

**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.**

SUPPLEMENTARY FACTUM OF THE APPLICANTS

(Approval and Reverse Vesting Order)
(returnable November 28, 2024)

November 27, 2024

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TO: THE SERVICE LIST

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PART I – OVERVIEW

1. This supplementary factum is filed in support of the Applicants' motion to, among other things, approve the sale of the Applicants' Business by way of a reverse vesting (the "**RVO**").
2. Capitalized terms not otherwise defined herein have the meaning given to them in the Affidavit of Andrew Williams sworn November 21, 2024 (the "**Williams Affidavit**") and the Factum of the Applicants dated November 25, 2024 (the "**Applicants' Factum**").
3. On November 27, 2024, the Applicants were served with materials from certain franchisees (the "**Opposing Parties**") with claims against the Applicants and one of their current directors and officers (the "**Franchise Claims**") opposing the Pre-Filing D&O Release (as defined below) sought by the Applicants in the RVO.
4. The Opposing Parties assert the Pre-Filing D&O Release should not be granted because it is, (1) contrary to section 5.1(1) of the CCAA, (2) not fair and reasonable, and (3) inconsistent with the policy objective of the *Arthur Wishart Act, 2000*, SO 2000, c 3 (the "**AWA**").
5. What the Opposing Parties really seek is for this Court to make a pre-determination as to the applicability of the Pre-Filing D&O Release to the Franchise Claims without a proper legal and factual record before the Court. It is not appropriate or necessary for the Court to do so. The determination as to whether all or part of the allegations in the Franchise Claims are released by the Pre-Filing D&O Release should be made at a later date on a complete record, which is consistent with current jurisprudence. To the extent all or part of the allegations in the Franchise Claims are ultimately found to be claims that are not captured within the purview of the Pre-Filing D&O Release, they are not barred from proceeding.
6. The Pre-Filing D&O Release is appropriate, fair and reasonable and balances the need to permit the Applicants to complete the Transactions while also preserving the rights of persons with actual claims that fall within the carveouts in section 5.1 of the CCAA. There is no real

question as to the contribution of the Released D&Os. It is the uncontroverted evidence of the Monitor and the Applicants that the Released D&Os have materially contributed to the CCAA proceeding, which has resulted in a going-concern transaction for the benefit of their stakeholders including their material senior secured creditor, BMO, as well as their 328 employees, landlords, franchisees, suppliers and customers.

7. Not only is the release necessary to provide certainty and finality for the current directors and officers of the Applicants as to their ongoing liabilities, the release – as drafted with an express carveout for claims under section 5.1(2) of the CCAA – is based on this Court’s precedent, and is fair and reasonable.

PART II – FACTS

A. The Pre-Filing D&O Release

8. The RVO releases the current directors and officers of the Applicants (the “**Released D&Os**”) from any and all claims, including, but not limited to, claims under the AWA, that any person may have or be entitled to assert against the Released D&Os based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place prior to commencement of these CCAA proceedings in respect of the Applicants, the Business, operations, assets, property and affairs of the Applicants and/or these CCAA proceedings; provided that, such release shall not waive, discharge, release, cancel or bar any claim or liability: (a) arising out of any gross negligence or willful misconduct on the part of the applicable Released D&O; (b) that is not permitted to be released pursuant to section 5.1(2) of the CCAA, or (c) that is an Insured Claim (as defined below) (the “**Pre-Filing D&O Release**”).¹

¹ Affidavit of Andrew Williams sworn November 21, 2024, [para 81](#). (“**Williams Affidavit**”). Approval and Reverse Vesting Order, [para 35](#).

9. The Pre-Filing D&O Release is limited in its scope in four critical ways:
- (a) it does not waive or bar any claim or liability arising out of any gross negligence or willful misconduct on the part of the applicable Released D&O;
 - (b) it does not waive or bar any claims that section 5.1(2) of the CCAA precludes from being released;
 - (c) it does not waive or bar any claim that is an insured claim under any insurance policy maintained by the Applicants (the “**Insured Claims**”); and
 - (d) it only applies to *current* officers and directors.²

B. The Franchise Claims

10. Prior to the commencement of these CCAA proceedings, certain former franchisees, including the Opposing Parties, served the Applicants with the Franchise Claims.

11. The Franchise Claims include claims for rescission under section 6 of the AWA and for damages under sections 6 and 7 of the AWA. In addition to the claims made against certain of the Applicants, the Franchise Claims include claims against one current officer and director of the Applicants (Mr. Jürgen Schreiber), one former officer and director of the Applicants (Mr. Justin Farbstein), one former employee of the Applicants (Mr. Josh Davidson), and certain non-CCAA affiliates of the Applicants. The statutory damages claimed pursuant to the Franchise Claims total approximately \$5 million.³

12. Despite the Opposing Parties’ assertion that the Pre-Filing D&O Release will end the Franchise Claims,⁴ the only defendant in the Franchise Claims that falls within the purview of the

² Williams Affidavit, *ibid*, [paras 82-83](#). Supplementary Affidavit of Andrew Williams sworn November 26, 2024, [para 7](#) (“**Supplementary Williams Affidavit**”).

³ Williams Affidavit, *supra*, [para 86](#). See also, Affidavit of Sonio Cavalieri D’Oro sworn November 27, 2024, [para 8](#). (“**Cavalieri D’Oro Affidavit**”)

⁴ Cavalieri D’Oro Affidavit, *supra*, heading “[The Proposed Release of Directors Will End Our Claims](#)”.

Pre-Filing D&O Release is the *current* officer and director, Mr. Schreiber, and even then only for claims that can properly be released under the CCAA. The Pre-Filing D&O Release does not affect the Franchise Claims with respect to any of the claims against the former director and officer (Mr. Farbstein), the employee (Mr. Davidson), the Applicants, or the non-CCAA affiliates of the Applicants named therein.⁵

PART III – ISSUE

13. This supplemental factum addresses only one issue: whether the Court should grant the Pre-Filing D&O Release.

PART IV – LAW AND ARGUMENT

A. The Pre-Filing D&O Release is Compliant with the Provisions of the CCAA

14. The Opposing Parties' primary argument is that the Pre-Filing D&O Release is not compliant with the CCAA in that it does not comply with section 5.1(1) of the CCAA. Specifically, the Opposing Parties argue that before considering the *Metcalfe* and *Lydian* factors, this Court should ensure the third-party release is for "obligations of the company where the directors are by law liable in their capacity as directors."⁶ No authority is cited for this proposition.

15. The Opposing Parties baldly assert, without citing any authorities, that the claims against Mr. Schreiber are "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."⁷ Given the Opposing Parties view of the Franchise Claims, they assert that the claims do not fall within section 5.1(1) of the CCAA and therefore no release can be granted.

⁵ Supplementary Williams Affidavit, *supra*, [para 8](#).

⁶ [S. 5.1\(1\)](#) of the CCAA.

⁷ Opposing Parties' Factum, [para 25](#).

16. The Applicants adamantly disagree with this argument for two reasons: first, section 5.1(1) of the CCAA is not a provision that limits the discretion of the Court under section 11 of the CCAA, and second, the Franchise Claims against Mr. Schreiber are, in fact, asserted against him in his capacity as director.

i) Section 5.1(1) is not a limiting provision

17. This Court has already concluded that section 5.1(1) of the CCAA is not to be interpreted as a provision that limits the Court's jurisdiction under section 11 of the CCAA. In *Green Relief*, Koehnen J. held:

Returning [to] the language of s. 5.1 (1), it is drafted permissively. It does not limit the overall jurisdiction of the court under section 11 of the CCAA to make any order that it considers appropriate in the circumstances.

At least one other court has approved a release in the absence of a plan and in the face of opposition to the release: *Re Nemaska Lithium Inc.*, 2020 QCCS 3218 where Gouin J. noted that the carveout provided by s. 5.1 (2) of the CCAA adequately protected the shareholders who opposed the release.⁸

18. Accordingly, it is not a pre-requisite to granting a third-party release that the Court be satisfied that the universe of hypothetical claims be pre-emptively itemized and expressly carved out from the release. Such a process would be unwieldy and impractical. Rather, as long as the release expressly preserves the carveout provided by s. 5.1(2) of the CCAA, the Court ought to be satisfied that no injustice will be done.

ii) The Franchise Claims are claims against Mr. Schreiber as director

19. Second, the Applicants submit that the Franchise Claims as against Mr. Schreiber do, in fact, arise from obligations of the company where a director is by law liable in his capacity as a director for the payment of such obligations, as contemplated by section 5.1(1) of the CCAA. In

⁸ *Re Green Relief Inc.*, 2020 ONSC 6837, paras [25-26](#). [*Re Green Relief*].

particular, while not all franchisor's associate's are directors, in the instant case, Mr. Schreiber is only alleged to be a franchisor's associate by virtue of his role as a director of the franchisor. These are not necessarily distinct concepts as evidenced by *2619506 Ontario Inc., v. 2082100 Ontario Inc*, a case cited by the Opposing Parties.⁹

B. This Court Need Not Make a Pre-Emptive Determination of the Application of the Release

20. The Opposing Parties ask that this Court make a pre-emptive determination at this motion regarding the applicability of the Pre-Filing D&O Release to the Franchise Claims, on the basis of a late-filed motion, with only the plaintiffs' pleadings, without the benefit of any defences, discovery, factual record, or any other foundation that would allow this Court to determine whether the character of the claims asserted in fact fall within the carveout in section 5.1(2) of the CCAA. Such a determination, aside from being difficult and potentially prejudicial for lack of evidentiary record, is unnecessary and premature.

21. Releases are often granted over the objections of creditors.¹⁰ If the *Lydian* factors are met and the release is drafted in compliance with the CCAA such that it expressly preserves the carveout in section 5.1(2), then there is no injustice caused by the release. In fact, the express exceptions in section 5.1(2) permits parties to assert claims they say are carved out of the release. As with any release, it is for the party relying on such release to demonstrate, at the appropriate time, in the appropriate proceeding, before a Court with appropriate jurisdiction and context, that the release should apply to bar such claim.

⁹ See for e.g., *2619506 Ontario Inc., v. 2082100 Ontario Inc.*, 2021 ONCA 702, [paras 12-13](#).

¹⁰ See for e.g., *Re Green Relief*, *supra*, paras [25-26](#); *Re Nemaska Lithium Inc.* [2020 QCCS 3218](#).

22. The Applicants also submit it is not necessary or appropriate for the Court to make a determination that the Pre-Filing D&O Release *cannot* apply to the Franchise Claims based on section 5.1(1) or (2) of the CCAA at this motion. Instead, that determination should be reserved to a later date, before the appropriate Court, on a complete evidentiary and legal record. This position is consistent with the position taken by the courts including this Court in *Green Relief* and the Quebec Superior Court in *Cirque du Soleil*.¹¹

23. In *Green Relief*, a debtor sought approval of a reverse vesting transaction that contained a release of its directors and officers. As in this case, the relief was not contested except for the release contained in the vesting order. Specifically, certain former directors sought a determination that the release would not apply to the oppression claims they wished to bring against the other current and former directors of the applicants. Justice Koehnen granted the release and declined to determine whether the release applied to the directors' oppression claim. Instead, he held that the applicability of the release to specific claims should be determined at a later date.¹² In doing so, Justice Koehnen held:

There is substantial difference of opinion on the proper interpretation of the release. It is not appropriate to interpret the release in a vacuum. It is preferable to do so on the basis of concrete circumstances which might present themselves if and when any claim is brought that implicates the release. I will however remain seized of the interpretation of the release. If any claim arises that calls for interpretation of the release, including an interpretation of any available insurance coverage, that issue must be brought before me for determination.¹³

24. In *Cirque du Soleil*, the Quebec Superior Court approved an approval and vesting order that contained releases in favour of the directors of *Cirque du Soleil* that, as in this case, contained an exclusion for any claims that could not be released under to section 5.1(2) of the CCAA. The

¹¹ *Green Relief*, *supra*, [para 72](#); *Arrangement relatif à 9424-9356 Québec inc.*, 2021 QCCS 5319, [para. 2](#), leave to appeal refused, 2022 QCCA 549, leave to appeal refused 2023 CarswellQue 7500 (S.C.C.) [*Cirque du Soleil*]

¹² *Green Relief*, *ibid*, [paras 67-72](#).

¹³ *Green Relief*, *ibid*, [para 2](#).

order expressly contemplated that a determination of whether the release applied to a plaintiff's claim of defamation against the directors would be addressed by the court at a subsequent hearing.¹⁴ As in this case, the plaintiffs' claim for defamation was commenced against the current directors prior to the commencement of the CCAA proceeding.¹⁵

25. It is critical that the applicability of the Pre-Filing D&O Release be determined on a complete factual record. At this time, none of the allegations against Mr. Schreiber have been proven, let alone any claim that would fall within the purview of the exclusions under section 5.1(2) such as a misrepresentation or a contractual relationship.

26. At this juncture, the Court's focus should be to approve the RVO and Transactions, which is critical to the Applicants' and their stakeholders as the Business takes steps to exit these CCAA proceedings as a going concern. The objection of the few Opposing Parties should not compromise the Transactions for the benefit of the creditors generally.

C. The Pre-Filing D&O Release is Fair and Reasonable

27. The Applicants' Factum describes the law with respect to third-party releases.¹⁶ As noted therein, courts have found that a pre-filing release of directors and officers, with substantially similar language to the Pre-Filing D&O Release in the RVO, is fair and appropriate in the context of the *Lydian* factors.¹⁷ The Court has made that finding even over the objections of creditors.¹⁸

28. The Applicants' Factum applies the *Lydian* factors to the circumstances before the Court and the Pre-Filing D&O Release. The Applicants do not propose to rehash those argument here.

¹⁴ *Cirque du Soleil*, *supra*, [para 2](#).

¹⁵ *Cirque du Soleil*, *ibid*, [para 20](#).

¹⁶ Applicants' Factum, [paras 50-54](#).

¹⁷ *Green Relief*, *supra*, [para 27](#); *Atlas Global Brands Inc*, 2024 ONSC 5570 [Black J] [**Atlas Global**] at [para 101](#); *Re Atlas Global Brands Inc* (29 October 2024), Toronto CV-24-00722386-00CL (ONSC)([Order](#) and [Endorsement](#)) [Steele J] [**Atlas Global 2**], [para 28](#); *Nexii Building Solutions Inc et al (Re)* (28 June 2024), Vancouver 5240195 (BCSC) (Ancillary Order), [para 13](#).

¹⁸ *Green Relief*, *supra*, [para 57](#); *Atlas Global Brands Inc*, 2024 ONSC 5570, [paras 98-102](#). [**Atlas Global**]

However, the Applicants wish to highlight a few points in response to the Opposing Parties' arguments that the Pre-Filing D&O Release is not fair and reasonable:

- (a) The uncontroverted evidence of both the Monitor and the Applicants is that the Released D&Os significantly contributed to these CCAA proceedings including the negotiation with the Applicants' material secured creditor, negotiation with landlords in respect of over 50 retained store lease locations, the implementation of the SISP and the negotiation of the Subscription Agreement. These individuals have been critical to the success of this restructuring, which has resulted in the Business emerging as a going-concern transaction that preserves value for stakeholders.¹⁹
- (b) Although the Opposing Parties suggest the Released D&Os were simply discharging their duties as directors and officers,²⁰ that does not mean they did not significantly contribute to the success of these CCAA proceedings.
- (c) Although the Opposing Parties suggest that the release is not necessary because it is not a condition to closing the Transactions, that is not a requirement in order for a third-party release to be granted.²¹
- (d) The Opposing Parties submit that the Pre-Filing D&O Release is too broad. This view is inconsistent with the case law, including prior orders which mirror the language in the RVO.²² Of note, the Opposing Parties point out that, for the purposes of the Franchise Claims, the Pre-Filing D&O Release only applies to Mr. Schreiber. This would seem to suggest that the Pre-Filing D&O Release is in fact

¹⁹ Williams Affidavit, *supra*, [para 52](#) and [para 85](#); Third Report of the Monitor, [para 5.7](#).

²⁰ Opposing Parties' Factum, *supra*, [para 31](#).

²¹ See for e.g. *Re Green Relief*, *supra*, [para 52](#).

²² See for e.g. *Atlas Global 2*, *supra*, [para 25](#); *Atlas Global*, *supra*, [102](#).

quite narrow.

- (e) Despite the underlying thread of the Opposing Parties' materials that it is improper for a director related to a purchaser to be released, it is commonplace in the CCAA context for parties with an interest in the debtor company to purchase the company as part of the sale process, be they a related entity, a lender, or both.²³

29. Therefore, the Applicants submit that the *Lydian* factors are met in this case such that it is appropriate for the Court to grant the Pre-Filing D&O Release.

PART V – RELIEF REQUESTED

30. The Applicants therefore seek the RVO in the form appended at Tab 3 to the Applicants' motion record.

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

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²³ See for e.g., *Fresh City Farms and Mama Earth Organics*, 2024 ONSC 2016, [para 12](#).

SCHEDULE A – LIST OF AUTHORITIES

1.	<i>Re Green Relief Inc</i> , <u>2020 ONSC 6837</u>
2.	<i>2619506 Ontario Inc., v. 2082100 Ontario Inc.</i> , <u>2021 ONCA 702</u>
3.	<i>Re Nemaska Lithium Inc</i> , <u>2020 QCCS 3218</u> .
4.	<i>Arrangement relatif à 9424-9356 Québec inc</i> , <u>2021 QCCS 5319</u> , leave to appeal refused, <u>2022 QCCA 549</u> , leave to appeal refused <u>2023 CarswellQue 7500 (SCC)</u>
5.	<i>Re Atlas Global Brands Inc</i> (29 October 2024), Toronto CV-24-00722386-00CL (ONSC)(<u>Order</u> and <u>Endorsement</u>) [Steele J]
6.	<i>Atlas Global Brands Inc</i> , <u>2024 ONSC 5570</u>
7.	<i>Nexii Building Solutions Inc et al (Re)</i> (28 June 2024), Vancouver 5240195 (BCSC) (<u>Ancillary Order</u>)
8.	<i>Atlas Global Brands Inc</i> , Toronto CV-24-00722386-00CL (OSC) (<u>Approval and Reverse Vesting Order dated October 4, 2024</u>)
9.	<i>Fresh City Farms and Mama Earth Organics</i> , <u>2024 ONSC 2016</u>

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.

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.

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.

Stays, etc. – other than initial application

11.02 (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Assignment of Agreements

11.3 (4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Arthur Wishart Act (Franchise Disclosure), 2000, SO 2000, c 3

Franchisor's obligation to disclose

5 (1) A franchisor shall provide a prospective franchisee with a disclosure document and the prospective franchisee shall receive the disclosure document not less than 14 days before the earlier of,

- (a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise, other than an agreement described in subsection (1.1); and
- (b) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or franchisor's associate relating to the franchise, excluding the payment of a deposit if it,
 - (i) does not exceed the prescribed amount,
 - (ii) is refundable without any deductions, and
 - (iii) is given under an agreement that in no way binds the prospective franchisee to enter into a franchise agreement.

Exception

(1.1) Clauses (1) (a) and (5) (a) do not apply to an agreement if it only contains terms that,

- (a) require any information or material that may be provided to a prospective franchisee to be kept confidential;
- (b) prohibit the use of any information or material that may be provided to a prospective franchisee; or
- (c) designate a location, site or territory for a prospective franchisee.

Same

(1.2) Despite subsection (1.1), clauses (1) (a) and (5) (a) apply to an agreement if it contains terms that,

- (a) require information to be kept confidential or prohibit the use of information, if the information,
 - (i) is or comes into the public domain other than as a result of a contravention of the agreement,
 - (ii) is disclosed to any person other than as a result of a contravention of the agreement, or
 - (iii) is disclosed with the consent of all the parties to the agreement; or
- (b) prohibit the disclosure of information to an organization of franchisees, other franchisees of the same franchise system or a franchisee's professional advisors.

Methods of delivery

(2) A disclosure document may be delivered personally, by registered mail or by any other prescribed method.

Same

(3) A disclosure document must be one document, delivered as required under subsections (1) and (2) as one document at one time.

Contents of disclosure document

- (4) The disclosure document shall contain,
 - (a) all material facts, including material facts as prescribed;
 - (b) financial statements as prescribed;
 - (c) copies of all proposed franchise agreements and other agreements relating to the franchise to be signed by the prospective franchisee;
 - (d) statements as prescribed for the purposes of assisting the prospective franchisee in making informed investment decisions; and
 - (e) other information and copies of documents as prescribed.

Material change

(5) The franchisor shall provide the prospective franchisee with a written statement of any material change, and the franchisee must receive such statement, as soon as practicable after the change has occurred and before the earlier of,

- (a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise, other than an agreement described in subsection (1.1); and

- (b) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or franchisor's associate relating to the franchise, excluding the payment of a deposit if it,
 - (i) does not exceed the prescribed amount,
 - (ii) is refundable without any deductions, and
 - (iii) is given under an agreement that in no way binds the prospective franchisee to enter into a franchise agreement.

Contents of statement

(5.1) A statement of material change shall contain the information that is prescribed.

Information to be accurate, clear, concise

(6) All information in a disclosure document and a statement of a material change shall be accurately, clearly and concisely set out.

Exemptions

(7) This section does not apply to,

- (a) the grant of a franchise by a franchisee if,
 - (i) the franchisee is not the franchisor, an associate of the franchisor or a director, officer or employee of the franchisor or of the franchisor's associate,
 - (ii) the grant of the franchise is for the franchisee's own account,
 - (iii) in the case of a master franchise, the entire franchise is granted, and
 - (iv) the grant of the franchise is not effected by or through the franchisor;
- (b) the grant of a franchise to a person for the person's own account or to a corporation that the person controls if the person,
 - (i) has been an officer or director of the franchisor or of the franchisor's associate for at least six months and is currently such an officer or director, or
 - (ii) was an officer or director of the franchisor or of the franchisor's associate for at least six months and not more than four months have passed since the person was such an officer or director;
- (c) the grant of an additional franchise to an existing franchisee if that additional franchise is substantially the same as the existing franchise that the franchisee is operating and if

there has been no material change since the existing franchise agreement or latest renewal or extension of the existing franchise agreement was entered into;

- (d) the grant of a franchise by an executor, administrator, sheriff, receiver, trustee, trustee in bankruptcy or guardian on behalf of a person other than the franchisor or the estate of the franchisor;
- (e) the grant of a franchise to a person to sell goods or services within a business in which that person has an interest if the sales arising from those goods or services during the first year of operation of the franchise, as anticipated by the parties or that should be anticipated by the parties at the time the franchise agreement is entered into, do not exceed, in relation to the total sales of the business during that year, a prescribed percentage;
- (f) the renewal or extension of a franchise agreement where there has been no interruption in the operation of the business operated by the franchisee under the franchise agreement and there has been no material change since the franchise agreement or latest renewal or extension of the franchise agreement was entered into;
- (g) the grant of a franchise if,
 - (i) the prospective franchisee is required to make a total initial investment, determined in the prescribed manner, of an amount that does not exceed a prescribed amount,
 - (ii) the franchise agreement is not valid for longer than one year and does not involve the payment of a non-refundable franchise fee, or
 - (iii) the franchisor is governed by section 55 of the Competition Act (Canada);
- (h) the grant of a franchise if the prospective franchisee is required to make a total initial investment, determined in the prescribed manner, of an amount that is greater than a prescribed amount.

Same

- (8) For the purpose of subclause (7) (a) (iv), a grant is not effected by or through a franchisor merely because,
- (a) the franchisor has a right, exercisable on reasonable grounds, to approve or disapprove the grant; or
 - (b) a transfer fee must be paid to the franchisor in an amount set out in the franchise agreement or in an amount that does not exceed the reasonable actual costs incurred by the franchisor to process the grant.

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.

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.

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.

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.

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.

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).

Damages for misrepresentation, failure to disclose

7 (1) If a franchisee suffers a loss because of a misrepresentation contained in the disclosure document or in a statement of a material change or as a result of the franchisor's failure to comply in any way with section 5, the franchisee has a right of action for damages against,

- (a) the franchisor;
- (b) the franchisor's agent;
- (c) the franchisor's broker, being a person other than the franchisor, franchisor's associate, franchisor's agent or franchisee, who grants, markets or otherwise offers to grant a franchise, or who arranges for the grant of a franchise;
- (d) the franchisor's associate; and
- (e) every person who signed the disclosure document or statement of material change.

Deemed reliance on misrepresentation

(2) If a disclosure document or statement of material change contains a misrepresentation, a franchisee who acquired a franchise to which the disclosure document or statement of material change relates shall be deemed to have relied on the misrepresentation.

Deemed reliance on disclosure document

(3) If a franchisor failed to comply with section 5 with respect to a statement of material change, a franchisee who acquired a franchise to which the material change relates shall be deemed to have relied on the information set out in the disclosure document.

Defence

(4) A person is not liable in an action under this section for misrepresentation if the person proves that the franchisee acquired the franchise with knowledge of the misrepresentation or of the material change, as the case may be.

Same

(5) A person, other than a franchisor, is not liable in an action under this section for misrepresentation if the person proves,

- (a) that the disclosure document or statement of material change was given to the franchisee without the person's knowledge or consent and that, on becoming aware of its having been given, the person promptly gave written notice to the franchisee that it was given without that person's knowledge or consent;
- (b) that, after the disclosure document or statement of material change was given to the franchisee and before the franchise was acquired by the franchisee, on becoming aware of any misrepresentation in the disclosure document or statement of material change, the person withdrew consent to it and gave written notice to the franchisee of the withdrawal and the reasons for it; or

- (c) that, with respect to any part of the disclosure document or statement of material change purporting to be made on the authority of an expert or purporting to be a copy of or an extract from a report, opinion or statement of an expert, the person had no reasonable grounds to believe and did not believe that,
- (i) there had been a misrepresentation,
 - (ii) the part of the disclosure document or statement of material change did not fairly represent the report, opinion or statement of the expert, or
 - (iii) the part of the disclosure document or statement of material change was not a fair copy of or extract from the report, opinion or statement of the expert.

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

Court File No. CV-24-00726584-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF 2675970 ONTARIO INC. et al.

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

Proceedings commenced at Toronto

**SUPPLEMENTARY FACTUM OF THE APPLICANTS
(Approval and Reverse Vesting Order)**

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