

CITATION: Sears Canada Inc. (Re), 2018 ONSC 2879
COURT FILE NO.: CV-17-11846-00CL
DATE: 20180509

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

RE: 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.

APPLICANTS

BEFORE: HAINES J.

COUNSEL: *Jeremy Dacks*, for the Sears Canada Entities

Katy O'Rourke, for Employee Representative Counsel

Alan Merskey and *Evan Cobb*, for the Monitor

Wael Rostom and *Stephen Brown-Okruhlik*, for the Respondent Equity Holders

Lily Harmer, for Superintendent

Jesse Mighton, for Cadillac Fairview

D.J. Miller, for Oxford Properties Group

Michael Barrack, for Morneau Shepell

John Birch and *Natalie Levine*, for 13 Former Sears Directors

Lou Brzezinski, for Home Town Dealer

Alex MacFarlane and *Bevan Brooksbank*, for Sears Holdings Corp.

Andrew Hatnay, *Amy Tang* and *Jules Monteyne*, Pension Rep. Counsel

Richard Swan and *Sean Zweig*, for the Independent Directors

Gustavo Camelino, for Cushman Wakefield and Other Landlords

David Ullmann, for Primaris, Bentall and Other Landlords

HEARD: March 2, 2018

ENDORSEMENT

[1] Pension and Retiree Representative Counsel requests an Order for the appointment of Lax O'Sullivan Lissus Gottlieb LLP as Litigation Investigator in these proceedings to take certain steps to review and coordinate potential claims that Sears Canada Inc. and its affiliates (collectively, the "**Sears Canada Entities**") or their creditors may have against various parties.

[2] The motion is supported or not opposed by Employee Representative Counsel, Morneau Shepell (as pension plan administrator), the Superintendent of Financial Services, certain landlords, and certain Sears Hometown Dealers.

[3] The motion is supported by the Monitor. The Monitor believes there are benefits to the creation of a structure to coordinate litigation in this case, as noted in the Monitor's Twelfth Report.

[4] Aspects of the motion were opposed by counsel to Sears Holdings Corporation, ESL Investments Inc., and certain former directors of Sears Canada Inc. on the basis that (i) the Litigation Investigator should not be appointed as a 'court-officer'; and (ii) in the case of the former directors, the provisions of the proposed Order deeming certain claims to be "Excluded Claims" under the court-approved claims process should not be granted.

[5] I am satisfied that this Court has jurisdiction to grant the Order sought and that the requested Order substantially in the form sought by Pension and Retiree Representative Counsel is appropriate in the circumstances and should be granted.

[6] The requested Order provides for a two-stage process to the mandate of the Litigation Investigator. At the first stage, the Litigation Investigator shall investigate, consider and report to a committee of creditors regarding any rights or claims that the Sears Canada Entities and/or any creditors of the Sears Canada Entities may have against any parties. It is appropriate for the Litigation Investigator to be appointed as a court-officer during this stage of the mandate.

[7] The Litigation Investigator shall not take any further steps to pursue any claims after the completion of the first stage of the mandate without further Order of the Court. The Litigation Investigator may seek such a further Order of the Court authorizing it to pursue claims identified in the first stage of the mandate. Sears Holdings Corporation, ESL Investments Inc. and affiliated and related parties, and former directors of the Sears Canada Entities reserve their rights to object to the Litigation Investigator continuing in the capacity of a court officer and/or its standing when pursuing any claim, including any claim of the creditors of the Sears Canada Entities, as identified pursuant to the mandate.

[8] The requested Order provides that any claims that are advanced by the Litigation Investigator or any creditors, in each case as permitted or directed by further Order of the Court, shall be excluded from the claims process approved by this court on December 8, 2017. I have heard the arguments of counsel to the former directors with respect to this provision. However, I am satisfied that satisfactory protections are provided in the proposed form of Order through the requirement that a further Order of the Court be obtained before any such claims proceed outside of the claims process. The application of this provision is limited only to those claims identified

through the Litigation Investigator's mandate, and not to any and all claims that may be asserted against directors and officers.

[9] Questions were raised by Pension and Retiree Representative Counsel regarding the standing of Sears Holdings Corporation and ESL Investments Inc. with respect to the matters that are the subject of this motion. This issue does not need to be determined on the current motion.

[10] In granting the Litigation Investigator Order, the Court did not rule on the standing of Sears Holdings Corporation, ESL Investments Inc. and affiliated and related parties, even though their standing was challenged by the Moving Party at the return of the motion. The Court acknowledges that all parties reserve their rights to make any arguments regarding the standing, or lack of standing, of Sears Holdings Corporation, ESL Investments Inc. and affiliated and related parties, on any future motion by the Litigation Investigator or any other party seeking the Court's authorization to pursue any claims identified pursuant to the Litigation Investigator's mandate. The fact that the standing issue was not decided today shall not be relied on by Sears Holdings Corporation, ESL Investments Inc. and affiliated and related parties should they oppose any future submission regarding their standing. For greater certainty, the phrase "affiliated and related parties" as used in this paragraph does not include current or former officers or directors of Sears Canada Inc. or any of the other Applicants.

[11] As this motion proceeded on consent of, or was otherwise unopposed by Employee Representative Counsel, landlord creditors, dealer class action creditors, the Superintendent of Financial Services and Morneau Shepell, the Moving Party has confirmed that the Turner affidavit, sworn February 14, 2018, is to be considered withdrawn and not relied on in this motion. Counsel to Morneau Shepell and the Superintendent of Financial Services respectively also confirm that their Joint Factum dated February 13, 2018, is to be considered withdrawn and not relied on in this motion.

[12] The appointment of the Litigation Investigator does not reflect any acceptance of an alleged conflict as had been raised by FSCO or Morneau on the original return of this motion.



HAILEY J.

Date: May 9, 2018