

Ontario Court gives go ahead to Sears Canada lawsuits against Edward Lampert

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An Ontario Superior Court judge on Monday gave the green light to at least two lawsuits going ahead against Edward Lampert, his hedge fund and former directors of insolvent Sears Canada Inc.

The lawsuits, from the court-appointed monitor in Sears's insolvency and a special litigation trustee, focus on a \$509-million dividend the Toronto-based retailer paid to shareholders – including Mr. Lampert, his hedge fund and related firms – five years ago.

The monitor, FTI Consulting, argues Sears gave the nod to the 2013 dividend “through a materially deficient process that led to the diversion of significant liquidity to shareholders, largely benefiting insiders at the expense of creditors,” according to a document filed by the monitor. At the same time, Sears was proceeding “inevitably to an insolvent liquidation in which the substantial shortfalls to creditors are and should have been clear,” it says.

Mr. Lampert and his hedge fund were significant shareholders of Sears Canada at the time. By June, 2017, Sears got court protection from its creditors, owing them billions of dollars and putting about 16,000 employees out of work. In October of this year, U.S.-based Sears Holdings Corp., of which Mr. Lampert is chairman and former chief executive, got bankruptcy protection south of the border.

Now Sears Canada's monitor and a litigation trustee are authorized to go after the \$509-million from Mr. Lampert, his hedge fund, ESL Investments Inc., firms related to ESL and former Sears Canada directors, arguing the dividend crippled Sears's ability to remain in business as a going concern while benefiting Mr. Lampert.

“It is the beginning of the war with Lampert,” Lou Brzezinski, a lawyer at Blaney McMurtry LLP, said in an interview after Monday's hearing. He represents former Sears Hometown store operators, who have a separate class-action lawsuit against Mr. Lampert and his companies.

If the latest lawsuits are successful, the recovery of the dividend or part of it could help pay back Sears Canada unsecured creditors, including pensioners. They found out last week their representatives came to a tentative settlement with the monitor for an estimated \$48-million for the retirees, whose pension has a \$260-million wind-up deficit.

Over all, Sears Canada's unsecured creditors can now expect to recover 7.4 cents on the dollar of their roughly \$2-billion of claims, court documents suggest.

While Judge Glenn Hainey on Monday allowed the lawsuits to proceed, lawyers for Mr. Lampert and former directors said they would vigorously fight the claims. And they deny the allegations against them.

Mr. Lampert's lawyers say after Sears Canada paid the \$509-million dividend in late 2013, the retailer still had \$513.8-million of cash remaining – an amount greater than its cash on hand after a \$101-million dividend payment a year earlier that is not being challenged, filings say. And the ESL firms paid about US\$168.5-million for an additional equity interest in Sears Canada in October, 2014, they say.

Andrew Hatnay, a lawyer at Koskie Minsky LLP who represents pensioners, said in an interview that other parties, including the pension administrator, are also considering launching lawsuits against Mr. Lampert and his companies and former directors.

Ken Eady, a Sears Canada retiree, said in an interview he's pleased the court authorized the lawsuits to go ahead "but there's still a long road ahead. These things take time."

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