

**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

**RESPONDING FACTUM OF THE DEFENDANTS,
WILLIAM HARKER AND WILLIAM CROWLEY
(WAIVER OF PRIVILEGE MOTION)**

March 15, 2019

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Defendants

**RESPONDING FACTUM OF THE DEFENDANTS,
WILLIAM HARKER AND WILLIAM CROWLEY**

PART I - OVERVIEW

1. The Defendants William Harker and William Crowley are not opposed in principle to waiver of privilege in respect of certain documents relevant to this action and the other related actions.¹ However, the approach proposed by the Plaintiff FTI Consulting Canada Inc. ("FTI") must be modified to provide for a fair process that accounts for the Former Directors' legal rights.

2. First, certain legal advice was provided jointly to Sears Canada Inc. ("Sears Canada") and the Former Directors. The privilege arising from that advice cannot be waived without the consent of both Sears Canada and the Former Directors. Moreover, any decision by one of the beneficiaries of that joint privilege to waive it must be made on an informed basis.

¹ Ephraim J. Bird, Douglas Campbell, James McBurney, and Donald Ross, who are Defendants in the related actions, take the same position as the Defendants William Harker and William Crowley (together, the "Former Directors").

3. Accordingly, in order to protect the rights and interests of the Former Directors, the protocol to address joint privilege over Sears Canada documents must:

- (a) allow each beneficiary of joint privilege to review the documents over which they have a claim of joint privilege, so that they may consider the question of waiver in an informed manner; and
- (b) allow each such beneficiary to propose waiver of privilege over some or all of those documents, while providing all other beneficiaries an opportunity to agree, or to dispute the proposed waiver and have the matter resolved by the court.

4. FTI cannot and should not have an exclusive right to review joint privilege documents or an exclusive ability to select documents (the existence of which are within its exclusive knowledge), in respect of which that joint privilege should be waived.

5. Second, certain legal advice was provided to Sears Canada in connection with a class action commenced by 1291079 Ontario Limited in 2013 relating to certain franchise law matters (the "2013 Class Action"). Waiver of privilege in connection with the 2013 Class Action, without the consent of the Former Directors, would be inappropriate and prejudicial because:

- (a) the Former Directors were privies to that privilege in 2013 and thereafter;
- (b) the 2013 Class Action is the very foundation of the class action commenced by the same Plaintiff in 2015 (the "2015 Class Action"), which was threatened against the Former Directors in 2013 and in which they are now Defendants;
- (c) the Defendants in the 2015 Class Action have the only remaining interest in the defence of the allegations made in the 2013 Class Action, and as such are entitled to the benefit of the privilege relating to the 2013 Class Action; and

- (d) there is a substantial risk that the Plaintiff in the 2015 Class Action could use documents protected by privilege in the 2013 Class Action unfairly against the Former Directors in the 2015 Class Action.

6. Accordingly, the same approach to waiver of privilege proposed above relating to joint privilege should be employed in respect of the 2013 Class Action privileged documents. The approach proposed by the Former Directors is incorporated into the form of order at Schedule “C”.

7. Finally, with respect to the production of insurance policies that may respond to this action and the related actions, all such policies were produced to FTI and the Plaintiffs in the related actions more than a month ago.

PART II - THE FACTS

A. Waiver Must Preserve Other Rights

8. In its capacity as monitor in the Sears Canada CCAA proceedings, FTI has “full and complete access” to the property of Sears Canada, including its “books, records, data, including data in electronic form, and other financial documents”. FTI is currently in possession of certain Sears Canada documents that are relevant to the related actions, some of which are privileged.²

9. FTI 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.³ The Former Directors are not opposed in principle. However, they believe that any such waiver must occur in a manner that respects their legal rights and interests.⁴

10. In particular, the Former Directors seek to ensure that privilege is not waived without their informed consent or a court order over (i) documents subject to joint privilege in their favour and

² Motion Record of the Monitor (“Motion Record”), Tab 2, Affidavit of Geoff Mens sworn February 7, 2019 (“Mens Affidavit”), paras. 4-5, 15, p. 9, 12.

³ Motion Record, Tab 2, Mens Affidavit, para. 15, p. 12.

⁴ Responding Motion Record (“Responding Record”), Tab 1, Affidavit of John Birch sworn February 21, 2019 (“Birch Affidavit”), paras. 4-5, p. 2.

(ii) privileged documents relating to the 2013 Class Action, since such waiver could prejudice or harm their interests.⁵ The Former Directors cannot exercise informed consent unless they have the opportunity to review these documents before deciding whether to consent to waiver.

11. Moreover, in light of the Former Directors' interest in these documents, it would be contrary to the Former Directors' legal rights and unfair to vest FTI with exclusive discretion to determine which privileged documents should be proposed for waiver. The Former Directors should also be entitled to propose waiver of privilege over jointly privileged and 2013 Class Action documents, subject to the consent of FTI or a court order.

12. The Former Directors have attempted to negotiate these matters with FTI. In response to these negotiations, FTI has revised its initial proposed form of order.⁶ However, these revisions fall short of adequately protecting the rights and interests of the Former Directors.

13. Accordingly, the Former Directors have included their own form of order at Schedule "C" to this factum. That form of order will accomplish the waiver of privilege sought by FTI over all Sears Canada documents that are relevant to the related actions, subject to the following:

- (a) documents subject to joint privilege will be excluded from the waiver, produced to the parties with a potential claim to the privilege, and then any party with such a claim to the privilege may propose waiver of such privilege, which will be determined on consent or by the court; and
- (b) documents subject to privilege relating to the 2013 Class Action will be excluded from the waiver, produced to the Former Directors, and then either FTI or the Former Directors may propose waiver of such privilege, which will be determined on consent or by the court.

⁵ Responding Record, Tab 1, Birch Affidavit, paras. 6-10, pp. 2-3.

⁶ Responding Record, Tab 1, Birch Affidavit, paras. 11-12, p. 3.

B. All Insurance Policies Were Produced

14. For several years, Sears Canada had insurance policies covering liability of directors and officers. However, those policies contain a “prior acts exclusion” endorsement that denies coverage for any claim based on “wrongful acts” occurring prior to October 15, 2014. The acts or omissions giving rise to the related actions are alleged to have occurred prior to that date.⁷

15. Accordingly, although counsel to the Former Directors provided notice of the related actions to the insurers of Sears Canada, those insurers have taken the position that their policies do not respond to, or provide indemnification in respect of, the related actions.⁸

16. However, the insurers of Sears Holdings Corporation have advised the Former Directors that insurance policies purchased by Sears Holdings Corporation, not Sears Canada, which cover the 2015 to 2016 policy year, may respond to this action and the related actions on the basis that those insurance policies were in effect when the first of the related actions – the 2015 Class Action – was commenced.⁹

17. Accordingly, on February 12, 2019, the Former Directors produced these insurance policies to each of the Plaintiffs in each of the related actions. These insurance policies are all of the insurance policies that the Former Directors believe may provide coverage in respect of the related actions.¹⁰

18. No insurer has actually confirmed that it will indemnify Messrs. Harker or Crowley, or any other of the Former Directors, in respect of any liability that they may ultimately be found to have in connection with the related actions.¹¹

⁷ Responding Record, Tab 1, Birch Affidavit, para. 15, p. 4.

⁸ Responding Record, Tab 1, Birch Affidavit, para. 16, p. 4.

⁹ Responding Record, Tab 1, Birch Affidavit, para. 14, p. 4.

¹⁰ Responding Record, Tab 1, Birch Affidavit, para. 13, p. 4; Responding Record, Tab 1B, Exhibit “B”, pp. 12-13.

¹¹ Responding Record, Tab 1, Birch Affidavit, para. 17, p. 4.

PART III - ISSUE & THE LAW

19. There are two issues on this motion:
- (a) whether the protocol for waiver of privilege should provide an ability for the Former Directors to give informed consent to waiver, and propose waiver, over (i) jointly privileged documents and (ii) harmful and prejudicial privileged documents; and
 - (b) whether additional insurance policies, which are not responsive to the claims advanced in the related actions, must in any event be produced.

A. Informed Consent and Right to Propose Waiver

(i) Joint Privileged Documents

20. There is no dispute between the parties that certain legal advice was provided jointly to Sears Canada and the Former Directors. The joint privilege arising from such advice cannot be waived by either of Sears Canada or the Former Directors without the consent of the other.¹²

21. The form of order proposed by FTI sets out a protocol for addressing the joint privilege of these documents unless and until they are proposed for production by FTI. In that event, the Former Directors are provided with a list of the documents and given an opportunity to consent or dispute production, and if they dispute production they may make submissions to the court.

22. This protocol fails to protect the rights and interests of the Former Directors because:

- (a) it denies them the necessary opportunity to give informed consent to any proposed waiver based on the content of each joint privileged document, and instead forces them to make “blind decisions” relating to a highly important matter based on the name of each document alone, as set out on a list compiled by an adverse party; and

¹² Former Directors’ Book of Authorities, Tab 3, *Chiang, Re*, 2013 ONSC 6753, para. 16.

- (b) it denies them the ability to initiate the process of waiving privilege over joint privileged documents, and instead allows FTI to withhold all joint privileged documents for which it does not wish to initiate the waiver process – in which case, despite having a privilege claim over those documents, the Former Directors will never become aware that those documents exist.

23. FTI should not be permitted to review, analyze, and “cherry pick” which joint privilege documents to disclose to the Former Directors, the very people to whom the privilege belongs. As such, the form of order and joint privilege protocol proposed by FTI effects a process that is unfair to the Former Directors and disregards their rights and interests.

24. The protocol proposed by the Former Directors addresses these deficiencies by ensuring that each beneficiary of any joint privilege (whether Sears Canada, the Former Directors, or other Defendants) has the opportunity:

- (a) to review the documents in respect of which they may have a claim to joint privilege so that they can consider the question of waiver in an informed manner; and
- (b) to propose that privilege be waived over some or all of the documents in respect of which they have a claim to joint privilege, while providing all other beneficiaries of that joint privilege an opportunity to agree to the waiver, or to dispute the waiver, in which case the matter is resolved by the court.

25. This is the sensible and fair approach to protecting joint privilege. It will allow every beneficiary of that joint privilege equal rights in and to the privileged documents.

(ii) The 2013 Class Action Privileged Documents

26. The same approach as outlined above should be taken with respect to potentially privileged documents relating to the 2013 Class Action. Waiver of privilege in connection with

those documents, without the consent of the Former Directors, would be inappropriate, unfair, and highly prejudicial in the circumstances. Although the Former Directors were not Defendants in the 2013 Class Action:

- (a) they are privies, not strangers, to the privilege – they were directors or officers of Sears Canada when the 2013 Class Action was commenced and for a significant period of time thereafter and, as such, would have received or had access to the privileged documents now in issue;
- (b) they are Defendants in the 2015 Class Action, which is derivative of the 2013 Class Action (as an oppression claim based on the class’s status as contingent judgment creditors due to the existence of the 2013 Class Action), and which was threatened and contemplated in 2013; and
- (c) the Defendants in the 2015 Class Action, including the Former Directors, have the only remaining interest – and a necessary interest – in defending the allegations made in the 2013 Class Action.

27. As such, the Former Directors are successors in interest with respect to the defence of the 2013 Class Action – they are required to defend the allegations made in the 2013 Class Action, which is no longer proceeding, in order to defend the derivative 2015 Class Action brought by the same Plaintiff. Accordingly, the Former Directors are entitled to the benefit of lawyer-client privilege relating to the 2013 Class Action:

Solicitor and client privilege belonging to a predecessor in title can be asserted by his or her successor in title. Thus, the privilege of the original owner continues to a successor in title.¹³

¹³ Former Directors’ Book of Authorities, Tab 7, *Upm-Kymmene Corp. v. Repap Enterprises Inc.* (2001), 109 A.C.W.S. (3d) 222 (Ont. Sup. Ct.), para. 10.

28. Moreover, the Former Directors should likewise be entitled to the benefit of litigation privilege relating to the 2013 Class Action because:

- (a) the 2013 Class Action and the 2015 Class Action are inextricably linked, and the underlying claims made in the 2013 Class Action remain crucial to the claims made and defences available in the 2015 Class Action; and
- (b) litigation privileged documents prepared in the context of the 2013 Class Action were also prepared in contemplation of the 2015 Class Action, which had been threatened as against the Former Directors at that time.

29. The purpose of the litigation privilege arising in the context of the 2013 Class Action was to create a zone of privacy including “in relation to pending or apprehended litigation.”¹⁴ There is no basis to defeat that purpose given that the 2015 Class Action remains ongoing:

litigation is not over until it is over. It cannot be said to have “terminated”, in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.¹⁵ [emphasis added]

30. Since the Former Directors would have received or had access to the privileged 2013 Class Action documents at the time, and since they are related parties who remain locked in essentially the same legal combat, they are entitled to that litigation privilege, which continues to survive for their benefit notwithstanding the stay of the 2013 Class Action:

Litigation privilege that arose in one proceeding may continue to be protected in another proceeding even if it involves different parties provided the litigation in which the privilege is now asserted is sufficiently related.¹⁶ [emphasis added]

¹⁴ Former Directors’ Book of Authorities, Tab 1, *Blank v. Canada (Department of Justice)*, 2006 SCC 39, para. 34.

¹⁵ Former Directors’ Book of Authorities, Tab 1, *Blank v. Canada (Department of Justice)*, 2006 SCC 39, para. 34.

¹⁶ Former Directors’ Book of Authorities, Tab 4, *Kaymar Rehabilitation Inc. v. Champlain Community Care*, 2013 ONSC 1754, para. 49.

31. With respect to both types of privilege, waiver requires the consent of the Former Directors as successors in interest:

The privilege which arises out of the professional legal relationship is that of the client and does not belong to the solicitor. This is also the case with respect to 'anticipation of litigation' privilege although it has its origin in the protection of the solicitors' brief rather than client communications. Only the client or his or her successors in interest, if so predisposed, may waive the solicitor-client privilege.¹⁷ [emphasis added]

32. Accordingly, and given that there is a substantial risk that the Plaintiff in the 2015 Class Action could use documents protected by privilege in the 2013 Class Action unfairly against the Former Directors in the 2015 Class Action, the joint privilege protocol proposed by the Former Directors should equally apply to the privileged 2013 Class Action documents.

B. Insurance Policies Were Appropriately Produced

33. Rule 30.02(3) of the *Rules of Civil Procedure* provides that any insurance policy which may satisfy all or part of the judgment in an action must be produced if requested. The Former Directors have complied with that rule.¹⁸

34. Upon request, the Former Directors produced to FTI and the Plaintiffs in the related actions all insurance policies which may satisfy all or part of a judgment in any of the related actions. According to the Former Directors' insurers, no other policies apply.¹⁹

35. The purpose of rule 30.02(3) is to provide a specific and limited exception to the general rule that only relevant documents need to be produced.²⁰ Requiring the Former Directors to produce insurance policies which will not respond to the related actions take this exception a step further and a step too far.

¹⁷ Former Directors' Book of Authorities, Tab 6, Sopinka, Lederman & Bryant, *The Law of Evidence*, 5th ed. (Toronto: LexisNexis Canada, 2018), pp. 1021-1022.

¹⁸ R.R.O. 1990, Reg. 194, r. 30.02(3).

¹⁹ Responding Record, Tab 1, Birch Affidavit, para. 13, p. 4, Responding Record, Tab 1B, Exhibit "B", pp.12-13.

²⁰ Former Directors' Book of Authorities, Tab 5, *Pye Bros. Fuels Ltd. v. Imperial Oil Ltd.*, 2012 ONCA 153, para. 9.

36. The Court of Appeal has confirmed that, in interpreting rule 30.02(3), a court is entitled to consider the purpose for which production of an insurance policy is sought. The rule should not be used as “a means to obtain discovery of documents in advance of commencing a separate action relating to coverage or contractual obligations”, or for another collateral purpose.²¹

37. Given that the policies sought by FTI do not respond to the related actions, as confirmed by the insurers themselves, the request for production by FTI is improper and there is no basis to order such production.

PART IV - ORDER REQUESTED

38. The Former Directors have an interest in the privilege that FTI seeks to waive and oppose the form of order sought by FTI because it does not sufficiently address the Former Directors’ legal rights and interests. Rather, it vests FTI with authority to waive Sears Canada’s privilege unfairly in its discretion. Such an approach is impermissible.²²

39. The Former Directors therefore request an order in the form attached as Schedule “C”, which provides the necessary protections to them in the event of a waiver of privilege relating to Sears Canada’s documents.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of March, 2019.



CASSELS BROCK & BLACKWELL LLP

²¹ Former Directors’ Book of Authorities, Tab 5, *Pye Bros. Fuels Ltd. v. Imperial Oil Ltd.*, 2012 ONCA 153, para. 9.

²² Former Directors’ Book of Authorities, Tab 2, *Bre-X Minerals Ltd., Re*, 2001 ABCA 255.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Blank v. Canada (Department of Justice)*, 2006 SCC 39
2. *Bre-X Minerals Ltd., Re*, 2001 ABCA 255
3. *Chiang, Re*, 2013 ONSC 6753
4. *Kaymar Rehabilitation Inc. v. Champlain Community Care*, 2013 ONSC 1754
5. *Pye Bros. Fuels Ltd. v. Imperial Oil Ltd.*, 2012 ONCA 153
6. Sopinka, Lederman & Bryant, *The Law of Evidence*, 5th ed. (Toronto: LexisNexis Canada, 2018)
7. *Upm-Kymmene Corp. v. Repap Enterprises Inc.* (2001), 109 A.C.W.S. (3d) 222 (Ont. Sup. Ct.)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Insurance Policy

30.02(3) A party shall disclose and, if requested, produce for inspection any insurance policy under which an insurer may be liable,

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

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

but no information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action.

SCHEDULE "C"
FORM OF ORDER

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

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in its capacity as Court-appointed monitor in proceedings
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ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, WILLIAM HARKER
and WILLIAM CROWLEY

Defendants

ORDER

THIS MOTION made by FTI CONSULTING CANADA INC., in its capacity as Court-appointed monitor in proceedings pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c. c-36 (the **Monitor**), was heard this day at 330 University Avenue, Toronto, Ontario.

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

AND UPON HEARING the oral submissions of the parties,

1 THIS COURT ORDERS that, subject to paragraphs 2 through 6 below, privilege in favour of Sears Canada Inc. (**Sears Canada**) is hereby waived over all documents relevant to this action and the related actions commenced by each of the Litigation Trustee (Court File No CV-18-00611214-00CL), Morneau Shepell Ltd. in its capacity as administrator of Sears

Canada's Registered Pension Plan (Court File No. CV-18-00611217-00CL), and certain former "Sears Hometown" dealers (Court File No. 4114/15 (Milton)) (the **2015 Action** and, collectively with the other three actions, the **Related Actions**), that are in the power, possession or control of the Monitor or Sears Canada except those documents related to the class proceeding commenced by 1291079 Ontario Ltd. against Sears Canada (Court File No. 3769/13-CP (Milton)) (the **2013 Action**) .

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

- (a) documents that contain any communication that is between a lawyer and any of ESL Investments Inc., Edward S. Lampert, ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP, or ESL Institutional Partners (collectively, the **ESL Parties**) and/or Sears Holdings Corporation;
- (b) documents containing any communication by or to the ESL Parties and/or Sears Holdings Corporation and/or any current or former directors or officers of the Sears Canada Entities (as such term is defined in the Initial Order in the CCAA proceeding Court File No. CV-17-11846-00CL) (a **Current or Former D&O**) created on or after November 26, 2013 and relating to the 2015 Action or the 2013 Action; and
- (c) documents containing communications between a lawyer and a Current or Former D&O for which privilege could reasonably be asserted by a Current or Former D&O, or documents that reflect legal advice or litigation work product prepared for the benefit of a Current or Former D&O, whether alone or as part of

a joint retainer (hereafter, items (a), (b), and (c) shall be referred to collectively as the **Potentially Shared Privileged Documents**).

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

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

5 THIS COURT ORDERS that the Monitor shall produce the Potentially Shared Privileged Documents to each of the ESL Parties and the Current or Former D&Os who are defendants in any of the Related Actions (the **Defendant D&Os**), as applicable, and shall produce the SCI Hometown Documents to the Defendant D&Os.

6 THIS COURT ORDERS that in the event that any party intends to produce any Potentially Shared Privileged Documents or SCI Hometown Documents, that party shall provide a list of such documents on reasonable notice, which shall be no less than seven days, to the Monitor, the ESL Parties, Sears Holdings Corporation and/or the Defendant 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 within the time period specified in such notice to the Monitor, the ESL Parties, Sears

Holdings and/or the Defendant D&Os, as the case may be, then the Potentially Shared Privileged Documents or the SCI Hometown Documents listed may be produced and any claim to privilege, including privilege in favour of Sears Canada is deemed to be waived.

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

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

ESL Investments Inc. *et al.*

and

Plaintiff

Defendants

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at TORONTO

ORDER

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

BLACKLINE

**SHOWING CHANGES TO FTI'S FORM OF ORDER
AS PROPOSED BY THE FORMER DIRECTORS**

**ONTARIO
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THE HONOURABLE) WEDNESDAY, THE 20th
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2 THIS COURT ORDERS that prior to any production of documents by the Monitor in this action and the Related Actions, the Monitor shall take reasonable steps to review such documents to identify any:

- (a) documents that contain any communication that is between a lawyer and any of ESL Investments Inc., Edward S. Lampert, ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP, or ESL Institutional Partners (collectively, the **ESL Parties**) and/or Sears Holdings Corporation;
- (b) documents containing any communication by or to the ESL Parties and/or Sears Holdings Corporation and/or any current or former directors or officers of the Sears Canada Entities (as such term is defined in the Initial Order in the CCAA proceeding Court File No. CV-17-11846-00CL) (a **Current or Former D&O**) created on or after November 26, 2013 and ~~directly in response~~relating to the 2015 Action or ~~a class proceeding commenced by 1291079 Ontario Ltd. against Sears Canada in the Ontario Superior Court of Justice (Milton) bearing Court File No. 3769/13-CP) (the 2013 Action)~~the 2013 Action; and
- (c) documents containing communications between a lawyer and a Current or Former D&O for which privilege could reasonably be asserted by a Current or Former

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

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

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

5 THIS COURT ORDERS that the Monitor shall produce the Potentially Shared Privileged Documents to each of the ESL Parties and the Current or Former D&Os who are defendants in any of the Related Actions (the Defendant D&Os), as applicable, and shall produce the SCI Hometown Documents to the Defendant D&Os.

6 THIS COURT ORDERS that in the event that ~~the Monitor~~ any party intends to produce any Potentially Shared Privileged Documents, ~~the Monitor~~ or SCI Hometown Documents, that party shall provide a list of such documents on reasonable notice, which shall be no less than seven days, to the Monitor, the ESL Parties, Sears Holdings Corporation and/or the ~~Current or Former~~ Defendant 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 Monitor, the ESL Parties, Sears Holdings and/or the ~~Current or Former~~ Defendant D&Os, ~~then as~~ the ~~Monitor case~~ may ~~produce~~ be, then the Potentially Shared Privileged Documents ~~or~~ the SCI Hometown Documents listed may be produced and any claim to privilege, including privilege in favour of Sears Canada is deemed to be waived.

~~6 THIS COURT ORDERS that in the event that the Monitor intends to produce any SCI Hometown Documents, the Monitor shall provide a list of such documents on reasonable notice, which shall be no less than seven days, to the Current or Former D&Os, so that any issue regarding privilege may be resolved by the parties or determined by this Court. If no response is received by the Monitor within the time period specified in such notice to the Current or Former D&Os, then the Monitor may produce the SCI Hometown Documents. This paragraph 6 is not intended to determine whether any SCI Documents are the subject of a valid claim of privilege by any party.~~

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

FTI CONSULTING CANADA INC. -and-
Plaintiff

ESL INVESTMENTS INC *et al.*
Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

**RESPONDING FACTUM OF THE DEFENDANTS
WILLIAM HARKER AND WILLIAM CROWLEY
(WAIVER OF PRIVILEGE MOTION)**

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