

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

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

**RESPONDING MOTION RECORD OF THE DEFENDANTS
WILLIAM HARKER AND WILLIAM CROWLEY
WAIVER OF PRIVILEGE MOTION
RETURNABLE MARCH 20, 2019**

February 21, 2019

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ESL Institutional Partners LP, and Edward Lampert

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

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 -

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ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, WILLIAM HARKER
and WILLIAM CROWLEY

Defendants

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

FTI CONSULTING CANADA INC.,
in its capacity as Court-appointed monitor in proceedings
pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 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

**AFFIDAVIT OF JOHN N. BIRCH
(SWORN FEBRUARY 21, 2019)**

I, John N. Birch, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the President and director of John N. Birch Professional Corporation, which corporation is a partner of Cassels Brock & Blackwell LLP ("**Cassels**"). Cassels is counsel of record for the Defendants William Harker ("**Harker**") and William Crowley ("**Crowley**") in this action (the "**Monitor Action**").
2. As one of the members of Cassels with primary carriage of this matter, I have knowledge of the matters to which I hereinafter depose in this affidavit. To the extent that I do not have personal knowledge of any particular matter, I have identified the source of my information and I believe that information to be true.

MOTION OF THE MONITOR

3. I swear this affidavit in response to the motion of the plaintiff, FTI Consulting Canada Inc. in its capacity as court-appointed monitor (the "**Monitor**") in the *Companies' Creditors Arrangement Act* proceedings of Sears Canada Inc. ("**Sears Canada**"), seeking an order

- (a) waiving privilege over documents in the power, possession, or control of Sears Canada or the Monitor that are relevant to this action or the three related actions (collectively, the "**Actions**"); and
- (b) compelling Harker and Crowley to produce for inspection insurance policies that may provide indemnification for liability.

MOTION REGARDING PRIVILEGE

4. Neither Harker and Crowley, nor the other former directors whom we represent in the Actions (together, the "**Former Directors**"), are opposed in principle to the court allowing the Monitor to waive privilege over certain documents that are relevant to the Actions (should the court determine that it has the power to do so).

5. However, they are concerned that the broad form of waiver power that the Monitor seeks could negatively affect their legal rights.

6. With respect to certain legal advice that was provided, both Sears Canada and the Former Directors were joint clients of the law firm providing the advice and thus no individual client (*i.e.*, Sears Canada) has the ability to waive privilege relative to third parties.

7. This is the case, for example, regarding the legal advice provided in respect of the action brought by 1291079 Ontario Limited against the Former Directors and others parties (Court File No. 4114/15) (the "**2015 Action**"), given that Stikeman Elliott LLP represented Sears Canada and the Former Directors jointly.

8. In other cases, it is apparent that production of privileged information without the consent of the Former Directors would be prejudicial to their interests. For example, Sears Canada retained Stikeman Elliott LLP to represent it in the earlier action by 1291079 Ontario Limited against Sears Canada (the “**2013 Action**”) relating to the alleged treatment of Sears Hometown Dealers. The facts underlying the 2013 Action are closely related to the 2015 Action.

9. I am informed by Samaneh Hosseini of Stikeman Elliott LLP, counsel for Sears Canada in the 2013 Action, and believe, that her firm performed legal analysis of the claims in the 2013 Action, provided advice on the merits to Sears Canada, and advanced that proceeding at least to the documentary discovery stage.

10. Accordingly, I believe that the production by the Monitor of privileged materials from the 2013 Action would be harmful to the interests of the Former Directors, given that such action is closely related to the 2015 Action (which remains outstanding) and since such privileged documents and communications—if produced by the Monitor—could be unfairly used by the plaintiff in the 2015 Action.

11. Accordingly, our firm provided an alternate form of privilege order to counsel to the Monitor on or about February 14, 2019. John M. Picone, a lawyer in our office, and I subsequently discussed our proposed alternate form of privilege order with Robert Frank of Norton Rose Fulbright Canada LLP, counsel to the Monitor, on February 15, 2019.

12. Since this privilege motion brought by the Monitor has not yet been resolved, the Former Directors are now prepared to put forward, on a “with prejudice” basis, the form of order on the privilege issue that they previously proposed and would be prepared to accept. That form of order is attached as **Exhibit “A”**.

MOTION TO PRODUCE INSURANCE POLICIES

13. On February 12, 2019, our firm produced to the Monitor and the other plaintiffs in the Actions (collectively, the “**Plaintiffs**”) copies of all insurance policies that the Former Directors believe may provide coverage in respect of the Actions. A letter dated February 12, 2019 from Wendy Berman, a lawyer in our office, to counsel for each of the Plaintiffs, under cover of which the policies were produced, is attached as **Exhibit “B”**.

14. The policies that were provided to the Plaintiffs are policies purchased by Sears Holdings Corporation (“**Sears Holdings**”), which cover the 2015 to 2016 policy year, being the policies in effect when the 2015 Action was commenced. The insurers of Sears Holdings have taken the position that the policies from this period are the ones that may respond to the Actions.

15. Further, for several years, Sears Canada had insurance policies covering liability of directors and officers. However, those policies contain a “prior acts exclusion” endorsement that denies coverage for any claim based on “wrongful acts” occurring prior to October 15, 2014. The acts or omissions giving rise to the Actions are alleged to have occurred between November and December 2013, and possibly before then.

16. Accordingly, although our firm provided notice of the Actions to the insurers of Sears Canada, those insurers have taken the position that their policies do not respond to, or provide indemnification in respect of, the Actions.

17. Accordingly, our firm has produced to the Plaintiffs all insurance policies that we believe may provide coverage in respect of the Actions. However, to be clear, no insurer has confirmed that it will actually indemnify Harker, Crowley, or any other of the Former Directors whom we represent in respect of any liability that they may ultimately be found to have.

SWORN BEFORE ME at the City of Toronto, in
the Province of Ontario, on February 21, 2019

Anna Jones

COMMISSIONER FOR TAKING AFFIDAVITS

LSUC # 65741W

Anna Tomps

John Birch

JOHN N. BIRCH

FTI CONSULTING CANADA INC.
Plaintiff

-and-

ESL INVESTMENTS INC *et al.*
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

AFFIDAVIT OF JOHN N. BIRCH
(SWORN FEBRUARY 21, 2019)

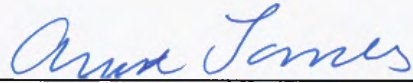
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Lawyers for the Defendants
William Harker and William Crowley

This is Exhibit "A" referred to in the Affidavit of Service of John N. Birch,
sworn February 21, 2019



Commissioner for Taking Affidavits
(or as may be)

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE)	WEDNESDAY , THE 20 th DAY OF
)	
MR. JUSTICE MCEWEN)	MARCH, 2019
)	

BETWEEN:

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 paragraph 2 through 5 below, privilege in favour of Sears Canada Inc. (**Sears Canada**) is hereby waived over all documents relevant to this action and/or the related actions commenced by each of the Litigation Trustee (Court File No. CV-18-00611214-00CL), Morneau Shepell Ltd. in its capacity as administrator of the Sears Canada's

Registered Pension Plan (Court File No. CV-18-00611217-00CL), and certain former “Sears Hometown” store franchisees (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.

2. **THIS COURT ORDERS** that prior to any production of documents by the Monitor in the Related Actions, the Monitor shall take reasonable steps to review such documents to identify all of the following:

- 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 (collectively, the **ESL/SHC Documents**);
- b. documents, including those containing any communication by or to Sears Canada, 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**), that relate to the 2015 Action and a class proceeding commenced by 1291079 Ontario Ltd. in the Ontario Superior Court of Justice (Milton) Court File No. 3769/13 (the **2013 Action**), including without limiting the generality of the foregoing, the files of Stikeman Elliott LLP and Sears Canada relating to the 2013 Action or the 2015 Action (all of which documents in this paragraph (b) shall be referred to collectively as the **Hometown Litigation Files**);
and
- c. documents containing communications between a internal and external legal counsel and a Current or Former D&O for which privilege could reasonably be

asserted, 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 (the **Director Documents**).

3. **THIS COURT ORDERS** that no waiver of any privilege shall have occurred by the inadvertent production of the ESL/SHC Documents or the Director Documents (collectively, the **Potentially Shared Privileged Documents**) should a Potentially Shared Privileged 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.

4. **THIS COURT ORDERS** that the Monitor shall forthwith produce to the ESL Parties and the Current or Former D&Os all Potentially Shared Privileged Documents to the extent that such parties may be able to assert privilege over the documents, that such production shall not constitute a waiver of privilege, and that if any of the Monitor, the ESL Parties, or the Current or Former D&Os, as the case may be, intend to produce any Potentially Shared Privileged Documents to any other party, the party intending to so produce shall provide a list of such documents on reasonable notice, which shall be no less than seven days, to any other party that may be able to assert privilege over those documents, so that any issue regarding privilege may be resolved by the parties or determined by this Court. If no response to such notice is received within the time period specified in such notice, then the party proposing production may produce the Potentially Shared Privileged Documents.

5. **THIS COURT ORDERS** that, despite any other provision of this order,

- a. no party may, without the consent of the Current or Former D&Os, disclose any of the Hometown Litigation Files to the plaintiff or counsel to the plaintiff in the 2013 Action or the 2015 Action;

- b. the Monitor shall provide to counsel to the defendants in the 2015 Action a complete copy of the Hometown Litigation Files and such production shall not constitute a waiver of privilege; and
 - c. if the Current or Former D&Os intend to produce any of the Hometown Litigation Files to any other party, the Current or Former D&Os shall provide a list of such documents to the Monitor on not less than 10 days' notice, so that, if the Monitor objects, any issue regarding privilege may be resolved by the parties or determined by this Court, and, if no response to such notice is received within the time period specified in such notice, then the Current or Former D&Os may produce the documents that they propose to produce.
-

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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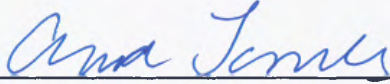
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Lawyers to FTI Consulting Canada Inc.,
as Court-Appointed Monitor

This is Exhibit "B" referred to in the Affidavit of Service of John N. Birch,
sworn February 21, 2019

A handwritten signature in blue ink, appearing to read "Anna Jones", is written above a horizontal line.

Commissioner for Taking Affidavits
(or as may be)



February 12, 2019

By Email

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Attention: David Sterns and Andy Seretis

Dear Counsel:

**Re: Ephraim J. Bird et al ats Sears Canada Inc.
William Crowley et al ats FTI Consulting Canada Inc.
Ephraim J. Bird et al ats Morneau Shepell Ltd.
Ephraim J. Bird et al ats 1291079 Ontario Limited**



Page 2

We write further to your respective requests for disclosure and production of any insurance policies under which an insurer may be liable to satisfy, indemnify or reimburse all or part of a judgment against our clients in these matters.

Further to your requests, and pursuant to Rule 30.02(3) of the *Rules of Civil Procedure*, we enclose copies of the relevant policies. As we have advised you previously, none of the insurers has provided any confirmation that it will indemnify the directors for liability in the litigation.

Yours truly,

Cassels Brock and Blackwell LLP

A handwritten signature in cursive script, appearing to read "W. Berman", followed by a horizontal line extending to the right.

Wendy Berman

Enclosures

cc: Litigation Service List

FTI CONSULTING CANADA INC. -and-
Plaintiffs

ESL INVESTMENTS INC *et al.*
Defendants

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