

**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 TRANSCRIPT BRIEF OF THE FORMER DIRECTORS
(MOTION TO VARY TIMETABLE OR OBTAIN INTERIM FUNDING,
RETURNABLE ON SEPTEMBER 19, 2019)**

September 14, 2019

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TO: **Litigation Service List**

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

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Tab 1

In the Matter Of:
Sears Canada Inc. et al. v.
ESL Investments Inc. et al.

STEVEN BISSELL
September 10, 2019

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

2 ONTARIO

3 SUPERIOR COURT OF JUSTICE

4 COMMERCIAL LIST

5 BETWEEN:

6
7 FTI CONSULTING CANADA INC., IN ITS CAPACITY AS
8 COURT-APPOINTED MONITOR IN PROCEEDINGS PURSUANT
9 TO THE COMPANIES' CREDITORS ARRANGEMENT ACT, RSC
10 1985, C. C-36

11
12 Plaintiff

13 - and -

14 ESL INVESTMENTS INC., ESL PARTNERS LP,
15 SPE I PARTNERS, LP, SPE MASTER I, LP, ESL
16 INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT,
17 WILLIAM HARKER

18
19 Defendants

20 -----
21 This is the Cross-Examination of Steven Bissell
22 on an affidavit sworn September 3, 2019, taken
23 at the offices of Norton Rose Fulbright Canada
24 LLP, 222 Bay Street, Suite 3000, Toronto on the
25 10th day of September, 2019.

Sears Canada Inc. et al. v. ESL Investments Inc. et al.
STEVEN BISSELL on September 10, 2019

Page 2	<p>1 Court File No. CV-18-00611214-00CL</p> <p>2 ONTARIO</p> <p>3 SUPERIOR COURT OF JUSTICE</p> <p>4 BETWEEN:</p> <p>5</p> <p>6 SEARS CANADA INC., BY ITS COURT-APPOINTED</p> <p>7 LITIGATION TRUSTEE, J. DOUGLAS CUNNINGHAM, Q.C.</p> <p>8</p> <p>9 Plaintiff</p> <p>10 - and -</p> <p>11 ESL INVESTMENTS INC., ESL PARTNERS LP, SPE</p> <p>12 I PARTNERS, LP, SPE MASTER I, LP, ESL</p> <p>13 INSTITUTIONAL PARTNERS, LP, EDWARD LAMPERT,</p> <p>14 EPHRAIM J. BIRD, DOUGLAS CAMPBELL, WILLIAM</p> <p>15 CROWLEY, WILLIAM HARKER, R. RAJA KHANNA, JAMES</p> <p>16 MCBURNEY, DEBORAH ROSATI, AND DONALD ROSS</p> <p>17</p> <p>18 Defendants</p> <p>19 -----</p> <p>20 This is the Cross-Examination of Steven Bissell</p> <p>21 on an affidavit sworn September 3, 2019, taken</p> <p>22 at the offices of Norton Rose Fulbright Canada</p> <p>23 LLP, 222 Bay Street, Suite 3000, Toronto on the</p> <p>24 10th day of September, 2019.</p> <p>25 -----</p>	Page 4
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	<p>1 APPEARANCES:</p> <p>2 Robert Frank, Esq., for the Monitor</p> <p>3 Evan Cobb, Esq.,</p> <p>4</p> <p>5</p> <p>6 Lara Jackson, Esq., for Crowley, Harker</p> <p>7 & Ross</p> <p>8</p> <p>9 Matthew Gottlieb, Esq., for the Trustee</p> <p>10 Philip Underwood, Esq.,</p> <p>11</p> <p>12 Kiran Patel, Esq., for Morneau Shepell</p> <p>13</p> <p>14 Richard Swan, Esq., for the Board of</p> <p>15 Directors</p> <p>16</p> <p>17 Sandy Lockheart, Esq., for ESL</p> <p>18</p> <p>19 Chris Kinnear Hunter, Esq, for Sears Holdings</p> <p>20</p> <p>21</p> <p>22</p> <p>23 REPORTED BY:</p> <p>24 Amy Armstrong</p> <p>25 Realtime Verbatim Reporter</p>	

<p style="text-align: right;">Page 6</p> <p style="text-align: center;">INDEX</p> <p style="text-align: center;">PAGE</p> <p>WITNESS: Steven Bissell</p> <p>Cross-Examination by Mr. Swan9</p>	<p style="text-align: right;">Page 8</p> <p>The following list of undertakings, advisements and refusals is meant as a guide only for the assistance of counsel and no other purpose.</p> <p style="text-align: center;">INDEX OF UNDERTAKINGS</p> <p>The questions/requests undertaken are noted by U/T and appear on the following page/line: None noted.</p> <p style="text-align: center;">INDEX OF ADVISEMENTS</p> <p>The questions/requests taken under advisement are noted by a U/A and appear on the following page/line: None noted.</p> <p style="text-align: center;">INDEX OF REFUSALS</p> <p>The questions/requests refused are noted by R/F and appear on the following page/line: 31/16, 32/4, 32/23, 33/19, 34/7, 34/15, 34/19, 44/25.</p>															
<p style="text-align: right;">Page 7</p> <p style="text-align: center;">INDEX OF EXHIBITS</p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 5%;"></th> <th style="width: 85%;">NO./DESCRIPTION</th> <th style="width: 10%;">PAGE</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>1 Rosati Indemnification Agreement.</td> <td>13</td> </tr> <tr> <td>2</td> <td>2 Khanna Indemnification Agreement.</td> <td>13</td> </tr> <tr> <td>3</td> <td>3 Order Appointing Litigation</td> <td>17</td> </tr> <tr> <td>4</td> <td>Trustee.</td> <td></td> </tr> </tbody> </table>		NO./DESCRIPTION	PAGE	1	1 Rosati Indemnification Agreement.	13	2	2 Khanna Indemnification Agreement.	13	3	3 Order Appointing Litigation	17	4	Trustee.		<p style="text-align: right;">Page 9</p> <p>—Upon commencing at 11:02 A.M.</p> <p>STEVEN BISSELL: Affirmed.</p> <p>CROSS-EXAMINATION BY MR. SWAN:</p> <p>1 Q. Good morning, Mr. Bissell. I understand you've been affirmed this morning?</p> <p>2 A. Yes, I have.</p> <p>3 Q. And you are here as a representative of the court-appointed monitor?</p> <p>4 A. That's correct.</p> <p>5 Q. And you've sworn an affidavit on this motion which is filed in the joint motion record of the plaintiffs.</p> <p>6 A. Yes.</p> <p>7 Q. Did you have any corrections to that affidavit before we begin?</p> <p>8 A. No, I do not. I do not.</p> <p>9 Q. You've had a chance to review it since swearing it?</p> <p>10 A. Yes.</p> <p>11 Q. Thank you. The directors, the former directors of Sears Canada who are defendants in this proceeding, they were the subject of pre-CCAA indemnification agreements by Sears Canada, were they not?</p> <p>12 A. My understanding is yes, they</p>
	NO./DESCRIPTION	PAGE														
1	1 Rosati Indemnification Agreement.	13														
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3	3 Order Appointing Litigation	17														
4	Trustee.															

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1 were.
 2 7 Q. Right. And, in fact, Mr. Ross
 3 has included one in his affidavit. Did you see
 4 that?
 5 A. Yes, I did.
 6 8 Q. Okay. And I am going to show you
 7 indemnification agreements for Mr. Khanna and
 8 Ms. Rosati. I wonder if you take a look at
 9 those. Have you seen this before?
 10 A. No, I have not.
 11 9 Q. Okay. And I take it that because
 12 of the CCAA filing, Sears Canada is not
 13 indemnifying Mr. Khanna, Ms. Rosati or any of
 14 the other defendant directors under this
 15 indemnification agreement. Is that the case?
 16 A. So we understand that there's the
 17 indemnification agreements are in place.
 18 10 Q. Yes?
 19 A. That Sears Canada has provided
 20 these indemnities to the former directors, and
 21 that as a result there may be claims against the
 22 estates.
 23 11 Q. Right.
 24 A. The Sears Canada entities. But
 25 they would be unsecured claims.

Page 11

1 12 Q. Unsecured. The monitor is
 2 treating those claims as unsecured pre-filing
 3 claims?
 4 A. That's correct.
 5 13 Q. Is that right?
 6 A. That's correct.
 7 14 Q. And I take it it's the monitor's
 8 position that those indemnification claims
 9 should share rateably with other pre-filing
 10 claimants. Is that the case?
 11 A. Our view is that if there is a
 12 claim brought forward by the directors with
 13 respect to – that would be otherwise covered by
 14 the indemnity and it's reviewed and determined
 15 to be an allowed claim, it would be an unsecured
 16 claim against the estate, correct.
 17 15 Q. And share rateably with other
 18 unsecured claims?
 19 A. That's correct.
 20 16 Q. Right. But for my purposes the
 21 principal proposition I put to you is that Sears
 22 Canada is not presently indemnifying the
 23 directors in respect of this litigation, is it?
 24 A. I don't think I understand the
 25 question.

Page 12

1 17 Q. Sears Canada is not presently
 2 indemnifying the directors in respect of, for
 3 example, legal fees relating to litigation, is
 4 it?
 5 A. There's no payments being made at
 6 this point in respect of – no payments have
 7 been made to the former directors in that
 8 regard.
 9 18 Q. Right. And you were aware that
 10 back in the pre-CCAA days, that Sears Canada
 11 arranged to place directors' and officers'
 12 insurance for these defendant directors?
 13 A. I'm aware of the insurance.
 14 19 Q. And, in fact, if you take a
 15 moment and look at paragraph 15A of that
 16 agreement, or either of them. They're
 17 identical.
 18 A. They're the same.
 19 20 Q. You can just take a moment to
 20 review that. Sir, you've told me you've not
 21 seen this agreement –
 22 A. I just need a little bit more
 23 time. Okay.
 24 21 Q. You acknowledged in paragraph 15A
 25 of this indemnification agreement the

Page 13

1 corporation, being Sears Canada, shall use its
 2 reasonable best efforts to ensure that it has in
 3 place at all times directors' and officers'
 4 insurance; do you see that?
 5 A. That's what it says, yes.
 6 MR. SWAN: Thank you. Let's mark
 7 these two documents as Exhibits 1 and 2 to this
 8 examination. Exhibit 1 will be the
 9 indemnification agreement of Ms. Rosati;
 10 Exhibit 2 will be the indemnification agreement
 11 of Mr. Khanna.
 12 EXHIBIT NO. 1: Rosati Indemnification
 13 Agreement.
 14 EXHIBIT NO. 2: Khanna Indemnification
 15 Agreement.
 16 BY MR. SWAN:
 17 22 Q. And, sir, to your knowledge,
 18 directors' and officers' was put in place in
 19 respect of the defendant directors through a
 20 Sears holdings policy, are you aware of that?
 21 A. I'm aware of that just through
 22 the information provided as part of these
 23 proceedings and the issues, the matters that
 24 have come up in terms of the insurance, yes, I'm
 25 aware of that.

<p>Page 14</p> <p>1 23 Q. Okay. You are aware of that. 2 And that it is those policies that are the 3 subject of the insurance coverage applications 4 presently before Justice McEwen; you're aware of 5 that? 6 A. Again, I don't know. I'm going 7 to assume that we're talking about – I don't 8 know. 9 24 Q. All right. 10 A. That these are the policies that 11 I understand the issues and the matters, but – 12 25 Q. And you're aware that the limits 13 under the tower or the 2015 – '16 tower that XL 14 is the primary layer for, are \$150 million? Are 15 you aware of that? 16 A. Yes. 17 26 Q. And that's the insurance that was 18 put in place by Sears Canada through Sears 19 Holdings for these directors; right? 20 A. That is my understanding. 21 27 Q. Okay. And you have been involved 22 in the Sears Canada insolvency since the initial 23 filing, have you? 24 A. Yes. 25 28 Q. Thank you. I'm going to show you</p>	<p>Page 16</p> <p>1 A. Correct. 2 33 Q. And if you look at paragraph 11 3 of the order it makes reference to payment of 4 the litigation trustee's fees. I'll let you 5 read it, but I'll put the question to you in 6 advance so you'll know what to look for. The 7 company is authorized and directed to pay the 8 litigation trustee's fees on a biweekly basis; 9 is that right? 10 A. Yes, that's right. 11 34 Q. And under paragraph 12, the 12 litigation trustee parties shall pass their 13 accounts from time to time. Do you see that? 14 A. Yes. 15 35 Q. And to your knowledge, has the 16 litigation trustee ever passed his accounts? 17 A. They've submitted invoices for 18 payment, yes. 19 36 Q. But have they passed before the 20 Ontario Superior Court? 21 A. I'm not aware. 22 37 Q. Okay. In other words, you don't 23 believe they have. My information and my 24 knowledge is they haven't. And you don't have 25 any knowledge to the contrary; is that right?</p>
<p>Page 15</p> <p>1 a copy of an order under which the litigation 2 trustee was appointed on the 3rd of December 3 2018. Are you familiar with this order? 4 MR. FRANK: Do you have a copy, 5 counsel? 6 MR. SWAN: I do. 7 MR. FRANK: Thank you. 8 THE WITNESS: Yes, I am. 9 BY MR. SWAN: 10 29 Q. I would like you to look at 11 paragraph 9 on page 5. And do you agree with me 12 that under the terms of this order the 13 litigation trustee is indemnified and held 14 harmless by Sears Canada? 15 A. I just need a second to read 16 through that entire paragraph. Just one second. 17 Okay. 18 30 Q. Do you agree with that 19 proposition? 20 A. Repeat your proposition again? 21 31 Q. The proposition is that the 22 litigation trustee is indemnified and held 23 harmless by Sears Canada. 24 A. Yeah, that's what it says here. 25 32 Q. Yes.</p>	<p>Page 17</p> <p>1 A. I don't have any knowledge of it. 2 MR. SWAN: For the sake of 3 completeness, although we likely don't have to, 4 let's mark that as Exhibit 3 to this 5 examination, being the order appointing the 6 litigation trustee. 7 EXHIBIT NO. 3: Order Appointing 8 Litigation Trustee. 9 BY MR. SWAN: 10 38 Q. So I'd like to asking you some 11 questions now about, specifically about the 12 position the directors find themselves in on the 13 present motion. And I take it it's the 14 monitor's position that the current schedule, 15 which concludes with a trial beginning in May 16 2020, should remain as is. Is that the 17 monitor's position? 18 A. Yes, it is. 19 39 Q. And I take it that a trial on 20 that schedule, we might call it an expedited 21 schedule, is important to the monitor? 22 A. It is. 23 40 Q. And I also take it from what 24 you've said in your affidavit, that the 25 monitor's position is that no interim funding</p>

<p>1 from any Sears Canada sources should be provided 2 to the defendant directors during this insurance 3 dispute. 4 A. With respect to the defence of 5 the litigation? 6 41 Q. Yes. 7 A. Yes, that is correct. 8 42 Q. And that position includes the 9 fact that the monitor takes the position that no 10 funds should be paid out of the 11 12 million-dollar fund; is that right? 12 A. In respect of the defence costs? 13 43 Q. Yes. 14 A. That is correct. 15 44 Q. You said a couple of times, "In 16 respect of the defence costs." Do you mean to 17 distinguish liability generally? 18 A. What I'm referring to is the 19 basis of the reserve. There is a reserve that 20 was established. 21 45 Q. Yes? 22 A. And that reserve was approved and 23 set up to cover the cost of the litigation: 24 Trustee, counsel, monitor, monitor's counsel, as 25 well as any potential adverse cost awards or</p>	Page 18	<p>1 well as potentially any adverse cost awards 2 against the plaintiffs. 3 51 Q. But no specific amount I'm 4 hearing you say has been set aside? 5 A. We've got – no, nothing 6 specific. There's a \$12 million amount that 7 we've considered and set aside. Within there, 8 we have contemplated and determined and come up 9 with what we think are reasonable amounts in 10 respect to both costs and what could be 11 potentially adverse cost awards. 12 52 Q. And what is the amount that's 13 been allocated for an adverse costs award? 14 A. Again, it's not specifically 15 allocated, but we contemplated there could be 16 adverse cost awards of a million, \$2 million, 17 \$3 million. 18 53 Q. Nothing more specific than that? 19 A. Nothing more specific than that. 20 54 Q. And no amount of the 12 million 21 has been specifically set aside for that – 22 A. No. 23 55 Q. – I think you're telling me? 24 A. No. 25 56 Q. So I've heard the monitor's</p>	Page 20
<p>1 liabilities of the plaintiffs in that respect. 2 46 Q. So we'll come back to that fund a 3 little bit later. 4 A. Sure. 5 47 Q. But is a specific amount within 6 the \$12 million reserve set aside for costs? 7 A. It was contemplated for that, 8 yes. 9 48 Q. But is a specific amount, has a 10 specific amount been set aside? 11 A. So when the process to come up 12 with the amount of the reserve contemplated what 13 were the expectations were in terms of cost as 14 well as potential cost awards, adverse cost 15 awards against the plaintiff, the parties. 16 That's correct. 17 49 Q. But my question is has the 18 monitor set aside a specific amount? 19 A. No, nothing has separately been 20 set aside. There's a single reserve. 21 50 Q. Yes. 22 A. The amount of that reserve was 23 determined to be able to cover the costs – 24 excuse me, the legal cost, the cost of the 25 litigation and that the litigation trustee as</p>	Page 19	<p>1 position that no funds should come from the 2 company. Is it therefore the monitor's position 3 that the defendant directors should fund their 4 legal fees personally in this period? 5 A. We've been asked whether we think 6 the estate should pay for these funds. 7 57 Q. Right? 8 A. And my view is that – and our 9 view has been that the estate should not be 10 funding those costs. So are you asking my 11 personal view whether the defendant directors 12 should pay these personally? 13 58 Q. I'm asking the monitor's view as 14 opposed to your personal view. 15 A. Okay. I understand. 16 59 Q. The monitor being FTI as opposed 17 to you personally. 18 A. Sure. I don't have a view. The 19 monitor does not have a view of where the 20 funding should come from. Our view is that it 21 should not be coming from the estate. 22 60 Q. Right. So is it the monitor's 23 position that the defendant director should pay 24 them personally if necessary? 25 A. We don't have a position on that.</p>	Page 21

<p>Page 22</p> <p>1 61 Q. Well, have you turned your mind 2 to that? 3 A. No. 4 62 Q. Do you not care? 5 A. As long it's not being funded by 6 the estate. 7 63 Q. You don't care? 8 A. I don't. 9 64 Q. Okay. When I say "you," you mean 10 the monitor? 11 A. The monitor hasn't – we haven't 12 discussed this as a monitor. We haven't turned 13 our minds to this in terms of whether or not if 14 it's going to be the directors themselves 15 personally or if they have other ability to fund 16 it. The important matter that I've been – 17 we've been asked to provide a position on is 18 whether or not the estate should provide the 19 funding. 20 65 Q. And in your consideration of that 21 question, did you take into account the fact 22 that Sears Canada indemnified the directors for 23 any claims under the indemnification agreements 24 and that Sears Canada was responsible for 25 placing the directors' and officers' insurance</p>	<p>Page 24</p> <p>1 stakeholders; right? 2 A. Yes. 3 69 Q. Former directors, in fact, have 4 claims against the company for indemnification, 5 do they not? 6 A. Yes. 7 70 Q. And former directors have, as a 8 matter of contract with the company, have or 9 should have the benefit of directors' and 10 officers' insurance that the company was to 11 place; correct? 12 A. There's indemnity agreements, 13 there's insurance that was in place, yes. 14 71 Q. You agree with those propositions 15 that I've just put to you? 16 A. Repeat your propositions again. 17 72 Q. Maybe we should just have the 18 reporter read them back. 19 –COURT REPORTER READS BACK FROM 20 QUESTION 70– 21 BY MR. SWAN: 22 73 Q. Do agree with those propositions? 23 A. I do. 24 74 Q. Thank you. And in view of those 25 propositions, I will ask the question: Is the</p>
<p>Page 23</p> <p>1 that's led to the current set of circumstances? 2 Did you take that into account? 3 A. We took into account, but no 4 further than – you know, they have a claim 5 against the estate. Just like thousands of 6 other creditors have claims, the directors would 7 have a claim again in respect to these indemnity 8 agreements. 9 66 Q. So if it turns out that the 10 defendant directors have to attempt in some 11 fashion to fund their own legal fees personally, 12 the monitor is comfortable with that as an 13 officer of the Court? 14 A. Again, the monitor isn't looking 15 to determine whether they're comfortable, 16 whether or not the directors. Our view is that, 17 again, it shouldn't be funded from the estate. 18 If they have the means to, you know, find other 19 sources for that, we're not taking a position 20 nor do we have a view on how they do that. 21 67 Q. The monitor does have an 22 obligation to take into account the interests of 23 all shareholders; right? 24 A. Yes. 25 68 Q. Former directors are</p>	<p>Page 25</p> <p>1 monitor as an officer of the Court recognizing 2 the interests of these particular stakeholders 3 and those facts, is the monitor comfortable with 4 the proposition that the defendant directors, if 5 they're able to, fund their own legal fees? 6 A. Again, I go back to what is the 7 monitor being asked to decide - to give you. 8 75 Q. Well, did you consider the 9 question? 10 A. I understand but – 11 MR. GOTTLIEB: Mr. Swan, let him 12 speak, please. 13 BY MR. SWAN: 14 76 Q. Go ahead. 15 A. You're asking whether or not the 16 monitor's comfortable; right? I'm not really 17 understanding the question. And I look at this, 18 this way. I understand kind of where you're 19 going, but I also understand that there's a lot 20 of other creditors, right? 21 77 Q. Mm-hmm. 22 A. Suppliers, former employees, etc. 23 Are you asking me a similar question, do I 24 think about am I comfortable with their claims 25 and how – is the expectation that they're able</p>

<p style="text-align: right;">Page 26</p> <p>1 to fund and, you know, take care of their 2 different obligations and liabilities that they 3 have are being negatively impacted to do because 4 of the estate proceedings and because of the 5 CCAA proceedings. So I'm trying to understand 6 what you're asking in terms of whether the 7 monitor is comfortable with whether or not they 8 pay. 9 78 Q. Let me put – 10 A. Sure. 11 79 Q. – my proposition to you in two 12 parts that might make it easier to answer. 13 A. Okay. 14 80 Q. We've reviewed the facts in terms 15 of indemnification, directors' and officers' 16 insurance and so on. We won't cover those 17 again. The monitor made a decision to take the 18 position that it is on this motion. In taking 19 that position, did the monitor expressly turn 20 its mind to the question whether it is 21 appropriate whether the monitor is comfortable 22 that the individual director defendants on those 23 facts, if they're able to, may be obliged to pay 24 for their own legal fees personally? Did you 25 turn your mind to that question?</p>	<p style="text-align: right;">Page 28</p> <p>1 to all the potential sources. So had we thought 2 about that if the implication is that the estate 3 doesn't? Yes. 4 84 Q. And you had considered the 5 proposition that they might, some of them might 6 have to represent themselves. Did you consider 7 that? 8 A. No, not specifically we didn't 9 consider that. I didn't consider that. 10 85 Q. It was suggested yesterday by 11 counsel for the litigation trustee in a 12 cross-examination that it may be many months, 13 perhaps beyond the May 2020 trial date, before 14 the insurance funding dispute is resolved. Do 15 you believe that? Does the monitor believe that 16 may be the case? 17 A. I don't know. I don't have a 18 view on that. 19 86 Q. What information do you have as 20 to the length of time it may take to resolve 21 this insurance funding dispute? 22 A. I understand that potentially 23 given, you know, that there's steps first, that 24 there's going to be a determination of 25 jurisdiction to making decisions. I know I'm</p>
<p style="text-align: right;">Page 27</p> <p>1 A. We turned our mind that that if 2 they are able to, it would be appropriate. 3 81 Q. You did? 4 A. Yes. 5 82 Q. And if they're not able to, did 6 the monitor turn its mind to the question 7 whether it would be appropriate for director 8 defendants to represent themselves in this 9 proceeding? 10 A. I'm sorry. Ask your question one 11 more time, please. 12 83 Q. In the event that the director 13 defendants are not able to pay some of them 14 their legal fees, did the monitor turn its mind 15 to line to the question whether it is 16 appropriate that the director defendants might 17 have to represent themselves? In other words, 18 not have a lawyer through trial? 19 A. That was a potential scenario of 20 this decision or this position. If our position 21 is that the estate should not be funding their 22 defence costs, obviously then they need to find 23 another way. It's either they're going to have 24 personally pay for it. If there's other 25 sources, if there's – you know, I can't speak</p>	<p style="text-align: right;">Page 29</p> <p>1 aware of that, that that could potentially end 2 up being heard in courts in the United States. 3 I understand that the proceedings in the United 4 States can tend to take longer than in Canada. 5 So, yes, I understand that there's potential, 6 that the timeline, it's uncertain. So we are 7 aware of that. The monitor is aware of that. 8 87 Q. So you believe that indeed it may 9 take many months, indeed possibly longer than 10 the schedule that would lead to the commencement 11 and end of this trial before the insurance 12 funding dispute is resolved. You believe that's 13 a possibility? 14 A. It's always a possibility. 15 88 Q. Well, I mean a reasonable 16 possibility. 17 A. I couldn't – I don't know to say 18 that that's a reasonable possibility, the timing 19 of that. 20 89 Q. Okay. 21 A. We're hoping that everything 22 moves along as quickly as possible. 23 90 Q. And in the course of your 24 consideration of this, did the monitor consider 25 whether there could be an effective mediation in</p>

<p>1 March or April of 2020 in the absence of clarity 2 on insurance coverage? Did you take that into 3 account? 4 A. Sorry, mediation in respect of 5 what and between which parties? 6 91 Q. Mediation between the plaintiffs 7 and the defendants, including the director 8 defendants. Under the litigation schedule there 9 is a mediation. 10 A. Okay. 11 92 Q. In fact, there are some steps of 12 a mediation. In respect of the position that 13 the monitor is taking on this motion, did the 14 monitor consider whether there can be an 15 effective mediation in the absence of clarity on 16 insurance coverage? 17 A. That specific issue was not 18 considered. 19 MR. GOTTLIEB: Can we take a break, 20 please, for five. I want to talk to Mr. Frank. 21 Thanks. 22 -RECESS TAKEN AT 11:27 A.M.- 23 -UPON RESUMING AT 11:30 A.M. - 24 BY MR. SWAN: 25 93 Q. We spoke earlier about the</p>	Page 30	<p>1 97 Q. Has the monitor communicated to 2 His Honour what the balance of that fund is, to 3 your knowledge? 4 R/F MR. FRANK: Don't answer that 5 question. 6 MR. SWAN: Don't answer the question 7 whether this has been communicated to His 8 Honour? On what basis? 9 MR. FRANK: Any questions about the 10 balance of the fund. 11 MR. SWAN: Why? 12 MR. FRANK: Same answer. Privileged. 13 MR. SWAN: Well, this motion asks for 14 funding out of that fund. 15 MR. FRANK: You can ask questions 16 about the fund, but not the balance of what's 17 been expended, I should say. 18 BY MR. SWAN: 19 98 Q. Well, I asked what the balance of 20 the fund is. If His Honour asks what the 21 balance of the fund is, are you prepared to tell 22 them? 23 R/F MR. FRANK: Don't answer that 24 question. 25 MR. SWAN: Because you're prepared to</p>	Page 32
<p>1 \$12 million fund. And according to the order 2 appointing the litigation trustee, the 3 litigation trustee and his counsel's fees are 4 paid out of that fund; correct? 5 A. Correct. 6 94 Q. And the monitor and the monitor's 7 counsel's fees in respect of this litigation is 8 also paid out of that fund? 9 A. That is correct. 10 95 Q. And this is the fund that you 11 referred to in paragraph 10 of your affidavit, 12 right? 13 A. Yes. 14 96 Q. And what is the current balance 15 of that fund? How much remains? 16 R/F MR. FRANK: Don't answer that 17 question. 18 MR. SWAN: Why not? 19 MR. FRANK: Privilege. 20 MR. SWAN: Privileged? 21 MR. FRANK: Yes. 22 MR. SWAN: How could the amount in a 23 fund be privileged? 24 MR. FRANK: You have my objection. 25 BY MR. SWAN:</p>	Page 31	<p>1 answer that question? 2 MR. GOTTLIEB: Mr. Swan, he just said 3 no. Could we move on, please? 4 MR. SWAN: It's not your examination. 5 You are not defending the examination. 6 MR. GOTTLIEB: But we're being here to 7 sit down. We're not going to resolve objections 8 today by restating them. So let's just move on. 9 MR. SWAN: I think Mr. Frank can speak 10 for himself. 11 BY MR. SWAN: 12 99 Q. All right. I'd like you to be 13 very clear about this. I'd like you to tell me 14 how much remains in the \$12 million fund, and 15 I'd like you to tell me how much has been spent 16 on this litigation by the two plaintiff parties. 17 I don't need an individual breakdown, but in 18 particular I'd like to know how much remains. 19 R/F MR. FRANK: You have our objection. 20 BY MR. SWAN: 21 100 Q. Do you have an order of magnitude 22 of what the monitors go-forward legal fees will 23 be for this litigation proceeding? Do you have 24 a budget? 25 MR. GOTTLIEB: Mr. Swan, can you ask</p>	Page 33

<p style="text-align: right;">Page 34</p> <p>1 that again or have the reporter read it back, 2 please? 3 BY MR. SWAN: 4 101 Q. Do you have either a budget or a 5 sense of the go-forward legal fees for the 6 monitor in respect of this litigation? 7 R/F MR. FRANK: Same objection. 8 MR. SWAN: You're refusing to answer? 9 MR. FRANK: Yes. 10 BY MR. SWAN: 11 102 Q. Same question for the litigation 12 trustee. Do you have a budget or a sense of the 13 go-forward legal fees for the litigation 14 trustee? 15 R/F MR. FRANK: Don't answer that. 16 BY MR. SWAN: 17 103 Q. In respect of this litigation as 18 it relates to the \$12 million fund? 19 R/F MR. FRANK: Same objection. 20 BY MR. SWAN: 21 104 Q. Okay. In addition to the 22 12 million-dollar fund, Sears Canada has 23 approximately \$155 million of cash; is that 24 right? 25 A. No, there's more than</p>	<p style="text-align: right;">Page 36</p> <p>1 exact amount. We have reporting that will be 2 available. 3 111 Q. At the time you swore paragraph 9 4 did you know there was an excess of \$200 million 5 in cash? 6 A. I knew there was an excess of 7 155 million. 8 112 Q. Did you know there was an excess 9 of 200? 10 A. No, not at the time that I swore 11 the affidavit. 12 113 Q. When did you become aware that 13 there was an excess of 200 million? 14 A. We're currently preparing 15 information for a monitor's report in support of 16 the estate extension as a part of that exercise. 17 We're pulling together the exact amounts of 18 money held by both the Sears Canada entities as 19 well as the monitor on behalf of Sears. And 20 that's where I have that information today. I. 21 114 Q. And my question was when did you 22 become aware that there was an excess of 200 23 million in cash? 24 A. Actually yesterday. 25 115 Q. Yesterday?</p>
<p style="text-align: right;">Page 35</p> <p>1 \$155 million available in cash. 2 105 Q. How much is there? 3 A. So currently we'll be preparing 4 information, but currently there's approximately 5 \$205 million. 6 106 Q. 205 million? 7 A. \$205 million. 8 107 Q. And in your affidavit in 9 paragraph 9 you referred to 155 million. I take 10 it there's been a change in that? 11 A. No, my statement is that there's 12 in excess of. 13 108 Q. In excess of? 14 A. Correct. 15 109 Q. Would you say the actual number 16 is 205? 17 A. Correct. 18 110 Q. Why did you say in excess of 155 19 if the actual number is 205? 20 A. The 155 million is as I'm sure 21 you are aware is important with respect to the 22 pension support agreement, the financial 23 condition. So for the purposes of this 24 affidavit it was – we indicated that there was 25 in excess of \$155 million. We didn't put the</p>	<p style="text-align: right;">Page 37</p> <p>1 A. Yes. 2 116 Q. And when I asked you at the 3 beginning of this cross-examination if you had 4 any corrections to your affidavit why didn't you 5 identify that? 6 A. I don't see that as a correction. 7 My statement is that there's an excess of 8 \$155 million. 9 117 Q. So you're comfortable with that? 10 A. I am. 11 MR. SWAN: Okay. All right. Let's 12 take a brief break, and I'll speak to my 13 colleague. 14 –RECESS TAKEN AT 11:37 A.M.– 15 –UPON RESUMING AT 11:39 A.M.– 16 BY MR. SWAN: 17 118 Q. I asked you earlier about the 18 decision that the monitor made to oppose this 19 motion. Do you recall those questions? 20 A. There was a lot of questions. 21 Which what specific question? 22 119 Q. Well, do you recall I asked you a 23 number of questions about the monitor's 24 consideration and the ultimate decision to 25 oppose this motion?</p>

<p>Page 38</p> <p>1 A. Yes, I'm aware of several 2 questions like that. 3 120 Q. You recall those questions. And 4 you told me it was just yesterday that you 5 learned that the company actually has 6 205 million in cash? 7 A. The exact amount, yes. 8 121 Q. What amount did you think the 9 company had at the time you made the decision to 10 oppose the motion? 11 A. I was aware that we were at 12 approximately in the range of 180 or 13 \$190 million. 14 122 Q. So it turns out that since you 15 made that decision, there is an additional 15 to 16 24 million in cash available; is that right? 17 A. No, it was never described as 18 being that there was 155 million. It was – the 19 point here in the affidavit is that there is in 20 excess of \$155 million. 21 123 Q. That's not what I'm asking. 22 A. Okay. 23 124 Q. Though I have no comment. What 24 you said a moment ago is at the time this 25 decision was made to oppose the motion, you</p>	<p>Page 40</p> <p>1 to oppose the motion, the cash balances of the 2 Sears Canada entities we had contemplated in 3 terms of the affidavit, but I'm not sure where 4 you're going with this questioning. 5 131 Q. Don't worry about where I'm 6 going. 7 A. Okay. 8 132 Q. Just listen to the question. 9 A. Sure. 10 133 Q. You've already told me that at 11 the time you made the decision to oppose this 12 motion, you believed that Sears Canada's cash 13 balances were 180 to 190 million. 14 A. Correct. 15 134 Q. You now say that as of yesterday 16 you realized there are 205 million. 17 A. Yes. 18 135 Q. So at the time you made the 19 decision to oppose the motion, you believed that 20 the cash balances were between 15 to 25 million 21 less than they actually turned out to be? 22 A. No. This statement here says 23 that there's cash in excess – 24 136 Q. No, don't worry about your 25 affidavit.</p>
<p>Page 39</p> <p>1 believed there was in the order of 180 to 2 190 million in cash; right? 3 A. Correct. 4 125 Q. And you now believe there's 5 205 million in cash? 6 A. Yes. 7 126 Q. And at the time you made the 8 decision to oppose the motion you believe there 9 was somewhere between 15 and \$25 million less in 10 cash; is that right? 11 A. No. 12 127 Q. What did you believe there was? 13 You just told me you believe there was 180 to 14 190 million. 15 A. Correct. That's correct. I 16 don't understand the question. 17 128 Q. I'll repeat it. 18 A. Please. 19 129 Q. You say there's now about 20 205 million in cash. 21 A. Yes. 22 130 Q. At the time you made the decision 23 to oppose the decision, you believe there was 24 180 to 190 million? 25 A. At the time we made the decision</p>	<p>Page 41</p> <p>1 A. Okay. 2 137 Q. This has nothing to do with 3 what's in your affidavit. 4 A. Yes. 5 138 Q. You told me – 6 A. Yes? 7 139 Q. – that at the time you made the 8 decision to oppose the motion, there was between 9 180 and 190 million in cash. 10 A. Yes. 11 140 Q. As of yesterday you now know 12 there's 205 million. 13 A. Yes. 14 141 Q. At the time, therefore, my 15 question is this – 16 A. I understand. 17 142 Q. – at the time you make the 18 decision to oppose the motion, you believe that 19 there was between 15 and 25 approximately 20 million dollars less cash in Sears Canada than 21 there turned out to be? 22 A. Yes. 23 143 Q. Thank you. And the monitor, I 24 take it, has not sat down internally and 25 revisited that question with the knowledge that</p>

<p>1 there is now 205 million in cash? 2 A. It doesn't change their answer. 3 144 Q. Have you had that discussion and 4 consideration internally? 5 A. Yes. 6 145 Q. Since you realized there was 7 205 million yesterday, you've had that 8 discussion internally? 9 A. I've considered it. We've 10 considered it. It's the amount of cash that's 11 not what – I don't see that as being – we're 12 being asked whether we think it's appropriate to 13 fund the defendant's costs out of the estate and 14 taking the cash balance is in isolation. It's 15 not just the cash balance as of today. It's 16 what our, again, expected costs of the 17 administration, claims that are still uncertain 18 and unsettled, that are taken into consideration 19 and whether or not we're prepared to support the 20 estate funding these. And our view and our 21 position is that it's not. 22 146 Q. Here's my question. 23 A. Sure. 24 147 Q. It's pretty straightforward. You 25 learned yesterday that the cash balance was, in</p>	<p>Page 42</p> <p>1 MR. FRANK: Mr. Swan, I've let you go 2 quite a while with your questioning about the 3 monitor's views. I think you've gone quite far 4 with those. And I realize this is a 5 cross-examination, and number one, you have an 6 answer to that question already. I realize it's 7 cross-examination, but I think you're going 8 beyond the scope of relevance in terms of – if 9 you want to put to the monitor specific 10 questions about whether it was aware of certain 11 things, that's fine, but as to the monitor's 12 internal thinking, I think you're going too far. 13 BY MR. SWAN: 14 152 Q. Well, I'll put my question as 15 plainly as I can and if you want to refuse it, 16 that's your right. My question is this: Since 17 the monitor learned that there was 205 million 18 in cash more than yesterday, that there was 19 205 million cash, materially more than was 20 thought to be the case before, has the monitor 21 sat down and considered whether it is still 22 appropriate to oppose this motion or take other 23 steps in respect of defendant director costs? 24 Has the monitor actually considered that? 25 R/F MR. FRANK: I'm going to object at</p> <p>Page 44</p>
<p>1 fact, higher. It was 205 million? 2 A. Yes. 3 148 Q. Some 15 to 25 million more than 4 you thought it was when you made the decision to 5 oppose the motion and some 50 million more 6 stated that the amount in your affidavit, right? 7 A. I disagree with the 8 characterization of this. This is – it's in 9 excess of 155 million. 10 149 Q. All right. 11 A. We're not stating that there's 12 155 million. 13 150 Q. Since you learned yesterday that 14 there was 205 million, has the monitor sat down 15 and considered the question whether this 16 motion – with interim funding should be 17 provided under this motion? Have you actually 18 done that? 19 A. Have I sat down? 20 151 Q. Has the monitor? The monitor 21 being FTI, has the monitor sat down and 22 considered, in view of that, whether this motion 23 should still be opposed or whether some other 24 step should be taken to fund director defence 25 costs?</p> <p>Page 43</p>	<p>1 this point. 2 BY MR. SWAN: 3 153 Q. In paragraph 5 of your affidavit, 4 you refer to a number of things that you were 5 told by Mr. Cobb? 6 A. Yes. 7 154 Q. And you were not personally 8 present in those instances where you were 9 advised by Mr. Cobb; is that right? 10 A. That's correct. 11 155 Q. And you're relying on Mr. Cobb's 12 interpretation and memory of events? 13 A. I'm relying on Mr. Cobb in terms 14 of the events that are laid out here in the 15 affidavit, yes. 16 156 Q. You're relying on his memory and 17 his interpretation of those events? 18 A. Yes. 19 157 Q. And if he's right, if he's wrong, 20 you have no way of knowing one way or the other, 21 do you? 22 A. I also know that the materials of 23 what this timeline and the background and series 24 of events are not just coming from Evan Cobb. 25 They've been available and discussed by various</p> <p>Page 45</p>

<p>1 parties. I know that this isn't just purely 2 Evan's interpretation. 3 158 Q. I understand that a number of 4 things are, in fact, documents. I understand 5 and appreciate that. I'm specifically referring 6 to instances where Mr. Cobb has advised you of 7 things. You've told me you aren't there and 8 you're relying on Mr. Cobb's memory and his 9 interpretation? 10 A. Yes. 11 159 Q. And that must be the case. 12 A. Yes. 13 160 Q. As a matter of human nature, if 14 he's right or he's wrong, you don't know for 15 certain, you're relying on what he told you. 16 A. Yes. 17 MR. SWAN: Thank you. Subject to the 18 various refusals, those are my questions. Thank 19 you. 20 MR. FRANK: We have no re-examination. 21 MR. SWAN: Thank you. 22 MS. JACKSON: Thank you. 23 —Whereupon the examination concluded at 11:48 24 a.m. 25</p>	<p>Page 46</p>
<p>1 REPORTER'S CERTIFICATE 2 3 4 I, Amy Armstrong, RVR-CVR, Realtime 5 Verbatim Reporter, certify; 6 That the foregoing proceedings were 7 taken before me at the time and place therein 8 set forth at which time the witness was put 9 under oath by me; 10 That the testimony of the witness and 11 all objections made at the time of the 12 examination were recorded stenographically by me 13 and were thereafter transcribed; 14 That the foregoing is a true and 15 accurate transcript of my shorthand notes so 16 taken. Dated this 12th day of September, 2019. 17 18 19 20 _____ 21 PER: AMY ARMSTRONG 22 REALTIME VERBATIM REPORTER 23 24 25</p>	<p>Page 47</p>

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Tab 2

AMENDED AND RESTATED INDEMNIFICATION AGREEMENT

THIS AGREEMENT is made as of this 4th day of July, 2014.

B E T W E E N:

Sears Canada Inc., a corporation incorporated under the *Canada Business Corporations Act*

(the "Corporation")

- and -

Deborah E. Rosati

(the "Indemnified Party")

RECITALS:

- A. The *Canada Business Corporations Act* (the "**CBCA**") permits, and in some cases requires, the Corporation to indemnify individuals who are or were directors and/or officers of the Corporation, or who act or acted at the Corporation's request as directors and/or officers or in a similar capacity of other entities (an "**Other Entity**", a term which, for the purposes of this indemnification agreement (the "**Agreement**") shall include a corporation or other entity that becomes an Other Entity in the future). In this Agreement:
 - (i) each such individual, duly elected or appointed as a director and/or officer, including acting in a capacity similar to director and/or officer of an Other Entity and including an individual who has ceased to be a director and/or officer or to act in any such capacity, is referred to as a "Director" and/or "Officer", as appropriate;
 - (ii) unless the context otherwise requires, words importing the singular include the plural and vice versa and words importing gender include all genders; and
 - (iii) unless otherwise indicated, references to sections are to sections in this Agreement;
- B. The Indemnified Party is at present a Director or Officer or both of the Corporation;
- C. The Indemnified Party and the Corporation entered into an Indemnification Agreement as of April 26th, 2007 (the "**Original Agreement**"), which they wish to amend and restate;
- D. Accordingly, the Corporation and the Indemnified Party wish to enter into this Agreement, and in so doing affirm that they intend that all the provisions of this Agreement be given legal effect to the full extent permitted by applicable law.

NOW THEREFORE in consideration of the sum of \$1.00 now given by the Indemnified Party to the Corporation, and of the mutual covenants and agreements contained in this Agreement and other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged), the parties agree as follows:

1. Subject to sections 2 and 3, the Corporation agrees to indemnify and save harmless the Indemnified Party:
 - 1.1 from and against all costs, charges and expenses reasonably incurred by the Indemnified Party in respect of any civil, criminal, administrative, investigative or other proceeding to which the Indemnified Party is involved by reason of being or having been a Director and or Officer; and
 - 1.2 to the extent such costs, charges and expenses are not otherwise paid by the Corporation or Other Entity, as appropriate, from and against all costs, charges and expenses that the Indemnified Party may reasonably incur as a result of carrying out the Indemnified Party's duties as a Director and or Officer in respect of the Indemnified Party's reasonable and necessary travel, lodging or accommodation costs, charges or expenses.

2. Indemnification under section 1 shall be made only if the Indemnified Party:
 - 2.1 acted honestly and in good faith with a view to the best interests of either the Corporation or the Other Entity, as the case may be; and
 - 2.2 in the case of a criminal or administrative proceeding that is enforced by a monetary penalty, the Indemnified Party had reasonable grounds for believing that the Indemnified Party's conduct was lawful.

Sections 2.1 and 2.2 are referred to in this Agreement as the "**Standards of Conduct**". For the purposes of the Standards of Conduct and this Agreement generally:

- (a) for purposes of any determination hereunder, the Indemnified Party will be deemed, subject to compelling evidence to the contrary, to have acted in good faith and in the best interests of the Corporation or any Other Entity. The Corporation will have the burden of establishing the absence thereof;
- (b) the knowledge and/or actions, or failure to act, of any other director, officer, agent or employee of the Corporation or any Other Entity will not be imputed to the Indemnified Party for purposes of determining the right to indemnification under this Agreement;
- (c) the Corporation will have the burden of establishing that any amount it wishes to challenge is not reasonable; and
- (d) the termination of any proceeding by judgment, order, settlement, conviction or upon a plea of *nolo contendere* or its equivalent shall not, of itself, create a

presumption that the Indemnified Party is not entitled to indemnification under this Agreement.

3. In respect of an action by or on behalf of the Corporation or an Other Entity to procure a judgment in its favour to which the Indemnified Party is made a party by reason of being or having been a Director and/or Officer, indemnification under section 1 shall be made only after obtaining approval of the court having jurisdiction, provided that the Corporation shall or shall cause such Other Entity to seek and use all reasonable efforts to obtain that approval as soon as reasonably possible in the circumstances.

4. For the purposes of this Agreement:

4.1 “**proceeding**” shall include a claim, demand, suit, action, proceeding or investigation, whether threatened in writing, pending, commenced, continuing or completed, and any appeal or appeals therefrom;

4.2 “**costs, charges and expenses**” shall include:

4.2.1 subject to section 9, an amount paid to settle an action or satisfy a judgment, except in respect of an action to which section 3, above, is applicable;

4.2.2 a fine, penalty, levy or charge paid to any domestic or foreign government (federal, provincial, municipal or otherwise) or to any regulatory authority, agency, commission or board of any domestic or foreign government, or imposed by any court or any other law, regulation or rule-making entity having jurisdiction in the relevant circumstances (collectively, a “**Governmental Authority**”), including as a result of a breach or alleged breach of any statutory or common law duty imposed on directors or officers or of any law, statute, rule or regulation or of any provision of the articles, by-laws or any resolution of the Corporation or an Other Entity;

4.2.3 an amount paid to satisfy a liability arising as a result of the failure of the Corporation or an Other Entity to pay wages, vacation pay and any other amounts that may be owing to employees or to make contributions that may be required to be made to any pension plan, retirement income plan or other benefit plan for employees or to remit to any Governmental Authority payroll deductions, income taxes or other taxes, or any other amounts payable by the Corporation or an Other Entity; and

4.2.4 reasonable legal costs on a solicitor and his own client basis, including those incurred in enforcing the Indemnified Party’s rights under this Agreement; and

- 4.3 the Indemnified Party shall be considered to be “**involved**” in any proceeding if the Indemnified Party has any participation whatsoever in such proceeding, including merely as a witness.
5. Upon the Indemnified Party becoming aware of any proceeding which may give rise to indemnification under this Agreement, the Indemnified Party shall give written notice to the Corporation, directed to its (a) Chief Executive Officer or President and (b) General Counsel, as soon as is practicable, provided however that failure to give notice in a timely fashion shall not disentitle the Indemnified Party to indemnification unless the Corporation suffers actual prejudice by reason of the delay.
6. The Corporation may conduct any investigation it considers appropriate of any proceeding of which it receives notice under section 5, and shall pay all costs of that investigation.
7. The parties wish to facilitate the payment by the Indemnified Party of ongoing costs in connection with matters for which indemnification under this Agreement is provided. Accordingly, the parties agree as follows:
- 7.1 subject to section 7.2, the Corporation shall, upon demand, make advances (“**Expense Advances**”) to the Indemnified Party of all reasonable amounts for which the Indemnified Party seeks indemnification under this Agreement before the final disposition of the relevant proceeding. In connection with such demand, the Indemnified Party shall provide the Corporation with a written affirmation of the Indemnified Party’s good faith belief that the Indemnified Party has met the Standards of Conduct, along with sufficient particulars of the costs, charges and expenses to be covered by the proposed Expense Advance to enable the Corporation to make an assessment of their reasonableness;
- 7.2 the Corporation shall make Expense Advances to the Indemnified Party in accordance with the provisions of the CBCA; and
- 7.3 the Indemnified Party shall execute a separate undertaking which shall set out the Indemnified Party’s acknowledgement and agreement to repay to the Corporation, upon demand, all Expense Advances in the event that it is subsequently determined that the Indemnified Party has not met the Standards of Conduct.
8. The indemnities in section 1 shall not apply in respect of any proceeding initiated by the Indemnified Party:
- 8.1 against the Corporation or an Other Entity, unless it is brought to establish or enforce any right under this Agreement, any other right of indemnity or in connection with any directors’ and officers’ liability insurance or similar policy;
- 8.2 against any Director or Officer unless the Corporation or the Other Entity, as the case may be, has joined in or consented to the initiation of such proceeding; or

- 8.3 against any other corporation, partnership, trust, joint venture, unincorporated entity or person, unless it is a counterclaim.
9. The Corporation shall be entitled to participate, at its own expense, in the defence of the Indemnified Party in any proceeding. If the Corporation so elects after receipt of notice of a proceeding, or the Indemnified Party in that notice so directs, the Corporation shall assume control of the negotiation, settlement or defence of the proceeding, in which case the defence shall be conducted by counsel chosen by the Corporation and reasonably satisfactory to the Indemnified Party. If the Corporation elects to assume control of the defence, the Indemnified Party shall have the right to participate in the negotiation, settlement or defence of the proceeding and to retain counsel to act on the Indemnified Party's behalf, in which case the Corporation shall reimburse the Indemnified Party for any fees and disbursements of that counsel if a conflict of interests has arisen between the Corporation and the Indemnified Party. Notwithstanding anything contained herein, the Corporation shall not be responsible for fees and expenses of more than one counsel in each applicable jurisdiction separate from counsel for the Corporation for all Directors and Officers in connection with any action or separate but similar or related actions arising out of the same general allegations or circumstances. The Indemnified Party and the Corporation shall cooperate fully with each other and their respective counsel in the investigation related to, and defence of, any proceeding and shall make available to each other all relevant books, records, documents and files and shall otherwise use their best efforts to assist each other's counsel to conduct a proper and adequate defence.
10. In respect of the settlement of any proceeding, the parties agree as follows:
- 10.1 the Corporation may not, without the prior written consent of the Indemnified Party (which consent shall not be unreasonably withheld or delayed) enter into an agreement to settle any proceeding involving the Indemnified Party;
- 10.2 if the Indemnified Party refuses after requested by the Corporation, acting reasonably, to give consent to the terms of a proposed settlement in accordance with section 10.1 which is otherwise acceptable to the Corporation, the Corporation may require the Indemnified Party to negotiate or defend the Claim independently of the Corporation. In that case, any amount recovered by the claimant in excess of the amount for which settlement could have been made by the Corporation shall not be recoverable under this Agreement, and the Corporation will only be responsible for costs, charges and expenses up to the time at which settlement could have been made;
- 10.3 the Corporation shall not be liable for any settlement of any proceeding effected without its prior written consent (which consent shall not be unreasonably withheld or delayed);
- 10.4 the Indemnified Party shall have the right to negotiate a settlement in respect of any proceeding, provided that unless the Corporation has approved the settlement, the Indemnified Party shall pay any compensation or other payment to be made under the settlement and the costs of negotiating and implementing the settlement, and shall not

seek indemnity from the Corporation in respect of such compensation, payment or costs; and

10.5 the settlement of a proceeding shall not create a presumption that the Indemnified Party did not meet or would not have met the Standards of Conduct.

11. Should any payment made pursuant to this Agreement, including the payment of insurance premiums or any payment made by an insurer under an insurance policy, be deemed to constitute a taxable benefit or otherwise be or become subject to any tax or levy, then the Corporation shall pay any amount as may be necessary to ensure that the amount received by or on behalf of the Indemnified Party, after the payment of or withholding for such tax, fully reimburses the Indemnified Party for the actual cost, expense or liability incurred by or on behalf of the Indemnified Party.
12. Each of the provisions contained in this Agreement is distinct and severable and a declaration of invalidity or unenforceability of any such provision or part thereof by a court of competent jurisdiction shall not affect the validity or enforceability of any other provision hereof. To the extent permitted by applicable law, the parties waive any provision of law which renders any provision of this Agreement invalid or unenforceable in any respect. The parties shall engage in good faith negotiations to replace any provision which is declared invalid or unenforceable with a valid and enforceable provision, the economic effect of which comes as close as possible to that of the invalid or unenforceable provision which it replaces.
13. This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein.
14. The obligations of the Corporation under this Agreement, other than under Section 15, shall continue until the later of:
 - (i) six (6) years after the Indemnified Party ceases to be a director or officer of the Corporation or any Other Entity; and
 - (ii) one (1) year after the final termination of all proceedings with respect to which the Indemnified Party is entitled to claim indemnification under this Agreement.
15. (a) The Corporation shall use its reasonable best efforts to ensure that it has in place at all times a directors' and officers' liability insurance policy no less favourable to the Indemnified Party under which the Indemnified Party is covered in his or her capacity as a current or former director or officer of the Corporation or its subsidiaries. In the event the Corporation is sold or enters into any business combination as a result of which the directors' and officers' liability insurance policy is terminated and not replaced with a substantially similar policy applicable to the Indemnified Party, the Corporation shall use its reasonable best efforts to cause run off "tail" insurance to be purchased for the benefit of the Indemnified Party with substantially the same coverage for not less than a six (6) year term following such termination. The Corporation shall provide to the Indemnified Party a certificate of insurance of each

insurance providing the coverages contemplated by this section forthwith after coverage is obtained, and shall forthwith notify the Indemnified Party if the insurer cancels, makes material changes to coverage or refuses to renew coverage (or any part of the coverage). In the event that an Indemnified Party is subject to a deductible under any insurance policy contemplated by this Section 15(a), the Corporation shall pay such deductible for and on behalf of the Indemnified Party.

- (b) In the event that the director is covered under a Sears Holding Corporation policy, that shall not avoid the need for a Corporation policy under Section 15(a), but the Corporation shall provide to the Indemnified Party a certificate of insurance forthwith after coverage is obtained, and shall forthwith notify the Indemnified Party if the insurer cancels, makes material changes to coverage or refuses to renew coverage (or any part of the coverage). In the event that an Indemnified Party is subject to a deductible under any such insurance policy contemplated by this Section 15(b), the Corporation shall pay such deductible for and on behalf of the Indemnified Party.
16. Except as expressly provided in this Agreement, no amendment or waiver of this Agreement shall be binding unless executed in writing by the party to be bound thereby. No waiver of any provision of this Agreement shall constitute a waiver of any other provision nor shall any waiver of any provision of this Agreement constitute a continuing waiver unless otherwise expressly provided.
17. This Agreement shall enure to the benefit of the Indemnified Party and the Indemnified Party's heirs, administrators, executors and personal representatives and shall be binding upon the Corporation and its successors.
18. This Agreement shall supersede and replace the Original Agreement. Subject to the foregoing, this Agreement shall not operate to abridge or exclude any other rights, in law or in equity, to which the Indemnified Party or the Corporation may be entitled. This Agreement shall be deemed effective as and from the date on which the Indemnified Party first became a director or officer of the Corporation or any Other Entity.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

INDEMNIFIED PARTY

D. Rosati

Name: Deborah E. Rosati
Position: Director

SEARS CANADA INC.

[Signature]

by: _____
Name: Franco Perugini
Title: Corporate Secretary

Tab 3

AMENDED AND RESTATED INDEMNIFICATION AGREEMENT

THIS AGREEMENT is made as of this 4th day of July, 2014.

BETWEEN:

Sears Canada Inc., a corporation incorporated under the *Canada Business Corporations Act*

(the "Corporation")

- and -

R. Raja Khanna

(the "Indemnified Party")

RECITALS:

- A. The *Canada Business Corporations Act* (the "**CBCA**") permits, and in some cases requires, the Corporation to indemnify individuals who are or were directors and/or officers of the Corporation, or who act or acted at the Corporation's request as directors and/or officers or in a similar capacity of other entities (an "**Other Entity**", a term which, for the purposes of this indemnification agreement (the "**Agreement**") shall include a corporation or other entity that becomes an Other Entity in the future). In this Agreement:
- (i) each such individual, duly elected or appointed as a director and/or officer, including acting in a capacity similar to director and/or officer of an Other Entity and including an individual who has ceased to be a director and/or officer or to act in any such capacity, is referred to as a "Director" and/or "Officer", as appropriate;
 - (ii) unless the context otherwise requires, words importing the singular include the plural and vice versa and words importing gender include all genders; and
 - (iii) unless otherwise indicated, references to sections are to sections in this Agreement;
- B. The Indemnified Party is at present a Director or Officer or both of the Corporation;
- C. The Indemnified Party and the Corporation entered into an Indemnification Agreement as of October 25th, 2007 (the "**Original Agreement**"), which they wish to amend and restate;
- D. Accordingly, the Corporation and the Indemnified Party wish to enter into this Agreement, and in so doing affirm that they intend that all the provisions of this Agreement be given legal effect to the full extent permitted by applicable law.

NOW THEREFORE in consideration of the sum of \$1.00 now given by the Indemnified Party to the Corporation, and of the mutual covenants and agreements contained in this Agreement and other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged), the parties agree as follows:

1. Subject to sections 2 and 3, the Corporation agrees to indemnify and save harmless the Indemnified Party:

- 1.1 from and against all costs, charges and expenses reasonably incurred by the Indemnified Party in respect of any civil, criminal, administrative, investigative or other proceeding to which the Indemnified Party is involved by reason of being or having been a Director and or Officer; and

- 1.2 to the extent such costs, charges and expenses are not otherwise paid by the Corporation or Other Entity, as appropriate, from and against all costs, charges and expenses that the Indemnified Party may reasonably incur as a result of carrying out the Indemnified Party's duties as a Director and or Officer in respect of the Indemnified Party's reasonable and necessary travel, lodging or accommodation costs, charges or expenses.

2. Indemnification under section 1 shall be made only if the Indemnified Party:

- 2.1 acted honestly and in good faith with a view to the best interests of either the Corporation or the Other Entity, as the case may be; and

- 2.2 in the case of a criminal or administrative proceeding that is enforced by a monetary penalty, the Indemnified Party had reasonable grounds for believing that the Indemnified Party's conduct was lawful.

Sections 2.1 and 2.2 are referred to in this Agreement as the "**Standards of Conduct**". For the purposes of the Standards of Conduct and this Agreement generally:

- (a) for purposes of any determination hereunder, the Indemnified Party will be deemed, subject to compelling evidence to the contrary, to have acted in good faith and in the best interests of the Corporation or any Other Entity. The Corporation will have the burden of establishing the absence thereof;
- (b) the knowledge and/or actions, or failure to act, of any other director, officer, agent or employee of the Corporation or any Other Entity will not be imputed to the Indemnified Party for purposes of determining the right to indemnification under this Agreement;
- (c) the Corporation will have the burden of establishing that any amount it wishes to challenge is not reasonable; and
- (d) the termination of any proceeding by judgment, order, settlement, conviction or upon a plea of *nolo contendere* or its equivalent shall not, of itself, create a

presumption that the Indemnified Party is not entitled to indemnification under this Agreement.

3. In respect of an action by or on behalf of the Corporation or an Other Entity to procure a judgment in its favour to which the Indemnified Party is made a party by reason of being or having been a Director and/or Officer, indemnification under section 1 shall be made only after obtaining approval of the court having jurisdiction, provided that the Corporation shall or shall cause such Other Entity to seek and use all reasonable efforts to obtain that approval as soon as reasonably possible in the circumstances.

4. For the purposes of this Agreement:

- 4.1 “**proceeding**” shall include a claim, demand, suit, action, proceeding or investigation, whether threatened in writing, pending, commenced, continuing or completed, and any appeal or appeals therefrom;

- 4.2 “**costs, charges and expenses**” shall include:

- 4.2.1 subject to section 9, an amount paid to settle an action or satisfy a judgment, except in respect of an action to which section 3, above, is applicable;

- 4.2.2 a fine, penalty, levy or charge paid to any domestic or foreign government (federal, provincial, municipal or otherwise) or to any regulatory authority, agency, commission or board of any domestic or foreign government, or imposed by any court or any other law, regulation or rule-making entity having jurisdiction in the relevant circumstances (collectively, a “**Governmental Authority**”), including as a result of a breach or alleged breach of any statutory or common law duty imposed on directors or officers or of any law, statute, rule or regulation or of any provision of the articles, by-laws or any resolution of the Corporation or an Other Entity;

- 4.2.3 an amount paid to satisfy a liability arising as a result of the failure of the Corporation or an Other Entity to pay wages, vacation pay and any other amounts that may be owing to employees or to make contributions that may be required to be made to any pension plan, retirement income plan or other benefit plan for employees or to remit to any Governmental Authority payroll deductions, income taxes or other taxes, or any other amounts payable by the Corporation or an Other Entity; and

- 4.2.4 reasonable legal costs on a solicitor and his own client basis, including those incurred in enforcing the Indemnified Party’s rights under this Agreement; and

- 4.3 the Indemnified Party shall be considered to be “**involved**” in any proceeding if the Indemnified Party has any participation whatsoever in such proceeding, including merely as a witness.
5. Upon the Indemnified Party becoming aware of any proceeding which may give rise to indemnification under this Agreement, the Indemnified Party shall give written notice to the Corporation, directed to its (a) Chief Executive Officer or President and (b) General Counsel, as soon as is practicable, provided however that failure to give notice in a timely fashion shall not disentitle the Indemnified Party to indemnification unless the Corporation suffers actual prejudice by reason of the delay.
6. The Corporation may conduct any investigation it considers appropriate of any proceeding of which it receives notice under section 5, and shall pay all costs of that investigation.
7. The parties wish to facilitate the payment by the Indemnified Party of ongoing costs in connection with matters for which indemnification under this Agreement is provided. Accordingly, the parties agree as follows:
- 7.1 subject to section 7.2, the Corporation shall, upon demand, make advances (“**Expense Advances**”) to the Indemnified Party of all reasonable amounts for which the Indemnified Party seeks indemnification under this Agreement before the final disposition of the relevant proceeding. In connection with such demand, the Indemnified Party shall provide the Corporation with a written affirmation of the Indemnified Party’s good faith belief that the Indemnified Party has met the Standards of Conduct, along with sufficient particulars of the costs, charges and expenses to be covered by the proposed Expense Advance to enable the Corporation to make an assessment of their reasonableness;
- 7.2 the Corporation shall make Expense Advances to the Indemnified Party in accordance with the provisions of the CBCA; and
- 7.3 the Indemnified Party shall execute a separate undertaking which shall set out the Indemnified Party’s acknowledgement and agreement to repay to the Corporation, upon demand, all Expense Advances in the event that it is subsequently determined that the Indemnified Party has not met the Standards of Conduct.
8. The indemnities in section 1 shall not apply in respect of any proceeding initiated by the Indemnified Party:
- 8.1 against the Corporation or an Other Entity, unless it is brought to establish or enforce any right under this Agreement, any other right of indemnity or in connection with any directors’ and officers’ liability insurance or similar policy;
- 8.2 against any Director or Officer unless the Corporation or the Other Entity, as the case may be, has joined in or consented to the initiation of such proceeding; or

- 8.3 against any other corporation, partnership, trust, joint venture, unincorporated entity or person, unless it is a counterclaim.
9. The Corporation shall be entitled to participate, at its own expense, in the defence of the Indemnified Party in any proceeding. If the Corporation so elects after receipt of notice of a proceeding, or the Indemnified Party in that notice so directs, the Corporation shall assume control of the negotiation, settlement or defence of the proceeding, in which case the defence shall be conducted by counsel chosen by the Corporation and reasonably satisfactory to the Indemnified Party. If the Corporation elects to assume control of the defence, the Indemnified Party shall have the right to participate in the negotiation, settlement or defence of the proceeding and to retain counsel to act on the Indemnified Party's behalf, in which case the Corporation shall reimburse the Indemnified Party for any fees and disbursements of that counsel if a conflict of interests has arisen between the Corporation and the Indemnified Party. Notwithstanding anything contained herein, the Corporation shall not be responsible for fees and expenses of more than one counsel in each applicable jurisdiction separate from counsel for the Corporation for all Directors and Officers in connection with any action or separate but similar or related actions arising out of the same general allegations or circumstances. The Indemnified Party and the Corporation shall cooperate fully with each other and their respective counsel in the investigation related to, and defence of, any proceeding and shall make available to each other all relevant books, records, documents and files and shall otherwise use their best efforts to assist each other's counsel to conduct a proper and adequate defence.
10. In respect of the settlement of any proceeding, the parties agree as follows:
- 10.1 the Corporation may not, without the prior written consent of the Indemnified Party (which consent shall not be unreasonably withheld or delayed) enter into an agreement to settle any proceeding involving the Indemnified Party;
- 10.2 if the Indemnified Party refuses after requested by the Corporation, acting reasonably, to give consent to the terms of a proposed settlement in accordance with section 10.1 which is otherwise acceptable to the Corporation, the Corporation may require the Indemnified Party to negotiate or defend the Claim independently of the Corporation. In that case, any amount recovered by the claimant in excess of the amount for which settlement could have been made by the Corporation shall not be recoverable under this Agreement, and the Corporation will only be responsible for costs, charges and expenses up to the time at which settlement could have been made;
- 10.3 the Corporation shall not be liable for any settlement of any proceeding effected without its prior written consent (which consent shall not be unreasonably withheld or delayed);
- 10.4 the Indemnified Party shall have the right to negotiate a settlement in respect of any proceeding, provided that unless the Corporation has approved the settlement, the Indemnified Party shall pay any compensation or other payment to be made under the settlement and the costs of negotiating and implementing the settlement, and shall not

seek indemnity from the Corporation in respect of such compensation, payment or costs; and

10.5 the settlement of a proceeding shall not create a presumption that the Indemnified Party did not meet or would not have met the Standards of Conduct.

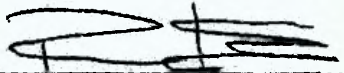
11. Should any payment made pursuant to this Agreement, including the payment of insurance premiums or any payment made by an insurer under an insurance policy, be deemed to constitute a taxable benefit or otherwise be or become subject to any tax or levy, then the Corporation shall pay any amount as may be necessary to ensure that the amount received by or on behalf of the Indemnified Party, after the payment of or withholding for such tax, fully reimburses the Indemnified Party for the actual cost, expense or liability incurred by or on behalf of the Indemnified Party.
12. Each of the provisions contained in this Agreement is distinct and severable and a declaration of invalidity or unenforceability of any such provision or part thereof by a court of competent jurisdiction shall not affect the validity or enforceability of any other provision hereof. To the extent permitted by applicable law, the parties waive any provision of law which renders any provision of this Agreement invalid or unenforceable in any respect. The parties shall engage in good faith negotiations to replace any provision which is declared invalid or unenforceable with a valid and enforceable provision, the economic effect of which comes as close as possible to that of the invalid or unenforceable provision which it replaces.
13. This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein.
14. The obligations of the Corporation under this Agreement, other than under Section 15, shall continue until the later of:
 - (i) six (6) years after the Indemnified Party ceases to be a director or officer of the Corporation or any Other Entity; and
 - (ii) one (1) year after the final termination of all proceedings with respect to which the Indemnified Party is entitled to claim indemnification under this Agreement.
15. (a) The Corporation shall use its reasonable best efforts to ensure that it has in place at all times a directors' and officers' liability insurance policy no less favourable to the Indemnified Party under which the Indemnified Party is covered in his or her capacity as a current or former director or officer of the Corporation or its subsidiaries. In the event the Corporation is sold or enters into any business combination as a result of which the directors' and officers' liability insurance policy is terminated and not replaced with a substantially similar policy applicable to the Indemnified Party, the Corporation shall use its reasonable best efforts to cause run off "tail" insurance to be purchased for the benefit of the Indemnified Party with substantially the same coverage for not less than a six (6) year term following such termination. The Corporation shall provide to the Indemnified Party a certificate of insurance of each

insurance providing the coverages contemplated by this section forthwith after coverage is obtained, and shall forthwith notify the Indemnified Party if the insurer cancels, makes material changes to coverage or refuses to renew coverage (or any part of the coverage). In the event that an Indemnified Party is subject to a deductible under any insurance policy contemplated by this Section 15(a), the Corporation shall pay such deductible for and on behalf of the Indemnified Party.

- (b) In the event that the director is covered under a Sears Holding Corporation policy, that shall not avoid the need for a Corporation policy under Section 15(a), but the Corporation shall provide to the Indemnified Party a certificate of insurance forthwith after coverage is obtained, and shall forthwith notify the Indemnified Party if the insurer cancels, makes material changes to coverage or refuses to renew coverage (or any part of the coverage). In the event that an Indemnified Party is subject to a deductible under any such insurance policy contemplated by this Section 15(b), the Corporation shall pay such deductible for and on behalf of the Indemnified Party.
16. Except as expressly provided in this Agreement, no amendment or waiver of this Agreement shall be binding unless executed in writing by the party to be bound thereby. No waiver of any provision of this Agreement shall constitute a waiver of any other provision nor shall any waiver of any provision of this Agreement constitute a continuing waiver unless otherwise expressly provided.
17. This Agreement shall enure to the benefit of the Indemnified Party and the Indemnified Party's heirs, administrators, executors and personal representatives and shall be binding upon the Corporation and its successors.
18. This Agreement shall supersede and replace the Original Agreement. Subject to the foregoing, this Agreement shall not operate to abridge or exclude any other rights, in law or in equity, to which the Indemnified Party or the Corporation may be entitled. This Agreement shall be deemed effective as and from the date on which the Indemnified Party first became a director or officer of the Corporation or any Other Entity.

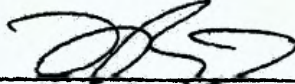
IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

INDEMNIFIED PARTY



Name: R. Raja Khanna
Position: Director

SEARS CANADA INC.



by: _____
Name: Franco Perugini
Title: Corporate Secretary

Tab 4

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE)
)
MR. JUSTICE HAINEY) MONDAY, THE 3RD
)
) DAY OF DECEMBER, 2018

IN THE MATTER OF THE *COMPANIES' CREDITORS*
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED



AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SEARS CANADA INC., 9370-2751
QUEBEC INC., 191020 CANADA INC., THE CUT INC.,
SEARS CONTACT SERVICES INC., INITIUM LOGISTICS
SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM
TRADING AND SOURCING CORP., SEARS FLOOR
COVERING CENTRES INC., 173470 CANADA INC., 2497089
ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA
INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD.,
4201531 CANADA INC., 168886 CANADA INC., AND 3339611
CANADA INC.

(each, an "Applicant", and collectively, the "Applicants")

**ORDER
(APPOINTMENT OF LITIGATION TRUSTEE,
LIFTING OF STAY, AND OTHER RELIEF)**

THIS MOTION, made by the Litigation Investigator, for an Order pursuant to section 11 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36,, as amended (the "CCAA") and Rule 6.01 of the *Rules of Civil Procedure*, RRO 1990, Reg. 194, as amended (the "*Rules*") for an order, among other things, appointing a Litigation Trustee to pursue certain claims on behalf of the Applicants and/or any creditors of the Applicants and providing for the process by which a

common issues trial will be heard, was heard this day at 330 University Avenue, 8th Floor, Toronto, Ontario.

ON READING the Monitor's 27th Report to the Court dated November 5, 2018 and the Litigation Investigator's First Report to the Court dated November 5, 2018 (the "**First Report**"), and on reading and hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for the Litigation Investigator, and such other counsel for various creditors and stakeholders as were present, no one else appearing although duly served as appears from the Affidavit of Service.

SERVICE

1. THIS COURT ORDERS that this motion is properly returnable today and hereby dispenses with further service thereof.

TERMINATION OF LITIGATION INVESTIGATOR APPOINTMENT

2. THIS COURT ORDERS that the appointment of the Litigation Investigator pursuant to the Amended Litigation Investigator Order dated April 26, 2018 (the "**Amended Litigation Investigator Order**"), is hereby terminated, effective immediately.

CONTINUATION AND EXTENSION OF LITIGATION CREDITORS' COMMITTEE

3. THIS COURT ORDERS that the Creditors' Committee established pursuant to the Amended Litigation Investigator Order dated April 26, 2018 shall continue as currently constituted thereunder to consult with and provide input to the Litigation Trustee Parties in respect of the claims brought by the Litigation Trustee in accordance with this Order.

4. THIS COURT ORDERS that the Litigation Trustee Parties shall meet with the Creditors' Committee on a monthly basis unless otherwise agreed for a particular month by said parties, and which meetings shall be subject to confidentiality and that privilege shall be maintained.

APPOINTMENT OF LITIGATION TRUSTEE

5. THIS COURT ORDERS that the Honourable J. Douglas Cunningham, Q.C. is hereby appointed as an officer of this Court to be the Litigation Trustee over and in respect of the Applicants' claims identified in the First Report of the Litigation Investigator (the "Litigation Assets" or the "Claims") on the terms described herein.

LITIGATION TRUSTEE'S POWERS

6. THIS COURT ORDERS that the Litigation Trustee is hereby empowered, authorized and directed to do all things and carry out all actions necessary to prosecute the Claims, including:

- (a) to engage, give instructions and pay counsel as well as consultants, appraisers, agents, advisors, experts, auditors, accountants, managers and such other persons from time to time on whatever basis the Litigation Trustee may agree, in consultation with the Monitor, to assist with the exercise of his powers and duties. Notwithstanding such authority, the Litigation Trustee shall be under no obligation to consult with its counsel, consultants, appraiser, agents, advisors, experts, auditors, accountants, managers and its good faith determination not to do so shall not result in the imposition of liability on the Litigation Trustee, unless such determination is based on gross negligence or willful misconduct;

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- (b) to execute, assign, issue and endorse documents of whatever nature in the name of and on behalf of Sears Canada for any purpose in connection with the Claims or otherwise pursuant to this Order; and
- (c) to pursue the Claims, defend any counter claim, third party claim or other claim brought against Sears Canada, and subject to further Order of the Court, and in consultation with the Monitor, to settle or compromise, abandon, dismiss or otherwise dispose of such proceeding. The authority hereby conferred shall extend to any appeals or applications for judicial review in respect of any order or judgment pronounced in such proceeding.

7. THIS COURT ORDERS that, notwithstanding the generality of paragraph 5^{6(e)} above, the Litigation Trustee is hereby authorized and empowered to commence claims, in his own name or on behalf of the Applicants, against ESL Investments Inc. (and certain affiliates), Edward Lampert, William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, Deborah E. Rosati, R. Raja Khanna, James McBurney and Douglas Campbell.

8. THIS COURT ORDERS that the stay of proceedings provided for in paragraph 25 of the Initial Order dated June 22, 2017 (the "**Initial Order**"), is hereby lifted as against William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, Deborah E. Rosati, R. Raja Khanna, James McBurney and Douglas Campbell for the purposes of permitting the claims referred to in the First Report, including those of the Litigation Trustee, to be commenced and pursued against those persons.

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INDEMNITY

9. THIS COURT ORDERS that the Litigation Trustee shall incur no liability or obligation as a result of his appointment or in carrying out of any of the provisions of this Order, save and except for any gross negligence or any willful misconduct. Sears Canada shall indemnify and hold harmless the Litigation Trustee and his designated agents, representatives and professionals with respect to any liability or obligations as a result of his appointment or the fulfillment of his duties in carrying out the provisions of this Order, save and except for any gross negligence or willful misconduct. For clarity, in no event shall the Litigation Trustee be personally liable for any costs awarded against Sears Canada in the action. Any such costs awarded shall be a claim solely against Sears Canada estate. No action, application or other proceeding shall be commenced against the Litigation Trustee as a result of, or relating in any way to his appointment, the fulfillment of his duties or the carrying out of any Order of this Court except with leave of this Court being obtained. Notice of any such motion seeking leave of this Court shall be served upon Sears Canada, the Monitor and the Litigation Trustee at least seven (7) days prior to the return date of any such motion for leave.

10. THIS COURT ORDERS that the indemnity pursuant to paragraphs ⁵⁻⁹~~4-8~~ above shall survive any termination, replacement or discharge of the Litigation Trustee. Upon any termination, replacement or discharge of the Litigation Trustee, on not less than 10 business days' notice, all claims against the Litigation Trustee, his designated agents, representatives and professionals for which leave of the Court has not already been sought and obtained shall be, and are hereby forever discharged, other than claims for which a party seeks leave prior to the discharge date to bring a claim against the Litigation Trustee and (i) such leave has been obtained; or (ii) the request for leave remains outstanding.

LITIGATION TRUSTEE'S ACCOUNTS

11. THIS COURT ORDERS that the Litigation Trustee and counsel to the Litigation Trustee (collectively, the "**Litigation Trustee Parties**") shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by Sears Canada as part of the costs of these proceedings. Sears Canada is authorized and directed to pay the accounts of the Litigation Trustee Parties on a bi-weekly basis (or such other interval as may be mutually agreed upon) and, in addition, Sears Canada is hereby authorized to pay to the Litigation Trustee Parties retainers not exceeding \$50,000.00 each, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

12. THIS COURT ORDERS that the Litigation Trustee Parties shall pass their accounts from time to time, and for this purpose the accounts of the Litigation Trustee Parties are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

13. THIS COURT ORDERS that the Litigation Trustee Parties shall be entitled to the benefit of and are hereby granted a charge in the maximum amount of \$500,000.00 (the "**Litigation Trustee's Charge**") on the "**Property**" of Sears Canada as defined by paragraph 4 of the Initial Order, ranking *pari passu* with the Administration Charge (as defined in the Initial Order), in priority to all other security interests, trusts (statutory or otherwise), liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any person, including all charges granted by the Initial Order (other than the Administration Charge) and all other Orders of this Court granted in these proceedings.

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14. THIS COURT ORDERS that the filing, registration or perfection of the Litigation Trustee's Charge shall not be required, and that the Litigation Trustee's Charge shall be valid and enforceable for all purposes, notwithstanding any such failure to file, register, record or perfect.

15. THIS COURT ORDERS that the granting of the Litigation Trustee's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Litigation Trustee's Charge shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declaration of insolvency herein; (b) any application(s) for bankruptcy order(s) issued pursuant to *Bankruptcy and Insolvency Act* (Canada) (the "BIA"), or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; or (d) the provisions of any federal or provincial statutes, and notwithstanding any provision to the contrary in any agreement.

16. THIS COURT ORDERS that the payments made by Sears Canada pursuant to this Order and the granting of the Litigation Trustee's Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

LIMITATION ON ENVIRONMENTAL LIABILITIES

17. THIS COURT ORDERS that nothing herein contained shall require the Litigation Trustee to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the

disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the “**Environmental Legislation**”), provided however that nothing herein shall exempt the Litigation Trustee from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Litigation Trustee shall not, as a result of this Order or anything done in pursuance of the Litigation Trustee’s duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

PROCEDURE

18. THIS COURT ORDERS that a case management judge for the claims brought by the Monitor, the Litigation Trustee, the Pension Administrator, and the Class Action plaintiffs as referred to in the First Report will be appointed as soon as possible.

19. THIS COURT ORDERS that the procedure to be followed for the claims brought by the Monitor, the Litigation Trustee, the Pension Administrator, and the Class Action plaintiffs as referred to in the First Report shall be determined by the case management judge.

GENERAL

20. THIS COURT ORDERS that, without limiting any other provisions of this Order, the Litigation Trustee may from time to time apply to this Court for advice and directions in the discharge of his powers and duties hereunder.

21. THIS COURT ORDERS that the Monitor and the Litigation Trustee may report to the Court on their activities from time to time as any of them may see fit or as this Court may direct.

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22. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Litigation Trustee and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Litigation Trustee, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Litigation Trustee and its agents in carrying out the terms of this Order.

23. THIS COURT ORDERS that the Litigation Trustee be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Litigation Trustee is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

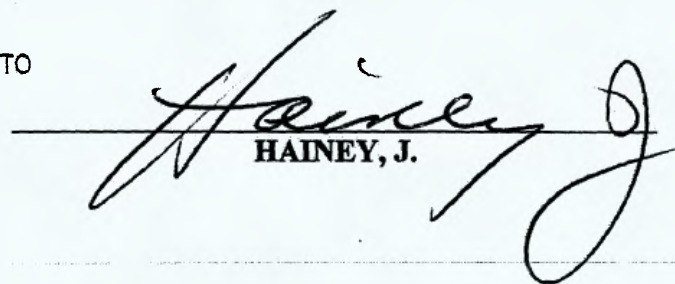
24. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Litigation Trustee and the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

DEC 04 2018

PER / PAR:

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HAINEY, J.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985 c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUEBEC INC., 191020 CANADA
INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM
TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA
INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041, ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611
CANADA INC.

Court File No. CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

ORDER

**(APPOINTMENT OF LITIGATION TRUSTEE,
LIFTING OF STAY, AND OTHER RELIEF)**

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Litigation Investigator

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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 TRANSCRIPT BRIEF OF THE FORMER DIRECTORS

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