

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

FTI CONSULTING CANADA INC.,  
in its capacity as Court-appointed monitor in proceedings  
pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c. c-36

Plaintiff

- and -

ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS, LP, SPE MASTER I, LP,  
ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, WILLIAM HARKER  
and WILLIAM CROWLEY

Defendants

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

March 8, 2019

**CASSELS BROCK & BLACKWELL LLP**

2100 Scotia Plaza  
40 King Street West  
Toronto, ON M5H 3C2

**William J. Burden LSO #: 15550F**

Tel: 416.869.5963  
Fax: 416.640.3019  
bburden@casselsbrock.com

**Wendy Berman LSO #: 32748J**

Tel: 416.860.2926  
Fax: 416.640.3107  
wberman@casselsbrock.com

**John N. Birch LSO #: 38968U**

Tel: 416.860.5225  
Fax: 416.640.3057  
jbirch@casselsbrock.com

Lawyers for the Defendants  
William Harker and William Crowley

TO: **NORTON ROSE FULBRIGHT CANADA LLP**  
Royal Bank Plaza, South Tower  
200 Bay Street, Suite 3800  
Toronto, ON M5J 2Z4

**Orestes Pasparakis LSO#: 36851T**  
Tel: 416.216.4815  
Fax: 416.216.3930  
orestes.pasparakis@nortonrosefulbright.com

**Robert Frank LSO #: 35456F**  
Tel: 416.202.6741  
Fax: 416.216.3930  
robert.frank@nortonrosefulbright.com

**Evan Cobb LSO#: 55787N**  
Tel: 416.216.1929  
Fax: 416.216.3930  
evan.cobb@nortonrosefulbright.com

Lawyers for the Plaintiff

AND TO: **POLLEY FAITH LLP**  
The Victory Building  
80 Richmond Street West  
Suite 1300  
Toronto, ON M5H 2A4

**Harry Underwood LSO #: 20806C**  
Tel: 416.365.6446  
Fax: 416.365.1601  
hunderwood@polleyfaith.com

**Andrew Faith LSO #: 47795H**  
Tel: 416.365.1602  
Fax: 416.365.1601  
afaith@polleyfaith.com

**Sandy Lockhart LSO #: 73554J**  
Tel: 416.306.6450  
Fax: 416.365.1601  
slockhart@polleyfaith.com

Lawyers for the Defendants  
ESL Investments Inc., ESL Partners, LP,  
SPE I Partners, LP, SPE Master I, LP,  
ESL Institutional Partners, LP, and Edward S. Lampert

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**PART I - OVERVIEW**

1. The Defendants William Harker and William Crowley seek nothing more than access to corporate documents which they are contractually entitled to obtain and which must be produced by the Plaintiff FTI Consulting Canada Inc. ("FTI") in any event in the ordinary course.
2. Together with Ephraim J. Bird, Douglas Campbell, James McBurney, and Donald Ross (collectively, the "Former Directors"), they seek the same type of production in the parallel proceeding commenced by the litigation trustee (together with FTI, the "Plaintiffs").
3. In the unique circumstances of these proceedings, the documents sought are essential and necessary to allow the Former Directors to properly and adequately respond to the claims in their statements of defence.

4. The request by the Former Directors to have document production take place in a slightly different sequence is consistent with the objective of ensuring that these actions proceed to trial in February 2020 in the most just, cost-effective and efficient manner.

5. Moreover, it would be unfair to the Former Directors to require them to incur the additional cost and suffer the inefficiency that will result from filing and then amending inadequate and incomplete statements of defence, and possibly arguing motions in connection with those amendments, after they have reviewed the relevant documents requested but currently held back by the Plaintiffs.

6. With a view to defending this action in the most cost-effective and expeditious way, the Former Directors requested production from the Plaintiffs on a number of occasions before seeking recourse from the court. Importantly, in doing so, the Former Directors have raised their indemnification agreements with Sears Canada, which provide them with a specific contractual right to access the documents requested – which the Plaintiffs have ignored.

7. The Plaintiffs have offered no principled basis to refuse production. Rather, but only in the face of this motion, FTI produced a hand-picked, narrow, and inadequate subset of documents. This restrictive production did not correct the imbalanced and unfair position in which the Former Directors find themselves. Nor did it address the rights of the Former Directors to broad, comprehensive access to Sears Canada Inc. (“Sears Canada”) documents and information relating to the defence of any proceeding pursuant to their individual director indemnification agreements and pursuant to general corporate law and governance policy objectives.

8. While the Plaintiffs have many thousands of Sears Canada documents relating to the Former Directors’ conduct, which they used to prepare their statements of claim, the Former Directors still do not have sufficient information to answer the allegations made, most of which relate to events that occurred between five and ten years ago.

9. Production of relevant non-privileged corporate documents by the Plaintiffs would not be onerous. The Plaintiffs have already spent many months reviewing and analyzing these documents. Moreover, such production by the Plaintiffs to the Former Directors will be necessary in the ordinary course of these proceedings in any event.

10. The Former Directors require the documents requested to plead, they have a contractual right to those documents to prepare their statements of defence, and early production is the most expedient, fair, and cost effective path to trial. Accordingly, the Plaintiffs should be required to produce the relevant non-privileged Sears Canada documents within their possession, control, or power at this stage of the proceedings.

## **PART II - THE FACTS**

### **A. Background**

11. Sears Canada and its affiliated companies (collectively, the “Sears Entities”) obtained protection under the CCAA on June 22, 2017 pursuant to an initial order (as amended and restated, the “Initial Order”).<sup>1</sup>

12. Pursuant to the Initial Order, FTI was appointed as monitor of the Sears Entities. The Initial Order also provided that no proceeding could be commenced or continued against any former directors or officers of the Sears Entities.<sup>2</sup>

13. On March 2, 2018, the court issued an order (amended April 26, 2018) appointing Lax O’Sullivan Lisus Gottlieb LLP (“Lax O’Sullivan”) as litigation investigator of the Sears Entities. Lax O’Sullivan was given a mandate to investigate and report on potential rights and claims of the Sears Entities or their creditors against third parties, including Sears Canada’s former directors.<sup>3</sup>

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<sup>1</sup> Motion Record, Tab 2, Affidavit of John Birch sworn February 7, 2019 (“Birch Affidavit”), para. 3, p. 10.

<sup>2</sup> Motion Record, Tab 2A, Birch Affidavit, Exhibit “A”, pp. 22-49.

<sup>3</sup> Motion Record, Tab 2, Birch Affidavit, para. 5, p. 10; Motion Record, Tab 2B, Exhibit “B”, pp. 50-62.

14. On December 3, 2018, the court ordered that the stay provided by the Initial Order (as extended) be lifted to permit certain claims to be continued or commenced against, among others, the Former Directors (the “Lift-Stay Order”).<sup>4</sup>

15. On December 19, 2018, three actions were commenced against, among others, the Former Directors: (i) this action; (ii) an action by the litigation trustee, represented by Lax O’Sullivan, the former litigation investigator, and (iii) an action by the administrator of the Sears Canada registered pension plan (the “Actions”).<sup>5</sup> In addition, a putative class action commenced by a former dealer of Sears Canada against, among others, the Former Directors, in October 2015 was permitted to continue.<sup>6</sup>

16. Each of the Actions involve complex legal and factual issues and will be proceeding on an expedited timetable, with a trial currently scheduled to commence less than ten-and-a-half months from the return date of this motion. These Actions contain serious allegations and seek significant monetary and other relief against the Former Directors. In this action and the litigation trustee’s action, the Plaintiffs seek damages or compensation in the amount of \$509 million.<sup>7</sup>

17. The situation that the Former Directors face is extraordinary. Despite being adverse parties, the Plaintiffs have a significant informational advantage, having already obtained possession, by virtue of their roles as CCAA monitor and litigation investigator, of certain Sears Canada documents that the Former Directors were, and continue to be, entitled to access in connection with their work as members of Sears Canada’s board of directors (the “Board”).<sup>8</sup>

18. Indeed, FTI has possession of more than 100,000 of Sears Canada’s documents and has devoted significant time and resources to a targeted review of these documents to advance the

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<sup>4</sup> Motion Record, Tab 2, Birch Affidavit, para. 7, p. 11; Motion Record, Tab 2D, Exhibit “D”, pp. 76-85.

<sup>5</sup> Motion Record, Tab 2, Birch Affidavit, para. 9, p. 11.

<sup>6</sup> Motion Record, Tab 2, Birch Affidavit, para. 8, p. 11; Motion Record, Tab 2E, Exhibit “E”, pp. 86-101.

<sup>7</sup> Motion Record, Tab 2, Birch Affidavit, para. 10, p. 11.

<sup>8</sup> Motion Record, Tab 2, Birch Affidavit, para. 11, p. 12.

claims against the Former Directors, as detailed in the invoices filed in support of their court approved fees.<sup>9</sup>

19. FTI has shared these documents with Lax O'Sullivan (while it was the litigation investigator), and both FTI and Lax O'Sullivan reviewed and analyzed those Sears Canada documents over periods of more than fourteen months and nine months, respectively, before these proceedings were commenced.<sup>10</sup>

20. The Former Directors have not been afforded the same access to Sears Canada documents, which has caused a significant and unfair informational imbalance.<sup>11</sup>

**B. The Serious Allegations Cannot be Answered without the Documents**

21. This action and the litigation trustee's action are principally based on allegations that, more than five years ago, the Former Directors approved, and caused Sears Canada to pay, a \$509 million dividend to shareholders (the "Dividend").<sup>12</sup>

22. The claims made by the Plaintiffs are severe – breach of fiduciary duty, conspiracy, concealment, conflict of interest, oppression, among other things – and relate entirely to the Former Directors' roles on the Sears Canada Board.<sup>13</sup>

23. In particular, FTI alleges that the Defendants William Crowley and William Harker:

- (a) were directed by and acted in concert with certain shareholders of Sears Canada, which are also defendants in these proceedings, to implement a scheme to extract

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<sup>9</sup> Motion Record, Tab 2, Birch Affidavit, para. 13, p. 12; Motion Record, Tab 2I, Exhibit "I", pp. 176-243; Motion Record, Tab 2J, Exhibit "J", pp. 244-319.

<sup>10</sup> Motion Record, Tab 2, Birch Affidavit, paras. 11-13, p. 12; Motion Record, Tab 2K, Exhibit "K", pp. 320-332.

<sup>11</sup> Motion Record, Tab 2, Birch Affidavit, para. 12, p.12.

<sup>12</sup> Motion Record, Tab 2, Birch Affidavit, para. 10, p. 11; Motion Record, Tab 2F, Exhibit "F", para. 1(b), p. 106; Motion Record, Tab 2G, Exhibit "G", para. 1(a), p. 134.

<sup>13</sup> Motion Record, Tab 2F, Exhibit "F", pp. 103-129, Motion Record, Tab 2G, Exhibit "G", pp. 130-156.

cash improperly from Sears Canada through the disposition of its most valuable real estate assets;

- (b) were directed by and acted in concert with other defendants to implement a scheme to pay an extraordinary dividend for improper purposes;
- (c) improperly concealed from the Board their involvement in negotiations relating to the above-mentioned scheme; and
- (d) knew and recklessly disregarded operational and financial challenges, management projections and long term viability risk, and failed to exercise proper business judgment in approving the Dividend.<sup>14</sup>

24. These allegations directly implicate the conduct of the Defendants William Crowley and William Harker in the performance of their duties as directors, including their oversight responsibilities for certain corporate decisions, their practices (and past practices) as members of the Board regarding review and consideration of information relating to such decisions, and their communications with others at the relevant times and during their tenure on the Board.<sup>15</sup>

25. The Plaintiff in the litigation trustee action alleges that the Former Directors:

- (a) failed to authorize capital investments, and instead improperly and wrongfully authorized the sale of certain real estate assets and the distribution of capital to shareholders;
- (b) knew and recklessly disregarded operational and financial challenges, management projections and long term viability risk, and failed to exercise proper business judgment in approving the Dividend; and

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<sup>14</sup> Motion Record, Tab 2K, Exhibit "K", paras. 46-49, pp. 119-120.

<sup>15</sup> Motion Record, Tab 2, Birch Affidavit, para. 18, p. 14; Motion Record, Tab 2F, Exhibit "F", pp. 103-129.



- (c) failed to implement or ensure an adequate corporate governance process for the consideration of the Dividend, including full disclosure of all relevant information and obtaining necessary external professional advice.<sup>16</sup>

26. These allegations directly implicate the Former Directors' review and consideration of information provided to them by management through various board presentations, including those regarding Sears Canada's strategic plan for the years 2011 to 2014, their consideration of the financial implications of the closure of certain retail locations, and the process of authorizing payment of the Dividend.<sup>17</sup>

27. The events to which these allegations relate took place at least five years ago, and in some cases as much as fourteen years ago. Moreover, the Plaintiffs base their claims on events that long pre-date the payment of the Dividend in 2013. For example, in paragraphs 10 to 13 of the statement of claim in this action and in paragraphs 2 to 4 of the statement of claim in the litigation trustee action, allegations are made about events that go back to at least 2010.<sup>18</sup>

28. The Plaintiffs also rely on events taking place much earlier. For example, in paragraph 51 of the statement of claim in this action and in paragraph 49 of the statement of claim in the litigation trustee action, allegations relating to asset sales and dividend distributions are made that go back to 2005, when many of the Former Directors were not even on the Board.<sup>19</sup>

29. The Former Directors cannot properly and adequately plead and provide meaningful answer and defence to these serious allegations, which relate to events many years ago, without the opportunity to review and consider such information and documents.<sup>20</sup>

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<sup>16</sup> Motion Record, Tab 2G, Exhibit "G", paras. 4, 12, pp. 135, 137.

<sup>17</sup> Motion Record, Tab 2G, Exhibit "G", pp. 130-156.

<sup>18</sup> Motion Record, Tab 2F, Exhibit "F", paras. 10-13, pp.109-111.

<sup>19</sup> Motion Record, Tab 2F, Exhibit "F", paras. 10-13, pp.109-111.

<sup>20</sup> Motion Record, Tab 2, Birch Affidavit, para. 23, p.15.

**C. The Former Directors' Contractual Right to the Documents**

30. In addition to their need to obtain the documents requested to plead, the Former Directors are entitled to access those documents pursuant to the terms of individual director indemnification agreements with Sears Canada. These indemnification agreements provide the Former Directors with broad, comprehensive access to documents and information of Sears Canada relating to the defence of any proceeding.

31. In particular, the Former Directors' indemnification agreements contain the following provision entitling them to access the documents sought on this motion:

The Indemnified Party and the Corporation shall cooperate fully with each other and their respective counsel in **the investigation related to, and defence of, any proceeding and shall make available to each other all relevant books, records, documents and files** and shall otherwise use their best efforts to assist each other's counsel to conduct a proper and adequate defence.  
[emphasis added]

32. The Former Directors' entitlements to access documents pursuant to these provisions is consistent with general corporate law and governance policy, which aims to encourage participation as directors by providing important assurance regarding access to resources and information in the event of litigation relating to their service as directors.<sup>21</sup>

**D. Numerous Attempts to Obtain the Documents Rebuffed**

33. The Former Directors have taken the following steps to obtain the documents from the Plaintiffs, both prior to the Lift-Stay Order and thereafter:

- (a) a letter sent to counsel to FTI on October 19, 2018 requesting preservation and disclosure of Sears Canada documents;<sup>22</sup>

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<sup>21</sup> Motion Record, Tab 2, Birch Affidavit, para. 40, p. 19.

<sup>22</sup> Motion Record, Tab 2, Birch Affidavit, paras. 32-33, p. 17; Motion Record, Tab 2R, Exhibit "R", p. 378.

- (b) a letter sent to counsel to FTI and to the litigation trustee on November 20, 2018 requesting production of Sears Canada documents;<sup>23</sup>
- (c) a letter sent to counsel to FTI on January 28, 2019 requesting production of the documents sought on this motion;<sup>24</sup> and
- (d) a letter sent to counsel to the litigation trustee on January 31, 2019 requesting production of the documents sought on this motion.<sup>25</sup>

34. In these letters, the Former Directors explained their need to access the documents in connection with the investigations undertaken by the Plaintiffs and these proceedings, but the Plaintiffs have refused to produce them (and, more recently, simply ignored the requests). The Plaintiffs have not offered any principled basis to support their refusals.<sup>26</sup>

35. Although the Plaintiffs answered the Former Directors' requests to inspect the documents specifically referenced in the statements of claim,<sup>27</sup> and in the face of this motion provided a slim brief of documents already shared with other former directors,<sup>28</sup> such production:

- (a) does not correct the imbalanced and unfair position in which the Former Directors find themselves – these documents do not put them in a position to defend the proceedings; and
- (b) does not address the right of the Former Directors to access “all relevant books, records, documents and files” pursuant to their indemnification agreements.

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<sup>23</sup> Motion Record, Tab 2, Birch Affidavit, paras. 35-36, pp. 17-18; Motion Record, Tab 2T, Exhibit “T”, p. 382.

<sup>24</sup> Motion Record, Tab 2, Birch Affidavit, paras. 39-40, pp. 18-19; Motion Record, Tab 2W, Exhibit “W”, p. 391.

<sup>25</sup> Motion Record, Tab 2, Birch Affidavit, para. 41, p. 19; Motion Record, Tab 2X, Exhibit “X”, p. 393.

<sup>26</sup> Motion Record, Tab 2S, Exhibit “S”, p. 381; Motion Record, Tab 2U, Exhibit “U”, pp. 385-386.

<sup>27</sup> Responding Motion Record of the Plaintiff (“Responding Record”), Tab 1, Affidavit of Geoff Mens sworn February 21, 2019 (“Mens Affidavit”), paras. 5-6, p. 2.

<sup>28</sup> Responding Record, Tab 1, Mens Affidavit, para.10, p. 3; Responding Record, Tab 1J, Exhibit “J”, pp. 1273-1712.

**E. The Need To Prevent Delay**

36. The Plaintiffs will be required to produce the requested documents in the ordinary course of these proceedings in any event. Production by the Plaintiffs prior to the close of pleadings will not cause any delay. To the contrary, such production will prevent delay because it will:

- (a) prevent the Former Directors from being forced to file incomplete and inadequate statements of defence as a result of not having had an opportunity to conduct a meaningful review of relevant documents and information to adequately respond to allegations involving historic corporate actions; and
- (b) save the significant and unnecessary time and expense that would be incurred by pleadings amendments and associated motions.<sup>29</sup>

37. The approach proposed by the Former Directors is the best way to ensure that the trial date, set for February 2020, is not put in jeopardy.<sup>30</sup>

**PART III - ISSUE & THE LAW**

38. The only issue on this motion is whether the Plaintiffs should be required to produce relevant non-privileged documents now, rather than after the Former Directors deliver statements of defence. The Plaintiffs should be required to do so because:

- (a) the documents sought, which must be produced in any event in the ordinary course, are necessary and essential to prepare statements of defence;
- (b) proceeding in this manner is the most just, most expeditious, and least expensive way toward trial; and
- (c) the Former Directors have a contractual right to these documents.

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<sup>29</sup> Motion Record, Tab 2, Birch Affidavit, paras. 24-25, pp. 15-16.

<sup>30</sup> Motion Record, Tab 2, Birch Affidavit, para. 43, p. 19.

**A. The Documents Sought are Essential and Necessary**

**(i) Jurisdiction to order early production**

39. The Court may order document production at any time, including prior to the discovery phase, where it is in the interest of justice to do so and in accordance with rules 1.04 and 30.04(5) of the *Rules of Civil Procedure* (the “Rules”).<sup>31</sup>

40. Indeed, the courts have indicated that it may be considered a “general rule” that production should be ordered before the close of pleadings where “the court is satisfied that the documents at issue were essential or necessary for the purpose of allowing the requesting party to plead”.<sup>32</sup> The Court of Appeal has confirmed the availability of production before the close of pleadings “in exceptional circumstances to enable a party to plead.”<sup>33</sup>

**(ii) The documents are essential and necessary to plead**

41. While each case in which a request for early production is made turns on its own facts – what is essential and necessary is highly dependent upon the circumstances – the court has previously ordered production before the close of pleadings in circumstances where doing so would “level the playing field and give each of the litigants the same advantage with respect to the documents” and where a “motion may be averted”.<sup>34</sup>

42. The exceptional circumstances faced by the Former Directors merit production prior to the close of pleadings in the overriding interests of justice and fairness, to “level the playing field”, and to avoid unnecessary steps and motions.

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<sup>31</sup> R.R.O. 1990, Reg. 194, rr. 1.04, 30.04(5).

<sup>32</sup> Book of Authorities of the Defendants William Crowley and William Harker (“Former Directors’ Book of Authorities”), Tab 4, *De Iuliis v. Zilli*, 2014 ONSC 5515, para. 15.

<sup>33</sup> Former Directors’ Book of Authorities, Tab 6, *Meuwissen v. Strathroy Middlesex General Hospital* (2006), 154 A.C.W.S. (3d) 324 (Ont. C.A.), para. 6.

<sup>34</sup> Former Directors’ Book of Authorities, Tab 4, *De Iuliis v. Zilli*, 2014 ONSC 5515, para. 26; Former Directors’ Book of Authorities, Tab 5, *Kalen v. Brantford (City)*, 2011 ONSC 1891, para. 46.

43. Despite being adverse parties in these proceedings, the Plaintiffs have obtained possession of more than 100,000 Sears Canada documents – many of which the Former Directors were entitled to access and have possession of in connection with their work on the Board, but to which they do not now have access.<sup>35</sup>

44. The Plaintiffs also conducted a detailed review and analysis of those documents over a period of many months before these proceedings were commenced, and shared them with others, while denying the Former Directors similar access to conduct their own review and analysis for the purpose of understanding and defending against the very serious and complex claims made by the Plaintiffs.<sup>36</sup>

45. The Plaintiffs have maintained this unfair and uneven playing field without any principled basis and notwithstanding that the Former Directors were, and continue to be, entitled contractually to access the Sears Canada documents.

46. This unfairness is compounded by the fact that the allegations made in these proceedings relate primarily to events that took place at least five years ago, and in some cases as far back as fourteen years ago,<sup>37</sup> and directly implicate and engage:

- (a) communications with others, including management of Sears Canada, and use of information and documents provided to the Former Directors,<sup>38</sup>
- (b) practices and past practices of the Former Directors as members of the Board, including with respect to the process and financial implications of the closure of

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<sup>35</sup> Motion Record, Tab 2, Birch Affidavit, paras. 11-13, pp. 11-13; Motion Record, Tab 2I, Exhibit “I”, para. 22, p. 183, Motion Record, Tab 2K, Exhibit “K”, para. 11(b), p. 325.

<sup>36</sup> Motion Record, Tab 2, Birch Affidavit, para. 13, p. 12; Motion Record, Tab 2I, Exhibit “I”, para. 22, p. 183.

<sup>37</sup> Motion Record, Tab 2, Birch Affidavit, para. 19, p.14.

<sup>38</sup> Motion Record, Tab 2F, Exhibit “F”, pp. 103-129; Motion Record, Tab 2G, Exhibit “G”, pp. 130-156.

certain Sears Canada retail locations, and the process of authorizing payment of the Dividend;<sup>39</sup> and

(c) documents that the Former Directors created and reviewed at the relevant times.<sup>40</sup>

47. In defending these proceedings, the Former Directors are entitled to, and required to, provide “a concise statement of material facts” on which they rely in their statements of defence.<sup>41</sup>

In light of the nature of the allegations, the period of time to which they relate, and the documentary basis for these allegations, the Former Directors are not in a position to do so. In fact, it is the uncontroverted evidence of the Former Directors’ counsel that:

the documents sought on this motion are therefore essential and necessary for the purpose of allowing the Former Directors to adequately and properly plead [and that the Former Directors cannot] provide meaningful answer and defence to the serious allegations against them without first reviewing the documents sought.<sup>42</sup>

48. It would not be in the interests of justice to deny the Former Directors the opportunity to appropriately defend these proceedings in their statements of defence. The very purposes of pleadings include (i) to define with clarity and precision the issues or questions which are in dispute and (ii) to inform the court as to the precise matters in issue between the parties.<sup>43</sup>

49. The Former Directors are not in a position to meet these objectives, and it would be unfair to prevent them from doing so or to delay them from doing so at their additional expense, especially in the context of complex and highly fact-specific allegations relating to breach of fiduciary duty, conspiracy, concealment, conflict of interest, and oppression.

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<sup>39</sup> Motion Record, Tab 2F, Exhibit “F”, paras. 50-52, p.120.

<sup>40</sup> Motion Record, Tab 2F, Exhibit “F”, pp. 103-129; Motion Record, Tab 2G, Exhibit “G”, pp. 130-156.

<sup>41</sup> R.R.O. 1990, Reg. 194, r. 25.06(1).

<sup>42</sup> Motion Record, Tab 2, Birch Affidavit, para. 23, p.15.

<sup>43</sup> Former Directors’ Book of Authorities, Tab 3, *D.E. & J.C. Hutchison Contracting Co. v. Windigo Community Development Corp.* (1998), 84 A.C.W.S. (3d) 54 (Ont. Gen. Div.), para. 26.

**B. The Most Just, Most Expeditious, and Least Expensive Approach**

50. Production of the requested documents before the Former Directors are required to defend not only allows them access to documents that are essential and necessary to plead, but will also ensure the most just, expeditious, and least expensive determination of each of the ongoing parallel proceedings. It will also ensure that the current trial schedule is not jeopardized.<sup>44</sup>

51. In particular, the implications of production now are:

- (a) the steps in these proceedings will take place in a slightly different sequence while also preserving the trial dates, which have been set for February 2020; and
- (b) the Plaintiffs will be required to produce only those documents that they are required to produce in these proceedings in any event.

52. In contrast, the implications of requiring the Former Directors to plead before production, and therefore before they are able to adequately do so, are:

- (a) the Former Directors will be forced to file inadequate and incomplete statements of defence, which will contain bald denials, while they wait for production; and
- (b) then, after the very same documents now requested are produced following the close of pleadings, the Former Directors will have to:
  - (i) seek additional time to review these documents;
  - (ii) prepare amended statements of defence; and
  - (iii) likely prepare motion materials relating to such amendments.<sup>45</sup>

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<sup>44</sup> R.R.O. 1990, Reg. 194, rr. 1.04, 1.04(1.1).

<sup>45</sup> Motion Record, Tab 2, Birch Affidavit, para. 44, pp. 19-20.



53. Each of these additional and unnecessary steps will result in delay and additional expense, without any corresponding benefit, or any benefit whatsoever. Such an approach is at odds with the goal of securing the most expeditious and least expensive way forward.

54. Given the importance and complexity of the matters at issue in these proceedings, and to ensure that these proceedings are determined on their merits in the most just, most expeditious, and least expensive way, rule 30.04(5) should be invoked to require early production.

**C. The Former Directors Have a Contractual Right to the Documents Requested**

55. Pursuant to the individual indemnification agreements between the Former Directors and Sears Canada, the Former Directors are entitled to the documents sought on this motion given that they relate to the investigation and defence of a proceeding.

56. According to the indemnification agreements:

The Indemnified Party and the Corporation shall cooperate fully with each other and their respective counsel in **the investigation related to, and defence of, any proceeding and shall make available to each other all relevant books, records, documents and files** and shall otherwise use their best efforts to assist each other's counsel to conduct a proper and adequate defence.<sup>46</sup> [emphasis added].

57. FTI is in possession of the Sears Canada documents. It would be manifestly unfair to permit them to ignore the specific and important contractual rights of the Former Directors, which relate directly to this action (as well as the other Actions and the putative class action).

58. Indemnification entitlements for directors, including access to resources and information to respond to the investigation or prosecution of claims relating to their service to the corporation, are recognized as fulfilling important corporate law and governance policy objectives.

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<sup>46</sup> Motion Record, Tab 2, Birch Affidavit, para. 28, p. 16; Motion Record, Tabs 2L-2Q, Exhibits "L"- "Q", pp. 334-371.

59. In particular, indemnification entitlements encourage participation as corporate directors by providing important assurance regarding access to resources and information should they face litigation relating to their service to the corporation.<sup>47</sup>

60. The Supreme Court of Canada has confirmed that the fundamental policy objective of such indemnification “is geared to encourage responsible behavior yet still permit enough leeway to attract strong candidates to directorship and consequently foster entrepreneurship”.<sup>48</sup>

61. The Plaintiffs, in denying the Former Directors their rights under the indemnification agreements, have undermined these important contractual entitlements and corporate governance objectives. Indeed, their refusal to produce documents to which the Former Directors are entitled under their indemnification agreements runs contrary to the very rationale of encouraging individuals to agree to serve on corporate boards.

#### **PART IV - ORDER REQUESTED**

62. The Former Directors cannot appropriately defend against the serious allegations made in these proceedings, which specifically implicate information and documents from many years ago, without reviewing and considering that information and those documents.

63. The Former Directors therefore request an order requiring the Plaintiffs to produce all relevant non-privileged documents before the Former Directors are required to deliver statements of defence, with costs if this motion is opposed at the hearing, on the basis that:

- (a) the documents sought, which must be produced in any event in the ordinary course, are necessary and essential to prepare statements of defence;

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<sup>47</sup> Former Directors’ Book of Authorities, Tab 1, *Bennett v. Bennett Environmental Inc.*, 2009 ONCA 198, para. 23.

<sup>48</sup> Former Directors’ Book of Authorities, Tab 2, *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5, para. 74.

- (b) proceeding in this manner is the most just, most expeditious, and least expensive way toward trial; and
- (c) the Former Directors have a contractual right to these documents.

64. The Former Directors support the order for document production sought by the other Defendants in this action and the litigation trustee action on the grounds and for the reasons stated by those Defendants.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 8<sup>th</sup> day of March 2019.



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**CASELS BROCK & BLACKWELL LLP**

## SCHEDULE "A"

### LIST OF AUTHORITIES

1. *Bennett v. Bennett Environmental Inc.*, 2009 ONCA 198
2. *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5
3. *D.E. & J.C. Hutchison Contracting Co. v. Windigo Community Development Corp.* (1998), 84 A.C.W.S. (3d) 54 (Ont. Gen. Div.)
4. *De Iuliis v. Zilli*, 2014 ONSC 5515
5. *Meuwissen v. Strathroy Middlesex General Hospital* (2006), 154 A.C.W.S. (3d) 324 (Ont. C.A.)
6. *Kalen v. Brantford (City)*, 2011 ONSC 1891

## **SCHEDULE “B”**

### **TEXT OF STATUTES, REGULATIONS & BY-LAWS**

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

##### ***General Principle***

**1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

##### ***Proportionality***

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

##### ***Court may Order Production***

**30.04** (5) The court may at any time order production for inspection of documents that are not privileged and that are in the possession, control or power of a party.

FTI CONSULTING CANADA INC.  
Plaintiff

-and-

ESL INVESTMENTS INC *et al.*  
Defendants

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT  
TORONTO

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

**CASSELS BROCK & BLACKWELL LLP**

2100 Scotia Plaza  
40 King Street West  
Toronto, ON M5H 3C2

**William J. Burden LSO #: 15550F**

Tel: 416.869.5963  
Fax: 416.640.3019  
bburden@casselsbrock.com

**Wendy Berman LSO #: 32748J**

Tel: 416.860.2926  
Fax: 416.640.3107  
wberman@casselsbrock.com

**John N. Birch LSO #: 38968U**

Tel: 416.860.5225  
Fax: 416.640.3057  
jbirch@casselsbrock.com

Lawyers for the Defendants  
William Harker and William Crowley