

CITATION: Osmun v. Cadbury Adams Canada Inc., 2010 ONSC 2643

COURT FILE NO.: 08-CV-347263PD2

DATE: 20100505

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

)
) *Harvey T. Strosberg Q.C. and Charles M.*
) *Wright, for the plaintiffs*

)
) *Scott Maidment and Adrienne Boudreau, for*
) *the defendants The Hershey Company and*
) *Hershey Canada Inc.*

)
) *Christopher P. Naudie and Jean-Marc*
) *LeClerc, for the defendant Cadbury Adams*
) *Canada Inc.*

)
) *Catherine Beagan Flood and Iris Antonios,*
) *for the defendant Nestle Canada Inc.*

)
) *Don Houston and Randy Hughes, for the*
) *defendant ITWAL Limited*

)
) *Sandra Forbes and Davit D. Akman, for the*
) *defendants Mars Incorporated and Mars*
) *Canada Inc.*

)
) **HEARD:** April 21, 2010

Proceedings under the *Class Proceedings Act, 1992*

REASONS FOR DECISION – SETTLEMENT APPROVAL

G.R. STRATHY J.

[1] This is a motion by the plaintiffs for approval of a partial settlement with two of the defendants, Cadbury Adams Canada Inc. ("Cadbury") and ITWAL Limited ("ITWAL"). For the reasons that follow, I approve the settlement.

[2] On December 30, 2009, I certified this action against Cadbury and ITWAL, on consent, for the purposes of settlement: *Osmun v. Cadbury Adams Canada Inc.*, [2009] O.J. No. 5566.

[3] Notice of the certification and of this approval hearing has been given to the class. The deadline for written objections to the settlement agreement was April 11, 2010. There have been no objections delivered. The deadline to submit written requests to opt out of the action was April 13, 2010. No class members have opted out. The settlement is opposed by the defendants The Hershey Company and Hershey Canada Inc. (together, "Hershey"), primarily on the basis of the terms of the bar order. Other concerns, detailed below, have been expressed by counsel for Mars Incorporated and Mars Canada Inc. (together, "Mars").

Background

[4] The plaintiffs allege that the defendants conspired to fix, and did fix, maintain or stabilize prices of chocolate confectionary products in Canada, and that ITWAL engaged in price maintenance. The defendants, other than ITWAL, are manufacturers of chocolate confectionary products. ITWAL operates a retail and wholesale foodservice distribution network, and was a major purchaser and distributor of chocolate confectionary products during the relevant period.

[5] Companion proceedings have been commenced across Canada. This action, together with the British Columbia action titled *Jacob Stuart Main v. Cadbury Schweppes plc, Cadbury Adams Canada Inc., Mars, Incorporated, Mars Canada Inc. formerly known as Effem Inc., The Hershey Company, Hershey Canada Inc., Nestlé S.A., Nestlé Canada Inc. and ITWAL Limited* (Vancouver Registry) (Court File No. S078807) and the Quebec action titled *Gaetan Roy v. Cadbury Adams Canada Inc., Hershey Canada Inc., Mars Canada Inc., Nestlé Canada Inc.* (File No. 200-06-000094-071), will be referred to as the "Main Proceedings."

The Settlement Agreements

[6] The plaintiffs in the Main Proceedings have entered into separate settlements with Cadbury, dated October 14, 2009 and with ITWAL, dated October 6, 2009 (the "Settlement Agreements"). Cadbury and ITWAL will be referred to as the "Settling Defendants" or "SDs." The Settlement Agreements are subject to court approval in Ontario, British Columbia and Quebec. Cadbury retained the right to terminate its settlement agreement if a pre-defined "opt out threshold" was exceeded. If the settlement is not approved, or is terminated by one of the SDs, the action will proceed as a contested proceeding and the SDs will be entitled to contest certification. If the Settlement Agreements are approved, the Main Proceedings will continue against the remaining defendants (referred to as the "Non-Settling Defendants" or "NSDs").

[7] Other proceedings have been commenced in Canada regarding alleged price-fixing in the chocolate confectionary industry (the "Additional Proceedings"). The plaintiffs in the Additional Proceedings have agreed to resolve their claims as part of the Settlement Agreements. The plaintiffs in the Additional Proceedings have agreed that, upon the Settlement Agreements becoming effective, the Additional Proceedings will be dismissed without costs and with prejudice against the SDs and other Releasees.

[8] The Settlement Agreements are detailed and complex. Among other things, under the Cadbury settlement agreement:

- a. Cadbury agreed to pay CDN \$5,700,000 to the class. On November 5, 2009, Cadbury paid \$5,795,695.60, being the settlement amount, plus pre-deposit interest at a rate of 2.5% per annum from February 5, 2009. Class counsel deposited these monies in an interest-bearing trust account. As of April 12, 2010, after payment of the costs of distributing the notice, the balance in the trust account was \$5,655,431.33.
- b. Cadbury is required to cooperate with the plaintiffs to aid them in pursuing their claims against the non-settling defendants. Cadbury is required to:
 - i. provide an evidentiary proffer;

- ii. produce relevant documents, including transactional data and price announcements; and
 - iii. make available current and (if reasonably necessary) former directors, officers or employees of Cadbury for interviews with counsel in the Main Proceedings and/or experts retained by them, to provide testimony at trial, and/or affidavit evidence.
- c. Cadbury will pay for the cost of the notice program in excess of \$250,000. Counsel estimate that Cadbury will be required to pay at least \$16,000 towards the cost of notice.
- d. Cadbury has the right to terminate the Cadbury Settlement Agreement should opt outs exceed a certain threshold. As noted, there have been no opt outs.

[9] The ITWAL settlement agreement provides:

- a. ITWAL will assign to or for the benefit of the settlement class any claim it has against the NSDs in relation to the purchase, sale, pricing, discounting, marketing, or distribution of chocolate products (as defined). On the basis of this assignment, the plaintiffs will claim damages against the NSDs based on the sale of all chocolate products in Canada including those sold to and through ITWAL.
- b. ITWAL will cooperate with the plaintiffs in pursuing the claims against the NSDs; and,
 - i. ITWAL will produce copies of relevant "Take Action Now" notices, transactional data, and other relevant documents that are reasonably necessary for the prosecution of the Main Proceedings;
 - ii. Glenn Stevens, the President and Chief Executive Officer of ITWAL will make himself available for an interview with counsel in the Main Proceedings and/or experts retained by them; and
 - iii. If reasonably necessary, ITWAL will make current directors, officers or employees of ITWAL available for testimony at trial and/or to provide affidavit evidence.
- c. ITWAL will pay the costs of notice up to \$25,000.

[10] Upon the Settlement Agreements becoming effective, the Main Proceedings will be dismissed against Cadbury and ITWAL, without costs and with prejudice. Cadbury and ITWAL will receive full and final releases from the settlement class. If approved, these releases will form part of the final settlement approval orders.

The bar order – Pierringer orders

[11] The Settlement Agreements also contain a “bar order,” an ingredient that is common in partial settlements of tort actions in both class actions and ordinary actions. A settling defendant in such an action would not want to settle with the plaintiff, while leaving itself exposed to claims for contribution and indemnity from its co-defendants. A defendant opposing the partial settlement could effectively act as a spoiler of the settlement by maintaining a claim for contribution and indemnity from the settling defendant. In order to promote the settlement of complex multi-party litigation, a device was necessary to permit the plaintiff to settle with one or more defendants who want to settle, while maintaining the action against one or more defendants who do not want to settle. The device that has been crafted, and approved by the courts, is referred to as a “*Pierringer* agreement.”¹ Under such an agreement, the settling defendants agree to pay the plaintiff to pay a sum that is a compromise of their proportionate share of the plaintiff’s claim. The court grants an order barring the non-settling defendants from seeking contribution and indemnity from the settling defendants. In return for this, the plaintiff is permitted to continue the action against the non-settling defendants, but only for the proportion of the damage for which they are directly responsible.

[12] The authority to make an order giving effect to a *Pierringer* agreement, referred to as a “bar order,” arises from s. 12 of the *C.P.A.*, which provides that “[T]he court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.” As well, s. 13 provides that “[T]he court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate”: see *Ontario*

¹ After *Pierringer v. Hoger*, 124 N.W. 2d 106 (Wis. S.C. 1963).

New Home Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130, [1999] O.J. No. 2245 (S.C.J.) at paras. 40, 41, 75, 76. It is well-settled that the bar order cannot interfere with the substantive rights of the non-settling defendants: *Amoco Canada Petroleum Co. v. Propak Systems Ltd.*, above.

[13] *Pierringer* agreements have been frequently approved by Canadian courts in class proceedings and individual actions: *Manitoba (Securities Commission) v. Crocus Investment Fund*, 2006 MBQB 276, 28 B.L.R. (4th) 228 (Q.B.) at paras. 29-30; *Amoco Canada Petroleum Co. v. Propak Systems Ltd.*, 2001 ABCA 110, 200 D.L.R. (4th) 667 at 673-675; *M.(J.) v. B.(W.)* (2004), 71 O.R. (3d) 171, [2004] O.J. No. 2312 (C.A.) at para. 31; *Hudson Bay Mining and Smelting Co. v. Fluor Daniel Wright* (1997), 12 C.P.C. (4th) 94, 120 Man. R. (2d) 214 (Q.B.) at para. 26.

[14] There are a number of cases, including price-fixing cases, in which bar orders have been approved by this court: *Gariepy v. Shell Oil Co.* (2002), 26 C.P.C. (5th) 358, [2002] O.J. No. 4022 (S.C.J.); *Furlan v. Shell Oil Co.*, 2002 BCSC 1577, 25 C.P.C. (5th) 363; *Toronto Transit Commission v. Morganite Canada Co. (c.o.b. National Electrical Carbon Canada)* (2007), 47 C.P.C. (6th) 179, [2007] O.J. No. 448 (S.C.J.) at paras. 26, 36; *Randall Klein Inc. v. Nan Ya Plastics Corp. et al* (14 June 2005), London 41309CP, (Ont. S.C.J.)

[15] In the partial settlement of a typical class action involving the negligence of several defendants, the following form of bar order has been used, to limit the plaintiff's claim against the non-settling defendants to their several liability:

The Plaintiffs shall not make joint and several claims against the Non-Settling Defendants but shall restrict their claims to several claims against each of the Non-Settling Defendants such that the Plaintiffs shall be entitled to receive only those damages proven to have been caused by each of the Non-Settling Defendants.

See: *Gariepy v. Shell Oil Co.*, above, at para. 19; *Ontario New Home Warranty Program v. Chevron Chemical Co.*, above, at para. 36.

[16] In this case, the proposed form of bar order in Ontario and British Columbia, as set out in the Cadbury settlement agreement, is in the following terms:

(1) The Main Plaintiffs in the Ontario Proceeding and the BC Proceeding shall seek a bar order from the Ontario and BC Courts providing for the following:

(a) all claims for contribution, indemnity or other claims over, whether asserted or unasserted or asserted in a representative capacity, inclusive of interest, taxes and costs, relating to the Released Claims (including, without limitation, the ITWAL Claims held and released by the Settlement Class as Released Claims), which were or could have been brought in the Main Proceedings or otherwise, by any Non-Settling Defendant or any other Person or party, against a Releasee, or by a Releasee against a Non-Settling Defendant, are barred, prohibited and enjoined in accordance with the terms of this section (unless such claim is made in respect of a claim by an Opt Out);

(b) a Non-Settling Defendant may, upon motion on at least ten (10) days notice to counsel for the Settling Defendants, and not to be brought unless and until the action against the Non-Settling Defendants has been certified and all appeals or times to appeal have been exhausted, seek an order from one or more of the Ontario and BC Courts for the following:

(A) documentary discovery and an affidavit of documents in accordance with the relevant rules of civil procedure from Cadbury Adams Canada;

(B) oral discovery of a representative of Cadbury Adams Canada, the transcript of which may be read in at trial;

(C) leave to serve a request to admit on Cadbury Adams Canada in respect of factual matters; and/or

(D) the production of a representative of Cadbury Adams Canada to testify at trial, with such witness to be subject to cross-examination by counsel for the Non-Settling Defendants.

Cadbury Adams Canada retains all rights to oppose such motion(s).

(c) To the extent that that an order is granted pursuant to section 8.1(1)(b) and discovery is provided to a Non-Settling Defendant, a copy of all discovery provided, whether oral or documentary in nature, shall timely be provided by Cadbury Adams Canada to the Main Plaintiffs and Class Counsel; and

(d) a Non-Settling Defendant may effect service of the motion(s) referred to in section 8.1(1)(b) on Cadbury Adams Canada by service on counsel of record for Cadbury Adams Canada in the Main Proceedings.

(2) If the Courts ultimately determine there is a right of contribution and indemnity between co-conspirators, the Main Plaintiffs in the Ontario Proceeding and the BC Proceeding and the Settlement Class Members in the Ontario Proceeding and the BC Proceeding shall restrict their joint and several claims against the Non-Settling Defendants such that the Main Plaintiffs in the Ontario Proceeding and the BC Proceeding and the Settlement Class Members in the Ontario Proceeding and the BC Proceeding shall be entitled to claim and recover from the Non-Settling Defendants on a joint and several basis, only those damages, if any, arising from and allocable to the conduct of and/or sales by the Non-Settling Defendants. [emphasis added]

[17] The terms of the proposed ITWAL bar order are substantially the same.

[18] The reason for the underlined language, which is contentious, is that the law in Canada is uncertain about whether there is a right to contribution and indemnity between intentional tortfeasors, particularly where their conduct is alleged to be a criminal conspiracy: see *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3 at para. 67.

[19] For this reason, the plaintiffs in this case, like plaintiffs in other price-fixing cases, want to preserve their right to pursue the NSDs based on their joint liability for the plaintiffs damages, should it be determined that there is no right to contribution and indemnity between criminal co-conspirators. This is why para. 2 of the proposed bar order provides that “If the Courts ultimately determine there is a right of contribution and indemnity between co-conspirators ...” the plaintiffs will only be able to claim damages “arising from and allocable to the conduct of and/or sales” of the NSDs.

[20] I will return to the subject of the proposed bar order later in these reasons.

The Position of the Defendants

Hershey's Position

[21] Hershey objects to the settlement because it says that the terms of the bar order permit the plaintiffs to sue the NSDs for the profits wrongfully earned by the SDs while at the same time depriving the NSDs of their substantive right to seek apportionment, contribution and indemnity from those parties. It says that, unlike the typical “symmetrical” bar order in a *Pierringer*

settlement, which releases the SDs but limits the plaintiff's claim against the NSDs to their own proportionate share of liability, the proposed settlement in this case is "asymmetrical". Hershey says that the settlement should not be approved because it deprives the NSDs of their substantive rights, allows Cadbury to retain unlawful profits while transferring liability for them to the NSDs, and it is generally unfair to them because it treats them differently from the SDs. I will discuss this objection in more detail below.

Mars' Position

[22] Mars raises several issues with respect to the settlement. I will identify them here and will also set out the disposition of these issues, which is largely the result of agreement between counsel.

(1) The ITWAL Assignment

[23] Mars raises questions about the validity of the assignment of ITWAL's claims to the plaintiffs. These questions include whether the assignment is champertous and whether there is any right to assign a claim that is associated with the assignor's own illegal behaviour: *Frederickson v. Insurance Corporation of British Columbia* (1985), 64 B.C.L.R. 301, 1986 CarswellBC 131, at paras. 26 and 36-37 (C.A.), aff'd [1988] 1 S.C.R. 1089, 1988 CarswellBC 697; *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, [1983] S.C.J. No. 33 at pp. 473, 475-479. Plaintiffs' counsel acknowledges that there may be some defences to the assignment and to ITWAL's underlying claims. The parties agree that these issues do not have to be resolved at this time. The NSDs are at liberty to raise these and other issues relating to the ITWAL assignment at any time in the future. I leave it to counsel to agree on and propose the terms of the order to give effect to this acknowledgment.

(2) The fate of the Additional Proceedings and other actions

[24] Ms. Forbes on behalf of Mars expressed the concern that the proposed settlement approval orders contemplate that the Additional Proceedings will be dismissed against the SDs but will continue against the NSDs, without the benefit of a bar order, causing potential unfairness to the NSDs. She also notes that the Settlement Agreements provide that any person

who falls within the settlement class, and has commenced another action, but has not opted out of the Main Proceedings, is deemed to have agreed to the dismissal of that other action as against the SDs. Mars submits that by not opting out, the class members are required to pursue any claims they have against the NSDs in the Main Proceedings and not through other actions and there should be an order to this effect.

[25] I was advised that counsel are continuing to discuss the resolution of these issues. I will therefore defer consideration pending counsel either proposing a solution or reaching an impasse.

(3) Cadbury Holdings Limited

[26] Cadbury Holdings Limited (“Cadbury Holdings”) is not a defendant in this action or in the Quebec action, but it is a defendant in the British Columbia action. For this reason, it is a signatory to the Cadbury settlement agreement. Mars submits that both Cadbury and Cadbury Holdings should be identified as an SD in the settlement approval order and the NSDs should have the right to bring a motion for discovery of both Cadbury entities. Counsel for Cadbury acknowledges that such an order is appropriate. I agree.

(4) The Bar Order

[27] Ms. Forbes made other submissions with respect to the bar order, the details of which I will discuss below.

The Plaintiffs’ Response

[28] Mr. Strosberg on behalf of the plaintiffs points to the enormous value of obtaining the cooperation of a “whistleblower” in conspiracy class actions. Leniency is part of the Competition Bureau’s official policy (see Canadian Competition Bureau’s Immunity Program under the *Competition Act* found online at <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02480.html>). There is nothing wrong in the civil context, he submits, with giving the party who breaks the “icejam” a better deal on settlement than the other defendants who want to defend the case to the hilt. This is particularly the case when the “icebreaker” cooperates with the plaintiff as Cadbury and ITWAL have promised to do here. I accept this general proposition.

[29] Mr. Strosberg also submits that the simple answer to Hershey's objections concerning the bar order is that its claim for contribution and indemnity is statute barred because it has not been asserted and the limitation period has expired. I do not accept this submission. First, in order to come to this determination it would be necessary to make factual inquiries and there is no record before me that would permit me to do so. Second, there are limitation periods in other jurisdictions that appear to be unexpired.

[30] The balance of Mr. Strosberg's submissions have to do with the approval of the settlement and the bar order.

The Test for settlement approval

[31] The plaintiffs refer to *Nunes v. Air Transat A.T. Inc.*, [2005] O.J. No. 2527, 20 C.P.C. (6th) 93 (S.C.J.) at para. 7, in which Cullity J. set out a useful summary of the principles to be applied on a motion for settlement approval:

- (a) to approve a settlement, the court must find that it is fair, reasonable, and in the best interests of the class;
- (b) the resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;
- (c) there is a strong initial presumption of fairness when a proposed settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval;
- (d) to reject the terms of a settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;
- (e) a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. All settlements are the product of compromise and a process of give and take. Settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best

interests of those affected by it when considered in light of the risks and obligations associated with continued litigation;

(f) it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action or simply rubber-stamp a proposed settlement; and

(g) the burden of satisfying the court that a settlement should be approved is on the party seeking approval.

[32] In addition, the plaintiffs refer to the often-cited decisions of Sharpe J., as he then was, in *Dabbs v. Sun Life, Assurance Company of Canada*, [1998] O.J. No.1598 (Gen. Div.) at para. 13; and (1998), 40 O.R. (3d) 429, [1998] O.J. No. 2811 (Gen. Div.) at pp. 439-444; aff'd (1998), 41 O.R. (3d) 97, 165 D.L.R. (4th) 482 (C.A.); leave to appeal to denied [1998] S.C.C.A. No. 372. In the first of the above judgments, Sharpe J. set out a list of factors that are useful in assessing the reasonableness of a proposed settlement. The factors are as follows:

(a) the presence of arm's-length bargaining and the absence of collusion;

(b) the proposed settlement terms and conditions;

(c) the number of objectors and nature of objections;

(d) the amount and nature of discovery, evidence or investigation;

(e) the likelihood of recovery or likelihood of success;

(f) the recommendations and experience of counsel;

(g) the future expense and likely duration of litigation;

(h) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiations;

(i) the recommendation of neutral parties, if any; and

(j) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

[33] It is worth noting, as Sharpe J. himself did, that these factors must not be applied in a mechanical way. They are no more than a guide to the process. It is not necessary for all factors

to be present, nor is it necessary that the factors be given equal weight. Some factors may be given greater significance, while others might be disregarded, depending on the circumstances of the case.

[34] The court cannot modify the terms of a proposed settlement. The court can only approve or reject the settlement. In deciding whether to reject a settlement, the court should consider whether doing so could de-rail the settlement negotiations. There is no obligation on parties to resume discussions and it may be that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort. This result would be contrary to the widely-held view that the resolution of complex litigation through settlement is encouraged by the courts and favoured by public policy: *Semple v. Canada (Attorney General)*, 2006 MBQB 285, 40 C.P.C. (6th) 314 at para. 26; *Ontario New Home Warranty Program v. Chevron Chemical Co.*, at paras. 69, 70.

[35] I will examine below what I regard as the most important factors supporting approval of the settlement in this case.

The settlement terms and conditions are favourable to the class

[36] I have set out above the key terms of the settlement. In this case, the court is dealing with a partial settlement that resolves the plaintiffs' claims against two of the defendants but leaves three remaining defendants in the action. There are direct financial benefits from the settlement, in that there will be a significant monetary recovery for the class. In addition, securing the cooperation of Cadbury and ITWAL is an important and immeasurable non-pecuniary benefit. This would be significant in any case, but in a conspiracy action, where the allegation is that the defendants share a dark secret, obtaining the cooperation of two of the alleged conspirators to assist the plaintiff in pursuing the alleged co-conspirators is of inestimable value. Cooperation of non-settling defendants has been considered to be an important factor in other cases: *Crosslink Technology, Inc. v. BASF Canada et al.*, (November 30, 2007), London, 50305CP (Ont. S.C.J.) at p. 8, paras. 22, 23 (unreported); *Nutech Brands Inc. et al. v. Air Canada et al.*, (19 February 2009), London, 50389CP (S.C.J.) at paras. 29-30, 36-37.

[37] Tactically, the settlement is beneficial to the Class, because it reduces the size of the opposition, simplifies the litigation, and drives a potential wedge between the alleged conspirators.

[38] There is a rational and justifiable basis for the *quantum* of the plaintiffs' settlement with Cadbury. It represents approximately 50% of the profits flowing to Cadbury as a result of an average 5.2% increase in its prices on October 31, 2005 and continuing until September, 2007. It represents a reasonable compromise of the plaintiffs' financial claim to reflect litigation risks, other factors contributing to the price increase and the benefit of Cadbury's cooperation in the ongoing action.

[39] ITWAL is a corporation, but it is essentially a cooperative. Its members hold shares in the corporation and any profits are paid out annually. Counsel agree that ITWAL does not have significant assets. It is unlikely that a large judgment against it could be satisfied.

[40] The assignment of ITWAL's claims represents a significant potential value to the settlement class. It is an integral part of the ITWAL settlement agreement. Moreover, the Cadbury settlement agreement is subject to express conditions that require the completion of this assignment under the ITWAL settlement agreement prior to the effective date of the Cadbury settlement. Since ITWAL was a major purchaser of chocolate products during the relevant period, Cadbury required a release of ITWAL's claims as a part of the settlement.

[41] While ITWAL's financial contribution to the settlement is very modest, the benefit of its cooperation is important.

The settlement is the result of a real negotiating process

[42] I am satisfied that the settlement in this case was the process of a real and extensive bargaining process between parties represented by experienced counsel and that the settlement achieved is a real one.

The partial settlement reduces risk of loss and increases prospects of success

[43] Litigation is all about risks. Every party wants to reduce its downside and increase its upside. This partial settlement gives the plaintiffs the best of both worlds. It compromises a difficult, and by no means certain, claim against the SDs in exchange for real money and increased prospects of success against the NSDs. It may well act as an incentive to some of the NSDs to settle the claim, either individually or as a group.

There has been no objection to the settlement

[44] It is significant that there has not been a single objection or opt-out. No class member opposes the settlement. There has been extensive advertising of the settlement and members of the class include large and sophisticated corporations.

The settlement comes with the recommendations of experienced class counsel

[45] When class counsel presents a negotiated settlement to the court for approval, it is almost invariable that it will bear counsel's seal of approval. One might ask, therefore, why the recommendation of class counsel should be a factor. The answer is threefold. First, counsel has a duty to the class as a whole and not just to the representative plaintiffs. Counsel has to keep this responsibility in mind in recommending a settlement. Second, having been appointed by the court, counsel owes a duty to the court, including a duty to identify any limitations of the settlement. That duty has been fulfilled in this case. Third, counsel is uniquely situated to assess the risks and benefits of the litigation and the advantages of any settlement. In the case of a partial settlement, counsel is best situated to make the kind of judgment call involved in assessing the benefits obtained in exchange for releasing a party from the litigation. Class counsel in this case have extensive experience in class proceedings, including considerable experience in price-fixing cases. Their recommendation carries considerable weight.

[46] I am entirely satisfied that from the perspective of the settlement class, the settlement is fair, reasonable and in their best interests. The remaining question, however, is whether the proposed bar order is fair to the NSDs. It will not be fair if it affects their substantive rights.

Is the bar order unfair to the NSDs?

[47] There is precedent for a bar order of the kind proposed here in a price-fixing conspiracy case. A similar order was granted by Rady J. in *Irving Paper Limited et al v. Autofina Chemicals Inc. et al*, (September 24, 2008), London, 47026 (S.C.J.). The order was the result of a partial settlement. It appears that in that case the NSDs took no position with respect to the form of order.

[48] Rady J. also made a similar form of order in *Crosslink Technology, Inc. v. BASF Canada*, (November 30, 2007), File 50305CP (S.C.J.). In that case, the NSDs opposed the proposed order, arguing that it was unfair that the plaintiff did not agree absolutely to limit its claims against the NSDs to their proportionate liability, and instead put the onus on the NSDs to obtain a court ruling that there was a right to contribution and indemnity. The NSDs also objected to the use of the term “allocable to the sales or conduct” of the NSDs, which is similar to the language used in the proposed bar order in this case. They contended that this language was an attempt to transfer to the NSDs responsibility for profits made from sales by the SDs, because the conduct of the NSDs in the alleged conspiracy contributed to those profits. The plaintiffs argued that there may well be no right of contribution between criminal co-conspirators engaged in anti-competitive behaviour. They said that in view of the uncertain state of Canadian law on the subject, the bar order should not compromise the plaintiff’s claims against the NSDs any more than was necessary to fairly protect them. The proposed bar order left open the possibility that a court could ultimately determine that a right to contribution and indemnity existed, in which case the plaintiffs’ claim would be limited to the NSDs’ proportionate share. On the other hand, if there was no such right, the plaintiffs would be free to pursue the NSDs for the full extent of the damages caused by the conspiracy.

[49] Rady J. concluded, at paras. 47 – 50, that the proposed bar order was appropriate:

I begin by observing that the litigants agree that it is not settled in Canada whether a right to contribution and indemnity exists between co-conspirators in a price fixing case. It is not necessary for the court to make that determination at this junction.

It seems to me that the proposed wording ... is appropriate in the circumstances of this case for several reasons. First, this is a case involving allegations of what may be criminal or quasi-criminal conduct as well as allegations of tortious behaviour, including conspiracy and intentional interference with economic relations. The law respecting the rights of co-defendants to claim contribution and indemnity in a case such as this is not clear. As a result, it strikes me as inappropriate to craft a bar order based on an assumption that the right exists. The Non Settling Defendants are not prejudiced because their potential rights are not being limited or abrogated. They are simply held in abeyance pending further determination of the court.

With respect to the inclusion of the reference to the conduct of the Non Settling Defendants, it seems to me that the frailty of that argument is that it presumes that the basis of allocating liability is based on share of sales. However, there are other methods for allocating liability, one based on profits, for example. The basis for allocating liability is an open question, and as with the entitlement to contribution and indemnity, remains to be determined by the court.

As a result, I cannot give effect to the objections of the Non Settling Defendants. I am unable to conclude that their ability to fully and fairly defend their position is impaired by the proposed order.

[50] I was also referred to an order made by Leitch R.S.J. in a partial settlement in *Nutech Brands Inc. v. Air Canada et al.* (Court File No. 50389CP) February 18, 2009. The order defined “Proportionate Liability” as follows:

‘Proportionate Liability’ means that proportion of any judgment that, had they not settled, a court or other arbiter would have apportioned to the Settling Defendants and Released Parties, whether pursuant to the *pro rata*, proportionate fault, *pro tanto*, or another method.

[51] The order then provided, in paragraph 13:

(a) Subject to paragraph (b) of this paragraph [which deals with claims in other jurisdictions and is not relevant] all claims for contribution and indemnity or other claims over, whether asserted or unasserted or asserted in a representative capacity, inclusive of interest, taxes and costs, relating to the Released Claims, which were or could have been brought in the Action by any Non-Settling Defendant or any other Person or Party against a Released Party, or by a Released Party against a Non-Settling defendant or any other Person or Party, are barred, prohibited and

enjoined in accordance with the terms of this paragraph (unless such claim is made in respect of a claim by an Opt Out);

[52] Paragraphs 14 and 15 of the order then provided:

14. THIS COURT ORDERS that if, in the absence of paragraph 13 hereof, the Non-Settling Defendants would have the right to make claims for contribution and indemnity or other claims over, whether in equity or in law, by statute or otherwise, from or against the Released Parties:

(a) the Plaintiffs and the Settlement Class Members shall not claim or be entitled to recover from the Non-Settling Defendants that portion of any damages, costs or interest awarded in respect of any claim(s) on which judgment is entered that corresponds to the Proportionate Liability of the Released Parties proven at trial or otherwise;

(b) for greater certainty, the Plaintiffs and the Settlement Class Members shall limit their claims against the Non-Settling Defendants to, and shall be entitled to recover from the Non-Settling Defendants, only those claims for damages, costs and interest attributable to the Non-Settling Defendants' several liability to the Plaintiffs and the Settlement Class Members, if any;

(c) this Court shall have full authority to determine the Proportionate Liability at the trial or other disposition of this Action, whether or not the Released Parties remain in this action or appear at the trial or other disposition, and the Proportionate Liability shall be determined as if the Released Parties are parties to this Action for that purpose and any such finding by this Court in respect of the Proportionate Liability shall only apply in this Action and shall not be binding upon the Released Parties in any other proceedings.

15. THIS COURT ORDERS that if, in the absence of paragraph 13 hereof, the Non-Settling Defendants would not have the right to make claims for contribution and indemnity or other claims over, whether in equity or in law, by statute or otherwise, from or against the Released Parties, then nothing in this Order is intended to or shall limit, restrict or affect any arguments which the Non-Settling Defendants may make regarding the reduction of any judgment against them in the Action.

[53] I have reproduced the terms of this order in detail because it appears to have been the product of negotiation between sophisticated parties, represented by very experienced counsel in class proceedings, some of whom are involved in this action. There is much to commend these terms and I shall return to them later in these reasons.

[54] I have set out above the substance of Hershey's opposition to the bar order in this case. Hershey says that the order is unfair because there is no symmetry between what each party gives up. The NSDs lose the right to claim contribution and indemnity from the SDs, but in return the plaintiffs do not give up the right to claim from the NSDs the profits wrongfully earned by the SDs. Mr. Maidment submits that, under a proper *Pierringer* order, when the SDs are released from the action they take their liability with them and it cannot be transferred to the shoulders of the NSDs.

[55] Mr. Maidment submits that, even if this form of order is permitted by the *C.P.A.*, it should not be granted because it does not promote behaviour modification. He argues that it permits the SDs to keep the fruits of their unlawful activity by entering into a speedy settlement with the plaintiffs and passing the burden of their conduct onto the shoulders of their competitors. He submits that, faced with the potential of massive joint and several liability, with no right of recourse against the SDs, there is enormous and unfair pressure on the NSDs to settle. A bit player, who has small market share, made small profits and whose participation in the acts in question was borderline, will be under enormous pressure to settle in the face of a potentially devastating award of 100% of the damages.

[56] Mr. Maidment's submission is that the *C.P.A.* does not permit the form of bar order proposed in this case because it interferes with the substantive rights of the NSDs. He relies on *Lau v. Bayview Landmark Inc.* (2006), 34 C.P.C. (6th) 138, [2006] O.J. No. 600 (S.C.J.). That proposed class action arose from a failed real estate investment scheme. It was alleged that a real estate firm (the settling defendants) was jointly and severally liable with a law firm (the non-settling defendants) for breach of trust, breach of fiduciary duty and negligence for releasing investment funds to some of the co-defendants. The terms of the proposed settlement did not contain a bar order, barring claims against the non-settling defendants for their joint and several liability. The plaintiffs, who were propounding the settlement, took the position that a bar order was not required because the non-settling defendants had not made cross-claims against the settling defendants and, in the absence of such claims, there was no reason to limit the claims of the plaintiffs to the several liability of the non-settling defendants.

[57] C.L. Campbell J. refused to approve the settlement in the form sought by the plaintiffs – i.e., without a bar order. He noted that the defendants might be liable as concurrent tortfeasors rather than joint tortfeasors, but in any event he concluded that the failure to include a bar order would prejudice the non-settling defendants' rights. With the settling defendants out of the action, the non-settling defendants would be deprived of the right to shift responsibility for the plaintiffs' loss to the settling defendants and to distinguish their conduct from the conduct of the settling defendants. They would be deprived of the ability to assert crossclaims in the future, which they might have deferred doing for tactical reasons. He concluded that the absence of a bar order would cause unfairness at paras. 18-21:

I have concluded that the non-settling Defendants cannot procedurally or substantively be put back in the position that they would have been if there were no settlement, for the purposes of fully advancing their defence without any opportunities to amend pleadings and cross-claim, neither of which are before me or permitted in the agreement between the settling parties.

I accept the general premise of settlement of actions in part where settlement in whole may not be possible. Partial settlement can well result in shortened, less expensive trials and may well be the precursor to a full settlement. In this situation, the settlement sought by the Plaintiffs would deprive the non-settling Defendants of substantive rights.

The Court of Appeal for Ontario has recognized the principle of encouraging settlement in *M. (J.) v. B. (W.)*, [2004] O.J. No. 2312. But in approving what has come to be known as a "Pierringer" agreement, the Court adopted the proposition that such partial settlements must achieve "the goal of the proportionate share agreement [being] to limit the liability of the non-settling party to its several liability." ..

The Court of Appeal in *M. (J.)* confirmed that while apportionment of liability may be made at trial even though there is an absent defendant through settlement, that process must not create an unfairness. In my view, the settlement here as proposed without a bar order would create an unfairness.

[58] I respectfully agree with the conclusion of Campbell J. on the issues before him. I do not, however, consider that this case is authority for the proposition that it was lack of "symmetry" that made the settlement objectionable – it was the fact that the settlement prejudiced the NSDs' substantive rights. It left them jointly liable for all the plaintiffs' damages without the

corresponding right of contribution from the SDs. In this case, if it is ultimately found that there is a right of contribution from the SDs, the plaintiffs' damages will be confined to the NSDs' proportionate share. If it is found that, because of the nature of their conduct, there is no right of contribution, the NSDs may be exposed to the plaintiffs' entire damages. In the latter instance, there is no prejudice to their substantive rights because it will have been determined that the NSDs have no right to contribution and indemnity and the plaintiffs have the right to sue whomsoever they choose.

[59] Mr. Maidment submits that the decision of Rady J. in *Crosslink Technology, Inc. v. BASF Canada*, above, is wrong because the uncertainty in the state of the law should not be a reason for depriving the NSDs of their substantive rights. He refers to *Hunt. v. Carey*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 at para. 33 in support of the proposition that a party should not be "driven from the judgment seat" because of the uncertain state of the law or the novelty of the issue before the court. He says that the language of s. 1 of the *Negligence Act*, R.S.O. 1990, c. N.1, permitting apportionment, contribution and indemnity between defendants "in the degree in which they are respectively found to be at fault or negligent" means that there is a right to contribution in the case of intentional faults: *Bell Canada v. COPE (Sarnia)* (1980), 31 O.R. (2d) 571, [1980] O.J. No. 3882 (C.A.), affg. (1980), 11 C.C.L.T. 170, [1980] O.J. No. 69 (H.C.J.); *Bains v. Hofs* (1992), 76 B.C.L.R. (2d) 98, [1992] B.C.J. No. 2709, at para. 26 (S.C.); *Brown v. Cole* (1995), 43 C.P.C. (3d) 111, 14 B.C.L.R. (3d) 53 at para. 20 (C.A.); see also, *Rabideau v. Maddocks* (1992), 12 O.R. (3d) 83, [1992] O.J. No. 2850 (Gen. Div.).

[60] It of some interest that the United States Supreme Court has held that there is no right to contribution between co-conspirators under U.S. antitrust legislation: *Texas Industries v. Radcliff Materials*, 451 U.S. 630, 646 (1981). I also note a decision of Senior Master Rodgers in *Standard International Corporation et. al. v. Morgan et al.*, [1967] 1 O.R. 328, [1967] O.J. No. 932 (H.C.J.) at para. 12, in which it was held, relying on *Hollebone v. Barnard*, [1954] O.R. 236, [1954] 2 D.L.R. 278, that the words "fault or negligence" in the *Negligence Act* were synonymous and simply mean "negligence" and that there is no right of contribution between co-conspirators.

[61] The decision in *Hollebone v. Barnard*, was not followed by Linden J. in *Bell Canada v. Cope (Sarnia)*, a decision that was affirmed by the Court of Appeal. That case was one of both trespass and negligence. The Court of Appeal adopted the conclusion of Linden J. that:

Fault and negligence, as these words are used in the statute, are not the same thing. Fault certainly includes negligence, but it is much broader than that. Fault incorporates all intentional wrongdoing, as well as other types of substandard conduct. In this case, both intentional and negligent wrongdoing were satisfactorily proved.

[62] In *Blackwater v. Plint*, above, the Supreme Court of Canada expressly left the issue open for another day, at para. 67:

It remains an open question whether the term "fault" in the *Negligence Act* includes vicarious liability. Fault has been held not to include intentional torts and torts other than negligence: e.g., *Chernesky v. Armadale Publishers Ltd.*, [1974] 6 W.W.R. 162 (Sask C.A.); *Funnell v. C.P.R.*, [1964] 2 O.R. 325 (H.C.). Other cases hold the contrary: *Bell Canada v. Cope (Sarnia) Ltd.* (1980), 11 C.C.L.T. 170 (Ont. H.C.); *Gerling Global General Insurance Co. v. Siskind, Cromarty, Ivey & Dowler* (2004), 12 C.C.L.I. (4th) 278 (Ont. Sup. Ct. J.). However, it is not necessary to resolve this dispute. If vicarious liability amounts to "fault" under the *Negligence Act*, the trial judge's conclusion that Canada was 75% at fault would amount to a finding that fault could be apportioned, with the result that s. 1(2) would not apply to impose an equal allocation. On the other hand, if vicarious liability is not "fault" under the Act, then the Act does not apply. In this case, liability may be assigned at common law, with the same result.

[63] Mr. Maidment has pointed to some interesting commentaries on the social and economic desirability of the fair apportionment of responsibility for conspiracies in restraint of trade and allowing contribution between co-conspirators: Robert P. Taylor, "*Contribution: Searching for Fairness in a Procedural Thicket*" (1980) 49 Antitrust L. J. 1029 at 1031; Council of the Section of Antitrust Law, "*Report of the Section on Proposed Amendment of the Clayton Act to Permit Contribution in Damage Actions*" (1980) 49 Antitrust L. J. 291 at 293. As fascinating as these issues are, the parties agree that I cannot and need not resolve them at this time.

[64] Mr. Maidment submits, however, that the effect of postponing the determination of this issue is to make his clients “immediately and presumptively liable” for the overcharges of ITWAL and Cadbury. As he puts it in his factum:

As a practical matter, the complete release of the SDs means that the SDs' liability is *immediately* and presumptively transferred to the NSDs. Moreover, the NSDs' substantive right to apportionment and contribution is *immediately* and presumptively abrogated and replaced by a vague proviso that has been specially formulated by the plaintiffs and has never been the subject of any proper judicial interpretation or application in any trial.

[65] In my view, this overstates the effect of the proposed order. The order does not transfer liability, presumptively or otherwise. It simply leaves that determination for another day. While it may leave the NSDs in some uncertainty concerning their rights of indemnity, that uncertainty existed from the commencement of this litigation in view of the unsettled state of the law.

[66] Finally, as I have noted, Mr. Maidment submits that if there is jurisdiction to make the order, it should not be granted because it does not promote behaviour modification and it is unfair to his clients because it puts them under extreme pressure to settle the case. On the former point, he says that permitting this type of settlement will give an incentive to the most culpable conspirator to settle the case and to shift its share of the responsibility to the less culpable. The court's approval of the settlement would create an environment in which the parties whose behaviour is most in need of modification are rewarded for their wrongdoing. On the latter point, he says that the settlement is not fair and reasonable when viewed from the perspective of the NSDs because it will place pressure on innocent defendants to settle the case to avoid a crushing liability – see Robert P. Taylor, *"Contribution: Searching for Fairness in a Procedural Thicket"*, above at 1033; Joseph Angland, *"Joint and Several Liability, Contribution, and Claim Reduction"* (2008) *New Directions in Antitrust Law and Policy* at 2372, 2380-2382.

[67] Whatever the force that Mr. Maidment's submissions might have in another case, on the facts of this case they are not persuasive. First, I am satisfied that the settlement with Cadbury results in a substantial financial penalty that is rationally related to the benefits Cadbury received from the price increases at issue. That, coupled with the promise of cooperation and the publicity

attached to the settlement, accomplishes the behaviour modification goals of class proceedings. This is not a case in which the defendant has paid a pittance for the release it has obtained. Second, the NSDs are very substantial manufacturers of chocolate products, nationally and internationally, with large shares in a market they obviously dominate. They are not “bit players” who are likely to be intimidated into an oppressive settlement.

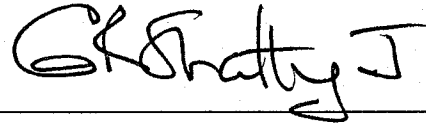
[68] I do have a concern with respect to the language of the proposed bar order that provides that if the courts determine that there is a right of contribution and indemnity the plaintiffs will be entitled to recover from the NSDs “on a joint and several basis, only those damages, if any, arising from and allocable to the conduct of and/or sales by the Non-Settling Defendants.” My concern arises for two reasons. First, I am not sure what “allocable to the conduct” means. Does it mean the same as “the degree in which they are respectively found to be at fault” as used in s. 1 of the *Negligence Act* and, if so, why not simply say so? Second, by referring to “allocable to the ... sales” of the NSDs, it appears to confuse measure of damages with degree of responsibility for damages. I think the problem arises, in part, because there is no clear agreement on the measure of the individual liability of a co-conspirator. It might be more appropriate, for example, to simply use the language of the standard bar order, such as “the damage proven to have been caused by the NSDs.”

[69] I mentioned earlier the terms of the bar order in *Nutech Brands Inc. v. Air Canada*, proposed by Ms. Forbes. It seems to me that an order in that form would remove some of the concerns I have expressed about the bar order currently proposed. As the issue was not fully canvassed on the hearing, I would suggest that counsel discuss the precise form of the order and attempt to resolve the question. I have set aside dates for a continuation of the hearing, and will hear further submissions on the issue at that time, if necessary. The parties may make written submissions prior to the hearing, if they wish to do so.

Conclusion

[70] Subject to the resolution of the issues identified in these reasons, I am prepared to approve the Cadbury settlement and the ITWAL settlement. A case conference should be

arranged, as soon as possible, to discuss the procedure for the resolution of any outstanding issues and to settle the terms of the order.

A handwritten signature in black ink, appearing to read "G.R. Strathy J.", written in a cursive style. The signature is positioned above a horizontal line.

G.R. Strathy J.

Released: May 5, 2010

CITATION: Osmun v. Cadbury Adams Canada Inc., 2010 ONSC 2643
COURT FILE NO.: 08-CV-347263PD2
DATE: 20100505

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

**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

REASONS FOR DECISION –

SETTLEMENT APPROVAL

G.R. Strathy J.

Released: May 5, 2010