

C A N A D A

PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

(Class Action)  
SUPERIOR COURT

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NO: 500-06-001081-203

STEVE HOLCMAN

Representative Plaintiff

v.

RESTAURANT BRANDS INTERNATIONAL  
INC.  
and  
RESTAURANT BRANDS INTERNATIONAL  
LIMITED PARTNERSHIP  
and  
THE TDL GROUP CORP.

Defendants

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**APPLICATION TO APPROVE A CLASS ACTION SETTLEMENT**

(Art. 590 CCP, art. 58 of the *Regulation of the Superior Court of Québec in civil matters*, CQLR c C-25.01, r 0.2.1, and art. 32 of the *Act Respecting the Fonds d'aide aux actions collectives*, ch. F- 3.2.0.1.1)

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**TO THE HONOURABLE MARTIN F. SHEEHAN OF THE SUPERIOR COURT OF QUEBEC, DESIGNATED JUDGE IN THE PRESENT CASE, THE REPRESENTATIVE PLAINTIFF AND HIS COUNSEL SUBMIT THE FOLLOWING:**

**I. INTRODUCTION**

1. The purpose of the present application is for the Court to approve the national settlement agreement signed by the parties on May 26, 2022 (the "**Transaction**"), a copy of which is communicated herewith as **Exhibit T-1**;
2. By judgment rendered on June 15, 2022 (as rectified on July 4, 2022), the Court: (i) authorized the class action for settlement purposes against the Defendants (hereinafter collectively referred to as "**RBI**"); (ii) approved the national notice program, including the opt-out and objection deadlines of August 31, 2022; and (iii) scheduled the settlement approval hearing for September 6, 2022;

3. The class authorized for settlement purposes only is the following:

Tous Résidents au Canada utilisateurs de l'application Tim Hortons® avec des comptes enregistrés au Canada dont les informations de géolocalisation ont été collectées par l'un des Défendeurs entre le 1er avril 2019 et le 30 septembre 2020.	All Canadian Resident users of the Tim Hortons® application with registered accounts in Canada whose geolocation information was collected by any of the Defendants between April 1, 2019, and September 30, 2020.
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4. On July 29, 2022, the Notice of Hearing to Approve the Transaction (the "Pre-Approval Notice") was disseminated by the Defendants to the approximately 1.8 million Class Members it identified as per the Transaction, as it appears from the affidavit of TDL's representative dated September 1, 2022 communicated under seal as **Exhibit T-2**;
5. As it appears from Exhibit T-2, 98.79% of the emails were delivered according to the Defendants. Although a relatively low portion of the emails remained undeliverable (i.e. 1.21%), the parties have determined that it is not reasonable, proportionate or economically efficient in the circumstances to make efforts to deliver the direct notice through other means;
6. As of the exclusion/objection deadline (August 31, 2022), 93 Class Members have requested their exclusion from the class action, as it appears from the chart and exclusions received by Class Counsel communicated *en liasse* as **Exhibit T-3**. In addition, 38 Class Members have objected to the Transaction, as it appears from the chart and objections received communicated *en liasse* as **Exhibit T-4**;
7. The Pre-Approval Notice that was sent to Class Members provided a hyperlink to Class Counsel's bilingual webpages dedicated to this class action (<https://www.lpclex.com/timhortons> and <https://www.clg.org/Class-Action/List-of-Class-Actions/Tim-Hortons-Mobile-Application-Privacy-Class-Action>), containing various important documents, including copies of the Application for Authorization (as well as its amendment), copies of the Transaction, the Judgment dated June 15, 2022 (as rectified on July 4, 2022), and copies of the Pre-Approval Notice;
8. The Parties have agreed on a final notice of settlement approval, **Exhibit T-5**;
9. For the reasons that follow, the Representative Plaintiff asks that this Court approve the Settlement Agreement pursuant to article 590 C.C.P.;
10. Class Counsel will present its request for approval of Class Counsel Fees and disbursements at a later date;

## II. APPROVAL OF THE SETTLEMENT AGREEMENT

11. The criteria which the case law has established for approval of a class action settlement are the following:
  - i) The probability of success;
  - ii) The amount and nature of discovery;
  - iii) The terms and conditions of the Settlement Agreement;
  - iv) The attorneys' recommendation and their experience;
  - v) Approval of the Plaintiff;
  - vi) The future expenses and probable length of the litigation;
  - vii) The number and nature of any opt-outs and/or objectors;
  - viii) Good faith of the parties and the absence of collusion;
12. The Representative Plaintiff submits that an analysis of all of these criteria should lead this Court to conclude that the Transaction is fair and reasonable and in the best interest of Class Members;
  - i. The Probability of Success:
13. While the Representative Plaintiff maintains that his action is well-founded, the Defendants vigorously deny his claims and allegations. The Transaction specifically indicates that the Defendants deny any liability or wrongdoing, deny that the Plaintiffs or the Class Members have any justifiable claim for relief, and deny that they have any liability to the Plaintiffs or to the Class Members (preamble at page 2 and sections 2, 4 and 64);
14. The parties would have entered into a serious and contradictory debate as to whether the Defendants committed the alleged privacy violations and, if they did, whether the Class Members are entitled to any damages;
15. It goes without saying that these debates would have extended to the parties hiring experts and bringing in consumers to testify at trial in order to counter each other's claims;
16. There was always the risk that the Court would not authorize the class action or it would not be successful on the merits and this risk is abated through the Transaction, which guarantees some form of compensation to Class Members, as well as the permanent deletion any geolocation information about Group Members that may be in the Defendants' possession within 90 Days from the Effective Date (**section 41**);

17. Indeed, a number of privacy class actions were recently dismissed in Quebec and across Canada at the authorization/certification stage, to name a few:
- *Homsy c. Google*, [2022 QCCS 722](#)
  - *Chow v Facebook, Inc.*, [2022 BCSC 137](#)
  - *Setoguchi v Uber B.V.*, [2021 ABQB 18](#)
  - *Li c. Equifax inc.*, [2019 QCCS 4340](#)
  - *Bourbonnière c. Yahoo! Inc.*, [2019 QCCS 2624](#)
18. Even if the Representative Plaintiff was successful in having the Class authorized at a contested hearing, Class Counsel is aware that the Defendants could very well have filed appeals in respect of multiple issues, thus resulting in increased risk and considerable delays;
19. The risk of dismissal is particularly relevant in privacy class actions, especially given that on May 13, 2022, the Court of Appeal of Quebec confirmed the first instance judgment dismissing a class action on the merits in *Lamoureux c. Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, [2022 QCCA 685](#)<sup>1</sup> (referencing the Supreme Court of Canada's judgment in *Mustapha v. Culligan of Canada Ltd.*, [2008 SCC 27](#), para. 9);
20. Lastly, on June 1, 2022, the analysis of the joint investigation by several privacy commissioners across Canada into location tracking by the Tim Hortons App was released, a copy of the report communicated as **Exhibit T-6**;
21. While the report finds that the Defendants contravened certain sections of federal and provincial (QC, BC, AB) privacy legislation, the report shows the serious hurdles that Class Members would have faced in proving damages, if any, for instance:

**22.** In its RFI response, Tim Hortons explained the following with respect to the acquisition of Radar's services:

While TDL intended to use Radar's services to help deliver a better App-based experience, we highlight that TDL's actual use of Radar's services and the Radar Location Data was very limited. The reason for this limited use was due to TDL's refocusing of internal priorities toward [other commercial priorities] ... shortly after the Radar SDK technology was implemented.

**TDL only used Radar Location Data on an aggregated, de-identified basis to conduct limited analytics related to User trends.** These analytics activities were conducted

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<sup>1</sup> Application for leave to the Supreme Court of Canada filed on August 4, 2022 (no. 40309).

infrequently, and the results of such analytics **did not contain personal information of any User.** ...

Critically, TDL never used Radar Location Data to tailor or personalize marketing to a particular User. TDL also never used Radar Location Data to conduct analytics or generate any reports with respect to a particular User.” [Emphasis in the original.]<sup>2</sup>

**36.** Tim Hortons asserted, however, **and we accept**, that its actual use of Radar’s services and the Radar Location Data was limited. In fact, **Tim Hortons stated that it had not used Radar Location Data for any targeted advertising.**

...

**43** ... While the **evidence indicates that Tim Hortons did not use** Radar Location Data to develop such sensitive insights, the real **potential** for the information to be used in this way renders it sensitive.

...

**78.** Given the volume and **potential** sensitivity of the location information in question, as well as the level of **risk** associated with the current location tracking ecosystem, the level of protections provided in the Contract would in our view, appear to be inadequate. [NOTE TO US FOR ARGUMENT PLAN – SEE PARA 27 of EQUIFAX re risk and potential harm]

22. For these reasons, it is respectfully submitted that the probability of success was far from certain in the present case;

ii. **The Amount and Nature of Discovery**

23. The Representative Plaintiff and his attorneys were given access to and reviewed relevant information concerning the Defendants’ app figures (on a confidential basis);

24. Class Counsel conducted two cross-examinations on affidavit of a representative of the Defendants (on February 22, 2021 and on July 20, 2021);

25. On April 19, 2021, the parties participated in a mediation presided by Joel Weisenfeld, in which they exchanged confidential mediation briefs. The mediation was unsuccessful;

26. After extensive and protracted negotiations, in reaching the terms of the Transaction on May 26, 2022, the following were considered:

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<sup>2</sup> Footnote 12 in the report: “Tim Hortons further clarified that it did not use the Radar Location Data to tailor or personalize marketing to groups or sub-groups of individuals, or to conduct targeted advertising more generally.”

- a) The Parties would have spent important resources and would have required certain expertise, including IT experts and cyber forensics, to determine the precise nature of the data collected;
- b) The fact that many Class Members may have consented to the collection of such data with other applications on their devices;

iii. **The Terms of the Transaction:**

- 27. The Transaction is a favourable result for Class Members in that it provides for a resolution of the litigation and for the compensation provided for at section 35 of the Transaction, namely a credit to be used for the purchase of one Hot Beverage and one Baked Good from any participating Tim Hortons store within Canada;
- 28. “**Baked Good**” means a baked good that has a maximum retail value of \$2.39 CAD plus taxes each (for example, a croissant, a muffin, a cookie, a bun, a biscuit or a doughnut). “**Hot Beverage**” means a hot beverage that has a maximum retail value of \$6.19 CAD plus taxes each (for example, a brewed coffee, a hot latte, a hot cappuccino, a hot espresso, a hot cortado, a hot tea or a hot chocolate);
- 29. The credit is in the form of a single, one-time use only, non-transferable, non-refundable and non-cash convertible credit, redeemable at check-out, whether with a coupon or using the Tim Hortons App (each, a “**Credit**”);
- 30. The Defendants have provided Class Counsel and the Representative Plaintiff with confidential and commercially-sensitive information allowing them to be convinced that the Credits being issued to approximately 1.9 million Class Members bring them real value, in particular because these Class Members were more than likely to purchase a Hot Beverage and Baked Good within the next 12 months even if they had not received the Credit (see the Defendants’ confidential affidavit already communicated under seal as **Exhibit T-2**);
- 31. To this end, and, as it appears from Exhibit T-2, the Credit can be considered as good as cash to Class Members, while allowing the parties to be creative and settle this class action in a proportionate and efficient manner;
- 32. The Transaction also provides the following noteworthy benefits:
  - a) The total potential value of the Transaction is estimated at **\$16,179,000** [1,885,571 x \$8.58 (\$2.39 + \$6.19) plus taxes];
  - b) There is no need for any of the Class Members to produce invoices or a proof of purchase, or to do anything at all in order to receive the

compensation, which will be credited directly into their Active Account or else by email to those who do not have an Active Account;<sup>3</sup>

- c) Under the terms of the Transaction, it was negotiated and agreed that the Defendants would be responsible for managing the distribution of the Credits and assuming the costs of the dissemination of notices. While the dollar amount is not quantified in the agreement, this is an amount that could have otherwise been deducted from the total settlement value;

**iv. The Attorneys' Recommendations and their Experience:**

33. Experienced Class Counsel across Canada have negotiated and recommended the terms and conditions of the Transaction;
34. As mentioned in *Abihisira c. Stubhub inc.*, 2019 QCCS 5659, para. 41(d), it is worth emphasizing that in the case of payments by cheque, the cost to issue individual cheques would have been approximately \$3.00 per Class Member and that these cheques would have expired after 6 months and the cost to issue a new cheque is \$15.00 each;
35. In light of the above, Class Counsel believes that the Transaction is fair and reasonable, respects the rule of proportionality and provides relief and benefits to the Class Members in the circumstances and in light of the risks that would arise from continuing the litigation;

**v. Approval of the Representative Plaintiffs:**

36. The Representative Plaintiff has provided his instructions to enter into the Transaction on his own behalf and on behalf of the Class Members and all of the Representative Plaintiffs have signed the Transaction, Exhibit T-1;

**vi. The Future Expenses and Probable Length of the Litigation:**

37. If the case were to proceed in an adversarial fashion, there is no doubt that there would be protracted litigation and important costs;
38. In addition, it is safe to say that the present action would take several years to be decided on the merits and there would have been a possibility that a successful judgment could be brought into appeal, causing further delays. During this passage of time, it becomes more difficult to identify and compensate Class Members (change email addresses, move, death, etc.);

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<sup>3</sup> The term "Account" is defined at section II of the Settlement Agreement as the account of a Member used to access the Tim Hortons App and which is linked to a Member's email address and the term "Active Account" means an Account which, as at the Reparation Date, was used or otherwise accessed by a Member in the preceding twelve months.

39. Conversely, having obtained a settlement in the form of compensation and an undertaking to destroy any geolocation information about Group Members that may be in the Defendants' possession is in the interests of judicial economy, proportionality and a favorable result for Class Members;

**vii. The Number and Nature of any Opt-Outs and/or Objectors:**

40. Following the emailing of the pre-approval notices on July 29, 2022, 93 opt out requests were received by Class Counsel (Exhibit T-3) and 38 Class Members objected to the terms of the Transaction;
41. In total, the opt-outs and objections represent less than a fraction of a percent (0.0069%) of total Class Members;
42. The jurisprudence indicates that the Court must consider the nature of the objections. Most of the objections raised by Class Members are because they are unhappy with the value of the compensation offered, namely a baked good and hot beverage. Others would have preferred to receive compensation in a different form;
43. The nature of the objections are similar to those made in other class action settlements which have been approved by the Court;
44. It is worth emphasizing that none of the objections or exclusions mentions that the person suffered a financial loss as a result of the alleged privacy breach;

**viii. Good Faith of the Parties and the Absence of Collusion:**

45. The Transaction was negotiated at arm's-length, in utmost good faith and without collusion between the parties;
46. The negotiations that led to the Transaction were adversarial, lasting several months. Some of the notable steps leading up to the Transaction were:
- The *Application to Authorize* this class action was filed on June 20, 2020;
  - On November 20, 2020, RBI filed its application for leave to adduce evidence and a separate application for declinatory exception;
  - On February 22, 2021 and on July 20, 2021, the Representative Plaintiff cross-examined a representative of the Defendants concerning the application for declinatory exception (the Defendants later desisted from this application);
  - On April 25, 2021, the Representative Plaintiff produced its table of objections and reasoning in anticipation of a debate on the objections made during the examination of Mr. Moore;



- The application to adduce evidence was debated by way of written submissions produced on May 6, 13 and 19, 2021;
  - Following the judgment allowing certain evidence, the Representative Plaintiff again cross-examined the Defendants’ representative;
  - On April 19, 2021, a mediation presided by Joel Weisenfeld was held with counsel for all of the pending class actions across Canada. This mediation failed;
  - The authorization hearing had been scheduled for November 29, 2021;
  - On November 9, 2021, the Court agreed to postpone the authorization hearing, as the parties informed the Court that they had entered into serious settlement discussions;
  - On May 26, 2022, the Representative Plaintiff filed his Amended Authorization application;
  - It was only following multiple contentious debates that the parties finally arrived at an initial settlement in principle;
  - The Transaction was finally signed by the parties on May 26, 2022 and judgment authorizing the class action for settlement purposes only and the publication of notices was rendered on June 15, 2022 and rectified July 4, 2022. The notices were sent to Class Members on July 29, 2022;
47. By all accounts, the lead up to the Transaction and the negotiations of the details of the settlement were all done at arm’s length and were hard fought up until the end;
48. For all of these reasons, the Representative Plaintiff asks the Court to approve the Transaction.

PAR CES MOTIFS, PLAISE AU TRIBUNAL :	FOR THESE REASONS, MAY IT PLEASE THE COURT TO:
<b>[1] ACCUEILLIR</b> la demande du Représentant en approbation de la transaction;	<b>[1] GRANT</b> the Representative Plaintiff’s Application to Approve the Transaction;
<b>[2] DÉCLARER</b> que les définitions contenues dans la transaction s’appliquent et sont incorporées au présent jugement, et en conséquence en font partie intégrante,	<b>[2] DECLARE</b> that the definitions set forth in the Transaction apply to and are incorporated into this judgment, and as a consequence shall form an integral part thereof, being understood that the

étant entendu que les définitions lient les parties à la transaction;	definitions are binding on the parties to the Settlement Agreement;
<b>[3] APPROUVER</b> la transaction conformément à l'article 590 du <i>Code de procédure civile du Québec</i> , et <b>ORDONNER</b> aux parties de s'y conformer;	<b>[3] APPROVE</b> the Transaction as a transaction pursuant to article 590 of the <i>Code of Civil Procedure</i> , and <b>ORDER</b> the parties to abide by it;
<b>[4] DÉCLARER</b> que la transaction (incluant son préambule et ses annexes) est juste, raisonnable et qu'elle est dans le meilleur intérêt des Membres du Groupe et qu'elle constitue une transaction en vertu de l'article 2631 du <i>Code civil du Québec</i> , qui lie toutes les parties et tous les Membres du Groupe tel qu'énoncé aux présentes;	<b>[4] DECLARE</b> that the Transaction (including its Preamble and its Schedules) is fair, reasonable and in the best interest of the Class Members and constitutes a transaction pursuant to article 2631 of the <i>Civil Code of Quebec</i> , which is binding upon all parties and all Class Members as set forth herein;
<b>[5] ORDONNER</b> et <b>DÉCLARER</b> que le présent jugement, incluant la transaction, lie chaque Membre du Groupe;	<b>[5] ORDER</b> and <b>DECLARE</b> that this judgment, including the Transaction, shall be binding on every Class Member;
<b>[6] ORDONNER</b> aux défenderesses de notifier par courriel à chaque membre du groupe de l'Avis d'approbation de la transaction déposé comme pièce T-5 (annexes C et D à la transaction) dans un délai de quinze (15) Jours suivant la Date d'entrée en vigueur, afin de les informer de l'approbation de la transaction et de l'émission de leur compensation aux fins du règlement;	<b>[6] ORDER</b> the Defendants to notify each Class Member by email, within fifteen (15) Days following the Effective Date, with the Notice of the Approval of the Transaction filed as Exhibit T-5 (Schedules C and D to the Transaction), in order to inform them of the approval of the Transaction and the issuance of their compensation pursuant to the transaction;
<b>[7] ORDONNER</b> aux défenderesses de fournir à la Cour une comptabilité de la valeur totale des Crédits échangés après 12 mois de leur émission;	<b>[7] ORDER</b> the Defendants to provide the Court with an accounting of the total value of the Credits redeemed after 12 months of their issuance;
<b>[8] RÉSERVER</b> le droit aux Avocats du Groupe de déposer leur demande d'approbation des honoraires des avocats du groupe qui sera entendue à une date ultérieure à confirmer par la Cour et les parties;	<b>[8] RESERVE</b> Class Counsel's right to file its application for the approval of class counsel fees to be heard at a later date to be confirmed by Court and the parties;
<b>[9] LE TOUT</b> , sans frais de justice.	<b>[9] THE WHOLE</b> , without legal costs.

Montreal, September 1, 2022

*(s) LPC Avocat Inc.*

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**LPC AVOCAT INC.**

Co-Counsel for Applicant

Me Joey Zukran

[jzukran@lpclex.com](mailto:jzukran@lpclex.com)

Montreal, September 1, 2022

*(s) Consumer Law Group Inc.*

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**CONSUMER LAW GROUP INC.**

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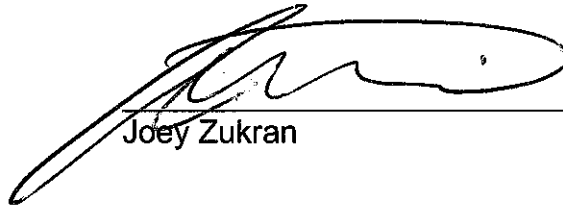
**AFFIDAVIT OF JOEY ZUKRAN**

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I, Joey Zukran, attorney, practicing my profession at 276, rue Saint-Jacques, Suite 801, Montreal, Quebec, H2Y 1N3, solemnly affirm:

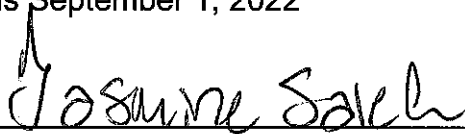
1. That I am the attorney for the Representative Plaintiff in the present Action;
2. That I have taken cognizance of the Application attached and the facts alleged therein are accurate to the best of my knowledge;
3. That said Application is made in good faith.

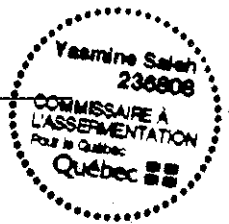
AND I HAVE SIGNED



Joey Zukran

Solemnly affirmed before me at Montreal  
this September 1, 2022

  
#236808



C A N A D A

PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

(Class Action)  
SUPERIOR COURT

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NO: 500-06-001081-203

STEVE HOLCMAN

Representative Plaintiff

v.

RESTAURANT BRANDS INTERNATIONAL  
INC. ET ALS.

Defendants

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**LIST OF EXHIBITS**

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- Exhibit T-1:** Copy of the Transaction signed by the parties on May 26, 2022;
- Exhibit T-2:** **[UNDER SEAL]** Affidavit sworn by TDL's representative on September 1, 2022;
- Exhibit T-3:** *En liasse*, table of opt-outs and copies of the opt-out requests received by Class Counsel;
- Exhibit T-4:** *En liasse*, table of objections and copies of the objections received by Class Counsel;
- Exhibit T-5:** Final notice of settlement approval to Class Members;
- Exhibit T-6:** Copy of the findings of the Joint investigation into location tracking by the Tim Hortons App (PIPEDA Findings #2022-001).

Montreal, September 1, 2022

Montreal, September 1, 2022

*(s) LPC Avocat Inc.*

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**LPC AVOCAT INC.**  
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*(s) Consumer Law Group Inc.*

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## NOTICE OF PRESENTATION

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**TO: Me Pierre-Paul Daunais**  
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### **Counsel for the Defendants**

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### **Counsel for the FAAC**

**TAKE NOTICE** that the present *Application to Approve a Class Action Settlement* shall be presented for adjudication before the Honourable Martin F. Sheehan, J.S.C., on **September 6, at 9:00 a.m., via TEAMS and in room 16.11** of the Montreal Courthouse, situated at 1 Notre-Dame Street East, Montréal (Quebec), H2Y 1B6.

Montreal, September 1, 2022

Montreal, September 1, 2022

*(s) LPC Avocat Inc.*

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*(s) Consumer Law Group Inc.*

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RESTAURANT BRANDS INTERNATIONAL INC.  
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*the Fonds d'aide aux actions collectives*, ch. F-3.2.0.1.1)

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**ORIGINAL**

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