



Court File No. CV-19-617792-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE

)

FRIDAY, THE 21ST

)

JUSTICE McEWEN

)

DAY OF JUNE, 2019

B E T W E E N:

(Court Seal)

1291079 ONTARIO LIMITED

Plaintiff

and

SEARS CANADA INC., SEARS HOLDING 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

ORDER (CERTIFICATION)

THIS MOTION, made by the plaintiff, 1291079 Ontario Limited (“**129 Ontario**”) for an order certifying the class proceeding under the *Class Proceedings Act, 1992*, SO 1992, c 6 (“**CPA**”) and other relief was heard this day at the court house at 330 University Avenue, 9th Floor, Toronto, Ontario, M5G 1R7.

ON READING the material filed, including the motion record, the supplementary motion record, the amended notice of motion, the responding motion record and supplementary motion record of William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, James McBurney, and Douglas Campbell, the responding motion record and supplementary responding

motion record of ESL Investments, Inc., filed, and on hearing the submissions of the lawyers for the parties,

1. **THIS COURT ORDERS** that this action is certified as a class proceeding pursuant to the CPA as against 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.

2. **THIS COURT ORDERS** that the class is defined as all corporations, partnerships, and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement with Sears at any time from July 5, 2011 to November 19, 2013 (as these terms are defined in the Fresh as Amended Statement of Claim).

3. **THIS COURT ORDERS** that 129 Ontario is appointed as the representative plaintiff on behalf of the class.

4. **THIS COURT ORDERS** that the following common issues are certified for this proceeding:

- (a) Are the class members “complainants” within the meaning of section 238(d) of the *Canada Business Corporations Act*, RSC 1985, c C-44 (“CBCA”) in respect of the claims made in the action as against the defendants, and each of them?
- (b) Did the defendants, or any of them, engage in conduct that was “oppressive” to the class members’ interests within the meaning of section 241 of the CBCA in respect of the authorization and payment of an extraordinary cash dividend paid on December 6, 2013?
- (c) If so, are those defendants jointly and severally required to pay compensation pursuant to section 241(3)(j) of the CBCA or otherwise to the class members?
- (d) In determining the compensation:

- (i) Is the quantum of such compensation to be based on the Plaintiff's proven affected unsecured claim against Sears Canada Inc. of \$80,000,000, as agreed by the court-appointed monitor in the filing by Sears Canada under the *Companies' Creditors Arrangement Act* ("CCAA") and as set out in the plan of arrangement filed by the Monitor in the CCAA?
- (ii) If not, directions with respect to the calculation of the quantum of compensation to be determined at a subsequent hearing following the determination of common issues (a), (b) and (c).

5. **THIS COURT ORDERS** that the Litigation Plan in the form appended as Schedule "A" is hereby approved.

6. **THIS COURT ORDERS** that the common issues will be determined by way of a second trial (the "**Second Trial**") following the joint trial of the actions bearing court file numbers CV-18-00611214-00CL, CV-18-00611217-00CL, and CV-18-00611219-00CL (the "**Joint Trial**") that is currently scheduled for May, 2020.

7. **THIS COURT ORDERS** that 129 Ontario may participate in the Joint Trial to the extent it deems appropriate but it may not raise the merits of the certified class action against Sears Canada Inc. in Court File No. Court File No. 3769/13-CP (the "**Franchise Class Action**"). For greater clarity:

- (a) 129 Ontario may examine the defendants at the Joint Trial on what steps the defendants took to inquire about the Franchise Class Action, what advice they received about the Franchise Class Action (subject to any rulings on privilege), and what steps they took in response to the correspondence from Sotos LLP around the time of the disputed dividend; and

(b) 129 Ontario shall not be permitted to lead evidence or to cross-examine any witness during the Joint Trial on the merits of the Franchise Class Action, the reasonableness of the Former Directors' decision on whether to set a reserve for the Franchise Class Action as it relates to the merits of the Franchise Class Action, the reasonable expectations of 129 Ontario and the other proposed class members and whether those reasonable expectations were violated. These matters shall be solely within the scope of the Second Trial and shall not be the subject of any finding of fact or law at the Joint Trial.

8. **THIS COURT ORDERS** the parties will be bound by the findings of the trial judge at the Joint Trial in the subsequent Second Trial.

9. **THIS COURT ORDERS** FTI Consulting Canada, Inc., in its capacity as court appointed Monitor to Sears Canada Inc., shall, to the extent it has such information in its possession, provide to class counsel the last known mailing and email addresses of all class members.

10. **THIS COURT ORDERS** that the form and content of the notice of certification ("**Certification Notice**"), the manner of dissemination of the Certification Notice, the procedure by which the Class may opt out of this class proceeding and the costs of disseminating the Certification Notice and receiving opt-outs will be determined by further Order of this Court.

11. **THIS COURT DECLARES** that nothing in this order shall prejudice the positions of any of the parties with respect to all matters relating to the amended and restated settlement agreement between 129 Ontario, Sears Canada Inc. and FTI Consulting Canada Inc., in its capacity as court-appointed monitor, dated as of December 14, 2018, including the validity, enforceability, and interpretation thereof.

12. **THIS COURT ORDERS** costs of this motion will be addressed at a case conference to be scheduled.



McEwen J

SUPERIOR COURT OF JUSTICE
ENTERED

AUG 29 2019
AC
COUR SUPÉRIEURE DE JUSTICE
ENTRÉ

SCHEDULE "A"

Court File No.CV-19-617792-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

1291079 ONTARIO LIMITED

Plaintiff

- and -

SEARS CANADA INC., SEARS HOLDING 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*, S.O. 1992, C.6

PLAINTIFF'S FURTHER AMENDED LITIGATION PLAN

SECTION 1 - GENERAL

DEFINED TERMS

1.1 In this plan, capitalized terms have the same meaning as given to them in the Fresh as Amended Statement of Claim, unless otherwise noted. Otherwise:

"Class Action" means the class proceeding commenced in the Superior Court of Justice bearing Court File No. CV-19-617792-00CL.

"Plaintiff's Counsel" means, collectively, Sotos LLP and Blaney McMurtry LLP.

"Class" means all of the Class Members.

"Class Member" or **"Class Members"** means one or more members of the proposed class comprised of:

All corporations, partnerships, and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement with Sears Canada Inc. at any time from July 5, 2011 to November 19, 2013.

SCHEDULE "A"

“**Common Issues Trial**” means the trial of the common issues certified in the Class Action that will occur after the Joint Trial.

“**CPA**” means the *Class Proceedings Act, 1992*, S.O. 1992, c.6.

“**Dealer Agreement**” means a Sears Hometown Store dealer agreement.

“**Franchise Class Action**” means the class proceeding commenced in the Superior Court of Justice bearing Court File No. 3769/13.

“**Joint Trial**” is the consolidated trial of the Other Claims.

“**Other Claims**” means the three other Sears-related actions brought by the Monitor, the Litigation Trustee, and the Pension Administrator (all as defined in the December 3, 2018 Order of the Honourable Justice Hainey).

“**Website**” means <https://sotosclassactions.com/cases/current-cases/sears-canada-oppression/>.

REPORTING

1.2 Plaintiff’s Counsel will report regularly to the Class Members through the Website it maintains for the Class Action. The information on the status of the Class Action will be updated regularly. Plaintiff’s Counsel will designate a person or persons to manage the communications with Class Members.

SECTION 2 – CERTIFICATION MOTION

NOTICE

2.1 The Plaintiff will, at a future date, ask the Court to:

- (a) Permit the form and content of the notice of certification (the “**Notice of Certification**”) to be approved. The Notice of Certification will inform all Class Members of the nature of the claim and their right to opt out; and
- (b) Permit the means by which the Notice of Certification will be given to the Class Members to be settled (the “**Notice Program**”).

2.2 The Plaintiff proposes that the Notice of Certification be distributed in accordance with the following Notice Program:

- (a) Email and/or regular mail distribution to the contact information of each Class Member provided by Sears or its monitor; and
- (b) Posted in English and French by Plaintiff’s Counsel on Plaintiff’s Counsel’s Website and provided by Plaintiff’s Counsel to any person who requests it.

SCHEDULE "A"

So long as the list of class members provided by Sears or its monitor is complete and accurate, the Plaintiff does not consider it necessary to cause the Notice to be published in a national newspaper or other medium. However, if such list is found to be materially incomplete or inaccurate, the Plaintiff will request that the defendants pay the cost of publishing the Notice of Certification in such media as is considered necessary in order to come to the attention of the omitted class members.

SECTION 3 – LITIGATION STEPS IN THE JOINT TRIAL

3.1 The Other Claims will be tried together in the Joint Trial in 2020. The Plaintiff will participate in the Joint Trial to the extent that deems appropriate, but it undertakes not to raise during the Joint Trial the merits of the Franchise Class Action. For clarity:

- a) The Plaintiff may examine the Defendants at the Joint Trial on what steps the Defendants took to inquire about the Franchise Class Action, what advice they received about the Franchise Class Action (subject to any rulings on privilege), and what steps they took in response to the correspondence from Sotos LLP around the time of the disputed Dividend.
- b) The Plaintiff shall not be permitted to lead evidence or to cross-examine any witness during the Joint Trial on the merits of the Franchise Class Action, the reasonableness of the Former Directors' decision on whether to set a reserve for the Franchise Class Action as it relates to the merits of the Franchise Class Action, the reasonable expectations of the Plaintiff and the other Class Members and whether those reasonable expectations were violated. These matters shall be solely within the scope of the Common Issues Trial and shall not be the subject of any finding of fact or law at the Joint Trial.

3.2 The parties will be bound by the findings of the trial judge at the Joint Trial in the subsequent Common Issues Trial.

3.3 Any documentary production or examination for discovery of the Plaintiff before the Joint Trial will be limited to the issues to be tried at the Joint Trial set out in section 3.1 above. Provided that if the Plaintiff undertakes not to call a witness at the Joint Trial or to proffer in evidence documents not already produced by other parties, production and examination for discovery of the Plaintiff will be dispensed with. However, the Plaintiff will respond to interrogatories addressed to its pleading in respect of matters relevant to the Joint Trial.

3.4 Class counsel shall provide notice to Class Members of the result of the Joint Trial in accordance with section 2.2 of this Plan.

SECTION 4 – LITIGATION STEPS IN THE COMMON ISSUES TRIAL

4.1 The Common Issues Trial shall resolve the common issues as set out in the certification order. Following the final determination of the Joint Trial, and prior to the Common Issues Trial, the parties will conduct a case conference with the Court in respect of addressing and scheduling the litigation steps in the Common Issues Trial (the "**Common Issues Trial Protocol**"). To the extent required, further matters arising between the parties in respect of the Common Issues Trial may be addressed with the Court through case conferences.

SCHEDULE "A"

4.2 The Defendants shall provide Statements of Defence no later than 30 days following the date on which the Ontario Superior Court of Justice renders a decision with respect to the Joint Trial, unless the Court orders otherwise.

4.3 The Plaintiff may seek an order from the Court requiring the Defendants to provide their Statements of Defence earlier.

4.4 As part of the Common Issues Trial Protocol, the parties will agree on and implement a documentary discovery plan in accordance with the Sedona Conference Principles and a schedule to engage in meet and confers, subject to this Court's further orders. If there are areas of disagreement, any of the parties may seek direction from the Court.

4.5 The Defendants will conduct an examination for discovery of the Plaintiff, and the Plaintiff will conduct an examination for discovery of the individual Defendants and a representative from each of the corporate Defendants but the parties cannot, until the production of documents has been completed, estimate the time required for each examination. Scheduling will also need to include time for receipt of responses to anticipated undertakings and refusals, as well as motions concerning undertakings and refusals.

4.6 The Plaintiff may ask the Court for an order allowing examination of more than one representative of each corporate Defendant, if necessary.

4.7 Within 120 days of receiving document production, the parties will complete examinations for discovery, unless the Court orders otherwise.

4.8 Plaintiff's Counsel anticipates the exchange of expert reports and the exchange of reply reports.

4.9 The Plaintiff proposes that all expert reports be exchanged within 60 days of the completion of examinations for discovery, unless the Court orders otherwise.

4.10 Within 90 days of the reply reports being filed, cross-examinations in respect of all expert reports will be completed, unless the Court orders otherwise.

4.11 At any stage, the parties may bring a motion asking the Court to clarify or redefine the common issues, if required.

4.12 Although no motions other than those indicated in this plan are currently anticipated by the Plaintiff, additional motions may be required and will be scheduled as the case progresses.

4.13 Class counsel shall provide notice to Class Members of the result of the Common Issues Trial in accordance with section 2.2 of this Plan.

SECTION 5 – LITIGATION STEPS FOLLOWING THE COMMON ISSUES TRIAL

5.1 Within 45 days of a decision following the Common Issues Trial, assuming success in favour of the Plaintiff, the parties shall attend a case planning conference to set a schedule and to confirm the process to be followed in bringing the Class Action to final resolution. The process which will be required is dependent on the nature of the decision at the common issues trial.

5.2 If liability and aggregate damages are determined in favour of the Class at the Common Issues Trial, a plan for distributing the aggregate damage award will be developed by the Plaintiff, in accordance with section 24 of the CPA, to provide fair compensation through an efficient, timely, and impartial distribution process.

5.3 Pursuant to subsections 24(2), 24(4) and 26(4) of the CPA, the Court, or a referee if one is appointed, will be asked to determine, based on such evidence as may be necessary, or approve:

- (a) The allocation of any aggregate damages recovery among the Class;
- (b) Whether part of the award of aggregate damages should be allocated to the Class in proportion to the economic harm suffered; and
- (c) Whether the claims of Class Members should be assessed in a summary claims procedure or in some other manner reasonably expected to benefit Class Members.

5.4 Once the division of any aggregate damages award between the Class has been determined and assuming claims may be assessed in a summary claims assessment procedure, the Plaintiff will ask that the Court implement and adopt a claims procedure pursuant to subsections 24(5)-(7) of the CPA, which includes the following steps:

- (a) Setting a claims deadline before which eligible Class Members will be required to file their claims for compensation;
- (b) Appointment of an administrator to implement the claims process, including the review and assessment of filed claims;
- (c) Appointment of a referee to review any issues as to eligibility or the value of claims determined by the administrator, if required;
- (d) The right to appeal the referee's decision to the Court for a final and binding decision; and
- (e) The creation of a report by the administrator at the conclusion of the claims procedure.

5.5 The Plaintiff will further propose that the claims assessment procedure, wherever practical, utilize:

SCHEDULE "A"

- (a) A paperless, web-based claims and claims management system;
- (b) Standardized claims forms and filing procedures;
- (c) The Defendants' records as presumptive proof of a Class Member's membership in the class where the Class Member does not contest those records; and
- (d) Affidavit or other summary methods for introducing evidence, if necessary.

5.6 As soon as practicable following the expiration of the claims deadline and, if necessary, after any reviews performed by the referee have been completed and appeals resolved, and the amount and number of eligible claims is known, the administrator shall report to the Court on the name, address, and proposed distribution for each eligible Class Member, including his or her prorated share of any punitive damages award or pre- and post-judgment interest award.

5.7 Pursuant to section 26 of the *CPA*, Plaintiff's Counsel shall thereafter seek directions from the Court on a means of distributing any Class Members' awards.

5.8 If the Court determines certain common issues in favour of the Class but does not determine liability and award aggregate damages, the amount and distribution of damages would need to be determined in accordance with the provisions of section 25 of the *CPA*

5.9 The Plaintiff will ask the Court to order that the Defendants pay all administration costs, including the costs of the notice and the fees of the administrator and referees or alternatively that those costs be paid out of the total recovery after payment of counsel fees, disbursements, and taxes or distribution to the eligible Class Members.

SECTION 6 – AMENDMENTS OF THIS PLAN

6.1 This plan may be amended from time to time by directions given at case management conferences or by further order of the Court.

1291079 ONTARIO LIMITED
Plaintiff

-and- SEARS CANADA INC. et al.
Defendants

Court File No. CV-19-617792-00CL

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

PROCEEDING COMMENCED AT TORONTO

**ORDER
(Certification)**

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