] Justice Campbell adopted this perspective in finding that it would have been "unduly technical" to prevent the applicant corporation in *Fiber Connections* from bringing an oppression claim on its own behalf.[81]

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[76] *Olympia & York*, para. 32 (ESL BOA, Tab 16); *Essar*, paras. 4-5 (BOA, Tab 14).
[77] *Id.*, para. 118.
[78] *Id.*, para. 146.
[79] *Id.*, para. 140.
[80] *APAC limited v. Cronin*, 2018 ONSC 3256, para. 22 (aff'd, 2019 ONSC 86 (Div. Ct.)) (BOA, Tab 8).
[81] *Fiber Connections*, para. 28 (BOA, Tab 5).

65. It is appropriate that Sears, an insolvent corporation represented by a Litigation Trustee and acting for the ultimate benefit of its creditors, bring a claim against certain of its former directors and officers for conduct that was oppressive towards both the corporation and its creditors. An order striking this portion of the claim would not save any time or judicial effort, and would frustrate the broad remedial purpose of the oppression remedy. This portion of the ESL Parties' motion should be dismissed.

(ii) The Oppression Claim on Behalf of the Pensioners is Appropriate

66. The standard on a motion to strike a claim as an abuse of process under rule 21.01(3)(d), is, like all other motions under rule 21, a very high one. The court should invoke its authority to do so "only in the clearest of cases".[82] Even if two proceedings are duplicative, the party seeking a stay must show both that the continuation of the actions would cause it injustice (not just inconvenience or additional expense) and that the other party would not be prejudiced by a stay.[83]

67. The ESL Parties have identified no reasonable basis at all for a finding that it would be an abuse of process to allow the Litigation Trustee to bring an oppression claim on behalf of the Pensioners, among others. As a result, this ground of their motion should be dismissed.

68. The inclusion of the Pensioners in the group of beneficiaries on behalf of which the Litigation Trustee's claim is brought is not unfair; in fact, it is required by the nature of the claim itself. Prohibiting the Litigation Trustee from advancing the oppression claim on behalf of the Pensioners would be illogical and would not result in any fairness or efficiency benefits.

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[82] *Currie v. Halton Regional Police Services Board*, 2003 CanLII 7815 (C.A.), para. 18 (ESL BOA, Tab 5).
[83] *Carbone v. DeGroote*, 2018 ONSC 109, para. 34 (ESL BOA, tab 4).

69. The oppression claims of the Litigation Trustee and Pension Administrator are not duplicative. Although they arise from the same transaction, they are based on different expectations, interests, and duties.

70. The Litigation Trustee's oppression claim is brought on behalf of Sears' creditors generally, under the principle that an insolvent corporation can bring such a claim as a representative of its creditors on a collective basis.[84] Sears' creditors make up a diverse group, including landlords, employees, pensioners, security holders, and others, with myriad interests.[85] They are united in this case by the fact that their reasonable expectations and interests as creditors were prejudiced by the oppressive conduct of the Former Directors and Bird set out in the Statement of Claim.[86] The only sense in which the claim is brought on behalf of the Pensioners individually is that they will be entitled to a portion of any recovery by virtue of their claims against Sears' estate.

71. The Pension Administrator's oppression claim, in contrast, is based on the violation of the Pensioners' expectations and interests in their capacity as beneficiaries of the Plan.[87] These expectations and interests flow from the fact that Sears was the administrator of the Plan at the time the impugned dividend was authorized and paid. As such, these specific expectations and interests are not shared by any of Sears' other creditors. However, that distinction does not diminish the fact that Pensioners' expectations and interests as general creditors of Sears are

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[84] *Essar*, para. 63 (BOA, Tab 14); *Olympia & York*, para. 63 (ESL BOA, Tab 16).
[85] LT Response, para. 1.1(a) (ESLMR, Tab 4, pg. 41).
[86] Statement of Claim, paras. 82-89 (CBDMR, Tab 2, pgs. 28-30; ESLMR, Tab 2, pgs. 28-30).
[87] Pension SOC, paras. 36-37 (ESLMR, Tab 5, pg. 63).

aligned with the other creditors. In that capacity, the Pensioners are entitled to the benefits which may flow to the Sears estate from the Litigation Trustee's prosecution of this action.

72. There is no basis for excluding the Pensioners from the group of stakeholders whose interests were oppressed by the authorization and payment of the 2013 Dividend. There is no dispute that the Pensioners are creditors of Sears, like all of the other creditors for whose benefit the Litigation Trustee Action is ultimately being prosecuted. The *CCAA* court accepted this fact when it appointed the Litigation Trustee to bring claims for the benefit of all of Sears' creditors, without carving out claims on behalf of the Pensioners.

73. The ESL Parties' concern about the Pensioners' expectations being defined differently in the two actions is misplaced. It is to be expected that the Pensioners would have different expectations in their capacities as beneficiaries of the Plan than as creditors of Sears generally. In fact, this difference is one of the reasons why the Litigation Trustee Action and the Pension Administrator Action each advance distinct oppression claims.

74. The Pension Administrator is clearly the proper party to bring claims based upon breaches of pension legislation and the specific duties owed to pensioners. There would be no need to have a litigation trustee funded by the estate for that purpose.

75. There is also no concern that denying the motion to strike would could lead to inconsistent verdicts or undermine the principle of finality. All of the Actions are proceeding together, and will be heard at a joint trial. It is to be expected that the trial judge will weigh the various claims and reach a ruling that is internally consistent. This case is completely different from the situation

considered by the Supreme Court in *CUPE*, which involved the "relitigation of issues finally decided in previous judicial proceedings".[88]

76. Nor would an order striking the references to the Pensioners in the Statement of Claim do anything to further the interest of judicial economy. As explained above, the Litigation Trustee's oppression claim is being prosecuted on behalf of Sears' creditors as a group rather than any individual creditors. It will proceed in precisely the same manner regardless of the identity of the various creditors who will ultimately benefit from it.

77. In short, an order striking out the reference to the Pensioners in the Litigation Trustee's oppression claim is inconsistent with the basis of the claim, would produce no benefits, and would create unnecessary complexity. There is no basis for such an order, and the motion seeking it should be dismissed.

(D) No Basis to Strike Conspiracy Claim

78. The Cassels Brock Directors have not met the high burden of demonstrating a "radical defect" in the Litigation Trustee's conspiracy claim.

79. The Court of Appeal has made it clear that courts must approach a motion to strike pleadings with a focus on the "substance of a pleading, not its form".[89] Even a claim that does not explicitly plead all of the elements of a cause of action will still be sustained where the elements are "implicit in the rest of the pleadings".[90] By the same token, even when the pleading does not "explicitly set out the technical cause of action on which it relies" the court should not strike it as

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[88] *Toronto (City) v. CUPE*, 2003 SCC 63, para. 15 (ESL BOA, Tab 21).
[89] *Rausch*, para. 95 (BOA, Tab 1).
[90] *Ibid.*

long as it "raises the factual matrix of concern to the plaintiff" and the pleaded facts "implicitly advance" a claim.[91]

80. Conspiracy claims, in particular, are treated "more leniently" than other claims at the early stages of a proceeding due to the "secretive nature of conspiratorial conduct".[92] This standard is appropriate because conspiracies are, by their nature, based on "the withholding of information from alleged victims", who will become the plaintiffs in a subsequent action.[93]

81. As a result of the secrecy inherent in conspiracies, it will generally be impossible for the plaintiff to uncover the full details of such a claim until after examinations for discovery have been completed.[94] The question of how the conspiring parties agreed to participate in the conspiracy and the communications that they had in furtherance of it will naturally be factual matters within the knowledge of the defendants.[95] It is not reasonable to expect that the plaintiff in a conspiracy case will be aware of specific communications between the conspirators or the precise mechanism by which the conspiracy is implemented.[96]

82. A pleading of conspiracy should set out: (a) the parties to the conspiracy; (b) their relationship; (c) the agreement between them; (d) the purpose of the conspiracy; (e) the acts allegedly done in furtherance of the agreement; and (f) the resulting injury to the plaintiff.[97] The Statement of Claim alleges each of these elements.

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[91] *Ibid.*
[92] *Ontario v. Rothmans Inc.*, 2016 ONSC 59 (Master), para 95 (BOA, Tab 9).
[93] *North York Branson Hospital v. Praxair Canada Inc.* [1998] O.J. No. 5993 (Gen. Div.), para. 22 (lv. to appeal denied, [1999] O.J. No. 399 (Div. Ct.)) (BOA, Tab 10).
[94] *Ibid.*
[95] *The Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2019 ONSC 128, para. 103 (BOA, Tab 11).
[96] *Ibid.*
[97] *Id.*, para. 115

83. The parties to the conspiracy and the acts they undertook in furtherance of it were:

(a) Lampert, who orchestrated the plan to sell Sears' key assets and return the proceeds to the ESL Parties and Sears Holdings;[98]

(b) Bird, William Crowley, and William Harker, who operationalized the plan by preparing the dividend proposal and participated in the process by which it was authorized;[99] and

(c) The other Former Directors, who rubber-stamped the authorization of the dividend despite knowing that it was not in Sears' best interest.[100]

84. All of the Defendants acted knowing that the payment of the 2013 Dividend was in breach of the Former Directors' fiduciary obligations to Sears.[101]

85. The parties were related through Lampert. ESL is owned and controlled by Lampert.[102] Bird, Crowley, and Harker were former senior executives at ESL appointed by Lampert to senior executive positions at Sears.[103] Lampert and ESL, directly and indirectly, through their influence over Sears Holdings, were also involved in the appointment of the other Former Directors.[104]

86. The Defendants agreed that the 2013 Dividend would be paid to Lampert, ESL, and Sears Holdings, despite the fact that it was contrary to the best interests of Sears.[105] The purpose of the

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[98] Statement of Claim, paras. 33, 47 and 52 (CBDMR, Tab 2, pgs. 19, 21 and 22; ESLMR, Tab 2, pgs. 19, 21 and 22).
[99] Statement of Claim, paras. 35, 54 (CBDMR, Tab 2, pgs. 19 and 23; ESLMR, Tab 2, pgs. 19 and 23).
[100] Statement of Claim, paras. 59-65 (CBDMR, Tab 2, pgs. 24-25; ESLMR, Tab 2, pgs. 24-25).
[101] Statement of Claim, paras. 90, 98 (CBDMR, Tab 2, pgs. 30 and 32; ESLMR, Tab 2, pgs. 30 and 32).
[102] Statement of Claim, para. 18 (CBDMR, Tab 2, pg. 16; ESLMR, Tab 2, pg. 16).
[103] Statement of Claim, paras. 35-36 (CBDMR, Tab 2, pg. 19; ESLMR, Tab 2, pg. 19).
[104] Statement of Claim, paras. 34 (CBDMR, Tab 2, pg. 19; ESLMR, Tab 2, pg. 19).
[105] Statement of Claim, paras. 97-98 (CBDMR, Tab 2, pg. 32; ESLMR, Tab 2, pg. 32).

agreement was to provide liquidity to ESL, which was facing large investor redemption requests.[106]

87. The injury suffered by Sears was the distribution of the $509 million paid out in the 2013 Dividend. This damaged Sears' interests and ensured that the funds would not remain available to satisfy the company's increasing liabilities.[107]

88. While all of the particulars of the Defendants' conspiracy will not be known to the Litigation Trustee until the discovery process is completed, the Statement of Claim has alleged facts sufficient to set out all of the elements of a cause of action for conspiracy.

89. In the alternative, the Litigation Trustee should be given leave to amend the Statement of Claim. As the Court of Appeal noted in *Adelaide Capital*, it is inappropriate to strike a claim without leave to amend except in the clearest of cases.[108] In that case, the Court found that a claim for misrepresentation contained no particulars at all as to the falsity of the impugned statements, or even an identification of which statements were being impugned.[109] Nevertheless, the Court granted leave to amend.[110]

90. The Defendants already made a demand for particulars, but did not seek any particulars regarding the Litigation Trustee's conspiracy claim. If the Court finds that the conspiracy claim is deficient, the Litigation Trustee should be permitted to amend the Statement of Claim to add those particulars now.

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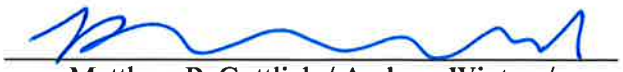
[106] Statement of Claim, para. 47 (CBDMR, Tab 2, pg. 21; ESLMR, Tab 2, pg. 21).
[107] Statement of Claim, para. 98 (CBDMR, Tab 2, pg. 32; ESLMR, Tab 2, pg. 32).
[108] *Adelaide Capital Corp. v. Toronto Dominion Bank*, 2007 ONCA 456, para. 6 (BOA, Tab 12).
[109] *Id.*, para. 2.
[110] *Id.*, para. 8.

PART IV - ORDER REQUESTED

91. The Litigation Trustee respectfully requests that the Court dismiss the Motions, with costs payable forthwith.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of April, 2019.



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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Rausch v. Pickering (City)*, 2013 ONCA 740
2. *Odhavji Estate v. Woodhouse*, 2003 SCC 69
3. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959
4. *Holley v. Northern Trust Co., Canada*, 2014 ONSC 889 (aff'd, 2014 ONCA 719)
5. *Cami International Poultry Inc. v. Chicken Farmers of Ontario*, 2013 ONSC 7142
6. *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014
7. *Olympia & York Developments Ltd., (Trustee of) v. Olympia & York Realty Corp*., 2001 CarswellOnt 2954 (S.C.J.) (aff'd (2003), 68 O.R. (3d) 544 (C.A.))
8. *Malata Group (HK) Ltd. v. Jung*, 2008 ONCA 111
9. *Rea v. Wildeboer*, 2015 ONCA 373
10. *Arend v. Boehm*, 2017 ONSC 3582
11. *Fiber Connections Inc. v. SVCM Capital Ltd.*, [2005] O.J. No. 3899 (S.C.J.) (lv. to appeal granted on other grounds, [2005] O.J. No. 1845 (C.A. [In Chambers]))
12. *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42
13. *Paton Estate v. Ontario Lottery and Gaming Corp.*, 2016 ONCA 458
14. *Dalex Co. v. Schwartz Levitsky Feldman* (1994), 19 O.R. (3d) 463 (Gen. Div.)
15. *APAC limited v. Cronin*, 2018 ONSC 3256 (aff'd, 2019 ONSC 86 (Div. Ct.))
16. *Currie v. Halton Regional Police Services Board*, 2003 CanLII 7815 (C.A.)
17. *Toronto (City) v. CUPE*, 2003 SCC 63
18. *Ontario v. Rothmans Inc.*, 2016 ONSC 59 (Master)
19. *North York Branson Hospital v. Praxair Canada Inc.* [1998] O.J. No. 5993 (Gen. Div.) (lv. to appeal denied, [1999] O.J. No. 399 (Div. Ct.))
20. *The Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2019 ONSC 128
21. *Adelaide Capital Corp. v. Toronto Dominion Bank*, 2007 ONCA 456

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. **RULES OF CIVIL PROCEDURE, R.R.O. 1990, REG. 194**

RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL

WHERE AVAILABLE

To Any Party on a Question of Law

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

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 (2).

To Defendant

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

Jurisdiction

(a) the court has no jurisdiction over the subject matter of the action;

Capacity

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

Another Proceeding Pending

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

Action Frivolous, Vexatious or Abuse of Process

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (3).

MOTION TO BE MADE PROMPTLY

21.02 A motion under rule 21.01 shall be made promptly and a failure to do so may be taken into account by the court in awarding costs. R.R.O. 1990, Reg. 194, r. 21.02.

FACTUMS REQUIRED

21.03 (1) On a motion under rule 21.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 15.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 5.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 5.

(4) REVOKED: O. Reg. 394/09, s. 5.

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

PART XX - REMEDIES, OFFENCES AND PUNISHMENT

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.

(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.

3. **COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36**

PART II - JURISDICTION OF COURTS

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

SEARS CANADA INC., by its Court-appointed Litigation Trustee, J. Douglas Cunningham, Q.C. Plaintiff	-and-	ESL INVESTMENTS INC. et al. Defendants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

RESPONDING FACTUM OF THE PLAINTIFF
(Re Motions to Strike, Returnable April 17-18, 2019)

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