

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**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 S. LAMPERT, EPHRAIM J. BIRD, DOUGLAS CAMPBELL,  
WILLIAM CROWLEY, WILLIAM HARKER, R. RAJA KHANNA, JAMES  
MCBURNEY, DEBROAH ROSATI and DONALD ROSS

Defendants

**RESPONDING FACTUM OF THE DEFENDANT FORMER DIRECTORS,  
R. RAJA KHANNA AND DEBORAH ROSATI  
(Documentary Production Motions, Returnable March 20, 2019)**

March 11, 2019

**BENNETT JONES LLP**  
3400 One First Canadian Place  
P.O. Box 130  
Toronto, ON M5X 1A4

**Richard Swan (#32076A)**  
Email: swanr@bennettjones.com

**Jason Berall (#68011F)**  
Email: berallj@bennettjones.com

Telephone: (416) 863-1200  
Facsimile: (416) 863-1716

Lawyers for the Defendants,  
R. Raja Khanna and Deborah Rosati

TO: THE LITIGATION SERVICE LIST

Court File No. CV-18-611219-00CL

**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, L.P., EDWARD S. LAMPERT, WILLIAM HARKER  
and WILLIAM CROWLEY

Defendants

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Court File No. CV-18-611214-00CL

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

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, L.P.,  
EDWARD LAMPERT, EPHRAIM J. BIRD, DOUGLAS CAMPBELL, WILLIAM CROWLEY,  
WILLIAM HARKER, R. RAJA KHANNA, JAMES MCBURNEY, DEBORAH ROSATI  
and DONALD ROSS

Defendants

Court File No. CV-18-611217-00CL

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

**B E T W E E N:**

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

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Court File No. 4114/15 (Milton)

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

1291079 ONTARIO LIMITED

Plaintiff

and

ESL INVESTMENTS INC., SEARS CANADA INC., WILLIAM C. CROWLEY, WILLIAM R.  
HAWKER, 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*

**LITIGATION SERVICE LIST**

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

**Orestes Pasparakis**  
Tel: +1 416.216.4815  
**Robert Frank**  
Tel: +1 416.202.6741  
**Evan Cobb**  
Tel: +1 416.216.1929  
**Catherine Ma**  
Tel: +1 416.216.4838  
Fax: +1 416.216.3930

orestes.pasparakis@nortonrosefulbright.com  
robert.frank@nortonrosefulbright.com  
evan.cobb@nortonrosefulbright.com  
catherine.ma@nortonrosefulbright.com

Lawyers to FTI Consulting Canada Inc.

**AND TO: BLAKE, CASSELS & GRAYDON LLP**  
Suite 4000, Commerce Court West  
199 Bay Street  
Toronto, Ontario M5L 1A9

**Michael E. Barrack**  
Tel: +1 416.863.5280  
**Kathryn M. Bush**  
Tel: +1 416.863.2633  
**Kiran Patel**  
Tel: +1 416.863.2205  
Fax: +1 416.863.2653

michael.barrack@blakes.com  
kathryn.bush@blakes.com  
kiran.patel@blakes.com

Lawyers for Morneau Shepell Ltd., in its capacity as Administrator for the Sears Canada Inc. Registered Retirement Plan

**AND TO: LAX O'SULLIVAN LISUS GOTTLIEB LLP**  
145 King St. West, Suite 2750  
Toronto, ON M5H 1J8

**Matthew Gottlieb**  
Tel: +1 416 644 5353  
**Andrew Winton**  
Tel: +1 416.644.5342  
**Philip Underwood**  
Tel: +1 416.645.5078  
**Jessica Zhi**  
Tel: +1 416.644.4016  
Fax: +1 416.598.3730

mgottlieb@lolg.ca  
awinton@lolg.ca  
punderwood@lolg.ca  
jzhi@lolg.ca

Representatives of the Litigation Investigator and Lawyers for the Litigation Trustee

**AND TO: SOTOS LLP**  
180 Dundas Street West, Suite 1200  
Toronto, Ontario M5G 1Z8

**David Sterns**  
Tel: +1 416.977.0007  
**Andy Seretis**  
Tel: +1 416.977.0007  
Fax: +1 416.977.0717

dsterns@sotosllp.com  
aseretis@sotosllp.com

-----  
**Blaney McMurtry LLP**  
2 Queen St E #1500,  
Toronto, ON M5C 3G5

**Lou Brzezinski**  
Tel: +1 416.593.2952  
Fax: +1 416.594.5084

lbrzezinski@blaney.com

Lawyers for 1291079 Ontario Limited

AND **BENNETT JONES LLP**  
TO: 3400 One First Canadian Place  
P.O. Box 130  
Toronto, Ontario M5X 1A4

**Gary Solway**

Tel: +1 416.777.6555

**Sean Zweig**

Tel: +1 416.777.6254

**Richard B. Swan**

Tel: +1 416.777.7479

Jason M. Berall

Tel: +1 416.777.5480

Fax: +1 416.863.1716

solwayg@bennettjones.com

zweigs@bennettjones.com

swanr@bennettjones.com

berallj@bennettjones.com

Lawyers to the Board of Directors and the  
Special Committee of the Board of Directors  
of Sears Canada Inc.

AND **CASSELS BROCK & BLACKWELL  
LLP**  
TO: Suite 2100, Scotia Plaza  
40 King Street West  
Toronto, Ontario M5H 3C2

**Wendy Berman**

Tel: +1 416.860.2926

**John N. Birch**

Tel: +1 416.860.5225

**Natalie E. Levine**

Tel: +1 416.860.6568

**Anna Tombs**

Tel: +1 416.860.6563

Fax: +1 416.360.8877

wberman@casselsbrock.com

jbirch@casselsbrock.com

nlevine@casselsbrock.com

atombs@casselsbrock.com

Lawyers for Certain Former Directors  
and Officers of the Applicants (Klaudio  
Leshnjani, James R.G. McBurney, E.J.  
Bird, Calvin McDonald, Ronald Boire,  
Deirdra Cheeks Merriwether, Donald C.  
Ross, Douglass Campbell)

AND **LENCZNER SLAGHT ROYCE**  
TO: **SMITH GRIFFIN LLP**  
Suite 2600  
130 Adelaide Street West  
Toronto ON M5H 3P5

**Peter J. Osborne**  
Tel: +1 416.865.3094  
**Matthew B. Lerner**  
Tel: +1 416.865.2940  
**Chris Kinnear Hunter**  
Tel: +1 416.865.2874  
**Chris Trivisonno**  
Tel: +1 416.865.3059  
Fax +1 416.865.9010

posborne@litigate.com  
mlerner@litigate.com  
chunter@litigate.com  
ctrivisonno@litigate.com

Lawyers for Sears Holding Corporation and  
Sears Holdings Management Corporation

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

**Harry Underwood**  
Tel: +1 416.365.1600  
**Andrew Faith**  
Tel: +1 416.365.1600  
**Jeffrey Haylock**  
Tel: +1 416.365.1600  
**Sandy Lockhart**  
Tel: +1 416.365.1600  
Fax: +1 416.365.1601

hunderwood@polleyfaith.com  
afaith@polleyfaith.com  
jhaylock@polleyfaith.com  
slockhart@polleyfaith.com

Lawyers for Mr. Edward S. Lampert,  
ESL Investments Inc., ESL Partners,  
L.P., SPE I Partners, L.P., SPE Master I,  
L.P. ESL Institutional Partners, L.P., and  
RBS Partners, L.P. (collectively, the  
“ESL Parties”)

COPY TO: **PALIARE ROLAND ROSENBERG AND CASSELS BROCK & BLACKWELL**  
**ROTHSTEIN LLP** TO: **LLP**  
155 Wellington St West, 35th Floor Suite 2100, Scotia Plaza  
Toronto, Ontario M5V 3H1 40 King Street West  
Toronto, Ontario M5H 3C2

**Ken Rosenberg**

Tel: +1 416.646.4304

**Lily Harmer**

Tel: +1 416.646.4326

**Max Starnino**

Tel: +1 416.646.7431

**Elizabeth Rathbone**

Tel: +1 416. 646.7488

Fax: +1 416.646.4301

ken.rosenberg@paliareroland.com

lily.harmer@paliareroland.com

max.starnino@paliareroland.com

elizabeth.rathbone@paliareroland.com

Lawyers to the Superintendent of Financial  
Services as Administrator of the Pension  
Benefits Guarantee Fund

**William J. Burden**

Tel: +1 416.869.5963

**Wendy Berman**

Tel: +1 416.860.2926

**John N. Birch**

Tel: +1 416.860.5225

Fax: +1 416.360.8877

bburden@casselsbrock.com

wberman@casselsbrock.com

jbirch@casselsbrock.com

Lawyers for William (Bill) C. Crowley  
and William (Bill) R. Harker



**Email Litigation Service List:**

orestes.pasparakis@nortonrosefulbright.com; robert.frank@nortonrosefulbright.com; evan.cobb@nortonrosefulbright.com; catherine.ma@nortonrosefulbright.com; michael.barrack@blakes.com; kathryn.bush@blakes.com; kiran.patel@blakes.com; mgottlieb@lolg.ca; awinton@lolg.ca; punderwood@lolg.ca; jzhi@lolg.ca; dsterns@sotosllp.com; aseretis@sotosllp.com; lbrzezinski@blaney.com; solwayg@bennettjones.com; zweigs@bennettjones.com; swanr@bennettjones.com; wberman@casselsbrock.com; jbirch@casselsbrock.com; nlevine@casselsbrock.com; atombs@casselsbrock.com; posborne@litigate.com; mlerner@litigate.com; chunter@litigate.com; ctrivisonno@litigate.com; hunderwood@polleyfaith.com; afaith@polleyfaith.com; jhaylock@polleyfaith.com; slockhart@polleyfaith.com; ken.rosenberg@paliareroland.com; lily.harmer@paliareroland.com; max.starnino@paliareroland.com; elizabeth.rathbone@paliareroland.com; berallj@bennettjones.com;

## **PART I - OVERVIEW**

1. The circumstances giving rise to this action are highly particular. The action was commenced after an investigation procedure within a CCAA proceeding by a court-appointed “Litigation Investigator” (the law firm of Lax O’Sullivan Lisus Gottlieb LLP), who in the course of events then reviewed thousands of Sears Canada Inc. (“**Sears Canada**”) and related documents provided by the CCAA Monitor (the “**Litigation Investigator Documents**”). After a nine-month review, the Litigation Investigator recommended the court appointment of a Litigation Trustee (with the Litigation Investigator thereafter serving as the Litigation Trustee’s litigation counsel), to commence \$500 million claims in the Ontario Superior Court against a number of persons, including former Sears Canada directors, relating to a 2013 dividend. The resulting proceeding is itself quite particular, with an expedited schedule leading to a proposed trial of this action and certain related actions (including a class action) tentatively scheduled for less than a year from now.

2. In view of this unique genesis, and the fact that a court officer is the plaintiff, it is essential that there both be and appear to be a level playing field for all parties, and that no parties (or their privies) have or appear to have any special advantages.

3. Given: (1) the rather unique circumstances giving rise to this action; (2) the extent of access by the Litigation Investigator and the Litigation Trustee to what are essentially the documents of a third party (Sears Canada); (3) the disparity in pre-pleading access to documents between the plaintiff and the defendants; (4) the financial magnitude of the claims; (5) the fact that the claims are advanced against individual defendants whose assets and reputations are directly at stake; (6) the expedited litigation schedule for an action of this magnitude; (7) the fact that the subject

documents will have to be produced in any event at the documentary production stage, potentially leading to pleadings amendments and consequential delays; and (8) the relative simplicity of an order for appropriate disclosure at the pre-pleading stage; it is submitted that in the particular circumstances of this matter, an order for disclosure now is appropriate, necessary and advantageous to the proceeding.

## **PART II - FACTS**

4. As the background facts have largely been set out in the factum of the moving director defendants,<sup>1</sup> the responding directors will not repeat them all here. However, the following facts are especially pertinent to the position of the responding directors:

- (a) The Order appointing the Litigation Investigator provides that the Investigator was appointed for the purpose of investigating and reporting to a committee of creditors regarding claims that Sears and/or any of its creditors may have against any parties, including current and former directors.<sup>2</sup>
- (b) The Order appointing the Litigation Investigator required the Monitor to provide the Litigation Investigator Documents to the Litigation Investigator. Those documents included documents belonging to Sears regarding the matters at issue in this action.<sup>3</sup>

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<sup>1</sup> The moving director defendants are William Harker, William Crowley, Ephraim J. Bird, Douglas Campbell, James McBurney, and Donald Ross.

<sup>2</sup> Amended Litigation Investigator Order, para. 2, Motion Record of the Moving Director Defendants, Tab 2(B), p. 51.

<sup>3</sup> Amended Litigation Investigator Order, para. 7, Motion Record of the Moving Director Defendants, Tab 2(B), pp. 55-56.

- (c) The Monitor was required to keep a record of the Litigation Investigator Documents.<sup>4</sup>
- (d) The defendant directors and Sears are parties to indemnification agreements providing that: “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>5</sup>

### PART III - LAW & ARGUMENT

5. This Court has the authority to order pre-pleading production of documents from a party in the interests of justice, where the circumstances warrant.<sup>6</sup> As set out above and below, the very particular circumstances of this case make appropriate an order for pre-pleading production.

#### A. Legal Authority for Pre-Pleading Production

6. Rule 30.04(5) of the *Rules of Civil Procedure* provides that the Court may order document production at any time:

**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.<sup>7</sup>

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<sup>4</sup> Amended Litigation Investigator Order, para. 8, Motion Record of the Moving Director Defendants, Tab 2(B), p. 56.

<sup>5</sup> Indemnification Agreements, Motion Record of the Moving Director Defendants, Tabs L-Q.

<sup>6</sup> *De Iuliis v. Zilli*, 2014 ONSC 5515 at para. 14 [*De Iuliis*], Responding Book of Authorities of the Defendant Former Directors (“**BoA**”), Tab 1.

<sup>7</sup> *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 30.04(5).

7. Ontario Courts have held that:

- (a) pre-pleading production may be ordered “[w]here it is in the interest of justice” to do so;<sup>8</sup> and
- (b) “[n]otwithstanding that pre-discovery production is ‘usually exercised’ in order to enable a party to plead, the court’s discretion to order production ‘at any time’ could ... be exercised on other compelling grounds.”<sup>9</sup>

**B. This Court Should Order the Litigation Trustee to Produce the Litigation Investigator Documents**

8. The Litigation Investigator and Litigation Trustee were and are court-appointed officers in the Sears Canada CCAA proceeding to investigate and pursue claims against the defendant directors for the benefit of Sears’ creditors. Access was granted to the Litigation Investigator Documents by the Monitor, as approved by the CCAA Court. Neither these court officers, nor Sears’ creditors, would ordinarily have access to the Sears documents in issue.

9. This action was commenced nine months after the Litigation Investigator was appointed and granted access to the Litigation Investigator Documents. The Litigation Trustee is now seeking to have the defendants deliver defences without the benefit of all documents provided to the Litigation Investigator.

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<sup>8</sup> *De Iuliis*, *supra* note 6 at para. 14, Responding Book of Authorities of the Defendant Former Directors (“BoA”), Tab 1.

<sup>9</sup> *Durling v. Sunrise Propane Energy Group Inc.*, [2008] O.J. No. 5031 at para. 25 (Sup. Ct. (Master)), BoA, Tab 2; See also *Popov v. Jones*, 2011 ONSC 665 at para. 28, *aff’d* 2011 ONSC 3594, BoA, Tab 3.

10. The director defendants' indemnity agreements entitle them to all Sears Canada documents necessary to defend this action. The obligations under the indemnity agreements in respect of documents are not being fulfilled. Fairness dictates that the director defendants be afforded the full extent of their rights. Those rights include access to the Litigation Investigator Documents.

11. The expedited timetable for this action also argues in favour of the pre-pleading production of documents. If the director defendants are required to plead prior to receiving the Litigation Investigator Documents, it may very well be necessary to amend defences after receiving those documents, which will delay the action. If there is to be an expedited schedule, the Court should fully consider procedural directions that will facilitate that schedule and protect the procedural and substantive rights of the parties to the greatest extent possible.

12. The scale of this action (over \$500 million), the public nature of this action, and the gravity of the allegations advanced in this action must be given proper regard.

### **C. Summary of Bases for the Order Sought**

13. To summarize, these defendant directors assert that pre-pleading production of the Litigation Investigator Documents should be directed at this time for at least the following reasons:

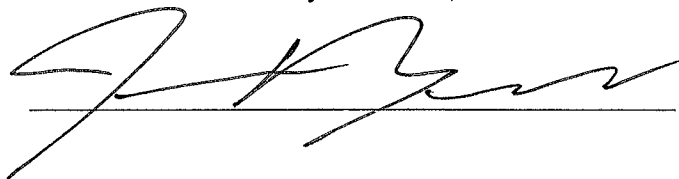
- (a) the unique circumstances giving rise to this action;
- (b) the need for a level playing field, and that no party (especially a court-appointed officer) should have or appear to have any special advantage;
- (c) the extent of access by the Litigation Investigator and the Litigation Trustee to what are essentially the documents of a third party (Sears Canada);
- (d) the financial magnitude of the claims;

- (e) the fact that half-billion dollar claims are advanced against individual defendants whose assets and reputations are directly at stake;
- (f) the expedited litigation schedule that would see several related actions potentially tried together;
- (g) the fact that the subject documents will have to be produced in any event at the documentary production stage, potentially leading to pleadings amendments and consequential delays; and
- (h) the relative simplicity of an order for appropriate disclosure at the pre-pleading stage.

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

14. The former directors Khanna and Rosati support the requests for pre-pleading production of the Litigation Investigator Documents.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 11th day of March, 2019.



**BENNETT JONES LLP**  
Richard Swan  
Jason Berall

Lawyers for the Defendants,  
R. Raja Khanna and Deborah Rosati

**SCHEDULE “A”**

**LIST OF AUTHORITIES**

1. *De Iuliis v. Zilli*, 2014 ONSC 5515
2. *Durling v. Sunrise Propane Energy Group Inc.*, [2008] O.J. No. 5031 (Sup. Ct. (Master))
3. *Popov v. Jones*, 2011 ONSC 665, aff’d 2011 ONSC 3594



## SCHEDULE "B"

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

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

#### INSPECTION OF DOCUMENTS

##### Request to Inspect

**30.04** (1) A party who serves on another party a request to inspect documents (Form 30C) is entitled to inspect any document that is not privileged and that is referred to in the other party's affidavit of documents as being in that party's possession, control or power. R.R.O. 1990, Reg. 194, r. 30.04 (1).

(2) A request to inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating process, pleadings or an affidavit served by the other party. R.R.O. 1990, Reg. 194, r. 30.04 (2).

(3) A party on whom a request to inspect documents is served shall forthwith inform the party making the request of a date within five days after the service of the request to inspect documents and of a time between 9:30 a.m. and 4:30 p.m. when the documents may be inspected at the office of the lawyer of the party served, or at some other convenient place, and shall at the time and place named make the documents available for inspection. R.R.O. 1990, Reg. 194, r. 30.04 (3); O. Reg. 575/07, s. 1.

##### Documents to be Taken to Examination and Trial

(4) Unless the parties agree otherwise, all documents listed in a party's affidavit of documents that are not privileged and all documents previously produced for inspection by the party shall, without notice, summons or order, be taken to and produced at,

- (a) the examination for discovery of the party or of a person on behalf or in place of or in addition to the party; and
- (b) the trial of the action. R.R.O. 1990, Reg. 194, r. 30.04 (4).

##### Court may Order Production

(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. R.R.O. 1990, Reg. 194, r. 30.04 (5).

##### Court may Inspect to Determine Claim of Privilege

(6) Where privilege is claimed for a document, the court may inspect the document to determine the validity of the claim. R.R.O. 1990, Reg. 194, r. 30.04 (6).

##### Copying of Documents

(7) Where a document is produced for inspection, the party inspecting the document is entitled to make a copy of it at the party's own expense, if it can be reproduced, unless the person having possession or control of or power over the document agrees to make a copy, in which case the person shall be reimbursed for the cost of making the copy. R.R.O. 1990, Reg. 194, r. 30.04 (7).

**Divided Disclosure or Production**

(8) Where a document may become relevant only after the determination of an issue in the action and disclosure or production for inspection of the document before the issue is determined would seriously prejudice a party, the court on the party's motion may grant leave to withhold disclosure or production until after the issue has been determined. R.R.O. 1990, Reg. 194, r. 30.04 (8).

SEARS CANADA INC., by its Court-appointed Litigation Trustee, -and-  
J. DOUGLAS CUNNINGHAM, Q.C.  
Plaintiff

ESL INVESTMENTS INC. et al

Defendants

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT  
TORONTO

**RESPONDING FACTUM OF THE  
DEFENDANT FORMER DIRECTORS,  
R. RAJA KHANNA AND DEBORAH ROSATI  
(Documentary Production Motions, Returnable March 20, 2019)**

**BENNETT JONES LLP**  
3400 One First Canadian Place  
P.O. Box 130  
Toronto, ON M5X 1A4

**Richard Swan (#32076A)**  
Email: swanr@bennettjones.com

**Jason Berall (#68011F)**  
Email: berallj@bennettjones.com

Telephone: (416) 863-1200  
Facsimile: (416) 863-1716

Lawyers for the Defendants,  
R. Raja Khanna and Deborah Rosati