

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE) WEDNESDAY, THE 20th
)
JUSTICE McEWEN) DAY OF MARCH, 2019

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

ORDER

THIS MOTION made by 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 (the **Monitor**), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the evidence and the written submissions of the parties, filed,

AND UPON HEARING the oral submissions of the parties,

1 THIS COURT ORDERS that, subject to paragraphs 2 through 7 below, privilege in favour of Sears Canada Inc. (**Sears Canada**) is hereby waived over all documents relevant to this action and the related actions commenced by each of the Litigation Trustee (Court File No CV-18-00611214-00CL) (the **Litigation Trustee Action**), Morneau Shepell Ltd. in its capacity

as administrator of Sears Canada's Registered Pension Plan (Court File No. CV-18-00611217-00CL) (the **Morneau Action**), and certain former "Sears Hometown" dealers (Court File No. 4114/15 (Milton)) (the **2015 Action** and, collectively with the other three actions, the **Related Actions**), that are in the power, possession or control of the Monitor or Sears Canada (the **Waiver**).

2 The Waiver shall not include any waiver of privilege in favour of any party in any documents relating solely to the class proceeding commenced by 1291079 Ontario Ltd. against Sears Canada (Court File No. 3769/13-CP (Milton)) (the **2013 Action**), but shall include waiver of privilege in favour of Sears Canada only in any documents relating to the 2013 Action and any one of this action, the Litigation Trustee Action or the Morneau Action.

3 THIS COURT ORDERS that prior to any production of documents by the Monitor in this action and the Related Actions, the Monitor shall take reasonable steps to review such documents to identify any:

- (a) documents that contain any communication that is between a lawyer and any of ESL Investments Inc., Edward S. Lampert, ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP, or ESL Institutional Partners (collectively, the **ESL Parties**) and/or Sears Holdings Corporation;
- (b) documents containing any communication by or to the ESL Parties and/or Sears Holdings Corporation and/or any current or former directors or officers of the Sears Canada Entities (as such term is defined in the Initial Order in the CCAA proceeding Court File No. CV-17-11846-00CL) (a **Current or Former D&O**) created on or after November 26, 2013 and referencing the 2015 Action, the threat of the 2015 Action, or the 2013 Action; and

(c) documents containing communications between a lawyer and a Current or Former D&O for which privilege could reasonably be asserted by a Current or Former D&O, or documents that reflect legal advice or litigation work product prepared for the benefit of a Current or Former D&O, whether alone or as part of a joint retainer (hereafter, items (a), (b), and (c) shall be referred to collectively as the **Potentially Shared Privileged Documents**).

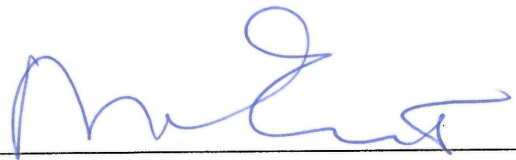
4 THIS COURT ORDERS that prior to any production of documents by the Monitor in this action and the Related Actions, the Monitor shall take reasonable steps to review such documents to identify any documents containing any communication by or to Sears Canada created on or after November 26, 2013 directly in response to either the 2015 Action or the 2013 Action (the **SCI Hometown Documents**).

5 THIS COURT ORDERS that no waiver of any privilege shall have occurred by the inadvertent production of Potentially Shared Privileged Documents or the SCI Hometown Documents should a Potentially Shared Privileged Document or SCI Hometown Document not be identified or if any other document subject to privilege (including solicitor-client privilege, litigation privilege, and common interest privilege) in favour of the ESL Parties, Sears Holdings Corporation or the Current or Former D&Os is produced.

6 THIS COURT ORDERS that in the event that the Monitor identifies any Potentially Shared Privileged Documents or SCI Hometown Documents that are relevant to this action or the Related Actions and would otherwise be listed in an affidavit of documents but not produced due to privilege, the Monitor shall, at the time documentary production is made, as ordered or agreed among the parties, provide copies of the Potentially Shared Privilege Documents or SCI Hometown Documents to each of the ESL Parties and the Current or Former D&Os who are

defendants in any of the Related Actions (the **Defendant D&Os**), to the extent that such parties may be able to assert privilege.

7 THIS COURT ORDERS that in the event that any party intends to produce any Potentially Shared Privilege Documents or SCI Hometown Documents, that party shall provide a list of such documents on reasonable notice, which shall be no less than seven days, to the Monitor, the ESL Parties and/or the Defendant D&Os to the extent that such parties may be able to assert privilege, so that any issue regarding privilege may be resolved by the parties or determined by this Court. If no response is received within the time period specified in such notice to the Monitor, the ESL Parties, and/or the Defendant D&Os, as the case may be, then the Potentially Shared Privilege Documents or the SCI Hometown Documents listed may be produced and any claim to privilege, including privilege in favour of Sears Canada, is deemed to be waived. This paragraph 7 is not intended to determine whether any Potentially Shared Privilege Documents or SCI Hometown Documents are the subject of a valid claim of privilege by any party.



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ON / BOOK NO:
LE / DANS LE REGISTRE NO:

MAR 21 2019

PER / PAR: *fw*

FTI Consulting Canada Inc.,
in its capacity as Court-appointed monitor

ESL Investments Inc. *et al.*

and

Plaintiff

Defendants

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at TORONTO

ORDER

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as Court-Appointed Monitor