

Cause No.:

Dossier no.:

IN THE COURT OF QUEEN'S BENCH OF
NEW BRUNSWICK

COUR DU BANC DE LA REINE DU
NOUVEAU-BRUNSWICK

TRIAL DIVISION

DIVISION DE PREMIÈRE INSTANCE

JUDICIAL DISTRICT OF MONCTON

CIRCONSCRIPTION JUDICIAIRE DE

BETWEEN:

ENTRE:

RICK THOMPSON,

Plaintiff,

Demandeur,

- and -

- et -

**CADBURY SCHWEPPEs PLC,
CADVURY ADAMS CANADA INC.,
MARS, INCORPORATED, MARS
CANADA INC. formerly known as Effem
Inc., THE HERSHEY COMPANY,
HERSHEY CANADA INC., NESTLE
S.A., NESTLE CANADA INC. and
ITWALL LIMITED,**

Defendants.

Défendeur.

NOTICE OF ACTION WITH
STATEMENT OF CLAIM ATTACHED
(FORM 16A)

AVIS DE POURSUITE ACCOMPAGNÉ
D'UN EXPOSÉ DE LA DEMANDE
(FORMULE 16A)

Proceeding under the *Class Proceedings
Act*, S.N.B. 2006, c. C-5.1

TO: **THE DEFENDANTS**

DESTINATAIRE:

LEGAL PROCEEDINGS HAVE BEEN
COMMENCED AGAINST YOU BY
FILING THIS NOTICE OF ACTION
WITH STATEMENT OF CLAIM
ATTACHED.

PAR LE DÉPÔT DU PRÉSENT AVIS DE
POURSUIITE ACCOMPAGNÉ D'UN
EXPOSÉ DE LA DEMANDE, UNE
POURSUIITE JUDICIAIRE A ÉTÉ
ENGAGÉ CONTRE VOUS.

If you wish to defend these proceedings, either you or a New Brunswick lawyer acting on your behalf must prepare your Statement of Defence in the form prescribed by the Rules of Court and serve it on the Plaintiff or the Plaintiff's lawyer at the address shown below and, with proof of such service, file it in this Court office, together with the filing fee of \$100.00,

(a) If you are served in New Brunswick, **WITHIN 20 DAYS** after service on you of this Notice of Action With Statement of Claim Attached, or

(b) If you are served elsewhere in Canada or in the United States of America, **WITHIN 40 DAYS** after such service, or

(c) If you are served anywhere else, **WITHIN 60 DAYS** after such service.

If you fail to do so, you may be deemed to have admitted any claim made against you and without further notice to you **JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE.**

You are advised that:

(a) You are entitled to issue documents and present evidence in the proceeding in English or French or both;

(b) The Plaintiff intends to proceed in the English language; and

Si vous désirez présenter une défense dans cette instance, vous-même ou un avocat du Nouveau-Brunswick chargé de vous représenter devrez rédiger un exposé de votre défense en la forme prescrite par les Règles de procédure, le signifier au demandeur ou à son avocat à l'adresse indiquée ci-dessous et le déposer au greffe de cette Cour avec un droit de dépôt de \$100.00 et une preuve de sa signification:

(a) **DANS LES 20 JOURS** de la signification que vous sera faite du présent avis de poursuite accompagné d'un exposé de la demande, si elle vous est fait au Nouveau-Brunswick ou

(b) **DANS LES 40 JOURS** de la signification, si elle vous est faite dans une autre région du Canada ou dans les États-Unis d'Amérique ou

(c) **DANS LES 60 JOURS** de la signification, si elle vous est faite ailleurs.

Si vous omettez de la faire, vous pourrez être réputé avoir admis toute demande formulée contre vous et, sans autre avis, **JUGEMENT POURRA ÊTRE RENDU CONTRE VOUS EN VOTRE ABSENCE.**

Sachez que:

(a) Vous avez le droit dans la présente instance, d'émettre des documents et de présenter votre preuve en français, en anglais ou dans les deux langues;

(b) La demanderesse a l'intention d'utiliser la langue anglaise; et

If you pay to the Plaintiff or the Plaintiff's lawyer the amount of the Plaintiff's claim, together with the sum of \$100.00 for the Plaintiff's costs, within the time you are required to serve and file your Statement of Defence, further proceedings will be stayed or you may apply to the Court to have the action dismissed.

THIS NOTICE is signed and sealed for the Court of Queen's Bench by Anne Richard, Clerk of the Court at 770 Main Street, Moncton, New Brunswick, E1C 8R3 on the _____ day _____, 2008.

Anne Richard

Si, dans le délai accordé pour la signification et le dépôt de l'exposé de votre défense, vous payez au demandeur ou à son avocat le montant qu'il réclame, plus \$100.00 pour couvrir ses frais, il y aura suspension de l'instance ou vous pourrez demander à la cour de rejeter l'action.

CET AVIS est signé et scellé au nom de la Cour du Banc de la Reine par Anne Richard, greffière de la Cour à 770, rue Main, Moncton, Nouveau-Brunswick, E1C 8R3 ce _____ 2008.

greffière de la Cour

STATEMENT OF CLAIM

THE REPRESENTATIVE PLAINTIFF

1. The Plaintiff, Rick Thompson, is a retired member of the Canada Air Force who resides in Moncton, New Brunswick. During the Class Period as defined below, Mr. Thompson purchased chocolate products manufactured, marketed and distributed by the Defendants (the "Chocolate Products") for his own personal consumption.

THE CLASS AND THE CLASS PERIOD

2. This action is brought on behalf of the Plaintiff and all persons resident in New Brunswick who purchased Chocolate Products excluding the Defendants and their present and former directors, officers, parents, subsidiaries and affiliates (collectively the "Class Members") from January 1, 2001 through to the present (the "Class Period") or such other class definition of class period as the Court may ultimately decide on the motion for certification.

CHOCOLATE PRODUCTS

3. Chocolate Products consist of all chocolate confectionary manufactured, marketed and distributed by the Defendants for sale to the Canadian public including chocolate bars such as Mars, Snickers, M&Ms, Twix, Kit Kat, Oh Henry, Skor, Hershey's, Reese, Caramilk, Dairy Milk, Mr. Big, Crunch, Coffee Crisp, Aero and Smarties.

THE DEFENDANTS

4. Cadbury Adams Canada Inc. ("Cadbury Canada") is a business entity organized under the laws of Canada with its principal place of business in Toronto, Ontario. During the Class Period, Cadbury Canada supplied, marketed sold and/or distributed certain Chocolate Products in Canada including in New Brunswick, either directly or indirectly through the control of its affiliates and/or subsidiaries.

5. Mars, Incorporated (“Mars”) is a business entity organized under the laws of the USA and a manufacturer, marketer and distributor of certain Chocolate Products with its headquarters in McLean, Virginia, USA. During the Class Period, Mars supplied, marketed, sold and/or distributed certain Chocolate Products in Canada including in New Brunswick, either directly or indirectly through the control of its affiliates and/or subsidiaries.

6. Mars Canada Inc. formerly known as Effem Inc. (“Mars Canada”) is a business entity organized under the laws of Ontario and a subsidiary of Mars with its principal place of business in Bolton, Ontario. During the Class Period, Mars Canada supplied, marketed, sold and/or distributed certain Chocolate Products in Canada including in New Brunswick either directly or indirectly through the control of its affiliates and/or subsidiaries.

7. The business of each of Mars and Mars Canada is inextricably interwoven with that of the other and each is the agent of the other for the purposes of the manufacture, marketing, supply, sale and/or distribution of certain Chocolate Products in Canada including in New Brunswick and for the purposes of the conduct hereinafter described.

8. The Hershey Company (“Hershey”) is a business entity organized under the laws of Delaware, USA and a manufacturer, marketer and distributor of certain Chocolate Products with its headquarters in Hershey, Pennsylvania, USA. During the Class Period, Hershey supplied, marketed, sold and/or distributed certain Chocolate Products in Canada including in New Brunswick either directly or indirectly through the control of its affiliates and/or subsidiaries.

9. Hershey Canada Inc. (“Hershey Canada”) is a business entity organized under the laws of Ontario and a subsidiary of Hershey with its principal place of business in Mississauga, Ontario. During the Class Period, Hershey Canada supplied, marketed, sold and/or distributed certain Chocolate Products in Canada including in New Brunswick, either directly or indirectly through the control of its affiliates and/or subsidiaries.

10. The business of each of Hershey and Hershey Canada is inextricably interwoven with that of the other and each is the agent of the other for the purposes of the manufacture, marketing, supply, sale and/or distribution of certain Chocolate Products in Canada including in New Brunswick either directly or indirectly through the control of its affiliates and/or subsidiaries.

11. Nestle Canada Inc. ("Nestle Canada") is a business entity organized under the laws of Ontario with its principal place of business in Toronto, Ontario. During the Class Period, Nestle Canada supplied, marketed, sold and/or distributed certain Chocolate Products in Canada including in New Brunswick either directly or indirectly through the control of its affiliates and/or subsidiaries.

12. ITWAL Limited ("ITWAL") is a food distributor with a national distribution network with its headquarters in Brampton, Ontario. During the Class Period, ITWAL supplied, marketed, sold and/or distributed certain Chocolate Products in Canada including in New Brunswick.

13. Throughout the period of time covered by this action, the Defendants engaged in the business of manufacturing, marketing, supplying, selling and distributing Chocolate Products throughout Canada including New Brunswick.

CONSPIRACY AND TORTIOUS INTERFERENCE WITH ECONOMIC INTERESTS

14. During the Class Period, senior executives and employees of the Defendants, acting in their capacities as agents for the Defendants, conspired with each other to illegally fix the prices of Chocolate Products sold in Canada including in New Brunswick. In furtherance of the conspiracy, such persons engaged in communications, conversations and attended meetings with each other at times and places and as a result of these communications and meetings, the Defendants unlawfully agreed to:

- (a) fix, increase and maintain at artificially high levels the prices at which the Defendants would sell Chocolate Products in Canada including in British Columbia;
- (b) exchange information in order to monitor and enforce adherence to the agreed upon prices for Chocolate Products;
- (c) fix, increase and maintain at artificially high levels the resale prices at which Chocolate Products would be offered for sale to the public in Canada including in New Brunswick
- (d) refuse to supply to, discriminate against and punish those retailers whose low pricing policies were contrary to the Defendants' suggested resale prices for Chocolate Products; and
- (e) prevent or lessen, unduly, competition in the manufacture, marketing, supply, sale and distribution of Chocolate Products in Canada including in New Brunswick.

15. In furtherance of the conspiracy, during the Class Period, the following acts were done by the Defendants and their respective servants and agents:

- (a) they fixed, increased and/or maintained at artificially high levels the retail price of Chocolate Products and coordinated the retail prices for the sale of Chocolate Products;
- (b) they fixed, increased and/or maintained at artificially high levels the trade price of Chocolate Products and coordinated the trade prices for the sale of Chocolate Products;
- (c) they agreed on measures to reduce discounting of trade prices and reduce "trade spend" to resellers of Chocolate Products;
- (d) they met secretly to discuss the prices of Chocolate Products in Toronto, Vancouver and Niagara-on-the-Lake;
- (e) they secretly exchanged pricing information regarding Chocolate Products;
- (f) they limited supplies of Chocolate Products to retailers who did not maintain the Defendants' recommended retail prices of Chocolate Products;
- (g) they provided false reasons for increased prices of Chocolate Products by describing such increases as the result of external cost increases;

- (h) they destroyed documents that evidenced the conspiracy;
- (i) they instructed members of the conspiracy at meetings not to divulge the existence of the conspiracy; and
- (j) they disciplined any corporation which failed to comply with the conspiracy.

16. The Defendants were motivated to conspire and their predominant purposes and predominant concerns were:

- (a) to harm the Plaintiff and other Class Members by requiring them to pay artificially high prices for Chocolate Products; and
- (b) to illegally increase their profits on the sale of Chocolate Products.

17. The acts alleged in this claim to have been done by each corporate Defendant were authorized, ordered and done by each corporate Defendant's officers, directors, agents, employees or representatives while engaged in the management, direction, control or transaction of its business affairs.

CONSPIRACY AND TORTIOUS INTERFERENCE WITH ECONOMIC INTERESTS

18. The acts particularized in paragraphs 14 to 16 were in breach of sections 45 and 61, Part VI of the *Competition Act* RS 1985 c. C-34. Consequently, according to section 36 of the *Competition Act*, the Defendants are jointly and severally liable to the Plaintiff and the other Class Members for their damages in respect of all purchases of Chocolate Products in New Brunswick supplied by the Defendants. Further, the Plaintiff and the other Class Members are entitled to their costs of investigation into this matter.

19. Further, or alternatively, the acts particularized in paragraphs 14 to 16 were unlawful acts directed towards the Plaintiff and the other Class Members which unlawful acts the Defendants knew in the circumstances would likely cause injury to the Plaintiff and the other class Members. Consequently, pursuant to the law of civil conspiracy, the Defendants are jointly and severally liable to the Plaintiff and the other Class Members

for their damages in respect of all purchases of Chocolate Products manufactured and/or supplied by the Defendants.

20. Further, or alternatively, the acts particularized in paragraphs 14 to 16 were unlawful acts intended to cause the Plaintiff and the other Class Members economic loss and constituted tortious interference with the economic interests of the Plaintiff and the other Class Members and render the Defendants jointly and severally liable to pay the resulting damages in respect of all purchases of Chocolate Products in New Brunswick manufactured and/or supplied by the Defendants.

UNJUST ENRICHMENT, WAIVER OF TORT AND CONSTRUCTIVE TRUST

21. In the alternative, the Plaintiff waives the tort and pleads that he and the other Class Members are entitled to recover under restitutionary principles.

22. The Defendants have each been unjustly enriched by the receipt of the artificially induced overcharge on the sale of Chocolate Products. The Plaintiff and other Class Members have suffered a deprivation in the amount of such overcharge attributable to the sale of Chocolate Products in New Brunswick.

23. Since the artificially induced overcharge received by the Defendants from the Plaintiff and each Class Member resulted from the Defendants' wrongful or unlawful acts, there is and can be no juridical reason justifying the Defendants' retaining any part of such overcharge and in particular, any contracts upon which the Defendants purport to rely to receive the illegal overcharge are void and illegal.

24. The Defendants are constituted as constructive trustees in favour of the Class Members for all of the artificially induced overcharge from the sale of Chocolate Products because, among other reasons:

- (a) the Defendants were unjustly enriched by the artificially induced overcharge;

- (b) the Class Members suffered a deprivation because of the artificially induced overcharge;
- (c) the Defendants engaged in inappropriate conduct and committed a wrongful act in conspiring to fix the price of Chocolate Products;
- (d) the artificially induced overcharge was acquired in such circumstances that the Defendants may not in good conscience retain it;
- (e) justice and good conscience require the imposition of a constructive trust;
- (f) the integrity of the marketplace would be undermined if the court did not impose a constructive trust; and
- (g) there are no factors that would, in respect of the artificially induced overcharge, render the imposition of a constructive trust unjust.

25. The Plaintiff pleads that equity and good conscience requires the Defendants to hold in trust for the Plaintiff and the other Class Members all of the artificially induced overcharge from the sale of Chocolate Products and to disgorge this overcharge to the Plaintiff and the other Class Members.

THE DAMAGES OF THE PLAINTIFF AND THE OTHER CLASS MEMBERS

26. The Plaintiff and other Class Members have suffered damages as a result of the foregoing conspiracy, which had the effect of raising, maintaining and stabilizing prices of Chocolate Products at artificial and non-competitive levels.

27. During the Class Period, the Plaintiff and other Class members have purchased billions of dollars of Chocolate Products. By reason of the alleged violations of the *Competition Act* and the common law, the Plaintiff and the other Class Members paid more for Chocolate Products than they would have paid in the absence of the illegal combination and conspiracy. As a result, they have been injured in their business and property and have suffered damages in an amount presently undetermined.

28. The Plaintiff asserts that his damages combined with the damages suffered by the other Class Members are capable of being quantified on an aggregate basis as the

difference between the actual prices of Chocolate Products and the prices which would have prevailed in the absence of the unlawful conspiracy.

PUNITIVE DAMAGES

29. The Plaintiff pleads that the Defendants' conduct as particularized in paragraphs 14 to 16 was high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, willful, in contumelious disregard of the Plaintiff's rights and the rights of each Class Member, indifferent to the consequences and as such renders the Defendants liable to pay punitive damages.

THE RELEVANT STATUTES

30. The Plaintiff pleads and relies upon the *Class Proceedings Act*, S.N.B., 2006 c. C-5.1, the *Competition Act*, R.S. 1985, c. 19, (2nd Supp.) and all amendments thereto, and says that there are numerous persons in New Brunswick and elsewhere having the same interest in this cause, and the Plaintiff brings this action in his own right and on behalf of or for the benefit of all persons so interested, as a class proceeding.

31. The Plaintiff pleads and relies upon Rule 11 of the *Rules of Court of New Brunswick* in support of this action as a representative action.

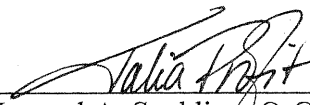
32. The Plaintiff pleads and relies upon Rule 19.01 (h), (i) and (j) of the *Rules of Court of New Brunswick* in support of service upon the Defendants outside of New Brunswick, without leave, and state that this action is in respect of torts committed in New Brunswick, in respect of damage sustained arising from the commission of such torts, and for an injunction sought in New Brunswick.

RELIEF CLAIMED

33. The Plaintiff, on his own behalf, and on behalf of the Class Members, claims against the Defendants:

- (a) an order certifying this action as a class proceeding and appointing the Plaintiff as Representative Plaintiff;
- (b) general damages for conspiracy, tortious interference with economic interests, and conduct that is contrary to Part VI of the *Competition Act*, R.S. 1985, c. 19 (2nd Suppl.);
- (c) a declaration that the Defendants have been unjustly enriched at the expense of the Plaintiff and the other Class Members by their receipt of the illegal overcharge;
- (d) a declaration that the Defendants hold the illegal overcharge in a constructive trust for the benefit of the Plaintiff and the other Class Members;
- (e) an order directing the Defendants to disgorge their illegal overcharge;
- (f) costs of investigation pursuant to section 36 of the *Competition Act*, R.S.C. 1985, c. 19 (2nd Suppl.);
- (g) punitive damages;
- (h) interest pursuant to the *Judicature Act*, R.S.N.B. 1973, c. J-2;
- (i) costs of this action;
- (j) an injunction enjoining the Defendants from further unlawful conduct; and
- (k) such further and other relief as to this Honourable Court may deem just.

DATED at Moncton, New Brunswick, this 15th day of February, 2008.


Howard A. Spalding, Q.C./ Talia C. Profit
Solicitors for the Plaintiff and Class
Members

BARRY SPALDING
1077 St. George Blvd., Suite 100
PO Box 1066
Moncton, NB E1C 8P2

Telephone : (506) 859-1244
Fax : (506) 859-1249