

AMENDED THIS MODIFIÉ CE Jan. 16/2019 PURSUANT TO CONFORMÉMENT À

RULE/LA RÈGLE 26.02 (_____)

THE ORDER OF JUSTICE MORGAN
L'ORDONNANCE DU

Court File No.: CV-17-577371 -000P
-AM-

DATED / FAIT LE Ashley Hulle
REGISTRAR CLERK
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

1523428 ONTARIO INC.

Plaintiff

- 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 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 June 19, 2017Issued by "M. BRENTON"Fresh as Amended: January ^{16th} 2019

Local Registrar

Address of Court Office:

Ontario Superior Court of Justice

393 University Avenue, 10th Floor

Toronto, Ontario M5G 1E6

TO: **THE TDL GROUP CORP.**
226 Wycroft Road
Oakville ON L6K 3X7

AND TO: **OSLER, HOSKIN & HARCOURT LLP**
Attention: Mark Gelowitz, Jennifer Dolman, Geoffrey J. Hunnisett
1 First Canadian Place, Suite 6200
Toronto, ON M5X 1B8

Lawyers for the Defendant

CLAIM

1. The plaintiff claims with respect to the defendant, The TDL Group Corp. ("TDL"):
 - (a) damages for breach of contract in the amount of \$500,000,000.00;
 - (b) a declaration that each proposed class member in Ontario is entitled to the benefit of the *Arthur Wishart Act (Franchise Disclosure), 2000*, SO 2000, c.3. ("AWA"), as described below, and further that each proposed class member carrying on business in Alberta, Manitoba, British Columbia, New Brunswick, and Prince Edward Island is entitled to the protection of the provincial franchise statute applicable in its province;
 - (c) damages pursuant to Section 3 of the AWA and all other provincial franchise statutes as described below, and, in respect of 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 ("Civil Code"), in the amount of \$150,000,000.00;
 - (d) punitive, exemplary and aggravated damages, or any of them, in the amount of \$150,000,000.00;
 - (e) an accounting of all moneys in the Ad Fund as at December 15, 2014;
 - (f) an accounting of all receipts into and disbursements out of the Ad Fund since December 15, 2014 to the date of trial;

- (g) a declaration of this Court that the Ad Fund was and is to be used solely for the following purposes:
- i) to advertise and promote for the furtherance of the public image of "Tim Hortons" franchised restaurants and advertise offerings to generate revenue at the Canadian franchisees' level for their benefit; and
 - ii) for marketing activities of Tim Hortons franchises located in Canada;
- (h) an order that TDL return to the Ad Fund all moneys which it wrongfully caused to be expended from the Ad Fund as described below;
- (i) pre-judgment and post-judgment interest on all amounts claimed above in accordance with the provisions of the *Courts of Justice Act*, RSO 1990, c.C43;
- (j) its costs of this action on a substantial indemnity basis together with all applicable taxes thereon; and
- (k) such further and other relief as the nature of the action requires including all further necessary or appropriate accounts, inquiries and directions.

A. Overview of Claim

2. Tim Hortons is an iconic Canadian brand. The success of the brand is in large part attributable to the success of the Tim Hortons franchise system. The system's franchisees are pillars of their local communities from coast to coast, dedicated to

the brand and the customers they serve. The essence of the system since its inception and in its development was that franchisees had the opportunity to receive and generally did experience excellent returns on their investments by the operation of their stores in accordance with the Tim Hortons system.

3. Despite the success of their stores, they could not benefit from a sale of their stores to third parties in any meaningful way. As a general practice, TDL's franchisees were offered new franchise agreements when theirs' expired to allow them to continue to benefit from the success of their stores. Growth of store revenues was supported by the franchisor's historic fair use of the large national advertising fund which was created by the franchisees' contractually mandated contributions from revenues (**the "Ad Fund"**). The Ad Fund plays an important role in developing and preserving the Tim Hortons brand for the primary benefit of franchisees.
4. In December 2014, the shares of TDL, the franchisor of the Tim Hortons franchise system, were acquired by Brazilian-based private equity firm, 3G Capital ("**3G**"). 3G interposed Restaurant Brands International Inc. ("**RBI**") to acquire the shares of TDL.
5. Since RBI acquired TDL, TDL has used various strategies to extract more money out of the Tim Hortons franchise system at the expense of franchisees. One such strategy has been to use the Ad Fund in ways in which the fund had never historically been used or permitted. Contrary to the franchise agreements between TDL, on the one hand, and the plaintiff and the proposed class members on the

other, this money has been funnelled to TDL at the wrongful expense of the franchisees.

6. The purpose of this action is:

(a) to cause the funds which have been improperly removed from the Ad Fund to be returned to it;

(b) declare the rightful uses of the Ad Fund; and

(c) for damages caused by TDL's breach of the franchise agreements with the franchisees and the statutory and common law duties of fair dealing and good faith which it owed to the franchisees subject to provincial statutes applicable to franchises.

B. Parties

7. The plaintiff, 1523428 Ontario Inc., is incorporated under the laws of Ontario and carries on business in the City of Toronto, Ontario, as a franchisee of the Tim Hortons franchise system pursuant to two franchise agreements with TDL.

8. TDL is a British Columbia corporation and has its head office in the Town of Oakville, Province of Ontario. TDL carries on business as the franchisor of the Tim Hortons franchise system.

9. The proposed class consists of all persons who have carried on business as a Tim Hortons franchisee in Canada under a franchise agreement or other form of operating agreement with TDL at any time on or after December 15, 2014

("franchisees" or "proposed class members"). The plaintiff brings this action on its own behalf and on behalf of the proposed class members.

C. The Tim Hortons Franchise System

10. Tim Hortons is one of Canada's most well-known quick-service restaurant franchise systems with franchises all across Canada, ranging from small communities to large, urban centres. The Tim Hortons franchise system has grown all across Canada and elsewhere in the world and has approximately 3,500 franchised locations in Canada alone during the period covered by this action. Tim Hortons franchises sell coffee, baked goods (doughnuts, muffins, etc.) and smaller meal items such as soups and sandwiches.
11. Franchisees operate their respective franchises pursuant to standard, non-negotiable franchise agreements with TDL. Much like any mature franchise system, the TDL standard form of franchise agreement has evolved and changed to reflect TDL's evolving business practices and interests and the demands of the franchise system.
12. Each version of the franchise agreement in force during the period covered by this action requires the franchisee to contribute a certain percentage of its restaurant's gross sales to the Ad Fund controlled and operated by TDL through the Tim Hortons Advertising and Promotion Fund (Canada) Inc. ("THAPF"). THAPF's sole business activity is the receipt and disbursement of funds constituting the Ad Fund as directed by TDL. The Ad Fund contribution is currently 3.5% of gross

sales. During the period covered by this action to date, the Ad Fund collected nearly \$700,000,000 in contributions from the franchisees.

13. The franchise agreement in use in 2008 had the following provision in Section 8 relating to Ad Fund contributions:

"The parties recognize the value of advertising and the importance of the standardization of advertising and promotion to the furtherance of the public image of all Tim Hortons Shops operated pursuant to the 'TIM HORTONS SYSTEM'. Accordingly, the Licensee agrees to make the monthly Advertising Levy required under Section 4.02 hereof to meet any and all costs incident to such national, regional and other area advertising at such times and places as the Licensor may, in its sole discretion, direct. The Licensee acknowledges that such advertising is intended to maximize the public's awareness of Tim Hortons Shops and that the Licensor accordingly undertakes no obligation to ensure that the Licensee or any individual licensee benefits directly or indirectly in its local market from the placement of such advertising."

14. The franchise agreement introduced in 2012 and a subsequent one introduced in 2016 contained substantially the same provision in Section 8 relating to Ad Fund contributions, with one amendment to change "the public's awareness of Tim Hortons Shops" to "the public's awareness of the Tim Hortons brand generally". This remains the current provision.
15. Regardless of the version of franchise agreement that a franchisee has operated under, TDL has maintained a single advertising and promotion fund. Whether or not a franchisee is operating under the 2006 form of franchise agreement or the 2016 form of franchise agreement, the Ad Fund contributions go into the same fund and have not been segregated nor used differently by TDL.

16. The benefit of the Ad Fund is that franchisees can pool money for the advertising and promotion of the franchise system and participate in promotions/advertising campaigns that they would not be able to on an individual basis. Its purpose is to advertise and promote the furtherance of the public image of Tim Hortons franchised restaurants and advertise offerings to generate revenue at the Canadian franchisees' level for their benefit or, as stated in the audited financial statements of THAPF, "for the marketing activities of Tim Horton's franchises located in Canada".
17. TDL, through THAPF as further described below, maintains full control over what type of advertising and promotion is conducted using the Ad Fund contributions.

D. THAPF

18. TDL has not operated the Ad Fund directly. Rather, it has operated the Ad Fund through its affiliate, THAPF. All Ad Fund contributions by franchisees to TDL have been re-directed to THAPF and were segregated from TDL's other business accounts in part to promote its independence and transparency. Under the direction of TDL, THAPF paid all expenditures chargeable to the Ad Fund. THAPF is the party that entered into contracts for advertising and promotional activities.
19. The franchisees are required by TDL to enter into certain direct contracts with THAPF.

E. TDL Undergoes Corporate Restructuring

20. In or around December 15, 2014, the Brazilian private equity firm 3G acquired TDL in a deal totalling \$12,500,000,000. The transaction was structured as a merger between the parent company of TDL at that time, Tim Hortons Inc., with Burger King Worldwide, Inc. ("**BKW**") to form RBI. Shares of RBI are traded publicly on the Toronto Stock Exchange and New York Stock Exchange.
21. BKW, at the time prior to the merger, was owned by 3G. Following the merger, 3G has been and continues to be the majority shareholder of RBI.
22. Immediately following the acquisition, 3G deployed its well-honed profit-extraction methods in order to increase its corporate revenues. This included a massive restructuring of TDL's employee pool, directing the dismissal of a significant percentage of TDL's employees, including those responsible for marketing activities, and increasing prices charged to franchisees for such staple and fundamental products including coffee. It also put in place new executive management at TDL and RBI. This included the appointment of Elias Diaz Sese ("**Sese**") as President of TDL and Daniel Schwartz ("**Schwartz**") as CEO of RBI. Sese's compensation was largely tied to the share price of RBI and the profitability of TDL. Schwartz, as CEO of RBI, had a similar compensation structure.
23. The annual contributions to the Ad Fund, approaching \$300,000,000 contributed by franchisees, including the plaintiff, and controlled by TDL, represented a large pool of funds which, if used to cover the costs of corporate expenses, would

enhance TDL's financial performance, RBI's stock price and the executive compensation received by the TDL/RBI executive group to the detriment of the plaintiff and the proposed class members.

F. Changes to the Ad Fund Operations

24. Prior to the corporate restructuring and before the new executive was put in place by RBI, the Ad Fund contributions were used largely for their intended purpose.
25. Immediately following the corporate restructuring and under the new executive put in place by RBI, TDL started implementing several changes to the administration of the Ad Fund to the detriment of franchisees. As particularized below, these changes by TDL included charging operational/administrative expenses to the Ad Fund that were not previously charged to the Ad Fund and not properly chargeable to the Ad Fund and failing to provide statements of the Ad Fund's operations as required by the franchise agreements.

(i) Improper Charges to the Ad Fund

26. Historically, the administration of the Ad Fund was done in consultation with input from a body of franchisee representatives serving as a marketing subcommittee of what was known as the "Advisory Board". On an annual basis, the marketing subcommittee would review on a line-by-line basis the complete inputs and expenditures of the Ad Fund and would summarize the use of the Ad Fund contributions for the Advisory Board. The unofficial target of the Ad Fund was to spend approximately 7.0% of franchisee contributions on administrative

expenses, the majority of which would be comprised of administrative staffing of the Ad Fund.

27. Upon the takeover of TDL by 3G, TDL began charging operational/administrative expenses to the Ad Fund that were not previously charged to the Ad Fund and are not properly chargeable to the Ad Fund. The Advisory Board ceased to be consulted in any meaningful way on the use of Ad Fund contributions.
28. Following the change in executive management, the administrative expenses of TDL charged to the Ad Fund significantly increased. This increase in administrative expenses was despite TDL dismissing a large number of marketing personnel employed at TDL and despite the fact that the salaries of marketing personnel constituted 85-95% of total administrative expenses following the 3G takeover. Even though TDL terminated the employment of close to half of the employees responsible for advertising and promotional activities and whose compensation was charged to the Ad Fund, the Ad Fund still saw a substantial increase in administrative expenses for several reasons.
29. *First*, TDL started charging the Ad Fund for TDL employees that were previously paid by TDL directly through its general operating revenues and whose roles and responsibilities had little or nothing to do with administering the Ad Fund. This included charging the Ad Fund for employees such as customer service representatives, operations support people and people located at the regional offices who support the employees responsible for running the Ad Fund. None of

these employees' compensation was properly chargeable to the Ad Fund within the purpose of the Ad Fund or provisions of the franchise agreements.

30. *Second*, TDL created a "Marketing Intelligence Team", which consisted of hiring scores of analysts whose responsibilities were to analyze operating data points consistent with RBI's unique business practices and very little relating to Ad Fund objectives. Franchisees have seen no tangible benefit from the creation of the Marketing Intelligence Team and the types of analyses generated by the Marketing Intelligence Team are not properly chargeable to the Ad Fund.
31. *Third*, TDL started charging the Ad Fund for the costs of franchisee training, which expense was previously borne by TDL.
32. *Fourth*, TDL started charging the Ad Fund for its research and development department. This included research and development for product testing and menu development. Prior to the takeover, only research for marketing purposes was charged to the Ad Fund.
33. *Fifth*, TDL started charging the Ad Fund for the administration of a new program called "Operations Excellence". Operations Excellence is responsible for customer service functions and evaluating franchisees. Both of these costs were previously paid for by TDL.
34. *Sixth*, TDL charged the Ad Fund for the promotion of TDL's private label products that are sold through non-franchised channels, such as grocery stores, that competed with franchisees for sales of Tim Hortons branded coffee. Further,

TDL started using Ad Fund contributions to pay grocery stores' listing fees for products going into those stores.

35. *Seventh*, TDL started charging expenses of the Tim Hortons Children's Foundation to the Ad Fund, such as transportation expenses incurred by the Foundation.
36. *Eighth*, TDL has started charging the Ad Fund for the expenses related to the customer pre-loaded debit cards, known as "TimCards". Further, the unused balance of TimCards, referred to as "breakage" has been going to TDL, rather than to the Ad Fund as it historically had been.
37. *Ninth*, TDL started charging the Ad Fund a disproportionate amount of operational expenses in relation to the amount charged to the advertising fund for U.S.-based franchisees.
38. TDL's funnelling of money out of the Ad Fund, following the RBI takeover, is in breach of the franchise agreements with all of the proposed class members. In particular, section 8.01 of all versions of the franchise agreement in use within the system states that the Ad Fund "... shall not be used to defray any of [TDL's] general operating expenses, except for such reasonable administrative personnel and overhead costs on a fully allocated basis as [TDL] may incur for activities related to the administration or direction of the Advertising Fund, which [TDL] shall be entitled to recover from the Advertising Fund."
39. Section 8.01 precludes TDL from charging the expenses identified above to the Ad Fund. Each of the above changes does not relate to the promotion and

advertising of franchised restaurants, or the Tim Hortons brand generally, within the permitted purposes of the Ad Fund. Charging these expenses to the Ad Fund is not commercially reasonable. They are general operating expenses incurred by any franchisor in order to run a successful franchise system.

40. Moreover, the franchise agreements stipulate that the contributions to the Ad Fund are for the specific purpose of advertising, marketing and sales promotion. There is therefore an express or implied obligation under the franchise agreements that TDL would direct the use of the Ad Fund solely for the purpose of advertising and marketing and not for any other purpose. This means that TDL is not permitted under the franchise agreements to use the Ad Fund to pay for its general operating/administrative expenses or the promotion of the sale of private-label products at non-franchised locations.
41. In sum, the above charges were not properly chargeable to the Ad Fund and are not commercially reasonable administrative personnel and overhead costs related to the proper administration or direction of the Ad Fund. By charging them to the Ad Fund, TDL is in breach of the plaintiff's and each proposed class member's franchise agreement.
42. The plaintiff accordingly seeks an order for its own benefit and the benefit of all proposed class members that TDL return to the Ad Fund all amounts improperly charged by TDL to the Ad Fund.

(ii) Failure to Provide Statement of Operations

43. The franchise agreements stipulate that TDL is required to provide the franchisees annually with a statement/accounting of the operation of the Ad Fund. The disclosure document delivered to prospective franchisees prior to entering into their respective franchise agreements represented that the practice was to obligate TDL to provide audited financial statements of the Ad Fund's operations to franchisees.
44. TDL failed to supply the required statements in 2015 and 2016 of the operations of the Ad Fund until demand was made in 2017 on behalf of the Great White North Franchisee Association (the "GWNFA" or the "Association"), a franchisee association formed to address franchisee concerns with RBI's operations of the Tim Hortons franchise system in Canada. Following the demand of the Association, TDL provided the audited financial statements of THAPF to the Association. In response to receiving these statements, formal demand was made by the Association on behalf of the franchisees for the particulars of various items contained in the financial statements. Despite repeated demands, and in breach of its duties of good faith and statutory duty of fair dealing, TDL has refused or failed to provide any of the requested information.
45. The class members therefore seek a detailed accounting and a determination of the amounts improperly expended from the Ad Fund and an order for repayment to the franchisees of all improper or excessive charges to the Ad Fund.

G. Harm to Franchisees

46. As a direct result of the aforementioned acts and omissions, TDL has downloaded many of its corporate operating/administrative costs to the Ad Fund while the franchisees did not get the full benefit of their Ad Fund contributions. TDL has deliberately used Ad Fund contributions to pay for expenses that it was aware were not historically nor properly chargeable to the Ad Fund.

47. As a direct and foreseeable consequence of the acts and omissions pleaded above, the franchisees are entitled to substantial damages for breach of contract.

48. Further and in the alternative, TDL must account for and disgorge all of its expenses unreasonably charged to the Ad Fund as a result of its acts and omissions described above. TDL has used these Ad Fund contributions unjustly and in breach of its obligations, for its own financial benefit to the detriment of franchisees and without juristic reason.

H. Breach of Duties of Good Faith and Fair Dealing

49. TDL is a "franchisor" within the meaning of the AWA and the other common law provincial franchise statutes.

50. All class members carrying on business in Ontario, Alberta, Manitoba, British Columbia, New Brunswick and Prince Edward Island are entitled to the protection of their provinces' respective franchise statutes. Under these provincial statutes regulating franchising, TDL owes the proposed class members operating in Ontario, Alberta, Manitoba, British Columbia, New Brunswick and Prince

Edward Island a duty of fair dealing in the performance and enforcement of the franchise agreement.

51. Further, and in the alternative, TDL owes a duty of good faith in the performance and enforcement of the franchise agreements to all proposed class members, particularly in the exercise of all discretionary rights affecting the use of Ad Fund contributions, which are implied contractual obligations.
52. 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.
53. The franchise agreements grant TDL discretion in the administration of the Ad Fund. Such discretionary rights must be exercised consistent with the primary purpose of the Ad Fund, which is to advertise and promote Tim Hortons franchised stores and the offerings available in those stores generally and the reasonable expectations of the franchisees who mandatorily contribute a portion of their revenues into it.
54. TDL's contractual rights and obligations must be considered and determined in light of the vulnerability and the dependence of franchisees who, by virtue of the franchise agreements, do not have any say or control over the use of the Ad Fund. The use of the Ad Fund contributions must also be considered in light of TDL's other corporate actions including raising prices to franchisees for coffee products which the proposed class members cannot recover from their customers.

55. By reason of its actions in respect of the Ad Fund, TDL has repeatedly breached the franchise agreements including the duty to perform its obligations thereunder in good faith, has breached the statutory duty of fair dealing under the AWA and other provincial franchise statutes, and, with respect to proposed class members located in Quebec, has acted contrary to the duties contained in articles 6, 7 and 1375 of the Quebec Civil Code.

56. The plaintiff and the proposed class members plead and rely on section 3 of the AWA, section 7 of the *Franchises Act*, S.A. 1995, c. F-17, section 3 of the *The Franchises Act*, C.C.S.M., c. F156, section 3 of the *Franchises Act*, S.B.C. 2015, c. 35, section 3 of the *Franchises Act*, S.N.B. 2007, c. F-23.5, section 3 of the *Franchises Act*, R.S.P.E.I. 1988, c. F-14.1, in respect of class members located in Ontario, Alberta, Manitoba, British Columbia, New Brunswick and Prince Edward Island, respectively.

I. Punitive/Exemplary/Aggravated Damages

57. The acts of TDL as aforesaid were taken for the direct financial benefit of TDL and with the wanton disregard for the interests of the plaintiff and the proposed class members. The plaintiff and the proposed class members are entitled to an award of punitive, exemplary and aggravated damages, or any of them, as against TDL.

58. The Plaintiff proposes that the Trial of this action be in the City of Toronto, in the Province of Ontario.

Date: June 19, 2017
Amended: January 16, 2019

HIMELFARB, PROSZANSKI

Barristers and Solicitors

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COURT FILE NO.: CV-17-577371

1523428 ONTARIO INC.
PLAINTIFF

-and-

THE TDL GROUP CORP.
DEFENDANT

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings commenced at TORONTO

FRESH AS AMENDED
STATEMENT OF CLAIM

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