

2008 01 T 0650 CP

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN:

WILLIAM KELLY and GERALD LEDREW

PLAINTIFFS

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

Brought under the *Class Actions Act*, SNL 2001, c. C-18.1

STATEMENT OF CLAIM

THE REPRESENTATIVE PLAINTIFFS

1. The Plaintiff William Kelly, retired, resides at 22 Flavin Street, St. John's, Newfoundland and Labrador, A1C 3R9. The Plaintiff Gerald LeDrew, businessman, resides at 6 LeDrew's Road, Conception Bay South, Newfoundland and Labrador, A1X 3C1. During the Class Period as defined below, Mr. LeDrew and Mr. Kelly purchased chocolate products manufactured, marketed and distributed by the Defendants (the "Chocolate Products") for their own personal consumption.

THE CLASS AND THE CLASS PERIOD

2. This action is brought on behalf of the Plaintiffs and all persons resident in Newfoundland and Labrador 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 Newfoundland and Labrador, 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 Newfoundland and Labrador, 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 Newfoundland and Labrador, 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 Newfoundland and Labrador 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 Newfoundland and Labrador, 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 Newfoundland and Labrador, 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 Newfoundland and Labrador 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 Newfoundland and Labrador, 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 Newfoundland and Labrador.
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 Newfoundland and Labrador.

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 Newfoundland and Labrador. 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 Newfoundland and Labrador;
 - (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 Newfoundland and Labrador;

- (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 Newfoundland and Labrador.
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 Plaintiffs 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 INTERFERNCE 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* RSC 1985 c. C-34. Consequently, according to section 36 of the *Competition Act*, the Defendants are jointly and severally liable to the Plaintiffs and the other Class Members for their damages in respect of all purchases of Chocolate Products in Newfoundland and Labrador supplied by the Defendants. Further, the Plaintiffs 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 Plaintiffs and the other Class Members which unlawful acts the Defendants knew in the circumstances would likely cause injury to the Plaintiffs and the other Class Members. Consequently, pursuant to the law of civil conspiracy, the Defendants are jointly and severally liable to the Plaintiffs 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 Plaintiffs and the other Class Members economic loss and constituted tortious interference with the economic interests of the Plaintiffs 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 Newfoundland and Labrador manufactured and/or supplied by the Defendants.

UNJUST ENRICHMENT, WAIVER OF TORT AND CONSTRUCTIVE TRUST

21. In the alternative, the Plaintiffs waive the tort and plead that they 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 Plaintiffs and other Class Members have suffered a deprivation in the amount of such overcharge attributable to the sale of Chocolate Products in Newfoundland and Labrador.
23. Since the artificially induced overcharge received by the Defendants from the Plaintiffs 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 Plaintiffs plead that equity and good conscience requires the Defendants to hold in trust for the Plaintiffs and the other Class Members all of the artificially induced overcharge from the sale of Chocolate Products and to disgorge this overcharge to the Plaintiffs and the other Class Members.

THE DAMAGES OF THE PLAINTIFFS AND THE OTHER CLASS MEMBERS

26. The Plaintiffs 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 Plaintiffs 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 Plaintiffs 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 Plaintiffs assert that their 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 Plaintiffs plead 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 Plaintiffs' 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 Plaintiffs plead and rely upon the *Class Actions Act*, SNL 2001, c. C-18.1, and the *Competition Act*, RSC 1985, c. 19, (2nd Suppl.) and all amendments thereto.
31. The Plaintiffs plead that the Statement of Claim in this action may be served outside of Newfoundland and Labrador and relies on sections 6.07 (1) (f), (g), (i) and (j) and 6.07 (2) of the *Rules of the Supreme Court, 1986*.

RELIEF SOUGHT:

32. WHEREFORE the Plaintiffs, on their own behalf, and on behalf of the Class Members, claim against the Defendants:
 - (a) an order certifying this action as a class proceeding and appointing the Plaintiffs 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*, RSC 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 Plaintiffs 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*, RSC, 1985, c. 19 (2nd Suppl.);
 - (g) punitive damages;

- (h) pre-judgment interest pursuant to the *Judgment Interest Act*, RSN 1990, c. J-2;
- (i) an injunction enjoining the Defendants from further unlawful conduct; and
- (j) such further and other relief as to this Honourable Court may seem just.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 12th day of February, 2008.

CHES CROSBIE BARRISTERS

Solicitors for the Plaintiffs whose
address for service is:

169 Water Street, 4th Floor

St. John's, NL A1C 1B1

Per: Chesley F. Crosbie, Q.C.

- and -

BRANCH MACMASTER

1210-777 Hornby Street

Vancouver, BC V6Z 1S4

Per: Ward Branch

TO: THE DEFENDANTS

ISSUED at St. John's, in the Province of Newfoundland and Labrador, this 13 day of February, 2008.

Sgt. Michael Miller
Trial Co-ordinator (A)

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TRIAL DIVISION

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WILLIAM KELLY and GERALD LEDREW

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NOTICE TO DEFENDANT(S)

You are hereby notified that the Plaintiff may enter judgement in accordance with the Statement of Claim or such order as, according to the practice of the Court, the Plaintiff is entitled to, without any further notice to you unless within 10 days, after service hereof upon you, you cause to be filed in the Registry of the Supreme Court of Newfoundland and Labrador at St. John's a defence and unless within the same time a copy of your defence is served upon the Plaintiff or the Plaintiff's Solicitor at the Plaintiff's Solicitors stated address for service.

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 the Plaintiff's Solicitor within 10 days from the service of this notice upon you, then proceeding will be stayed.

TO: THE DEFENDANTS
Cadbury Adams Canada Inc.
Toronto, ON

Mars, Incorporated
McLean, Virginia, USA

Mars Canada Inc.
Bolton, ON

Hershey Company
Hershey, Pennsylvania, USA

Hershey Canada Inc.
Mississauga, ON

Nestle Canada Inc.
Toronto, ON

ITWAL Limited
Brampton, ON