

Court File No. 08-CV-347263PD2

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

DAVID OSUM and
METRO (WINDSOR) ENTERPRISES INC.

Plaintiffs

- and -

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

Defendants

Proceeding under the *Class Proceedings Act 1992*

**AFFIDAVIT OF ANDREA DEKAY
(SWORN FEBRUARY 25, 2010)**

I, Andrea DeKay, of the City of London, in the County of Middlesex, **MAKE OATH
AND SAY AS FOLLOWS:**

1. I am a partner with the law firm Siskinds LLP (“Siskinds”), Plaintiffs' counsel herein and as such have knowledge of the matters to which I hereinafter deposed. Where I make statements in this affidavit which are not within my personal knowledge, I have identified the source of that information and belief. All of the information I have deposed to I verily believe to be true.

NATURE OF THE MOTION

2. This motion is made by Class Counsel for an order approving Class Counsel's legal fees and disbursements with respect to settlements entered into with ITWAL Limited

("ITWAL"), and Cadbury Adams Canada Inc. ("Cadbury Adams") and Cadbury Holdings Limited as the successor to Cadbury Schwepps PLC (collectively "Cadbury").

3. The settlement agreements are subject to the approval of the Ontario, British Columbia and Quebec courts. The Ontario fee approval motion is scheduled to proceed immediately following the settlement approval hearing.

BACKGROUND

4. The Plaintiffs commenced the within action by Notice of Action. The statement of claim was filed on February 4, 2008. The claim alleges that the Defendants conspired to fix prices of chocolate confectionary, including boxed chocolates, chocolate bars and seasonal novelties ("Chocolate Products"). The claim further alleges that the Defendants engaged in price maintenance.
5. With the exception of ITWAL, the Defendants are manufacturers of Chocolate Products. ITWAL operates a retail and foodservice wholesale distribution network, and was a major purchaser and distributor of Chocolate Products during the relevant period.
6. Proceedings have been commenced across Canada regarding alleged price-fixing in the chocolate confectionary industry. Approval of the settlement agreements and Class Counsel fees is being sought in this action and the British Columbia action titled *Jacob Stuart Main v. Cadbury Schwepps plc, Cadbury Adams Canada Inc., Mars, Incorporated, Mars Canada Inc. formerly known as Effem Inc., The Hershey Company, Hershey Canada Inc., Nestle S.A., Nestle Canada Inc. and ITWAL Limited* (Vancouver Registry) (Court File No. S078807) (the "BC Action"). Court Approval of the Settlement and Quebec Counsel fees are being sought in the Quebec action titled *Gaetan Roy v. Cadbury Adams Canada Inc., Hershey Canada Inc., Mars Canada Inc., Nestle Canada*

Inc. (File No. 200-06-000094-071) (the "Quebec Action"). Collectively, these actions represent the "Main Proceedings".

7. The plaintiffs in the each of the other proceedings commenced across Canada (collectively 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 Cadbury, ITWAL and other releasees, as defined in the settlement agreements.
8. Only one Additional Proceeding was commenced in Ontario (*Azik Ebert v. Hershey Canada Inc., Mars Inc., Nestle Canada Inc., Cadbury Beverages Canada Inc.*, (Toronto, Court File No. 08-CV-349126CP)). On December 18, 2009, that action was discontinued on a without costs basis.

CLASS COUNSEL TEAM

Counsel in the Main Proceedings

9. The Plaintiffs retained Sutts, Strosberg LLP ("Strosberg") in September 2008 to commence and prosecute an action in relation to the pricing of Chocolate Products. Shortly thereafter, Strosberg and Siskinds (collectively "Ontario Class Counsel") agreed to work together in the prosecution of this action.
10. Harrison Pensa LLP ("HP") was originally part of the group of counsel that was litigating the within action. However, to help avoid duplication and inefficiencies, HP agreed to cease further involvement at least for the time being.
11. Ontario Class Counsel have agreed to work with the law firms of Camp Fiorante Matthews ("Camp") and Branch MacMaster ("Branch"), counsel in the BC Action

(collectively BC Class Counsel), and Siskinds Desmeules avocats LLP, counsel in the Quebec Action ("Quebec Class Counsel"), in pursuing the litigation. Ontario and BC Class Counsel are collectively referred to as "Class Counsel".

Counsel in the Additional Proceedings

12. Class Counsel decided to commence actions in Alberta, Manitoba, Saskatchewan, Newfoundland, Nova Scotia, and New Brunswick. In each of these actions, Branch is working with counsel located in the relevant province.
13. In February 2008, the Merchant Law Group commenced actions in Alberta, British Columbia, Manitoba, and Saskatchewan on behalf of its clients. In April 2008, Class Counsel and the Merchant Law Group agreed to work together in the prosecution of the various actions, with Class Counsel taking the lead. Class Counsel similarly made an agreement with counsel in the *Ebert* action, Juroviesky and Ricci LLP.
14. Attached as Exhibit "A" is a chart identifying counsel in each of the Additional Proceedings. Counsel in the Additional Proceedings are collectively referred to as "Additional Counsel".

SETTLEMENTS ACHIEVED

15. The ITWAL and Cadbury settlements were negotiated separately, but simultaneously. Negotiations spanned over a period of more than 15 months.

Cadbury Settlement Agreement

16. Under the terms of the Cadbury settlement agreement, Cadbury agreed to pay CDN \$5,700,000 for the benefit of settlement class members, plus pre-deposit interest at a rate of 2.5% per annum from February 5, 2009 until the date of deposit. On November 5, 2009, Cadbury paid the settlement amount, plus pre-deposit interest, for a total of CDN

\$5,795,695.60. Thereafter, the settlement amount has been held in an interest bearing trust account by BNY Trust Company. As of January 31, 2010, the settlement amount was valued at CDN \$5,798,792.47, including interest.

17. The settlement agreement permits Cadbury to terminate on account of opt-outs (should the opt-out threshold be exceeded) and claim an opt-refund in respect of each opt-out.
18. Cadbury is required to pay the costs of notice that exceed \$250,000.
19. Under the terms of the Cadbury settlement agreement, Cadbury Adams is required to provide substantial cooperation to the Plaintiffs in the ongoing prosecution of the litigation.

ITWAL Settlement Agreement

20. Under the terms of the ITWAL settlement agreement, ITWAL is required to fully and absolutely assign and transfer to the settlement class any claims that ITWAL and certain related entities have in relation to the purchase, sale, pricing, discounting, marketing, or distributing of Chocolate Products, including any claims relating to alleged unlawful horizontal or vertical anticompetitive conduct. The effect of the assignment is that ITWAL's purchases of Chocolate Products remain at large for the purposes of calculating the damages suffered by settlement class members.
21. ITWAL is required to pay the costs of notice up to \$25,000.
22. ITWAL is required to cooperate with the Plaintiffs in the continued prosecution of the litigation.

NOTICE TO SETTLEMENT CLASS MEMBERS

23. On December 30, 2009, the court ordered the dissemination of a notice of settlement approval hearing. The long-form notice of settlement approval hearing advises putative settlement class members that Class Counsel would collectively be requesting court approval of legal fees in an amount not to exceed 25% of the value of the settlements, plus disbursements and taxes. The long-form notice further advises that fees must be approved by the court and will be paid out of the settlement funds. A copy of the long-form notice is attached as Exhibit "B".

RISKS UNDERTAKEN BY ONTARIO CLASS COUNSEL

24. From the outset, Ontario Class Counsel agreed to pursue this action on a contingent fee basis, accepting responsibility for all costs and seeking court approval for a fee if successful. The retainer agreements entered into with the Plaintiffs confirm that understanding and provide that Ontario Class Counsel will pay all expenses associated with the litigation and will only be paid in the event of success.

25. The retainer agreement entered into with the Plaintiffs, dated December 1, 2007, provides that counsel will be paid any disbursements (not already recovered by the Defendants as costs), plus applicable taxes and interest in accordance with s. 33(7)(c) of the *Class Proceedings Act, 1992*, plus the greater of:

- (a) the base fee increased by a multiplier of 4, less any fees already recovered as costs, plus applicable taxes; or
- (b) if a settlement is reached before examinations for discovery, 30% of the settlement, less any fees already paid, plus applicable taxes.

A copy of the retainer agreement is attached to the Affidavits of David Osmun, sworn October 27, 2009 and Edmond Soulliere, sworn October 26, 2009.

26. The retainer agreement entered into with the plaintiff in the BC Action and BC Class Counsel provides that BC Class Counsel will be paid a percentage of the value of any settlement including any partial settlement, or compensation from any source, pertaining to the Case, or any judgment obtained at trial. The fee shall be payable on all amounts, including prejudgment interest and post judgment interest (amounts awarded by the Court for interest on the judgment before trial and after trial), calculated as 30% of the value of any settlement including any partial settlement or compensation from any source or judgment. Attached hereto as Exhibit "C" is a copy of the retainer agreement entered into between the plaintiff in the BC Action and BC Class Counsel.
27. There have been no guilty pleas or findings in Canada or elsewhere. Although the Competition Bureau is investigating the pricing of Chocolate Products, no charges have been laid since the Bureau's initial searches in late 2007.
28. In undertaking this litigation, Ontario Class Counsel was and continues to be cognizant of the following specific litigation risks:
- (a) the risk that the court will not certify the action. Despite recent favourable decisions certifying price-fixing class actions (both subject to appeal), the law in this area is still in a relatively early stage of its development;
 - (b) procedural risks associated with multi-party litigation;
 - (c) the risk that the court would not agree that an aggregate damage assessment was possible;
 - (d) the risk that individual class members will encounter difficulties proving that damages were not passed on by them or were passed on to them;

- (e) the risk that the court would find that the agreement entered into by the Defendants was ineffective, or that any illegal agreement had little or no effect on prices; and
- (f) even in the event that the Plaintiffs are successful in all phases in the litigation, the Plaintiffs are aware that the Defendants would likely file appeals in respect of multiple issues, thus resulting in a considerable delay in compensation for class members.

TIME AND EXPENSES INCURRED BY COUNSEL

29. I have been provided with dockets from Class Counsel and Additional Counsel. The following chart outlines the time docketed by Class Counsel and Additional Counsel:

Law Firm	Total Docketed Time
Class Counsel	
Siskinds (up to February 16, 2010)	\$204,937.00
Strosberg (up to February 2, 2010)	\$157,303.00
HP (up to February 9, 2009)	\$15,186.00
Camp (up to February 1, 2010)	\$36,520.00
Branch (up to February 7, 2010)	\$31,496.50
Additional Counsel	
The Merchant Law Group (up to Feb 16, 2010)	\$93,292.25
Kapoor, Selnes & Klimm (up to Feb 8, 2010)	\$8,125.00
Ches Crosbie Barristers (up to Feb 12, 2010)	\$14,220.00
Wagners (up to February 8, 2010)	\$8,948.50
Kolthammer Batchelor & Laidlaw LLP (up to Feb 11, 2010)	\$13,133.00
Wilder Wilder & Langtry (up to Feb 9, 2010)	\$7,952.00
Juroviesky and Ricci LLP (up to Feb 21, 2008)	\$23,410.75
Barry Spalding (up to Feb 9, 2010)	\$18,219.75
TOTAL	\$632,743.75

30. The dockets further indicate that the hourly rates and time docketed thus far by primary lawyers/clerks involved in pursuing the litigation are as follows:

Law Firm	Lawyer/Clerk	Hours Worked on File	Current Hourly Rate
Siskinds (as of February 16, 2010)	Charles Wright Called to the Bar in 1995	185.70	\$600.00
	Andrea DeKay Called to the Bar in 2001	126.80	\$475.00
	Linda Visser Called to the Bar in 2006	145.80	\$275.00
	Jennifer Bald Law Clerk	40.80	\$150.00
Strosberg (as of February 2, 2010)	Harvey Strosberg, Q.C. Called to the Bar in 1971	26.60	\$905.00
	Heather Rumble Peterson Called to the Bar in 1985	114.00	\$585.00
	Jay Strosberg Called to the Bar in 2002	98.90	\$410.00
Camp (as of February 1, 2010)	J.J. Camp, Q.C. Called to the B.C. Bar in 1970	16.50	\$650.00
	David Jones Called to the B.C. Bar in 1994	46.30	\$450.00
	Reidar Mogerman Called to the B.C. Bar in 1997	8.30	\$450.00
Branch (as of February 7, 2010)	Ward Branch Called to the B.C. Bar in 1993	28.90	\$400.00
	Luciana Brasil Called to the B.C. Bar in 1999	64.50	\$305.00

31. The dockets provided by Class Counsel and Additional Counsel, together with Siskinds' records, indicate that the following disbursements have been charged since the commencement of the litigation:

Law Firm	Total Disbursements (up to February 16, 2010)
Class Counsel	
Siskinds	\$59,338.39
Strosberg	\$10,129.39
HP	\$32.64
Camp	\$1,894.81
Branch	\$3,947.42
Total of Class Counsel Disbursements	\$75,342.65
Additional Counsel	
The Merchant Law Group	\$4,057.32
Kapoor, Selnes & Klimm	\$118.50
Ches Crosbie Barristers	\$119.50
Wagners	\$541.15
Kolthammer Batchelor & Laidlaw LLP	\$657.20
Wilder Wilder & Langtry	\$41.72
Juroviesky and Ricci LLP	\$121.00
Barry Spalding	\$232.00
Total of Additional Counsel Disbursements	\$5,888.39
TOTAL (Class Counsel and Additional Counsel)	\$81,231.04

32. The disbursements charged by Class Counsel, which constitute the majority of disbursements, can be broken down as follows:

Disbursement	Cost
Accountants Fees	\$250.00
Agent Fees	\$5,178.45
B.C. Online Search	\$51.00
Binding	\$196.35
Copies	\$7,416.86
Corporate Search	\$179.62
Courier	\$395.65
Court Fees	\$531.00
Domain Name	\$75.00
Expert Fees	\$48,266.07
File Opening	\$75.00
Long Distance / Faxes	\$1,281.95
LPIC Levy	\$50.00
Postage	\$478.41
Registry Agent	\$33.00
Research	\$1,379.24
Service	\$457.06
Teranet Search	\$385.00
Travel / Meals / Mileage	\$8,662.96
TOTAL	\$75,342.62

33. Counsel have funded all disbursements associated with advancing this file. No application was made to the Class Proceedings Fund for assistance. If the settlement class had received such disbursement funding, it would now be obligated to repay any financial support provided by the Class Proceedings Fund, plus 10% of the settlement funds received by the Plaintiffs.

CLASS COUNSEL FEE REQUEST

34. No fee is sought in respect of the ITWAL settlement.
35. Class Counsel and Quebec Class Counsel have agreed to collectively request court approval of legal fees in an amount equal to 25% of the Cadbury settlement amount (including accrued interest), plus disbursements and applicable taxes.
36. By agreement amongst Class Counsel and Quebec Class Counsel, 7.2% of the Cadbury settlement amount will be allocated to the Quebec class for the purpose of Quebec Class Counsel's fee application. The remaining settlement amount will be allocated to the Ontario and B.C. classes for the purposes of Class Counsel's fee applications. This allocation will not affect the distribution of the settlement amount to settlement class members.
37. A combined fee award is appropriate in the circumstances given Class Counsel's decision to pursue the proceedings on a national basis, with the litigation being focused in Ontario.
38. The combined fee being sought by Class Counsel is \$1,335,235.12 plus disbursements of \$81,231.04 and applicable taxes in the amount of \$70,729.60, for a total of \$1,487,195.76. BC Class Counsel will be seeking approval of this combined fee from the British Columbia court.
39. A legal fee of \$1,335,235.12 would represent 25% of the portion of the Cadbury settlement amount allocated to the Ontario and B.C. classes for the purposes of Class Counsel's fee applications.
40. The fee request is consistent with the retainer agreements entered into with the plaintiffs in this action and the BC Action.

41. The following chart summarizes the combined legal fees and disbursements being sought with respect to the Cadbury settlement amount:

Cadbury settlement amount	\$5,700,000.00
Plus: Pre-deposit interest	\$95,695.60
Plus: Interest earned (up to January 31, 2010)	\$3,096.87
Less: 44% of interest earned to account for taxes	\$43,468.68
Total recovery under the Cadbury settlement	\$5,755,323.79
Less: 7.2% attributable to the Quebec class	\$414,383.31
Total recovery for the purposes of Class Counsel's fee application	\$5,340,940.48
25% of total recovery for the purposes of Class Counsel's fee application	\$1,335,235.12
Plus: GST on Fees (5%)	\$66,761.76
Plus: Disbursements	\$81,231.04
Plus: Applicable taxes on Disbursements	\$3,967.84
Total Fee Request	\$1,487,195.76

42. Additional Counsel will be paid out of the fees awarded to Class Counsel and will not be seeking additional fees from the courts.

SWORN OR AFFIRMED before)
me at the City of London, in the)
County of Middlesex, this 25th day of)
February, 2010.)


A Commissioner, etc.)


Andrea DeKay)