

AMENDED THIS 5 DAY OF March 2018
PURSUANT TO RULE 26-92(a)
DIS
LOCAL REGISTRAR,
SUPERIOR COURT OF JUSTICE

Court File No.: 178/17 CP

MODIFIÉ DE _____ 200_____
CONFORMÉMENT À LA RÈGLE _____
BETWEEN _____
GREFFIER LOCAL
COUR SUPÉRIEURE DE JUSTICE

ONTARIO
SUPERIOR COURT OF JUSTICE

PAUL MULLINS

Plaintiff

and

LUXURY HOTELS INTERNATIONAL OF CANADA, ULC,
OTTAWA TOURISM, and OTTAWA GATINEAU HOTEL ASSOCIATION

Defendants

Proceeding under the *Class Proceedings Act, 1992*

FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date January 26, 2017

Issued by "T. Abdelsamed"
Local registrar

Address of court office London Court House
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London ON N6A 6K1

TO: LUXURY HOTELS INTERNATIONAL OF CANADA, ULC

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Lawyers for the Defendants Ottawa Tourism and Ottawa Gatineau Hotel Association

CLAIM

1. The Plaintiff, on his own behalf and on behalf of all Plaintiff Class Members, seeks:
 - (a) an order certifying this action as a class proceeding and appointing the Plaintiff as the representative plaintiff of the proposed Plaintiff Class (hereinafter defined) pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6;
 - (b) a declaration that the Defendants' actions (as hereinafter described) and the Defendants' collection of a Destination Marketing Fee (as hereinafter defined) is contrary to Part III of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A and the parallel provisions of the consumer protection legislation in other Canadian provinces as described in Appendix 1 hereto;
 - (c) a declaration that it is in the interests of justice to disregard the requirement to give notice pursuant to section 18(5) and section 101 of the *Consumer Protection Act, 2002* and the parallel provisions of the consumer protection legislation in other Canadian provinces as described in Appendix 1 hereto;
 - (d) damages pursuant to section 18(2) of the *Consumer Protection Act, 2002* and the parallel provisions of the consumer protection legislation in other Canadian provinces as described in Appendix 1 hereto in an amount to be determined;
 - (e) a declaration that the Defendants' actions (as hereinafter described) were false and misleading contrary to section 52 of the *Competition Act*, R.S.C. 1985, c. C-34;
 - (f) exemplary, punitive, and aggravated damages in the amount of \$20,000,000;

- (g) in the alternative to the claim for damages, an accounting or other such restitutionary remedy disgorging the revenues realized by the Defendants from their collection of a Destination Marketing Fee (as hereinafter defined);
- (h) a declaration that any funds received by the Defendants through their collection of a Destination Marketing Fee (as hereinafter defined) are held in trust for the benefit of the Plaintiff and Plaintiff Class Members;
- (i) a reference to decide any issues not decided at the trial of the common issues;
- (j) costs of administration and notice, plus applicable taxes, pursuant to section 26(9) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6;
- (k) costs of this action pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194;
- (l) prejudgment interest and postjudgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43; and
- (m) such further and other relief as to this Honourable Court seems just.

THE PARTIES & THE CLASSES

Plaintiff

2. The Plaintiff, Paul Mullins, is a resident of Angus, Ontario. On January 25 – 28, 2016, the Plaintiff stayed at the Marriott Courtyard in Ottawa, Ontario, a hotel owned and/or operated by Luxury Hotels International of Canada, ULC. The Plaintiff was charged a “Destination Market Program” which is a Destination Marketing Fee (a “DMF”) as a

percentage of the nightly room charges in the amount of \$13.41, plus HST on the DMF in the amount of \$1.74 for a total charge of \$15.15. This charge was included on the invoice provided at the time of checking out of the hotel.

3. At the time of checking out of the Marriott Courtyard in Ottawa, Ontario, the Plaintiff sought clarification regarding the DMF. At that time, the employee of Marriott Courtyard did not advise the Plaintiff that payment of the DMF was voluntary. However, had the Plaintiff been aware that the DMF was a voluntary fee, the details of which are described below, the Plaintiff would not have paid the DMF.

Plaintiff Class

4. The Plaintiff seeks to represent the following class (the "Plaintiff Class") of which he is a member:

All persons, corporations, and other entities resident in Canada that have paid a Destination Marketing Fee to a hotel or other business in Canada, excluding the city of Niagara Falls, Ontario and the province of Saskatchewan, branded, owned, operated, or managed by one of the Defendants.

5. The identities of the Plaintiff Class Members are known to the Defendants.

Defendant Hotels

6. The Defendant, Luxury Hotels International of Canada, ULC (“Luxury”), is a corporation incorporated pursuant to the laws of the Province of Ontario with its head office located in Mississauga, Ontario.
7. Luxury operates hotels in Canada under a number of different brands, including, but not limited to, Marriott, Courtyard by Marriott, Fairfield Inn & Suites, Residence Inn by Marriott, Delta, Towneplace Suites by Marriott, and Renaissance Inn by Marriott all of which charge a DMF.

Defendant Industries

8. The Defendant, Ottawa Tourism, is a corporation incorporated pursuant to the laws of the province of Ontario with its head office located in Ottawa, Ontario.
9. The Defendant, Ottawa Gatineau Hotel Association, is a registered non-for-profit organization with its head office located in Ottawa, Ontario.
10. Ottawa Tourism and/or the Ottawa Gatineau Hotel Association are believed to be the ultimate recipient(s) of the DMFs collected by the Defendant Hotels in Ottawa and the surrounding area, the precise details of which are known to the Defendants or any one of them.
11. The Defendants, Luxury, Ottawa Tourism, and Ottawa Gatineau Hotel Association are herein collectively referred to as the “Defendants”.
12. The Plaintiff is unable to discern the precise mechanism for the collection, retention, or remitting of the DMF collected by the Defendants, or any one of them. As such, the full

details of the collection, retention, or remitting of the DMF are within the knowledge of the Defendants, or any one of them.

THE NATURE OF THE CLAIM

13. This class action concerns the Defendants' breach of sections 14, 15, and 17 of the *Consumer Protection Act, 2002* regarding the Defendants' false, misleading, and deceptive representations and unfair trade practices regarding collection of a DMF in Canada.
14. Further, the Defendants have unlawfully interfered with the economic interests of the Plaintiff and the Defendants have been unjustly enriched via collection of an unlawful DMF.

DESTINATION MARKETING FEES IN ONTARIO & CANADA

15. Beginning in or about 2003 or 2004, tourism organizations in Ontario and elsewhere in Canada implemented industry-led approaches to generate additional revenues for the purposes of marketing or other tourism development initiatives. These programs were initially developed as a response to the decrease in tourism following the SARS outbreak in Ontario and included collecting an additional fee from consumers in addition to nightly rates at hotels.
16. The fees are collected under various names including, but not limited to, the following: "destination marketing fee", "tourism improvement fee", "attractions and promotions fee", "tourism marketing fee", or "destination marketing & development fee" (collectively herein referred to as a "Destination Marketing Fee" or "DMF").

17. Any individual business collecting a DMF is required to remit the fee collected to a local accommodation industry association and/or a local or regional non-profit tourism organization.
18. The express purpose of the DMF is to promote tourism in the region through the regional non-profit tourism organizations.
19. In several cities in Ontario, hotels collect a DMF from customers and remit the DMF to a local accommodation industry association or directly to a regional non-profit tourism organization.
20. The collection of a DMF is not a tax. Business collecting a DMF are permitted to do so only on a voluntary basis on the part of the consumer. Although various provinces and/or municipalities collect a hotel “tax” or “levy” pursuant to provincial legislation, a DMF is separate and apart from that hotel “tax” or “levy” and is often charged in addition to any legal tax collected.

MTCS GUIDELINES

21. In Ontario, the Ministry of Tourism, Culture and Sport (the “MTCS”) provides guidelines for tourism organizations with respect to the collection and use of the DMF (the “MTCS Guidelines”).
22. The MTCS Guidelines are posted on the Ontario government’s website. The MTCS Guidelines instruct participating hotels that collect the fees to remit all fees collected to the regional/local accommodation industry association. The accommodation industry association is then required to transfer the funds to a regional/local non-profit marketing organization for marketing activities promoting the city or region.

23. The MTCS Guidelines include the following directives:
- (a) guidance on how the funds will be used and how decisions will be made regarding use of funds (e.g., advertising, marketing, product development, research);
 - (b) that all participating businesses should be prepared to respond to consumer inquiries about the DMF and that staff should be trained to ensure that they understand and can explain the fee, in particular that the fee is not a government tax or levy;
 - (c) that businesses may include fees in the price or make the amount to be charged known in advance to the prospective consumer and must accurately represent/describe its purpose;
 - (d) that businesses participating in the collection of a DMF must also adhere to any applicable provisions of provincial and federal statutes, for example, the provincial *Consumer Protection Act, 2002* and the federal *Competition Act*.
24. The MTCS Guidelines specifically state that businesses collecting the fees are responsible for ensuring that the fees are not misrepresented as taxes.
25. The MTCS Guidelines specifically state that business must adhere to the provisions of the *Consumer Protection Act, 2002* and the *Competition Act*.
26. The Plaintiff pleads and relies on the MTCS Guidelines.
27. The DMFs collected in Ontario and elsewhere in Canada are purposely confusing to consumers.

28. The Defendants misrepresent that the DMF collected is being collected and used pursuant to the MTCS Guidelines.
29. The Defendants misrepresent that the DMF collected is a tax.
30. The Defendants fail to advise the Plaintiff that the DMF is a voluntary fee. The DMF is automatically charged by the Defendants on all invoices.
31. The Defendants' staff and/or employees are unable to adequately explain the purpose of the DMF.
32. The Defendants' actions are inconsistent with the MTCS Guidelines. The Defendants' actions are inconsistent with industry standards and/or industry practices.
33. The quantum of the DMF is completely arbitrary and the DMF collected is purposely confusing. Further, in several instances, HST is charged on the DMF.
34. Due to the confusing nature of DMFs in Ontario and elsewhere in Canada, the Plaintiff and Class Members could not reasonably have discovered the wrongdoing of the Defendants and all limitation periods are therefore tolled and/or suspended.

CAUSES OF ACTION

(a) Breach of the Consumer Protection Act, 2002

35. The Defendants' actions are false, misleading or deceptive representations under section 14 of the *Consumer Protection Act, 2002* and an unfair practice under section 17 of the *Consumer Protection Act, 2002*. In particular, without limiting the scope of the Defendants' representations contrary to sections 14 and 17 of the *Consumer Protection Act, 2002* and the parallel provisions of other provincial legislation as described in

Appendix 1 hereto and section 52 of the *Competition Act*, the Defendants falsely, misleadingly or deceptively made:

- (a) representations that misrepresent the purpose of a DMF; and
- (b) representations using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact regarding the collection, purpose, and/or use of a DMF where such use or failure tended to deceive the Plaintiff and Plaintiff Class Members.

- 36. The Defendants misrepresented the purpose and ultimate use of the DMF to consumers. The Defendants misrepresented the DMF as though it is an obligatory fee and/or a tax.
- 37. The Plaintiff pleads and relies upon the provisions of the *Consumer Protection Act, 2002* and the parallel provisions of the consumer protection legislation in other Canadian provinces as described in Appendix 1 hereto.

(b) Breach of the Competition Act

- 38. The Defendants' collection of a DMF from the Plaintiff and Plaintiff Class Members is a false and misleading representation under section 52 of the *Competition Act* as the Defendants misrepresent the purpose and ultimate use of the DMF to consumers.
- 39. The Plaintiff repeats and relies upon the allegations made in the preceding paragraphs.
- 40. The Plaintiff pleads and relies upon the provisions of the *Competition Act*.

(c) Negligence

41. The Defendants were negligent as they know or ought to have known that their unlawful acts committed by way of collection of a DMF from the Plaintiff and Plaintiff Class Members would result in harm to the Plaintiff and Plaintiff Class Members.
42. At all material times, the Defendants owed a duty of care to the Plaintiff and Plaintiff Class Members to:
 - (a) ensure that a DMF is collected only on a voluntary basis;
 - (b) ensure that the Plaintiff is made aware that the DMF is a voluntary fee; and
 - (c) ensure that the DMF collected is remitted to a local accommodation industry association and/or a regional tourism industry association.
43. The Defendants breached their duty of care. The Plaintiff states that his damages were caused by the negligence of the Defendants. Such negligence includes, but is not limited to, the following:
 - (a) by unilaterally charging the Plaintiff a DMF as though it were an obligatory fee and/or a tax;
 - (b) by misrepresenting that a DMF is a tax;
 - (c) by failing to advise the Plaintiff that the DMF is paid only on a voluntary basis; and
 - (d) by failing to ensure that employees are aware of the true nature of the DMF pursuant to the MTCS Guidelines.

44. As a result of the Defendants breaching their duty of care owed to the Plaintiff, the Plaintiff suffered damages.
45. The Plaintiff pleads and relies on the provisions of the *Negligence Act*, R.S.O. 1990, c. N-1 and the parallel provisions of other provincial legislation as described in Appendix 2 hereto.

(d) Unjust Enrichment

46. Through the Defendants' receipt of a DMF, the Defendants were unjustly enriched and the Plaintiff was correspondingly deprived. There is no established juristic reason for the enrichment. In particular, there was no valid and enforceable contractual clauses between the Defendants and the Plaintiff which permitted the Defendants to lawfully collect the fee. The Plaintiff and the Defendants were not *ad idem* with respect to the collection of the DMF.
47. Revenue generated from the DMF was an additional revenue collected by the Defendants and an additional charge by the Defendants without additional consideration. The Defendants have been unjustly enriched at the expense of the Plaintiff and must be required to disgorge all of the revenues received thereby.

DAMAGES

48. Rescission of the agreement between the Plaintiff and the Defendants pursuant to section 18(1) of the *Consumer Protection Act, 2002* is not possible in the circumstances. The Plaintiff is therefore entitled to recover damages pursuant to section 18(2) of the *Consumer Protection Act, 2002* and the parallel provisions of the consumer protection legislation in other Canadian provinces as described in Appendix 1 hereto.

49. The Plaintiff claims punitive damages for the unlawful conduct of the Defendants. The Defendants' acts, wrongdoings, and breaches of duties constitute unlawful business practices, the effects of which were and are borne by the Plaintiff and Plaintiff Class Members.

WAIVER OF TORT

50. In the alternative to damages, in all of the circumstances, the Plaintiff pleads an entitlement to "waive the tort" and claim an accounting or other such restitutionary remedy for disgorgement of the revenues generated by the Defendants as a result of their unlawful collection of a DMF.
51. As a direct, proximate, and foreseeable result of the Defendants' acts and otherwise wrongful conduct, the Plaintiff was economically harmed by paying a DMF that was unlawfully charged. The Defendants profited and benefited economically from the collection of a DMF and putative class members suffered corresponding harm. As a result, the Defendants were unjustly enriched by the monies they received through the collection of a DMF.
52. The Defendants voluntarily charged, accepted, and/or retained these profits and benefits with full knowledge and awareness that, as a result of their wrongdoing, the Plaintiff was wrongfully charged.
53. It would be unreasonable for the Defendants to retain the profits or money received from the collection of a DMF because the Plaintiff was deceived.

54. The Plaintiff pleads Waiver of Tort and requests that an accounting be made of all DMF collected by the Defendants and that all revenues thereof be disgorged and distributed to the Plaintiff Class Members on an aggregate basis regardless of reliance or harm suffered.

PLACE OF TRIAL

55. The Plaintiff proposes that this action be tried in the City of London.

January 26, 2017

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APPENDIX 1

Alberta - *Fair Trading Act*, R.S.A. 1000, C. F-2

British Columbia - *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2

Manitoba – *The Business Practices Act*, C.C.S.M. c. B120, c. 2 and *The Consumer Protection Act*, C.C.S.M. c. C200

New Brunswick – *Consumer Product Warranty and Liability Act*, S.N.B. 1978, c. C-18.1

Newfoundland and Labrador - *Consumer Protection and Business Practices Act*, S.N.L. 2009, c. C-31.1

Northwest Territories – *Consumer Protection Act*, R.S.N.W.T. 1988, c. C-17

Nova Scotia – *Consumer Protect Act*, R.S.N.S., c. 92

Nunavut – *Consumer Protection Act*, R.S.N.W.T. (Nu) 1988, c. C-17

Prince Edward Island - *Business Practices Act*, R.S.P.E.I. 1988, c. B-7

Quebec – *Consumer Protection Act*, CQLR c. P-40.1

Saskatchewan – *The Consumer Protection and Business Practices Act*, S.S. 2014, c. C-30.2

Yukon – *Consumers Protection Act*, R.S.Y. 2002, c. 40

APPENDIX 2

British Columbia – *Negligence Act*, R.S.B.C. 1996, c. 333

PAUL MULLINS
Plaintiff

v.

LUZURY HOTELS INTERNATIONAL OF CANADA, U.L.C, et al.
Defendants

Court File No. 178/17 CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceedings commenced in LONDON

FRESH AS AMENDED STATEMENT OF CLAIM

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