

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

B E T W E E N:

1291079 ONTARIO LIMITED

Plaintiff

and

SEARS CANADA INC., SEARS HOLDINGS CORPORATION, ESL
INVESTMENTS INC., WILLIAM C. CROWLEY, WILLIAM R. HARKER,
DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH E. ROSATI, R.
RAJA KHANNA, JAMES MCBURNEY and DOUGLAS CAMPBELL

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**AFFIDAVIT OF JAMES KAY
(Sworn November 16, 2020)**

I, JAMES KAY, of the Town of Woodstock, in the Province of Ontario, **MAKE OATH
AND SAY:**

1. I am the President of 1291079 Ontario Limited (“**129**”), the plaintiff in this action. In addition to being the proposed representative plaintiff in this action (the “**Oppression Action**”), 129 was the representative plaintiff in a certified class proceeding against the defendant, Sears Canada Inc. (“**Sears**”), bearing Court File No. 3769/13-CP (the “**Franchise Action**”).

2. I have personal knowledge of the matters stated in this affidavit, except where I have acquired such information from others or from documents attached hereto, in which case I believe such information to be true.

PLAN OF DISTRIBUTION AND CLAIMS PROCESS

3. As a result of the settlements reached with the Defendants, there is approximately \$3,750,000 to be distributed to the Class Members.

4. I have discussed with Andy Seretis, a lawyer at Sotos LLP, the terms of the proposed plan of distribution and claims process, which I understand will be set out in detail in his affidavit to be sworn. More specifically, I have discussed with Mr. Seretis the following matters:

- (a) the Class Members that are entitled to share in the settlement amount;
- (b) the allocation of the settlement amount to Class Members, namely, that each Class Member will receive an equal share of the settlement amount to be distributed;
- (c) payments to be made from the settlement amount prior to distribution to Class Members, including reimbursing contributions from Class Members;
- (d) the administration of the distribution of the settlement amount;
- (e) the claims process whereby each Class Member is required to submit a statutory declaration; and
- (f) the distribution of the Notice of Distribution.

5. I was personally involved in the decision as to how the settlement amount should be allocated. While I do not have experience with a class action plan of distribution and claims process, I understand and agree with the rationale underlying the proposed plan of distribution and claims process, and thus support the approval of the plan of distribution and claims process to be submitted by Class Counsel. Specifically, with respect to the allocation of the settlement amount

to Class Members, I am supportive of the proposal to distribute an equal amount to Class Members.

The decision to pay an equal amount to each Class Member was made for the following reasons:

- (a) I understand from Mr. Seretis that, under an equal distribution, each Class Member would receive approximately \$10,000-12,000 as its share of the settlement proceeds. While this amount would not likely compensate any Class Member fully for their losses, it would provide meaningful compensation to Class Members who are primarily comprised of small businesses in rural locations;
- (b) While there was consideration of allocating settlement funds proportionately to the size of a Hometown Store, determining such allocation presents serious challenges such as:
 - (i) Class Counsel does not have objective data (such as sales figures) for each Class Member during the class period that would enable it to calculate different potential payouts based on that objective data. While this information may be available from Sears' Monitor in the CCAA, the time, work and cost required to sort, analyze, verify and calculate potential payouts would likely exceed the marginal increase a Class Member would receive above an equal distribution. Similarly, asking Class Members to provide data such as sales figures also does not work since there is a chance that not all Class Members can be located or not all Class Members retained their records, and also there would be no easily ascertainable way to verify any data provided.
 - (ii) it is unknown whether a larger Hometown Store would have suffered proportionately greater losses than a smaller Hometown Store since a larger

store may have generated enough revenue to make a profit and smaller Hometown Stores may have been disproportionately harmed; and

(iii) it is also unknown at this point how damages would have been determined following a trial and judgment in favour of the Class Members.

(c) We also considered paying a higher proportion of the settlement amounts to Class Members whose stores were open for longer periods than those whose stores were open less time. This approach was also rejected since some of the stores that were open before 2010 may have been profitable during that period, whereas those which were open from 2010 onwards generally all suffered from the same underlying problems in the system that were the subject of the litigation.

6. I swear this affidavit in support of the motion approving the proposed plan of distribution and claims process and the form and manner of distribution of the proposed notice of distribution, and for no other or improper purpose.

Sworn remotely by James Kay of the Town of Woodstock, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on November 16, 2020 in accordance with *O. Reg. 431/20*, Administering the Oath or Declaration Remotely.

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Karen Whibley

Commissioner for Taking Affidavits
(or as may be)

J. Kay

JAMES KAY

Karen Michelle Whibley, a Commissioner, etc.
Province of Ontario, for Sotos LLP, Barristers &
Solicitors. Expires August 10, 2021