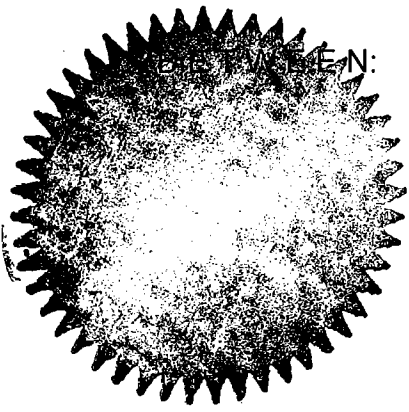


**ONTARIO  
SUPERIOR COURT OF JUSTICE**



BEEN:

FAIRVIEW DONUT INC. and BRULE FOODS LTD.

Plaintiffs

- and -

THE TDL GROUP CORP., THE TDL GROUP LTD.,  
TIM DONUT LIMITED and TIM HORTONS INC.

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 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.

1500.00

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$ for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400 for costs and have the costs assessed by the court.

Date: June 12, 2008

Issued by

  
Local Registrar

Address of

Court office: 393 University Avenue  
Toronto ON

TO: THE TDL GROUP CORP.  
874 Sinclair Road  
Oakville ON L6K 2Y1

AND

TO: THE TDL GROUP LTD.  
874 Sinclair Road  
Oakville ON L6K 2Y1

AND

TO: TIM DONUT LIMITED  
874 Sinclair Road  
Oakville ON L6K 2Y1

AND

TO: TIM HORTONS INC.  
874 Sinclair Road  
Oakville ON L6K 2Y1

**CLAIM**

1. The Plaintiffs claim, on behalf of themselves and all Class Members:
  - a. Special damages for breach of contract in the amount of \$1,230,000,000.00;
  - b. General damages for breach of contract in the amount of \$720,000,000.00;
  - c. In the alternative to a. and b., damages for breach of the duty of good faith and fair dealing at common law and (where applicable) under section 3 of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3, as amended, and section 7 of the *Franchises Act*, R.S.A. 2000, c. F-23, as amended, in the amount of \$1,950,000,000.00;
  - d. In the further alternative to a., b., and c., special damages in the amount of \$1,230,000,000.00 and general damages in the amount of \$720,000,000.00 for negligent misrepresentation;
  - e. In the further alternative to a., b., c. and d., a declaration that the Defendants have been unjustly enriched, to the deprivation of the Plaintiffs and other Class Members, by the Always Fresh conversion and by the imposition of a lunch menu, which both resulted in unreasonably low margins for the franchisees; an order requiring the Defendants to disgorge to the Plaintiffs and Class A Members all profits earned by the Defendants

by reason of the Always Fresh conversion and to disgorge to the Plaintiffs and Class B Members all profits earned by reason of the lunch menu; and an order for an accounting of all such profits;

- f. Prejudgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- g. Costs on a substantial indemnity basis; and
- h. Such further and other relief as this Honourable Court may deem just.

### **“Tim Hortons”**

- 2. Tim Hortons is the trade name under which a chain of quick serve restaurants and kiosks selling donuts, coffee, and other food items operates in Canada, the United States and, to a limited extent, internationally. The trade name “Tim Hortons” and related names and trademarks are owned by the Defendant, The TDL Group Corp. The TDL Group Corp. licenses the use of the name and related trademark and system for the operation of the quick serve restaurants and drive-through and walk-up kiosks (the “Tim Hortons stores”), primarily by means of franchising.

### **The Parties**

#### The Representative Plaintiffs

- 3. The Plaintiff, Fairview Donut Inc. (“Fairview”), is a corporation incorporated under the laws of Ontario which carries on business as a Tim Hortons franchisee

operating a Tim Hortons store (store no. 593) in Burlington, Ontario. Fairview operated another Tim Hortons store (store no. 368) in the period 1988 to 2008.

4. The Plaintiff, Brule Foods Ltd. ("Brule"), is a corporation incorporated under the laws of Ontario which carries on business as a Tim Hortons franchisee operating one Tim Hortons store as a franchisee (store no. 750) and one store on a contract basis (store no. 2267). Both stores are located in Burlington, Ontario. Brule operated a third store in Burlington (store no. 737) as a franchise in the period 1994 to 2007.

#### The Class

5. The Plaintiffs are members of and bring this action on behalf of the following classes:
  - a. "Class A Members", being all persons, including corporations, carrying on business or who carried on business in Canada as a Tim Hortons store under a license agreement with The TDL Group Corp. or its predecessors, having executed such license agreement prior to the conversion of their Tim Hortons store from the full production model to the Always Fresh frozen product model (as described in paragraph 15 below), including those persons, including corporations, whose license agreement(s) with The TDL Group Corp. have since ended; and

- b. "Class B Members", being all persons, including corporations, carrying on business in Canada as a Tim Hortons store under a license agreement with The TDL Group Corp. or its predecessors, who have been forced by The TDL Group Corp. to sell lunch menu items resulting in unreasonably low margins, as more particularly described in paragraph 48 below, including those persons whose license agreement(s) with The TDL Group Corp. have ended following the introduction of the lunch menu.
6. There are currently approximately 500 to 800 potential Class Members operating approximately 2400 Tim Hortons stores in Canada.

#### The Defendants

7. The Defendant The TDL Group Corp. ("TDL") is a corporation incorporated pursuant to the laws of Nova Scotia, with its head office located in Oakville, Ontario. TDL carries on business throughout Canada as the franchisor of the Tim Hortons stores.
8. The Defendant Tim Donut Limited and The TDL Group Ltd. are corporations which previously carried on business in Canada as franchisors of the Tim Hortons stores. Tim Donut Limited is a predecessor of TDL, having amalgamated with Dim Sum Holdings Ltd. in 1992 to create The TDL Group Ltd., which entity later, as a result of a series of subsequent amalgamations with other entities, formed TDL.

9. The Defendant Tim Hortons Inc. is a Delaware U.S.A. corporation listed on the New York Stock Exchange whose principal headquarters is located in Oakville, Ontario. Tim Hortons Inc. is the parent company of The TDL Group Corp.
10. Tim Hortons is Canada's largest chain of quick serve restaurants and kiosks with annual revenue in 2007 of \$1.9 billion and annual net income in 2007 of \$269.6 million.

### **The Claim: Damages suffered due to Always Fresh Conversion**

#### Tim Hortons Background

11. Tim Hortons was founded by NHL player Tim Horton in 1964 in the City of Hamilton. In 1966, Horton partnered with Ronald Joyce, under whose leadership the chain grew from three to over 2000 stores by 2000.
12. From the time of its founding in 1964 until approximately 2002, all donuts and most other baked goods were prepared and baked onsite in the Tim Hortons stores, with the exception of pastries, bagels and buns, which were received frozen and baked in convection ovens at the Tim Hortons stores. Each store was equipped with high-volume baking equipment and the store owners employed bakers who worked through the night to produce baked goods for sale the next day. The Defendants designated the distributors from whom the franchisees could purchase approved refrigerated and frozen ingredients and in addition TDL sold the majority of certain ingredients and supplies directly to the franchisees. One of the key components of this distribution system was that the supplies and

ingredients were to be sold by the Defendants to the franchisees at lower prices than the franchisees could obtain for the same product in the marketplace due to their volume buying power.

13. At the time the Plaintiffs and Class A Members entered into license agreements with the Defendants, the Tim Hortons chain was operating under this “full baking” model.

#### The Always Fresh Conversion

14. Following the departure of Joyce from management in January 2001, the Defendants began to implement fundamental changes to the manner in which the chain of Tim Hortons stores operated, the most significant of which was the conversion of all Tim Hortons stores to the so-called “Always Fresh” system (the “Always Fresh conversion”).
15. The Always Fresh conversion occurred as follows:
  - a. In or around 2001 to 2002, a manufacturing plant was built in partnership with an Irish company, IAWS Group plc, in Brantford, Ontario, for the production of donuts and Timbits (and later, sandwich buns and pastries) to be supplied to all Tim Hortons stores in Canada and the United States. At the Brantford plant, the product is baked and then frozen (“par-baked”), to be shipped frozen via refrigerated transport to all North American Tim Hortons stores, which microwave such frozen products prior to finishing

and sale. The Defendants and IAWS Group plc each have a 50% interest in the Brantford plant.

- b. With respect to all baked goods other than donuts and Timbits (and later, sandwich buns and pastries), most baked goods (i.e., muffins, cookies and biscuits) were baked from ingredients onsite in the Tim Hortons stores. The Defendants now designate the distributors from whom the Plaintiffs and Class A Members must purchase these frozen products, which, in turn, are baked or thawed onsite in convection ovens in the Tim Hortons stores.
  - c. Commencing in September 2002, the Defendants required the Plaintiffs and Class A Members to convert their full-baking Tim Hortons stores to the Always Fresh system by disposing of their baking equipment and purchasing and installing freezers and microwave equipment and to thereafter purchase frozen product from the Brantford plant through their selected distributor, to be microwaved and finished in-store before sale to customers.
16. The Plaintiffs converted their respective stores in September and October 2002.
  17. Prior to conversion, the Defendants made the following representations to the Plaintiffs and Class A Members with respect to the Always Fresh conversion:
    - a. The par-bake system would cause product quality to improve, which would in turn cause sales to increase;

- b. The cost to the franchisees of producing a donut utilizing the par-baked system would increase modestly from 8 or 9 cents to 12 cents per donut;
  - c. The par-baked system's increase in the cost to produce a donut would be offset by a significant reduction in operating costs, as the franchisees would avoid the expense of employing highly paid or expensive baking staff in addition to other savings such as reduced "throws" (i.e. discarded unsold product); and
  - d. The franchisees' lives would be less stressful because they would not have to worry about the baking staff.
18. These representations were made by Paul House, then President and Chief Operating Officer (now Executive Chairman) of TDL, and by David Clanachan, also a TDL executive, at a Regional Meeting held in Toronto at the Westin Harbour Castle in or around November 27 and 28, 2001. At this meeting, franchisees were shown the new product and oven. Taste tests were conducted. The meeting was designed to garner support for the Always Fresh conversion and all of the speakers advised the store owners that they would benefit from the conversion. At that meeting the franchisees were not advised of the cost of the Always Fresh conversion.
19. In fact, the Always Fresh conversion has resulted in an increase in costs to produce donuts with a corresponding decrease in profits of the Plaintiffs and Class A Members. Contrary to the Defendants' representations enumerated in paragraph 17 above, the cost of producing a donut has risen from 8 or 9 cents

per donut to 20 cents per donut, largely because of the inflated price at which the Brantford plant sells the frozen product to the franchisees. The cost of producing certain other baked goods has also increased. The prices charged to the franchisees for many products and supplies have increased and the prices charged are often significantly above market price for comparable products and supplies. The transportation costs from the Brantford plant to all Tim Hortons stores across Canada, which is passed on to the franchisees as part of the costs of the par-baked product, is such that these product costs are not competitive and exceed the marketplace costs for such product.

20. Following the Always Fresh conversion, the Plaintiffs' and Class A Members' income as a percentage of sales has decreased by 3.5%. The Plaintiffs and Class A Members have sustained damages in the period May 25, 2002, to date of approximately \$100,000,000.00 per year, entitling the Plaintiffs and Class A Members to special damages of \$600,000,000.00. In the alternative, the Defendants have been unjustly enriched by the "Always Fresh" program since its inception to date at the expense of the Plaintiffs and Class A Members in the amount of \$600,000,000.00.
21. The Always Fresh conversion has not only hurt franchisees' year to year profitability, but it also came at substantial capital expense to the Plaintiffs and Class A Members, who were forced to invest approximately \$35,000.00 to \$50,000.00 per store for the new equipment package with no compensation from the Defendants for such capital expense, and received minimal compensation for the existing kitchen equipment they were forced to divest. In total the Plaintiffs

and Class A Members were forced to spend approximately \$75,000,000.00 to purchase the new equipment and were forced to discard existing kitchen equipment worth approximately \$75,000,000.00, entitling the Plaintiffs and Class A Members to \$150,000,000.00 in special damages.

22. While the Plaintiffs and Class A Members have suffered a loss in profit, the Defendants experienced an increase in profits as a result of the Always Fresh conversion. The Defendants own 50% of the Brantford plant and thus earn profit on all frozen product and supplies (which are sold to the franchisees at a marked-up price). This is in addition to the revenue the Defendants earn from royalties of 3.5 to 4.5% on all product sold at Tim Hortons stores, as well as franchising and real estate fees.
23. Franchisees who carefully tracked the effect of the Always Fresh conversion on the franchisees' bottom line have made this information known to the Defendants through conversations with TDL executives and by memos since January 2004, such conversations and memos had with and addressed to David Clanachan (Divisional Executive VP of TDL) and Roland Walton (Executive VP of Operations of TDL), and copied to Paul House. The Defendants have made no effort to reverse the ongoing losses suffered by the Plaintiffs and Class A Members.

#### Breach of Contract

24. The relationship between Tim Hortons and each of the Class Members is governed in part by written license agreements executed by TDL as franchisor,

the individual Plaintiffs and Class Members as franchisees, and often by the principal owner(s) of each franchisee as indemnifier(s) or covenantor(s).

25. The Plaintiffs have entered into license agreements with the Defendants for the following terms:

<b>Plaintiff</b>	<b>Store No.</b>	<b>Term</b>
Fairview	368	1988 to 2008
	593	2001 to 2021
Brule	737	1994 to 2007
	750	1994 to 2007
	2267	2000 to 2008

26. The license agreements between TDL and the Plaintiffs and other Class Members are standard form agreements which are substantially similar but vary in some minor respects. These agreements are franchise agreements within the meaning of section 1 of the *Arthur Wishart Act, 2002* and section 1 of the *Franchises Act (Alberta)*.
27. The language of the license agreements is clear that a franchise is granted for a full-baking store. The preamble of each license agreement describes the "TIM HORTONS SYSTEM" as relating to:

**...shops involving the production**, merchandising and sale of donuts, muffins, tarts, cakes, pies, cookies, coffee and other related products utilizing a specially designed building with specified equipment, equipment layouts, interior and exterior accessories...  
[emphasis added]

28. While the license agreements do permit the Defendants to implement certain changes, the Defendants are limited to only introducing changes that constitute an improvement of the existing system, which provide a benefit to the franchisees, and which do not unreasonably alter the franchisee's rights or obligations under the agreement. The Always Fresh conversion does not fit under any of these exceptions. The Plaintiffs and other Class Members plead and rely upon the following provisions contained in the license agreements:

- a. The license agreements all contain express language that restricts the Defendants' right to impose changes unless such changes constitute an improvement:

WHEREAS the Licensor ... has acquired experience and skill in the development, opening and operating of shops involving the production, merchandising and sale of donuts, muffins, tarts, cakes, pies, cookies, coffee and other related products ... **all of which may be improved**, further developed or otherwise modified from time to time...  
[emphasis added]

- b. The license agreements permit changes to the store-wide operating manual but only as a service to the franchisees to provide for new developments in standards, specifications, procedures and techniques:

Section 3.00 – Initial and Continuing Services Furnished by Licensor

During the term of this License, the **Licensor shall provide the following services to the Licensee:**

...  
to provide a Confidential Operating Manual which contains the standards, specifications, procedures and techniques of the "TIM HORTON SYSTEM" and **to revise, from time to time, the content of the manuals to incorporate new developments regarding standards, specifications, procedures and techniques;** [emphasis added]

- c. The license agreements provide that the Defendants may impose changes to the store-wide operating manual, but those changes must involve *improved* methods, procedures and techniques:

Section 7.03 – Changes in Confidential Operating Manual

(a) **In order that the Licensee may benefit** from new knowledge gained by the Licensor as to **improved methods, procedures and techniques** in the preparation, merchandising and sale of donuts and other food items, and in the operation of the Tim Hortons Shop, **the Licensor may from time to time revise the contents of the Confidential Operating Manual and such other manuals and materials** ... [emphasis added]

- d. Certain license agreements provide under section 7.03 that changes to the store-wide operating manual must not unreasonably alter the franchisee's rights or obligations:

Section 7.03 – Changes in Confidential Operating Manual

(a) ... the Licensor may from time to time revise the contents of the Confidential Operating Manual and such other manuals and materials ... **provided that such changes shall not unreasonably alter the Licensee's rights or obligations under this Agreement.** [emphasis added]

