

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE )  
JUSTICE D.K. GRAY )  
MONDAY, THE 8th  
DAY OF SEPTEMBER, 2014

BETWEEN:

**1291079 ONTARIO LIMITED**

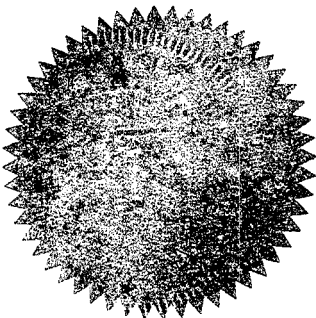
Plaintiff

- and -

**SEARS CANADA INC. and SEARS, ROEBUCK AND CO.**

Defendants

Proceeding under the *Class Proceedings Act, 1992*



**ORDER**

**THIS MOTION**, made by the plaintiff for an order certifying this action as a class proceeding, appointing 1291079 Ontario Limited as representative plaintiff and providing for notice to the class was heard on June 11, 2014, at Milton, and the decision reserved to this day.

**ON READING** the material filed including the notice of motion, the affidavit of James Kay sworn November 14, 2013, the affidavit of Greg Wallace sworn March 3, 2014, the transcript of the cross-examination of James Kay conducted on May 6, 2014, the transcript of the cross-examination of Greg Wallace conducted on May 7, 2014, the parties' respective facts, the statement of claim, filed, the statement of defence, filed, and on being advised by the plaintiff

that it was not proceeding with the cause of action in negligent misrepresentation and on hearing the submissions of counsel for the plaintiff and the defendants,

**AND UPON** being advised that the parties had reached an agreement in respect of the quantum of costs to be paid to the plaintiff by the defendants,

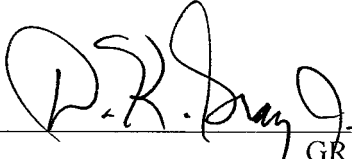
1. **THIS COURT ORDERS** that this action be and is hereby certified as a class proceeding as against Sears Canada.
2. **THIS COURT ORDERS** that the class be and is hereby defined as all corporations, partnerships, and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement with Sears at any time from July 5, 2011 to the date of sending of the notice of certification.
3. **THIS COURT ORDERS** that the plaintiff be and is hereby appointed as the representative plaintiff on behalf of the Class.
4. **THIS COURT ORDERS** that the following common issues be and are hereby certified for the purposes of this proceeding:
  - (a) Has Sears Canada, at any time since July 5, 2011 breached its obligations under the Dealer Agreements with each of the class members, including the asserted obligation to exercise contractual discretion in good faith, by:
    - (i) Failing to increase commission paid to class members;
    - (ii) Changing commissions paid to class members in August 2012;

- (iii) Selling directly to customers located within the class members' Market Areas (as defined in their respective Dealer Agreements), or, alternatively, by failing to pay commission to the class members for goods sold directly to customers located within the class members' Market Areas through direct channels;
  - (iv) Changing local store advertising subsidies;
  - (v) Failing to provide a monthly accounting of how compensation was calculated; or
  - (vi) Imposing handling fees payable by customers on catalogues sales made by dealers?
- (b) Has Sears Canada been unjustly enriched by any of the acts or omissions in (a) (i) to (vi) above?
- (c) If liability is established, what is the appropriate measure of damages or compensation, if any, for the class?
- (d) Is Sears Canada a "franchisor" within the meaning of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 (*Arthur Wishart Act*)? If so:
- (i) Did Sears Canada breach the duty of fair dealing under s. 3 of the *Arthur Wishart Act* by any of the acts or omissions set out in (a) (i) to (vi) above, and, if so, what are the damages for the class?
  - (ii) Was Sears Canada required to deliver to each class member a disclosure document within the meaning of s. 5 of the *Arthur Wishart Act* at least fourteen days before the class member signed a Dealer Agreement or any material amendment thereof, and if so, were the provisions of s. 5(3) of the *Act* otherwise complied with? If s. 5 was not complied with, what are the damages for the class under s. 7?
5. **THIS COURT ORDERS** that Sears Canada shall deliver to counsel for the plaintiff a list of names and last known addresses, email addresses and telephone numbers of the Class Members in electronic spreadsheet format within 30 days of the date of this order.

6. **THIS COURT ORDERS** that a notice of certification to the Class in a form attached as Schedule “A” (English) and Schedule “B” (French) to this order (the “Notice to the Class”) is hereby approved.
7. **THIS COURT ORDERS** that the English Notice to the Class shall be mailed to all Class Members by counsel for the plaintiff and published on the website of Sotos LLP on or before March 20, 2015.
8. **THIS COURT ORDERS** that the French version of the Notice to the Class shall be posted on the website of Sotos LLP and mailed to all Class Members in the Provinces of Quebec and New Brunswick on or before March 20, 2015.
9. **THIS COURT ORDERS** that the cost of mailing the Notice to the Class shall be paid by the plaintiff.
10. **THIS COURT ORDERS** that a Class Member may opt out of the class proceeding by sending to Sotos LLP either the Opt-Out Coupon attached to the Notice to the Class, or some other legible, written, signed request to opt out containing substantially the same information as the Opt-Out Coupon, on or before the expiry of the 90<sup>th</sup> day after the Notice to the Class is sent, which date shall be specified in the Notice to the Class.
11. **THIS COURT ORDERS** that Sotos LLP shall advise defendants' counsel of any Notices to the Class returned as undeliverable forthwith upon the return of the Notices to the Class, after which counsel for the defendants shall make best efforts to provide class

counsel with updated information for the affected dealers so that the Notice to the Class can be re-sent to such class members.

12. **THIS COURT ORDERS** that a Class Member may not opt out of the class proceeding after the expiry of the 90<sup>th</sup> day after the Notice to the Class is sent, which date shall be specified in the Notice to the Class.
13. **THIS COURT ORDERS** that Sotos LLP shall serve on Sears Canada, within 7 days after the end of the opt-out period described in paragraph 10 hereof, an affidavit containing a list of persons who have opted out of the class proceeding and attaching copies of all Opt-Out Coupons, or other legible, written, signed request to opt out containing substantially the same information as the Opt-Out Coupon, received from Class Members.
14. **THIS COURT ORDERS** that Sears Canada shall pay to the plaintiff costs of this motion in the amount of \$70,000.00, which amount is inclusive of fees, disbursements and HST, on or before October 9, 2014.

  
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GRAY, J.

**77-54**

**FEB 27 2015**

**SUPERIOR COURT OF JUSTICE  
MILTON**