

**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

**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, DEBORAH ROSATI and DONALD ROSS

Defendants

**MOTION RECORD OF THE ESL PARTIES
(MOTION FOR PRE-PLEADING PRODUCTIONS)**

February 7, 2019

POLLEY FAITH LLP

The Victory Building
80 Richmond Street West, Suite 1300
Toronto, ON M5H 2A4

Harry Underwood (20806C)

hunderwood@polleyfaith.com

Andrew Faith (47795H)

afaith@polleyfaith.com

Jeffrey Haylock (61241F)

jhaylock@polleyfaith.com

Sandy Lockhart (73554J)

slockhart@polleyfaith.com

Tel: 416.365.1600

Fax: 416.365.1601

Lawyers for the defendants,
ESL Investments Inc., ESL Partners, LP, SPE I
Partners, LP, SPE Master I, LP, ESL
Institutional Partners, LP

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 **LAX O'SULLIVAN LISUS**
TO: **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

Fax: +1 416.598.3730

mgottlieb@counsel-toronto.com

awinton@counsel-toronto.com

punderwood@counsel-toronto.com

Representatives of the Litigation
Investigator and Lawyers for the
Litigation Trustee

AND **NORTON ROSE FULBRIGHT**
TO: **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

Fax: +1 416.216.3930

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

Lawyers to FTI Consulting Canada Inc.

AND **SOTOS LLP**
TO: 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

Fax: +1 416.863.1716

solwayg@bennettjones.com

zweigs@bennettjones.com

swanr@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**
TO: **LLP**
Suite 2100, Scotia Plaza
40 King Street West
Toronto, Ontario M5H 3C2

Wendy Berman

Tel: +1 416.860.2926

John Birch

Tel: +1 416.860.5225

Natalie E. Levine

Tel: +1 416.860.6568

Anna Tombs

Tel: +1 416.860.6563

Fax: +1 416.640.3207

wberman@casselsbrock.com

jbirch@casselsbrock.com

nlevine@casselsbrock.com

atombs@casselsbrock.com

Lawyers for Certain Former Directors
and Officers of the Applicants (Klaudio
Leshnjani, William (Bill) C. Crowley,
William (Bill) R. Harker, 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 **PALIARE ROLAND ROSENBERG**
TO: **ROTHSTEIN LLP**
155 Wellington St West, 35th Floor
Toronto, Ontario M5V 3H1

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

INDEX

INDEX

| Tab | Description | Page No. |
|------------|--|-----------------|
| 1. | Notice of Motion dated February 7, 2019 | 1 |
| 2. | The Litigation Trustee's Statement of Claim issued December 19, 2018 (CV-18-00611214-00CL) | 9 |
| 3. | Morneau Shepell's Statement of Claim issued December 19, 2019 (CV-18-00611217-00CL) | 39 |
| 4. | The Monitor's Statement of Claim issued December 19, 2019 (CV-18-00611219-00CL) | 61 |
| 5. | The Class Action Statement of Claim issued October 21, 2015 (4414/15) | 91 |
| 6. | Amended order of Hainey J. re Litigation Investigator, pronounced April 26, 2018, Court File No.: CV-17-11846-00CL | 111 |
| 7. | Order of Hainey J re Appointment of Litigation Trustee, Lifting of Stay, and Other Relief, pronounced December 3, 2018, Court File No.: CV-17-11846-00CL | 127 |
| 8. | Order of Hainey J re Transfer at Undervalue Proceeding Approval, pronounced December 3, 2018, Court File No.: 17-11846-00CL | 139 |

Tab 1

Court File Nos. CV-18-00611219-00CL, CV-18-00611214-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

**NOTICE OF MOTION
(MOTION FOR PRE-PLEADING PRODUCTION)**

The defendants, ESL Investments Inc., ESL Partners LP, SPE I Partners, LP, SPE Master I, LP, ESL Institutional Partners, LP, and Edward S. Lampert (the “**ESL Parties**”), will make a motion to a Judge presiding over the Commercial List on Wednesday, March 20, 2018 at 10:00 a.m., or as

soon after that time as the Motion can be heard at the court house, 330 University Avenue, 7th Floor, Toronto, Ontario, M5G 1R7.

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

THE MOTION IS FOR

- (a) An order requiring the Monitor, the Litigation Trustee, and/or the Litigation Investigator to produce to the defendants the documents received by the Litigation Investigator;
- (b) The costs of this motion; and
- (c) Such further and other relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE

- (d) Although defendants are generally entitled to production only after pleadings close, in some cases fairness may warrant production at the outset of the proceedings. This is such a case.
- (e) The ESL Parties bring this motion as a continuation of their objection in the CCAA proceeding to the Litigation Investigator's motion to appoint the Litigation Trustee. The ESL Parties sought as a condition of the Litigation Trustee's appointment the immediate disclosure of all relevant Sears Canada documents obtained by the Litigation Investigator as a result of its mandate (the "**Documents**"). The ESL Parties agreed to defer this objection to the present proceedings.
- (f) The Litigation Trustee has relied on the Documents, which he received from his counsel, to plead a case that relies largely on internal documents that detail the Sears Canada board of directors' issuance of the 2013 dividend. His counsel, Lax O'Sullivan Lisus Gottlieb LLP,

obtained the documents by virtue of its previous role in the CCAA proceeding as the Litigation Investigator.

(g) Unlike in a typical proceeding, the creditors and other “stakeholders”, on whose behalf the Litigation Trustee seeks relief, did not possess the Documents at the time of the events in issue. Instead, the Documents are those of a third-party that the creditors’ representative obtained through the CCAA process.

(h) As minority shareholders, the ESL Parties, like the creditors, had no access to Sears Canada’s internal documents during the events in issue. Just as the Documents were required to plead the creditors’ allegations regarding the directors’ conduct, so too are they required for the ESL Parties’ defence of that conduct.

(i) By denying immediate disclosure of the Documents, the Monitor and Litigation Trustee gain an unfair advantage in having the ESL Parties commit blindly to a defence of the directors’ conduct before the details of that conduct are disclosed—and therefore before the ESL Parties can have any reasonable grasp of the directors’ conduct. On the other hand, there is no unfairness or disadvantage to the plaintiffs in disclosing the Documents now.

(j) Further, immediate production of the Documents will advance the proceedings far more quickly than post-pleading production. Pre-pleading production will allow the ESL Parties to file substantive defences, reducing the need for an amendment. It will also allow them to commence the document review process in parallel with the preliminary motions.

Other Grounds

(k) Rules 1.04(1), 1.04(1.1), 1.04(2), 30.04(5) and 57.03 of the *Rules of Civil Procedure*;

- (l) Section 11 of the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36; and
- (m) Such further and other grounds as the lawyers may advise.

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

- (n) The statements of claim issued in the following Court File Nos:
 - (i) CV-18-00611214-00CL;
 - (ii) CV-18-00611217-00CL;
 - (iii) CV-18-00611219-00CL; and
 - (iv) 4114/15 (Milton Registry);
- (o) The following orders issued by this Court:
 - (i) Amended order of Hainey J re Litigation Investigator, pronounced April 26, 2018, Court File No: CV-17-11846-00CL;
 - (ii) Order of Hainey J re Appointment of Litigation Trustee, Lifting of Stay, and Other Relief , pronounced December 3, 2018, Court File No: CV-17-11846-00CL; and
 - (iii) Order of Hainey J re Transfer at Undervalue Proceeding Approval, pronounced December 3, 2018, Court File No: CV-17-11846-00CL; and
- (p) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

February 7, 2019

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

Harry Underwood (20806C)

hunderwood@polleyfaith.com

Andrew Faith (47795H)

afaith@polleyfaith.com

Jeffrey Haylock (61241F)

jhaylock@polleyfaith.com

Sandy Lockhart (73554J)

slockhart@polleyfaith.com

Tel: 416.365.1600

Fax: 416.365.1601

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

TO: **THE LITIGATION SERVICE LIST**

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. et al.

Defendants

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

**NOTICE OF MOTION
(MOTION FOR PRE-PLEADING PRODUCTION)**

POLLEY FAITH LLP

The Victory Building
80 Richmond Street West, Suite 1300
Toronto, ON M5H 2A4

Harry Underwood (20806C)

hunderwood@polleyfaith.com

Andrew Faith (47795H)

afaith@polleyfaith.com

Jeffrey Haylock (61241F)

jhaylock@polleyfaith.com

Sandy Lockhart (73554J)

slockhart@polleyfaith.com

Tel: 416.365.1600

Fax: 416.365.1601

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

Tab 2

CV-18-00611214-00CL

Court File No.

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

BETWEEN:



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

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS, LP,
SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP,
EDWARD LAMPERT, EPHRAIM J. BIRD, DOUGLAS CAMPBELL,
WILLIAM CROWLEY, WILLIAM HARKER, R. RAJA KHANNA, JAMES
MCBURNEY, DEBORAH ROSATI, and DONALD ROSS

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANTS

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

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

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

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

-2-

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

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

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

Address of court office: Superior Court of Justice
330 University Avenue, 10th Floor
Toronto ON M5G 1E6
R7

-3-

TO: **MCMILLAN LLP**
Brookfield Place
181 Bay Street
Suite 4400
Toronto ON M5J 2T3

Wael Rostom
wael.rostom@mcmillan.ca
Tel: (416) 865-7790

Brett Harrison
brett.harrison@mcmillan.ca
Tel: (604) 691-6118

Tushara Weerasooriya
tushara.weerasooriya@mcmillan.ca
Tel: (416) 860-6568

Stephen Brown-Okruhlik
stephen.brown-okruhlik@mcmillan.ca
Tel: (416) 860-6568
Fax: (416) 640-3207

POLLEY FAITH LLP
The Victory Building
80 Richmond Street West
Suite 1300
Toronto ON M5H 2A4

Harry Underwood
hunderwood@polleyfaith.com

Andrew Faith
afaith@polleyfaith.com

Jeffrey Haylock
jhaylock@polleyfaith.com

Sandy Lockhart
slockhart@polleyfaith.com

Tel: 416 365 1600
Fax: 416 365 1601

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

-4-

AND TO: **CASSELS BROCK & BLACKWELL LLP**
Barristers and Solicitors
Scotia Plaza
40 King Street West
Suite 2100
Toronto ON M5H 3C2

John N. Birch LSO#: 38968U
jbirch@casselsbrock.com

Tel: (416) 860-5225

Fax: (416) 640-3057

Mary I.A. Buttery LSO#: 34599R
mbuttery@casselsbrock.com

Tel: (604) 691-6118

Fax: (604) 691-6120

Natalie Levine LSO#: 64908K
nlevine@casselsbrock.com

Tel: (416) 860-6568

Fax: (416) 640-3207

Lawyers for the Defendants,
Ephraim J. Bird, Douglas Campbell, William Crowley, William Harker,
James McBurney and Donald Ross

AND TO: **BENNETT JONES LLP**
Barristers and Solicitors
1 First Canadian Place
Suite 3400
P.O. Box 130
Toronto ON M5X 1A4

Richard Swan
swanr@bennettjones.com

Tel: (416) 777-7479

Sean Zweig
zweigs@bennettjones.com

Tel: (416) 777-6254

Fax: (416) 863-1716

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

CLAIM

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

-6-

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

Overview

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

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

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

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

-7-

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

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

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

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

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

-8-

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

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

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

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

The Parties

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

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

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

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

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

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

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

-10-

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

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

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

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

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

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

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

Lampert’s Purchase of Sears Holdings

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

-11-

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

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

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

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

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

-12-

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

Lampert's Involvement in the Operations of Sears Canada

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

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

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

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

Sears Canada's Financial and Operational Problems

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

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

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

-13-

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

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

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

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

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

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

The Dividend Plan

ESL's Need for Liquidity to Satisfy Redemptions

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

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

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

Sale of Sears Canada's Assets

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

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

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

-15-

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

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

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

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

The Dividend Proposal

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

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

Lack of Notice and Undue Haste

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

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

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

-17-

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

Insufficient Information Provided to the Board

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

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

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

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

Lack of Governance Procedures

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

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

-18-

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

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

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

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

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

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

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

Sears Canada's Board Rubber-Stamps the Dividend Payment

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

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

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

Effects of the Dividend

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

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

-20-

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

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

The CCAA Proceeding

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

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

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

The Claims

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

The Former Directors and Bird: Breaches of Duties and Oppression

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

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

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

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

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

-22-

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

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

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

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

-23-

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

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

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

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

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

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

-24-

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

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

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

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

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

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

Conspiracy By All Defendants

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

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

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

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

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

-26-

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

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

December 19, 2018

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Matthew P. Gottlieb LSO#: 32268B
mgottlieb@lolg.ca

Tel: 416 644 5353

Andrew Winton LSO#: 54473I
awinton@lolg.ca

Tel: 416 644 5342

Philip Underwood LSO#: 73637W
punderwood@lolg.ca

Tel: 416 645 5078

Fax: 416 598 3730

Lawyers for the Plaintiff

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

Plaintiff

-and- ESL INVESTMENTS INC., et al.

Defendants

CV-18-0061121400CL

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

STATEMENT OF CLAIM

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Matthew P. Gottlieb LSO#: 32268B
mgottlieb@iolg.ca

Tel: 416 644 5353

Andrew Winton LSO#: 544731
awinton@iolg.ca

Tel: 416 644 5342

Philip Underwood LSO#: 73637W
punderwood@iolg.ca

Tel: 416 645 5078

Fax: 416 598 3730

Lawyers for the Plaintiff

Tab 3

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

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

BETWEEN :

MORNEAU SHEPELL LTD. in its capacity as administrator of the
Sears Canada Inc. Registered Pension Plan

Plaintiff

- and -

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP,
SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP,
EDWARD S. LAMPERT, WILLIAM HARKER, WILLIAM CROWLEY,
DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH E. ROSATI,
R. RAJA KHANNA, JAMES MCBURNEY and DOUGLAS CAMPBELL

Defendants



STATEMENT OF CLAIM

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

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

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

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

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

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

- 2 -

Ray Williams, Registrar

Date: December 19, 2018

Issued by


Local registrarAddress of court office 330 University Avenue
7th Floor
Toronto, Ontario M5G 1R7TO: ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP,
SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP and
EDWARD S. LAMPERTc/o **MCMILLAN LLP**
Brookfield Place
181 Bay Street, Suite 4400
Toronto ON M5J 2T3**Wael Rostom**
Tel: +1 416.865.7790
Brett Harrison
Tel: +1 416.865.7932
Tushara Weerasooriya
Tel: +1 416.865.7890
Stephen Brown-Okruhlik
Tel: +1 416.865.7043
Fax: +1 416.865.7048wael.rostom@mcmillan.ca
brett.harrison@mcmillan.ca
tushara.weerasooriya@mcmillan.ca
stephen.brown-okruhlik@mcmillan.ca

and

c/o **POLLEY FAITH LLP**
The Victory Building
80 Richmond Street West, Suite 1300
Toronto, ON M5H 2A4**Harry Underwood**
Andrew Faith
Jeffrey Haylock
Sandy LockhartTel: +1 416.365.1600
Fax: +1 416.365.1601hunderwood@polleyfaith.com
afaith@polleyfaith.com
jhaylock@polleyfaith.com
slockhart@polleyfaith.com

- 3 -

AND TO: WILLIAM HARKER, WILLIAM CROWLEY, DONALD CAMPBELL ROSS,
EPHRAIM J. BIRD, JAMES MCBURNEY and DOUGLAS CAMPBELL

c/o CASSELS BROCK & BLACKWELL LLP

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

Mary BATTERY

Tel: +1 604.691.6118

Fax: +1 604.691.6120

John Birch

Tel: +1 416.860.5225

Natalie E. Levine

Tel: +1 416.860.6568

Christopher Horkins

Tel: +1 416.815.4351

Fax: +1 416.640.3207

mbattery@casselsbrock.com

jbirch@casselsbrock.com

nlevine@casselsbrock.com

chorkins@casselsbrock.com

AND TO: DEBORAH E. ROSATI and R. RAJA KHANNA

c/o BENNETT JONES LLP

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

Gary Solway

Tel: +1 416.777.6555

Sean Zweig

Tel: +1 416.777.6254

Fax: +1 416.863.1716

solwayg@bennettjones.com

zweigs@bennettjones.com

- 4 -

AND A
COURTESY
COPY TO:

SUPERINTENDENT OF FINANCIAL SERVICES AS ADMINISTRATOR OF THE
ONTARIO PENSION BENEFITS GUARANTEE FUND

c/o **PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**
155 Wellington Street West
35th Floor
Toronto, ON M5V 3H1

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

- 5 -

CLAIM

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

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

- 6 -

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

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

The Parties

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

- 7 -

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

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

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

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

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

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

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

- 8 -

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

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

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

- 9 -

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

The Plan

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

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

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

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

- 10 -

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

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

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

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

2013 Plan to Dispose of Real Estate Assets to Fund Dividends

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

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

- 11 -

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

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

22. In accordance with the Monetization Plan:

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

- 12 -

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

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

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

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

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

- 13 -

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

The 2013 Dividend

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

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

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

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

Desjardins Capital Markets Report (October 30, 2013)

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

CIBC Report (November 4, 2013)

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

- 14 -

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

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

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

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

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

- 15 -

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

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

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

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

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

- 16 -

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

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

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

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

Liability of Defendants

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

- 17 -

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

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

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

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

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

- 18 -

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

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

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

44. The Plaintiff relies upon the CBCA.

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

December 19, 2018

BLAKE, CASSELS & GRAYDON LLP

Barristers & Solicitors
199 Bay Street, Suite 4000
Commerce Court West
Toronto, ON M5L 1A9

Michael Barrack LSO #21941W
Tel: (416) 863-5280
michael.barrack@blakes.com

Kathryn Bush LSO #23636O
Tel (416)863-2633
kathryn.bush@blakes.com

Kiran Patel LSO #58398H
Tel: (416) 863-2205
kiran.patel@blakes.com

Fax: (416) 863-2653

Lawyers for the Plaintiff

MORNEAU SHEPELL LTD. in its capacity as administrator and ESL INVESTMENTS INC. et al.
of the Sears Canada Inc. Registered Pension Plan

Plaintiff

Defendants

Court File No.:

CV-18-00611 217-006L

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

STATEMENT OF CLAIM

BLAKE, CASSELS & GRAYDON LLP

Barristers & Solicitors
199 Bay Street, Suite 4000
Commerce Court West
Toronto, ON M5L 1A9

Michael Barrack LSO #21941W

Tel: (416) 863-5280
michael.barrack@blakes.com

Kathryn Bush LSO #236360

Tel: (416)863-2633
kathryn.bush@blakes.com

Kiran Patel LSO #58398H

Tel: (416) 863-2205
kiran.patel@blakes.com

Fax: (416) 863-2653

Lawyers for the Plaintiff

Tab 4

CV-18-0061219-00CL

Court File No.:

**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

STATEMENT OF CLAIM

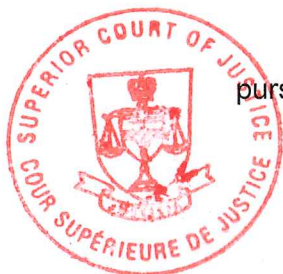
A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

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

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

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

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



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

Ray Williams, Registrar

Date: December 19, 2018

Issued by

Ray Williams
Local registrar

Address of court office 330 University Avenue
7th Floor
Toronto, Ontario M5G 1E6

R7

TO: **MCMILLAN LLP**
Brookfield Place
181 Bay Street, Suite 4400
Toronto ON M5J 2T3

Wael Rostom

Tel: +1 416.865.7790

Brett Harrison

Tel: +1 416.865.7932

Tushara Weerasooriya

Tel: +1 416.865.7890

Stephen Brown-Okruhlik

Tel: +1 416.865.7043

Fax: +1 416.865.7048

wael.rostom@mcmillan.ca
brett.harrison@mcmillan.ca
tushara.weerasooriya@mcmillan.ca
stephen.brown-okruhlik@mcmillan.ca

Lawyers for Edward S. Lampert, ESL Investments Inc., and ESL Partners, LP

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

Harry Underwood

Andrew Faith

Jeffrey Haylock

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 Edward S. Lampert, ESL Investments Inc., and ESL Partners, LP

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

Mary Buttery

Tel: +1 604.691.6118

Fax: +1 604.691.6120

John Birch

Tel: +1 416.860.5225

Natalie E. Levine

Tel: +1 416.860.6568

Fax: +1 416.640.3207

mbuttery@casselsbrock.com

jbirch@casselsbrock.com

nlevine@casselsbrock.com

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

AND TO: **SPE I Partners, LP**
1170 Kane Concourse, Suite 200
Bay Harbor, FL, 33154
U.S.A.

AND TO: **SPE Master I, LP**
1170 Kane Concourse, Suite 200
Bay Harbor, FL, 33154
U.S.A.

AND TO: **ESL Institutional Partners, LP**
1170 Kane Concourse, Suite 200
Bay Harbor, FL, 33154
U.S.A.

CLAIM

1 The Plaintiff, FTI Consulting Canada Inc., in its capacity as Court-appointed monitor of Sears Canada Inc. (**Sears**) in proceedings pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c. c-36 (the **CCAA**) (the **Monitor**) claims against the Defendants:

- (a) a declaration that the transfer of funds to the Defendants, ESL Investments Inc. (**ESL Investments**), ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP, ESL Institutional Partners, LP, and Edward S. Lampert (**Lampert**), by means of a dividend of \$5.00 per share paid by Sears on December 6, 2013 (the **2013 Dividend**):
 - (i) was a transfer at undervalue for the purposes of section 96 of the *Bankruptcy and Insolvency Act*, RSC, 1985, c. B-3 (the **BIA**), as incorporated into the CCAA by section 36.1 thereof (the **Transfer at Undervalue**); and
 - (ii) is void as against the Monitor;
- (b) an order that the Defendants, either as parties to the 2013 Dividend or as privies thereto, or both, shall jointly and severally pay to Sears the full amount of the 2013 Dividend, being approximately \$509 million in total;
- (c) in the alternative, an order that the Defendants, either as parties to the 2013 Dividend or as privies thereto, or both, shall jointly and severally pay to Sears the portion of the 2013 Dividend received by the Defendants, collectively;

- (d) in the further alternative, an order that each of the Defendants, either as parties to the 2013 Dividend or as privies thereto, or both, shall pay to Sears the amount of the 2013 Dividend that such Defendant received, or directly or indirectly benefitted from;
- (e) pre and post-judgment interest in accordance with the *Courts of Justice Act*, RSO 1990, c. C.43; and
- (f) costs of this action on a substantial indemnity basis.

The Parties

2 Sears and its affiliate companies obtained protection under the CCAA on June 22, 2017, and pursuant to section 11.7 of the CCAA, the Plaintiff was appointed as Monitor under the Initial Order. On December 3, 2018, the Monitor obtained authorization from the Court to bring this action.

3 The Defendant ESL Investments is a privately-owned hedge fund incorporated under the laws of Delaware with its principal executive offices located at 1170 Kane Concourse, Bay Harbor Islands, Florida. The Defendants ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP, and ESL Institutional Partners, LP (collectively, and together with ESL Investments, **ESL**) are affiliates of ESL Investments.

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

5 The Defendant William Crowley was a non-independent director of Sears from March 2005 to April 2015, including at the time the 2013 Dividend was approved by the Sears Board and paid to Sears' shareholders.

6 The Defendant William Harker was a non-independent director of Sears from November 2008 to April 2015, including at the time the 2013 Dividend was approved by the Sears Board and paid to Sears' shareholders.

7 At all material times, including on November 18, 2013 through to December 3, 2013, Lampert and ESL held a controlling ownership interest in Sears Holdings Corporation (**Holdings**) and beneficially owned 55% of Holdings' outstanding shares. In turn, at all material times, Holdings held a controlling ownership interest in Sears. On October 15, 2018, Holdings filed for Chapter 11 protection from creditors with the United States Bankruptcy Court. Holdings is not a party to this action.

8 At all material times, including on November 18, 2013 through to December 6, 2013, Holdings and each of the Defendants other than Crowley was a direct or beneficial shareholder of Sears, and held the following ownership interests:

- (a) Holdings beneficially owned 51,962,391 shares in Sears, representing approximately 51% of the outstanding shares.
- (b) ESL beneficially owned 17,725,280 shares in Sears, representing approximately 17.4% of the outstanding shares, which were directly held as follows:
 - (i) ESL Partners, LP: 15,821,206 shares;
 - (ii) SPE I Partners, LP: 830,852 shares;
 - (iii) SPE Master I, LP: 1,068,522 shares;
 - (iv) ESL Institutional Partners, LP: 4,381 shares; and

- (v) CRK Partners, LLC (an affiliate of ESL Investments, Inc. that was voluntarily cancelled effective June 1, 2018 and is not a party to these proceedings): 319 shares;
- (c) Lampert owned 10,433,088 shares in Sears, representing approximately 10.2% of the outstanding shares; and
- (d) Harker owned 4,604 shares in Sears.

9 In this action, the Monitor seeks a declaration that the 2013 Dividend was a transfer at undervalue pursuant to section 96 of the BIA (as incorporated into proceedings under the CCAA by section 36.1 thereof) and is therefore void as against the Monitor, and it seeks payment from the Defendants who were parties and/or privies to the Transfer at Undervalue.

Sears' Operational Decline

10 Beginning in 2011, Sears' financial performance began to decline sharply. According to Sears' publicly-disclosed audited annual financial statements for 2010 – 2013 (as amended, in certain cases), Sears' revenues, operating profits/losses and gross margin rates were as follows:

| Year | Total Revenues (\$ million) | Operating Profit (Loss) (\$ millions) | Gross Margin Rate |
|------|--------------------------------|---|----------------------|
| 2010 | 4,938.5 | 196.3 | 39.3% |
| 2011 | 4,619.3 | (50.9) | 36.5% |
| 2012 | 4,300.7 | (82.9) | 36.7% |
| 2013 | 3,991.8 | (187.8) | 36.2% |

- 11 As early as 2011, Sears' management recognized that drastic, transformative action would be required for Sears to re-establish a foothold in the Canadian retail market. In the 2011 strategic plan (the **2011 Strategic Plan**) prepared for Sears' board of directors (the **Board**), then-Chief Executive Officer Calvin McDonald described the state of Sears as follows:

Sears Canada is not a good retailer. Our business is broken: trading is awkward and inefficient, we lack product and merchandising focus and we are becoming irrelevant to customers while losing touch with our core.

[...]

We lack many of the fundamental processes, structures and culture of a strong retailer. In short, we lack 'retail rhythm'. However, most of our challenges are self-induced, meaning we are in a position to fix them.

- 12 The 2011 Strategic Plan also made clear that if transformative action was not taken, Sears could not expect to re-emerge as a successful retailer: "If we do not innovate, we will cease to be relevant." More directly, the 2011 Strategic Plan warned that "the current trajectory of growth and margin decline would take EBITDA into negative territory if we do not take drastic action."

- 13 Notwithstanding the concerning operational trends identified in the 2011 Strategic Plan, Sears failed to take the necessary action to reinvigorate its business. Between 2011 and 2013, Sears consistently invested fewer resources on growth and transformational initiatives relative to its industry peers. In particular, the Board rejected multiple attempts by management, including in particular McDonald, to use Sears' capital to revitalize its business.

2013 Plan to Dispose of Real Estate Assets to Fund Dividends

- 14 By 2013, ESL Investments and Lampert had an immediate need for cash from Sears. ESL Investments had raised money from investors years earlier on terms that precluded these investors from redeeming their investment for a period of time. In 2013, this holding period had expired, investors were entitled to withdraw funds and ESL Investments faced significant redemptions.
- 15 In order to satisfy its redemption obligations, ESL and Lampert devised a plan to extract cash from Sears through (a) the disposition of its most valuable real estate assets, and (b) the payment of an extraordinary dividend for the benefit of ESL and Lampert (collectively the **Monetization Plan**).
- 16 To give effect to the Monetization Plan, Lampert personally directed the disposition of Sears' real estate assets in 2013. Lampert provided specific instructions to Sears on the price sought by Sears for its dispositions. The Monitor specifically denies Lampert's public statement on February 11, 2018:

While I take no issue with the decisions that the board of Sears Canada made with regard to dividends and certain real estate sales, I have to emphasize that I have never served as a director or officer of Sears Canada, so I don't have firsthand knowledge of their internal deliberations and the alternatives considered.

17 At all materials times, Lampert directed and acted in concert with officers and directors of Sears to implement the Monetization Plan, including in particular with Crowley (then Chair of the Sears Board), Harker (then a director of Sears), and E.J. Bird (then Chief Financial Officer of Sears). Jeffrey Stollenwerck (then President, Real Estate Business Unit of Holdings) was also engaged by ESL and Lampert on these matters. Lampert had a longstanding professional and personal relationship with each of them:

- (a) Crowley had acted as President and Chief Operating Officer of ESL Investments from January 1999 to May 2012, Executive Vice-President and Chief Administrative Officer of Holdings from September 2005 to January 2011 and Chief Financial Officer of Holdings for periods in 2005-2007;
- (b) Harker was an Executive Vice-President and General Counsel of ESL Investments from February 2011 to June 2012 and an officer of Holdings from September 2005 until August 2012, during which time he acted variously as General Counsel, Corporate Secretary and Senior Vice-President, among other roles;
- (c) Bird was the Chief Financial Officer of ESL Investments from 1991 until 2002; and
- (d) Stollenwerck was the President of the Real Estate Business Unit of Holdings from February 2008 to April 2018 and a Senior Vice President, Real Estate for Holdings from March 2005 to February 2008. Before joining Holdings, Stollenwerck had acted as Vice-President, Research at ESL Investments.

18 In accordance with the Monetization Plan, Sears entered into an agreement with Oxford Properties Group on or about June 14, 2013 to terminate Sears' leases at Yorkdale Shopping Centre and Square One Mississauga in exchange for a payment to Sears of \$191 million (the **Oxford Terminations**). The Oxford Terminations closed June 24, 2013.

September 2013 Board Presentations

19 On September 23, 2013, two years after the 2011 Strategic Plan, the Board received a series of management presentations directly addressing Sears' deteriorating operational and financial performance (the **2013 Board Presentations**). Among other things, the 2013 Board Presentations reported that:

- (a) sales continued to decline across Sears' business at a rate of 2.6% per year;
- (b) based on year-to-date current trends (and without appropriately accounting for stores closed in connection with the Monetization Plan), Sears' projected EBITDA by 2016 would be negative \$105 million; and
- (c) Sears was struggling operationally: "Basics not fixed".

20 Earlier that month, Board presentations had also recognized that competition in the Canadian retail space was increasing with Target's entry into the market. Target had opened 68 stores in Canada in the second quarter of 2013, and planned to open a further 124 stores in Canada by year end.

21 Following the 2013 Board Presentations, the Board knew or ought to have known that Sears' business was in decline and that its long term viability was at risk.

Continued Disposition of Real Estate Assets

- 22 In accordance with the Monetization Plan, Sears pursued an agreement with Cadillac Fairview Corporation Limited (**Cadillac Fairview**) to terminate five additional high-value leases (Toronto Eaton Centre, Sherway Gardens, Markville Shopping Centre, Masonville Place and Richmond Centre) (the **Cadillac Terminations**).
- 23 Lampert directed the negotiating strategy in connection with the Cadillac Terminations with a view to ensuring a dividend of the proceeds before the end of 2013. Crowley and Stollenwerck negotiated directly with Cadillac Fairview, including with respect to the final price of \$400 million.
- 24 On October 28, 2013, the Board approved the Cadillac Terminations. The Board was not advised of the role that Lampert, Crowley or Stollenwerk had played in negotiating the Cadillac Terminations. The Cadillac Terminations closed on November 12, 2013.
- 25 In the same period, Sears and Stollenwerck negotiated the sale of Sears' 50% interest in eight properties jointly owned with The Westcliff Group of Companies. Sears' 50% interest was sold to Montez Income Properties Corporation in exchange for approximately \$315 million (the **Montez Sale**).
- 26 The Sears Board approved the Montez Sale on November 8, 2013. The approval was made by written resolution and without an in-person board meeting.
- 27 The Montez Sale closed in January 2014.
- 28 The assets disposed of by Sears were its "crown jewels". It was plain that the divestment of these key assets in 2013, while Sears was struggling in the face of stiffer retail competition from Target and others, would have a dramatic negative impact on Sears. The negative impact in fact unfolded:

| Year | Total Revenues (\$ million) | Operating Profit (Loss) (\$ millions) | Gross Margin Rate |
|------|--------------------------------|---|----------------------|
| 2012 | 4,300.7 | (82.9) | 36.7% |
| 2013 | 3,991.8 | (187.8) | 36.2% |
| 2014 | 3,424.5 | (407.3) | 32.6% |
| 2015 | 3,145.5 | (298.3) | 31.8% |
| 2016 | 2,613.6 | (422.4) | 27.3% |

29 Lampert directed Sears to complete each of the Oxford Terminations, the Cadillac Terminations and the Montez Sale. These dispositions were part of the Monetization Plan, and completed in order to provide ESL Investments with funds to address its redemption obligations.

The 2013 Dividend

30 On November 12, 2013, the same day Sears received \$400 million in proceeds from the Cadillac Terminations, Crowley directed Bird to move forward with an extraordinary dividend of between \$5.00 and \$8.00 per share.

31 On November 18 and 19, 2013, six days after the closing of the Cadillac Terminations, the Board held an in-person meeting (the **November Meeting**). Although Sears had no business operations in the United States, the November Meeting was held in New York City at the offices of Wachtell, Lipton, Rosen & Katz (**Wachtell**).

32 The November Meeting began with a short pre-dinner discussion on November 18 and continued with a full day session on November 19, 2013.

33 During the short pre-dinner discussion on November 18, 2013, the Board unanimously resolved to declare the 2013 Dividend, an extraordinary dividend of \$5.00 per common share, for an aggregate dividend payment of approximately \$509 million.

34 The circumstances surrounding the 2013 Dividend raise a series of red flags.

Lack of Notice to the Board

35 The Board had no advance notice that it would be asked to consider an extraordinary dividend at the November Meeting.

36 On Friday November 15, 2013, the Board was provided with a package of material for the November Meeting (the **Board Materials**). The Board Materials included a detailed agenda with 15 separate items for the Board to consider during the November Meeting.

37 Neither the agenda nor any of the other Board Materials made any reference to the fact that the Board would be asked to consider an extraordinary dividend or any dividend at all. Moreover, the possible payment of a dividend had not been tabled in any prior Board meeting in 2013.

Lack of Information

38 The Board was not provided with the information necessary to assess the appropriateness of an extraordinary dividend.

39 Unlike past instances in which the Board was asked to consider an extraordinary dividend, the Board Materials did not contain any financial or operational information regarding the payment of a proposed dividend. The Board did not receive:

- (a) any written materials regarding a proposed dividend or possible dividend structures;

- (b) any written presentation analyzing the impact the proposed dividend would have on Sears' business, including taking into account possible downside scenarios; or
- (c) any *pro forma* assessment of Sears' liquidity and cash flows following the payment of a dividend. Rather, the *pro forma* cash flows included in the Board Materials assumed that no dividend would be paid in either 2013 or 2014.

40 While Sears' management had identified the need to provide the Board with various cash flow analyses covering various dividend scenarios, the limited analysis that was done by management was incomplete and never presented to the Board.

41 Moreover, and unlike past meetings in which the Board had considered extraordinary dividends:

- (a) management did not prepare a written presentation to the Board on the proposed dividend and there was no written recommendation or proposal from management to the Board; and
- (b) the directors were not provided with legal advice with respect to their duties in connection with the declaration of a dividend.

Financial Uncertainty

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

- 43 On November 14, 2013, the Investment Committee of Sears' Board was presented with material showing an estimated pension plan deficiency of \$313 million at December 2013. The members of the Investment Committee were Crowley, Harker and Bird. This fact was not presented to the Board at the November Meeting.
- 44 In advance of the November Meeting, the Board was provided with only high level *pro forma* cash flows for 2014. The cash flows were based on a 2014 Plan EBITDA of \$135 million, of which \$118 million was based on aspirational changes to the business that management hoped would result in financial improvement but that management and the Board should have known were unreasonably optimistic. Moreover, the *pro forma* cash flows presented to the Board assumed the receipt of proceeds of the Montez Sale even though the transaction had not closed. Again, no information was provided to the Board on the impact an extraordinary dividend would have on future investment opportunities and future cash flows.
- 45 The Board Materials did however include two analyst reports, both of which reviewed the financial circumstances of Sears and predicted its eventual failure:

Desjardins Capital Markets Report (October 30, 2013)

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

CIBC Report (November 4, 2013)

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

A Conflicted Board

- 46 The 2013 Dividend was approved by the Board unanimously and without any abstentions.
- 47 Crowley and Harker participated in the Board's deliberations to pay the 2013 Dividend and approved the payment of the 2013 Dividend despite the fact that Sears had specifically determined that:
- (a) Crowley and Harker were not "independent" directors; and
 - (b) pursuant to National Instrument 52-110, Crowley and Harker had a material relationship with Holdings and/or ESL that could "be reasonably expected to interfere with the exercise of [their] independent judgment."
- 48 Further, Crowley did not disclose to the Board that he, Lampert and Stollenwerck were personally involved in the 2013 real estate divestitures or that the timetable and size of the proposed dividend was dictated by ESL Investment's need for funds. Rather, the Board was led to believe that Sears' management was responsible for the 2013 real estate divestitures. For example, Crowley expressly advised the independent members of the Board: "I do not think that the Board or the independents should attempt to insert themselves in the negotiations [of real estate transactions]. Bill [Harker] and I did not and do not do that."

49 Crowley and Harker in particular were focused on the interests of ESL and Lampert. Crowley and Harker failed to disclose the motivations of ESL and Lampert to the Board and the fact that both the real estate dispositions and 2013 Dividend were driven by the needs of ESL and Lampert, and not the best interests of Sears.

Departure from Past Governance Practices

50 The Board process for the 2013 Dividend represented a sharp departure from past practice of the Sears Board and ordinary standards of good corporate governance.

51 For example, in December 2005, the Board approved an extraordinary dividend. The process for approving that dividend included:

- (a) multiple Board meetings on September 7, 2005, September 14, 2005, and December 2, 2005 to discuss the merits and risks of a potential dividend in light of the company's operational needs;
- (b) multiple oral presentations from management and a dividend recommendation by the Chief Financial Officer;
- (c) separate meetings between the independent directors of Sears and the Chief Financial Officer to assess the company's financial state;
- (d) legal advice from both in-house and external counsel to the Board; and
- (e) review by the Board of draft press releases and an officer's certificate with respect to the dividend.

52 In May 2010, the Board approved another extraordinary dividend, again with the benefit of a robust process:

- (a) multiple meetings of the Board on April 23, 2010, May 7, 2010, and May 18, 2010 to discuss the merits and risks of a potential dividend in light of the company's operational needs;
- (b) separate meetings of the independent directors on May 7, 2010 and May 12, 2010, with their own counsel present, to discuss the options available to Sears with respect to its excess cash and the amount of the potential dividend in light of the company's operational needs;
- (c) multiple presentations by management, including a 40-page presentation dated April 23, 2010 and a subsequent 20-page presentation dated May 7, 2010, providing detailed analyses of excess cash and financial forecasts (with downside scenarios) for multiple dividend options;
- (d) a dialogue between management and the Board continuing over several meetings with respect to various options for a potential dividend;
- (e) consideration of multiple potential uses for excess cash, including cash dividends in various amounts, a substantial issuer bid and a normal course issuer bid; and
- (f) a deferral of half the proposed dividend pending a full assessment of the company's operational needs.

53 In September 2010, the Board approved a second extraordinary dividend for 2010. The process for approving that dividend included:

- (a) multiple meetings of the Board on or around August 23, 2010 and September 10, 2010 to discuss the capital structure of the company and the merits and risks of a potential dividend in light of the company's operational needs;

- (b) multiple presentations by management, including a "capital structure update" dated August 3, 2010 and a 32-page presentation assessing the capital structure of the company and potential dividend options, including financial forecasts and downside scenarios, which the Board reviewed in advance of approving the dividend; and
- (c) a separate meeting of the independent directors on or around September 8, 2010, with their own counsel present, to discuss the options available to Sears with respect to its excess cash and the amount of the potential dividend in light of the company's operational needs.

54 In December 2012, the Board approved a smaller extraordinary dividend. While not as fulsome as previous governance processes, the process for approving the 2012 dividend nonetheless included:

- (a) a meeting on December 12, 2012 which included thorough discussion and analysis of the impact of a potential dividend on available cash, EBITDA and total debt, the company's need to retain cash for operational uses, and downside scenarios in respect of a possible dividend;
- (b) a report entitled "Dividend Discussion" which was prepared by Sears' Chief Financial Officer and which the Board reviewed in advance of approving the dividend; and
- (c) a review of the draft officer's certificate with respect to the dividend by external counsel to the independent directors, and a dialogue with the Chief Financial Officer of Sears addressing counsel's comments.

55 In stark contrast, the 2013 Dividend was the first item of business at a pre-dinner discussion at the outset of the November Meeting and was declared without any adequate financial, operational or cash flow information upon which to exercise proper business judgment. It was dealt with before any of the planned presentations to the Board, which addressed Sears' financial results, or the reports on management priorities, asset valuations, operating efficiency and Sears' 2014 financial plan and without the benefit of any independent legal advice regarding the directors' duties in the circumstances.

56 The Board's inability to make a proper business decision in respect of the 2013 Dividend was apparent from the fact that one of the Board members, Ronald Weissman, had been appointed to the Board that day. Weissman, a resident of Texas, had no material prior dealings with Sears or knowledge of Sears' financial or operational circumstances upon which to base his decision to approve the 2013 Dividend.

The 2013 Dividend is a Transfer at Undervalue and Void

A Transfer at Undervalue

57 The 2013 Dividend provided no value to Sears and solely benefited its direct and indirect shareholders, including the Defendants ESL, Lampert and Harker. The amounts of the gratuitous benefit received by the Defendants were:

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

58 The Defendants also caused approximately \$259 million to be paid to Holdings through the 2013 Dividend.

Non-Arm's Length Dealings

59 At all materials times:

- (a) Holdings was the controlling shareholder of Sears, was a related entity to Sears, and was not dealing at arm's length with Sears;
- (b) ESL and Lampert exercised both *de facto* and *de jure* control over Holdings. As Holdings stated in its 2013 Annual Report, Mr. Lampert had "substantial influence over many, if not all, actions to be taken or approved by our stockholders"; and
- (c) ESL and Lampert were not dealing at arm's length with Sears as a result of their direct and indirect beneficial control position in Holdings, which in turn held a controlling interest in Sears. Further, Holdings, ESL and Lampert collectively held more than 75% of Sears' shares. ESL, Lampert and Holdings (at the direction of ESL and Lampert) acted in concert with respect to the control of Sears, and specifically acted in concert and with a single mind to exercise influence over Sears in connection with the 2013 Dividend and the Monetization Plan.

60 As a result of these relationships, each of Holdings, ESL, Lampert, and Sears are related entities who are presumed not to have acted at arm's length in respect of the 2013 Dividend. ESL and Lampert used their position of control over Sears to direct and/or influence Sears and its directors to carry out the Monetization Plan and the 2013 Dividend.

Intention to defraud, defeat or delay Sears' creditors

61 The 2013 Dividend was effected by Sears for the sole purpose of satisfying the immediate financial needs of ESL Investments and Lampert and in reckless disregard of the interests of Sears' creditors. The 2013 Dividend was made with the specific intention

to prioritize the interests of Lampert and ESL over Sears' creditors and other stakeholders.

62 In particular, considering the surrounding circumstances, Sears knew but recklessly disregarded the fact that the 2013 Dividend would have a material adverse impact on its ability to continue as a viable business and pay its creditors. In particular, the 2013 Dividend was:

- (a) a non-arm's length transaction made outside the usual course of business;
- (b) paid in the face of significant outstanding indebtedness to Sears' creditors, including pensioners, in circumstances in which:
 - (i) Sears had no operating income to repay its debts, including to its pensioners and other creditors;
 - (ii) applying reasonable assumptions, the Board could only reasonably have expected Sears to be significantly cash flow negative from 2014 onwards; and
 - (iii) the Board had no real plan to repay such indebtedness;
- (c) paid in circumstances that raise a series of "red flags", including as a result of the following facts:
 - (i) the 2013 Dividend was declared with unusual haste and with no advance notice to the Board;
 - (ii) the 2013 Dividend was declared in the absence of proper Board materials and with a deficient corporate governance process;

- (iii) the Board received no independent legal advice to properly discharge its duties with respect to a material transaction involving related parties: Holdings, ESL and Lampert;
- (iv) the divestiture of Sears' crown jewel assets had an obvious negative impact on its business;
- (v) Sears had not addressed its negative cash flows or operational challenges despite years of effort;
- (vi) there were clear conflicts of interest within the Board and management at the time the 2013 Dividend was declared; and
- (vii) the 2013 Dividend was driven by Lampert, Bird as Chief Financial Officer of Sears, and Crowley and Harker as non-independent directors of Sears, in order to satisfy ESL Investments' urgent need for funds.

63 In March of 2014, the Board was presented with a proposal for a further, more modest dividend on short notice. The proposed dividend was not approved by the Board due to concerns about Sears' financial position, only three months after the payment of the 2013 Dividend.

64 Sears knew or recklessly disregarded the fact that the 2013 Dividend would defraud, defeat or delay Sears' creditors. Shortly after the 2013 Dividend, Crowley supported further dividends in an email to Harker, stating:

"... we cannot hold cash because we may watch the business spiral down and do nothing.... Keeping the cash to fund a dying business does not make sense."

65 The Transfer at Undervalue effected by means of the 2013 Dividend is therefore void as against the Monitor within the meaning of section 96 of the BIA.

ESL, Lampert, Crowley and Harker are Liable as Privies

66 The Defendants ESL, Lampert, Crowley and Harker were privies to the Transfer at Undervalue and are liable to Sears.

67 None of ESL, Lampert, Crowley or Harker was dealing at arm's length with Holdings or Sears. Each of them knew that the 2013 Dividend would benefit ESL and Lampert and each of them sought to cause or confer that benefit. Further, each of them received either a direct or indirect benefit from the 2013 Dividend.

Director Indemnities

68 In order to preserve any indemnity rights Harker or Crowley may have against Sears, the Monitor will agree that any recoveries received from Harker or Crowley in connection with this claim will be reduced by the amount of any distribution that Harker or Crowley, respectively, would have received on account of an unsecured indemnity claim from the Sears estate. The purpose of this adjustment is to make Harker and Crowley whole for any such indemnity claims while not requiring the Sears estate to reserve funds for such indemnity claims.

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

69 The Monitor is entitled to serve SPE I Partners, LP, SPE Master I, LP, and ESL Institutional Partners, LP without a court order pursuant to rule 17 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, because the claim is authorized by statute to be made against a person outside Ontario by a proceeding commenced in Ontario (Rule 17.02(n)).

70 The Monitor pleads and relies on the BIA and the CCAA.

71 The Monitor proposes that the trial of this matter be heard in Toronto, Ontario.

December 19, 2018

Norton Rose Fulbright Canada LLP
Royal Bank Plaza, South Tower, Suite 3800
200 Bay Street, P.O. Box 84
Toronto, Ontario M5J 2Z4 CANADA

Orestes Pasparakis, LSO#: 36851T

Tel: +1 416.216.4815

Robert Frank LSO#: 35456F

Tel: 1 416.202.6741

Evan Cobb, LSO#: 55787N

Tel: +1 416.216.1929

Fax: +1 416.216.3930

orestes.pasparakis@nortonrosefulbright.com

robert.frank@nortonrosefulbright.com

evan.cobb@nortonrosefulbright.com

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

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

ESL Investments Inc. et al.

and

Plaintiff

Defendants

Court File No.:

CU-18-00611219-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at TORONTO

STATEMENT OF CLAIM

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, LSO#: 36851T
Tel: +1 416.216.4815

Robert Frank LSO#: 35456F
Tel: 1 416.202.6741

Evan Cobb, LSO#: 55787N
Tel: +1 416.216.1929
Fax: +1 416.216.3930

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

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

Tab 5

Court File No.

4114/15

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

1291079 ONTARIO LIMITED

Plaintiff

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS:

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

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

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

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

Sears Holdings Corp.
Law Dept. Intake

NOV 06 2015

Received
Grand served this date


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

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

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

October 21, 2015

Issued by


Local Registrar

Address of
court office

Milton Courthouse
491 Steeles Avenue East
Milton, ON L9T 1Y7

TO: SEARS CANADA INC.
290 Yonge Street, Suite 700
Toronto, Ontario
M5B 2C3

✓ **AND TO:** SEARS HOLDING CORPORATION
3333 Beverly Road
Hoffman Estates, IL 60179
United States of America

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

- AND TO: WILLIAM C. CROWLEY**
146 Central Park West, Apartment 10E
New York NY 10023
United States of America
- AND TO: WILLIAM R. HARKER**
39 Remsen Street- Apt. LB
Brooklyn NY 11201
United States of America
- AND TO: DONALD CAMPBELL ROSS**
73 Donwoods Drive
Toronto ON M4N 2G6
- AND TO: EPHRAIM J. BIRD**
1017 N. Ridge Road
Salado TX 76571
United States of America
- AND TO: DEBORAH E. ROSATI**
11821 Lakeshore Road RR#2
Wainfleet ON L0S 1V0
- AND TO: R. RAJA KHAMNA**
31 Delaware Avenue
Toronto ON M6H 2S8
- AND TO: JAMES MCBURNEY**
4 Luxemburg Gardens
London W6 7EA
United Kingdom
- AND TO: DOUGLAS CAMPBELL**
13 Roxborough Street West
Toronto ON MSR 1T9

CLAIM

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

Parties

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

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

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

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

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

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

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

9. The defendant, William R. Harker (“Harker”), is an individual residing in Brooklyn, New York in the United States of America. Harker was a director of Sears in 2013.
10. The defendant, Donald Campbell Ross (“Ross”), is an individual residing in Toronto, Ontario. Ross was a director of Sears in 2013.
11. The defendant, Ephraim J. Bird (“Bird”), is an individual residing in Salado, Texas in the United States of America. Bird was a director of Sears in 2013.
12. The defendant, Deborah E. Rosati (“Rosati”), is an individual residing in Wainfleet, Ontario. Rosati was a director of Sears in 2013.
13. The defendant, R. Raja Khanna (“Khanna”), is an individual residing in Toronto, Ontario. Khanna was a director of Sears in 2013.
14. The defendant, James McBurney (“McBurney”), is an individual residing in London, England. McBurney was a director of Sears in 2013.
15. The defendant, Douglas Campbell (“Campbell”), is an individual residing in Toronto, Ontario. Campbell was a director of Sears in 2013.
16. Crowley, Harker, Ross, Bird, Rosati, Khanna, McBurney and Campbell are hereinafter, collectively, referred to as the “Directors”.

Background

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

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

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

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

The Beginning of the End for Sears

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

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

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

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

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

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

The Path Towards Insolvency: A Chronology of Asset Stripping

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

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

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

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

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

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

Sears Declares Extraordinary Dividend Despite Significant Financial Losses

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

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

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

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

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

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

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

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

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

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

The Continuing Path Towards Insolvency

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

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

41. In May, 2014, Sears announced that it had sold its minority ownership interest in the Centre commercial Les Rivières shopping centre in Trois-Rivières, Quebec, for \$33.5 million.
42. In August, 2014, Sears announced that it had entered into an agreement to sell its interest in Kildonan Place, a shopping centre located in Winnipeg, for \$33.5 million.
43. In September, 2014, Sears announced that Mr. Campbell would resign as CEO by the end of the year.
44. In October, 2014, Ronald Boire was named as Mr. Campbell's replacement as CEO. Mr. Boire was Sears' third different CEO in just under two years.
45. In November, 2014, Sears and JPMorgan Chase Bank, N.A. announced that their agreement relating to the Sears-branded credit card would terminate on November 15, 2015.
46. In February, 2015, Sears released its financial results for the previous quarter and fiscal year. Sears suffered an operating loss of \$154.7 million for the last quarter of 2014. For the 2014 fiscal year, Sears suffered an operating loss of \$407.3 million.
47. In March 11, 2015, Sears announced that it had entered into an agreement to sell and lease back three of its properties for \$140 million. The locations include store space and adjacent property located at the Metropolis at Metrotown in Burnaby, British Columbia, Cottonwood Mall in Chilliwack, British Columbia and North Hill Shopping Centre in Calgary, Alberta.

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

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

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

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

Defendants Have Oppressed Class

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

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

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

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

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

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

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

Service Ex Juris

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

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

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

October 21, 2015

SOTOS LLP
Barristers and Solicitors
180 Dundas Street West, Suite 1200
Toronto, Ontario M5G 1Z8

David Sterns (LSUC # 36274J)
Louis Sokolov (LSUC #34483L)
Andy Seretis (LSUC # 57259D)
Rory McGovern (LSUC # 65633H)

Tel: (416) 977-0007

Fax: (416) 977-0717

Lawyers for the plaintiff

1291079 ONTARIO LIMITED
Plaintiff

-and-

SEARS CANADA INC., et al.
Defendants

Court File No. 4114/15

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT MILTON

STATEMENT OF CLAIM

SOTOS LLP

Barristers and Solicitors
180 Dundas Street West, Suite 1200
Toronto, ON M5G 1Z8

David Sterns (LSUC#: 36274J)
Louis Sokolov (LSUC#: 34483L)
Andy Seretis (LSUC#: 57259D)
Rory McGovern (LSUC#: 65633H)

Tel: (416) 977-0007
Fax: (416) 977-0717

Lawyers for the Plaintiff

Tab 6

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE

)

THURSDAY, THE 26TH

MR. JUSTICE HAINEY

)

DAY OF APRIL, 2018

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
 ARRANGEMENT OF SEARS CANADA INC., 9370-2751
 QUÉBEC INC., 191020 CANADA INC., THE CUT INC.,
 SEARS CONTACT SERVICES INC., INITIUM LOGISTICS
 SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM
 TRADING AND SOURCING CORP., SEARS FLOOR
 COVERING CENTRES INC., 173470 CANADA INC., 2497089
 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA
 INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD.,
 4201531 CANADA INC., 168886 CANADA INC., AND 3339611
 CANADA INC.

(each, an “**Applicant**”, and collectively, the “**Applicants**”)

AMENDED LITIGATION INVESTIGATOR ORDER

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



ON READING the Affidavit of William Turner sworn on February 12, 2018 including the exhibits thereto, the Affidavit of William Turner sworn on August 11, 2017, including the exhibits thereto, the Affidavit of William Turner sworn on February 14, 2018 including the exhibits thereto, the Affidavit of Jules Monteyne sworn on February 14, 2018 including the exhibits thereto, the Affidavit of Leanne M. Williams sworn on February 14, 2018 including the exhibits annexed thereto, the Monitor's Fourteenth Report to the Court dated March 1, 2018, and on hearing the submissions of Retiree Representative Counsel, Representative Counsel for the employees of the Sears Canada Entities ("**Employee Representative Counsel**"), counsel for the Applicants, counsel for the Monitor, and such other counsel for various creditors and stakeholders as were present, no one else appearing although duly served as appears from the Affidavit of Service of Veronica de Leoz, sworn February 12, 2018:

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that Lax O'Sullivan Lisus Gottlieb LLP is hereby appointed as Litigation Investigator (the "**Litigation Investigator**") in these CCAA proceedings for the benefit of the estates of the Sears Canada Entities and its creditors. The Litigation Investigator shall be an officer of this Court, and is appointed for the purpose of investigating, considering, and reporting to the Creditors' Committee (defined below), regarding any rights or claims, whether legal, equitable, statutory or otherwise, that the Sears Canada Entities and/or any creditors of any of the Sears Canada Entities may have as against any parties, including but not limited to current and former directors, officers, shareholders and advisors of any of the Sears Canada Entities (the "**Mandate**"). For greater certainty, the Litigation Investigator may

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

Litigation Investigator Reporting

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

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

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

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

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

The Committee

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

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

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

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

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

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

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

- (a) documents that contain any communication that is between a lawyer and the ESL parties and/or Sears Holdings Corporation;
- (b) documents containing any communication by or to the ESL parties and/or Sears Holdings Corporation and/or any current or former directors or officers of the Sears Canada Entities (a “**Current or Former D&O**”) created on or after November 26, 2013 and related to the 1291079 Ontario Ltd and Sears Canada Inc. et. al. class action of November 6, 2015 (Ontario Superior Court of Justice) File No. 4114/15); and

- (c) documents containing communications between a law firm and a Current or Former D&O for which privilege could reasonably be asserted, or documents that reflect legal advice or litigation work product prepared for the benefit of a Current or Former D&O, whether alone or as part of a joint retainer.

Hereafter, items a), b), and c) shall be referred to collectively as the “**Potentially Shared Privileged Documents**”). No waiver of any privilege shall have occurred by the inadvertent delivery of documents to the Litigation Investigator should a Potentially Shared Privileged Document not be identified or if any other document subject to privilege (including solicitor-client privilege, litigation privilege, and common interest privilege) is produced or disclosed to the Litigation Investigator.

10. **THIS COURT ORDERS** that in the event that the Monitor and/or Sears Canada Entities intend to produce any Potentially Shared Privileged Documents to the Litigation Investigator in facilitation of the fulfillment of the Mandate, the Monitor or the Sears Canada Entities, as the case may be, shall provide a list of such documents on reasonable notice, which shall be no less than seven days, to the ESL parties, Sears Holdings Corporation and/or the Current or Former D&Os to the extent that such parties may be able to assert privilege over the documents, so that any issue regarding privilege may be resolved by the parties or determined by this Court.

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

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

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

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

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

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

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

Litigation Investigator Costs

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

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

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

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

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

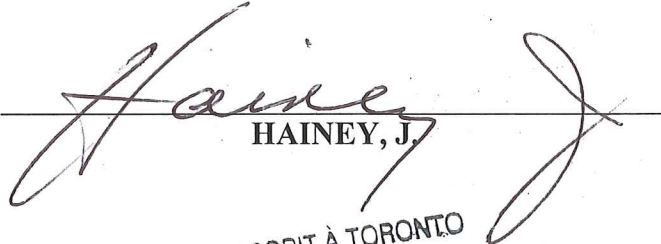
20. **THIS COURT ORDERS** that no action or proceeding may be commenced against the Litigation Investigator or any Creditors' Committee member in respect of the performance of its or their duties under this Order without leave of this Court on seven (7) business days' notice to the Litigation Investigator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

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

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

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

22. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative bodies having jurisdiction in Canada or in the United States of America, to give effect to this Order and to assist the Litigation Investigator in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Litigation Investigator as may be necessary or desirable to give effect to this Order, or to assist the Litigation Investigator in carrying out the terms of this Order.


HAINEY, J.

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

APR 26 2018

PER / PAR:

NB

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUÉBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041, ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

(each, an "Applicant", and collectively, the "Applicants")

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

Proceeding commenced at Toronto

AMENDED LITIGATION INVESTIGATOR ORDER

KOSKIE MINSKY LLP
20 Queen Street West, Suite 900, Box 52
Toronto, ON M5H 3R3

Andrew J. Hatnay – LSUC No. 31885W
Tel: 416-595-2083 / Fax: 416-204-2872
Email: ahatnay@kmlaw.ca

Mark Zigler – LSUC No. 19757B
Tel: 416-595-2090 / Fax: 416-204-2877
Email: mzigler@kmlaw.ca

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

Tab 7

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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| THE HONOURABLE |) | MONDAY, THE 3RD |
| |) | |
| MR. JUSTICE HAINEY |) | DAY OF DECEMBER, 2018 |

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SEARS CANADA INC., 9370-2751
QUEBEC INC., 191020 CANADA INC., THE CUT INC.,
SEARS CONTACT SERVICES INC., INITIUM LOGISTICS
SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM
TRADING AND SOURCING CORP., SEARS FLOOR
COVERING CENTRES INC., 173470 CANADA INC., 2497089
ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA
INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD.,
4201531 CANADA INC., 168886 CANADA INC., AND 3339611
CANADA INC.



(each, an “**Applicant**”, and collectively, the “**Applicants**”)

**ORDER
(APPOINTMENT OF LITIGATION TRUSTEE,
LIFTING OF STAY, AND OTHER RELIEF)**

THIS MOTION, made by the Litigation Investigator, for an Order pursuant to section 11 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36,, as amended (the “**CCAA**”) and Rule 6.01 of the *Rules of Civil Procedure*, RRO 1990, Reg. 194, as amended (the “**Rules**”) for an order, among other things, appointing a Litigation Trustee to pursue certain claims on behalf of the Applicants and/or any creditors of the Applicants and providing for the process by which a

common issues trial will be heard, was heard this day at 330 University Avenue, 8th Floor, Toronto, Ontario.

ON READING the Monitor's 27th Report to the Court dated November 5, 2018 and the Litigation Investigator's First Report to the Court dated November 5, 2018 (the "**First Report**"), and on reading and hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for the Litigation Investigator, and such other counsel for various creditors and stakeholders as were present, no one else appearing although duly served as appears from the Affidavit of Service.

SERVICE

1. THIS COURT ORDERS that this motion is properly returnable today and hereby dispenses with further service thereof.

TERMINATION OF LITIGATION INVESTIGATOR APPOINTMENT

2. THIS COURT ORDERS that the appointment of the Litigation Investigator pursuant to the Amended Litigation Investigator Order dated April 26, 2018 (the "**Amended Litigation Investigator Order**"), is hereby terminated, effective immediately.

CONTINUATION AND EXTENSION OF LITIGATION CREDITORS' COMMITTEE

3. THIS COURT ORDERS that the Creditors' Committee established pursuant to the Amended Litigation Investigator Order dated April 26, 2018 shall continue as currently constituted thereunder to consult with and provide input to the Litigation Trustee Parties in respect of the claims brought by the Litigation Trustee in accordance with this Order.

4. THIS COURT ORDERS that the Litigation Trustee Parties shall meet with the Creditors' Committee on a monthly basis unless otherwise agreed for a particular month by said parties, and which meetings shall be subject to confidentiality and that privilege shall be maintained.

APPOINTMENT OF LITIGATION TRUSTEE

5. THIS COURT ORDERS that the Honourable J. Douglas Cunningham, Q.C. is hereby appointed as an officer of this Court to be the Litigation Trustee over and in respect of the Applicants' claims identified in the First Report of the Litigation Investigator (the "**Litigation Assets**" or the "**Claims**") on the terms described herein.

LITIGATION TRUSTEE'S POWERS

6. THIS COURT ORDERS that the Litigation Trustee is hereby empowered, authorized and directed to do all things and carry out all actions necessary to prosecute the Claims, including:

- (a) to engage, give instructions and pay counsel as well as consultants, appraisers, agents, advisors, experts, auditors, accountants, managers and such other persons from time to time on whatever basis the Litigation Trustee may agree, in consultation with the Monitor, to assist with the exercise of his powers and duties. Notwithstanding such authority, the Litigation Trustee shall be under no obligation to consult with its counsel, consultants, appraiser, agents, advisors, experts, auditors, accountants, managers and its good faith determination not to do so shall not result in the imposition of liability on the Litigation Trustee, unless such determination is based on gross negligence or willful misconduct;

- (b) to execute, assign, issue and endorse documents of whatever nature in the name of and on behalf of Sears Canada for any purpose in connection with the Claims or otherwise pursuant to this Order; and
- (c) to pursue the Claims, defend any counter claim, third party claim or other claim brought against Sears Canada, and subject to further Order of the Court, and in consultation with the Monitor, to settle or compromise, abandon, dismiss or otherwise dispose of such proceeding. The authority hereby conferred shall extend to any appeals or applications for judicial review in respect of any order or judgment pronounced in such proceeding.

7. THIS COURT ORDERS that, notwithstanding the generality of paragraph 15(d) above, the Litigation Trustee is hereby authorized and empowered to commence claims, in his own name or on behalf of the Applicants, against ESL Investments Inc. (and certain affiliates), Edward Lampert, William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, Deborah E. Rosati, R. Raja Khanna, James McBurney and Douglas Campbell.

8. THIS COURT ORDERS that the stay of proceedings provided for in paragraph 25 of the Initial Order dated June 22, 2017 (the "**Initial Order**"), is hereby lifted as against William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, Deborah E. Rosati, R. Raja Khanna, James McBurney and Douglas Campbell for the purposes of permitting the claims referred to in the First Report, including those of the Litigation Trustee, to be commenced and pursued against those persons.

INDEMNITY

9. THIS COURT ORDERS that the Litigation Trustee shall incur no liability or obligation as a result of his appointment or in carrying out of any of the provisions of this Order, save and except for any gross negligence or any willful misconduct. Sears Canada shall indemnify and hold harmless the Litigation Trustee and his designated agents, representatives and professionals with respect to any liability or obligations as a result of his appointment or the fulfillment of his duties in carrying out the provisions of this Order, save and except for any gross negligence or willful misconduct. For clarity, in no event shall the Litigation Trustee be personally liable for any costs awarded against Sears Canada in the action. Any such costs awarded shall be a claim solely against Sears Canada estate. No action, application or other proceeding shall be commenced against the Litigation Trustee as a result of, or relating in any way to his appointment, the fulfillment of his duties or the carrying out of any Order of this Court except with leave of this Court being obtained. Notice of any such motion seeking leave of this Court shall be served upon Sears Canada, the Monitor and the Litigation Trustee at least seven (7) days prior to the return date of any such motion for leave.

10. THIS COURT ORDERS that the indemnity pursuant to paragraphs 4-8 above shall survive any termination, replacement or discharge of the Litigation Trustee. Upon any termination, replacement or discharge of the Litigation Trustee, on not less than 10 business days' notice, all claims against the Litigation Trustee, his designated agents, representatives and professionals for which leave of the Court has not already been sought and obtained shall be, and are hereby forever discharged, other than claims for which a party seeks leave prior to the discharge date to bring a claim against the Litigation Trustee and (i) such leave has been obtained; or (ii) the request for leave remains outstanding.

5-9



LITIGATION TRUSTEE'S ACCOUNTS

11. THIS COURT ORDERS that the Litigation Trustee and counsel to the Litigation Trustee (collectively, the "**Litigation Trustee Parties**") shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by Sears Canada as part of the costs of these proceedings. Sears Canada is authorized and directed to pay the accounts of the Litigation Trustee Parties on a bi-weekly basis (or such other interval as may be mutually agreed upon) and, in addition, Sears Canada is hereby authorized to pay to the Litigation Trustee Parties retainers not exceeding \$50,000.00 each, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

12. THIS COURT ORDERS that the Litigation Trustee Parties shall pass their accounts from time to time, and for this purpose the accounts of the Litigation Trustee Parties are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

13. THIS COURT ORDERS that the Litigation Trustee Parties shall be entitled to the benefit of and are hereby granted a charge in the maximum amount of \$500,000.00 (the "**Litigation Trustee's Charge**") on the "**Property**" of Sears Canada as defined by paragraph 4 of the Initial Order, ranking *pari passu* with the Administration Charge (as defined in the Initial Order), in priority to all other security interests, trusts (statutory or otherwise), liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any person, including all charges granted by the Initial Order (other than the Administration Charge) and all other Orders of this Court granted in these proceedings.

14. THIS COURT ORDERS that the filing, registration or perfection of the Litigation Trustee's Charge shall not be required, and that the Litigation Trustee's Charge shall be valid and enforceable for all purposes, notwithstanding any such failure to file, register, record or perfect.

15. THIS COURT ORDERS that the granting of the Litigation Trustee's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Litigation Trustee's Charge shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declaration of insolvency herein; (b) any application(s) for bankruptcy order(s) issued pursuant to *Bankruptcy and Insolvency Act* (Canada) (the "BIA"), or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; or (d) the provisions of any federal or provincial statutes, and notwithstanding any provision to the contrary in any agreement.

16. THIS COURT ORDERS that the payments made by Sears Canada pursuant to this Order and the granting of the Litigation Trustee's Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

LIMITATION ON ENVIRONMENTAL LIABILITIES

17. THIS COURT ORDERS that nothing herein contained shall require the Litigation Trustee to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the

disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the “**Environmental Legislation**”), provided however that nothing herein shall exempt the Litigation Trustee from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Litigation Trustee shall not, as a result of this Order or anything done in pursuance of the Litigation Trustee’s duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

PROCEDURE

18. THIS COURT ORDERS that a case management judge for the claims brought by the Monitor, the Litigation Trustee, the Pension Administrator, and the Class Action plaintiffs as referred to in the First Report will be appointed as soon as possible.

19. THIS COURT ORDERS that the procedure to be followed for the claims brought by the Monitor, the Litigation Trustee, the Pension Administrator, and the Class Action plaintiffs as referred to in the First Report shall be determined by the case management judge.

GENERAL

20. THIS COURT ORDERS that, without limiting any other provisions of this Order, the Litigation Trustee may from time to time apply to this Court for advice and directions in the discharge of his powers and duties hereunder.

21. THIS COURT ORDERS that the Monitor and the Litigation Trustee may report to the Court on their activities from time to time as any of them may see fit or as this Court may direct.

22. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Litigation Trustee and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Litigation Trustee, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Litigation Trustee and its agents in carrying out the terms of this Order.

23. THIS COURT ORDERS that the Litigation Trustee be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Litigation Trustee is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

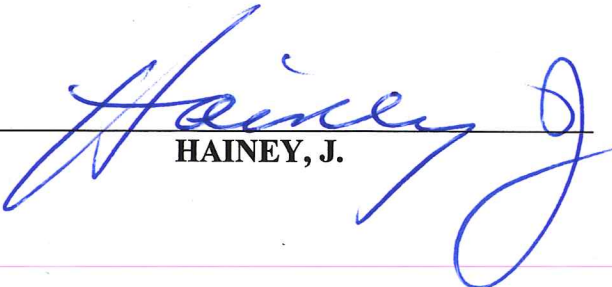
24. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Litigation Trustee and the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

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

DEC 04 2018

PER / PAR:

UM



HAINEY, J.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985 c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUEBEC INC., 191020 CANADA
INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM
TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA
INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041, ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611
CANADA INC.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

ORDER

**(APPOINTMENT OF LITIGATION TRUSTEE,
LIFTING OF STAY, AND OTHER RELIEF)**

LAX O'SULLIVAN LISUS GOTTLIEB LLP

Counsel

Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Matthew P. Gottlieb LSO#: 32268B

mgottlieb@counsel-toronto.com

Tel: 416 644 5353

Andrew Winton LSO#: 544731

awinton@counsel-toronto.com

Tel: 416 644 5342

Philip Underwood LSO#: 73637W

punderwood@counsel-toronto.com

Tel: 416 645 5078

Fax: 416 598 3730

Litigation Investigator

Tab 8

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

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

THE HONOURABLE MR.

)

MONDAY, THE 3RD

JUSTICE HAINEY

)

DAY OF DECEMBER, 2018



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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SEARS CANADA INC., 9370-2751
QUÉBEC INC., 191020 CANADA INC., THE CUT INC., SEARS
CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES
INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND
SOURCING CORP., SEARS FLOOR COVERING CENTRES
INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741
CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO
LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC.,
168886 CANADA INC., AND 3339611 CANADA INC.

Applicants

**TRANSFER AT UNDERVALUE PROCEEDING
APPROVAL ORDER**

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

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

TRANSFER AT UNDERVALUE CLAIM

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

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

6. **THIS COURT ORDERS** that the Creditors' Committee established pursuant to the Amended Litigation Investigator Order dated April 26, 2018 shall continue as currently constituted thereunder to also consult with the Monitor in respect of the Transfer at Undervalue Proceedings.

PROTECTIONS TO THE MONITOR

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

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

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

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

COSTS AND OPT-OUT MECHANISM

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

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

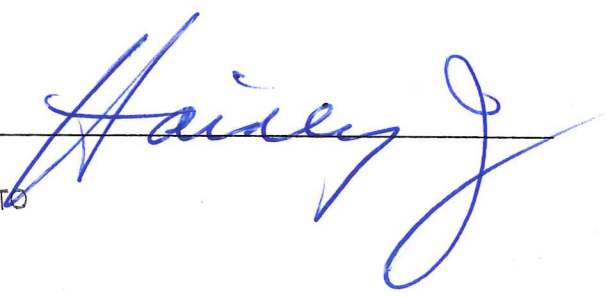
13. **THIS COURT ORDERS** that the form of opt-out notification attached as Appendix "C" to the Twenty-Seventh Report (the "**Opt-out Notice**") is hereby approved and the Monitor is authorized and directed to, as soon as practicable, deliver the Opt-out Notice to all unsecured creditors of SCI (other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

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

GENERAL

14. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States or any other jurisdiction to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order, including the U.S. Bankruptcy Court. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and the Monitor, as an

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



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

DEC 04 2018

PER / PAR: *UM*

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

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

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

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

Proceeding commenced at TORONTO

**TRANSFER AT UNDERVALUE PROCEEDING
APPROVAL ORDER**

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, LSUC#: 36851T
Tel: +1 416.216.4815

Virginie Gauthier, LSUC#: 41097D
Tel: +1 416.216.4853

Alan Merskey, LSUC#: 41377I
Tel: +1 416.216.4805

Evan Cobb, LSUC#: 55787N
Tel: +1 416.216.1929
Fax: +1 416.216.3930

orestes.pasparakis@nortonrosefulbright.com
virginie.gauthier@nortonrosefulbright.com
alan.merskey@nortonrosefulbright.com
evan.cobb@nortonrosefulbright.com

Lawyers to the Monitor, FTI Consulting Canada Inc.

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

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-18-00611219-00CL

-and- ESL INVESTMENTS INC. et al.

Defendants

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**MOTION RECORD OF THE ESL PARTIES
(MOTION FOR PRE-PLEADING PRODUCTIONS)**

POLLEY FAITH LLP

The Victory Building
80 Richmond Street West, Suite 1300
Toronto, ON M5H 2A4

Harry Underwood (20806C)

hunderwood@polleyfaith.com

Andrew Faith (47795H)

afaith@polleyfaith.com

Jeffrey Haylock (61241F)

jhaylock@polleyfaith.com

Sandy Lockhart (73554J)

slockhart@polleyfaith.com

Tel: 416.365.1600

Fax: 416.365.1601

Lawyers for the defendants,
ESL Investments Inc., ESL Partners, LP, SPE I Partners, LP, SPE
Master I, LP, ESL Institutional Partners, LP