

**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

**FACTUM OF THE MONITOR
(Waiver of Privilege Motion)
(returnable March 20, 2019)**

March 8, 2019

NORTON ROSE FULBRIGHT CANADA LLP
Royal Bank Plaza, South Tower
200 Bay Street, Suite 3800, P.O. Box 84
Toronto, Ontario M5J 2Z4

Orestes Pasparakis LSO#: 36851T

Tel: +1 416.216.4815

Robert Frank LSO#: 35456F

Tel: 1 416.202.6741

Evan Cobb LSO#: 55787N

Tel: +1 416.216.1929

Fax: +1 416.216.3930

orestes.pasparakis@nortonrosefulbright.com

robert.frank@nortonrosefulbright.com

evan.cobb@nortonrosefulbright.com

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

TO: THE LITIGATION SERVICE LIST

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PART I - INTRODUCTION

1 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 **CCAA**) (the **Monitor**) seeks an order waiving privilege over documents in the power, possession or control of Sears Canada Inc. (**Sears**) or the Monitor and relevant to this action and the other Related Actions (defined below) that are subject to privilege only in favour of Sears (the **Waiver**). The Monitor also seeks an order implementing a protocol for governing all disclosure of documents that are potentially privileged in favour of both Sears and another party (including any of the defendants).

2 The Waiver is within the scope of the Court's established jurisdiction, and appropriate in the circumstances.

3 Section 11 of the CCAA confers broad authority on the Court. Consistent with this broad statute-based jurisdiction, case law supports the position that, in appropriate circumstances, a monitor can seek a waiver of privilege in favour of an insolvent corporation. In the current circumstances, the Waiver sought by the Monitor is warranted for the following reasons:

- (a) the Waiver is an important step to support the timely and cost-effective pursuit of the Related Actions (defined below). The Court has already authorized the commencement of the Related Actions;
- (b) the Court's approval of the Governance Protocol (defined below) in the CCAA Proceedings (defined below) renders the relief sought in the current motion a logical and appropriate next step. Pursuant to the Governance Protocol, the powers of the Sears Board have effectively been shifted to the Monitor, and as a result, the Court should exercise its discretion to grant the Waiver.

(c) unlike other cases in which courts have declined to order waiver of privilege in favour of a bankrupt or insolvent entity, there are no parties with an interest in Sears' privilege who oppose the Waiver, nor are there any parties who could be prejudiced by the Waiver.

4 The Monitor also seeks, pursuant to Rule 30.02(3), production for inspection from the defendants, William Harker and William Crowley, of all insurance policies relevant to the Related Actions providing for liability insurance with respect to their roles as directors of Sears. To date, these defendants have produced only policies purchased by Sears Holdings Corporation (**Sears Holdings**), which cover the 2015 to 2016 policy year, on the basis of advice from insurers that no other policies are potentially responsive to the Related Actions.

5 In accordance with the broad purpose of Rule 30.02(3), grounded in the need for parties to litigation to be able to make *informed and sensible decisions* regarding circumstances where recourse *may be had* to any available insurance money, the Monitor seeks production of additional insurance policies which may be responsive to the Related Actions.

PART II - THE FACTS

A. Background

6 On June 22, 2017, Sears and a number of its subsidiaries (collectively, with Sears, the **Applicants**, and together with SearsConnect, the **Sears Canada Entities**) sought and obtained an initial order (as amended and restated on July 13, 2017, the **Initial Order**) under the CCAA (the proceedings commenced under the CCAA by the Applicants are referred to herein as the

CCAA Proceedings). Pursuant to the Initial Order, FTI Consulting Canada Inc. was appointed by the Court as the Monitor to monitor the financial affairs of the Sears Canada Entities.¹

B. The Monitor's Access to Sears' Documents

7 Among other things, the Initial Order directed and empowered the Monitor to have “full and complete access” to the property of the Sears Canada Entities, including their “premises, books, records, data, including data in electronic form, and other financial documents”, to the extent necessary to adequately assess the business of Sears and its affiliates and to perform its duties arising under the Initial Order.²

8 By an Order, amended and restated on April 26, 2018 (the **Litigation Investigator Order**), Lax O'Sullivan Lisus Gottlieb LLP was appointed as Litigation Investigator (the **Litigation Investigator**).³ The Litigation Investigator's mandate was to investigate, consider, and report to a creditors' committee regarding rights that the Sears Canada Entities or their creditors may have as against any parties, including but not limited to current and former directors, officers, shareholders and advisors of any of the Sears Canada Entities.⁴

9 The Litigation Investigator Order included a carefully crafted protocol designed to guard against any disclosure of documents that contained *shared* privileged communications in favour of *both* Sears *and* Sears Holdings Corporation, or current or former directors or Sears, or parties related to Edward Lampert⁵

¹ Affidavit of Geoff Mens sworn February 7, 2019 (the **Mens Affidavit**) at paras 3, 4, Motion Record of the Monitor dated February 7, 2019 for Waiver of Privilege Motion (the **Waiver MR**), Tab 2, p 9.

² Mens Affidavit at paras 4, 5 Waiver MR, Tab 2, p 9.

³ Mens Affidavit at para 7, Waiver MR, Tab 2, p 10; Amended Litigation Investigator Order issued April 26, 2018 (the **LI Order**), Waiver MR, Tab 7, p 109.

⁴ LI Order at para 2, Waiver MR, Tab 7, p 110.

⁵ LI Order at para 9, Waiver MR, Tab 7, pp 115-116.

C. The Related Actions

10 On December 3, 2018, the Monitor sought and obtained authorization from the Court to commence the current action related to the dividend of approximately \$509 million paid by Sears in December 2013 (the **2013 Dividend**). The Monitor commenced the current action on December 19, 2018.⁶

11 Also on December 3, 2018, the Court authorized three other parties to commence and/or continue actions related to the 2013 Dividend (collectively with the current action, the **Related Actions**). In particular:

- (a) the Honourable J. Douglas Cunningham, Q.C. was appointed as an officer of this Court to be the Litigation Trustee (the **Litigation Trustee**), and was authorized by the Court to commence claims in respect of the 2013 Dividend. The Litigation Trustee commenced its claim on December 19, 2018 in Court File No. CV-18-00611214-00CL;⁷
- (b) the Court lifted the stay of proceedings under the Initial Order to permit Morneau Shepell, in its capacity as administrator of the Sears Canada Registered Pension Plan, to commence a claim related to the 2013 Dividend, which it commenced on December 19, 2018 in Court File No. CV-18-00611217-00CL;⁸ and
- (c) the Court lifted the stay of proceedings granted under the Initial Order with respect to the existing proposed class proceeding in Court File No. 4114/15

⁶ Mens Affidavit at para 9, Waiver MR, Tab 2, p 11.

⁷ Mens Affidavit at para 11, Waiver MR, Tab 2, p 11; Statement of Claim of the Litigation Trustee issued December 19, 2018 (CV-18-611214-00CL), Waiver MR, Tab 4, p 46.

⁸ Mens Affidavit at para 13, Waiver MR, Tab 2, p 12; Statement of Claim of the Pension Administrator issued December 19, 2018 (CV-18-611217-00CL), Waiver MR, Tab 5, p 73.

commenced in Milton, Ontario on behalf of certain “Sears Hometown” store franchisees on the basis of the payment of the 2013 Dividend.⁹

12 As described above, the Monitor is currently in possession of certain documents from Sears that are relevant to *each* of the Related Actions. With a view to streamlining the litigation process, the Monitor intends to arrange for and coordinate documentary productions in each of the Related Actions. In connection with this mandate, the Monitor has determined that it is appropriate and in the best interests of Sears Canada to waive privilege over any documents relevant to the Related Actions which are subject to privilege in favour of Sears Canada.¹⁰

D. The Governance Protocol

13 On December 3, 2018, the Court granted the Governance Protocol and Stay Extension Order (the **Governance Protocol Order**), which appended at Schedule “A” a three page “governance protocol” (the **Governance Protocol**) and authorized the Monitor to take “all steps necessary to implement” that protocol.¹¹

14 The Governance Protocol authorized the Monitor, among other things, to take responsibility for various corporate decisions, including by:

- (a) overseeing the remaining wind-down of the Sears Canada Entities;
- (b) causing the Sears Canada Entities to perform such functions as the Monitor considers necessary or desirable in order to facilitate or assist the Sears Canada Entities in dealing with certain remaining matters;

⁹ Mens Affidavit at para 13, Waiver MR, Tab 2, p 12; Statement of Claim issued by Hometown Dealers (Court File No. 4114/15), Waiver MR, Tab 6, p 92.

¹⁰ Mens Affidavit at para 15, Waiver MR, Tab 2, p 12.

¹¹ Governance Protocol and Stay Extension Order December 3, 2018, Schedule “A”, Waiver MR, Tab 10, p 148.

- (c) signing such agreements, instruments and other documents on behalf of each of the Sears Canada Entities as the Monitor deems appropriate;
- (d) taking any and all corporate actions, and actions regarding the governance of the Sears Canada Entities (**Governance Action**), provided that such actions do not have an adverse effect on any creditors of the Applicants; and
- (e) exercising any and all of the rights and powers of the Sears Canada Entities set out in the Governance Protocol and in any other Order in the CCAA Proceedings and taking any steps reasonably incidental to the exercise of the powers and obligations conferred upon the Monitor.¹²

15 The Governance Protocol also directed the Monitor to assume these responsibilities “to the exclusion of any other Person, and without the need for approval of the remaining directors of [Sears] or the remaining directors of the other Applicants”.¹³

PART III - ISSUES AND THE LAW

A. Issues

16 There are three issues that arise on the current motion:

- (a) whether the Court has jurisdiction to direct the Monitor to proceed with the Waiver;
- (b) whether the Waiver is appropriate in the circumstances, subject to a protocol governing potentially shared privilege documents; and

¹² Governance Protocol and Stay Extension Order dated December 3, 2018 (the **Governance Protocol Order**), Schedule “A”, Waiver MR, Tab 10, p 148.

¹³ Governance Protocol Order, Schedule “A”, Waiver MR, Tab 10, p 148.

- (c) whether Crowley and Harker have an obligation to disclose additional insurance policies that may be responsive to the claims in the Related Actions.

B. The Court has Jurisdiction to Grant the Waiver

17 Section 11 of the CCAA provides as follows:

Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, **may**, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, **make any order that it considers appropriate in the circumstances.**¹⁴

18 The jurisdiction of the court to grant the Waiver pursuant to section 11 of the CCAA is not restricted by any provision of the CCAA. Other Ontario courts have exercised their discretion to make similar orders in circumstances of bankruptcy.¹⁵

C. The Waiver is Appropriate in the Circumstances

19 In assessing appropriateness, the Court will inquire whether the order sought advances the policy objectives underlying the CCAA.¹⁶ In the current circumstances, the Waiver is consistent with and advances the policy objectives underlying the CCAA for the following reasons. The Waiver is also consistent with the Monitor's powers under the Governance Protocol and is supported by all parties with an interest in the privilege.

i. Jurisprudence Supports a Waiver in the Circumstances

20 Under Ontario jurisprudence, it is clear that waivers in favour of bankrupt or insolvent corporate entities are permissible in appropriate circumstances.

¹⁴ *Companies' Creditors Arrangement Act*, RSC, 1985, c. C-36, s 11 (emphasis added).

¹⁵ For example, see *Canadian Triton International Ltd., Re*, [1998] O.J. No. 976 (Ont Ct Jus) (discussed in more detail below) in which Justice Farley authorized the Trustee in Bankruptcy to waive privilege in favour of a bankrupt corporation.

¹⁶ *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at paras 68-70 (**Century Services**).

21 In *Canadian Triton International Ltd., Re*, the court authorized a Trustee in Bankruptcy to waive privilege in favour of a bankrupt corporation, and thereby compel the disclosure of certain documents from the bankrupt's former solicitor. Justice Farley observed that while certain prior case law arguably suggested restrictions on a Trustee in Bankruptcy from waiving privilege in the case of individuals, the same analysis was not readily transferrable to a corporate bankrupt entity.¹⁷ Justice Farley held that an individual bankrupt, unlike a corporation, could remain subject to prosecution or otherwise be imperilled through his or her "*personal persona*". As a result, the policy considerations underpinning restrictions against Trustees in waiving privilege in the case of an *individual* bankrupt were not applicable in the case of corporations.

22 In *Re Teleglobe Inc.*, decided in the context of ongoing CCAA proceedings, Justice Farley held that a Court-appointed Monitor had authority to waive privilege of an insolvent corporation for the purpose of permitting the delivery of privileged documents from an insolvent corporation's former lawyers to an interim receiver. Indeed, Justice Farley's order directed the Monitor to "consider waiving the privilege."¹⁸

23 As in *Canadian Triton* and *Teleglobe Inc.*, Sears is a corporate entity whose circumstances do not give rise to the concerns that may restrict waivers of privilege in favour of individuals. As such, it is appropriate for the Court to authorize the Waiver in respect of Sears' privilege.

24 There is a limited body of case law in Alberta, anchored by *Re Bre-X Minerals Ltd.*,¹⁹ pursuant to which the Alberta Courts have declined to permit a Trustee in Bankruptcy to waive solicitor-client privilege on behalf of a bankrupt corporation. This line of cases is not applicable in the current circumstances for the following reasons:

¹⁷ *Canadian Triton International Ltd., Re*, [1998] O.J. No. 976 (Ont Ct Jus) (**Canadian Triton**) at para 9.

¹⁸ *Teleglobe Inc., Re*, [2004] O.J. No. 2905 (Ont Sup Ct) at para 9.

¹⁹ 2001 ABCA 255 (**Bre-X**).

- (a) as described above, Section 11 of the CCAA confers very broad authority on the Court in CCAA proceedings. Section 11 has no direct analogue in the *Bankruptcy and Insolvency Act*, and accordingly was not considered in *Bre-X* or the line of cases that have followed it;
- (b) unlike *Bre-X*, the Monitor is not asking the Court to vest it with authority to waive Sears' privilege at its discretion. Rather, it seeks a specific waiver over all documents in the power, possession or control of Sears or the Monitor and relevant to the Related Actions while providing protections for potentially shared privilege documents;
- (c) in *Bre-X*, the Alberta Court of Appeal emphasized that the bankrupt's shareholders could have called a meeting to deal with the issue of privilege (whether by the election of directors or otherwise). An analogous course of conduct is in this case foreclosed by the Governance Protocol, and accordingly, the proposed Waiver is practically desirable; and
- (d) unlike *Bre-X*, no parties with an interest in the privilege that the Monitor seeks to have waived are opposed to the court granting the Waiver. In response to concerns from certain defendants that "the broad form of waiver power that the Monitor seeks could negatively affect their legal rights",²⁰ the Monitor has proposed an amended draft order designed to address those concerns and safeguard the defendants' legal rights with respect to potentially shared privilege documents.

²⁰ Affidavit of John Birch sworn February 21, 2019 (the **Birch Affidavit**) at para 5, Responding Motion Record of the Defendants, William Harker and William Crowley dated February 21, 2019 for Waiver of Privilege Motion (the **Responding Waiver MR**), Tab 1, p 2.

ii. The Waiver Will Support Efficient, Cost-Effective and Justified Litigation

25 The Waiver in the current action will facilitate expedited and cost-effective litigation in respect of the Related Actions.

26 Through the current action, the Monitor seeks the return of very substantial assets that were removed from Sears' estate, so that those assets can be redistributed fairly among the creditors in accordance with applicable priorities. The purpose of the litigation is remedial in nature and entirely consistent with the policy objectives underlying the CCAA. The Court has already authorized the commencement of the Related Actions pursuant to section 11 of the CCAA, and the Waiver is a logical next step in this Court-approved litigation process.

27 In accordance with its mandate and in the interests of the Sears creditors, the Monitor seeks to conduct this litigation in the most streamlined manner possible. The proposed Waiver is a critical step in ensuring that documentary production can proceed in a timely and cost-effective manner. Should the Court decline to grant the Waiver, the Monitor will be required to undertake a time-consuming and expensive documentary review process to avoid any inadvertent disclosure of Sears' privileged documents, which will substantially impair the Monitor's ability to proceed on an expedited and efficient basis. The Monitor may also be unable to produce certain documents relevant to the Related Actions.

iii. No Interested Party Opposes the Waiver

28 There is no party who has an interest in the privilege affected by the Waiver who opposes the motion in principle (subject to certain concerns about the scope of the Waiver that can easily be resolved). This distinguishes this case from others in which Courts have declined to authorize monitors and Trustees in Bankruptcy to waive privilege.

29 Further, the defendants Crowley and Harker, along with other former directors of Sears, have stated through counsel that they are not “opposed in principle to the court allowing the Monitor to waive privilege over certain documents that are relevant to the [Related Actions] (should the court determine that it has the power to do so).”²¹

30 In *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, the Court of Appeal noted that CCAA proceedings involve “a balancing of prejudices.”²² In the current case, no parties are prejudiced by the order sought.

iv. Protocol for Documents Potentially Subject to Shared Privilege

31 The Monitor has proposed an effective mechanism for addressing any concerns that could arise with respect to documents which are subject to privilege in favour of multiple persons. The protocol is derived from the protocol that was negotiated among the parties, including the defendants, and implemented in the Amended Litigation Investigator Order dated April 26, 2018 to address concerns surrounding potentially shared privilege documents in respect of the mandate of the Litigation Investigator. As a result, the potentially affected parties will have the opportunity to assert privilege over potentially shared privilege documents.

D. The Defendants Must Produce Additional Insurance Policies

32 The Monitor’s request pursuant to Rule 30.02(3) for production for inspection of “all insurance policies relevant to this proceeding providing for liability insurance with respect to [the defendants’] roles as directors of Sears” has not been satisfied by the defendants. The defendants have produced only policies of Sears Holdings which cover the period from 2015 to 2016, on the basis of advice from insurers that no other policies are potentially responsive to the

²¹ Birch Affidavit at paras 14-16, Responding Waiver MR, Tab 1, p 4.

²² 2008 ONCA 587 at para 117.

Related Actions.²³ While it appears the 2015-2016 policy could be responsive, the defendants' production is insufficient in light of the scope and purpose of Rule 30.02(3).

33 The Court of Appeal for Ontario has held that the purpose of Rule 30.02(3) is to “assist the making of informed and sensible decisions by parties involved in litigation in circumstances where recourse may be had to any available insurance money.”²⁴ In *Williams v Pintar*, it was held that “[p]laintiffs must be able to anticipate the availability of any funds which may or may not satisfy judgment.”²⁵ The limited production made to date by the defendants is not sufficient to allow the plaintiffs in the Related Actions to make an “informed and sensible” decision as to recourse to insurance money.

PART IV - ORDER REQUESTED

34 The Monitor seeks an order:

- (a) waiving privilege over documents in the power, possession or control of Sears or the Monitor and relevant to the Related Actions that are subject to privilege only in favour of Sears, as reflected in the draft Order attached at Schedule C;
- (b) implementing a protocol for governing all disclosure of documents that are potentially privileged in favour of Sears and another party (including any of the defendants), as reflected in the draft Order attached at Schedule C; and

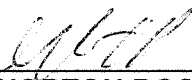
²³ Birch Affidavit at paras 13-16, Responding Waiver MR, Tab 1, p 4.

²⁴ *Pye Bros. Fuels Ltd. v. Imperial Oil Ltd.*, 2012 ONCA 153 at para 9 (emphasis added).

²⁵ *Williams v. Pintar*, 2014 ONSC 1606 at para 28 (emphasis added).

- (c) compelling the defendants William Crowley and William Harker to produce for inspection all insurance policies that may be responsive to the claims in the Related Actions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of March, 2019.

 PER Geoff Mans
NORTON ROSE FULBRIGHT CANADA LLP

Lawyers for the Monitor, FTI Consulting Canada Inc.

SCHEDULE "A"
LIST OF AUTHORITIES

- 1 *Canadian Triton International Ltd., Re*, [1998] O.J. No. 976 (Ont Ct Jus)
- 2 *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60
- 3 *Teleglobe Inc., Re*, [2004] O.J. No. 2905 (Ont Sup Ct)
- 4 *Re Bre-X Minerals Ltd.*, 2001 ABCA 255
- 5 *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587
- 6 *Pye Bros. Fuels Ltd. v. Imperial Oil Ltd.*, 2012 ONCA 153
- 7 *Williams v. Pintar*, 2014 ONSC 1606

**SCHEDULE “B”
RELEVANT STATUTES**

1. *Companies’ Creditors Arrangement Act, RSC 1985, c. c-36*

General power of court

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

2. *Rule 30.02, Rules of Civil Procedure, R.R.O. 1990, Reg. 194*

SCOPE OF DOCUMENTARY DISCOVERY

Disclosure

30.02 (1) Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document. R.R.O. 1990, Reg. 194, r. 30.02 (1); O. Reg. 438/08, s. 26.

Production for Inspection

(2) Every document relevant to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in rules 30.03 to 30.10, unless privilege is claimed in respect of the document. R.R.O. 1990, Reg. 194, r. 30.02 (2); O. Reg. 438/08, s. 26.

Insurance Policy

(3) A party shall disclose and, if requested, produce for inspection any insurance policy under which an insurer may be liable,

(a) to satisfy all or part of a judgment in the action; or

(b) to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment,

but no information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action. R.R.O. 1990, Reg. 194, r. 30.02 (3).

Subsidiary and Affiliated Corporations and Corporations Controlled by Party

(4) The court may order a party to disclose all relevant documents in the possession, control or power of the party's subsidiary or affiliated corporation or of a corporation controlled directly or indirectly by the party and to produce for inspection all such documents that are not privileged. R.R.O. 1990, Reg. 194, r. 30.02 (4).

SCHEDULE "C"
DRAFT ORDER

**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 6 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), Morneau Shepell Ltd. in its capacity as administrator of 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 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 directly in response to the 2015 Action or a class proceeding commenced by 1291079 Ontario Ltd. against Sears Canada in the Ontario Superior Court of Justice (Milton) bearing Court File No. 3769/13-CP) (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**).

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 documents containing any communication by or to Sears Canada created on or after November 26, 2013 directly in response to the 2015 Action or the 2013 Action (the **SCI Hometown Documents**).

4 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.

5 THIS COURT ORDERS that in the event that the Monitor intends to produce any Potentially Shared Privileged Documents, the Monitor shall provide a list of such documents on reasonable notice, which shall be no less than seven days, to the ESL Parties, Sears Holdings Corporation and/or the Current or Former D&Os to the extent that such parties may be able to assert privilege over the documents, so that any issue regarding privilege may be resolved by the parties or determined by this Court. If no response is received by the Monitor within the time period specified in such notice to the ESL Parties, Sears Holdings and/or the Current or Former D&Os, then the Monitor may produce the Potentially Shared Privileged Documents.

6 THIS COURT ORDERS that in the event that the Monitor intends to produce any SCI Hometown Documents, the Monitor shall provide a list of such documents on reasonable notice, which shall be no less than seven days, to the Current or Former D&Os, so that any issue

regarding privilege may be resolved by the parties or determined by this Court. If no response is received by the Monitor within the time period specified in such notice to the Current or Former D&Os, then the Monitor may produce the SCI Hometown Documents. This paragraph 6 is not intended to determine whether any SCI Documents are the subject of a valid claim of privilege by any party.

7 THIS COURT ORDERS that the Defendants William Crowley and William Harker shall produce all insurance policies relevant to this action and related actions which provide for liability insurance with respect to their former roles as directors of Sears Canada within five business days of this Order.

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

Plaintiff

and
ESL Investments Inc. *et al.*

Defendants

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at TORONTO

ORDER

NORTON ROSE FULBRIGHT CANADA LLP

Royal Bank Plaza, South Tower
200 Bay Street, Suite 3800, P.O. Box 84
Toronto, Ontario M5J 2Z4

Orestes Pasparakis, LSO#: 36851T

Tel: +1 416.216.4815

Robert Frank LSO#: 35456F

Tel: 1 416.202.6741

Evan Cobb, LSO#: 55787N

Tel: +1 416.216.1929

Fax: +1 416.216.3930

orestes.pasparakis@nortonrosefulbright.com

robert.frank@nortonrosefulbright.com

evan.cobb@nortonrosefulbright.com

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

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

Plaintiff

and
ESL Investments Inc. *et al.*

Defendants

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at TORONTO

**FACTUM OF THE MONITOR
(Waiver of Privilege Motion)
(returnable March 20, 2019)**

NORTON ROSE FULBRIGHT CANADA LLP

Royal Bank Plaza, South Tower
200 Bay Street, Suite 3800, P.O. Box 84
Toronto, Ontario M5J 2Z4

Orestes Pasparakis LSO#: 36851T

Tel: +1 416.216.4815

Robert Frank LSO#: 35456F

Tel: 1 416.202.6741

Evan Cobb LSO#: 55787N

Tel: +1 416.216.1929

Fax: +1 416.216.3930

orestes.pasparakis@nortonrosefulbright.com

robert.frank@nortonrosefulbright.com

evan.cobb@nortonrosefulbright.com

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