Court File No. CV-18-00611219-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

FTI CONSULTING CANADA INC., in its capacity as Court-appointed monitor in proceedings pursuant to the *Companies' Creditors Arrangement Act,* RSC 1985, c. c-36

Plaintiff

- and -

ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, WILLIAM HARKER and WILLIAM CROWLEY

Defendants

Court File No. CV-18-00611214-00CL

B E T W E E N:

SEARS CANADA INC., by its Court-appointed Litigation Trustee, J. DOUGLAS CUNNINGHAM, Q.C.

Plaintiff

- and -

ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD LAMPERT, EPHRAIM J. BIRD, DOUGLAS CAMPBELL, WILLIAM CROWLEY, WILLIAM HARKER, R. RAJA KHANNA, JAMES MCBURNEY, DEBORAH ROSATI, and DONALD ROSS

Defendants

Court File No. CV-18-00611217-00CL

B E T W E E N:

MORNEAU SHEPELL LTD. in its capacity as administrator of the Sears Canada Inc. Registered Pension Plan

Plaintiff

- and -

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, WILLIAM HARKER, WILLIAM CROWLEY, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH E. ROSATI, R. RAJA KHANNA, JAMES MCBURNEY and DOUGLAS CAMPBELL

Defendants

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

B E T W E E N:

1291079 ONTARIO LIMITED

Plaintiff

- and -

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

Defendants

JOINT FACTUM OF THE FORMER DIRECTORS

(MOTION TO VARY TIMETABLE OR OBTAIN INTERIM FUNDING, RETURNABLE SEPTEMBER 19, 2019)

September 14, 2019

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Wendy Berman LSO #: 32748J
Tel: 416.860.2926
Fax: 416.640.3107
wberman@casselsbrock.com

John N. Birch LSO #: 38968U
Tel: 416.860.5225
Fax: 416.640.3057
jbirch@casselsbrock.com

Lara Jackson LSO #: 41858M
Tel: 416.860.2907
Fax: 416.640.3108
ljackson@casselsbrock.com

Lawyers for the Defendants,
Ephraim J. Bird, Douglas Campbell,
William Crowley, William Harker,
James McBurney, and Donald Ross

BENNETT JONES LLP
3400 One First Canadian Place
PO Box 130, Toronto, ON M5X 1A4

Richard B. Swan
Tel: 416.777.7479
Fax: 416.863.1716
swanr@bennettjones.com

Jason M. Berall
Tel: 416.777.5480
Fax: 416.863.1716
berallj@bennettjones.com

Lawyers for the Defendants,
Deborah E. Rosati and R. Raja Khanna

TO: **Litigation Service List**

AND TO: **The Service List in the CCAA proceedings of Sears Canada Inc.**

TABLE OF CONTENTS

PART I - OVERVIEW 1

PART II - THE FACTS 5

A. CONTEXT OF THE ACTIONS 5

B. THE FORMER DIRECTORS' INSURANCE COVERAGE ISSUES 7

C. CONTEXT OF TIMETABLE ORDER 11

D. DELAY OF COVERAGE APPLICATION 13

E. THE MONITOR REFUSES TO PROVIDE INTERIM FUNDING 14

F. PREJUDICE TO THE FORMER DIRECTORS DUE TO LACK OF INSURANCE COVERAGE 15

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES 16

A. THE TIMETABLE ORDER SHOULD BE PAUSED 17

(i) The fundamental principle of director indemnification 17

(ii) This court has the discretion to pause the litigation 19

(iii) This court should exercise its discretion to pause the litigation 20

(iv) The timetable should be paused due to a material change in circumstances 23

B. IN THE ALTERNATIVE, SEARS CANADA SHOULD PROVIDE INTERIM FUNDING 24

PART IV - ORDER REQUESTED 28

SCHEDULE A – LIST OF AUTHORITIES

SCHEDULE B – TEXT OF STATUTES, REGULATIONS & BY-LAWS

PART I - OVERVIEW

1. This motion, for a pause in the litigation schedule or interim defence costs loan funding, is brought by the defendant former directors (the "**Former Directors**") of Sears Canada Inc. ("**Sears Canada**"), who are currently being deprived of all defence funding in four actions claiming the extraordinary amount of over $500 million in damages against each of them personally.

2. Sears Canada contractually agreed to indemnify all of the Former Directors and to place appropriate directors and officers insurance ("**D&O Insurance**") in respect of just such claims. However, Sears Canada acting through the Monitor has treated the Former Directors' indemnity claims as pre-filing claims and refused to fulfil them, and the insurers engaged by Sears Canada are taking coverage positions pointing at each other, raising jurisdictional issues, and refusing to provide any further defence costs coverage until the coverage dispute is resolved. Meanwhile, the Monitor and Litigation Trustee, both officers of the court who are fully indemnified and whose fees and counsel fees are fully and regularly paid out of a special fund of $12 million of Sears Canada cash (the remaining amount of which they steadfastly refuse to disclose, claiming "privilege", while at the same time demanding and receiving highly sensitive personal income and asset disclosure from the Former Directors), resolutely refuse to provide or even discuss any interim defence funding to the Former Directors. At the same time, the Monitor and Litigation Trustee insist that the expedited litigation timetable proceed exactly as it stands, even if it means that Former Directors or some of them have to self-represent at discoveries and trial of these complex and substantial claims. Allowing all of that to happen in these circumstances would be a travesty.

3. These positions are taken by the Monitor and Litigation Trustee despite the fact that the most recent (September 14) financial reporting from the Monitor reveals that there is some $205 million in available Sears Canada cash, as now admitted by the Monitor on cross-examination, not the amount of “in excess of $155 million” referenced in the Monitor’s affidavit on this motion. This amount is in addition to $12 million reserve fund, which is also to stand as security for any costs award in favour of the defendants.

4. The Former Directors are seeking to be treated fairly and to secure either a pause in the Litigation Timetable, or interim defence funding as a loan from Sears Canada as the actions now proceed down an extensive, expensive and expedited litigation course through discoveries this fall and on to trial in the spring of next year. Such a loan would be repaid to Sears Canada out of D&O Insurance, once the insurance issues are resolved.

5. Through no fault of their own, the Former Directors have been cut off from all insurance defence funding. The broader context can be summarized as follows:

(a) the Former Directors were directors of Sears Canada in late 2013 when the subject dividend came before the Board;

(b) the Former Directors are all parties to indemnification agreements pursuant to which Sears Canada agreed to indemnify them for their involvement in proceedings arising from their directorships and further agreed to place D&O Insurance to protect them in such proceedings, and to pay their legal expenses in the event of such proceedings;

(c) after Sears Canada entered CCAA protection in June 2017, the Monitor took the position that the Former Directors' indemnity claims are pre-filing claims, and therefore the Monitor refuses to indemnify the directors;

(d) In 2018, XL began covering defence costs as the first layer insurer in the 2015-16 insurance coverage tower, and none of the other insurers in the tower advised that they took a different position;

(e) the funds from the 2015 XL policy have now been exhausted, largely because of expenses and payments relating to Sears U.S., covered under the same policy;

(f) in May 2019, the second layer insurer in the 2015-16 tower, QBE, advised for the first time that it was disputing coverage and refusing to pay any defence costs on the asserted basis that the 2013-14 tower applies;

(g) the Former Directors engaged Canadian coverage counsel and expeditiously commenced an application in this court to determine whether QBE is required to provide coverage under the 2015-2016 tower, and secured August 27, 2019 as the hearing date for the application;

(h) QBE disputed this court's jurisdiction, such that the hearing was adjourned with a jurisdiction hearing scheduled for September 25 and the merits hearing scheduled for October 18, 2019;

(i) neither QBE, XL nor any of the other insurers have agreed to provide any defence coverage pending the outcome of the coverage application, despite repeated requests;

(j) through no fault of their own, the Former Directors find themselves in the position where they currently have no defence coverage for these $500 million claims, despite Sears Canada's agreement to indemnify them and to place insurance to cover their defence costs in precisely these circumstances;

(k) Sears Canada has ample funds to lend to cover defence expenses on an interim basis. Indeed, the general cash reserves of Sears Canada are $205 million, not the $155 million figure in the Monitor's affidavit;

(l) the $12 million reserve set aside for Litigation Trustee's and the Monitor's litigation legal fees must, for the purpose of this motion only, be presumed to remain flush with cash because the Monitor refuses to disclose the balance of the reserve on the basis of privilege, even though an expressly stipulated purpose of the reserve under the Order establishing it is to preserve funds for any costs award in favour of the defendants;

(m) the Litigation Trustee is fully indemnified under the Order appointing him, and is entitled to have his bills and those of his counsel paid on a bi-weekly basis from $12 million reserve, as is the Monitor and his counsel; and

(n) notwithstanding all of the above, the Monitor and Litigation Trustee absolutely insist on holding the current expedited litigation schedule and are expressly indifferent to how the individual Former Directors (for whom Sears Canada is obliged to indemnify and place insurance) might defend these actions, even if it means self-representation for some.

6. Fairness demands that one of the Monitor's/Litigation Trustee's two positions has to give – either the timetable must be paused or interim defence funding must be directed.

PART II - THE FACTS

A. Context of the Actions

7. The Former Directors are currently defendants in the following four actions (collectively, the "**Actions**"):

(a) a class action commenced by 1291079 Ontario Limited ("**129 Ontario**") in October 2015;

(b) an action commenced by a Litigation Trustee on behalf of Sears Canada in December 2018;

(c) an action commenced by the court-appointed Monitor of Sears Canada's CCAA proceeding (although not all Former Directors are defendants in the Monitor's action) in December 2018; and

(d) an action commenced by the Pension Administrator of the Sears Canada pension plan in December 2018.

8. The Actions relate solely to the Former Directors' decision-making as directors of Sears Canada and, in particular, the exercise of their business judgment in approving a dividend in November 2013. The Actions seek over $500 million in damages against each of the individual Former Directors.

9. The Former Directors are the beneficiaries of indemnification entitlements against any claims, costs or liabilities pursuant to section 124 of the *Canada Business Corporations Act* (**"CBCA**"), individual indemnification agreements with Sears Canada and D&O Insurance purchased by Sears Canada and Sears Holdings Corporation ("Sears Holdings"). In particular, Sears Canada agreed to indemnify the Former Directors for any liability incurred as a result of their conduct as directors, including the advance payment of defence costs, and also agreed to purchase D&O insurance for any liability that they may incur in that capacity.[1]

10. As the allegations against the Former Directors in the Actions arise from their decision-making as directors of Sears Canada, they are entitled to indemnification, including the advance payment of defence costs. As a matter of corporate law and policy, corporate directors are not expected to self-fund the defence costs of complex claims related to the discharge of their responsibilities as directors. Without such indemnification

[1] Amended Motion Record of the Former Directors, dated August 30, 2019 ("**Motion Record**"), Tab 2, Affidavit of Donald Campbell Ross sworn August 26, 2019 ("**Ross Affidavit**"), para. 7, p. 16 and Exhibit "B", p. 66; Exhibit 1 to the Cross-examination of Steven Bissell held on September 10, 2019, Indemnification Agreement between D. Rosati and Sears Canada Inc. dated July 4, 2014, Transcript Brief of the Former Directors, Tab 2, p. 21; Exhibit 2 to the Cross-examination of Steven Bissell held on September 10, 2019, Indemnification Agreement between R. Khanna and Sears Canada Inc. dated July 4, 2014, Transcript Brief of the Former Directors, Tab 3, p. 29.

entitlements, the Former Directors would not have agreed to serve or continue to serve as directors of Sears Canada.[2]

B. The Former Directors' Insurance Coverage Issues

11. The Monitor has taken the position that the Former Directors' indemnification claims against the Sears Canada estate, if allowed, will be treated as unsecured claims that are not entitled to any priority recovery.[3] As a result, D&O insurance is the Former Directors' only source of indemnification for defence costs and any judgment or settlement relating to the Actions.[4]

12. The Former Directors currently have no insurance funding; the first layer policy under which they were being funded is exhausted (largely through unrelated events in the United States) and the next layer insurer has denied coverage. Their attempts to reach an agreement on interim funding with insurers have met with refusals or stony silence. The Former Directors find themselves in this untenable position despite having taken all appropriate and necessary steps to provide proper notice to all potential insurers of the potential claims against them, and the Actions themselves.

13. Until July 15, 2019, the Former Directors received payment of their defence costs related to the Actions under the 2015-16 D&O insurance tower issued to Sears Holdings with total aggregate coverage of US$150 million (the "**2015 Policies**").

14. The primary layer of insurance under the 2015-16 tower is a US$15 million policy (the "**2015 XL Policy**") provided by XL Specialty Insurance Company ("**XL**") pursuant to

---

[2] Motion Record, Tab 2, Ross Affidavit, para. 10, p. 13.
[3] Responding Motion Record, Tab 1, Affidavit of Steven Bissell sworn September 3, 2019 ("**Bissell Affidavit**"), para. 12, p. 11.
[4] Motion Record, Tab 2, Ross Affidavit, paras. 10, 60, pp. 13, 24.

which XL provided coverage for defence costs until they advised on July 15, 2019 that the policy limits were exhausted. Above the XL Policy is a US$15 million first excess policy (the "**QBE Policy**") issued by QBE Insurance Corporation ("**QBE**"). Above the QBE Policy is a second excess policy (the "**Lloyd's Policy**") issued by a Lloyd's syndicate ("**Lloyd's**").[5] As set out below, the Former Directors now have no funding because the 2015 XL Policy is completely exhausted and QBE has denied coverage under the first excess policy.

15. The Former Directors' litigation counsel promptly gave notice to all D&O insurers of both Sears Canada and SHC in respect of the policy period that covered 2017-2018 shortly after the Sears Canada litigation investigator was appointed by court order. For the next five months, the D&O insurers considered the claims notices under the 2017-2018 policy period.[6]

16. Over the summer of 2018, when confirmation of coverage had still not been provided, six of the Former Directors jointly retained counsel (Covington & Burling LLP) at their own expense to advise on matters related to SHC, including insurance coverage and indemnification. These Former Directors have incurred the significant costs of such counsel, which are not covered by insurance.[7]

17. In the late summer of 2018, XL first took the position that coverage might be under the 2015 XL Policy, rather than the 2017-2018 policies. On September 7, 2018, the Former Directors notified the other 2015-2016 insurers, including QBE, that XL had taken

[5] Motion Record, Tab 2, Ross Affidavit, paras. 12-13, p. 13.
[6] Motion Record, Tab 2, Ross Affidavit, para. 18, p. 14.
[7] Motion Record, Tab 2, Ross Affidavit, para. 19, p. 14.

the position that the class action commenced against the Former Directors by 129 Ontario in October 2015 was a claim first made in the 2015-2016 policy period.[8]

18. On October 22, 2018, XL formally confirmed coverage of defence costs under the 2015 XL Policy rather than the 2017-2018 Policy. XL informed the Former Directors that its position was that all the claims in respect of which notice had been given constituted a single claim that was related to the 129 Action commenced in 2015.[9]

19. In early November 2018, XL advised that, because of the settlement of an earlier U.S. derivative action unrelated to the Actions, there was US$3 million of coverage remaining under the XL Policy.[10] The other insurers under the 2015 Policies, including QBE, were informed that XL had determined that the 2015 XL Policy responded to the claims made against the Former Directors in the Ontario Actions and that XL had agreed to pay defence expenses (as defined under the 2015 XL Policy).[11]

20. In December 2018, the Former Directors provided an update to all insurers under the 2015 Policies, including QBE, regarding the December 3, 2018 order of Justice Hainey that permitted litigation to be brought against the Former Directors and other parties.[12] Following this update, the Former Directors also provided regular updates to the insurers under the 2015 Policies about motions, case conferences, timetables, and all other material steps in the Actions.[13]

---

[8] Motion Record, Tab 2, Ross Affidavit, paras. 20-21, p. 15.
[9] Motion Record, Tab 2, Ross Affidavit, para. 22, p. 15.
[10] Reply Motion Record of the Former Directors, dated September 6, 2019 ("**Reply Record**"), Tab 1, Reply Affidavit of Donald Campbell Ross sworn September 6, 2019 ("**Second Ross Affidavit**"), Exhibit "S", p. 97.
[11] Motion Record, Tab 2, Ross Affidavit, para. 23, p. 15.
[12] Motion Record, Tab 2, Ross Affidavit, para. 26, p. 16.
[13] Motion Record, Tab 2, Ross Affidavit, paras. 24-26, pp. 15-16.

21. On May 7, 2019, given certain payments already incurred in connection with claims under the 2015 XL Policy that were unrelated to the Actions, counsel to the Former Directors sought confirmation from QBE of its commitment to provide coverage under the QBE Policy, including continuous reimbursement of the Former Directors' defence costs immediately upon exhaustion of the coverage available under the 2015 XL Policy.[14]

22. QBE has now denied coverage based on its contention that the claims first arose in 2013 (based on a letter from Sotos LLP – counsel in the class action – to Sears Canada in December 2013), such that the D&O insurance in the 2013-2014 policy period should pay defence costs and provide indemnification instead of the 2015 Policies.[15] QBE's position contradicts the coverage position of XL, which provided coverage under the 2015 XL Policy until that policy was exhausted. Further, although the Lloyd's Policy contains terms that require Lloyd's to provide "drop down" coverage, Lloyd's has not provided coverage despite the requests of the Former Directors.[16]

23. QBE had never provided any notice of this intended position to the Former Directors prior to May 2019, despite being aware since the fall of 2018 that XL had confirmed coverage under the 2015 XL Policy and despite regular updates on the status of the Actions.[17]

---

[14] Motion Record, Tab 2, Ross Affidavit, para. 27, p. 16.
[15] Motion Record, Tab 2, Ross Affidavit, para. 13, p. 13.
[16] Motion Record, Tab 2, Ross Affidavit, paras. 32-34, pp. 17-18.
[17] Motion Record, Tab 2, Ross Affidavit, para. 15, p. 14.

C. Context of Timetable Order

24. The Former Directors promptly advised the court and the other parties of QBE's position, while continuing to attempt to proceed with the litigation in good faith and keeping the court apprised of their insurance issues' potential impact on the timetable.[18]

25. At case conferences on May 27 and June 18, 2019, counsel to the Former Directors advised the court that QBE had denied coverage, that the denial of coverage may impact the timetable for the litigation and that the Former Directors were working to avoid any adverse impact this might have on the efficient progress of the litigation. This included the Former Directors' engagement of Toronto insurance coverage counsel to pursue an application in Ontario for declaratory relief as against QBE and XL regarding the Former Directors' insurance coverage (the "**Coverage Application**").[19]

26. At a case conference on June 27, 2019, counsel to the Former Directors advised Justice McEwen and the other counsel in attendance that the ongoing insurance coverage issues were unresolved and would need to be resolved before certain aspects of a litigation timetable, such as a mediation, could proceed.[20]

27. On July 5, 2019, coverage counsel for the Former Directors attended a chambers appointment at which Justice McEwen scheduled the Coverage Application (both any jurisdiction motion and the argument of the merits) for August 27, 2019.[21]

---

[18] Motion Record, Tab 2, Ross Affidavit, para. 43, p. 20; Reply Record, Tab 1, Second Ross Affidavit, para. 6(a), p. 6.
[19] Motion Record, Tab 2, Ross Affidavit, para. 43, p. 20; Reply Record, Tab 1, Second Ross Affidavit, para. 6, pp. 6-7.
[20] Reply Record, Tab 1, Second Ross Affidavit, para. 6(b), p. 6.
[21] Motion Record, Tab 2, Ross Affidavit, para. 39, p. 19.

28. At a case conference on July 12, 2019, Justice McEwen granted the Timetable Order on consent. At that time, counsel to the Former Directors reiterated that the insurance coverage issues remained unresolved and may require follow up, including in relation to the above timetable. Counsel to the Former Directors advised that the Former Directors would apprise the court of any developments in the insurance coverage dispute that may impact the litigation in order to address any issues as they arose.[22]

29. The Former Directors negotiated and consented to the Timetable Order in good faith and in the interest of pursuing the efficient resolution of the Actions.[23] At the time, XL continued to provide funding for defence costs under the 2015 XL Policy and, significantly, the Former Directors reasonably believed the Coverage Application would be heard on or about August 27, 2019, which was the date set by the court.[24]

30. Further, at that time, the Former Directors believed there were additional funds available for defence costs under the 2015 XL Policy and had no knowledge that the policy limits were near complete exhaustion. The latest information provided by XL at that point was that approximately US$743,000 in coverage would remain after XL processed payment of pending defence counsel invoices in late June 2019.[25] In fact, counsel to the Former Directors had followed up with XL on July 10, 2019 to obtain any further updates of the amount of remaining insurance coverage, but XL did not respond before the Timetable Order was granted.[26]

---

[22] Reply Record, Tab 1, Second Ross Affidavit, para. 6(c), p. 7.
[23] Motion Record, Tab 2, Ross Affidavit, para. 44, p. 20.
[24] Motion Record, Tab 2, Ross Affidavit, para. 40, p. 19.
[25] Reply Record, Tab 1, Second Ross Affidavit, Exhibit “U”, p. 106.
[26] Reply Record, Tab 1, Second Ross Affidavit, Exhibit “V”, p. 110.

31. Late on July 15, 2019, XL unexpectedly advised the Former Directors that coverage under the 2015 XL Policy was completely exhausted and that no further defence cost funding was available.[27] The Former Directors had no knowledge that coverage under the 2015 XL policy was near complete exhaustion at the time the Timetable Order was made.[28]

32. As a result, the Former Directors attempted to negotiate an interim funding arrangement with QBE and XL, without any success[29] The Former Directors also requested that Lloyd's provide drop-down coverage pursuant to the terms of the Lloyd's Policy but Lloyd's has failed to provide coverage.

D. Delay of Coverage Application

33. On July 25, 2019, QBE advised the Former Directors of its intention to challenge the jurisdiction of the Ontario court to decide the Coverage Application.[30] As a result, it became evident that the hearing of the Coverage Application may be delayed and that the Former Directors would have to meet multiple other resource intensive deadlines in the timetable before the Coverage Application was determined.[31]

34. On August 8, 2019, counsel to the Former Directors advised plaintiffs' counsel and the court of the exhaustion of insurance coverage, the likely delays in the Coverage Application and the impact these events would have on the Former Directors' ability to

---

[27] Motion Record, Tab 2, Ross Affidavit, para. 46, p. 21.
[28] Motion Record, Tab 2, Ross Affidavit, para. 48, p. 21.
[29] Motion Record, Tab 2, Ross Affidavit, paras. 54-55, p. 23.
[30] Motion Record, Tab 2, Ross Affidavit, para. 49, p. 21-22.
[31] Motion Record, Tab 2, Ross Affidavit, para. 50 and Exhibit "G", p. 95. The Coverage Application is scheduled to be heard on October 18, 2019. QBE's jurisdiction challenge is scheduled to be heard on September 25, 2019.

comply with the Timetable Order.[32] In response, plaintiffs' counsel indicated that they would oppose any changes to the existing timetable.

35. At a case conference on August 27, 2019, Justice McEwen scheduled the jurisdiction motion for September 25 and the hearing of the merits of the Coverage application for October 18, 2019.

E. The Monitor Refuses to Provide Interim Funding

36. In an effort to avoid any disruption to the timetable, the Former Directors requested that the Monitor provide interim funding for their defence costs through the Sears Canada estate, in the form of a non-recourse loan that would be repaid upon a determination of the insurance coverage dispute. The Monitor has refused to provide such a loan. As such, the Former Directors amended their Notice of Motion to seek this loan in the event that a pause in the timetable is not ordered.[33]

37. In the responding affidavit to the motion, it was indicated that Sears Canada held cash "in excess of $155 million."[34] However, on cross-examination, the evidence was clarified that Sears Canada at that time actually had cash "in the range of 180 or $190 million", and that that amount has in the interim been determined to be as much as $25 million higher than that."[35] The cross-examination revealed that Sears Canada in fact currently holds cash of approximately $205 million (which has since been confirmed in a

[32] Motion Record, Tab 2, Ross Affidavit, Exhibit "H", p. 98.
[33] Motion Record, Tab 1, Amended Notice of Motion, para. 1(c), p. 3.
[34] Responding Motion Record, Tab 1, Bissell Affidavit, para. 9, p. 10.
[35] Transcript of the Cross-examination of Steven Bissell held on September 10, 2019 ("**Bissell Cross**"), Q. 121, p. 38, Transcript Brief of the Former Directors, Tab 1, p. 12.

cash-flow statement delivered on the same day as this factum).[36] When asked whether the Monitor reconsidered whether to advance the Former Directors a loan from the Sears Canada estate after discovering that there was $15-$25 million more cash in the estate that the Monitor previously thought, the Monitor initially indicated that the issue had not been revisited, and then his counsel refused the question.

38. The December 3, 2018 Order of Justice Hainey established a $12 million reserve intended to cover: (a) the Monitor's and the Litigation Trustee's fees and disbursements in the Actions; and (b) any and all cost awards in favour of the defendants in the Related Actions (the "**Litigation Reserve**").[37] Under cross-examination, the Monitor's counsel refused to answer how much money was left in the Litigation Reserve on the basis of privilege.[38] The Litigation Trustee has consistently taken the same position throughout this proceeding.

F. Prejudice to the Former Directors Due to Lack of Insurance Coverage

39. The Timetable Order sets an expedited timetable for the litigation of the Actions, including discoveries in November and December 2019, a mediation in March and April 2020 (which will necessarily involve the participation of insurers, with coverage clarified, if it is to be remotely useful), and a six-week trial commencing on May 20, 2020.[39]

40. Given the complexity of the proceedings, the voluminous documentary productions (over 35,000 documents have been produced by the Monitor alone), the

---

[36] Bissell Cross, Q. 105, p. 35, Transcript Brief of the Former Directors, Tab 1, p. 11.
[37] Responding Motion Record, Tab 1, Bissell Affidavit, para. 10, pp. 10-11.
[38] Bissell Cross, Q. 96, p. 31, Transcript Brief of the Former Directors, Tab 1, p. 10.
[39] Responding Motion Record, Tab 1, Bissell Affidavit, Exhibit "H", p. 166.

expedited procedural schedule and the serious financial and reputational consequences, it is critically important that the Former Directors be able to defend the Actions with the assistance of appropriate defence counsel.[40]

41. Requiring the Former Directors to proceed without insurance coverage for their defence costs will fundamentally prejudice their ability to defend the Actions and could cause significant financial hardship.[41] The Former Directors have already personally incurred significant fees (over $500,000) in respect of the insurance coverage issues, and these fees are continuing.[42] The Former Directors never contemplated that they would face litigation relating to their roles as directors of Sears without any recourse to the indemnification and D&O Policies that they relied on in accepting and continuing in such roles. The injustice of the hardship they now face is highlighted by the fact that the majority of the Former Directors had ceased serving in their capacity of directors by 2015, approximately two years after the publicly disclosed 2013 dividend was paid and two years prior to the company filing for protection under the CCAA.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

42. The issues on this motion are as follows:

(a) whether the Timetable Order should be varied or amended until the Former Directors access D&O coverage for their legal fees, through the determination of the Coverage Application or through interim funding from the insurers; and

---

[40] Motion Record, Tab 2, Ross Affidavit, para. 57, p. 23.
[41] Motion Record, Tab 2, Ross Affidavit, para. 61, p. 24-25.
[42] Reply Record, Tab a, Second Ross Affidavit, Exhibit “B”, p. 14.

(b) if the Timetable Order is to remain in place, whether Sears Canada, through the Monitor, should be ordered to provide interim funding for the Former Directors' defence costs by means of a non-recourse loan that will be repaid out of reimbursement of defence costs from one or more insurers upon the determination of the Former Directors' insurance coverage dispute or such other terms as the court may direct.

A. The Timetable Order Should Be Paused

(i) The fundamental principle of director indemnification

43. Indemnification in legal proceedings is a fundamental right and expectation of corporate directors, which is well established by statute and by appellate jurisprudence. This motion brought by the Former Directors of Sears Canada must be considered in the context that they are being deprived of that fundamental right.

44. Canadian corporate statutes have long provided directors with a right of indemnification from claims arising from their directorships.[43] The existence of such statutory provisions is a "legislative and a corporate recognition of a reality" that persons who serve as directors and senior officers of public corporations expect, as incidental to that service, that they will be indemnified for costs and amounts reasonably incurred in actions or proceedings for which they might be personally responsible for their good faith actions as directors and officers.[44]

---

[43] See for example the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 124 and the *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 136.
[44] *Manitoba (Securities Commission) v. Crocus Investment Fund*, 2007 MBCA 36 [*Crocus Investment*], para. 13, Former Directors' Book of Authorities, Tab 1.

45. The purpose of an indemnity is to provide assurance to those who become directors that they will be compensated for adverse consequences that ensue from well-intentioned acts taken on behalf of the corporation. This is an important policy consideration that serves to attract and protect competent directors who will advance the interests of the corporation.[45]

46. The Supreme Court of Canada has recognized the strong policy goals underlying the principle of director indemnification, which "is geared to encourage responsible behaviour yet still permit enough leeway to attract strong candidates to directorships and consequently foster entrepreneurism."[46] The Ontario Superior Court and Court of Appeal have recently held that director indemnities are "important rights that should not be lightly interfered with" and that it is "commercially sensible and good public policy to offer this protection" to directors.[47]

47. The Former Directors should be presumed to have acted in good faith and should not be obliged to fund their own defence costs.[48] Directors are entitled to, and do, rely on the availability of ongoing funding for their defence costs from corporate indemnification or D&O insurance coverage. As the Ontario Court of Appeal recently observed, this recognizes "the reality that requiring an individual to fund his or her costs of litigation until

---

[45] *Bennett v. Bennett Environmental Inc.*, 2009 ONCA 198, para. 23, Former Directors' Book of Authorities, Tab 2.
[46] *Blair v. Consolidated Enfield Corp*., [1995] 4 S.C.R. 5, para. 74, Former Directors' Book of Authorities, Tab 3.
[47] *Noranco v. MidOcean Partners III*, 2019 ONSC 1173 [*Noranco*], paras. 45-46, Former Directors' Book of Authorities, Tab 4; *Unique Broadband Systems, Inc. (Re)*, 2014 ONCA 538, para. 77, Former Directors' Book of Authorities, Tab 5.
[48] *Crocus Investment*, *supra* note 44, para. 50, Former Directors' Book of Authorities, Tab 1.

its conclusion before being provided with indemnification would seriously impair the objective of indemnification itself."[49]

48. In *Noranco v. MidOcean Partners III*, an ongoing Commercial List proceeding involving many of the same firms and lawyers as this litigation, director defendants brought a motion to compel the corporate plaintiff to indemnify them.[50] Justice Myers, who was case managing the action, adjourned the motion from its originally scheduled date to January 8, 2019. In the endorsement adjourning the motion, Justice Myers wrote that "examinations for discovery of all parties will have to be moved back to accommodate the adjournment."[51] The adjournment of examinations for discovery was a logical consequence of the adjournment of the motion; it would have been unjust to require the director defendants to go through discoveries before their indemnification rights were determined.

(ii) This court has the discretion to pause the litigation

49. The court naturally has a discretion to extend or abridge the time prescribed by its own order, on terms it considers just.[52] The court also has residual discretion to amend consent interlocutory procedural orders, as part of its inherent jurisdiction to control its own process.[53] This discretion is broad and "should be exercised where necessary to

---

[49] *Med-Chem Health Care Ltd. v. Misir*, 2010 ONCA 380 [*Med-Chem*], para. 20, Former Directors' Book of Authorities, Tab 6.

[50] The decision from the motion is reported as *Noranco*, *supra* note 47, Former Directors' Book of Authorities, Tab 4.

[51] Endorsement of Justice Myers dated November 26, 2018, Former Directors' Book of Authorities, Tab 7.

[52] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 3.02; see also r. 59.06 which permits the amendment, setting aside or varying of an order previously made.

[53] *Sherman v. Monteith*, 2019 ONSC 3850, para. 26, Former Directors' Book of Authorities, Tab 8.

achieve the justice of the case."[54] As a matter of practice, it is commonly exercised when a timetable requires adjustment, for myriad reasons. This court has exercised its discretion to "pause" ongoing litigation where it is sensible to await developments in other proceedings before requiring parties to incur further costs, where developments in those other proceedings may impact the litigation being "paused".[55]

50. The factors to be considered in the exercise of discretion to vary a timetable order include the explanation advanced by the party seeking the delay, any prejudice caused by the delay, and the justice of the case.[56] In this case, justice demands that the pause be granted.

(iii) This court should exercise its discretion to pause the litigation

51. The cause of the delay relates to factors outside of the Former Directors' control. The Former Directors promptly notified the insurers under all relevant D&O Policies of the potential claims, which culminated in the Actions, and the determination by XL that the 2015 XL Policy applied to the claims. Unfortunately, and unexpectedly, QBE chose to "lie in the weeds" and not disclose its non-coverage position until many months after receiving notice of the claims. The Former Directors are moving the Coverage Application forward as expeditiously as possible.

52. Leaving aside the cause of the delay, the most important factor to be considered by this court in the exercise of its discretion is the justice of the case – and in this case,

---

[54] *Stoughton Trailers Canada Corp. v. James Expedite Transport Inc.*, 2008 ONCA 817, para. 1, Former Directors' Book of Authorities, Tab 9; See also *Beetown Honey Products Inc., Re* (2003), 67 O.R. (3d) 511 (Sup. Ct.), paras. 11-12, Former Directors' Book of Authorities, Tab 10 and *Clatney v. Quinn Thiele Mineault Grodzki LLP*, 2016 ONCA 377, para. 60, Former Directors' Book of Authorities, Tab 11.
[55] *David v. Loblaw*, 2018 ONSC 7519, para 24, Former Directors' Book of Authorities, Tab 12.
[56] *Lawrence v. Peel Regional Police Force*, 210 A.C.W.S. (3d) 296 (Ont. C.A.), para. 22, Former Directors' Book of Authorities, Tab 13.

justice demands levelling the playing field between the Former Directors and the well-funded plaintiffs over the next stages of the litigation.

53. The legal fees of the Monitor and the Litigation Trustee are being funded by the $12 million Litigation Reserve put in place as part of the authorization of the Actions by the Litigation Trustee and the Monitor.

54. The Monitor and the Litigation Trustee are also protected by indemnification provisions of orders of Justice Hainey dated December 3, 2018 to appoint the Litigation Trustee and authorize the proceeding brought by the Monitor. These orders also make the Monitor and Litigation Trustee immune from liability (except for gross negligence or wilful misconduct).[57]

55. The Monitor and the Litigation Trustee would undoubtedly not proceed with these actions in the absence of such funding and immunity from liability.

56. Since Sears Canada is insolvent and the Former Directors' indemnity claims are subject to the ongoing CCAA claims process, insurance coverage is the only means available in this case to give effect to these recognized principles of director indemnity. D&O insurance is closely linked to director indemnification in insolvency cases, where an indemnity may be unavailable.[58]

---

[57] Order of Justice Hainey (Appointment of Litigation Trustee, Lifting of Stay and Other Relief) dated December 3, 2018, para. 9, Former Directors' Book of Authorities, Tab 14; Order of Justice Hainey (TUV Proceeding Approval Order) dated December 3, 2018, paras. 7-8, Former Directors' Book of Authorities, Tab 15; Amended and Restated Initial Order of Justice Hainey dated June 22, 2017, para. 34, Former Directors' Book of Authorities, Tab 16.

[58] C. Brown and T. Donnelly, *Insurance Law in Canada* (Toronto: Thomson Reuters Canada Limited, 2018), § 18.15(b), Former Directors' Book of Authorities, Tab 17.

57. Whether two of the eight Former Directors may have the financial wherewithal to fund their own proportionate share of defence costs on an interim basis, while insurance coverage is determined, is not relevant to the relief sought.[59] The Court of Appeal has affirmed that the financial position of the directors in question is not a valid consideration in the context of an indemnity application. Indeed, "any meaningful assessment of a party's ability to pay would be almost impossible" in the early stages of litigation.[60]

58. If the Former Directors are forced to proceed with this complex and expensive litigation while insurance coverage for defence costs is not available, they will be effectively deprived of the benefit of their indemnity while litigating against multiple, fully-funded plaintiffs who are using Sears Canada funds (*i.e.*, the Litigation Reserve)[61] that, absent the insolvency proceedings, would have been available to fulfil Sears Canada's indemnification obligation.

59. There is a manifest unfairness in permitting Sears Canada's funds to be used to prosecute claims against the Former Directors who are entitled to be indemnified by those funds, while the Former Directors are deprived of defence funding. Justice requires that the prosecution of the Actions be paused pending the continuation of defence funding for the Former Directors, or that interim funding be provided out of the estate.

60. While it certainly is in the interests of the Sears Canada estate that this litigation proceeds to an expeditious conclusion, a delay will not impact the ultimate potential

---

[59] In an effort to avoid a refusals motion and further costly proceedings, six of the Former Directors agreed to provide personal financial information to the plaintiffs. The details of such information is protected by the Confidentiality Order dated September 12, 2019. The Former Directors expressly provided this information without prejudice to their position that their ability to interim fund is not relevant on the within motion: Reply Record, Tab 1, Second Ross Affidavit, Exhibit "B", p. 14.

[60] *Med-Chem*, *supra* note 49, paras. 26-27, Former Directors' Book of Authorities, Tab 6.

[61] Bissell Cross, Q. 93-95, pp. 30-31, Transcript Brief of the Former Directors, Tab 1, p. 10.

recovery to the estate. Moreover, a delay in the proceedings until the coverage issues are determined will provide the opportunity for a meaningful mediation before trial.

61. The Monitor acknowledged on cross-examination that it did not consider, in opposing the Former Directors' motion for a pause in the timetable, whether there could be an effective mediation in the absence of clarify on insurance coverage.[62] It is evident that mediation would be futile in the absence of certainty regarding insurance coverage.

62. In the circumstances, the court should exercise its discretion to vary the Timetable Order to provide for a "pause" so that the Former Directors can defend this litigation on a fully-funded basis against fully-funded Plaintiffs. [63]

(iv) The timetable should be paused due to a material change in circumstances

63. The Timetable Order should be varied or set aside based on the material change in circumstances that occurred after the Timetable Order was made.[64]

64. It is just and appropriate to revisit procedural orders and timelines to promote a fair and just determination of each case on its merits where "unexpected and unusual contingencies ... make it difficult or impossible for a party to comply".[65]

---

[62] Bissell Cross, Q. 92, p. 30, Transcript Brief of the Former Directors, Tab 1, p. 10.
[63] See for example *Gates Estate v. Pirate's Lure Beverage Room*, 2004 NSCA 36, paras. 37-38, Former Directors' Book of Authorities, Tab 18, where a four-month extension was found to cause no prejudice to the party opposing the variance to the timetable.
[64] *Joshi v. Joshi*, 2014 ONSC 4677, para. 6, Former Directors' Book of Authorities, Tab 19.
[65] *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544, para. 19, Former Directors' Book of Authorities, Tab 20.

65. The Former Directors' present insurance coverage position, and its impact on their ability to meet the Timetable Order, are the result of matters outside of their control, the full extent of which only became apparent after the Timetable Order was made.

66. Indeed, the Former Directors only learned after the Timetable Order was made that (a) their insurance coverage under the primary layer was fully exhausted, and (b) the hearing of the Coverage Application on the merits would likely occur later than August 27, 2019. These facts, and their impact on the Former Directors' ability to comply with the Timetable Order, are a "material change in circumstance" warranting a variance of the Timetable Order.

B. In the Alternative, Sears Canada Should Provide Interim Funding

67. If the court is not prepared to vary or amend the Timetable Order, the justice of the case warrants the funding of the Former Directors' defence costs by Sears Canada, through the Monitor, as a loan granted on a non-recourse basis to be repaid out of reimbursement of defence costs made from one or more insurers, or on such further terms as the court may determine.

68. Since notice of this motion has been given both to the entire service list in the Sears Canada CCAA proceedings, this court has discretion to ground some or all of the relief sought in the provisions of the CCAA. The CCAA provides this court with the power to make "any order it considers appropriate in the circumstances".[66] A discretionary order

[66] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**"), s. 21.

under the CCAA is appropriate when it advances the "policy objectives underlying the CCAA".[67]

69. In addition, section 11.52(1)(c) of the CCAA gives a court broad power to grant a charge "in respect of the fees and expenses of…any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act".[68] This provision has been used repeatedly to permit funding of representative counsel for creditor/stakeholder groups such as employees that have claims against an insolvent company. In fact, in the Sears Canada CCAA proceedings, the court used its powers under section 11.52 to appoint, and provide funding out of the estate for, employee representative counsel and retiree representative counsel.

70. In considering whether to fund such counsel, CCAA courts have considered factors such as whether, absent funding, counsel would be expected to serve.[69] The court will consider, in particular, whether the balance of convenience favours the granting of such an order and whether it is in the interests of justice to do so.[70] The present case is analogous to those cases like *Fraser Papers* where representative counsel are funded. In both cases, funding is sought even though the interested parties (be it directors or employees) are creditors of the insolvent company and are adverse in interest to the company.

---

[67] *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60, para. 70, Former Directors' Book of Authorities, Tab 21.
[68] CCAA, s. 11.52(1).
[69] *Re Fraser Papers Inc.,* [2009] O.J. No. 4287 (Sup. Ct. - Commercial List) [*Fraser Papers*], para. 18, Former Directors' Book of Authorities, Tab 22.
[70] *Ibid*, para. 7, Former Directors' Book of Authorities, Tab 22.

71. If the court concludes that the wherewithal of the directors is a relevant consideration, it is apparent in this case that only two of the eight Former Directors have sufficient assets to fund defence costs. A funding order will mitigate the serious prejudice that the directors will otherwise suffer.

72. The equities and all of the circumstances favour making the order sought. Sears Canada's assets have been liquidated and the company has ceased operations. Interim funding of defence costs will not deplete resources that otherwise would be needed for operations. The estate of Sears Canada has sufficient money on hand, whether in the Litigation Reserve or in general funds on hand, to readily permit interim loan funding of defence costs. As set out above, Sears Canada currently has approximately $205 million of cash on hand,[71] which is substantially in excess of what would be required for interim funding of defence costs, and thus there is no impediment to non-recourse interim funding from the Sears Canada estate.

73. Importantly, the Coverage Application will determine which tower applies to cover defence costs. Accordingly, regardless of the outcome, the tower that is found to apply will be forced to fund defence costs, including the repayment of the loan from the estate.

74. The Former Directors could also receive interim funding out of the $12 million Litigation Reserve. The current balance of the Litigation Reserve is unknown, since the Monitor has refused to advise how much funding has been advanced to the Monitor and its counsel or to the Litigation Trustee and its counsel.[72] The court is entitled to draw an

[71] Bissell Cross, Q. 133, p. 40, Transcript Brief of the Former Directors, Tab 1, p. 12.
[72] Bissell Cross, Q. 99, p. 33, Transcript Brief of the Former Directors, Tab 1, p. 10.

adverse inference (on this motion) from this improper refusal, being that sufficient funds remain in the fund to provide for the relief sought on this motion.

75. The Monitor does not support the Former Directors' request for interim funding on the basis that the Former Directors' indemnification claims are unsecured and not entitled to any priority recovery.[73] However, the interim funding would be repaid from insurance proceeds once the insurance coverage application is resolved and thus funding would not ultimately deplete the Sears Canada estate. The temporary use of funds to cover defence costs will cause much less interim prejudice to the Sears Canada estate than the lack of legal funding will cause permanent prejudice to the Former Directors. If the Former Directors are unable to properly defend themselves because they cannot afford defence counsel, they will suffer irreparable harm to their legal and financial interests.

76. In determining whether to oppose the Former Directors' funding request, the Monitor was aware of Sears Canada's indemnification obligations, including the obligation to provide D&O insurance.[74] However, the Monitor's representative testified that it was not the Monitor's concern whether the Former Directors might have to try to fund legal fees personally, nor did the Monitor consider a scenario in which the Former Directors might have to self-represent.[75]

77. The Monitor also did not revisit its decision not to provide funding when it recently became aware that there is approximately $15 million to $25 million more cash ($205

[73] Responding Record, Tab 1, Bissell Affidavit para. 12, p. 11.
[74] Bissell Cross, Q. 65, pp. 22-23, Transcript Brief of the Former Directors, Tab 1, p. 8.
[75] Bissell Cross, Q. 64, p. 22, Transcript Brief of the Former Directors, Tab 1, p. 8.

million) in the estate that it believed at the time when it determined to oppose the funding request.[76]

78. Providing such funding will not endanger creditor recoveries because any insurance funding recovered by the Former Directors will go to reimbursing the estate for the interim funded amounts. Practically, providing interim funding from the Sears Canada estate will allow for a quicker resolution of these actions.

79. In contrast, if the court is not prepared to pause the timetable or provide funding, the orderly functioning of these proceedings will inevitably break down, with predictable results.

80. All of the facts and circumstances favour the exercise of this court's discretion to either pause the timetable, or order that Sears Canada through the Monitor provide interim loan funding of the Former Directors' legal fees until the insurance coverage issues are determined and funded.

PART IV - ORDER REQUESTED

81. The Former Directors respectfully request an order varying the Timetable Order to suspend all further steps pending either,

(a) a final determination of the Former Directors' application bearing Court File No. CV-19-623573-00CL for declaratory relief in respect of their insurance coverage for defence costs in these actions or, if this court declines

[76] The Monitor recently discovered that the cash position of the estate is approximately $205 million. Previously, the Monitor believed that it was approximately $180 to $190 million: Bissell Cross, Q. 133-134, p. 40 and Q. 142-144, pp. 41-42, Transcript Brief of the Former Directors, Tab 1, p. 12.

jurisdiction, the final determination of parallel proceedings for similar relief before the courts of Illinois; or

(b) an agreement being reached with relevant insurers to provide interim funding for the Former Directors' defence costs in these actions pending resolution of the Insurance Coverage Application;

82. In the alternative, the Former Directors request an order directing Sears Canada through the Monitor to provide interim funding of all defence costs by means of a non-recourse loan, or on such terms as the court shall determine. If the court is prepared to order interim funding, the Former Directors will provide a funding request and, if the amount of funding cannot be agreed upon among the parties, the court may fix the amount at a subsequent case conference.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of September, 2019.

Per: Lara Jackson

CASSELS BROCK & BLACKWELL LLP

BENNETT JONES LLP

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Manitoba (Securities Commission) v. Crocus Investment Fund*, 2007 MBCA 36
2. *Bennett v. Bennett Environmental Inc.*, 2009 ONCA 198
3. *Blair v. Consolidated Enfield Corp*., [1995] 4 S.C.R. 5
4. *Noranco v. MidOcean Partners III*, 2019 ONSC 1173
5. *Unique Broadband Systems, Inc. (Re)*, 2014 ONCA 538
6. *Med-Chem Health Care Ltd. v. Misir*, 2010 ONCA 380
7. Endorsement of Justice Myers dated November 26, 2018
8. *Sherman v. Monteith*, 2019 ONSC 3850
9. *Stoughton Trailers Canada Corp. v. James Expedite Transport Inc.*, 2008 ONCA 817
10. *Beetown Honey Products Inc., Re* (2003), 67 O.R. (3d) 511 (Sup. Ct.), aff'd [2004] 3 C.B.R. (5th) 204 (C.A.)
11. *Clatney v. Quinn Thiele Mineault Grodzki LLP*, 2016 ONCA 377
12. *David v. Loblaw*, 2018 ONSC 7519
13. *Lawrence v. Peel Regional Police Force*, 210 ACWS (3d) 296 (Ont. CA)
14. Order of Justice Hainey (Appointment of Litigation Trustee, Lifting of Stay and Other Relief) dated December 3, 2018
15. Order of Justice Hainey (Transfer at Undervalue Proceeding Approval Order) dated December 3, 2018
16. Amended and Restated Initial Order of Justice Hainey dated June 22, 2017
17. C. Brown and T. Donnelly, *Insurance Law in Canada* (Toronto: Thomson Reuters Canada Limited, 2018), at § 18.15(b)
18. *Gates Estate v. Pirate's Lure Beverage Room*, 2004 NSCA 36
19. *Joshi v. Joshi*, 2014 ONSC 4677
20. *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544
21. *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60
22. *Fraser Papers Inc., Re*, [2009] O.J. No. 4287 (Sup. Ct. - Commercial List)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194**

EXTENSION OR ABRIDGMENT

General Powers of Court

3.02 (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just. R.R.O. 1990, Reg. 194, r. 3.02 (1).

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

[…]

AMENDING, SETTING ASIDE OR VARYING ORDER

Amending

59.06 (1) An order that contains an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate may be amended on a motion in the proceeding.

Setting Aside or Varying

(2) A party who seeks to,

> (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;
>
> (b) suspend the operation of an order;
>
> (c) carry an order into operation; or
>
> (d) obtain other relief than that originally awarded,

may make a motion in the proceeding for the relief claimed.

***Canada Business Corporations Act*, RSC 1985, c C-44**

Indemnification

124 (1) A corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or another individual who acts or acted at the corporation's request as a director or officer, or an individual acting in a similar capacity, of another entity, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment,

reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation or other entity.

Advance of costs

(2) A corporation may advance moneys to a director, officer or other individual for the costs, charges and expenses of a proceeding referred to in subsection (1). The individual shall repay the moneys if the individual does not fulfil the conditions of subsection (3).

Limitation

(3) A corporation may not indemnify an individual under subsection (1) unless the individual

> **(a)** acted honestly and in good faith with a view to the best interests of the corporation, or, as the case may be, to the best interests of the other entity for which the individual acted as director or officer or in a similar capacity at the corporation's request; and
>
> **(b)** in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, the individual had reasonable grounds for believing that the individual's conduct was lawful.

Indemnification in derivative actions

(4) A corporation may with the approval of a court, indemnify an individual referred to in subsection (1), or advance moneys under subsection (2), in respect of an action by or on behalf of the corporation or other entity to procure a judgment in its favour, to which the individual is made a party because of the individual's association with the corporation or other entity as described in subsection (1) against all costs, charges and expenses reasonably incurred by the individual in connection with such action, if the individual fulfils the conditions set out in subsection (3).

Right to indemnity

(5) Despite subsection (1), an individual referred to in that subsection is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by the individual in connection with the defence of any civil, criminal, administrative, investigative or other proceeding to which the individual is subject because of the individual's association with the corporation or other entity as described in subsection (1), if the individual seeking indemnity

> **(a)** was not judged by the court or other competent authority to have committed any fault or omitted to do anything that the individual ought to have done; and
>
> **(b)** fulfils the conditions set out in subsection (3).

Insurance

(6) A corporation may purchase and maintain insurance for the benefit of an individual referred to in subsection (1) against any liability incurred by the individual

> **(a)** in the individual's capacity as a director or officer of the corporation; or
>
> **(b)** in the individual's capacity as a director or officer, or similar capacity, of another entity, if the individual acts or acted in that capacity at the corporation's request.

Application to court

(7) A corporation, an individual or an entity referred to in subsection (1) may apply to a court for an order approving an indemnity under this section and the court may so order and make any further order that it sees fit.

Notice to Director

(8) An applicant under subsection (7) shall give the Director notice of the application and the Director is entitled to appear and be heard in person or by counsel.

Other notice

(9) On an application under subsection (7) the court may order notice to be given to any interested person and the person is entitled to appear and be heard in person or by counsel.

Remuneration

125 Subject to the articles, the by-laws or any unanimous shareholder agreement, the directors of a corporation may fix the remuneration of the directors, officers and employees of the corporation.

***Business Corporations Act*, R.S.O. 1990, c. B.16**

Indemnification

136 (1) A corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or another individual who acts or acted at the corporation's request as a director or officer, or an individual acting in a similar capacity, of another entity, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation or other entity. 2006, c. 34, Sched. B, s. 26.

Advance of costs

(2) A corporation may advance money to a director, officer or other individual for the costs, charges and expenses of a proceeding referred to in subsection (1), but the individual shall repay the money if the individual does not fulfil the conditions set out in subsection (3). 2006, c. 34, Sched. B, s. 26.

Limitation

(3) A corporation shall not indemnify an individual under subsection (1) unless the individual acted honestly and in good faith with a view to the best interests of the corporation or, as the case may be, to the best interests of the other entity for which the individual acted as a director or officer or in a similar capacity at the corporation's request. 2006, c. 34, Sched. B, s. 26.

Same

(4) In addition to the conditions set out in subsection (3), if the matter is a criminal or administrative action or proceeding that is enforced by a monetary penalty, the corporation shall

not indemnify an individual under subsection (1) unless the individual had reasonable grounds for believing that the individual's conduct was lawful. 2006, c. 34, Sched. B, s. 26.

Derivative actions

(4.1) A corporation may, with the approval of a court, indemnify an individual referred to in subsection (1), or advance moneys under subsection (2), in respect of an action by or on behalf of the corporation or other entity to obtain a judgment in its favour, to which the individual is made a party because of the individual's association with the corporation or other entity as described in subsection (1), against all costs, charges and expenses reasonably incurred by the individual in connection with such action, if the individual fulfils the conditions set out in subsection (3). 2006, c. 34, Sched. B, s. 26.

Right to indemnity

(4.2) Despite subsection (1), an individual referred to in that subsection is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by the individual in connection with the defence of any civil, criminal, administrative, investigative or other proceeding to which the individual is subject because of the individual's association with the corporation or other entity as described in subsection (1), if the individual seeking an indemnity,

(a) was not judged by a court or other competent authority to have committed any fault or omitted to do anything that the individual ought to have done; and

(b) fulfils the conditions set out in subsections (3) and (4). 2006, c. 34, Sched. B, s. 26.

Insurance

(4.3) A corporation may purchase and maintain insurance for the benefit of an individual referred to in subsection (1) against any liability incurred by the individual,

(a) in the individual's capacity as a director or officer of the corporation; or

(b) in the individual's capacity as a director or officer, or a similar capacity, of another entity, if the individual acts or acted in that capacity at the corporation's request. 2006, c. 34, Sched. B, s. 26.

Application to court

(5) A corporation or a person referred to in subsection (1) may apply to the court for an order approving an indemnity under this section and the court may so order and make any further order it thinks fit. R.S.O. 1990, c. B.16, s. 136 (5).

Idem

(6) Upon an application under subsection (5), the court may order notice to be given to any interested person and such person is entitled to appear and be heard in person or by counsel. R.S.O. 1990, c. B.16, s. 136 (6).

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36**

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Law of set-off or compensation to apply

21 The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

FTI CONSULTING CANADA INC. J. DOUGLAS CUNNINGHAM, Q.C. MORNEAU SHEPELL LTD. 1291079 ONTARIO LIMITED Plaintiffs	-and-	ESL INVESTMENTS INC *et al.* Defendants	Court File No.: CV-18-00611219-00CL Court File No. CV-18-00611214-00CL Court File No. CV-18-00611217-00CL Court File No. CV-19-617792-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

JOINT FACTUM OF THE FORMER DIRECTORS

BENNETT JONES LLP
3400 One First Canadian Place
PO Box 130, Toronto, ON M5X 1A4

Richard B. Swan
Tel: 416.777.7479
Fax: 416.863.1716
swanr@bennetthones.com

Jason M. Berall
Tel: 416.777.5480
Fax: 416.863.1716
berallj@bennettjones.com

Lawyers to the Defendants,
Deborah E. Rosati and R. Raja Khanna

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza, 40 King Street West
Toronto, ON M5H 3C2

Wendy Berman LSO #: 32748J
Tel: 416.860.2926
Fax: 416.640.3107
wberman@casselsbrock.com

John N. Birch LSO #: 38968U
Tel: 416.860.5225
Fax: 416.640.3057
jbirch@casselsbrock.com

Lara Jackson LSO #: 41858M
Tel: 416.860.2907
Fax: 416.640.3108
ljackson@casselsbrock.com

Lawyers for the Defendants,
Ephraim J. Bird, Douglas Campbell,
William Crowley, William Harker,
James McBurney, and Donald Ross