

AMENDED THIS 25th DAY OF: JANUARY 2006
PURSUANT TO THE ORDER OF: JUSTICE RADY
DATED THE 10th DAY OF JANUARY 2006
[Signature] **ONTARIO**
LOCAL REGISTRAR, SUPERIOR COURT OF ~~SUPERIOR~~ **SUPERIOR COURT OF JUSTICE**
MODIFIÉ CE 19
CONFORMEMENT A L'ORDONNANCE DE: BETWEEN:
FAIT LE 19 **R.G. GIBSON & SONS LTD.**
GREFFIER LOCAL COUR SUPÉRIEUR DE JUSTICE

Court File No. 46488CP

Plaintiff

- and -

~~BASF CANADA, BASF CORP., BASF A.G., BAYER INC.,
BAYER A.G., BAYER MATERIALSCIENC LLC, formerly known as
BAYER POLYMERS L.L.C., BAYER CORPORATION,
RHEIN CHEMIE GmbH, RHEIN CHEMIE CORPORATION,
CROMPTON CORPORATION, CROMPTON CO., CROMPTON CANADA
CORPORATION, UNIROYAL CHEMICAL COMPANY, INC,
and TSE INDUSTRIES, INC.~~

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$1000.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400.00 for costs and have the costs assessed by the court.

Date February 21, 2005

Issued by " N. TENENBAUM "
Local registrar

Address of court office London Court House
Civil, Landlord/Tenant Section
Group Floor, Unit "A"
80 Dundas Street
London, ON N6A 6A3

TO: BASF CANADA
345 Carlingview Drive
Toronto, ON M9W 6N9
Canada

AND TO: BASF CORP.
3000 Continental Drive North
Mount Olive, NJ 07838-1234
U.S.A.

AND TO: BASF A.G.
Carl-Bosch-Strabe 38
67056 Ludwigshafen, Germany

AND TO: BAYER INC.
77 Belfield Road
Etobicoke, ON M9W 1G6
Canada

AND TO: BAYER A.G.
51368 Leverkusen
Postfach D-51368
Germany

**AND TO: BAYER MATERIALSCIENC LLC,
formerly known as BAYER POLYMERS L.L.C**
100 Bayer Road
Pittsburgh, PA 15205-9741
U.S.A.

- AND TO: BAYER CORPORATION**
100 Bayer Road, Building 4
Pittsburgh, PA 15205-9741
U.S.A.
- AND TO: RHEIN CHEMIE GmbH**
Duesseldorfer Strasse 23-27
68219 Mannheim, Germany
- AND TO: RHEIN CHEMIE CORPORATION**
1014 Whitehead Rd. Ext.
Trenton, NJ 08638
U.S.A.
- AND TO: CROMPTON CORPORATION**
199 Benson Rd.
Middlebury, CT 06749
U.S.A.
- AND TO: CROMPTON CANADA CORPORATION**
3 Glencrest Blvd.
Toronto, Ontario M4B 1L2
Canada
- AND TO: CROMPTON CO. /CIE**
25 Erb St.
Elmira, Ontario N3B 3A3
Canada
- AND TO: UNIROYAL CHEMICAL COMPANY, INC.**
199 Benson Rd.
Middlebury, CT 06749
U.S.A.
- ~~AND TO: TSE INDUSTRIES, INC.~~**
~~4370 112th Terrace N.~~
~~Clearwater, FL 33762~~
~~U.S.A.~~

CLAIM

1. The plaintiff, R.G. Gibson & Sons Ltd., claims on behalf of itself and other persons in Canada who are similarly situated:
 - (a) general damages for conspiracy in the amount of \$30,000,000.00;
 - (b) general damages for intentional interference with economic relations in the amount of \$30,000,000.00;
 - (c) general damages for conduct that is contrary to Part VI of the *Competition Act*, R.S.C. 1985, Chap. C-34 in the amount of \$30,000,000.00;
 - (d) punitive and exemplary damages in the amount of \$5,000,000.00;
 - (e) costs of investigation pursuant to Part VI of the *Competition Act*, R.S.C. 1985, Chap. C-34 s. 36;
 - (f) pre-judgment interest at the rate of 10% compounded annually or as otherwise ordered by the Honourable Court;
 - (g) costs of this action on a solicitor and client basis; and
 - (h) such further and other relief as this Honourable Court awards.

The Plaintiff

2. The plaintiff, R.G. Gibson & Sons Ltd., is a corporation duly registered in Ontario, with its head office in London, Ontario. During the relevant time, at least February, 1998 to December, 2002, the plaintiff purchased polyurethane products which contained polyester polyol in Canada.

The Defendants

- ~~3. BASF Canada is a Federal corporation with its head office in Toronto, Ontario. BASF Canada is an affiliate of BASF Corp., a wholly owned subsidiary of BASF A.G. At all relevant times, BASF Canada manufactured, marketed, sold and/or distributed polyester polyol in Canada.~~
- ~~4. BASF Corp. is a U.S. corporation duly registered in Delaware ("BASF America"). Its principal place of business is in Mount Olive, New Jersey. BASF Corp. At all relevant times, BASF America manufactured, marketed, sold and/or distributed polyester polyol in Canada directly or indirectly through an agent, affiliate or subsidiary.~~
- ~~5. BASF A.G. is a German corporation ("BASF Germany"). It conducts business in Canada both in its own right and through its wholly owned subsidiary, BASF Canada. At all relevant times, BASF Germany manufactured, marketed, sold and/or distributed polyester polyol in Canada directly or indirectly through an agent, affiliate or subsidiary.~~
- ~~6. The business of each of BASF Canada, BASF America, and BASF Germany is inextricably interwoven with that of the other and each is the agent of the other for the purposes of the manufacture, marketing, sale and/or distribution of polyester polyol in Canada and for the purposes of the conspiracy described hereinafter.~~
7. Bayer Inc. is a Federal corporation with its head office in Etobicoke, Ontario ("Bayer Canada"). Bayer Canada is a subsidiary of Bayer A.G. At all relevant times, Bayer Canada manufactured, marketed, sold and/or distributed polyester polyol in Canada.
8. Bayer A.G. is a German corporation with its principal place of business in Germany ("Bayer Germany"). It is the parent company of Bayer Canada. At all relevant times,

Bayer Germany manufactured, marketed, sold and/or distributed polyester polyol in Canada directly or indirectly through an agent, affiliate or subsidiary.

9. Bayer MaterialScience LLC, formerly known as Bayer Polymers L.L.C. ("Bayer Polymers") is a U.S. corporation duly registered in Delaware, and is a subsidiary of Bayer A.G. Its principal place of business is in Pittsburgh, Pennsylvania. Bayer Polymers is the result of the merging of Bayer A.G.'s existing plastic, polyurethane, rubber, coatings and colourant business groups with Bayer Faser GmbH. At all relevant times, Bayer Polymers manufactured, marketed, sold and/or distributed polyester polyol in Canada directly or indirectly through an agent, affiliate or subsidiary.
10. Bayer Corporation ("Bayer America") is a U.S. corporation with its principal place of business in Pittsburgh, Pennsylvania. It is a wholly owned subsidiary of Bayer A.G. At all relevant times, Bayer America manufactured, marketed, sold and/or distributed polyester polyol in Canada directly or indirectly through an agent, affiliate or subsidiary.
11. Rhein Chemie GmbH is a German corporation with its principal place of business in Mannheim, Germany. It is a wholly owned subsidiary of Bayer A.G. At all relevant times, Rhein Chemie GmbH manufactured, marketed, sold and/or distributed polyester polyol in Canada directly or indirectly through an agent, affiliate or subsidiary.
12. Rhein Chemie Corporation is a U.S. corporation, duly registered in New Jersey. Its principal place of business is in Trenton, New Jersey. Rhein Chemie Corporation is a wholly owned subsidiary and/or controlled by Bayer Corporation and/or Rhein Chemie GmbH. At all relevant times, Rhein Chemie Corporation manufactured,

marketed, sold and/or distributed polyester polyol in Canada directly or indirectly through an agent, affiliate or subsidiary.

13. The business of each of Bayer Canada, Bayer Germany, Bayer America, Bayer Polymers, Rhein Chemie GmbH and Rhein Chemie Corporation is inextricably interwoven with that of the other and each is the agent of the other for the purposes of the manufacture, marketing, sale and/or distribution of polyester polyol in Canada and for the purposes of the conspiracy described hereinafter.
14. Crompton Corporation ("Crompton") is a corporation, duly registered in Delaware. Its headquarters and principal place of business are in Middlebury, Connecticut. Crompton has offices in Canada at Elmira, Ontario and Guelph, Ontario. Crompton acquired Uniroyal Chemical Company Inc. ("Uniroyal") in 1996. At all relevant times, Crompton manufactured, marketed, sold and/or distributed polyester polyol in Canada directly or indirectly through an agent, affiliate or subsidiary.
15. Crompton Co. is an extra-provincial corporation. Its principal place of business in Ontario is in Elmira. Crompton Co. is an agent, affiliate and/or subsidiary of Crompton. At all relevant times, Crompton Co. manufactured, marketed, sold and/or distributed polyester polyol in Canada directly or indirectly through an agent, affiliate or subsidiary.
16. Crompton Canada Corporation is a Federal corporation, with its principal place of business in Toronto, Ontario. Crompton Canada Corporation is an agent, affiliate and/or subsidiary of Crompton. At all relevant times, Crompton Canada Corporation manufactured, marketed, sold and/or distributed polyester polyol in Canada directly or indirectly through an agent, affiliate or subsidiary.

17. Uniroyal is a U.S. corporation, duly registered in New Jersey. Its principal place of business is in Middlebury, Connecticut. Since it was acquired by Crompton in 1996, Uniroyal has been a wholly owned subsidiary of Crompton. At all relevant times, Uniroyal manufactured, marketed, sold and/or distributed polyester polyol in Canada directly or indirectly through an agent, affiliate or subsidiary.
18. The business of each of Crompton, Crompton Co., Crompton Canada Corporation and Uniroyal is inextricably interwoven with that of the other and each is the agent of the other for the purposes of the manufacture, marketing, sale and/or distribution of polyester polyol in Canada and for the purposes of the conspiracy described hereinafter.
- ~~19. TSE Industries, Inc., is a U.S. corporation, duly registered in Florida. Its principal place of business is in Clearwater, Florida. At all relevant times, TSE Industries, Inc., manufactured, marketed, sold and/or distributed polyester polyol in Canada directly or indirectly through an agent, affiliate or subsidiary.~~
20. The acts alleged in this complaint to have been done by each defendant were authorized, ordered and done by its officers, directors, agents, employees or representatives while engaged in the management, direction, control or transaction of its business affairs.
21. Various persons and/or firms, not named as defendants herein, may have participated as co-conspirators in the violation alleged herein and may have performed acts and made statements in furtherance thereof.

Factual Background

22. Polyurethane is a subclass of urethane, and is composed of many single urethanes. Polyester polyol is a chemical used in the manufacture of polyurethanes.

Polyurethanes are a versatile family of polymers and are often used with soft rubbery polymers to make block copolymers, which possess properties of thermoplastic elastomers.

23. The named defendants supply a substantial majority of the total volume of polyester polyol sold in North America.

The Conspiracy

24. The plaintiff alleges that the defendants were involved in an unlawful conspiracy as detailed herein.
25. At various times from at least February, 1998 to December, 2002, senior executives and employees of the defendants engaged in telephone conversations and meetings with each other.
26. As a result of these conversations and meetings, the defendants entered into a conspiracy in which they unlawfully agreed to the price at which each company would sell polyester polyol to its customers and to the volume that each company would supply to its customers.
27. In furtherance of the conspiracy, during the relevant time, the following acts were done by the defendants, and their senior executives, employees and agents:
 - (a) They met secretly by telephone and in person to discuss prices and volumes of sales of polyester polyol;
 - (b) They agreed to, and did, fix and maintain prices and coordinate price increases for the sale of polyester polyol;

- (c) They agreed to, and did, allocate the volumes of sales, customers, and markets for polyester polyol among themselves;
 - (d) They agreed to refrain from bidding or to submit intentionally high, complementary and non-competitive bids for particular polyester polyol supply contracts;
 - (e) They exchanged information regarding the prices and volumes of sales of polyester polyol for the purpose of monitoring and enforcing adherence to the agreed-upon prices, volumes of sales and markets;
 - (f) They instructed members of the conspiracy not to divulge the existence of the conspiracy;
 - (g) They took active steps to conceal the unlawful conspiracy from their customers, the authorities, and the public; and
 - (h) They disciplined any corporation that failed to comply with the conspiracy.
28. The defendants were motivated to conspire and their predominant purpose and intention was:
- (a) To harm the plaintiff and members of the public by requiring them to pay artificially high prices for polyester polyol and/or products containing or derived from polyester polyol; and
 - (b) To unlawfully increase their profits on the sale of polyester polyol.
29. The acts particularized in paragraphs 25 to 27 were unlawful acts directed towards purchasers of polyester polyol and/or products containing polyester polyol, including

the plaintiff, which unlawful acts the defendants knew in the circumstances would likely cause injury to those purchasers and plaintiffs and the defendants are liable for the tort of civil conspiracy.

30. Alternatively, the acts particularized in paragraphs 25 to 27 were unlawful acts undertaken by the defendants with the intent to injure purchasers of polyester polyol and/or purchasers of products containing polyester polyol, including the plaintiff, and the defendants are liable for the tort of intentional interference with economic interests.
31. The acts particularized in paragraphs 25 to 27 were also in breach of Part VI of the *Competition Act* and render the defendants liable to pay damages pursuant to s. 26 of the *Competition Act*.
32. On March 15, 2004, the defendant, Crompton, announced that it had been granted conditional amnesty by Canadian, U.S., and European authorities, with respect to an investigation into collusive behaviour in the polyester polyol market. Amnesty is conditioned upon several factors, including Crompton's continued cooperation with the authorities. According to guidelines by the U.S. Department of Justice, conditional amnesty in the U.S. could only have been procured by Crompton's full confession of wrongdoing, and admission of guilt.
33. On September 30, 2004, the U.S. Department of Justice announced that Bayer Corporation agreed to plead guilty for its role in a conspiracy to fix prices of polyester polyol. According to the press release issued by the Department of Justice, the conspiracy took place between 1998 and 2002. Bayer will pay a \$33 million fine for its role in the conspiracy.

34. The plaintiff suffered the following damages:
- (a) The price of polyester polyol has been fixed, raised, maintained and stabilized at artificially high and non-competitive levels;
 - (b) Competition in the sale of polyester polyol has been restrained.
35. During the period covered by this claim, the plaintiff purchased polyurethane products, of which polyester polyol was a component part. By reason of the alleged violations of the *Competition Act* and the common law, the plaintiff paid more for polyurethane products than it would have paid in the absence of the illegal conspiracy and, as a result, it has been injured in its business and property and has suffered damages in an amount presently undetermined.
36. The plaintiff asserts that its damages and those of other persons who are similarly situated are capable of being quantified on an aggregate basis as the difference between the prices actually obtained by the defendants and the prices which would have been obtained in the absence of the unlawful agreements.
37. The plaintiff asserts that the defendants' conduct was high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, wilful, in contumelious disregard of the plaintiffs' rights and the rights of others who are similarly situated, and as such renders the defendants liable to pay aggravated, exemplary and punitive damages.
38. The plaintiff's damages have been suffered in the Province of Ontario.
39. The plaintiff pleads and relies on the *Competition Act*, R.S. 1985, c. 19 (2nd Supp), s.36.

40. The plaintiff pleads and relies on section 17 (g), (h), (o) and (p) of the *Rules of Civil Procedure*, allowing for service ex juris of the foreign defendants. Specifically, this originating process may be served without court order outside Ontario in that the claim is:

- (a) in respect of a tort committed in Ontario (rule 17.02(g));
- (b) in respect of damages sustained in Ontario arising from a tort or breach of contract wherever committed (rule 17.02(h));
- (c) against a person outside Ontario who is a necessary and proper party to this proceeding properly brought against another person served in Ontario (rule 17.02(o)); and
- (d) against a person carrying on business in Ontario (rule 17.02(p)).

41. The plaintiff pleads and relies on the *Class Proceedings Act, 1992*.

42. The plaintiff states that it is representative of persons who purchased polyester polyol or products containing polyester polyol during the relevant time period.

43. The plaintiff proposes that this action be tried at London, Ontario.

DATE: February 21, 2005

Siskind, Cromarty, Ivey & Dowler LLP
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London, Ontario N6A 3V8

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RG Gibson & Sons
Plaintiff and

BASF Canada et al.
Defendants

Court File No: 46488CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at London

Proceeding under the *Class Proceedings Act, 1992*

AMENDED STATEMENT OF CLAIM

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London, ON N6A 3V8

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