

**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

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

February 7, 2019

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Canada Inc.

TO: TUV LITIGATION SERVICE LIST

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

B E T W E E N :

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**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

**NOTICE OF MOTION
(Returnable March 20, 2019)**

The plaintiff, 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**) will make a motion to the Court, returnable on March 20, 2019 at 10:00 a.m. or as soon after that time as the motion can be heard, at 330 University Avenue, Toronto ON.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

- (a) An Order waiving privilege over documents in the power, possession or control of Sears Canada Inc. or the Monitor and relevant to this action and related actions that are subject to privilege in favour of Sears Canada Inc. (**Sears Canada**), and implementing a protocol for dealing with Potentially Shared Privileged

Documents, as defined in the Amended Litigation Investigator Order dated April 26, 2018; and

- (b) An Order compelling the Defendants William Crowley and William Harker to produce for inspection all insurance policies relevant to this proceeding providing for liability insurance with respect to their roles as directors of Sears Canada.

THE GROUNDS FOR THE MOTION ARE:

The Monitor's Collection of Documents

- (c) On June 22, 2017, Sears Canada and a number of its operating subsidiaries (the **Applicants**) sought and obtained an initial order (as amended, or amended and restated, the **Initial Order**) under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, as amended (the **CCAA**) in Court File No. CV-17-11846-00CL (the **CCAA Proceeding**);
- (d) Pursuant to the Initial Order, the Monitor was appointed, as an officer of the Court, to monitor the financial affairs of Sears Canada and certain of its affiliates, and was granted certain powers and obligations in accordance with the CCAA and the terms of the Initial Order;
- (e) Among other things, the Initial Order directed and empowered the Monitor to have "full and complete access" to the property of the Sears Canada, including its "premises, books, records, data, including data in electronic form, and other financial documents", to the extent that is necessary to adequately assess the business of Sears Canada and its affiliates and to perform its duties arising under the Initial Order;

- (f) The investigation of potential claims was included as among the Monitor's duties pursuant to both the Initial Order and the CCAA;
- (g) Beginning in October 2017, and continuing to the present, Sears Canada has provided the Monitor with access to its books, records, data, and other financial documents, in connection with the Monitor's mandate under both the Initial Order and the CCAA, and for the purpose of investigating and (if advisable) commencing claims, among other purposes;
- (h) Based on its review of Sears Canada's books and records, the Monitor recommended commencing litigation relating to a dividend paid to shareholders of Sears Canada on December 6, 2013 in the amount of approximately \$509 million (the **2013 Dividend**);
- (i) The Litigation Investigator, appointed pursuant to the Amended Litigation Investigator Order dated April 26, 2018, also recommended the commencement of litigation related to the 2013 Dividend;

The Related Actions

- (j) On December 3, 2018, Justice Hainey issued Orders authorizing the commencement and/or continuation of claims relating to the 2013 Dividend by each of the Monitor and the Litigation Trustee (who was appointed on the same date), and lifting the stay of proceedings to permit the claims of Morneau Shepell in its capacity as administrator of the Sears Canada's Registered Pension Plan, and certain former "Sears Hometown" store franchisees (collectively, the **Related Actions**) to commence or continue these actions;

- (k) Each of the Related Actions have now been commenced in the Ontario Superior Court of Justice;

A New Governance Protocol

- (l) Over the past year, Sears Canada has undergone a liquidation process and its wind down is now being overseen entirely by the Monitor;
- (m) On December 3, 2018, Justice Hainey issued an Order establishing a new governance protocol for Sears Canada (and its affiliates) (the **Governance Protocol Order**), the effect of which was effectively to transfer the responsibilities of Sears Canada's two remaining directors to the Monitor;

The Proposed Waiver of Privilege

- (n) The Monitor intends to arrange for and coordinate documentary productions in each of the Related Actions;
- (o) 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 documents relevant to the Related Actions which are subject to privilege in favour of Sears Canada, subject to providing for an appropriate procedure with respect to Potentially Shared Privileged Documents, as defined at paragraph 9 of the LI Order;
- (p) The Monitor is not aware of any parties who have an interest in Sears Canada's privilege and object to its motion for an Order authorizing a waiver of privilege over documents relevant to this action and the Related Actions that are subject to privilege in favour of Sears Canada;

- (q) There are no persons with standing to object to the Monitor's motion for an Order authorizing a waiver of privilege over documents relevant to this action and the Related Actions that are subject to privilege in favour of Sears Canada;
- (r) Pursuant to the Governance Order, the Monitor has the right to waive privilege over documents in the power, possession or control of Sears Canada or the Monitor and relevant to the Related Actions that are subject to privilege in favour of Sears Canada;

Motion for Production of Insurance Policies

- (s) Despite requests for disclosure and production of the insurance policies relevant to this action and the Related Action, including formal requests to inspect made by both the Litigation Trustee and the Monitor, the Defendants William Crowley and William Harker have not to date provided the insurance policies relevant to this action and the Related Actions, providing for liability insurance with respect to their roles as directors of Sears Canada;
- (t) *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, s. 23;
- (u) Rules 1.04, 30.02(3) and 37; and
- (v) Such other grounds as counsel may advise and to this Court may seem just.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) the affidavit of Geoff Mens sworn February 7, 2019; and
- (b) such other evidence as counsel may provide and to this Court may seem just.

February 7, 2019

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

TO: **TUV LITIGATION SERVICE LIST**

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

**NOTICE OF MOTION
(RETURNABLE MARCH 20, 2019)**

7

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SUPERIOR COURT OF JUSTICE
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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

**AFFIDAVIT OF GEOFF MENS
(sworn February 7, 2019)**

I, **GEOFF MENS**, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND
SAY:**

1 I am an associate lawyer at Norton Rose Fulbright Canada LLP (**NRFC**), counsel to 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**), in the above-referenced proceeding. As such, I have personal knowledge of the matters to which I hereinafter depose. To the extent I rely on information from others, I state the source of my information and believe that information to be true.

2 I make this affidavit in support of the Monitor's motion for an Order (a) waiving privilege over all documents relevant to the litigation in this action and the Related Actions (defined below) that are subject to privilege in favour of Sears Canada and in the possession, power or

control of Sears Canada or the Monitor, and (b) compelling the Defendants William Crowley and William Harker to produce all insurance policies relevant to this proceeding providing for liability insurance with respect to their roles as directors of Sears Canada.

Background to the CCAA Proceeding

3 On June 22, 2017, Sears Canada Inc. (**Sears Canada**) and a number of its operating subsidiaries (the **Applicants**) sought and obtained an initial order (as amended, or amended and restated, the **Initial Order**) under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, as amended (the **CCAA**) in Court File No. CV-17-11846-00CL (the **CCAA Proceeding**).

4 The Initial Order provided as follows at paragraph 30:

THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

[...]

(h) have full and complete access to the Property (including any Property in the possession of the Hometown Dealers and the Corbeil Franchisees), including the premises, books, records, data, including data in electronic form, and other financial documents of the Sears Canada Entities, to the extent that is necessary to adequately assess the Business and the Sears Canada Entities' financial affairs or to perform its duties arising under this Order; [...]

Collection and Sharing of Documents

5 Throughout 2017 and 2018, the Monitor, in its role as a Court-appointed officer, received and had access to the books and records of Sears Canada (the **Sears Documents**).

6 On April 26, 2018 in the CCAA Proceeding, Justice Hainey granted the Amended Litigation Investigator Order (the **LI Order**) appointing Lax O'Sullivan Lisus Gottlieb LLP as the Litigation Investigator in the CCAA Proceedings (the **Litigation Investigator**).

7 The LI Order contemplated that the Monitor would share certain of the Sears Documents with the Litigation Investigator, subject to certain conditions. Specifically, pursuant to the terms of the LI Order, any production of Sears Documents to the Litigation Investigator was governed by the following procedure to address privilege issues:

9. THIS COURT ORDERS that prior to any production of documents by the Monitor or the Sears Canada Entities to the Litigation Investigator to facilitate the fulfillment of the Mandate, the Monitor or Sears Canada Entities, as the case may be, shall take reasonable steps to review such documents to identify any:

(a) documents that contain any communication that is between a lawyer and 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 (a "**Current or Former D&O**") created on or after November 26, 2013 and related to the 1291079 Ontario Ltd and Sears Canada Inc. et. al. class action of November 6, 2015 (Ontario Superior Court of Justice) File No. 4114/15); and

(c) documents containing communications between a law firm 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.

Hereafter, items a), b), and c) shall be referred to collectively as the "**Potentially Shared Privileged Documents**". No waiver of any privilege shall have occurred by the inadvertent delivery of documents to the Litigation Investigator 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) is produced or disclosed to the Litigation Investigator.

10. THIS COURT ORDERS that in the event that the Monitor and/or Sears Canada Entities intend to produce any Potentially Shared Privileged Documents to the Litigation Investigator in facilitation of the fulfillment of the Mandate, the Monitor or the Sears Canada Entities, as the case may be, 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.

8 The Monitor intends to maintain this procedure with respect to any Potentially Shared Privileged Documents in making production in the Action and the Related Actions, as defined

below and is seeking an order confirming that this procedure will continue and remain applicable.

The Related Actions

9 On December 3, 2018, Justice Hainey granted an Order in the CCAA Proceeding authorizing the Monitor to commence the current action relating to the dividend paid to shareholders of Sears Canada on December 6, 2013 in the amount of approximately \$509 million (the **2013 Dividend**) (the **TUV Order**). The current action was in fact commenced in accordance with Justice Hainey's Order on December 19, 2018 (the **Monitor's Action**).

10 Also on December 3, 2018, Justice Hainey granted a separate Order providing for the appointment of a Litigation Trustee in the CCAA Proceeding and various other relief (the **LT Order**). Pursuant to the LT Order, the Honourable J. Douglas Cunningham, Q.C. was appointed as an officer of this Court to be the Litigation Trustee and authorized to pursue litigation related to the 2013 Dividend.

11 The Litigation Trustee did in fact commence an action related to the 2013 Dividend on December 19, 2018 in Court File No. CV-18-00611214-00CL (the **LT Action**).

12 The LT Order further provided that "the stay of proceedings provided for in paragraph 25 of 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 McBumey 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." A copy of the Litigation Investigator's First Report to the Court dated November 5, 2018 (together with the Supplement thereto, the **First LI Report**) referred to by Justice Hainey is attached to this affidavit as **Exhibit "A"**.

13 In accordance with the terms of the LT Order and the First LI Report referred to therein, an action was commenced by Morneau Shepell Ltd. in its capacity as administrator of the Sears Canada Registered Pension Plan on December 19, 2018 in Court File No. CV-18-00611217-00CL (the **Pension Administrator's Action**). Also in accordance with terms of the LT Order and the First LI Report referred to therein, an existing proposed class proceeding in Court File No. 4114/15 commenced in Milton, Ontario on behalf of certain "Sears Hometown" store franchisees for oppression on the basis of the payment of the 2013 Dividend was continued (the **Franchisee Action**, and together with the Monitor's Action, the Pension Administrator's Action and the LT Action, the **Related Actions**).

The Governance Protocol

14 On December 3, 2018, Justice Haaney issued a separate Governance Protocol and Stay Extension Order (the **Governance Protocol Order**). The effect of the Governance Protocol Order was to transfer certain powers from the current directors of Sears Canada to the Monitor.

Proposed Waiver of Privilege

15 Given that the Monitor has power, possession or control over Sears Documents, 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.

16 The Monitor is not aware of any persons who have an interest in the privilege that is proposed to be waived who intend to oppose the Monitor's motion for an Order authorizing a waiver of privilege or would have the standing to do so. However, certain former directors and officers of Sears Canada have indicated that they may seek to impose certain conditions on

such a waiver. Correspondence from Cassels Brock & Blackwell LLP, counsel to certain former directors and officers of Sears Canada (**CBB**) to this effect dated January 24, 2019 is attached to this affidavit as **Exhibit "B"**.

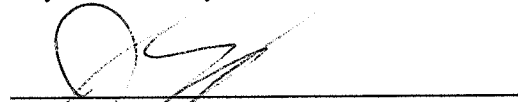
Former Directors Have Not Produced their Insurance Policies

17 I am advised by Evan Cobb, a partner at NRFC, that both prior to and since the commencement of the current action, the Monitor has requested copies of all relevant insurance policies from numerous parties.

18 The Litigation Trustee has similarly issued a formal request to inspect documents to CBB pursuant Rule 30.02(3) for disclosure and production of "any insurance policy or policies under which an insurer may be liable to satisfy all or part of a judgment against your clients, or to indemnify or reimburse your clients for money paid in satisfaction of a judgment, in connection with the above-noted action." A copy of the Litigation Trustee's request is attached to this affidavit as **Exhibit "C"**.

19 Former directors of Sears Canada who are named as defendants in the current actions and Related Actions, including William Crowley and William Harker, have not to date produced the policy or policies that granted them liability insurance as directors of Sears Canada.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, this 7th day of February, 2019.




Commissioner for Taking Affidavits

Justine Smith



GEOFF MENS

This is **Exhibit "A"** referred to in the
Affidavit of Geoff Mens
sworn before me, this 7th day
of **February, 2019**



A Commissioner for taking Affidavits

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

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 QUÉBEC 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.

Applicants

**FIRST REPORT OF LAX O'SULLIVAN LISUS GOTTLIEB LLP
IN ITS CAPACITY AS LITIGATION INVESTIGATOR
NOVEMBER 5, 2018**

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Litigation Investigator

TO: **THE SERVICE LIST**

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I. OVERVIEW

1. This is the first report of Lax O’Sullivan Lisus Gottlieb LLP (“**LOLG**”), in its capacity as Litigation Investigator (“**LI**”). It outlines the background to its appointment, the terms of the LI Order (defined below), the work done by the LI, and relief sought by the LI pursuant to the LI’s recommendation.

II. BACKGROUND TO APPOINTMENT

2. On June 22, 2017, Sears Canada Inc. (“**Sears Canada**”) and a number of its operating subsidiaries (collectively, with Sears Canada, the “**Applicants**”) sought and obtained an initial order (as amended and restated on July 13, 2017, the “**Initial Order**”), under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“**CCAA**”). The relief granted under the Initial Order was later extended to SearsConnect, a partnership forming part of the operations of the Applicants (together with the Applicants, the “**Sears Canada Entities**”). The proceeding commenced under the CCAA by the Applicants are referred to in this report as the “**CCAA Proceeding**”.

3. Among other things, the Initial Order:

- (a) appointed FTI Consulting Canada Inc. as monitor of the Sears Canada Entities (the “**Monitor**”) in the CCAA Proceeding; and
- (b) granted an initial stay of proceedings against the Sears Canada Entities until July 22, 2017.

4. The Court has subsequently extended the stay period, most recently by order dated July 24, 2018, to December 18, 2018.

5. Pursuant to an order of this Court dated March 2, 2018, LOLG was appointed as LI to investigate, identify and report on certain potential rights and claims of the Sears Canada Entities and/or creditors of the Sears Canada Entities. The order was amended on April 26, 2018 (the “**LI Order**”).

6. The LI Order provides, among other things, that the LI shall be an officer of this Court.

III. PURPOSE OF THIS REPORT

7. The purpose of this first report is to provide the Court with information regarding:
- (a) the work done by the LI to discharge its Mandate under the LI Order;
 - (b) the LI’s recommendation of a course of action in accordance with its Report to the Creditors’ Committee (the “**Report**”) provided pursuant to the LI Order; and
 - (c) the LI’s request for an order authorizing the appointment of a litigation trustee to pursue the relief recommended in the Report, and related relief.

IV. LI’S MANDATE AND REPORT UNDER THE LI ORDER

8. The LI Order required the LI to do the following:
- (a) Investigate claims and possible claims that the Sears Canada Entities and/or their creditors may have against any parties (“**Mandate**”); and
 - (b) Report to the Creditors’ Committee with such details as the LI considers advisable, with such reporting to include recommendations regarding a proposed litigation plan that includes (but is not limited to):
 - (i) the potential rights or claims of Sears Canada Entities or their creditors that should be pursued, if any; and
 - (ii) a description of how and by whom such rights and claims, if any, can best be pursued or continued, including:

- (1) the coordination of the prosecution of such rights or claims with other rights or claims that may be asserted by different parties;
- (2) if necessary or desirable, a proposed governance structure for the Creditors' Committee for the purpose of providing input to the LI in the prosecution of such rights, claims or causes of action; and
- (3) consideration of various options for funding the prosecution of such rights, claims or causes of action.

9. As set out below, the LI has now completed its Mandate and the Report.

V. THE WORK OF THE LI

10. Pursuant to the LI Order, a Creditors' Committee was established. The members of the Creditors' Committee executed confidentiality agreements and the persons to whom they reported signed non-disclosure agreements.

11. Following its appointment, and in accordance with the LI Order and the Mandate, the LI investigated claims and possible claims of the Sears Canada Entities and/or their creditors and the Monitor. During the course of this investigation, the LI:

- (a) met with the Monitor and its counsel for the purpose of receiving a confidential briefing from the Monitor, as contemplated in the LI Order;
- (b) reviewed documents provided to it by the Applicants concerning possible claims the Sears Canada Entities may have against various potential defendants;
- (c) met with the Applicants and their counsel;
- (d) conducted extensive legal research;

- (e) met with members of the Creditors' Committee, both individually and as a group, to discuss the members' views of possible claims the Applicants or creditors might advance;
- (f) met with the Creditors' Committee, the Monitor and the Monitor's counsel on multiple occasions to keep them apprised of the progress of the LI's investigation; and
- (g) considered how claims and possible claims may best be pursued, and how to coordinate various streams of potentially overlapping claims by different claimants.

12. On July 5, 2018, the LI presented a confidential interim report to the Creditors' Committee. On September 11, 2018, the LI presented a confidential final report to the Creditors' Committee ("**Report to Committee**"). At these meetings, the LI provided recommendations, discussed the basis for those recommendations, and answered questions. The members of the Creditors' Committee also discussed the recommendations and Report to Committee.

13. The Creditors' Committee unanimously accepted the LI's recommendation as set out in its Report to Committee.

VI. LI'S RECOMMENDATION CONCERNING FURTHER STEPS

A. The LI Order Contemplates Further Steps

14. The LI Order expressly provides that the LI shall be at liberty, and is authorized, at any time, to apply to the Court for advice and directions in respect of its Mandate or any variation or expansion of the powers and duties of the LI.

15. The LI Order also provides that, following delivery of a Report to the Creditors' Committee in accordance with its Mandate, the LI shall not take any further steps without a further order of

the Court. The LI Order expressly provides that nothing in it shall prevent the LI from seeking an order of the Court authorizing it to pursue any claims identified pursuant to the Mandate.

B. Litigation Should Be Pursued on Behalf of the Sears Canada Entities and Their Creditors

16. The LI recommends that litigation should be pursued on behalf of and for the benefit of the Sears Canada Entities and their creditors. As set out below, it is recommended that the defendants to the claims be the members of the Sears Canada Board of Directors as of November 2013 (the “**Directors**”), Edward Lampert (“**Lampert**”) and ESL Investments Inc., and certain of its affiliates who were shareholders of Sears Canada (collectively, “**ESL**”). But for the recent Chapter 11 filing of Sears Holdings Corp. (“**Holdings**”), the LI would recommend that Holdings also be a defendant in the litigation. Given the filing, the LI recommends that, at this time, litigation not be commenced against Holdings but that the Monitor consider the steps that should or could be taken regarding Holdings in the Chapter 11 proceeding or otherwise.

17. The LI’s view is that this litigation should be co-ordinated with the parties and counsel, to the extent practicable, for the sake of fairness to the parties, including the proposed defendants, and efficiency.

18. As a result of the recommendations contained herein, the LI believes and recommends that its mandate as LI should come to an end.

1. Appointment of Litigation Trustee to Pursue Sears Canada Claims

19. The LI recommends that a litigation trustee should be appointed with a mandate to pursue certain claims on behalf of and for the benefit of the Sears Canada Entities and their creditors (the “**LT Claims**”) with respect to the \$509 million dividend declared by Sears Canada’s Board of

Directors in November 2013 and paid to its shareholders, including Holdings and ESL, in December 2013 (the “**Dividend**”).

20. The LT Claims would be for oppression, breach of fiduciary duty and breach of the standard of care (against the Directors), conspiracy (against the Directors, ESL and Lampert, the principal of ESL), and unjust enrichment, knowing assistance, and knowing receipt.

21. In the LI’s view, appointment of an experienced litigation trustee would likely facilitate the efficient management and prosecution of litigation for the benefit of the Sears Canada Entities and their creditors.

22. The litigation trustee would be a court officer whose role would be to act on behalf of the Sears Canada Entities to prosecute and, where appropriate, resolve claims. The litigation trustee would also coordinate with other stakeholders.

23. The LI recommends that the Honourable J. Douglas Cunningham, Q.C. be appointed as the litigation trustee. The Creditors’ Committee and the Monitor support this recommendation.

24. The LI further recommends that LOLG be appointed as counsel to the LT to pursue the LT Claims and to co-ordinate the pursuit of claims with other counsel. The Creditors’ Committee and the Monitor also support this recommendation.

25. The reasonable fees and disbursements of the LT and his counsel would be paid by the Sears Canada Entities from the fund described below.

2. The Monitor Should Pursue a Transfer at Undervalue Claim

26. The LI recommends that the Monitor pursue a transfer at undervalue (“**TUV**”) claim under section 96 of the *Bankruptcy and Insolvency Act*, as incorporated into the CCAA pursuant to

section 36.1 with the respect to the CCAA (the “**Monitor’s Claim**”). Through this Claim, the Monitor would seek to set aside the Dividend on the basis that it was a gratuitous transfer to non-arm’s-length parties (specifically, ESL, Lampert, and Holdings) and that Sears Canada intended to defraud, defeat or delay creditors by paying it.

3. Pension Administrator and Superintendent of FSCO to Pursue Pension Claims

27. The LI recommends that certain creditors pursue claims directly. In particular, the LI understands that the Pension Administrator (defined below) and the Superintendent of the Financial Services Commission of Ontario wish to and intend to pursue pension claims, as follows:

- (a) A claim by Sears Canada’s pension administrator, Morneau Shepell Ltd. (the “**Pension Administrator**”) for breach of fiduciary duty, knowing assistance, knowing receipt and conspiracy. This claim would be brought against those persons who were directors of Sears Canada at the time the Dividend was declared, for breach of their obligations in their capacity as directors of the pension administrator of the Sears Canada pension plan at that time. The claim against ESL and Lampert would be for knowing assistance, knowing receipt and conspiracy; and
- (b) A claim for oppression, breach of fiduciary duty, breach of standard of care, knowing assistance, knowing receipt and conspiracy to be brought by Sears Canada’s Pensioners against the directors of Sears Canada at the time the 2013 Dividend was declared. The claim against ESL and Lampert would be for knowing assistance, knowing receipt and conspiracy.

28. The LI recommends that these claims be pursued in concert with the LT Claims and the Monitor’s Claim.

4. Franchisee Class Action Should be Transferred to the Commercial List

29. The LI recommends that an existing proposed class proceeding commenced in October 2015 by former “Sears Hometown” store franchisees (the “**Proposed Class Action**”) for oppression on the basis of the payment of the Dividend in the face of their previous suit for breaches of contract and the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3, for damages continue. It is recommended that Sotos LLP/Blaney McMurtry LLP, as class action counsel, in conjunction with the recommendation and the support of the LI, and with the support of the Monitor, seek an order of the Court transferring the Proposed Class Action (Court File No. 4114/15 commenced in Milton, Ontario) to the Commercial List and promptly seek an Order certifying the action as a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

30. The LI believes that it is important to co-ordinate the Proposed Class Action with the other proposed proceedings referred to herein as all of the proceedings deal with a significant overlap of critical facts. It would be inefficient for the Proposed Class Action to proceed in a different forum and could potentially lead to inconsistent findings on the same issues.

C. Claims Should Be Pursued in a Common Issues Trial

31. The LI recommends that the claims listed above (the “**Claims**”) be heard by this Court—to the extent possible—in a single joint issues trial to ensure efficiency in cost and time.

32. The LI proposes that the Claims be pursued through four separate actions (i.e., separate statements of claim), in which the Monitor, Pension Administrator, Litigation Trustee and the representative plaintiff are the respective plaintiffs, each to be represented by separate counsel. It is recommended that the Pension Administrator and Pensioners have one counsel appointed to deal with pension claims, with an assignment of claims being made as necessary.

33. Because an overwhelming majority of the facts and legal issues in the Claims overlap, the Claims should be joined into a single “common issues trial” to be case managed by a single judge on the Commercial List of the Superior Court of Justice. The LI’s proposed order seeks this relief.

34. It is recommended that meetings be convened by the Litigation Trustee on a periodic basis with the Creditor’s Committee and the Monitor to discuss the progress of the Claims and matters related to the Claims.

35. Other elements of the Claims which are specific to particular claims, claimants, or defendants should be heard separately as required.

D. LT Claims and Monitor’s Claim to be Funded by the Estate

36. The LI recommends that the LT Claims and the Monitor’s Claim be funded by the Estate, and that a fund totalling \$12 million be established for this purpose. The LI and the Monitor both agree that this amount represents a conservative estimate, including a buffer, for the contemplated fees and disbursements to be incurred by the LI, the Litigation Trustee, and the Monitor.

37. Management of Sears Canada, with oversight by the Monitor, would review the accounts and arrange for payment of those accounts.

38. This would necessarily include a mechanism to allow creditors to opt out of litigation funding. The Litigation Investigator has reviewed and supports the Monitor’s proposed opt-out mechanism.

39. The LI recommends that the remaining claims *not* be funded by the estate.
40. The LI respectfully submits to the Court this, its First Report.

Dated this 5th day of November, 2018.


LAX O'SULLIVAN LISUS GOTTLIEB LLP
In its capacity as court-appointed Litigation
Investigator

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

FIRST REPORT TO THE COURT
OF LAX O'SULLIVAN LISUS GOTTLIEB LLP
IN ITS CAPACITY AS LITIGATION INVESTIGATOR
NOVEMBER 5, 2018

LAX O'SULLIVAN LISUS GOTTLIEB LLP

Counsel

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Litigation Investigator

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

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 QUÉBEC 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.

Applicants

**SUPPLEMENT TO THE FIRST REPORT OF LAX O'SULLIVAN LISUS GOTTLIEB
LLP IN ITS CAPACITY AS LITIGATION INVESTIGATOR
NOVEMBER 16, 2018**

LAX O'SULLIVAN LISUS GOTTLIEB LLP
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Litigation Investigator

TO: **THE SERVICE LIST**

I. OVERVIEW

1. This is the supplemental report of Lax O’Sullivan Lisus Gottlieb LLP (“**LOLG**”), in its capacity as Litigation Investigator (“**LI**”). It supplements the first report of the LI dated November 5, 2018 (the “First Report”).
2. Defined terms in this supplemental report have the same meaning as in the First Report.

II. PURPOSE OF THIS REPORT

3. The purpose of this supplementary report is to provide the Court with information regarding:
 - (a) further detail about the Hon. Douglas Cunningham, Q.C., the proposed Litigation Trustee;
 - (b) the LI’s expectation that the claim of the Litigation Trustee will be based on the same facts as set out in the Monitor’s Draft Statement of Claim (attached to the Monitor’s Twenty-Seventh report), although the final decision on the claim will be the Litigation Trustee’s;
 - (c) confirmation that in the course of the review of documents described in the First Report, the LI was not provided with, and did not review, any Potentially Shared Privileged Documents (as defined in the Amended Litigation Investigator Order); and
 - (d) a revised draft order to correct some oversights contained in the draft order attached to the First Report.
4. Each of these points is addressed in more detail below.

III. REPORT

A. Proposed Litigation Trustee

5. The First Report, among other things, recommended the appointment of the Hon. Douglas Cunningham Q.C. as litigation trustee. It noted that the Creditors' Committee and the Monitor support this recommendation.

6. Mr. Cunningham has the necessary experience and expertise to act as litigation trustee. He is an experienced former trial judge of this Court, serving from 1991 to 2012, the latter ten years as Associate Chief Justice. He also served as President of the Ontario Superior Court Judges' Association and as Regional Senior Judge for the East Region. He was actively involved in mediating complex and high-stakes cases.

7. Prior to his appointment to the bench, Mr. Cunningham was a prominent civil litigation lawyer, focusing on complex civil litigation.

8. Since leaving the bench in 2012, he has conducted a civil arbitration and mediation practice. In 2015, Mr. Cunningham was appointed mediator in the insolvency proceeding of Stelco resolving the road block between the company, employees, current owner, and the prospective purchaser.

9. A copy of Mr. Cunningham's biography is attached as Appendix "A" to this supplemental report.

10. Mr. Cunningham has consented to the proposed appointment.

B. Anticipated Litigation Trustee Claim

11. The LI anticipates that the LT Claims (as defined in the LI's First Report) will be based largely on the same facts as those alleged in the Monitor's draft statement of claim (attached to the Monitor's Twenty-Seventh Report) concerning the Monitor's Claim.

12. Since the delivery of the LI's motion record, some stakeholders have asked the LI why it did not attach a draft statement of claim to its First Report. Based on its review of the Amended Litigation Investigator Order, the LI's view is that it would not be appropriate to do so, and that in any event it is ultimately up to the Litigation Trustee to decide which claims he should advance.

C. No Review of Potentially Shared Privileged Documents

13. Concerns have been raised with the LI in relation to its review of documents during the course of its investigation, including Potentially Shared Privileged Documents.

14. The LI can confirm that in the course of the document review described in the First Report, the LI did not review any Potentially Shared Privileged Documents as defined in the Amended Litigation Investigator Order. As a result, the process contained in the Amended Litigation Investigator Order to address Potentially Shared Privileged Documents was not engaged.

D. Revised Draft Order

15. The First Report attached a draft order. Since then, the LI has identified some aspects of the draft order that require correction or clarification, and attaches a revised draft order to this supplemental report. The main revisions contained in the revised order are set out below:

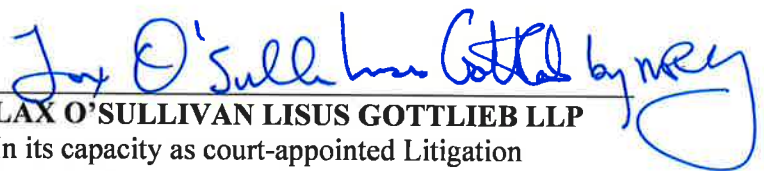
16. First, the draft order contained a heading (above paragraph 2) providing for the termination of the Creditors' Committee. This was an error. The body of the draft order itself does not provide

for the Creditors' Committee to be terminated. The heading has been amended accordingly in the revised draft order.

17. Second, the Common Issues Trial Protocol provided for and appended to the draft order did not address the Proposed Class Action. This was an oversight. The revised draft order and Common Issues Trial Protocol addresses the Proposed Class Action.

18. The LI respectfully submits to the Court this, its supplemental report.

Dated this 16th day of November, 2018.


LAX O'SULLIVAN LISUS GOTTLIEB LLP
In its capacity as court-appointed Litigation
Investigator

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

SUPPLEMENTAL REPORT TO THE COURT
OF LAX O'SULLIVAN LISUS GOTTLIEB LLP
IN ITS CAPACITY AS LITIGATION INVESTIGATOR
NOVEMBER 16, 2018

LAX O'SULLIVAN LISUS GOTTLIEB LLP

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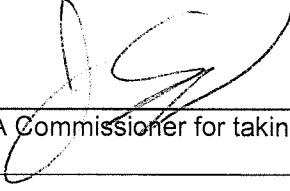
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Litigation Investigator

This is **Exhibit "B"** referred to in the
Affidavit of Geoff Mens
sworn before me, this 7th day
of **February, 2019**



A Commissioner for taking Affidavits



CASSELS BROCK
LAWYERS

January 24, 2019

By E-mail

Orestes Pasparakis and Evan Cobb
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jbirch@casselsbrock.com

tel: 416.860-5225

fax: 416.640.3057

file: 51243-1

Dear Counsel:

Re: Litigation against former directors of Sears Canada Inc. ("Sears Canada")

We understand that the Monitor intends to seek a court order authorizing a blanket waiver of privilege over documents relevant to the litigation that are subject to privilege in favour of Sears Canada. Subject to obtaining confirming instructions from our clients (the "Former Directors"), we anticipate that we will not oppose the Monitor's request for such a waiver, subject to the following limitations and conditions to be incorporated into any such order:

- 1) The waiver will not apply to any document where Sears Canada is not solely entitled to the benefit of privilege (e.g., joint retainers or advice given to the directors by counsel that acted as independent counsel to the board or a committee of the board) subject to the following process being followed.
- 2) In respect of any documents where there is a potential joint claim of privilege by Sears Canada along with the Former Directors ("Joint Privilege Documents"), the Monitor will provide the Joint Privilege Documents to the Former Directors for review. If the Former Directors do not consent to waive privilege, the documents will not be produced unless a further court order is obtained authorizing such production.
- 3) Further, for greater certainty, the Monitor shall provide to the Former Directors all Joint Privilege Documents where the directors were potentially joint clients along with Sears Canada, even if the Monitor does not seek to waive privilege over or produce such documents.
- 4) The Monitor shall immediately provide the necessary consent to Stikeman Elliott LLP (and any other relevant law firm that was involved) to provide to the Former Directors a copy of the law firm files associated with representation of either Sears Canada alone or Sears Canada and the Former Directors in the action brought by 1291079 Ontario Limited in 2013 (Court File No. 3769/13 CP) (the "2013 Action"). If the Monitor has already obtained such files, it shall provide a copy to the Former Directors' counsel.
- 5) The Monitor shall not waive privilege over or provide, directly or indirectly, to 1291079 Ontario Limited or its counsel (collectively, the "**129 Parties**") any privileged documents



Page 2

or information relating to the 2013 Action and the 2015 Action, including the files of Stikeman Elliot (or any other external or internal counsel) without the prior consent of the Former Directors.

We are available to discuss these matters further with you with a view to reaching a consensual resolution.

Yours truly,

Cassels Brock & Blackwell LLP

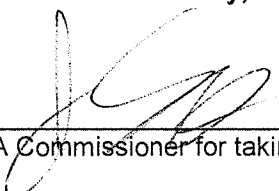
A handwritten signature in blue ink, appearing to read "John Birch", is written over the printed name.

John N. Birch
Services provided through a Professional Corporation

JNB/ah

cc: Richard Swan

This is **Exhibit "C"** referred to in the
Affidavit of Geoff Mens
sworn before me, this 7th day
of **February, 2019**



A Commissioner for taking Affidavits

Andrew Winton

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January 10, 2019

VIA EMAIL

Wendy Berman/ John N. Birch / Natalie Levine
Cassels Brock & Blackwell LLP
Scotia Plaza
40 King Street West
Suite 2100
Toronto, ON M5H 3C2

Dear Counsel:

**Re: Sears Canada Inc., by its Court-appointed Litigation Trustee, J.
Douglas Cunningham, Q.C. v. ESL Investments Inc. et al.
Court File No. CV-18-00611214-00CL**

In accordance with Rule 30.02(3) of the *Rules of Civil Procedure*, please disclose and produce to us forthwith any insurance policy or policies under which an insurer may be liable to satisfy all or part of a judgment against your clients, or to indemnify or reimburse your clients for money paid in satisfaction of a judgment, in connection with the above-noted action.

Yours truly,

A handwritten signature in blue ink, appearing to be "A. Winton", with a long horizontal flourish extending to the right.

Andrew Winton

Copy to: Matthew Gottlieb & Philip Underwood (LOLG)

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

**AFFIDAVIT OF GEOFF MENS
(SWORN FEBRUARY 7, 2019)**

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR.) WEDNESDAY , THE 20th DAY OF
)
JUSTICE MCEWEN) 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 paragraph 2 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, Morneau Shepell in its capacity as administrator of the Sears Canada's Registered Pension Plan, and certain former

“Sears Hometown” store franchisees, respectively, 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 or 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 1291079 Ontario Ltd. and Sears Canada Inc. et. al. class action of November 6, 2015 (Ontario Superior Court of Justice) File No. 4114/15; and
- (c) documents containing communications between a law firm 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 (hereafter, items (a), (b), and (c) shall be referred to collectively as the **Potentially Shared Privileged Documents**).

3 THIS COURT ORDERS THAT no waiver of any privilege shall have occurred by the inadvertent production of 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 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.

5 THE 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

and

ESL Investments Inc. *et al.*

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

Plaintiff

Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at TORONTO

ORDER

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evan.cobb@nortonrosefulbright.com

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

CV-18-00611214-00CL

Court File No.

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

BETWEEN:



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

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date December 19th 2018 Issued by Ray Williams Ray Williams, Registrar
Local Registrar

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CLAIM

1. The Plaintiff claims:
 - (a) damages on a joint and several basis in the amount of \$509 million,
 - (i) as against the Former Directors (as defined below) and Ephraim J. Bird (“**Bird**”) for breach of fiduciary duty, breach of the duty of care, and conspiracy;
 - (ii) as against the ESL Parties (as defined below), for inducing the Former Directors and Bird to breach their duties owed to Sears Canada Inc. (“**Sears Canada**”), knowing assistance, and conspiracy;
 - (b) in the alternative to paragraph (a) (ii) above, damages against the ESL Parties on a joint and several basis in the amount of \$402 million for inducing the Former Directors and Bird to breach their duties owed to Sears Canada, knowing assistance, and conspiracy;
 - (c) a declaration that the ESL Parties knowingly received the proceeds of a breach of fiduciary duty and/or were unjustly enriched, hold the proceeds of the Dividend (as defined below) in trust for Sears Canada and must disgorge the proceeds they received on account of the Dividend to Sears Canada;
 - (d) a declaration that the authorization and payment of the Dividend was oppressive and unfairly disregarded and was prejudicial to the interests of Sears Canada and its stakeholders and an Order setting aside the Dividend;

- (e) punitive and exemplary damages;
- (f) pre-judgment and post-judgment interest in accordance with sections 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (g) the costs of this proceeding, plus all applicable taxes; and
- (h) such further and other relief as to this Honourable Court may seem just.

Overview

2. In the early 2010s, Sears Canada was one of Canada's largest retailers. It operated more than 100 of its own full-line department stores, and had more than 25,000 employees.

3. However, Sears Canada was facing serious financial and operational challenges. Since 2007, its revenues and EBITDA had declined each year. In 2011, its management recognized that Sears Canada was falling behind its peers and identified a need to modernize its business in order to keep pace in an increasingly competitive retail environment. This required significant capital investment in order to refresh Sears Canada's stores and improve its e-commerce platform.

4. Despite these warnings, Sears Canada's board of directors ("**Board**") failed to authorize capital investments in the business. Instead, between 2005 and 2012, the company sold assets worth approximately \$2.86 billion and distributed approximately \$2.97 billion in capital to its shareholders.

5. The primary recipients of these distributions were Sears Holdings Corp. ("**Sears Holdings**"), the hedge fund ESL Investments, Inc. ("**ESL**") and its affiliates, and ESL's founder and proprietor, the billionaire investor Edward S. Lampert (collectively, the "**Significant Shareholders**").

6. In late 2013, Sears Canada was in the midst of its worst year yet. Its revenues declined by more than \$300 million year-over-year and its operating losses reached almost \$188 million. In September, its CEO resigned in frustration at the refusal of the Board to allocate sufficient capital to implement a turnaround strategy.

7. At the same time, ESL was experiencing a liquidity crisis. Its investors had submitted billions of dollars in redemption requests, which it was having difficulty funding.

8. Over the course of the year, Sears Canada sold off a number of its most important assets (the “**Key Asset Sales**”): the leases underlying some of its largest and most lucrative stores. The Sears Canada directors involved in the Key Asset Sales included a number of former ESL employees who had been selected for their roles by Lampert. In addition, even though he was not an officer or director of Sears Canada, Lampert was personally involved in the negotiations concerning these transactions.

9. The Key Asset Sales generated extraordinary proceeds of approximately \$591 million. At a November 2013 meeting of the Board held at the offices of Sears Holdings’ lawyers in New York City, less than a week after the final sale closed (the “**November 2013 Meeting**”), Sears Canada’s management proposed a plan to distribute more than \$509 million to its shareholders through an extraordinary dividend (the “**Dividend**”).

10. The Board was not given any advance notice of the proposed Dividend: it did not even appear on the agenda for the November 2013 Meeting. Although the Board was given extensive materials by management, those materials did not address the proposed Dividend or any analysis of its potential impacts on Sears Canada’s business. Nor did the Board receive legal or financial advice in relation to it. Nevertheless, the Board authorized the payment of the Dividend.

11. Lampert and ESL improperly used their influence with the Board to procure the Dividend, for the purpose of providing funds to the Significant Shareholders. In accordance with their shareholdings in Sears Canada, 79% of the Dividend was paid to Significant Shareholders.

12. The payment of the Dividend diverted funds from Sears Canada at a time when the Defendants knew, or ought to have known, that it would be in the best interests of Sears Canada to reinvest the funds in the business or to preserve liquidity to satisfy increasing losses and creditor claims. By mid-2017, Sears Canada had become insolvent, and, on June 22, 2017, it was granted protection under the *Companies' Creditors Arrangement Act* (the "*CCAA*"). Sears Canada has since liquidated its remaining assets and ceased operations, leaving massive unsatisfied debts owed to its unsecured creditors, including former employees and pensioners.

13. It was not until after the *CCAA* Proceeding (defined below) commenced that it was discovered that the declaration of the Dividend had taken place in improper circumstances.

14. The Plaintiff seeks to set aside the Dividend and seeks damages to compensate Sears Canada and therefore its creditors for the losses they have suffered as a result of the Dividend.

The Parties

15. The Plaintiff, Sears Canada, is a corporation incorporated under the laws of Canada, with its headquarters in Toronto.

16. Sears Canada is insolvent. It is an applicant in a *CCAA* proceeding commenced on June 22, 2017 (the "*CCAA Proceeding*"). By order dated December 3, 2018, the presiding court in that proceeding (the "*CCAA Court*") appointed the Honourable J. Douglas Cunningham, Q.C., as

Litigation Trustee for Sears Canada to pursue claims on behalf of Sears Canada and its creditors against third parties, including the Defendants.

17. The Defendant, ESL Investments Inc., is a corporation incorporated under the laws of Delaware, in the United States of America, with its headquarters in Bay Harbor Islands, Florida, in the United States of America. It is a hedge fund which operates through a number of subsidiary entities, namely: ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP, and ESL Institutional Partners, LP. These entities are collectively referred to herein as “**ESL**”. As a whole, ESL was at all relevant times the largest shareholder of Sears Holdings.

18. The Defendant, Edward S. Lampert, is an individual residing in Indian Creek, Florida, in the United States of America. Lampert was the CEO of Sears Holdings from May 2013 to October 2018. Lampert owns and controls ESL, and has served as ESL Investments Inc.’s Chairman and Chief Executive Officer since he founded it in 1988. Collectively, ESL and Lampert are referred to herein as the “**ESL Parties**”.

19. The Defendant Ephraim J. Bird is an individual residing in Salado, Texas, in the United States of America. Bird was a director of Sears Canada between May 2006 and November 13, 2013, and its interim CFO, and later permanent CFO, from March 2013 until June 2016.

20. The Defendant Douglas Campbell (“**Campbell**”) is an individual residing in Toronto. Campbell was Sears Canada’s COO from November 2012 until September 24, 2013, and its CEO and a director from that date until October 2014.

21. The Defendant William Crowley (“**Crowley**”) is an individual residing in New York, New York, in the United States of America. Crowley was the Chairman of Sears Canada’s Board in late 2013, and was a director of Sears from May 2005 to April 2015.

22. The Defendant William Harker (“**Harker**”) is an individual residing in New York, New York, in the United States of America. Harker was a director of Sears Canada from November 2008 to April 2015.

23. The Defendant R. Raja Khanna (“**Khanna**”) is an individual residing in Toronto. Khanna was a director of Sears Canada from October 2007 to August 2018.

24. The Defendant James McBurney (“**McBurney**”) is an individual residing in London, in the United Kingdom. McBurney was a director of Sears Canada from April 2010 until 2015.

25. The Defendant Deborah Rosati (“**Rosati**”) is an individual residing in Wainfleet, Ontario. Rosati was a director of Sears Canada from April 2007 to August 2018.

26. The Defendant Donald Ross (“**Ross**”) is an individual residing in New York, New York, in the United States of America. Ross was a director of Sears Canada from May 2012 until 2014.

27. The Defendants, other than the ESL Parties and Bird, are referred to herein as the “**Former Directors**”. All of the Former Directors were members of the Board during the November 2013 Meeting.

Lampert’s Purchase of Sears Holdings

28. In early 2005, the ESL Parties acquired a controlling share in the American retailer Sears, Roebuck & Co. (“**Sears Roebuck**”), the then-parent company of Sears Canada. After the

acquisition, the ESL Parties established Sears Holdings to hold their stakes in Sears Roebuck and Kmart, another retailer.

29. Lampert appointed himself Chairman of Sears Holdings, and later made himself CEO. From 2005 onwards, he played a direct role in the formulation of Sears Holdings' business strategy.

30. Soon after the acquisition, Lampert replaced the existing senior management of Sears Roebuck, in many cases with former ESL executives. Appointments to key positions at Sears Holdings made by Lampert included:

- (a) Crowley, the President and COO of ESL, who became Sears Holdings' CFO;
- (b) Harker, the former General Counsel of ESL, who became Sears Holdings' General Counsel and Corporate Secretary;
- (c) Bird, the CFO of ESL from 1991 to 2002, who became a board member and the CFO of Sears Hometown and Outlet Stores, Inc., an important Sears Holdings subsidiary; and
- (d) Jeffrey Stollenwerck ("Stollenwerck"), a Vice President at ESL, who became Senior Vice President and then President of Sears Holdings' real estate business.

31. Over the last several years, Sears Holdings has closed hundreds of Kmart and Sears stores and laid off thousands of employees. On October 15, 2018, Sears Holdings filed for bankruptcy protection under Chapter 11 of the U.S. Bankruptcy Code.

32. By 2013, Sears Canada was an independent public company and was no longer a Canadian operating subsidiary of Sears Holdings.

Lampert's Involvement in the Operations of Sears Canada

33. As he had at Sears Holdings, Lampert took a direct role in developing Sears Canada's business strategy.

34. The ESL Parties had significant direct shareholdings in Sears Canada. As of November 2013, the ESL Parties beneficially owned more than 28.1 million Sears Canada shares, amounting to 27.6% of its outstanding shares.

35. Lampert influenced the appointment of Sears Canada's management, including its chief executive officers. This included the appointment of Bird, a former ESL executive.

36. Crowley was appointed as the Chairman of the Board of Sears Canada in 2006, and Harker became a director in 2008. Bird was appointed as a Sears Canada director from 2006 to November 13, 2013, when he resigned from the Board but stayed on as the company's CFO.

Sears Canada's Financial and Operational Problems

37. Between 2011 and 2013, Sears Canada suffered aggregate operating losses of more than \$310 million.

38. As early as September 2011, the company's 2011-2014 Strategic Plan (the "**Strategic Plan**") explained that "Sears Canada requires a full transformation to be able to compete and win in the increasingly competitive Canadian retail environment."

39. Management provided the Board with regular updates on Sears Canada's operations, including the progress of the Strategic Plan. A March 2012 presentation to the Board noted that:

“Customer and employee perceptions have been in decline, yet to find bottom”, “Sears is ... failing to connect with the next generation”, and “[we h]ave underinvested recently in stores”.

40. In September 2013, Sears Canada’s CEO, Calvin McDonald (“**McDonald**”), resigned. McDonald later told the press that he had left in frustration at not being able to take the steps necessary to save the company, as a result of Lampert’s refusal to authorize investments in Sears Canada’s business. McDonald stated that “there was not a real long term commitment to save this business”.

41. The minutes of Sears Canada’s September 23, 2013 Board meeting summarize a presentation given by Douglas Campbell, Sears Canada’s then-COO, which noted that “At current trends, the projection for 2016 EBITDA will be -\$105 million”, and that sales “continue to decline across the business at 2.6%”. Campbell joined the Board the following day.

42. At the same meeting, the Board received a presentation on the Strategic Plan, which explained that the company’s e-commerce system was “seriously substandard”, and advised that “To catch competitors, significant investment and transformation is required.”

43. By October 2013, the Board was well aware of the problems facing Sears Canada and that its long term viability was at risk. In the circumstances, it was obvious to the Board that Sears Canada urgently needed capital to invest in its business or to preserve value to satisfy its rapidly growing losses and liabilities.

44. However, instead of investing in Sears Canada’s business or preserving value to fund liabilities and increasing losses, the Former Directors authorized a plan under which the company sold off its most lucrative assets and sent the proceeds directly to its shareholders.

The Dividend Plan

ESL's Need for Liquidity to Satisfy Redemptions

45. In 2012, ESL received a large number of redemption requests from its investors. These requests totaled approximately \$3.5 billion (US), an amount equal to more than half of ESL's total assets under management at the time. The redemptions were payable in 2013.

46. ESL did not have sufficient cash on hand to satisfy its investors' demands. As a result, it was forced to liquidate significant portions of its portfolio and to pay in-kind redemptions, made up of shares of the companies it owned.

47. To help ESL fund the redemptions, Lampert devised a plan to cause Sears Canada to make a large dividend payment, the majority of which would go to the Significant Shareholders. ESL would use the cash it received to fund redemptions, or distribute its Sears Holdings shares, which would be increased in value as a result of the Dividend, to its own investors as in-kind redemptions.

Sale of Sears Canada's Assets

48. As a result of its large operating losses, Sears Canada did not have sufficient cash on hand to fund a large dividend payment. The only way it could raise the necessary funds was to liquidate a number of its "crown jewels": the long-term under-market-value leases for its largest and most lucrative stores.

49. Sears Canada had liquidated many of its assets since being acquired by the ESL Parties in 2005. However, in that context, the 2013 Key Asset Sales were notable for their size and impact on Sears Canada's operations.

50. Over the course of 2013, Sears Canada sold seven of its most valuable leases for approximately \$591 million. The sales were carried out in two transactions:

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- (a) the sale of two leases – at the Yorkdale Shopping Centre in Toronto and the Square One Mall in Mississauga – to Oxford Properties Group in June 2013 for \$191 million; and
- (b) the sale of five leases – its flagship store in the Toronto Eaton Centre and four other large stores (two in the Greater Toronto Area, and one each in London, Ontario and Richmond, BC) – in November 2013 to Cadillac Fairview Corporation Limited for \$400 million (the “**Cadillac Fairview Sale**”).

51. Sears Canada also reached an agreement, in early November 2013, to sell its 50% interest in a group of eight Quebec shopping centres to Montez Income Properties Corporation for \$315 million. That transaction closed in January 2014.

52. Lampert played a direct role in negotiating the Key Asset Sales, even though he was not a director or an officer of Sears Canada. He provided direct instructions to Sears Canada on the price sought by Sears for the Key Asset Sales. Among other things, Lampert personally directed the negotiation strategy in connection with the Cadillac Fairview Sale. Stollenwerck, a senior executive at Sears Holdings’ real estate division and a former ESL employee, was the primary negotiator for Sears Canada, even though he was not a Sears Canada employee.

53. The Former Directors and Bird knew that the Key Asset Sales would significantly reduce Sears Canada’s earnings capacity, since the stores being closed were some of the company’s most valuable locations. A presentation to the Board (which at the time included Bird) at its September 2013 meeting projected a significant loss in earnings as a result of the liquidation of four of the large stores that were ultimately included in the Cadillac Fairview Sale.

The Dividend Proposal

54. At the same time the Cadillac Fairview Sale was closing in November 2013, three former ESL employees – Bird, Crowley, and Harker – worked to finalize the proposal for a large extraordinary dividend. Over the course of the ten-day period from November 8 to 18, 2013, Bird, Crowley and Harker settled on a proposed dividend payment of \$5 per share, or more than \$509 million in total.

55. At the time, the Significant Shareholders owned more than 79% of Sears Canada's outstanding shares, and therefore stood to receive a total of approximately \$402 million from a \$5 per share Dividend.

Lack of Notice and Undue Haste

56. The Cadillac Fairview Sale closed on Tuesday, November 12, 2013. The Dividend was approved at a board meeting held less than a week later, on the following Monday and Tuesday, November 18-19, 2013.

57. No information about or notice of the proposed Dividend was provided to the Board by Sears Canada's management in the lead-up to the meeting. Indeed, the Dividend was not even referred to in the agenda for the November 2013 Meeting.

58. Approval of the Dividend was treated as a foregone conclusion by Bird, Crowley and Harker. Although, as discussed below, the Board was not presented with any financial analysis of the Dividend, the minutes of the November 2013 Meeting note that the Board was “presented [with] a draft press release relating to the dividend” at the beginning of their discussion.

59. Notwithstanding the fact they did not receive adequate notice of the proposed Dividend before being asked to vote on it, the Former Directors did not seek any information or advice about the proposal before they approved it.

Insufficient Information Provided to the Board

60. The Board was not given sufficient information to understand the impact of the Dividend, nor did they seek additional information from management.

61. Extensive background materials (the “**Materials**”) were prepared by management and given to the Board before the November 2013 Meeting. However, the Materials did not contain any analysis of the Dividend. In fact, the Materials contained no references to the Dividend at all. The financial and operational plans included with the Materials also omitted any reference to the Dividend and failed to account for the Dividend in their calculations.

62. Even though Crowley, Bird, and Harker had previously undertaken a financial analysis of various Dividend scenarios in the weeks leading up to the declaration of the Dividend, none of their findings were presented to the Board.

63. Without even basic financial information or any professional advice, the Board was not in a position to properly assess the Dividend, even if it had tried or wanted to do so, which it did not.

Lack of Governance Procedures

64. The procedures adopted by Sears Canada’s Board at the November 2013 Meeting were manifestly insufficient for a transaction as large as the Dividend, particularly in light of Sears Canada’s precarious financial and operational position at the time.

65. The Board did not, *inter alia*:

- (a) seek advice from outside legal counsel;
- (b) commission any analysis from financial, accounting, or other advisors; or
- (c) convene an *in camera* session of the independent directors to discuss the Dividend prior to its approval.

66. The failure to take any of these steps before approving the Dividend differed from the Board's conduct with respect to previous dividends and failed to comply with proper governance procedures.

67. For example, before authorizing the payment of two smaller dividends in 2010, the Board implemented a number of significant governance procedures.

68. In 2010, Sears Canada's management provided the Board with a series of capital structure presentations, which were updated several times. These presentations explained the benefits and risks of returning capital to the Company's shareholders and included both extensive financial analysis and in-depth discussions of potential alternatives.

69. The proposed 2010 dividends were discussed during at least five separate board meetings between April and September 2010. The independent directors held an *in camera* meeting to discuss the dividend, and asked outside counsel to attend and provide information on the implications of the payment of an extraordinary dividend, as well as other potential options for use of the company's capital.

70. In November 2013, despite Sears Canada's far worse financial and operational situation, the Board did not conduct *any* of this due diligence. Instead, it approved the Dividend proposed

by Lampert's representatives in management and on the Board without any analysis of the implications to the company itself, or its minority shareholders, employees, creditors, or other stakeholders.

Sears Canada's Board Rubber-Stamps the Dividend Payment

71. After authorizing the liquidation of its most valuable assets, the Board failed to ensure that the proceeds were used for Sears Canada's benefit or to ensure that sufficient value would be available to satisfy creditor claims that would continue to accumulate as losses increased.

72. To the contrary, the Former Directors, almost immediately and without scrutiny or evaluation, decided to dividend out almost all of the money that Sears Canada earned from the Key Asset Sales.

73. The Former Directors could not have reasonably concluded that the Dividend was in Sears Canada's best interest based on the extremely limited information available to them at the time they approved the Dividend. Indeed, the Dividend was not in Sears Canada's best interest. By approving the Dividend, the Former Directors breached their common law and statutory obligations to Sears Canada.

Effects of the Dividend

74. Payment of the Dividend caused serious harm to Sears Canada and its stakeholders.

75. The funds used to pay the Dividend were derived from the sale of leases for some of Sears Canada's largest and best-performing stores, which were located in some of Canada's most densely populated areas. These divestments brought about a significant decline in Sears Canada's revenue-generation capacity without any corresponding long-term investment in its operations.

76. The main beneficiaries of the Dividend were Sears Holdings, ESL, and Lampert. Sears Canada did not receive any benefit from the Dividend.

77. After three more years of enormous losses, Sears Canada became insolvent in 2017. It has since liquidated all of its remaining inventory and assets and closed all of its stores. Sears Canada's liquidation has cost more than 15,000 employees their jobs, and has left its creditors with hundreds of millions of dollars in uncollectable debts.

The CCAA Proceeding

78. On June 22, 2017, Sears Canada and a number of its affiliates commenced the *CCAA* Proceeding.

79. Although the existence of the Dividend was known at the time it was paid, prior to the commencement of the *CCAA* Proceeding, the circumstances surrounding the Board's authorization of and the ESL Parties' involvement in the Dividend were not known to anyone other than Sears Canada's senior management and directors, and the Significant Shareholders.

80. These facts, including Lampert's involvement in the sale of the real estate assets, the non-independent Directors' role in the plan to declare the Dividend, and the absence of information and manifestly inadequate governance procedure at the November 2013 Meeting, were not known and were only uncovered after the *CCAA* Proceeding commenced.

The Claims

81. The facts surrounding the authorization and payment of the Dividend give rise to a number of claims by Sears Canada against the Former Directors, Bird, and the ESL Parties.

The Former Directors and Bird: Breaches of Duties and Oppression

82. The Former Directors breached their common law and statutory duties of care and fiduciary duties by:

- (a) authorizing the Dividend in circumstances where it was not in the best interests of Sears Canada, thereby favouring the interests of the Significant Shareholders over those of the company and its other stakeholders; and
- (b) failing to exercise the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances by, among other things, neglecting to obtain any information or professional advice about the impact on the business of Sears Canada in paying the Dividend, or in the alternative investing the \$509 million into its business or preserving this value to satisfy liabilities, before agreeing to authorize it.

83. Although Bird was not a director of Sears Canada at the time the November 2013 Meeting was held, he had been a director until immediately prior to the meeting. Bird attended the November 2013 Meeting in his capacity as chief financial officer of Sears Canada, and as such, he continued to owe fiduciary duties and a duty of care and loyalty to Sears Canada after his resignation from the Board.

84. Bird breached the duties he owed to Sears Canada by:

- (a) proposing the Dividend in circumstances where the Dividend was not in the best interests of Sears Canada;
- (b) proposing the Dividend for the benefit of the Significant Shareholders;

- (c) preparing and planning for the distribution of the Dividend without providing adequate information to the Board, in the hope that the Dividend would be declared by the Board;
- (d) withholding relevant financial information from the Former Directors that they required to properly analyze the merits of the Dividend, including information about Sears Canada's pension deficit; and
- (e) proposing and recommending the Dividend and then resigning from the Board before the November 2013 Meeting.

85. As a result of the breaches referred to in paragraphs 82 to 84 above, Sears Canada seeks to unwind the Dividend and seeks damages against the Former Directors and Bird in the amount of \$509 million.

86. Further, the Former Directors and Bird acted in an oppressive manner towards Sears Canada by:

- (a) disregarding the reasonable expectation of Sears Canada that their powers would be used for the benefit of the company, rather than for that of third parties like the Significant Shareholders; and
- (b) using their powers to authorize the Dividend, which was unfairly prejudicial to and disregarded the interests of Sears Canada and its creditors.

87. It is appropriate for Sears Canada, by way of its Litigation Trustee, to be the complainant for an oppression claim on its own behalf and on behalf of its creditors, who are all similarly affected by the oppressive conduct described above.

88. As a result of the Former Directors' and Bird's oppression Sears Canada seeks an Order:

- (a) declaring that the Former Directors and Bird, breached their duties owed to Sears Canada;
- (b) setting aside the Dividend; and
- (c) ordering the Former Directors and Bird to pay damages to Sears Canada on a joint and several basis in the amount of \$509 million.

89. An order setting aside the Dividend, imposing a constructive trust over those funds, and/or ordering compensatory payments in the same amount would remedy the Former Directors' and Bird's oppression and return to Sears Canada the funds that rightly belong to it, for the ultimate benefit of its creditors.

The ESL Parties: Inducing Breaches of Duties; Knowing Assistance, Knowing Receipt, and Unjust Enrichment

90. The ESL Parties knowingly induced, encouraged, assisted and participated in the Former Directors' and Bird's breaches of fiduciary duty. They knew of the fiduciary duties the Former Directors and Bird owed to Sears Canada, and that the Dividend would harm Sears Canada. The ESL Parties nonetheless influenced and encouraged the Former Directors to authorize the Dividend for the ESL Parties' own benefit.

91. But for the ESL Parties' inducement of and their assistance given to the Formers Directors' and Bird's breaches of their fiduciary duties to Sears Canada, those defendants would not have been put in circumstances where the breach of their duties in this manner was possible.

92. The ESL Parties knowingly assisted the Former Directors and Bird to take the wrongful step of authorizing and encouraging the Dividend, which resulted in prejudice to Sears Canada's rights, in circumstances where there was no right in the circumstances for the Former Directors and Bird to take such steps.

93. The ESL Parties are liable to Sears Canada for damages in the amount of \$509 million for inducing breaches of fiduciary duties and knowing assistance in the Former Directors' and Bird's breaches of their duties.

94. In the alternative, the ESL Parties are liable for disgorgement in the amount of \$140.8 million for knowingly receiving the proceeds of the Former Directors' and Bird's breaches of fiduciary duty.

95. In addition, or in the further alternative, the ESL Parties were unjustly enriched by receiving \$140.8 million by way of the Dividend in circumstances where it should not have been approved. The Dividend was paid gratuitously as a benefit to the ESL Parties, and caused a corresponding deprivation to Sears Canada. There was no juristic reason for the ESL Parties to receive the Dividend.

96. The appropriate remedy for the ESL Parties' unjust enrichment is the imposition of a constructive trust in favour of Sears Canada over the portion of the Dividend received by them.

Conspiracy By All Defendants

97. All of the Defendants acted together to generate the funds for and authorize the Dividend to the benefit of the Significant Shareholders and to the detriment of Sears Canada. This was unlawfully carried out through the Former Directors' and Bird's breaches of the duty of care, fiduciary duties, and oppressive conduct, as planned and directed by the ESL Parties. This conduct was directed at Sears Canada in circumstances where the Defendants knew, or ought to have known, that damage to Sears Canada would result.

98. The Defendants knew, or ought to have known, that it was not in the best interests of Sears Canada to distribute over half a billion dollars to its shareholders at a time when capital needed to be re-invested in the corporation to arrest its decline or to preserve value to satisfy liabilities. Instead, the distribution of the extraordinary revenues generated by the Key Asset Sales to shareholders accelerated Sears Canada's decline, thereby damaging its interests in the short-, medium-, and long-term, and ensured that \$509 million did not remain to satisfy increasing liabilities.

99. The Defendants are liable to Sears Canada for damages in the amount of \$509 million for conspiracy.

Service *Ex Juris*, Statutes Relied Upon, and Location of Trial

100. The Plaintiff is entitled to serve any Defendants who reside outside Ontario without a court order because this claim relates to a tort committed in Ontario, and because the Defendants carried on business in Ontario.

101. The plaintiff pleads and relies upon the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, sections 122, 238, and 241 and Rules 17(g) and 17(p) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

102. The plaintiff proposes that this action be tried in the City of Toronto.

December 19, 2018

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Lawyers for the Plaintiff

SEARS CANADA INC. by its litigation trustee
J. DOUGLAS CUNNINGHAM, Q.C.

-and- ESL INVESTMENTS INC., et al.

Plaintiff

Defendants

Court File No.

CV-18-0061121400CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

STATEMENT OF CLAIM

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Lawyers for the Plaintiff

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

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

BETWEEN :



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

STATEMENT OF CLAIM

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your statement of defence.

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TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

- 2 -

Ray Williams, Registrar

Date: December 19, 2018

Issued by


Local registrarAddress of 330 University Avenue
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Toronto, Ontario M5G 1R7TO: ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP,
SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP and
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AND A
COURTESY
COPY TO:

SUPERINTENDENT OF FINANCIAL SERVICES AS ADMINISTRATOR OF THE
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CLAIM

1. The Plaintiff, Morneau Shepell Ltd. ("**Morneau**") in its capacity as administrator of the Sears Canada Inc. Registered Pension Plan (the "**Plan**") claims:

- (a) Damages at law and in equity payable jointly and severally in the amount of the deficiency in the Plan as determined in the actuarial wind up report, which at present is estimated at approximately \$260 million:
- (i) as against the Defendants William Harker, William Crowley, Donald Campbell Ross, Deborah E. Rosati, R. Raja Khanna, James McBurney and Douglas Campbell (collectively the "**Director Defendants**") and Ephraim J. Bird for breach of fiduciary duty and negligence;
 - (ii) as against the Director Defendants and Ephraim J. Bird for inducing Sears Canada Inc. ("**Sears Canada**") and the other Director Defendants to breach their fiduciary duties and/or for knowingly assisting Sears Canada and the other Director Defendants in breaching such fiduciary duties;
 - (iii) as against the Defendants ESL Investments Inc., ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP, ESL Institutional Partners, LP, and Edward S. Lampert for inducing Sears Canada, Ephraim J. Bird and/or the Director Defendants to breach their fiduciary duties and/or for knowingly assisting Sears Canada, Ephraim J. Bird and/or the Director Defendants in breaching such fiduciary duties;
- (b) a declaration that the Defendants ESL Investments Inc., ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP, ESL Institutional Partners, LP, Edward S. Lampert, William Harker, Deborah Rosati, R. Raja Khanna and James McBurney

(collectively the "**Shareholder Defendants**") received directly or indirectly the 2013 Dividend (as defined below) with knowledge that such payment was the result of a breach of fiduciary duty by Sears Canada, Ephraim J. Bird and/or the Director Defendants and an order imposing a constructive trust on the assets of each such Shareholder Defendant equal to the value of the dividend payments directly or indirectly received by them and an order requiring such amount be remitted to the Plaintiff for the benefit of the Plan beneficiaries;

- (c) a declaration that the authorization and payment of the 2013 Dividend was oppressive and unfairly prejudicial to the interests of the Plan and its beneficiaries and unfairly disregarded their interests and orders pursuant to section 241 of the *Canada Business Corporations Act* (the "**CBCA**") setting aside the declaration and payment of the 2013 Dividend and/or requiring the Defendants to pay to the Plaintiff as compensation or restitution the amount required to fully fund the benefits promised under the Plan;
- (d) punitive and exemplary damages;
- (e) pre and post-judgment interest in accordance with the *Courts of Justice Act*; and
- (f) costs of this action on a substantial indemnity basis.

The Parties

2. The Superintendent of Financial Services for Ontario (the "**Superintendent**") has declared that Ontario's Pension Benefits Guarantee Fund (the "**PBGF**") applies to the Plan in respect of Ontario Plan beneficiaries. As a result, to the extent of any payment out of the PBGF into the Plan, the Superintendent has rights of subrogation in respect of the claims outlined herein. The PBGF is administered by the Superintendent. Subject to Plan recoveries from the Sears

Canada estates, the PBGF expects its contribution to the Plan to be material. As a result, the PBGF expects its subrogation rights in respect of these claims to be material.

3. Sears Canada is a corporation incorporated pursuant to the CBCA. Sears Canada and its affiliate companies obtained protection under the *Companies' Creditors Arrangements Act* (the "**CCA**") on June 22, 2017.

4. The Plaintiff was appointed administrator of the Plan by the Superintendent effective October 16, 2017.

5. The Defendant ESL Investments Inc. ("**ESL Investments**") is a privately-owned hedge fund incorporated under the laws of Delaware. The Defendants ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP, ESL Institutional Partners, LP (collectively, and together with ESL Investments, "**ESL**") are affiliates of ESL Investments.

6. The Defendant Edward S. Lampert ("**Lampert**") is an individual residing in Indian Creek, Florida. At all material times, Lampert controlled ESL, and has served as ESL Investments' Chairman and Chief Executive Officer since its creation in 1988.

7. The Director Defendants William Crowley, William Harker, Donald Campbell Ross, Deborah E. Rosati, R. Raja Khanna, James McBurney and Douglas Campbell were directors of Sears Canada at the time the 2013 Dividend was approved by the Sears Canada board of directors (the "**Board**").

8. The Defendant Ephraim J. Bird ("**Bird**") was a member of the Board until on or around November 13, 2013 and was at all material times the Chief Financial Officer of Sears Canada.

9. At all material times, including from November 18, 2013 through to December 6, 2013, Lampert and ESL held a controlling ownership interest in Sears Holdings Corporation (“Holdings”) and beneficially owned 55% of Holdings’ outstanding shares. In turn, at all material times, Holdings held a controlling ownership interest in Sears Canada. On October 15, 2018, Holdings filed for Chapter 11 protection from creditors with the United States Bankruptcy Court. Holdings is not a party to this action.

10. At all material times, including from November 18, 2013 through to December 6, 2013, Holdings and each of the Shareholder Defendants was a direct or beneficial shareholder of Sears Canada, and held the following ownership interests:

- (a) Holdings beneficially owned 51,962,391 shares in Sears Canada, representing approximately 51% of the outstanding shares.
- (b) ESL beneficially owned 17,725,280 shares in Sears Canada, representing approximately 17.4% of the outstanding shares, which were directly held as follows:
 - (i) ESL Partners, LP: 15,821,206 shares;
 - (ii) SPE I Partners, LP: 830,852 shares;
 - (iii) SPE Master I, LP: 1,068,522 shares;
 - (iv) ESL Institutional Partners, LP: 4,381 shares; and
 - (v) CRK Partners, LLC (an affiliate of ESL Investments that was voluntarily cancelled effective June 1, 2018 and is not a party to these proceedings): 319 shares;

- (c) Lampert owned 10,433,088 shares in Sears Canada, representing approximately 10.2% of the outstanding shares;
- (d) William Harker owned 4,604 shares in Sears Canada;
- (e) Deborah E. Rosati owned 2,600 shares in Sears Canada;
- (f) James McBurney owned 1,525 shares in Sears Canada; and
- (g) R. Raja Khanna owned 2,620 shares in Sears Canada.

The Plan

11. The Plan is a registered pension plan under the *Pension Benefits Act* (Ontario) which contains a defined benefit component. Sears Canada is the principal participating employer in the Plan and is obliged to make contributions to the Plan fund sufficient to ensure that the Plan fund has enough assets to pay all promised defined benefits when due.

12. Until October 16, 2017, Sears Canada was the administrator of the Plan and, as such, owed fiduciary duties to the Plan and the Plan beneficiaries.

13. In administering the Plan, Sears Canada acted through its officers and Board. These individuals (including the Director Defendants and Bird) also owed fiduciary duties and a duty of care to the Plan and the Plan beneficiaries.

14. Since at least 2010, Sears Canada and its directors have been aware of actuarial valuations disclosing that the assets held in respect of the defined benefit component of the Plan were insufficient to pay all of the promised defined benefits and that further employer contributions to the Plan fund were required in order to permit all promised benefits to be paid to Plan beneficiaries when due. To the knowledge of Sears Canada, Bird and the Director Defendants,

as at December 31, 2010, the Plan had a funding deficit of \$68,039,000, a solvency deficit of \$205,788,000 and a wind-up deficit of \$307,330,000.

15. During the period subsequent to December 31, 2010, Sears Canada made only the minimum contributions to the Plan fund permitted by law, even after Sears Canada, Bird and the Director Defendants knew or ought to have known that that the long-term viability of Sears Canada, and thus its ability to fully fund the Plan liabilities from future revenues, was at serious risk.

16. The Plan was wound up by order of the Superintendent effective October 1, 2017 and the Plan's wind-up deficit which crystalized on that date is currently estimated at approximately \$260 million.

17. The assets available for distribution under the CCAA to meet all of Sears Canada outstanding obligations including its obligation to fully fund the Plan's wind-up deficit is estimated to be only approximately \$155 million. Excluding claims relating to the Plan's wind-up deficit, the claims of unsecured creditors against Sears Canada total approximately \$1.5 billion.

2013 Plan to Dispose of Real Estate Assets to Fund Dividends

18. Beginning in 2011, Sears Canada's financial performance began to decline sharply.

19. By 2013, ESL Investments and Lampert had an immediate need for cash from Sears Canada. ESL Investments had raised money from investors years earlier on terms that precluded these investors from redeeming their investment for a period of time. When this holding period had expired in 2013, these investors were entitled to withdraw funds and ESL Investments faced significant redemptions.

20. In order to satisfy its redemption obligations, ESL and Lampert devised a plan to extract cash from Sears Canada through (a) the disposition of its most valuable real estate assets, and (b) the payment of an extraordinary dividend for the benefit of ESL and Lampert (collectively the "**Monetization Plan**").

21. To give effect to the Monetization Plan, Lampert personally directed the disposition of Sears Canada's real estate assets in 2013.

22. In accordance with the Monetization Plan:

- (a) Sears Canada entered into an agreement with Oxford Properties Group on or about June 14, 2013 to terminate Sears Canada's leases at Yorkdale Shopping Centre and Square One Mississauga in exchange for a payment to Sears Canada of \$191 million (the "**Oxford Terminations**"). The Oxford Terminations closed June 24, 2013.
- (b) Sears Canada pursued an agreement with Cadillac Fairview Corporation Limited (Cadillac Fairview) to terminate five additional high-value leases (Toronto Eaton Centre, Sherway Gardens, Markville Shopping Centre, Masonville Place and Richmond Centre) (the "**Cadillac Terminations**") for a payment of \$400 million. The Cadillac Terminations were approved by the Sears Canada Board on October 28, 2013 and closed on November 12, 2013.
- (c) Sears Canada negotiated the sale of Sears Canada's 50% interest in eight properties jointly owned with The Westcliff Group of Companies. Sears Canada's 50% interest was sold to Montez Income Properties Corporation in exchange for approximately \$315 million (the "**Montez Sale**"). The Sears Canada Board

approved the Montez Sale on November 8, 2013 and the sale closed in January 2014.

23. Lampert directed Sears Canada to complete each of the Oxford Terminations, the Cadillac Terminations and the Montez Sale. These dispositions were part of the Monetization Plan and completed in order to provide ESL Investments with funds to address its redemption obligations. The assets disposed of by Sears Canada were its "crown jewels".

24. By September 23, 2013, the Board including Bird had received management presentations directly addressing Sears Canada's deteriorating operational and financial performance which reported that:

- (a) sales continued to decline across Sears Canada's business at a rate of 2.6% per year;
- (b) based on year-to-date current trends (and without appropriately accounting for stores closed in connection with the Monetization Plan), Sears Canada's projected EBITDA by 2016 would be negative \$105 million;
- (c) Sears Canada was struggling operationally: "Basics not fixed"; and
- (d) competition in the Canadian retail space was increasing with Target's entry into the market. Target had opened 68 stores in Canada in the second quarter of 2013 and planned to open a further 124 stores in Canada by year end.

25. By September 23, 2013, the Director Defendants and Bird knew or ought to have known that Sears Canada's business was in decline, that its long-term viability was at risk, and that the divestment of these key assets in 2013 would have a dramatic negative impact on Sears Canada including its ability to fund the Plan. Despite such knowledge, neither Sears Canada nor

the Director Defendants nor Bird took any steps to ensure that the Plan was fully funded and able to satisfy the pension promise made to Plan beneficiaries.

The 2013 Dividend

26. On November 18 and 19, 2013, the Board held an in-person meeting (the "**November Meeting**") which was attended by the Director Defendants and Bird.

27. On November 12, 2013, prior to the November Meeting, the Board including Bird received a financial update on the performance of Sears Canada. Management reported that throughout the first three quarters of the year, Sears Canada had negative net income of \$49 million (\$27 million worse than the same period in 2012) and negative total cash flow of \$26.3 million.

28. On November 14, 2013, the Investment Committee of Sears Canada's Board was presented with material showing an estimated pension plan deficiency on a wind-up basis of \$313 million as at December 2013.

29. The materials provided to the Board and Bird in advance of the November Meeting included two analyst reports which reviewed the financial circumstances of Sears Canada and predicted its eventual failure:

Desjardins Capital Markets Report (October 30, 2013)

As long as consumers do not perceive that Sears Canada is going out of business and desert it, Sears may be able to manage its demise slowly over time, selling prime and non-core assets, and waiting for the elusive purchaser of 60–80 store locations to appear.

CIBC Report (November 4, 2013)

It is possible that SCC will simply operate its way into irrelevance, gradually selling off stores to stem the cash drain. That strategy would likely result in Sears occasionally cutting a special dividend cheque to all shareholders, not the worst way to create shareholder value. But that is dangerous to the

operations, particularly as the primary, and most profitably flagship stores are vended.

30. During the short pre-dinner discussion on November 18, 2013, the Director Defendants, at the instigation and urging of one or more of them and Bird, unanimously resolved to declare an extraordinary dividend of \$5.00 per common share, for an aggregate dividend payment of approximately \$509 million (the "2013 Dividend").

31. The Director Defendants approved the 2013 Dividend unanimously and without any abstentions despite the fact that they did not have:

- (a) any advance notice that they would be asked to consider an extraordinary dividend at the November Meeting;
- (b) any written materials regarding a proposed dividend or possible dividend structures;
- (c) any written presentation analyzing the impact the proposed dividend would have on Sears Canada including its ability to meet its pension obligations;
- (d) any pro forma assessment of Sears Canada's liquidity and cash flows following the payment of a dividend;
- (e) any management presentation or recommendation on the proposed dividend; or
- (f) any legal advice with respect to their duties in connection with the declaration of a dividend.

32. The Director Defendants approved and/or acquiesced to the 2013 Dividend and Sears Canada paid the 2013 Dividend to satisfy the immediate financial needs of ESL. The 2013

Dividend was directed by Lampert who was at all times acting in his personal capacity and as the directing mind of ESL and who:

- (a) knew that Sears Canada, Bird and the Director Defendants owed fiduciary duties to the Plan and the Plan beneficiaries;
- (b) knew that the Plan had a large unfunded deficit and that approval and payment of the extraordinary dividend would be contrary to the interests of the Plan beneficiaries; and
- (c) intended that the Director Defendants would approve and Sears Canada would pay the 2013 Dividend without regard to its impact on the Plan or the Plan beneficiaries.

33. The Director Defendants approved and/or acquiesced to the 2013 Dividend and Sears Canada paid said dividend fraudulently and dishonestly for the purpose of benefitting Lampert and ESL and in total disregard to the interests of the Plan and its beneficiaries. When they authorized the 2013 Dividend, the Director Defendants knew or should have known that the dividend would severely prejudice the ability of Sears Canada to satisfy its pension funding obligations.

34. Sears Canada paid the 2013 Dividend on December 6, 2013 and the Shareholder Defendants received the following dividend payments:

- (a) ESL: \$88,626,400;
- (b) Lampert: \$52,165,440;
- (c) William Harker: \$23,020;

- (d) Deborah E. Rosati: \$13,000;
- (e) James McBurney: \$7,625; and
- (f) R. Raja Khanna: \$13,100.

35. ESL and Lampert also benefited from approximately \$259 million paid to Holdings through the 2013 Dividend.

36. When the Shareholder Defendants received the above payments directly or indirectly from Sears Canada they knew or ought to have known that such payments had been authorized by the Director Defendants and paid by Sears Canada in breach of the fiduciary duties owed by them to the Plan and its beneficiaries. The Shareholder Defendants specifically knew or ought to have known that Sears Canada and the Director Defendants owed fiduciary duties to the Plan fund and the Plan beneficiaries, that the Plan was then seriously underfunded, that the long term viability of Sears Canada was then at risk and that payment of the 2013 Dividend to the Shareholder Defendants would severely prejudice the ability of Sears Canada to satisfy its pension funding obligations.

37. As a result of the 2013 Dividend, Sears Canada has insufficient assets to satisfy its obligation to fully fund all benefits accrued under the Plan with the result that Plan beneficiaries will not receive full payment of the pensions promised in the Plan.

Liability of Defendants

38. In authorizing and/or acquiescing to the 2013 Dividend in the manner and circumstances set out above, without first considering the need of Sears Canada to take steps as Administrator to provide for the Plan to be funded ahead of payments to shareholders and acting on such consideration, each Director Defendant (i) breached the fiduciary duties and duty of care he or she owed the Plan and the Plan beneficiaries and (ii) induced Sears Canada and the other

Director Defendants to breach the fiduciary duties they owed the Plan and the Plan beneficiaries and/or knowingly assisted Sears Canada and the other Director Defendants in breaching such duties.

39. In instigating and urging the approval and payment of the 2013 Dividend in the manner and circumstances set out above, without first considering the need of Sears Canada to take steps as Administrator to provide for the Plan to be funded ahead of payments to shareholders and acting on such consideration, Bird (i) breached the fiduciary duties and duty of care he owed the Plan and the Plan beneficiaries and (ii) induced Sears Canada and the Director Defendants to breach the fiduciary duties they owed the Plan and the Plan beneficiaries and/or knowingly assisted Sears Canada and the Director Defendants in breaching such duties.

40. In causing the Director Defendants to authorize the 2013 Dividend and in causing Sears Canada to pay such dividend in the manner and circumstances set out above, without first considering and at that time providing for appropriate funding or security for the Plan, the Shareholder Defendants induced the Director Defendants, Bird and Sears Canada to breach the fiduciary duties they owed the Plan and the Plan beneficiaries and/or knowingly assisted the Director Defendants, Bird and Sears Canada in breaching such duties.

41. In receiving directly and indirectly the 2013 Dividend payments in the manner and circumstances set out above, the Shareholder Defendants are in knowing receipt of assets transferred to them in breach of fiduciary duty and were unjustly enriched at the expense of the Plan and its beneficiaries and the Shareholder Defendants are required to account for all amounts so received for the benefit of the Plan beneficiaries.

42. Authorization and payment of the 2013 Dividend in the circumstances set out above was oppressive and unfairly prejudicial to the interests of the Plan and its beneficiaries and unfairly disregarded their interests and require an order pursuant to section 241 of the CBCA

setting aside the declaration and payment of the 2013 Dividend and requiring the Defendants to pay to the Plaintiff by way of compensation or restitution the amount required to fully fund the benefits promised under the Plan.

Service Ex Juris, Statutes Relied Upon, and Location of Trial

43. The Plaintiff relies upon paragraphs (g) and (n) and (p) of Rule 17.02 to serve this claim outside Ontario.

44. The Plaintiff relies upon the CBCA.

45. The Plaintiff proposes that the trial of this matter be heard in Toronto, Ontario.

December 19, 2018

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Lawyers for the Plaintiff

MORNEAU SHEPELL LTD. in its capacity as administrator and ESL INVESTMENTS INC. et al.

Plaintiff

Defendants

Court File No.:

CU-18-00611217-006L

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

STATEMENT OF CLAIM

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Lawyers for the Plaintiff

Court File No. 4114/15

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

1291079 ONTARIO LIMITED

Plaintiff

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the Rules of Civil Procedure. This

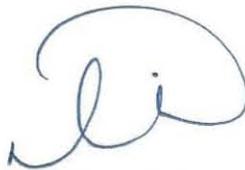
will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL-AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

October 21, 2015

Issued by


Local Registrar

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court office

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TO: SEARS CANADA INC.
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United States of America

AND TO: ESL INVESTMENTS INC.
200 Greenwich Avenue
Greenwich, CT 06830
United States of America

AND TO: WILLIAM C. CROWLEY
146 Central Park West, Apartment 10E
New York NY 10023
United States of America

AND TO: WILLIAM R. HARKER
39 Remsen Street- Apt. LB
Brooklyn NY 11201
United States of America

AND TO: DONALD CAMPBELL ROSS
73 Donwoods Drive
Toronto ON M4N 2G6

AND TO: EPHRAIM J. BIRD
1017 N. Ridge Road
Salado TX 76571
United States of America

AND TO: DEBORAH E. ROSATI
11821 Lakeshore Road RR#2
Wainfleet ON LOS 1VO

AND TO: R. RAJA KHANNA
31 Delaware Avenue
Toronto ON M6H 2S8

AND TO: JAMES MCBURNEY
4 Luxemburg Gardens
London W6 7EA
United Kingdom

AND TO: DOUGLAS CAMPBELL
13 Roxborough Street West
Toronto ON MSR 1T9

CLAIM

1. The plaintiff claims on behalf of itself and all members of the Proposed Class:
 - (a) a declaration that the plaintiff is a “complainant” under the *Canada Business Corporations Act*, R.S.C. 1985, c. C. 44 (the “CBCA”);
 - (b) a declaration that the plaintiff has been oppressed by the defendants under the CBCA;
 - (c) compensation pursuant to s. 241(3)(j) of the CBCA in an amount not exceeding \$100,000,000;
 - (d) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
 - (e) costs of this action on a substantial-indemnity scale, plus applicable goods and services and harmonized sales taxes; and;
 - (f) such further and other relief as this Honourable Court deems just, including all further necessary or appropriate accounts, inquiries and directions.

Parties

2. The plaintiff, 1291079 Ontario Limited (“129”), is incorporated under the laws of Ontario. Until December, 2013, 129 carried on business in the Town of Woodstock, Ontario, as a retailer under the “Sears Hometown” store program. 129 is the class representative in a certified class proceeding against Sears Canada Inc., bearing Court File No. CV- 3769 /13-CP (the “Class Action”) commenced in Milton, Ontario

3. The defendant, Sears Canada Inc. (“**Sears**”), is incorporated under the laws of Canada and has its head office in the City of Toronto, Province of Ontario. Sears’ stock is publicly traded on the Toronto Stock Exchange and on the NASDAQ.

4. The defendant, Sears Holding Corporation (“**Holding**”), is incorporated under the laws of the State of Delaware in the U.S.A. Until October, 2014, Holding owned 51% of the common shares of Sears, at which time its shareholdings were reduced to approximately 12% following a sale of its shares.

5. The defendant, ESL Investments Inc. (“**ESL**”), is incorporated under the laws of the State of Delaware in the U.S.A. ESL is a privately-owned hedge fund controlling over approximately \$9 billion in assets. Until October, 2014, ESL was a 27% shareholder of Sears, at which time it increased its shareholdings in Sears to approximately 48% through the acquisition of shares previously held by Holding.

6. The principal individual behind both Holding and ESL is hedge-fund billionaire Edward Lampert (“**Lampert**”). Lampert is the chairman and CEO of Holding and the founder, chairman and CEO of ESL. Lampert is also the largest individual shareholder of Holding.

7. Holding and ESL are affiliates of Sears as defined under section 2 of the CBCA.

8. The defendant, William C. Crowley (“**Crowley**”), is an individual residing in New York, New York in the United States of America. Crowley was a director of Sears in 2013.

9. The defendant, William R. Harker (“**Harker**”), is an individual residing in Brooklyn, New York in the United States of America. Harker was a director of Sears in 2013.

10. The defendant, Donald Campbell Ross (“**Ross**”), is an individual residing in Toronto, Ontario. Ross was a director of Sears in 2013.

11. The defendant, Ephraim J. Bird (“**Bird**”), is an individual residing in Salado, Texas in the United States of America. Bird was a director of Sears in 2013.

12. The defendant, Deborah E. Rosati (“**Rosati**”), is an individual residing in Wainfleet, Ontario. Rosati was a director of Sears in 2013.

13. The defendant, R. Raja Khanna (“**Khanna**”), is an individual residing in Toronto, Ontario. Khanna was a director of Sears in 2013.

14. The defendant, James McBurney (“**McBurney**”), is an individual residing in London, England. McBurney was a director of Sears in 2013.

15. The defendant, Douglas Campbell (“**Campbell**”), is an individual residing in Toronto, Ontario. Campbell was a director of Sears in 2013.

16. Crowley, Harker, Ross, Bird, Rosati, Khanna, McBurney and Campbell are hereinafter, collectively, referred to as the “**Directors**”.

Background

17. 129 is a Sears Hometown store dealer. On July 5, 2013, it commenced a class proceeding against Sears on behalf of all Hometown Dealer stores operating under a Dealer Agreement with Sears at any time on or after July 5, 2011 (the “Class”). The Class Action seeks \$100 million in damages on behalf of the Class for, *inter alia*, breach of contract and breaches of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (“Wishart Act”).

18. The Class Action was certified as a class proceeding on September 8, 2014.

19. 129 proposes that the class in this action be defined in the same manner as the class in the Class Action, namely:

all corporations, partnerships, and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement with Sears at any time from July 5, 2011 to the date of sending of the notice of certification

The Beginning of the End for Sears

20. Sears is a retailer of home appliances, furnishings, mattresses, electronics and apparel, among other things. It has operated in Canada for over 60 years. Sears’ retail network includes many different channels of retail, such as full-line department stores, furniture and appliance stores, Dealer Hometown stores, catalogue selling locations, and outlet stores. Sears also sells direct to customers through its website, www.sears.ca and its 1-800 telephone number.

21. Beginning in 2011, Sears began incurring large and growing operating losses. In the most recent fiscal year, Sears reported an operating loss of over \$400 million. The table below shows Sears' growing operating losses since 2011 (in CAD millions):

Year	Operating Profit (Loss)
2011	(\$50.9)
2012	(\$82.9)
2013	(\$187.8)
2014	(\$407.3)

22. By 2013, media and analyst reports began reporting that the end was near for Sears given the increasing losses and the absence of a viable plan for turnaround.

23. Even though Sears was losing substantial amounts of money through its operations, it held valuable capital assets, particularly long-term leases in prime shopping centres that were below fair market value rental rates.

24. Beginning in 2013, Sears, at the direction and under the control of Holding and ESL, took steps and made corporate decisions to liquidate these valuable assets in order to benefit Holding and ESL at the expense of creditors. These steps included liquidating Sears' prime assets. Rather than reinvesting these funds to offset the large and growing operating losses and attempt to turn the company around, the primary purpose of these steps was to siphon money out of Canada by paying substantial dividends to Holding and ESL prior to the inevitable bankruptcy filing for Sears.

The Path Towards Insolvency: A Chronology of Asset Stripping

25. In June, 2013, Sears announced that it was selling leases for two of its most prominent locations for \$191 million. The locations were in Toronto's highly-coveted Yorkdale Shopping Centre and Mississauga's Square One Shopping Centre.

26. In August, 2013, Sears announced that it was cutting 245 employees and outsourcing its information technology and financing work. This announcement followed Sears' cutting of over 700 employees earlier in 2013.

27. In September, 2013, Sears' CEO, Calvin MacDonald resigned from the company. Mr. MacDonald had become CEO in 2011 and was in the midst of a proposed three-year turnaround plan at the time of his resignation. Mr. MacDonald resigned because of disagreements with Lampert over commitment to Mr. MacDonald's turnaround plan. That same day, Sears announced that Douglas Campbell was appointed its CEO and President.

28. In October, 2013, Sears announced that it was selling five more of its prime leases, including its flagship location in Toronto's Eaton Centre, for \$400 million. At the same time, it announced the termination of 965 employees who worked at those locations.

29. In November, 2013, Sears announced that it was selling its 50% joint venture interest in eight properties for approximately \$315 million.

30. Also in November, 2013, Sears announced that it was laying off approximately 800 employees from its repair services and parts business.

Sears Declares Extraordinary Dividend Despite Significant Financial Losses

31. On November 19, 2013, Sears reported its third-quarter financial results. Sears' revenues for the third-quarter of 2013 were down 6.4% from the same quarter in 2012. Sears had a net loss of \$48.8 million for the third quarter of 2013.

32. Nevertheless, on that same day, despite these losses, the Directors declared an extraordinary cash dividend of \$5.00 per share on all common shares, or approximately \$509 million in the aggregate, to be paid on December 6, 2013 (the "**Extraordinary Dividend**"). The primary beneficiaries of the Extraordinary Dividend were Holding and ESL.

33. The Extraordinary Dividend was declared by the Directors and paid by Sears with knowledge by the defendants of the substantial claim against Sears by the Hometown dealers in the Class Action.

34. The Extraordinary Dividend was declared by the Directors and paid by Sears with knowledge by the defendants that:

- (a) Sears was aggressively liquidating its prime assets and would continue to do so in the future;

- (b) Sears was experiencing growing, unsustainable operating losses each quarter and would continue to do so in the future;
- (c) the defendants Holding and ESL were not prepared to allow Sears to commit the funds and resources necessary to implement a viable turnaround of Sears' operations, and that Mr. MacDonald and other executives had resigned as a result;
- (d) Sears was slashing its operating budget which would deprive it of the ability to effect a turnaround of its operations and would continue to do so in the future;
- (e) the Sears Hometown stores network was and would continue in the future to be abandoned by Sears. Every senior executive involved in the Sears Hometown store network either left the organization or would leave in the near future as a result of this abandonment and the growing despair of the independent dealer network; and
- (f) the class members, which are independent owner operators of Sears Hometown stores, were experiencing and would continue to experience massive, unsustainable losses which would lead to their financial demise.

35. The defendants knew that by paying the Extraordinary Dividend, they would strip the most valuable assets out of Sears and that Sears would likely be bankrupt or insolvent by the time the Class succeeded in the Class Action.

36. On November 26, 2013, after the declaration of the Extraordinary Dividend but prior to its payment, counsel for the plaintiff in the Class Action wrote to counsel for Sears requesting assurances that, having regard to the assets, liabilities (existing and contingent) and actual and likely future operating losses of Sears, it had set aside a sufficient reserve to satisfy a judgment against Sears should the Class Action be certified and succeed on the merits. No answer was provided.

37. On December 3, 2013, counsel for the plaintiff in the Class Action wrote to each Director to put them on notice that should Sears be unable to satisfy an eventual judgment against Sears in the Class Action, that each Director who authorized the Extraordinary Dividend may be jointly and severally liable with Sears for such damages. No answer was provided.

38. Sears paid the Extraordinary Dividend on December 6, 2013.

The Continuing Path Towards Insolvency

39. Following the payment of the Extraordinary Dividend on December 6, 2013, Sears continued aggressively down the path of winding-up operations in Canada and liquidating what remained of its valuable assets.

40. Having received the Extraordinary Dividend and facing its own financial issues, on May 14, 2014, Holding announced that it was exploring strategic alternatives for its shareholding in Sears, including a possible divestiture of its shares. Holding retained the firm of Bank of America Merrill Lynch for this purpose.

41. In May, 2014, Sears announced that it had sold its minority ownership interest in the Centre commercial Les Rivières shopping centre in Trois-Rivières, Quebec, for \$33.5 million.

42. In August, 2014, Sears announced that it had entered into an agreement to sell its interest in Kildonan Place, a shopping centre located in Winnipeg, for \$33.5 million.

43. In September, 2014, Sears announced that Mr. Campbell would resign as CEO by the end of the year.

44. In October, 2014, Ronald Boire was named as Mr. Campbell's replacement as CEO. Mr. Boire was Sears' third different CEO in just under two years.

45. In November, 2014, Sears and JPMorgan Chase Bank, N.A. announced that their agreement relating to the Sears-branded credit card would terminate on November 15, 2015.

46. In February, 2015, Sears released its financial results for the previous quarter and fiscal year. Sears suffered an operating loss of \$154.7 million for the last quarter of 2014. For the 2014 fiscal year, Sears suffered an operating loss of \$407.3 million.

47. In March 11, 2015, Sears announced that it had entered into an agreement to sell and lease back three of its properties for \$140 million. The locations include store space and adjacent property located at the Metropolis at Metrotown in Burnaby, British Columbia, Cottonwood Mall in Chilliwack, British Columbia and North Hill Shopping Centre in Calgary, Alberta.

48. On May 20, 2015, Sears released its financial performance for the first quarter of 2015. Sears suffered a \$59.1 million net loss for this quarter.

49. On July 2, 2015, Mr. Boire announced that he would be leaving his position as CEO of Sears by the end of the 2015 summer.

50. 25% of the Hometown Dealer stores have closed since 2013. More Hometown Dealer stores are closing weekly.

51. The value of Sears' shares has dropped significantly on the Toronto Stock Exchange and on NASDAQ in the past 24 months and there is widespread speculation that Sears will file for bankruptcy protection in the near future.

Defendants Have Oppressed Class

52. Sears' actions in paying the Extraordinary Dividend were done for the purpose of denuding Sears of its prime assets, and paying the funds from the realization of the assets to the primary benefit of Holding and ESL to the detriment of the Class.

53. At all material times, Holding and ESL controlled and directed Sears and directed the payment of the Extraordinary Dividend by Sears. The Directors voted for and consented to the resolution authorizing the payment of the Extraordinary Dividend. The defendants have interfered with the plaintiff's and the Class' rights as creditors of Sears.

54. Specifically, by directing and authorizing Sears to pay the Extraordinary Dividend and its other actions as described above, the defendants have:

- (a) effected a result;
- (b) carried on their business and affairs and those of Sears in a manner; and
- (c) exercised their powers in a manner,

that was oppressive and unfairly prejudicial to and that unfairly disregarded the interests of the Class, contrary to section 241 of the CBCA.

55. The plaintiff and the Class are complainants under ss. 238(d) of the CBCA.

56. The plaintiff pleads and relies on the CBCA, and particularly Part XX thereof.

Service Ex Juris

57. The plaintiff is entitled to serve Holding, ESL and certain of the Directors outside Ontario without a court order pursuant to the following rules of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 because:

- (a) Rule 17.02 (f)(i) – the claim relates to a contract made in Ontario;
- (b) Rule 17.02 (f)(iv) – the claim relates to a breach of a contract committed in Ontario;
- (c) Rule 17.02 (g) – the claim relates to a tort committed in Ontario;
- (d) Rule 17.02 (h) – the claim relates to damage sustained in Ontario arising from a tort and breach of contract; and
- (e) Rule 17.02 (o) – the defendants residing outside of Ontario are necessary and proper parties to this proceeding.

58. The plaintiff seeks to have this action tried immediately following the trial of the Class Action.

October 21, 2015

SOTOS LLP

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Lawyers for the plaintiff

1291079 ONTARIO LIMITED
Plaintiff

-and-

SEARS CANADA INC., et al.
Defendants

Court File No. 4114/15

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT MILTON

STATEMENT OF CLAIM

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Lawyers for the Plaintiff

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE

)

THURSDAY, THE 26TH

MR. JUSTICE HAINEY

)

DAY OF APRIL, 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
 QUÉBEC 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**”)

AMENDED LITIGATION INVESTIGATOR ORDER

THIS MOTION, made by Representative Counsel to the court-appointed Representatives of employees and retirees with respect to pension and post-retirement benefits of the Applicants (“**Retiree Representative Counsel**”) pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, (the “**CCAA**”) for an order appointing a Litigation Investigator to identify and report on certain rights and claims of the Applicants and SearsConnect (collectively, the “**Sears Canada Entities**”) and/or any creditors of the Sears Canada Entities, was heard this day at 330 University Avenue, Toronto, Ontario.



ON READING the Affidavit of William Turner sworn on February 12, 2018 including the exhibits thereto, the Affidavit of William Turner sworn on August 11, 2017, including the exhibits thereto, the Affidavit of William Turner sworn on February 14, 2018 including the exhibits thereto, the Affidavit of Jules Monteyne sworn on February 14, 2018 including the exhibits thereto, the Affidavit of Leanne M. Williams sworn on February 14, 2018 including the exhibits annexed thereto, the Monitor's Fourteenth Report to the Court dated March 1, 2018, and on hearing the submissions of Retiree Representative Counsel, Representative Counsel for the employees of the Sears Canada Entities ("**Employee Representative Counsel**"), counsel for the Applicants, counsel for the Monitor, 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 of Veronica de Leoz, sworn February 12, 2018:

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that Lax O'Sullivan Lisus Gottlieb LLP is hereby appointed as Litigation Investigator (the "**Litigation Investigator**") in these CCAA proceedings for the benefit of the estates of the Sears Canada Entities and its creditors. The Litigation Investigator shall be an officer of this Court, and is appointed for the purpose of investigating, considering, and reporting to the Creditors' Committee (defined below), regarding any rights or claims, whether legal, equitable, statutory or otherwise, that the Sears Canada Entities and/or any creditors of any of the Sears Canada Entities 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 (the "**Mandate**"). For greater certainty, the Litigation Investigator may

investigate any and all claims regardless of whether such claims have been included by creditors' proofs of claims filed pursuant to the Claims Procedure Order and E&R Claims Procedure Order (defined below), however, the Litigation Investigator shall have no role in determining, advising on, opposing, supporting, or articulating any claim of any creditor or stakeholder in the Claims Process, as defined in the Order of this Court dated December 8, 2017 as amended by Order dated February 22, 2018 or as further amended by Order of the Court (as amended, the "**Claims Procedure Order**") or any Claim as defined in the Employee and Retiree Claims Procedure Order dated February 22, 2018 (the "**E&R Claims Procedure Order**") and shall have no role in the distribution or allocation of estate funds.

Litigation Investigator Reporting

3. **THIS COURT ORDERS** that the Litigation Investigator's Mandate shall include reporting to the Creditors' Committee with such details as the Litigation Investigator considers advisable (all such reporting being collectively defined herein as the "**Report**"), taking into account any concerns of privilege and confidentiality. All Reports by the Litigation Investigator and all communications among the Creditors' Committee members and the Litigation Investigator shall be subject to common interest privilege. A Report by the Litigation Investigator will include recommendations regarding a proposed litigation plan that includes, but is not limited to:

- (a) those potential rights or claims of the Sears Canada Entities or any creditors of the Sears Canada Entities that should be pursued (if any); and
- (b) describing how and by whom such rights or claims (if any) can best be pursued or continued, including, but not limited to:

- (i) the coordination of the prosecution of such rights or claims with similar or related facts, rights or other claims that may be asserted by different parties;
- (ii) if necessary or desirable, a proposed governance structure for the Creditors' Committee created pursuant to this Order (or as same may be amended, expanded or reconstituted in future, in accordance with the terms of this Order) for the purpose of providing input to the Litigation Investigator in the prosecution of such rights, claims or causes of action; and
- (iii) consideration as to the various options available for funding the prosecution of such rights, claims or causes of action.

A confidential briefing ("**Investigator Briefing**") regarding all Reports prepared by the Litigation Investigator shall be given to the Monitor; provided that such Investigator Briefing shall be kept confidential by the Monitor and shall remain subject to privilege.

4. **THIS COURT ORDERS** that following delivery of a Report to the Creditors' Committee in accordance with its Mandate, the Litigation Investigator shall not take any further steps without a further Order of the Court. For greater certainty, nothing herein shall prevent the Litigation Investigator from seeking an Order of the Court authorizing it to pursue any claims identified pursuant to the Mandate.

The Committee

5. **THIS COURT ORDERS** that the Litigation Investigator shall fulfil his Mandate in consultation with a creditors' committee (the "**Creditors' Committee**") comprised of no more than eight (8) members (inclusive of two members on behalf of landlords) at any one time appointed by, or on behalf of the following creditor groups of the Sears Canada Entities: (i) Retiree Representative Counsel; (ii) Employee Representative Counsel; (iii) landlords; (iv) Hometown Dealers Class Action plaintiff counsel; (v) Morneau Shepell Ltd. in its capacity as Administrator for the Sears Canada Inc. Registered Retirement Plan; (vi) the Ontario Superintendent of Financial Services as Administrator of the Pension Benefits Guarantee Fund; and (vii) such other unsecured creditors of the Sears Canada Entities not represented in (i) through (vi) above as the majority of the Creditors' Committee may agree be included, in consultation with the Monitor, or as may be directed by the Court. The Creditors' Committee and the Litigation Investigator shall cooperate with the Monitor, and the Monitor shall cooperate with the Litigation Investigator and the Creditors' Committee in connection with the Mandate. The Creditors' Committee shall consult with and provide input to the Litigation Investigator with respect to the Mandate.

6. **THIS COURT ORDERS** that each member of the Creditors' Committee (including any alternates or replacements from the same stakeholder group as may be appointed by an existing member) may be a creditor itself or counsel/advisor representing that stakeholder interest, but in either case each member shall execute a Confidentiality Agreement in a form acceptable to the Litigation Investigator, the Sears Canada Entities and the Monitor prior to being entitled to participate in any discussions or meetings of the Creditors' Committee, receive any information from the Monitor, the Litigation Investigator or any other member of the Creditors' Committee,

or to receive the Report. The Litigation Investigator will meet with the Creditors' Committee at least monthly, or such other times as may be agreed by the Litigation Investigator and the Creditors' Committee. Meetings will only be conducted in person, to ensure the confidentiality of all discussions.

7. **THIS COURT ORDERS** that the Monitor shall provide to the Litigation Investigator (and, upon execution of appropriate Confidentiality Agreements, for delivery by the Litigation Investigator to the Creditors' Committee) a confidential briefing regarding the "Transactions of Interest" as identified in the Monitor's 11th Report to the Court (the "**Monitor Briefing**"). To the extent that the Litigation Investigator requests documents or information from the Sears Canada Entities and such requests are consistent with the Mandate (the "**Additional Company Information**"), then, subject to satisfactory resolution of issues of privilege and confidentiality (including any terms regarding sharing of information with the Creditors' Committee), the Sears Canada Entities shall cooperate with the Monitor to provide the Additional Company Information to the Litigation Investigator. The Monitor's delivery of the Monitor Briefing pursuant to the terms of this Order shall be subject to common interest privilege and strict confidentiality, and the Monitor is protected for so doing pursuant to section 142 of the *Courts of Justice Act* (Ontario). The Sears Canada Entities' delivery of the Additional Company Information pursuant to the terms of this Order shall be subject to strict confidentiality, and the Sears Canada Entities and their directors and officers are protected for so doing pursuant to section 142 of the *Courts of Justice Act* (Ontario). In the event of any concerns being raised regarding the delivery by the Monitor of any particular aspect of the Monitor Briefing that cannot be resolved without breaching the underlying basis for the concern, such concerns shall be resolved following a review by an independent party appointed by the Monitor and the

Litigation Investigator (or, absent agreement on the identity of such party, by the Court). Notwithstanding the foregoing, any document provided by the Sears Canada Entities as part of the Additional Company Information may be submitted by a party in receipt of such document to the court under seal for the purposes of resolving any dispute over whether such document should be produced in litigation.

8. **THIS COURT ORDERS** that the Monitor or the Sears Canada Entities, as the case may be, shall maintain copies and a record of all documents: (i) received by the Monitor from the Sears Canada Entities and provided to the Litigation Investigator in accordance with this Order; or (ii) provided by the Sears Canada Entities to the Litigation Investigator in accordance with this Order.

9. **THIS COURT ORDERS** that prior to any production of documents by the Monitor or the Sears Canada Entities to the Litigation Investigator to facilitate the fulfillment of the Mandate, the Monitor or Sears Canada Entities, as the case may be, shall take reasonable steps to review such documents to identify any:

- (a) documents that contain any communication that is between a lawyer and 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 (a "**Current or Former D&O**") created on or after November 26, 2013 and related to the 1291079 Ontario Ltd and Sears Canada Inc. et. al. class action of November 6, 2015 (Ontario Superior Court of Justice) File No. 4114/15); and

- (c) documents containing communications between a law firm 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.

Hereafter, items a), b), and c) shall be referred to collectively as the “**Potentially Shared Privileged Documents**”). No waiver of any privilege shall have occurred by the inadvertent delivery of documents to the Litigation Investigator 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) is produced or disclosed to the Litigation Investigator.

10. **THIS COURT ORDERS** that in the event that the Monitor and/or Sears Canada Entities intend to produce any Potentially Shared Privileged Documents to the Litigation Investigator in facilitation of the fulfillment of the Mandate, the Monitor or the Sears Canada Entities, as the case may be, 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.

11. **THIS COURT ORDERS** that the Litigation Investigator shall create and maintain a detailed list (including creation date, sender, recipient and subject) of those document(s) received from the Sears Canada Entities (either directly or through the Monitor) that it provides to the Creditors’ Committee or their counsel or agents.

12. **THIS COURT ORDERS** that, for greater certainty, any right, claim or cause of action identified by the Litigation Investigator as capable of being advanced and that is advanced with approval of the Court, whether by the Litigation Investigator or otherwise, may be removed from the claims process established under the Claims Procedure Order or the E&R Claims Procedure Order.

13. **THIS COURT ORDERS** that the Claims Procedure Order is hereby amended as follows:

- (i) subparagraph (vii) in the definition of “Excluded Claim” is hereby amended to read as follows: “Claim that may be asserted by any of the Sears Canada Entities or that are advanced by the Litigation Investigator or any creditors, in each case, as may be permitted or directed by further Order of the Court, against the Sears Canada Entities or any Directors and/or Officers, which for greater certainty shall include any Claim that may be identified, reviewed or investigated as part of the Litigation Investigator’s Mandate (as defined in an Order of the Court dated March 2, 2018)”.

14. **THIS COURT ORDERS** that the E&R Claims Procedure Order is hereby amended as follows:

- (i) the definition of “Excluded Claim” is hereby amended to add a new subparagraph (vi) that shall read as follows: “Claim that is advanced by the Litigation Investigator or any creditors, in each case, as may be permitted or directed by further Order of the Court, against the Sears Canada Entities or any Directors and/or Officers, which for greater certainty shall include any Claim that may be identified, reviewed or

investigated as part of the Litigation Investigator's Mandate (as defined in an Order of the Court dated March 2, 2018)".

Litigation Investigator Costs

15. **THIS COURT ORDERS** that the Litigation Investigator shall be paid from the funds of the Applicants its reasonable fees and disbursements, including the fees of any counsel retained by the Litigation Investigator in respect of the Mandate, the amount of which is not to exceed a budget approved by the Creditors' Committee in consultation with the Monitor prior to the Litigation Investigator commencing work in respect of fulfilling its Mandate in accordance with this Order. The Litigation Investigator and any counsel it retains shall be paid forthwith upon rendering fully-redacted versions of their accounts to the Applicants and the Monitor. Un-redacted versions of accounts rendered by the Litigation Investigator shall be made available to the Creditors' Committee and, upon request of the Court and subject to a sealing order to protect privilege and confidentiality, to the Court. In the event of any disagreement with respect to a proposed budget, any requested increased to such budget, or any accounts rendered by the Litigation Investigator, such disagreement may be remitted to this Court for determination.

16. **THIS COURT ORDERS** that the Litigation Investigator shall be entitled to the benefit of the Administrative Charge, as defined in the Initial Order issued by the Court dated June 22, 2017 as amended, for the Litigation Investigator's costs, as security for its professional fees, taxes, and disbursements reasonably incurred.

17. **THIS COURT ORDERS** that the Litigation Investigator is hereby authorized to take all appropriate steps and do all appropriate acts necessary or desirable to carry out its Mandate in accordance with the terms of this Order.

18. **THIS COURT ORDERS** that the Litigation Investigator shall be at liberty, and is hereby authorized, at any time, to apply to this Court for advice and directions in respect of its Mandate or any variation or expansion of the powers and duties of the Litigation Investigator, which shall be brought on at least seven (7) business days' notice to the Service List in these CCAA proceedings, unless time for service is otherwise abridged.

19. **THIS COURT ORDERS** that the Litigation Investigator shall have no personal liability as a result of the performance of its duties in carrying out the provisions of this Order, save and except for liability arising out of gross negligence or wilful misconduct. The Creditors' Committee members shall have no liability as a result of their participation on the Creditors' Committee or in providing input to the Litigation Investigator, save and except for liability arising out of gross negligence or wilful misconduct.

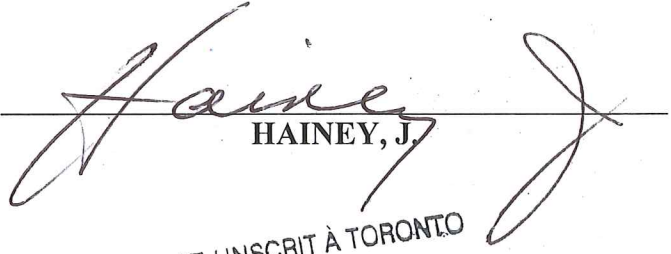
20. **THIS COURT ORDERS** that no action or proceeding may be commenced against the Litigation Investigator or any Creditors' Committee member in respect of the performance of its or their duties under this Order without leave of this Court on seven (7) business days' notice to the Litigation Investigator and the Creditors' Committee.

21. **THIS COURT ORDERS** that notwithstanding:

- (a) the pendency of these proceedings;
- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "BIA") in respect of any of the Applicants and any bankruptcy order issued pursuant to such applications; or
- (c) any assignment in bankruptcy made in respect of any of the Applicants;

the provisions of this Order shall be binding on any Investigator in bankruptcy or receiver that may be appointed in respect of any of the Applicants and any payments of fees and disbursements made to the Litigation Investigator in accordance with this Order shall not be void or voidable by creditors of any of the Applicants, nor shall any such payments constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or any reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

22. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative bodies having jurisdiction in Canada or in the United States of America, to give effect to this Order and to assist the Litigation Investigator 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 Investigator as may be necessary or desirable to give effect to this Order, or to assist the Litigation Investigator in carrying out the terms of this Order.


HAINEY, J.

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

APR 26 2018

PER / PAR:

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AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUÉBEC 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")

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

AMENDED LITIGATION INVESTIGATOR ORDER

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Representative Counsel for the Non-Unionized Retirees
and Non-Unionized Active and Former Employees of the
Sears Canada Entities

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.

)

MONDAY, THE 3RD

JUSTICE HAINEY

)

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
QUÉBEC 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.

Applicants

TRANSFER AT UNDERVALUE PROCEEDING
APPROVAL ORDER

THIS MOTION, made by FTI Consulting Canada Inc., in its capacity as Court-appointed Monitor (the "Monitor") of the Applicants in these proceedings for an order to commence certain proceedings was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion of the Monitor and the twenty-seventh report of the Monitor dated November 5, 2018 (the "Twenty-Seventh Report") and the first supplement to the Twenty-Seventh Report, dated November 20, 2018, and on hearing the submissions of counsel for the Monitor and such other counsel as were present, no one else appearing although duly served as appears from the Affidavit of Service of Catherine Ma, sworn November 6, 2018, filed:

TRANSFER AT UNDERVALUE CLAIM

1. **THIS COURT ORDERS** that the Monitor is authorized and empowered pursuant to section 36.1 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") to commence and continue a claim against 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 (the "**Transfer at Undervalue Proceedings**") under section 96 of the *Bankruptcy and Insolvency Act (Canada)*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"), as incorporated into the CCAA under Section 36.1, relating to the dividend paid to shareholders of Sears Canada Inc. ("**SCI**") on December 6, 2013 in the amount of approximately \$509 million (the "**2013 Dividend**") as further described in the Twenty-Seventh Report, and as set out in the draft statement of claim appended thereto, with such amendments as the Monitor deems appropriate.
2. **THIS COURT ORDERS** that the granting of this Order permitting the Monitor to commence the Transfer at Undervalue Proceedings does not constitute a determination of any liability under the Monitor's claim.
3. **THIS COURT ORDERS** that the Monitor is authorized to bring the Transfer at Undervalue Proceedings in this Court.
4. **THIS COURT ORDERS** that the stays of proceedings provided for under the initial order issued by this Court, as amended and restated on July 13, 2017 (the "**Initial Order**"), as they apply to former directors of SCI are hereby lifted solely to allow the Monitor to commence and continue the Transfer at Undervalue Proceedings against William Crowley and William Harker.
5. **THIS COURT ORDERS** that in addition to the powers provided to the Monitor pursuant to the Initial Order and the obligations imposed upon those with information and records

pertaining to the Applicants, the Applicants shall cooperate fully with the Monitor in relation to the Transfer at Undervalue Proceedings and the Applicants shall incur no liability by reason of the cooperation referred to in this paragraph.

6. **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 also consult with the Monitor in respect of the Transfer at Undervalue Proceedings.

PROTECTIONS TO THE MONITOR

7. **THIS COURT ORDERS** that in relation to all matters connected with the Transfer at Undervalue Proceedings, the Monitor shall have all of the rights, powers and protections provided for pursuant to the Initial Order.

8. **THIS COURT ORDERS** that the Monitor shall continue to have the benefit of the protections provided under paragraph 34 of the Initial Order in the exercise of its powers under this Order, including, without limitation, the commencement and continuation of the Transfer at Undervalue Proceedings.

9. **THIS COURT ORDERS** that the foregoing does not preclude the Court from awarding legal costs associated with the Transfer at Undervalue Proceedings in favour of a party to the Transfer at Undervalue Proceedings and in the event that such costs are awarded against the Monitor, the Monitor shall have a claim for indemnity against the Property (as such term is defined in paragraph 4 of the Initial Order) to satisfy any such costs award ("**Monitor's Cost Indemnity Claim**") and such indemnity claim shall be secured by the Administration Charge (as such term is defined in paragraph 37 of the Initial Order) created in accordance with the Initial Order, as amended by this Order.

10. **THIS COURT ORDERS** that the Initial Order shall be amended as necessary so as to provide that the maximum aggregate amount of the Administration Charge is equal the sum of \$5 million plus the amount of the Monitor's Cost Indemnity Claim.

COSTS AND OPT-OUT MECHANISM

11. **THIS COURT ORDERS** that the Monitor shall separately account for any costs directly related to the Transfer at Undervalue Proceedings and any claims pursued on the recommendation of the Litigation Investigator (as defined in the Twenty-Seventh Report) (the "LI Claims") from any other costs to administer the estates of the Applicants.

12. **THIS COURT ORDERS** that unsecured creditors of SCI who do not wish to have their distributions, if any, affected by the costs or recoveries of the Transfer at Undervalue Proceedings or the LI Claims (the "Opt-out Creditors") shall have the option to opt out of such participation and such Opt-out Creditors' recoveries will be neither increased by any recoveries from such claims nor reduced by the costs of pursuing such claims, including the costs of any Monitor's Cost Indemnity Claim.

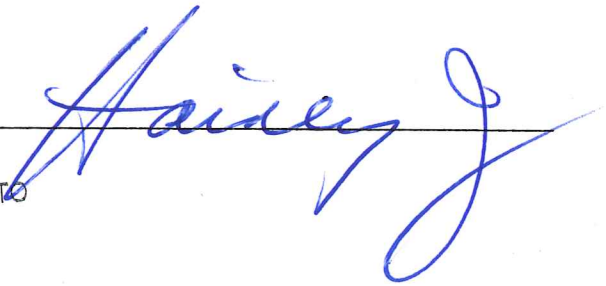
13. **THIS COURT ORDERS** that the form of opt-out notification attached as Appendix "C" to the Twenty-Seventh Report (the "Opt-out Notice") is hereby approved and the Monitor is authorized and directed to, as soon as practicable, deliver the Opt-out Notice to all unsecured creditors of SCI (other than those creditors represented by Employee Representative Counsel and Pension Representative Counsel (in each case as defined in the Twenty-Seventh Report)) having unsecured claims that are either resolved or disputed in amounts in excess of \$5,000 to the address shown on such unsecured creditor's proof of claim filed in accordance with the Claims Procedure Order granted on December 8, 2018 in these proceedings. The Monitor is further authorized and directed to, as soon as practicable, deliver the Opt-out Notice to Employee Representative Counsel, Pension Representative Counsel and to Morneau Shepell

Limited, as administrator of the Sears Canada Pension Plan. Employee Representative Counsel and Pension Representative Counsel shall each be authorized to determine whether an Opt-out Notice should be completed and delivered on behalf of those parties they represent and, following such determination, either elect to deliver or not deliver such Opt-out Notice on behalf of those parties they represent. Morneau Shepell Limited, as administrator of the Sears Canada Pension Plan, shall be authorized to determine whether an Opt-out Notice should be delivered in connection with the Sears Pension Claim (as defined in the Employee and Retiree Claims Procedure Order granted on February 22, 2018) and, following such determination, either elect to deliver or not deliver such Opt-out Notice in connection with the Sears Pension Claim. Any creditor, including Morneau Shepell Limited, (or Employee Representative Counsel or Pension Representative Counsel on behalf of the parties they represent) who receives an Opt-out Notice and returns such Opt-out Notice executed to the Monitor at the address shown on the Opt-out Notice so that it is received by the Monitor on or before sixty days after the date of delivery thereof to such creditor (or Employee Representative Counsel or Pension Representative Counsel on behalf of the parties they represent) shall have irrevocably agreed to be treated as an Opt-out Creditor in these proceedings. All other unsecured creditors of SCI shall be deemed not to be Opt-out Creditors.

GENERAL

14. **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 or any other jurisdiction to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order, including the U.S. Bankruptcy Court. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and the Monitor, as an

officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order



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

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PER / PAR: *UM*

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS
CANADA INC., et al.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

TRANSFER AT UNDERVALUE PROCEEDING
APPROVAL ORDER

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Lawyers to the Monitor, FTI Consulting Canada Inc.

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE)	MONDAY, THE 3RD
)	
MR. JUSTICE HAINEY)	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;

- (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 15(d) 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.

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 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.

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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.

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.

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.

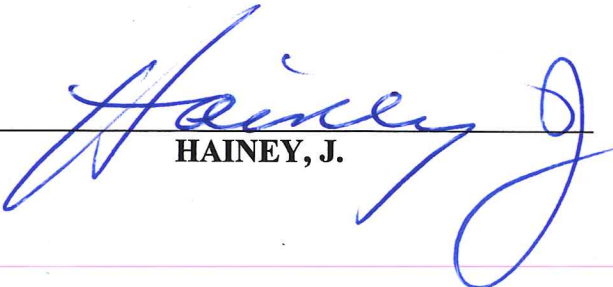
24. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Litigation Trustee and the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

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

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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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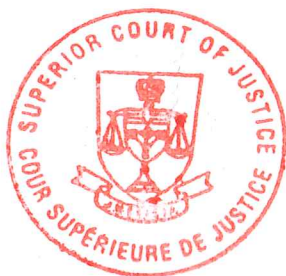
Litigation Investigator

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR.)	MONDAY, THE 3RD
)	
JUSTICE HAINEY)	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 QUÉBEC 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.



APPLICANTS

GOVERNANCE PROTOCOL AND STAY EXTENSION ORDER

THIS MOTION, made by FTI Consulting Canada Inc., in its capacity as monitor (the "**Monitor**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for an order approving the governance protocol for the Applicants and SearsConnect (collectively, the "**Sears Canada Entities**") attached as **Schedule "A"** to this Order (the "**Governance Protocol**") and certain other relief, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion of the Monitor and the Twenty-Eighth Report of the Monitor (the "**Twenty-Eighth Report**"), filed, and on hearing the submissions of respective counsel for the Monitor, the Sears Canada Entities, and such other counsel as were present, no

one else appearing although duly served as appears from the Affidavit of Service of Catherine Ma sworn November 28, 2018, filed:

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion, the Twenty-Eighth Report, and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that each capitalized term used and not defined herein shall have the meaning ascribed to such term in the Amended and Restated Initial Order dated June 22, 2017 (the "Initial Order") in these proceedings and in the Twenty-Eight Report.

GOVERNANCE PROTOCOL

3. **THIS COURT ORDERS** that the Governance Protocol is hereby approved and that the Monitor is authorized to take all steps necessary to implement such protocol.
4. **THIS COURT ORDERS** that, the Sears Canada Entities, their advisors and their current and former officers, directors, agents and representatives shall fully co-operate with the Monitor and any directions it may provide pursuant to this Order or the Governance Protocol, and shall provide the Monitor with such assistance as the Monitor may request from time to time to enable the Monitor to carry out and discharge its powers as set out in this Order, the Governance Protocol or any other Order of this Court.
5. **THIS COURT ORDERS** that, without limiting the provisions of the Initial Order, the Monitor shall not take possession of the Property or Business and not be deemed to have taken possession of the Property or Business, or any part thereof.
6. **THIS COURT ORDERS** that the Monitor shall be entitled to exercise any and all of the powers of the Sears Canada Entities set out herein, in the Governance Protocol and in any

other Order in these proceedings. Nothing in this Order shall derogate from the powers of the Monitor as provided for in the CCAA, the Initial Order or any other Order in these proceedings.

7. **THIS COURT ORDERS** that the Monitor be and is hereby authorized and empowered, but not obligated, without any personal liability therefor, in the name of and on behalf of the Sears Canada Entities, to:

- (a) take control of the existing bank accounts of the Sears Canada Entities listed in Schedule "B" attached hereto (the "**Bank Accounts**") and the funds credited thereto or deposited therein including, but not limited to, transferring any funds received into these bank accounts to accounts held in the name of the Monitor; provided that the Monitor shall endeavor to cause Sears Canada to perform the obligations of the Sears Canada Entities with respect to such Bank Accounts, including the payment of any fees or expenses arising in the ordinary course from the use of the accounts. Provided always that nothing in this Order or anything done by the Monitor in furtherance of its duties as Monitor shall create any obligation or liability on the part of the Monitor in respect of any amounts owing by the Sears Canada Entities on account of payment of such fees or expenses; and
- (b) the financial institutions maintaining such Bank Accounts shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken in accordance with the instructions of the Monitor or as to the use or application of funds transferred, paid, collected or otherwise dealt with in accordance with such instructions and such financial institutions shall be authorized to act in accordance with and in reliance upon such instructions without any liability in respect thereof to any person. For greater certainty and except to the extent that any of the terms of the documentation applicable to the Cash Management System (as defined in the Initial Order) are inconsistent with the authorities granted to the Monitor pursuant to this sub-paragraph 7(b) (dealing with Monitor control and access to bank accounts), nothing in this Order shall or shall be deemed to derogate from, limit, restrict or otherwise affect the protections granted pursuant to paragraph 5 of the Initial Order in favour of any bank providing Cash Management Services to the Sears Canada Entities.

PROTECTIONS OF THE MONITOR

8. **THIS COURT ORDERS** that, without limiting the provisions of the Initial Order, all employees of the Sears Canada Entities shall remain employees of the Sears Canada Entities until such time as the employment of such employees is terminated. Nothing in this Order or the Governance Protocol shall cause the Monitor to be liable for any employee-related liabilities or duties, including, without limitation, wages, severance pay, termination pay, vacation pay and pension or benefit amounts.

9. **THIS COURT ORDERS** that nothing in this Order or the Governance Protocol and nothing done by the Monitor in carrying out its duties under the Governance Protocol or hereunder shall result in, or be deemed to result in, the Monitor being an employer, successor employer, responsible person, operator, officer, director, employee receiver, trustee, assignee, liquidator, administrator, legal representative, receiver-manager or agent of the Sears Canada Entities or in possession or control of the Property or any part thereof, in each case, within the meaning of any statute, regulation or rule of law, or equity, for any purpose whatsoever. Without limiting the foregoing, the Monitor shall not, as a result of this Order or the Governance Protocol, or anything done pursuant to its powers pursuant to this Order or the Governance Protocol, be deemed to occupy or to take control, care, charge, possession or management 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 *Environmental Protection Act (Ontario)*, the *Occupational Health and Safety Act (Ontario)* and each of the respective regulations thereunder; provided however, if the Monitor is nevertheless found to be in possession of any Property, then the Monitor shall be deemed to be a person who has been lawfully appointed to take, or has lawfully taken, possession or control of such

Property for the purposes of section 14.06(1.1)(c) of the *Bankruptcy and Insolvency Act* (Canada) (the "BIA") and shall be entitled to the benefits and protections in relation to the Sears Canada Entities and such Property as provided by section 14.06(2) of the BIA to a "trustee" in relation to an insolvent person and its property.

10. **THIS COURT ORDERS** that, in addition to the rights and protections afforded to the Monitor under the CCAA, as an officer of this Court, or under the Initial Order, the Monitor shall not incur any liability or obligation as a result of carrying out the provisions of this Order or the Governance Protocol, save for gross negligence or wilful misconduct on its part, and the Monitor shall not have any liability with respect to any losses, claims, damages or liabilities, of any nature or kind, to any Person from and after the date of this Order, except to the extent such losses, claims, damages or liabilities result from the gross negligence or wilful misconduct on its part.

11. **THIS COURT ORDERS** that any distribution or payment made to creditors of the Sears Canada Entities will be deemed to have been made by the Sears Canada Entities, or any one of them, as applicable.

12. **THIS COURT ORDERS** that any Authorized Representative (as such term is defined in the Governance Protocol) acting upon the direction or delegation of the Monitor shall incur no liability or obligation as a result of carrying out the provisions of the Order or the Governance Protocol, save for gross negligence or wilful misconduct on their part, and any Authorized Representative shall not have any liability with respect to any losses, claims, damages or liabilities, of any nature or kind, to any Person from and after the date of this Order, except to the extent such losses, claims, damages or liabilities result from the gross negligence or wilful misconduct on their part.

13. **THIS COURT ORDERS** that, without limiting any other provision of this Order, the Sears Canada Entities shall, jointly and severally, indemnify the Monitor and any Authorized

Representative against any and all costs, expenses, obligations and liabilities that it or any of them may incur as result of carrying out the provisions of this Order or the Governance Protocol (in the case of an Authorized Representative, at the direction or delegation of the Monitor), except to the extent that liability was incurred as a result of the gross negligence or willful misconduct on the part of the Monitor or such Authorized Representative, as the case may be.

14. **THIS COURT ORDERS** that the Monitor shall continue to have the benefit of all of the indemnities, charges, protections and priorities as set out in the Initial Order and any other Order of this Court and all such indemnities, charges, protections and priorities shall apply and extend to the Monitor in the carrying out of the provisions of this Order and the Governance Protocol and shall also apply and extend to any Authorized Representative acting upon the direction or delegation of the Monitor. For the avoidance of doubt, no Authorized Representative shall be deemed to be a director of any of the Sears Canada Entities, or any entity affiliated with any of the Sears Canada Entities, under applicable law by reason of having been designated as an Authorized Representative pursuant to this Order or the Governance Protocol and/or having acted in such capacity at the direction or delegation of the Monitor.

EXTENSION OF THE STAY PERIOD AND DEADLINE TO ISSUE NOTICES OF REVISION OR DISALLOWANCE

15. **THIS COURT ORDERS** that the Stay Period (as such term is defined in the Amended and Restated Initial Order dated June 22, 2017 made in these proceedings) is hereby extended from December 18, 2018 until and including May 2, 2019. Further, the Application Period for the Employee Hardship Fund (as such terms, respectively, are defined in the Employee Hardship Fund Term Sheet, approved by the Court on August 18, 2017) shall also be extended from December 18, 2018 until and including May 2, 2019.

16. **THIS COURT ORDERS** that the deadline for the Monitor to issue Notices of Revision or Disallowance in respect of D&O Claims and claims filed by the Directors and Officers based

upon claimed indemnity obligations of the Applicants to such Directors and Officers, in each case pursuant to the Claims Procedure Orders, shall be extended until and including March 1, 2019.

SEALING

17. **THIS COURT ORDERS** that Schedule "B" to this Order shall be and is hereby sealed, kept confidential and shall not form part of the public record pending further Order of this Court.

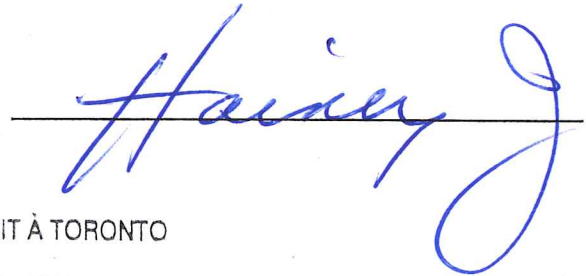
GENERAL

18. **THIS COURT ORDERS** that, except as may be necessary to give effect to this Order and the Governance Protocol, the Initial Order remains in full force and effect and in the event of a conflict between the terms of this Order and those in the Initial Order, the provisions of this Order shall govern.

19. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

20. **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 of America, to give effect to this Order and to assist the Sears Canada Entities, the Monitor and their respective agents in carrying out the terms of this Order and the Governance Protocol. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Sears Canada Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order and the Governance Protocol, to grant representative status to the Monitor in any foreign proceeding, or to assist the Sears Canada Entities and the Monitor and their respective agents in carrying out the terms of this Order and the Governance Protocol. Without limiting the foregoing, in regard to any Governance Action (as such term is defined in the Governance

Protocol) taken on behalf of any of the Sears Canada Entities by the Monitor, all applicable regulatory or governmental units or agencies are hereby directed to accept any such certificates or other documents filed by the Monitor and to take all such steps necessary or appropriate to allow and effect the Governance Action in question.

A handwritten signature in blue ink, appearing to read "Hainey", is written over a horizontal line.

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

DEC 04 2018

PER / PAR: UM

SCHEDULE A
Governance Protocol

Sears Canada Inc. Governance Protocol

All capitalized terms used herein and not otherwise defined have the meanings given to them in the Amended and Restated Initial Order dated June 22, 2017.

WHEREAS substantially all of the Property and assets of the Sears Canada Entities have been sold or otherwise disposed of or are the subject of a binding transaction agreement, with the exception of two remaining real property assets and other non-material assets (the "**Remaining Property**").

WHEREAS the Business previously carried on by the Sears Canada Entities has ceased operations.

WHEREAS the Applicants currently employ not more than ten individuals.

WHEREAS the remaining material steps to be taken in connection with these proceedings are: (i) completing the review, determination and adjudication of certain claims made against any of the Sears Canada Entities pursuant to the Claims Procedure Orders (as defined below) or otherwise (the "**Claims Resolution Process**"); (ii) monetizing the remaining real estate assets (the "**Real Estate Process**"); (iii) distributing the proceeds through a Plan if possible (the "**Distribution Process**"); and (iv) implementing a framework to proceed with certain litigation claims for the benefit of the Sears Canada Entities and their creditors (the "**Litigation Process**" and together with (i), (ii) and (iii), the "**Remaining Matters**").

WHEREAS no ordinary course business operations remain to be supervised and no material commercial transactions outside of the Real Estate Process remain to be implemented.

As a result of the foregoing, the following parties will oversee the Remaining Matters:

- i. the **Claims Resolution Process** has been, and will continue to be, administered by the Monitor in accordance with the Claims Procedure Order granted on December 8, 2017 and the Employee and Retiree Claims Procedure Order granted on February 22, 2018 (collectively, the "**Claims Procedure Orders**");
- ii. the **Real Estate Process** will be overseen by the Monitor. A group of stakeholders of the Sears Canada Entities has been consulted in this process and will continue to be consulted in accordance with past practice;
- iii. the **Distribution Process**, including all matters related to a Plan, including, without limitation, drafting of the Plan, and bringing of any motion to the Court in respect thereto, will be supervised and administered by the Monitor for the benefit of all creditors whose distributions will be determined in accordance with their legal entitlements or any negotiated resolutions resulting from the Claims Resolution Process; and
- iv. the **Litigation Process**, if approved by the Court, will be administered and supervised in accordance with the Order or Orders of the Court by the Court-appointed Litigation Trustee in connection with those claims it pursues on behalf of Sears Canada Inc., and by the Monitor in connection with those claims that the Monitor is empowered by statute to pursue.

In support of the foregoing, the Monitor will, to the exclusion of any other Person, and without the need for approval of the remaining directors of Sears Canada Inc. (the "**Remaining Directors**") or the remaining directors of the other Applicants:

- (a) oversee the remaining wind-down of the Sears Canada Entities, including without limitation:
 1. directing the Sears Canada Entities to preserve, protect and maintain control of the Remaining Property, or any parts thereof;

2. receiving, collecting and taking possession of all monies and accounts now owed or hereafter owing to any of the Sears Canada Entities; and
3. directing the Sears Canada Entities to file, or file on behalf of the Sears Canada Entities, any tax returns and directing the Sears Canada Entities to claim, or claim on behalf of the Sears Canada Entities, any and all rebates, refunds, and other amounts of tax (including sales taxes, capital taxes and income taxes) paid or payable by the Sears Canada Entities,

in each case on the basis that the Monitor shall incur no liability or obligation to any Person with respect to the foregoing matters.

(b) cause 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 the Remaining Matters including the Remaining Property or operations, wind-down or other activities, including, without limitation:

1. entering into any agreements or disclaiming any agreements;
2. retaining or terminating employees or contractors, including preparing and filing the Sears Canada Entities' employee-related remittances, T4 statements and records of employment for the Sears Canada Entities' former employees based solely upon information provided by the Sears Canada Entities and on the basis that the Monitor shall incur no liability or obligation to any Person with respect to such returns, remittances, statements, records or other documentation;
3. in the event of dissolution and winding up of any of the Sears Canada Entities, executing, acknowledging and filing all necessary or appropriate certificates or other documents with the appropriate governmental agency or unit on behalf of any such Sears Canada Entity and taking any other action necessary or appropriate to effect such dissolution and wind-up of each such Sears Canada Entity and withdrawing such Sears Canada Entity from qualification in any jurisdiction it is qualified to do business, including without limitation, executing and filing certificates of dissolution and paying of any associated filing fees and the filing of any tax returns deemed necessary or appropriate (and paying the related taxes) on behalf of such entity on the basis that the Monitor shall incur no liability or obligation to any Person with respect to such matters;

(c) cause the Sears Canada Entities to administer the Remaining Property of the Sears Canada Entities as the Monitor considers necessary or desirable for the purposes of completing any transaction involving any Remaining Property or for purposes of facilitating distributions to creditors of the Sears Canada Entities, whether by way of a Plan or otherwise;

(d) cause the Sears Canada Entities to engage assistants or advisors as the Monitor deems necessary to carry out the Remaining Matters and to provide instructions and directions to any current advisors of the Sears Canada Entities;

(e) have authority to sign such agreements, instruments and other documents on behalf of each of the Sears Canada Entities as the Monitor deems appropriate, whether in the Monitor's name or in the name of and on behalf of any one of the Sears Canada Entities (including, without limitation, financial statements, tax returns and tax filings);

(f) ~~as appropriate, delegate to any employee of the Sears Canada Entities (an "Authorized Representative")~~ the authority to sign such agreements, instruments, notices, directions, settlements, regulatory and tax filings, certificates, authorizations and other documents on behalf of each of the Sears Canada Entities as the Monitor may direct;

(g) be authorized but not obligated to take any and all corporate actions and actions regarding the governance of the Sears Canada Entities (the "**Governance Action**"), including without limitation, authorizing and effecting:

1. amendments or updates to bylaws;
2. amendments to certificates of incorporation;
3. merger or consolidation with any entity;
4. changes to the jurisdiction of incorporation or formation; and
5. dissolution and winding up of any of the Sears Canada Entities;

provided, in each case, that such actions do not have an adverse effect on any creditors of the Applicants, and any Governance Action so taken by the Monitor is hereby authorized without requiring any further action or approval by the applicable entity or the Remaining Directors, former or existing shareholders or officers.

(h) where appropriate or necessary to conduct the administration of the estate, consult with and provide regular updates to stakeholders of the Sears Canada Entities and their advisors and report to the Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to its exercise of the enhanced powers provided herein and other matters as may be relevant to the CCAA proceedings; and

(i) be entitled to exercise any and all of the rights and powers of the Sears Canada Entities set out herein and in any other Order in the CCAA proceedings and to perform such other duties or to take any steps reasonably incidental to the exercise of the powers and obligations conferred upon the Monitor herein.

The Remaining Directors are not removed from their positions as a result of this protocol. Bennett Jones LLP will continue to advise its current clients that were directors of Sears Canada Inc. on June 22, 2017 in dealing with D&O insurers and matters relating to the CCAA proceedings. Following the approval of this protocol by the Court, the Remaining Directors (and the remaining directors of the other Applicants) will have no liability, obligation or responsibility with respect to the Remaining Matters or any other matter over which the Monitor or any other person exercises control in accordance with this protocol. For greater certainty, this specifically does not relate to any liability, obligation or responsibility of the Remaining Directors (and the remaining directors of the other Applicants) that arose prior to the Court approval of the Order related to these Governance Protocols. The payment of legal fees of counsel to the Remaining Directors shall be subject to the approval of the Monitor as to scope and reasonability.

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
SEARS CANADA INC., et al.

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

Proceeding commenced at TORONTO

**GOVERNANCE PROTOCOL AND STAY EXTENSION
ORDER**

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Lawyers to the Monitor, FTI Consulting Canada Inc.

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

and

ESL Investments Inc. *et al.*

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

Plaintiff

Defendants

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

Proceeding commenced at TORONTO

**MOTION RECORD OF THE MONITOR
(WAIVER OF PRIVILEGE MOTION)
(RETURNABLE MARCH 20, 2019)**

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as Court-Appointed Monitor