

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

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 2675970 ONTARIO INC., 2733181
ONTARIO INC., 2385816 ALBERTA LTD., 2161907 ALBERTA
LTD., 2733182 ONTARIO INC., 2737503 ONTARIO INC.,
2826475 ONTARIO INC., 14284585 CANADA INC., 2197130
ALBERTA LTD., 2699078 ONTARIO INC., 2708540 ONTARIO
CORPORATION, 2734082 ONTARIO INC., TS WELLINGTON
INC., 2742591 ONTARIO INC., 2796279 ONTARIO INC.,
10006215 MANITOBA LTD., AND 80694 NEWFOUNDLAND &
LABRADOR INC.

FACTUM OF CERTAIN FRANCHISEES

(Returnable November 28, 2024)

November 27, 2024

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2810434 Ontario Incorporated and 2826139 Ontario Inc.*

TO: THE SERVICE LIST

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& LABRADOR INC.

(the “**Applicants**”)

FACTUM OF CERTAIN FRANCHISEES

(returnable November 28, 2024)

PART I – OVERVIEW

1. This factum is filed by Tripsetter Inc., 1000032072 Ontario Inc., 2810434 Ontario Incorporated, and 2826139 Ontario Inc (collectively, the “**Franchisees**”) in response to the motion by the Applicants for a reverse vesting order (the “**RVO**”) in their proceedings under the *Companies' Creditors Arrangement Act* (the “**CCAA**”).

2. The Franchisees do not oppose the transaction contemplated by the RVO. However, the Franchisees do oppose the proposed release, as drafted, of pre-filing claims against current directors and officers contemplated by Paragraph 35 of the draft RVO (the “**Proposed Release**”). The Proposed Release expressly seeks to release the Franchisee’s rights to compensation from certain individuals under the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3. (the “**Wishart Act**”). This release will immunize a single person – Jürgen Schreiber (“**Schreiber**”) – a director of the Applicants and of the Purchaser. It will undermine the principles of the Wishart Act. And, significantly, it will release pre-filing claims that should not be released under the CCAA in the circumstances of this case.

3. Under the Wishart Act, a franchisee may elect to rescind a contract in certain circumstances, giving rise to compensation pursuant to a statutory formula, which is “designed to put the franchisee back in its pre-franchise position”¹ (a “**Rescission Payment**”). The Wishart Act also provides that a broad spectrum of individuals defined as “franchisor’s associates” may be held liable for repayment of such investment. As detailed herein, such personal liability:

- a. has **nothing to do with an individual’s role as a director (if any)**;
- b. is **not** grounded in a contract claim; and
- c. is **not** grounded in misrepresentation or oppression; and
- d. **is** a direct, personal liability of the subject individual.²

4. The Proposed Release correctly incorporates the limitations set out in Section 5.1(2) of the CCAA, which are intended to align with the statute so as to limit the releases to those claims that are “*obligations of the [debtor] company where the directors are by law liable in their capacity as directors*” and not direct claims against the directors. However, those limitations would not protect the Franchisees’ rights to Rescission Payments – which are not based on contract, misrepresentation and oppression or misrepresentation/oppression, but are direct, personal claims against the individuals.

¹ 1490664 Ontario Ltd. v. Dig This Garden Retailers Ltd. 2005 CanLII 25181 (ON CA), [2005] O.J. No. 3040 (C.A.) at [para. 31](#).

² Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000 c. 3 (the “**Wishart Act**”), [s. 2](#), [s. 1\(1\)](#) definition of “franchisor’s associate”; and, [s. 6\(6\)](#).

Additionally, there is no insurance policy that covers such claims.³ Moreover, the Proposed Release goes too far by expressly seeking to release personal claims against the directors as franchisor's associates under the Wishart Act (the "**Rescission Claims**").

5. It is the position of the Franchisees that the Proposed Release, as drafted, and its impact on Franchisees' rights to pursue a Rescission Claims against Schreiber should not be approved by the Court because:

- (a) it does not satisfy the provisions of Section 5.1(1) of the CCAA;
- (b) the release of the Rescission Claims does not satisfy the prevailing case law as it is not fair and reasonable in the circumstances; and
- (c) for policy reasons, the release of the Rescission Claims should not be granted.

PART II – THE FACTS

6. The Franchisees were each in a contractual relationship with one or more of the Applicants, that granted them the right to operate a "Tokyo Smoke" retail cannabis store (the "**Franchise System**").⁴

7. The Franchisees have each rescinded their franchise agreements with certain of the Applicants, pursuant to the Wishart Act – serving their respective notices of rescission between May 31, 2021 and April 29, 2023. In such rescission notices, the Franchisees each demanded a Rescission Payment on account of all amounts invested in their franchised business. The value of those Rescission Payments, in aggregate, is approximately \$5,000,000.⁵

8. These notices were also served on and against certain individuals who are alleged to be

³ Third Report of the Monitor, dated November 26, 2024, [Section 5.9](#).

⁴ Affidavit of Sonia Cavalieri D'Oro, sworn November 27, 2024 (the "**Franchisee Affidavit**"), at para. 5.

⁵ Ibid., paras 6-8; and Exhibit "A".

“franchisor’s associates” under the Wishart Act. Under that statute, franchisors’ associates are personally liable for the rescission payments. The Franchisees have advanced Rescission Claims against the following franchisor’s associates: Jürgen Schreiber; Justin Farbstein and Josh Davidson.⁶

9. The affected Applicants and franchisors’ associates did not issue the Rescission Payments as required under the Wishart Act. Instead, each of the Franchisees were forced to commence litigation and dispute resolution proceedings. The affected Applicants and franchisors did not approach the same in good faith, but instead delayed the processes. As a result of these delays, the Franchisees were forced to go to Court and obtain an order to appoint an arbitrator.⁷

10. Shortly thereafter, the Applicants commenced these proceedings, effectively staying the Applicants’ rights under the Wishart Act⁸.

11. These proceedings were commenced for the purposes of implementing a stalking horse sale to a related party – TS Investments Corp. (the “**Purchaser**”), who also provided DIP financing. The Purchaser is related to the Applicants and Jürgen Schreiber is a director of Purchaser.⁹

12. Jürgen Schreiber is the only current director of the Applicants who will be immunized from the Rescission Claims under the Proposed Release.¹⁰

13. The Proposed Release will deny the Franchisees their rights under the Wishart Act to continue their direct, personal Rescission Claims against Schreiber.

PART III– ISSUE

14. The only issue to be determined by the Court with respect to the Franchisees’ response, is

⁶ Ibid., Exhibit “A”.

⁷ Ibid., paras 11-17; Exhibits “B”, “C”, “D” and “E”.

⁸ Ibid., para 19.

⁹ Ibid., Exhibits “F” and “G”.

¹⁰ Ibid, Exhibit “G”; and, Affidavit of Andrew Williams, sworn November 26, 2024, para 8, Supplemental Motion Record of the Applicants, dated November 26, 2024.

whether:

- a. this Court can or should grant the release of pre-filing, personal Rescission Claims against Schreiber under the Wishart Act.

The Franchisees submit that the answer to this question is – *no*.

PART IV – LAW & ARGUMENT

A. The Release of the Rescission Claims does not satisfy Section 5.1(1) of the CCAA

15. In the context of CCAA sale transactions (a “**CCAA Sale**”), it is common for releases to be granted in favour of directors and officers. There is no express statutory authority for such releases in the context of a CCAA Sale, but the Courts have relied on their broad authority under Section 11 to make such orders.¹¹

16. When considering a release in the context of a CCAA Sale, the Courts have recognized that Section 5.1 of the CCAA applies. That section expressly authorizes the Court to approve a CCAA plan of compromise or arrangement (a “**CCAA Plan**”) which includes a compromise or release of claims against the directors and officers, subject to certain limitations. The Courts have recognized the same principles apply to releases of directors and officers in a CCAA Sale.¹²

17. Thereafter, submissions on – and consideration of – the appropriateness of releases frequently focus on a consideration of the prevailing case law – i.e., the *Metcalfe* and *Lydian* factors¹³. However, before considering those factors, if the Courts are to rely on Section 5.1 in the context of a CCAA Sale, the Court ought to first ask if subject claims are claims that could or should be released under Section 5.1, which section includes express limitations on releases.

¹¹ Companies' Creditors Arrangement Act, RSC 1985, c C-36 (“**CCAA**”), [s. 11](#).

¹² *Re Green Relief Inc.*, 2020 ONSC 6837, [para 76](#); *Re Atlas Global Brands Inc.*, 2024 ONSC 5570, [paras 101-102](#); *Re Atlas Global Brands Inc.* (29 October 2024), Toronto CV-24-00722386-00CL (ONSC) (Endorsement), [para 30](#).

¹³ *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, [para 70](#) (leave to appeal to SCC dismissed, [2008 CanLII 46997](#)); *Lydian International Limited (Re)*, [2020 ONSC 4006](#).

18. Section 5.1 of the CCAA reads, in its entirety as follows:

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

- (a)** relate to contractual rights of one or more creditors; or
- (b)** are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.¹⁴

[emphasis added]

19. The purpose of importing the principles of Section 5.1 into a consideration of a release in the context of a CCAA Sale are two-fold: (i) there is no express statutory authority under the CCAA to grant such a release in a CCAA Sale; and, (ii) by importing such provisions the Courts have insured that releases in the context of CCAA sales are appropriately limited.

20. Put another way, by importing such considerations, the Court is ensuring that a requested release does not, in the context of a CCAA Sale, do what it is expressly prohibited from doing in the context of a CCAA Plan.

21. Accordingly, in the context of a CCAA Sale, before considering the *Metcalf* and *Lydian* factors, the Court should assess whether such release meets the principles of Section 5.1 of the CCAA,

¹⁴ CCAA, [s. 5.1](#)

namely:

- a. Section 5.1(1) – the released claims “relate to the obligations of the company where the directors are by law liable in their capacity as directors”;
- b. Section 5.1(2)(a) – the released claims cannot “relate to contractual rights of one or more creditors”;
- c. Section 5.1(2)(b) – the release claims cannot be “based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors”;
- d. Section 5.1(3) – the court must be satisfied that the release “would not be fair and reasonable in the circumstances.”¹⁵

22. The Proposed Release, as concerns the Franchisees’ Rescission Claims under the Wishart Act, does not satisfy Section 5.1(1) of the Act. The claims do not relate to “the obligations of the company where the directors are by law liable in their capacity as directors.”¹⁶

23. Under the Wishart Act, the franchisee is entitled to recover the Rescission Payment from the franchisor and/or the “**franchisor’s associates**”, which is defined in the Act as follows:

“franchisor’s associate” means a person,

(a) who, directly or indirectly,

(i) controls or is controlled by the franchisor, or

(ii) is controlled by another person who also controls, directly or indirectly, the franchisor, and

(b) who,

(i) is directly involved in the grant of the franchise,

(A) by being involved in reviewing or approving the grant of the franchise, or

(B) by making representations to the prospective franchisee on behalf of the franchisor for the purpose of granting the franchise, marketing the franchise or otherwise offering to grant the franchise, or

¹⁵ CCAA, s. [5.1\(1\)–\(3\)](#). Section 5.1(4) includes a deeming provision that would authorize the Court to include de facto or deemed directors in any release. However, that subsection does not speak to the analysis of a proposed release.

¹⁶ CCAA, s. [5.1\(1\)](#).

(ii) exercises significant operational control over the franchisee and to whom the franchisee has a continuing financial obligation in respect of the franchise;¹⁷

24. A “franchisor’s associate” is a special class of affiliate defined in the Wishart Act that is jointly and severally liable alongside the franchisor to pay Rescission Payments to a rescinding franchisee, “even if such party bears no responsibility for the inadequate or incorrect disclosure that has triggered the rescission”.¹⁸ The Wishart Act provides a rescinding franchisee with rights against franchisor’s associates “in order to increase the possibility of recovery.”¹⁹ A Rescission Claim is akin to claim under a personal guarantee, where the guarantor is directly liable as principal for an obligation.

25. The liability of the franchisor’s associate is a free-standing, direct, personal liability that has nothing to do with whether or not the subject individual was a director of the corporate franchisor or not. In fact, the Wishart Act does not attribute liability to directors as a matter of course at all.

26. Accordingly, the Rescission Claims are not of the type contemplated by Section 5.1(1) of the CCAA as they do not “relate to the obligations of the company where the directors are by law liable in their capacity as directors”. Instead, they are in the nature of a direct, personal claim against Schreiber for his role as a “franchisor’s associate” under the Wishart Act.

27. In view of the foregoing, the Franchisees submit that the Rescission Claims are not even of the nature of claims that can be released under Section 5.1(1) and the Court ought not disregard the statutory limitations on third-party releases that have been adopted by Courts in the context of CCAA Sales.

B. The Release of the Rescission Claims does not satisfy the prevailing case law as it is not fair and reasonable in the circumstances

28. In the alternative, in the event the Court decides to consider the express release of the

¹⁷ Wishart Act, [s. 2](#), definition of “franchisor’s associate”.

¹⁸ 2619506 Ontario Inc., v. 2082100 Ontario Inc., 2021 ONCA 702 (CanLII), para [16](#); *Sovereignty Investment Holdings, Inc. v 9127-6907 Quebec Inc.*, [2008 CanLII 57450 \(ON SC\)](#) at para [55-56](#).

¹⁹ *Sovereignty Investment Holdings, Inc. v 9127-6907 Quebec Inc.*, [2008 CanLII 57450 \(ON SC\)](#) at para [54](#).

Rescission Claims, notwithstanding that the same does not satisfy Section 5.1(1) of the CCAA, the Franchisees submit that the same does not meet the *Metcalf* and *Lydian* factors as it is not fair and reasonable in the circumstances.

29. The Applicants are correct that releases are frequently granted in CCAA proceedings. However, as Chief Justice Paquette of the Quebec Superior Court [Commercial Division] stated in *Re Blackrock*, no matter how frequently releases are granted “*the courts should not grant releases blindly and systematically*”.²⁰

30. In fact, the overarching theme running through the jurisprudence is that CCAA release should be appropriately limited in the circumstances and not overly broad.²¹ This consideration is one of the *Metcalf* and *Lydian* factors – i.e., whether the releases are fair, reasonable and not overly broad.

31. The *Metcalf* and *Lydian* factors require a global analysis, not all must be satisfied and no single factor is determinative.²² Such factors, as they apply to the Rescission Claims are discussed below:

- a. **Whether the parties to be released from claims are necessary and essential to the restructuring of the debtor?** The only party released from the Rescission Claims is Schreiber. He was a director of the Applicants throughout a stalking horse process that ended early for want of any interest and it will result in a sale to a purchaser related to him. It is trite to suggest that a director presiding over a CCAA was not “necessary”, but any remaining director has a duty to realize the best possible result to the company and its stakeholders. However, “necessary” Schreiber was, there was nothing

²⁰ *Blackrock Metals Inc*, 2022 QCCS 2828 (original English version) [Paquette C.J.], paras 128-129.

²¹ See *Re Green Relief Inc.*, 2020 ONSC 6837, paras 58-73; *Atlas Global Brands Inc*, 2024 ONSC 5570, paras 101; *Re Aleafia Health Inc. et al* (1 March 2024), Toronto CV-23-00703350-00CL (ONSC) ([CCAA Termination Order](#) and [Endorsement](#));

²² *Metcalf & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, para 70 (leave to appeal to SCC dismissed, 2008 CanLII 46997); *Lydian International Limited (Re)*, 2020 ONSC 4006 [Morawetz C.J.(as he then was)], para 54; *Green Relief*, *supra*, para 28.

exceptional in the role he played, that it would warrant the release of the Rescission Claims that could not be released under Section 5.1(1).

- b. **Whether the claims to be released were rationally connected to the purpose of the restructuring and necessary for it?** The Rescission Claims, are not connected to the restructuring or the transaction. They did not factor in the commencement of the CCAA; they are not claims for which Schreiber can claim indemnity from the Applicants; they are not based on Schreiber's role as a director, but are rather direct, personal claims against him (akin to a guarantee claim, which could not be released); and, they will not attach to the purchaser. The releases are not necessary for CCAA process or for the transactions to close.
- c. **Whether the parties being released have contributed to the restructuring?** As stated under part(a) above, the only party released from the same Schreiber. He was director of the Applicants through a stalking horse sale process, that ended early for want of any interest, that will result in a sale to a purchaser in which Schreiber has an interest. Whatever contributions made as a director of the Applicants, were made in accordance with Schreiber's duties and obligations as a director and served Schreiber's own interests.
- d. **Whether the transaction could succeed without the releases?** The release of the Rescission Claim is not a condition to the closing of the transaction contemplated by the RVO. Nor it is necessary to quantify any claim under the D&O Charge (as the Rescission Claims are not claims for which Schreiber can seek indemnification from the Applicants), nor does it release a post-filing claim or a claim that would attach to the purchaser. Moreover, but for the self-serving submission that the D&Os will not remain in their positions without the Release, the release of the Rescission Claims is

not necessary to facilitate the transaction. The Franchisees question whether one of the directors of the Applicants and the Purchaser, will “walk away” from the transaction because the Rescission Claims are not released. Regardless, the CCAA Court should not be ransomed by such demands and requirements to consider the release of claims that are not in accordance with the CCAA and are not fair or reasonable in the circumstances.

e. Whether the release will benefit the debtors as well as the creditors generally?

The release of the Rescission Claim will not impact the debtors or the creditors generally. The continuation of the Rescission Claim will not impact the recoveries of the secured creditors, nor the continuation of the business, nor the Applicants.

f. Whether the claims to be released are rationally connected to the purpose of the restructuring, are fair and not overly broad?

32. Concerning the last point, it is significant in the circumstances. The Applicants have cited various cases in which releases were sought and granted. While it is true that the form of releases in those cases is similar to that of the Proposed Release, none of those cases considered an express release of pre-filing Rescission Claims under the Wishart Act or any comparable act.

33. Accordingly, an assessment of whether the release of the Rescission Claims is rationally connected to the purpose of the restructuring, and whether such release is fair and not overly broad warrants careful consideration in the circumstances.

34. The Franchisees submit that the release of the Rescission Claims does not meet this factor, for the following reasons:

- a. it will have the effect of releasing the Rescission Claims, which are not, by their nature, qualifying claims for a release under Section 5.1(1) – this alone should be

grounds to reject the Proposed Release as drafted on the basis that it is unfair, as it attempts to do in a CCAA Sale what the debtors cannot do in a CCAA Plan;²³

- b. the Rescission Claims as against Schreiber are direct, personal claims against him that are not based on his role as a director of the Applicants and not reliant on the prosecution of any claim against any of the Applicants;²⁴
- c. the release, by design and effect, appears purpose-built to target a particular class of claims and immunize a single individual, as Schreiber will be the only beneficiary;²⁵ and
- d. the release of the Rescission Claims is not connected to the proposed CCAA Sale in any way (the Proposed Release is not a condition to the completion of the proposed CCAA Sale)²⁶; in fact, the release was not raised until the form of RVO was circulated to the service list, and the express release of the Wishart Act claims was not raised until a revised form of RVO was circulated to service list on November 26, 2024.²⁷

35. It is worth noting that importing the principles of Section 5.1 of the CCAA into considerations of the approval of a release in the context of CCAA Sale could also include Subsection 5.1(3) which authorizes the Court to reject a proposed compromise of claim against the directors and officers based on fairness:

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

[emphasis added]

²³ CCAA, [s. 5.1\(1\)](#).

²⁴ Wishart Act, [s. 2](#) definition of “franchisor’s associate”; and [s 6\(6\)](#); Affidavit of Andrew Williams, sworn November 26, 2024, para 8, Supplemental Motion Record of the Applicants, dated November 26, 2024;

²⁵ Draft RVO, para 35; and, Third Report of the Monitor, dated November 26, 2024, [Section 5.9](#).

²⁶ [Subscription Agreement, Exhibit “K”](#) to the Affidavit of Andy Williams, sworn November 21, 2024.

²⁷ Draft RVA, para 35.

36. This provides, in addition to the *Metcalfe* and *Lydian* factors, broad discretion vested in the Court to reject or partially reject requested relief. Significantly, the provision deals with a “claim” individually and, as Justice Farley noted in *Re BlueStar Battery Systems International Corp*, the section can be invoked to exempt individual claims from a compromise, thereby modifying the terms of a compromise or release in a CCAA Plan.²⁸

37. Accordingly, the invocation of Section 5.1(3) does not require the Court to reject the Proposed Release in its entirety but rather, if the Court deems it appropriate, this section empowers the Court to modify the release appropriately, including exempting particular claims.

38. For all of the forgoing reasons, the Franchisees submit that the Release of the Rescission Claims is not connect to the proposed transactions, is not fair and reasonable in the circumstances, and is overly broad.

39. Accordingly, the Court should not “*should not grant releases blindly and systematically*” just because the Proposed Release similar to prior releases in other cases, but should carefully assess the specific claims that are impacted by the Proposed Release, and the effect of such release not only on the outcome of the case, but on the broader application in industry. In this case, the Franchisees submit, the Court can and should make provision for the Rescission Claims, ordering the Rescission Claims are exceptions to the Proposed Release.

C. For Policy Reasons, the Proposed Release should not be Granted

40. Finally, there are significant policy considerations that Court ought to take into account in assessing the fairness of the Proposed Release vis-à-vis the Franchisee’s Rescission Claims.

(i) Undermining the Remedial Purpose of the Wishart Act

²⁸ *Re BlueStar Battery Systems International Corp*, [2000] OJ No 4587, [2000 CanLII 22678 \(Sup Ct J\)](#), para 16.

41. The history of franchising law has been troubled,²⁹ with Ontario (and other provinces) enacting specific legislation to stem abuses by franchisors. In Ontario, the Wishart Act is intended to be protective legislation for franchisees.³⁰ As per the Ontario Court of Appeal, the Wishart Act is *sui generis* remedial legislation intended to redress the imbalance of power as between a franchisor and franchisee, and to provide a remedy for abuses stemming from this imbalance.³¹ This orientation dictates that the legislation must be given a generous interpretation.³²

42. Accordingly, like the CCAA, the Wishart Act is remedial legislation and is to be given full breadth of interpretation and application to serve the objectives of protecting a vulnerable class, and to ensure such class has an adequate avenue to recover losses.

43. The Wishart Act was designed to circumvent the very result that will flow from the Proposed Release – an “insider” in a franchise system avoiding personal liability and leaving the franchisee without recourse. The creation of the class of “franchisor’s associate” was designed to lift the corporate veil of the franchisor, and attach joint and several liability to people who could otherwise attempt to shield themselves behind a shell company³³; or, in this case an insolvent company or “free and clear” purchaser.

44. If the Proposed Release releases the Rescission Claims it will deny the Franchisees their rights under and directly undermine the principal objective of the Wishart Act.

(ii) A Dangerous CCAA Precedent

45. In these proceedings, the beneficiary of the Proposed Release is also the beneficiary of the proposed CCAA sale. Schreiber is, simultaneously, a director of the Applicants and is involved with the

²⁹ *Personal Service Coffee Corp. v Beer*, 2005 CanLII 25180 (ON CA) at paras 24-28.

³⁰ *Mendoza v Active Tire & Auto Inc.*, 2017 ONCA 471 at para 13.

³¹ *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673 at para 26.

³² *2189205 Ontario Inc. v Springdale Pizza Depot Ltd.*, 2011 ONCA 467 at para 23.

³³ *Presse Café Franchise Restaurants Inc. et al. v La Libelula et al.*, 2024 ONSC 6177 (CanLII), at para 10.

Purchaser. The Court must be wary of a precedent that will allow a franchise group or controlling individual to:

- a. initiate CCAA proceedings;
- b. effect an “insider” sale to a related party to continue the business;
- c. get an overly broad release in favour of the director of the debtors who has an interest in the Purchaser; and
- d. leave the franchisees disenfranchised (no pun intended) and denied their rights under the Wishart Act to seek recovery against all franchisor associates.

46. It is easy to see the potential for abuse. Not only is this contrary to the purposes of the Wishart Act, but it also invites the abuse of the CCAA in the context of the franchising sector, which is an important part of Canada’s business community and is already beset with challenges in balancing the power dynamic between franchisor and franchisee.

PART V- RELIEF SOUGHT


47. As stated, the Franchisees have direct, personal, pre-filing Rescission Claims under the Wishart Act against the director of the Applicants – Jürgen Schreiber. That claim has been stayed by these proceedings, which are facilitating a CCAA Sale to a related-party purchaser in which Schreiber is also a director. That claim, however, has nothing to do with Schreiber’s role as a director of the any of the Applicants, nor is grounded in contract, misrepresentation or oppression. As such, that claim is not exempted from the Proposed Release. Moreover, the Proposed Release expressly seeks to release the pre-filing Rescission Claims. If granted, the Proposed Release will deny the Franchisees their right to pursue a direct Rescission Claim against Schreiber, as they would otherwise be entitled to do under the Wishart Act, in what appears to be a specifically targeted release.

48. For the reasons set out about, Proposed Release of the Rescission Claims should not be approved because:

- a. it does not satisfy the provisions of Section 5.1(1) of the CCAA;
- b. the release of the Rescission Claims does not satisfy the prevailing case law as it is not fair and reasonable in the circumstances; and
- c. for policy reasons, the Release of the Rescission Claims should not be granted.

49. The Franchisees request that the Court exercise its discretion to order that the Rescission Claims are not released by the Proposed Release.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of November 2024.



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**SCHEDULE “A”
LIST OF AUTHORITIES**

1. 1490664 *Ontario Ltd. v. Dig this Garden Retailers Ltd.*, 2005 CanLII 25181 (ON CA), <<https://canlii.ca/t/1l5xk>>
2. 2619506 *Ontario Inc., v. 2082100 Ontario Inc.*, 2021 ONCA 702 (CanLII), <<https://canlii.ca/t/jjj9c>>
3. 2189205 *Ontario Inc. v. Springdale Pizza Depot Ltd.*, 2011 ONCA 467 (CanLII), <<https://canlii.ca/t/flz4b>>
4. *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828 (CanLII), <<https://canlii.ca/t/jr2n4>>
5. *Atlas Global Brands Inc.*, 2024 ONSC 5570 (CanLII), <<https://canlii.ca/t/k76qt>>
6. *BlueStar Battery Systems International Corp.*, Re, 2000 CanLII 22678 (ON SC), <<https://canlii.ca/t/1w8tj>>
7. *Lydian International Limited (Re)*, 2020 ONSC 4006 (CanLII), <<https://canlii.ca/t/j8lwn>>
8. *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587 (CanLII), <<https://canlii.ca/t/20bks>>
9. *Mendoza v. Active Tire & Auto Inc.*, 2017 ONCA 471 (CanLII), <<https://canlii.ca/t/h45jd>>
10. *Personal Service Coffee Corp. v. Beer*, 2005 CanLII 25180 (ON CA), <<https://canlii.ca/t/1l5xj>>
11. *Presse Café Franchise Restaurants Inc. et al. v La Libelula et al.*, 2024 ONSC 6177 (CanLII), <<https://canlii.ca/t/k80kc>>
12. *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673 (CanLII), <<https://canlii.ca/t/2cx7g>>
13. *Sovereignty Investment Holdings, Inc. v. 9127-6907 Quebec Inc.*, 2008 CanLII 57450 (ON SC), <<https://canlii.ca/t/21fvh>>
14. *Re Aleafia Health Inc. et al* (1 March 2024), Toronto CV-23-00703350-00CL (ONSC) ([CCAA Termination Order](#) and [Endorsement](#))
15. *Re Atlas Global Brands Inc.* (29 October 2024), Toronto CV-24-00722386-00CL (ONSC) (Endorsement), <<https://documentcentre.ey.com/api/Document/download?docId=40492&language=EN>>
16. *Re Green Relief Inc.*, 2020 ONSC 6837 (CanLII), <<https://canlii.ca/t/jfvs7>>

SCHEDULE “B” RELEVANT STATUTES

Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36

Claims against directors — compromise

- **5.1 (1)** A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

- (2) A provision for the compromise of claims against directors may not include claims that
- (a) relate to contractual rights of one or more creditors; or
 - (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

- (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

General power of court

11 Despite anything in the [*Bankruptcy and Insolvency Act*](#) or the [*Winding-up and Restructuring Act*](#), if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Arthur Wishart Act (Franchise Disclosure), 2000, SO 2000, c 3, <<https://canlii.ca/t/54qkm>>

“franchisor’s associate” means a person,

- (a) who, directly or indirectly,
 - (i) controls or is controlled by the franchisor, or
 - (ii) is controlled by another person who also controls, directly or indirectly, the franchisor, and
- (b) who,
 - (i) is directly involved in the grant of the franchise,

- (A) by being involved in reviewing or approving the grant of the franchise, or
- (B) by making representations to the prospective franchisee on behalf of the franchisor for the purpose of granting the franchise, marketing the franchise or otherwise offering to grant the franchise, or
- (ii) exercises significant operational control over the franchisee and to whom the franchisee has a continuing financial obligation in respect of the franchise; (“personne qui a un lien”)

Application

2 (1) This Act applies with respect to a franchise agreement entered into on or after the coming into force of this section, with respect to a renewal or extension of a franchise agreement entered into before or after the coming into force of this section and with respect to a business operated under such an agreement, renewal or extension if the business operated by the franchisee under the franchise agreement or its renewal or extension is to be operated partly or wholly in Ontario. 2000, c. 3, s. 2 (1).

Same

(2) [Sections 3](#) and 4, clause 5 (7) (d) and sections 9, 11 and 12 apply with respect to a franchise agreement entered into before the coming into force of this section, and with respect to a business operated under such agreement, if the business operated by the franchisee under the franchise agreement is operated or is to be operated partly or wholly in Ontario. 2000, c. 3, s. 2 (2).

Rescission for late disclosure

6 (1) A franchisee may rescind the franchise agreement, without penalty or obligation, no later than 60 days after receiving the disclosure document, if the franchisor failed to provide the disclosure document or a statement of material change within the time required by [section 5](#) or if the contents of the disclosure document did not meet the requirements of section 5. 2000, c. 3, s. 6 (1).

Rescission for no disclosure

(2) A franchisee may rescind the franchise agreement, without penalty or obligation, no later than two years after entering into the franchise agreement if the franchisor never provided the disclosure document. 2000, c. 3, s. 6 (2).

Notice of rescission

(3) Notice of rescission shall be in writing and shall be delivered to the franchisor, personally, by registered mail, by fax or by any other prescribed method, at the franchisor’s address for service or to any other person designated for that purpose in the franchise agreement. 2000, c. 3, s. 6 (3).

Effective date of rescission

- (4) The notice of rescission is effective,
- (a) on the day it is delivered personally;
 - (b) on the fifth day after it was mailed;
 - (c) on the day it is sent by fax, if sent before 5 p.m.;
 - (d) on the day after it was sent by fax, if sent at or after 5 p.m.;
 - (e) on the day determined in accordance with the regulations, if sent by a prescribed method of delivery. 2000, c. 3, s. 6 (4).

Same

- (5) If the day described in clause (4) (b), (c) or (d) is a holiday, the notice of rescission is effective on the next day that is not a holiday. 2000, c. 3, s. 6 (5).

Franchisor's obligations on rescission

- (6) The franchisor, or franchisor's associate, as the case may be, shall, within 60 days of the effective date of the rescission,
- (a) refund to the franchisee any money received from or on behalf of the franchisee, other than money for inventory, supplies or equipment;
 - (b) purchase from the franchisee any inventory that the franchisee had purchased pursuant to the franchise agreement and remaining at the effective date of rescission, at a price equal to the purchase price paid by the franchisee;
 - (c) purchase from the franchisee any supplies and equipment that the franchisee had purchased pursuant to the franchise agreement, at a price equal to the purchase price paid by the franchisee; and
 - (d) compensate the franchisee for any losses that the franchisee incurred in acquiring, setting up and operating the franchise, less the amounts set out in clauses (a) to (c). 2000, c. 3, s. 6 (6).

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 2675970 ONTARIO INC. et al..

Court File No.: CV-24-00713128-0000

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

Proceedings commenced at Toronto

FACTUM OF CERTAIN FRANCHISEES

(returnable November 28, 2024)

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