

ORIGINATING NOTICE (ACTION)

2008

S.H. No.

292103

Court Administration

FEB 15 2008

Halifax, N.S.

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

BARRETT THOMPSON

Plaintiff

- and -



CADBURY ADAMS CANADA INC., MARS, INCORPORATED,  
MARS CANADA INC., formerly known as EFFEM INC.,  
THE HERSHEY COMPANY, HERSHEY CANADA INC.,  
NESTLE CANADA INC. and ITWAL LIMITED

Defendants

TO THE DEFENDANTS:

TAKE NOTICE that this proceeding has been brought by the Plaintiff against you, the Defendants, in respect of the claim set out in the Statement of Claim annexed to this notice.

AND TAKE NOTICE that the Plaintiff may enter judgment against you on the claim, without further notice to you, unless within TWENTY days after the service of this Originating Notice upon you, excluding the day of service, you or your solicitor cause your Defence to be delivered by mail or personal delivery to,

(a) the office of the Prothonotary at 1815 Upper Water Street in Halifax, Nova Scotia, and

(b) to the address given below for service of documents on the Plaintiff:

provided that if the claim is for a debt or other liquidated demand and you pay the amount claimed in the Statement of Claim and the sum of \$ (or such sum as may be allowed on taxation) for costs to the plaintiff or his solicitor within six days from the service of this notice on you, then this proceeding will be stayed.

ISSUED the *15<sup>th</sup>* day of February, A.D., 2008.

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**STATEMENT OF CLAIM**

(Proposed Common Law Class Proceeding)

**THE REPRESENTATIVE PLAINTIFF**

1. The plaintiff Barrett Thompson (“Mr. Thompson”) is a student who resides in Dartmouth, Nova Scotia. 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. The plaintiff seeks to certify this action as a class proceeding and pleads the Supreme Court of Canada's decision in *Western Canadian Shopping Centers Inc. v. Dutton*, [2001] 2 S.C.R. 534, and Rule 5.09 of Nova Scotia's *Civil Procedure Rules*, as providing the basis for such certification. This action is brought on behalf of the plaintiff and all persons resident in Nova Scotia 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 or 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 Nova Scotia, 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 Nova Scotia, 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 Nova Scotia, 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 Nova Scotia 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 Nova Scotia, 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 Nova Scotia, 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 Nova Scotia and for the purposes of the conduct hereinafter described.

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 Nova Scotia, 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 Nova Scotia.

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 Nova Scotia.

#### **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 Nova Scotia. 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 Nova Scotia;
- (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 Nova Scotia;
- (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 Nova Scotia.

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.

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 Nova Scotia 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 Nova Scotia 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 Nova Scotia.

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 millions 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, wilful, 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 *Competition Act*, R.S. 1985, c. 19, (2nd Supp.) and all amendments thereto.

WHEREFORE 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) prejudgment interest pursuant to the *Judicature Act*, R.S.N.S. 1989, c. 240;
- (i) an injunction enjoining the defendants from further unlawful conduct;
- (j) costs; and
- (k) such further and other relief as to this Honourable Court may seem just.

DATED at Halifax, Nova Scotia this 15<sup>th</sup> day of February, 2008.

PLACE OF TRIAL: HALIFAX, NOVA SCOTIA

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**RAYMOND F. WAGNER**

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**STATEMENT OF CLAIM**  
**(PROPOSED COMMON LAW CLASS PROCEEDING)**  
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