

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

DAVID OSMUN and
METRO (WINDSOR) ENTERPRISES INC.

Plaintiffs

and

CADBURY ADAMS CANADA INC.,
THE HERSHEY COMPANY, HERSHEY CANADA, INC.,
NESTLÉ CANADA, INC., MARS, INCORPORATED,
MARS CANADA INC. and ITWAL LIMITED

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM
(Notice of Action issued on January 17, 2007)**

1. The following terms used throughout this statement of claim have the meanings indicated:

- (a) **“Cadbury Canada”** means Cadbury Adams Canada Inc.;
- (b) **“Chocolate Companies”** means Cadbury Canada, Hershey, Hershey Canada, Mars, Mars Canada and Nestlé Canada;
- (c) **“Chocolate Product”** means any and all chocolate confectionary products of the **Chocolate Companies**;

- (d) “**CJA**” means the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (e) “**Class**” and “**Class Members**” means all persons in Canada who purchased a **Chocolate Product** in Canada during the **Class Period**, except the **Excluded Persons** and persons who are included in British Columbia Court File, Vancouver Registry, Number S078807 and in Quebec Court (District of Quebec) Action Number 06-000094-071 or such other definition as determined by the court;
- (f) “**Class Period**” means the period from at least February 1, 2001 to and including November 28, 2007 or such other period as determined by the court;
- (g) “**CMAC**” means the Confectionery Manufacturers Association of Canada;
- (h) “**Competition Act**” means the *Competition Act*, R.S.C. 1985, c. C-34, as amended;
- (i) “**Competition Bureau**” means the Competition Bureau of Canada;
- (j) “**Conspirators**” means the defendants and their officers, directors, senior employees and persons unknown;
- (k) “**CPA**” means the *Class Proceedings Act, 1992*, S.O. 1992, c. 6;
- (l) “**DOJ**” means the United States Department of Justice;
- (m) “**David**” means David Osmun;
- (n) “**Excluded Persons**” means the defendants and any of their subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns;
- (o) “**FCPC**” means the trade association known as Food and Consumer Products of Canada;
- (p) “**Hershey**” means The Hershey Company;
- (q) “**Hershey Canada**” means Hershey Canada, Inc.;

- (r) “**Informant**” means either a senior employee of **Cadbury Canada**, or alternatively, a person unknown to the plaintiffs, who provided evidence to the **Competition Bureau** concerning the conspiracy described herein;
- (s) “**Informant #2**” means a senior employee of **Cadbury Canada**, or alternatively, a person unknown to the plaintiffs, who provided evidence to the **Competition Bureau** concerning the conspiracy described herein;
- (t) “**Itwal**” means ITWAL Limited;
- (u) “**Lent**” means Eric Lent, the General Manager of Hershey Canada;
- (v) “**Leonidas**” means Robert Leonidas, the President and Chief Executive Officer of **Nestlé Canada**;
- (w) “**Mars**” means Mars, Incorporated;
- (x) “**Mars Canada**” means Mars Canada Inc., formerly known as Effem Inc.;
- (y) “**Metro**” means Metro (Windsor) Enterprises Inc.;
- (z) “**Nestlé Canada**” means Nestlé Canada, Inc.; and
- (aa) “**Overcharge**” means the difference between the prices paid for **Chocolate Products** and the prices which would have been paid during the **Class Period** in the absence of the conspiracy.

THE RELIEF CLAIMED

2. The plaintiffs claim on their own behalf and on behalf of the other Class

Members:

- (a) an order pursuant to the *CPA* certifying this action as a class proceeding and appointing them as the representative plaintiffs;
- (b) a declaration that the Conspirators conspired each with the other to raise, maintain, fix and stabilize the price of Chocolate Products during the Class Period;

- (c) a declaration that the defendants hold the Overcharge in trust for the Class Members;
- (d) special damages and general damages for conspiracy, unlawful interference with economic relations and conduct that is contrary to Part VI of the *Competition Act* in the amount of \$200,000,000 or such other sum as this court finds appropriate at the trial of the common issues or at a reference or references, or alternatively, damages assessed equal to the amount of the Overcharge as established by an accounting if necessary;
- (e) an accounting and the imposition of a constructive trust over the Overcharge and an order requiring the defendants to disgorge it;
- (f) punitive damages in the amount of \$20 million or such other sum as this court finds appropriate at the trial of the common issues;
- (g) costs of the investigation and prosecution of this action pursuant to s. 36(1) of the *Competition Act*;
- (h) prejudgment interest and postjudgment interest, compounded, or pursuant to ss. 128 and 129 of the *CJA*;
- (i) an order directing a reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues;
- (j) costs of this action on a substantial indemnity basis or in an amount that provides full indemnity plus, the costs of distribution of an award under s. 24 or 25 of the *CPA*, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution pursuant to s. 26(9) of the *CPA*; and
- (k) such further and other relief as to this Honourable Court seems just.

THE NATURE OF THE ACTION

3. This action concerns a conspiracy among the Conspirators to raise, maintain, fix and stabilize the price of Chocolate Products with the result that the

plaintiffs and the other Class Members paid non-competitive and artificially high prices for Chocolate Products during the Class Period.

4. The plaintiffs also allege that Itwal, with the cooperation of the Chocolate Companies, engaged in price maintenance, in that Itwal took steps to discourage price discounting for Chocolate Products.

THE PARTIES

5. David resides in the City of Windsor. During the Class Period, David purchased Chocolate Products in Ontario indirectly from each of the Chocolate Companies.

6. Metro is a corporation incorporated pursuant to the laws of the Province of Ontario, with its registered office located in the City of Windsor.

7. Metro is in the catering and vending machine business. During the Class Period, Metro purchased Chocolate Products directly from Mars Canada in Ontario and indirectly from the other Chocolate Companies. Metro therefore had a contractual relationship with Mars in Ontario.

8. Cadbury Canada is a corporation incorporated pursuant to the laws of Canada and is a wholly-owned subsidiary of Cadbury Schweppes PLC, which claims to

be the world's largest confectionery company. During the Class Period, Cadbury Canada maintained a confectionery manufacturing facility in Hamilton, Ontario.

9. Hershey is incorporated pursuant to the laws of the State of Delaware. Hershey claims to be the largest North American manufacturer of quality chocolate and confectionery products and a leading snack food company.

10. Hershey Canada is a corporation incorporated pursuant to the laws of Ontario and is a wholly-owned subsidiary of Hershey. During the Class Period, Hershey Canada maintained a confectionery manufacturing facility in Smith Falls, Ontario. During the Class Period, Hershey owned, dominated and controlled the businesses of Hershey Canada.

11. The businesses of Hershey and Hershey Canada are inextricably interwoven with each other so that each is the agent of the other.

12. Mars is a corporation incorporated pursuant to the laws of the State of Virginia. Mars describes itself as a global, family-owned business producing some of the world's favourite snack foods, pet care products, food and drinks.

13. Mars Canada is a corporation incorporated pursuant to the laws of Ontario and is a wholly-owned subsidiary of Mars. During the Class Period, Mars Canada maintained a confectionery manufacturing facility in Newmarket, Ontario.

During the Class Period, Mars owned, dominated and controlled the businesses of Mars Canada.

14. The businesses of Mars and Mars Canada are inextricably interwoven with each other so that each is the agent of the other.

15. Nestlé Canada is a corporation incorporated pursuant to the laws of Canada and is a wholly-owned subsidiary of Nestlé Suisse S.A., which claim to be the world's largest food and beverage company. During the Class Period, Nestlé Canada maintained a confectionery manufacturing facility in North York, Ontario.

16. Itwal is a corporation incorporated pursuant to the laws of Ontario. Itwal is a retail and foodservice wholesale distributor.

17. During the Class Period, the Chocolate Companies manufactured, marketed and sold Chocolate Products to customers in Ontario, in the rest of Canada and elsewhere. During the Class Period, Itwal distributed Chocolate Products manufactured by the Chocolate Companies, to retailers in Ontario and elsewhere in Canada.

18. The acts alleged in this claim to have been done by the defendants were authorized, ordered and done by their senior executives, senior employees, agents and unnamed co-conspirators while engaged in the management, direction, control or transaction of their business affairs.

THE BACKGROUND

19. Chocolate is produced from the beans of the cacao tree.

20. Most chocolate companies produce categories of confectionary products including: boxed chocolates, chocolate bars and/or seasonal novelties.

21. The chocolate market in Canada, and worldwide, is highly concentrated. The Chocolate Companies have an overwhelming percentage of the chocolate business. In 2004-2005, the Chocolate Companies controlled approximately 97.8% of the Canadian chocolate confectionery market. The respective shares of the largest chocolate manufacturers in Canada in 2004-2005 were as follows:

Manufacturer	2004-2005
Cadbury	26.9%
Nestlé	26.4%
Hershey	25.9%
Mars	18.6%

22. There are substantial barriers to entry into the chocolate confectionery market resulting from the cost of establishing manufacturing plants, distribution systems and environmental issues. In addition, the manufacturing of chocolate is highly technical and requires sophisticated knowledge of food technology, including hardware (processing machinery) and computers, software and formulation technology.

23. Both factors, high concentration and barriers to entry, facilitate the implementation and maintenance of a horizontal price-fixing cartel such as the conspiracy alleged herein.

THE COMPETITION BUREAU AND DOJ INVESTIGATIONS

24. On or about November 28, 2007, the Competition Bureau confirmed that it was investigating alleged anticompetitive practices in the Canadian chocolate confectionery industry. The Competition Bureau commenced its investigation after an unnamed participant in the alleged offences, the cooperating party, approached the Competition Bureau under its Immunity Program.

25. The plaintiffs allege that the cooperating party is Cadbury Canada.

26. The Competition Bureau served search warrants on Mars Canada, Nestlé Canada, Hershey Canada and Itwal, requiring them to produce documents relating to their pricing arrangements. The search warrants were granted based on evidence from the cooperating party that a number of suppliers in the chocolate industry had engaged in activities contrary to subsections 45(1)(b) and (c) of the *Competition Act*. The Competition Bureau indicated that its investigation was focused on Chocolate Products but that it could expand to other types of candy depending on what was uncovered during the investigation.

27. Nestlé Canada has confirmed that the Competition Bureau has commenced an investigation of virtually all major chocolate producers in Canada and that it is cooperating with authorities in their investigation.

28. Hershey Canada has admitted that it was contacted by the Canadian investigators on November 26, 2007 regarding the alleged conspiracy. Hershey has indicated that it is cooperating fully with officials.

29. Mars Canada has confirmed that it is being investigated by Canadian authorities.

30. Cadbury Canada has confirmed the investigation and has stated that it is cooperating with any inquiries by investigators.

31. On December 20, 2007, Mars and Nestlé U.S.A., Inc. issued statements acknowledging that the DOJ has commenced an investigation concerning the U.S. chocolate confectionery industry.

THE CONSPIRACY

32. During the Class Period, in Toronto and Niagara-on-the-Lake in Ontario, Charlevoix in Quebec, Vancouver in British Columbia and in places unknown, the Conspirators wrongfully, unlawfully, maliciously and lacking *bona fides* conspired and agreed among themselves to:

- (a) agree upon the prices to be charged and to control discounts for Chocolate Products in Ontario and elsewhere in Canada and to otherwise fix, increase, maintain or stabilize those prices;
- (b) prevent or lessen, unduly, competition in the market in Canada for Chocolate Products in Ontario and the rest of Canada by sharing sales and pricing data relating to the Chocolate Products;
- (c) monitor and implement the arrangements among the members of the cartel;
- (d) fraudulently conceal the agreements;
- (e) sell the Chocolate Products at the agreed-upon inflated prices; and
- (f) eliminate or prevent discounting of the price of the Chocolate Products.

33. The Conspirators were motivated to conspire and their predominant purposes and predominant concerns were to illegally increase their profits from the sale of Chocolate Products. The result of the unlawful conduct was that the plaintiffs and other Class Members paid inflated prices for Chocolate Products.

34. In furtherance of the conspiracy, the following acts were done by some or all of the Conspirators during the Class Period:

- (a) they agreed to, and did, fix, increase, maintain and coordinate price increases for the Chocolate Products;
- (b) they agreed to, and did, prevent price discounting of the Chocolate Products;
- (c) Itwal attempted to obtain an increase in and/or to discourage the reduction of the price at which Cadbury Canada, Nestlé Canada, Hershey Canada and Mars Canada supplied Chocolate Products to distributors and retailers;
- (d) beginning at least as early as February 2002 and continuing until at least February 2004, Itwal attempted to induce Cadbury Canada, Nestlé

Canada, Hershey Canada and Mars Canada as a condition of Itwal doing business with them, to refuse to supply Chocolate Products to a particular person or class of persons because of the low pricing policy of that person or class of persons;

- (e) they participated in secret meetings, conversations and communications in Ontario, Quebec, British Columbia and elsewhere to discuss the prices of the Chocolate Products;
- (f) they agreed during such meetings, conversations and communications on the price of the Chocolate Products and exchanged information to monitor and enforce the agreed-upon prices;
- (g) they agreed not to discuss publicly or otherwise reveal the nature and substance of the conspiracy;
- (h) Hershey Canada, Mars Canada, Nestlé Canada and Cadbury Canada and others met at various trade associations meetings and events hosted by common customers, including meetings hosted by CMAC and FCPC, to exchange information about market conditions and the pricing of the Chocolate Products;
- (i) they provided false reasons for the increase in the prices of the Chocolate Products during the Class Period by describing such increases as being the result of external costs rather than collusion;
- (j) they took steps to conceal the unlawful conspiracy from their customers, the authorities and the public; and
- (k) they destroyed documents that evidenced the conspiracy.

35. The acts particularized above were unlawful because they breached Part VI of the *Competition Act* and render the Conspirators liable to pay the damages which resulted pursuant to s. 36 of the *Competition Act*.

36. Further, or alternatively, the acts particularized above were unlawful acts directed towards the plaintiffs and other Class Members which unlawful acts the Conspirators knew in the circumstances would likely cause injury to them and the other

Class Members by requiring them to pay artificially high prices for Chocolate Products and are liable for the tort of civil conspiracy.

PARTICULARS OF THE CONSPIRACY

37. The Conspirators agreed that if one party increased the price of its Chocolate Products, the others would also increase their prices.

38. During the Class Period, the Conspirators communicated in person, by telephone, by email and by mail on numerous occasions including:

- (a) in February 2004, the Informant and Leonidas had a breakfast meeting to discuss trade spend;
- (b) in June 2005, Itwal emailed one of the Conspirators advising that Mars Canada and Nestlé Canada had been hinting at price increases for Chocolate Products;
- (c) in June and July 2005, in Charlevoix, Quebec at the CMAC annual meeting and at Nestlé Canada's offices, Leonidas provided the Informant with information concerning Nestlé Canada's planned price increases;
- (d) in February 2006, at a Second Cup coffee shop in Toronto, Leonidas asked the Informant to take a price increase for Chocolate Products;
- (e) on July 4, 2007, at Auberge du Pommier restaurant in Toronto, the Informant met a senior officer of Nestlé Canada, who asked the Informant to lead a price increase for Chocolate Products;
- (f) on July 5, 2007, employees of Nestlé Canada and Cadbury Canada discussed price increases for Chocolate Products;
- (g) on September 19, 2007, in Vancouver, British Columbia, Leonidas told the Informant that Nestlé Canada was taking a price increase in February 2008 for its entire portfolio;

- (h) on September 26, 2007, Itwal called Cadbury Canada and advised that one of its competitors would be taking a price increase in February, 2008;
- (i) on September 27, 2007, at a FCPC dinner in Niagara-on-the Lake, Leonidas told an employee of Cadbury Canada that Nestlé Canada was taking a price increase and suggested that Hershey Canada and Cadbury Canada do the same; and
- (j) in November 2005, February 2006 and 2007, employees of Mars Canada and Cadbury Canada discussed trade spend and margins on Chocolate Products.

THE PRICE OF CHOCOLATE PRODUCTS INCREASED

39. The Conspirators increased the price of Chocolate Products during the Class Period but provided false justifications for such price increases.

40. On July 29, 2005, Cadbury Canada announced a price increase of, on average, 5.2% for its chocolate portfolio, effective October 31, 2005. Cadbury Canada increased its price to align its prices with the price increases of Nestlé Canada.

41. On August 23, 2005, Hershey Canada announced that that it was increasing its prices by an unknown percentage on most of its chocolate and candy products effective October 31, 2005.

42. On September 6, 2005, Mars Canada announced a price increase of, on average, 6% on select items in its confectionery portfolio, effective November 7, 2005.

43. On October 30, 2006, Cadbury Canada announced a price increase on seasonal chocolate effective February 5, 2007—5% for Halloween products and 4% for Easter products.

44. In an effort to conceal the conspiracy, the Chocolate Companies publicly stated that the price increases were as a result of cost increases in cocoa, sugar, energy and packaging.

UNLAWFUL INTERFERENCE WITH ECONOMIC RELATIONS

45. The acts particularized herein:
- (a) were meant to injure Metro and some of the Class Members;
 - (b) interfered with the business affairs of Metro and some of the Class Members by unlawful means; and
 - (c) caused Metro and some of the other Class Members economic loss because they paid the Overcharge.

WAIVER OF TORT

46. The plaintiffs reserve the right to elect at the trial of the common issues to waive the torts of conspiracy and unlawful interference with economic relations and to have damages assessed in an amount equal to the Overcharge collected from the Class Members during the Class Period.

47. The Chocolate Companies are constituted as constructive trustees in favour of the Class Members in an amount equal to the Overcharge it collected from the Class Members, because, among other reasons:

- (a) they were unjustly enriched by their receipt of the Overcharge;
- (b) the Class Members suffered a deprivation because the price of the Chocolate Products were artificially inflated;
- (c) the Conspirators engaged in inappropriate conduct and committed a wrongful act in conspiring to fix the price of the Chocolate Products;
- (d) the Overcharge collected by the Chocolate Companies was acquired in such circumstances that the Chocolate Companies may not in good conscience retain it;
- (e) equity and good conscience requires it;
- (f) the Conspirators cannot profit from their wrongful and unlawful acts;
- (g) the integrity of the marketplace would be undermined if the court did not impose a constructive trust; and
- (h) there is no juridical reasons that would, in respect of the Overcharge, render the imposition of a constructive trust unjust.

THE PLAINTIFF AND THE CLASS MEMBERS SUFFERED DAMAGES

48. The plaintiffs and other Class Members have suffered damages as a result of the conspiracy, which had the effect of raising, maintaining, fixing and stabilizing the price of the Chocolate Products and preventing the discounting of the Chocolate Products.

49. During the Class Period, the plaintiffs and other Class Members have directly or indirectly paid millions of dollars for Chocolate Products to the Chocolate Companies. By reason of the alleged violations of the *Competition Act* and the common law, the plaintiffs and the other Class Members paid more for Chocolate Products than they would have paid in the absence of the conspiracy. As a result, they have been injured and have suffered damages in an amount at least equal to the Overcharge.

50. The plaintiffs assert that their combined damages along with those of the other Class Members are capable of being quantified on an aggregate basis, in whole or in part, as the difference between the amounts actually paid for Chocolate Products and the amounts which would have been paid in the absence of the conspiracy.

PUNITIVE DAMAGES

51. The plaintiffs plead that the conduct of the defendants was high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, wilful and motivated solely by economic considerations. Such conduct renders the defendants to pay punitive damages.

RELEVANT LEGISLATION

52. The plaintiffs plead and rely upon the *CJA*, *CPA* and the *Competition Act*, including sections 36, 45, 46 and 61.

REAL AND SUBSTANTIAL CONNECTION WITH ONTARIO

53. The plaintiffs plead that this action has a real and substantial connection with Ontario because, amount other things:

- (a) Metro had a contractual relationship with Mars Canada in Ontario;
- (b) Cadbury Canada has its head office in Toronto, Ontario and a manufacturing facility in Hamilton, Ontario;
- (c) Hershey Canada is incorporated pursuant to the laws of Ontario, has its head office in Toronto, Ontario and a manufacturing facility in Smith Falls, Ontario;
- (d) Mars Canada is incorporated pursuant to the laws of Ontario, has its head office in Bolton, Ontario and Newmarket, Ontario and a manufacturing facility in North York, Ontario;
- (e) Nestlé Canada has its head office in Toronto, Ontario;
- (f) Itwal is incorporated pursuant to the laws of Ontario and has its head office in Brampton, Ontario;
- (g) the plaintiffs' damages, and those of the other Class Members resident in Ontario, were sustained in Ontario;
- (h) the conspiracy was primarily conceived of in Ontario; and
- (i) the Chocolate Companies registered trademarks with the Canadian Intellectual Property Office in Ottawa.

PLACE OF TRIAL

54. The plaintiffs propose that this action be tried in the City of Toronto, in the Province of Ontario.

February 4, 2008

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