

**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 PLAINTIFFS
(SHC SETTLEMENT APPROVAL)
(returnable March 16, 2020)**

February 28, 2020

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN :

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

Plaintiff

and

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

Defendants

**MOTION RECORD OF THE PLAINTIFFS
(SHC SETTLEMENT APPROVAL)
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Court File No. CV-18-00611219-00CL

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

B E T W E E N:

FTI CONSULTING CANADA INC., in its capacity as Court-appointed monitor in proceedings pursuant to the Companies' Creditors Arrangement Act, 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, SEARS HOLDINGS CORPORATION, WILLIAM R. HARKER and WILLIAM C. CROWLEY

Defendants

Court File No. CV-18-00611214-00CL

B E T W E E N:

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, DONALD ROSS and SEARS HOLDINGS CORPORATION

Defendants

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

B E T W E E N:

MORNEAU SHEPELL LTD., in its capacity as administrator of the Sears Canada Inc. Registered Retirement 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, DOUGLAS CAMPBELL and SEARS HOLDINGS CORPORATION

Defendants

Court File No. CV-19-00617792-00CL

B E T W E E N :

1291079 ONTARIO LIMITED

Plaintiff

-and-

SEARS CANADA INC., SEARS HOLDINGS 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

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

B E T W E E N :

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., INTIUM LOGISTICS SERVICES INC., 9845488
 CANADA 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.

**NOTICE OF MOTION
 (SHC Settlement Approval and Bar Order)**

The plaintiffs will make a motion to a Judge presiding over the Commercial List on
 March 16, 2020 at 10:00 a.m., or as soon after that time as the motion can be heard at the court
 house, 330 University Avenue, 8th Floor, Toronto, Ontario, M5G 1R7.

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

THE MOTION IS FOR:

- (a) An order in the form attached as Schedule "A", and

- (b) Such further and other relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE

Settlement Agreement

- (a) The moving parties are the plaintiffs in actions bearing court file numbers CV-18-00611219-00CL, CV-18-00611212-00CL, CV-18-00611217-00CL and CV-19-00617792-00CL (the “**Actions**”);
- (b) Sears Canada Inc. and its affiliates obtained protection under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (“**CCAA**”) pursuant to an order dated June 22, 2017 in court file no. CV-17-11846-00CL;
- (c) Sears Holdings Corporation (“**SHC**”) is a defendant in each of the Actions;
- (d) SHC is the subject of proceedings under Chapter 11 of the United States Bankruptcy Code;
- (e) Due to SHC’s financial position, the costs of continuing litigation, and the uncertainties around recoveries for the Plaintiffs in the SHC insolvency, there was incentive for both the Plaintiffs and SHC to seek a settlement of the Actions as against SHC;
- (f) The plaintiffs entered into a settlement agreement with SHC which would settle all of their respective claims against SHC (“**Agreement**”);
- (g) The plaintiffs have not settled their claims against the remaining defendants in their respective actions (together, the “**Non-Settling Defendants**”);

- (h) The Agreement is conditional on this Court granting an order in the form attached as Schedule “A”;
- (i) The proposed settlement is fair and reasonable, benefits the stakeholders of Sears Canada Inc. generally, and is consistent with the purposes of the CCAA;
- (j) The proposed settlement is fair, reasonable and in the best interests of the 129 Settlement Class (as defined in Schedule “A”);

No Prejudice to the Non-Settling Defendants

- (k) Granting the relief sought on this motion will cause no prejudice to the Non-Settling Defendants;
- (l) The Court will have full authority to determine the apportionment of liability as between SHC and the Non-Settling Defendants;
- (m) Public policy supports *Pierringer*-style settlement agreements;
- (n) This Court has jurisdiction to bar or stay claims for indemnity where it is just to do so;
- (o) Sections 1, 2 and 5 of the *Negligence Act* R.S.O. 1990, c. N.1;
- (p) Sections 12 and 29 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6;
- (q) Section 11 of the CCAA;
- (r) Rules 1.04, 49 and 37 of the *Rules of Civil Procedure*; and
- (s) Such further and other grounds as the lawyers may advise.

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

Motion:

- (a) The 35th Report of the Monitor dated February 28, 2020;
- (b) The pleadings in the Actions;
- (c) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

February 28, 2020

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TO: LITIGATION SERVICE LIST

SCHEDULE 'A'

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

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

THE HONOURABLE)	MONDAY, THE 16th
JUSTICE McEWEN)	DAY OF MARCH, 2020

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, SEARS HOLDINGS
CORPORATION, WILLIAM R. HARKER and WILLIAM C. CROWLEY

Defendants

Court File No. CV-18-00611214-00CL

B E T W E E N:

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, DONALD ROSS and SEARS HOLDINGS CORPORATION

Defendants

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

B E T W E E N:

MORNEAU SHEPELL LTD., in its capacity as administrator of the Sears Canada Inc. Registered
Retirement 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 ROSATI, R. RAJA
KHANNA, JAMES MCBURNEY, DOUGLAS CAMPBELL and SEARS HOLDINGS
CORPORATION

Defendants

Court File No. CV-19-00617792-00CL

B E T W E E N :

1291079 ONTARIO LIMITED

Plaintiff

-and-

SEARS CANADA INC., SEARS HOLDINGS 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

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

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., 9845488 CANADA 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.

ORDER
(SHC Settlement Approval and Bar Order)

THIS MOTION made by Sears Canada Inc. (**Sears**) by its Court-Appointed Litigation Trustee, J. Douglas Cunningham, Q.C. (the **Litigation Trustee**) in proceedings pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36 (the **CCAA Proceedings**), FTI Consulting Canada Inc. in its capacity as Court-appointed monitor (the **Monitor**), Morneau Shepell Ltd., in its capacity as administrator of the Sears Canada Inc. Registered Retirement Plan (the **Pension Administrator**) and 1291079 Ontario Limited (collectively with the Monitor, the Litigation Trustee and the Pension Administrator, the **Plaintiffs**) for an order approving the release and settlement agreement between the Plaintiffs and Sears Holdings Corporation (**SHC**) and for an order releasing claims against SHC as more particularly defined below was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Motion Record of the Plaintiffs, the Thirty-Fifth Report of the Monitor dated February 28, 2020, and on hearing the submissions of counsel for the Plaintiffs and the Defendants:

Approval of SHC Settlement Agreement

1. **THIS COURT ORDERS** that the release and settlement agreement between the Plaintiffs and SHC dated November 7, 2019 (the **SHC Settlement Agreement**) is hereby approved and the parties thereto are hereby bound by this order and by those terms of the SHC Settlement Agreement that are conditional upon the granting of this Order and are authorized and directed to comply with their obligations thereunder, subject to the granting of the US Approval Order (as defined in the SHC Settlement Agreement) in the case of those obligations that are conditional upon the granting of the US Approval Order.
2. **THIS COURT ORDERS** that each of the Plaintiffs' actions, being CV-18-00611219-00CL, CV-18-00611214-00CL, CV-18-00611217-00CL, and CV-19-00617792-00CL (collectively, the **Actions**) are dismissed as against SHC pursuant to the terms of the SHC Settlement Agreement, without costs.

Release by Plaintiffs

3. **THIS COURT ORDERS** that in accordance with the terms and conditions of the SHC Settlement Agreement, all Settled Claims (as defined in the SHC Settlement Agreement) of each of the Plaintiff Releasers (as defined in the SHC Settlement Agreement) are, as of the Effective Date (as defined in the SHC Settlement Agreement), irrevocably and unconditionally fully, finally and forever released as against SHC.
4. **THIS COURT ORDERS** that this Order, including the SHC Settlement Agreement, is binding upon each 129 Settlement Class Member including those Persons who are minors or mentally incapable and the requirements of Rules 7.04(1) and 7.08(4) of the *Rules of Civil Procedure* are dispensed with in respect of the 129 Action.
5. **THIS COURT ORDERS** that the SHC Settlement Agreement is fair, reasonable and in the best interest of the Ontario Settlement Class.

6. **THIS COURT ORDERS** that the SHC Settlement Agreement is hereby approved pursuant to s. 29 of the *Class Proceedings Act, 1992* and shall be implemented and enforced in accordance with its terms.

Bar Orders

7. **THIS COURT ORDERS** that, without limiting the effect or validity of any provision of this order, all Plaintiff Releasors, including for greater certainty all members and beneficiaries under the Sears Canada Inc. Registered Retirement Plan, are permanently and forever barred, estopped, stayed and enjoined from commencing, conducting or continuing in any manner, directly or indirectly, any action, suits or demands, including without limitation, by way of contribution or indemnity or other relief, in common law or in equity, or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against SHC in relation to or otherwise in connection with the subject matter of the Settled Claims; excluding, for greater certainty, such Plaintiff Releasor's rights to enforce the terms of the SHC Settlement Agreement.

8. **THIS COURT ORDERS** that each and every Plaintiff Releasor is hereby permanently and forever barred, estopped, stayed and enjoined from: (i) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree, or order against SHC or its property in respect of any claims relating in any way to the Settled Claims; or (ii) taking any action to interfere with the implementation and consummation of the SHC Settlement Agreement; in each case excluding, for greater certainty, such Plaintiff Releasor's rights to enforce the terms of the SHC Settlement Agreement.

9. **THIS COURT ORDERS** that no Defendant not party to the SHC Settlement Agreement (the **Non-Settling Defendant(s)**) shall now or hereafter institute, continue, maintain or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any other person, any action, suit, cause of action, claim or demand against SHC (or any other person who may claim contribution or indemnity from SHC) in respect of the matters contained in any of the Actions. All claims for contribution or indemnity or other claims over (whether asserted or unasserted, tolled or not tolled, and whether relating to or arising from any of the Actions) which

were or could have been brought in any of the Actions or in a separate proceeding by any Non-Settling Defendant against SHC are barred, extinguished, prohibited and enjoined by this Order.

10. **THIS COURT ORDERS** that the Plaintiffs' recovery from the Non-Settling Defendant(s) and with which SHC is judicially determined to be jointly and severally liable to the Plaintiffs for damages, shall be reduced (in aggregate) by the amount of funds ultimately received by the Plaintiffs in respect of the Allowed Unsecured Claim from SHC pursuant to the SHC Settlement Agreement, as determined by the Court.

Recognition and Enforcement

11. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body (collectively, **Bodies**) having jurisdiction in Canada or in the United States or in any other jurisdiction to give effect to this order and to assist the Plaintiffs, the Litigation Trustee (as an officer of this Court) and the Monitor (as an Officer of this Court) and their respective agents in carrying out the terms of this order. All Bodies are hereby respectfully requested to make such orders and to provide such assistance to the Plaintiffs, the Litigation Trustee (as an officer of this Court) 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 Plaintiffs, the Litigation Trustee (as an officer of this Court) and the Monitor (as an officer of this Court) and their respective agents in carrying out the terms of this order.

FTI CONSULTING CANADA INC. Plaintiff		ESL INVESTMENTS INC. et al. Defendants	Court File No. CV-18-00611219-00CL
MORNEAU SHEPELL LTD. Plaintiff	-and-	ESL INVESTMENTS INC. et al. Defendants	Court File No. CV-18-00611217-00CL
SEARS CANADA INC., by its Court-appointed Litigation Trustee, J. Douglas Cunningham, Q.C. Plaintiff	-and-	ESL INVESTMENTS INC. et al. Defendants	Court File No. CV-18-00611214-00CL
1291079 ONTARIO LIMITED Plaintiff	-and-	ESL INVESTMENTS INC. et al. Defendants	Court File No. CV-19-00617792-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

**ORDER
(SHC SETTLEMENT APPROVAL AND BAR ORDER)**

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FTI CONSULTING CANADA INC. Plaintiff		ESL INVESTMENTS INC. et al. Defendants	Court File No. CV-18-00611219-00CL
SEARS CANADA INC., by its Court-appointed Litigation Trustee, J. Douglas Cunningham, Q.C. Plaintiff	-and-	ESL INVESTMENTS INC. et al.	Court File No. CV-18-00611214-00CL
MORNEAU SHEPELL LTD. Plaintiff	-and-	Defendants ESL INVESTMENTS INC. et al.	Court File No. CV-18-00611217-00CL
1291079 ONTARIO LIMITED Plaintiff	-and-	Defendants ESL INVESTMENTS INC. et al.	Court File No. CV-19-00617792-00CL
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., et al			

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

**NOTICE OF MOTION
(SHC Settlement Approval and Bar Order)**

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

Plaintiff

and

ESL Investments Inc. *et al.*

Defendants

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at TORONTO

**MOTION RECORD OF THE PLAINTIFFS
(SHC SETTLEMENT APPROVAL)
(returnable March 16, 2020)**

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