

AMENDED THIS / MODIFIÉ CE Jan. 16/2019 PURSUANT TO / CONFORMÉMENT À
 RÈGLE 26.02 ()
 THE ORDER OF / L'ORDONNANCE DU JUSTICE MORGAN
DATED / FAIT LE NOV. 21/2018
.....
REGISTRAR / GREFFIER
SUPERIOR COURT OF JUSTICE / COUR SUPÉRIEURE DE JUSTICE

Court File No.: CV-17-584058-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

**JB & M WALKER LTD., and
1128419 ALBERTA LTD.**

Plaintiffs

- and -

THE TDL GROUP CORP.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT:

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 had 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 OCT. 6/2017

Issued by 
Local Registrar

Fresh as Amended: January 16, 2019

Address of the Court Office:
Ontario Superior Court of Justice
393 University Avenue, 10th Floor
Toronto, Ontario M5G 1E6

TO: THE TDL GROUP CORP.
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AND TO: OSLER, HOSKIN & HARCOURT LLP

Attention: Mark Gelowitz, Jennifer Dolman, Geoffrey J. Hunnisett
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Lawyers for the Defendant

CLAIM

1. The Plaintiffs claim as against the Defendant, The TDL Group Corp. (“TDL”):
 - (a) Damages for breach of contract in the amount of \$600,000,000.00;
 - (b) A Declaration that each of the Proposed Class Members (defined below) in Ontario is entitled to the benefit of the Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c.3 (“AWA”). A further Declaration is sought that each class member carrying on business in Alberta, Manitoba, British Columbia, New Brunswick, Prince Edward Island and any jurisdiction having the same or similar legislation (“**Similar Legislation**”), is entitled to the protection of the franchise statute applicable in any province of any such jurisdiction;
 - (c) A Declaration that the Proposed Class Members in Ontario are entitled to the benefit of the statutory duty of fair dealing under section 3 and right of association under section 4 of the AWA. A further Declaration is sought that each Class Member carrying on business in Alberta, Manitoba, British Columbia, New Brunswick, Prince Edward Island and any jurisdiction having the same or Similar Legislation, are entitled to the protection of the franchise statute applicable in any province of any such jurisdiction;
 - (d) Damages in the amount of \$150,000,000.00, pursuant to sections 3(2) and 4(5) of the AWA and other Similar Legislation, and, in respect of Proposed Class Members carrying on business in Quebec, for breaches

of Articles 6, 7 and 1375 of the Civil Code of Quebec, S.Q. 1991, C. 64, ("**Quebec Civil Code**") or, in the alternative, an order pursuant to section 25 of the Class Proceedings Act, 1992, S.O. 1992 c.6, directing individual hearings in respect of such damage;

- (e) Punitive, exemplary and/or aggravated damages in the amount of \$100,000,000.00;
- (f) Pre-judgment interest calculated in accordance with the provisions of the Courts of Justice Act, R.S.O. 1990, c.C-43;
- (g) Post-judgment interest on the amounts claimed in the above in accordance with the provisions of the Courts of Justice Act, R.S.O. 1990, c.C-43;
- (h) The costs of this action on a substantial indemnity basis; and,
- (i) Such further and other relief as this Court may see fit.

The Parties

2. The Plaintiff, JB & M Walker Ltd., is incorporated under the laws of the Province of Ontario, where over 70% of the franchisees are members of the Great White North Franchisee Association (the "**Association**"), and carries on business in the City of Mississauga, in the Province of Ontario, as a franchisee of a franchise system known as "**Tim Hortons**" pursuant to a franchise agreement with TDL.
3. The Plaintiff, 1128419 Alberta Ltd., is incorporated under the laws of the Province of Alberta, where over 70% of the franchisees are members of the Association,

and carries on business in the City of Lethbridge, in the Province of Alberta, as a franchisee of Tim Hortons.

4. TDL is a corporation incorporated pursuant to the laws of the Province of British Columbia, having its principal place of business in the Province of Ontario, and carrying on business in Canada and beyond as a franchisor of the Tim Hortons franchise system.
5. The Association is an alliance of Tim Hortons' franchisees formed to protect the interests of franchisees. The Association is the largest single brand franchisee association in Canada.
6. The proposed class is comprised of all franchisees who have carried on business as Tim Hortons' franchisees under franchise agreements at any time on or after March 9, 2017 ("**Proposed Class Members**").
7. The Plaintiffs bring this action on their own behalf and on behalf of the Proposed Class Members.

Overview

8. Tim Hortons is one of Canada's most well-known brands operating quick serve restaurants under a franchise system with franchises throughout Canada. At present, there are in excess of 3,500 franchised locations. The primary business of the franchisees is to sell coffee, baked goods and quick serve food items.
9. The franchisees of Tim Hortons operate their franchises pursuant to the franchisor's standard franchise agreements which dictate the contractual terms

and obligations and business practices of the franchisor and franchisees. The franchise agreements entered into by the Plaintiffs and franchisees of Tim Hortons include implied terms and obligations, namely:

- (a) The duty of fair dealing in the performance and enforcement of the franchise agreement including the duty to act in good faith and in accordance with reasonable commercial standards under AWA section 3;
 - (b) The duty and obligation to not interfere with, prohibit or restrict, by contract or otherwise, a franchisee from forming or joining an organization of franchisees or from associating with other franchisees and a duty not to directly or indirectly penalize, attempt to penalize or threaten to penalize a franchisee for exercising any right under AWA section 4; and,
 - (c) A duty of good faith and honest performance of its contractual terms and obligations.
10. On or about December 15, 2014, TDL was acquired by a South American based private equity firm 3G Capital (“**3G**”) which involved a merger between the parent company of TDL, which at that time was Tim Hortons Inc., and Burger King Worldwide Inc., to form Restaurant Brands International (“**RBI**”). RBI became the parent company of TDL. RBI is a publicly traded company on both the Toronto and New York Stock Exchanges. 3G is the majority shareholder of RBI.

11. In recent years, the Tim Hortons franchise system has been faced with mounting pressure caused directly or indirectly by TDL and RBI which does and will adversely affect the interests and reasonable expectations of the Plaintiffs and the Proposed Class Members. In particular, the Tim Hortons system has been faced with ever increasing labour costs, supplier costs and increasing general operating and administrative costs, which are being dictated and managed by TDL to the detriment of the interests and reasonable expectations of franchisees.
12. As a result of the above, franchisees sought to and did incorporate the Association on March 9, 2017.
13. The objects of the Association include the following:
 - (a) To foster and promote the interests of the franchisees;
 - (b) To articulate and advocate the needs, interests and goals of the franchisees in the context of a balanced, constructive, cooperative and mutually respectful relationship with the franchisor;
 - (c) To promote and to improve communication between franchisees and the franchisor;
 - (d) To promote fairness in the franchise relationship between franchisees and franchisor;
 - (e) To secure, preserve, analyse, disseminate, and distribute accurate and reliable information to franchisees;

- (f) To promote open communication; and,
 - (g) To articulate and advocate the needs and interests of the franchisees before all levels of government.
14. The Association carries on its business without the purpose of financial gain to the franchisees and any profits or other benefits are to be used for the promotion of the purposes of the Association. Membership in the Association is open to all franchisees, except those that are owned or operated by, or affiliated with, TDL, RBI, or its owners.
15. The business and affairs of the Association are conducted through and with the supervision of its Board of Directors.

Right to Associate

16. Under AWA section 4 and Similar Legislation, franchisees have a right to associate with other franchisees and to form and join an association. Specifically, the AWA provides as follows:

Right to associate

4 (1) A franchisee may associate with other franchisees and may form or join an organization of franchisees. 2000, c. 3, s. 4 (1).

Franchisor may not prohibit association

(2) A franchisor and a franchisor's associate shall not interfere with, prohibit or restrict, by contract or otherwise, a franchisee from forming or joining an organization of franchisees or from associating with other franchisees. 2000, c. 3, s. 4 (2).

(3) A franchisor and franchisor's associate shall not, directly or indirectly, penalize, attempt to penalize or threaten to penalize a franchisee for exercising any right under this section. 2000, c. 3, s. 4 (3).

Provisions void

(4) Any provision in a franchise agreement or other agreement relating to a franchise which purports to interfere with, prohibit or restrict a franchisee from exercising any right under this section is void. 2000, c. 3, s. 4 (4).

Right of action

(5) If a franchisor or franchisor's associate contravenes this section, the franchisee has a right of action for damages against the franchisor or franchisor's associate, as the case may be. 2000, c. 3, s. 4 (5).

17. The Plaintiffs state that pursuant to the AWA and Similar Legislation, TDL has a duty to recognize the Association and is prohibited from taking any action that may interfere with, prohibit, restrict, penalize or threaten any franchisee, either directly or indirectly, for exercising their right to associate.
18. The Plaintiffs further state that subsequent to the incorporation of the Association, TDL has engaged in a pattern of conduct that has intentionally interfered with, restricted, penalized and threatened the franchisees for exercising their rights to associate.
19. The Plaintiffs state that the pattern of conduct referred to above includes:
 - (a) On or about March 30, 2017, David Clanachan, then Chairman of RBI Canada, posted a letter to all franchisees on TimZone (the electronic communication network used by TDL to communicate with franchisees):

"Dear Restaurant Owners,

...

Let me be clear- I am not in favour of an association. In fact, I don't like what is happening to our company. I understand that some restaurant Owners have formed an association and that the organizers of the association are conducting a national membership drive and campaign. The formation of an association would never be my preference."

- (b) During regularly scheduled reporting conference calls, then President, Sami Siddiqui, repeatedly discouraged franchisees from joining the Association;
- (c) By letters dated August 3, 2017 and September 18, 2017, TDL issued Notices of Default to members of the Association's Board of Directors falsely alleging that those board members improperly disclosed confidential communication and information regarding Tim Hortons. These Notices were designed to intimidate, threaten and penalize the board members for their roles within the Association and their efforts to advance franchisees' rights under the AWA;
- (d) The Notices of Default, which bore the notation "CONFIDENTIAL" on their face, were wilfully and intentionally delivered to the business locations of those board members without any notation of "PRIVATE" or "CONFIDENTIAL" on the outside of the envelopes. Nor were the Notices of Default sealed inside their packaging, as was the historical practice of TDL for confidential communications. As a result, the staff of

those franchisee corporations became aware of the contents of the envelopes and the Notices of Default;

- (e) TDL refuses to deal with the Association for its stated purposes thereby interfering with and/or restricting the proper functioning of the Association and penalizing the franchisees;
- (f) TDL has subjected the franchisees who are members of or wish to become members of the Association to intimidation and bullying, both in private and in public. This has had a chilling effect on the membership of the Association, causing many franchisees to join the Association anonymously;
- (g) Franchisees who are members of or wish to become members of the Association have been threatened with adverse dealings by TDL. As a result, franchisees fear that they will be targeted by TDL if they have joined or plan to join the Association;
- (h) TDL has falsely labelled franchisees who are members of or wish to become members of the Association as disgruntled and rogue franchisees both privately and publically in the media and elsewhere;
- (i) TDL has encouraged franchisees to report to TDL the identities of franchisees who attended at Association meetings and membership drives;

- (j) TDL has targeted franchisees who are known members of the Association or otherwise believed to be sympathetic to the Association and has denied them future store opportunities and/or renewals on the basis that they are not aligned with TDL because of their involvement with the Association;
- (k) Since at least March 9, 2017, TDL has conducted a campaign of intimidation against the Association's members by questioning individual franchisees as to whether they have joined the Association or whether they are "aligned" with TDL;
- (l) Since at least March 9, 2017, TDL has subjected known Association members to increased health and safety inspections and violation reports, including threats of escalation and requiring franchisees to submit remedial action plans;
- (m) A \$2 billion "war chest" has been set aside and used to buy out franchisees who are members of or wish to become members of the Association; and,
- (n) On September 4, 2018, TDL delivered what it refers to as a "Brand Protection Notice" to members of the Association's Board of Directors. On the same day, TDL took actions to lock the then President of the Association out of his stores. These actions were specifically designed to threaten and penalize franchisees for their involvement with the Association and continued presence on the Board of Directors.

20. The actions of the Defendant are contrary to the Plaintiffs' AWA section 4 rights and have caused damages to the Plaintiffs.

Duty of Fair Dealing and Good Faith Obligations

21. Section 3 of the AWA and Similar Legislation grants franchisees a statutory right to be treated fairly by the franchisor in the performance and enforcement of their franchise agreements. Specifically, the AWA states:

Fair dealing

3 (1) Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement. 2000, c. 3, s. 3 (1).

Right of action

(2) A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing in the performance or enforcement of the franchise agreement. 2000, c. 3, s. 3 (2).

Interpretation

(3) For the purpose of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards. 2000, c. 3, s. 3 (3).

22. Additionally at common law TDL owes a duty to the Plaintiffs to act in good faith in performing and enforcing the franchise agreement.
23. Further, TDL owes franchisees operating in the Province of Quebec a duty of good faith in the performance of its obligations under the franchise agreements pursuant to articles 6, 7 and 1375 of the Quebec Civil Code.

24. TDL has breached its duty of fair dealing and good faith obligations through its prejudicial and unfair treatment of the Proposed Class Members, the particulars of which are described in paragraph 19 of this Statement of Claim, including subparagraphs 19(c), (d), (j), (k), (l) and (n).

25. TDL has further breached its duty of fair dealing and good faith obligations through its performance of the following sections of the franchise agreement without regard to the legitimate interests of the Proposed Class Members:
 - (a) Section 1 - Grant of Licence: TDL has interfered with the Proposed Class Members enjoyment of the Tim Hortons trademarks and Tim Hortons franchise system;

 - (b) Section 5.04 - Supply to Tim Hortons Shop: TDL has refused to consider and/or ignored suggestions of alternative suppliers made by known or suspected Association member franchisees;

 - (c) Section 5.06 - Operation of Tim Hortons Shop: TDL has refused to permit known or suspected Association member franchisees to have meaningful input into operational and administrative issues directly impacting on their interests;

 - (d) Section 5.07 – Licensor’s Right of Inspection: Since at least March 9, 2017, TDL has subjected known or suspected Association members to increased health and safety inspections and violation reports, including

threats of escalation and requiring franchisees to submit remedial action plans; and,

- (e) Section 5.08 – Suggested Prices: TDL has refused to consider and/or ignored alternative food pricing suggestions from known or suspected Association member franchisees.

26. TDL has taken an adversarial approach to the Plaintiffs and has not discharged its contractual obligations fairly, and in good faith and in a commercially reasonable manner.

Breach of Contract

27. TDL is in breach of the implied contractual terms and obligations of the franchise agreement as set out in paragraph 9 of this Statement of Claim.

28. The manner in which TDL breached those implied contractual terms and obligations of the franchise agreement is set out in paragraphs 19 and 25 of this Statement of Claim.

29. As a result of TDL's conduct and breach of the implied contractual terms and obligations in the franchise agreement, the Plaintiffs have suffered damages, including:

- (a) Decreased revenues; and,
- (b) Increased costs, including labour costs, supply costs, general operating and administrative costs,

the full extent of which is not currently known but will be provided following discoveries and prior to the end of trial.

30. As a result of TDL's breach of the implied terms of the franchise agreements, the AWA and the common law, the Plaintiffs, and the Proposed Class Members, have consequently suffered damages.
31. The Plaintiffs also claim aggravated, exemplary and punitive damages as a result of the arbitrary, callous and highhanded actions of TDL as set out above.
32. The Plaintiffs claim declaratory relief as set out in subparagraphs 1(b) and (c) of this Statement of Claim in order to determine, protect and advance the rights of the franchisees to associate.
33. The Plaintiffs propose that this action be tried in the City of Toronto.

Date: October 6, 2017
Amended: January 16, 2019

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THE TDL GROUP CORP.

PLAINTIFFS

DEFENDANT

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings commenced at TORONTO

**FRESH AS AMENDED
STATEMENT OF CLAIM**

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