

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

DAVID OSMUN and
METRO (WINDSOR) ENTERPRISES INC.

Plaintiffs

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

NOTICE OF MOTION

The Plaintiff will make a motion to the court on Wednesday April 21, 2010 at 10:00 a.m. or as soon after as the motion can be heard, before Mr. Justice Strathy at the Court House, 361 University Ave, Toronto, Ontario.

PROPOSED METHOD OF HEARING: This Motion is to be heard

in writing under subrule 37.12(1), on consent;

in writing as an opposed motion under subrule 37.12.1(4);

orally.

THE MOTION IS FOR:

Order for Approval of Cadbury Settlement Agreement (the “Cadbury Order”)

1. An Order and Declaration that, except to the extent they are modified by the Cadbury Order, the definitions set out in the Cadbury Settlement Agreement apply to and are incorporated into the Cadbury Order;

2. A Declaration that the Cadbury Settlement Agreement is fair, reasonable and in the best interests of the Ontario Settlement Class;
3. An Order that the Cadbury Settlement Agreement be approved pursuant to s. 29 of the *Class Proceedings Act, 1992* and shall be implemented in accordance with its terms;
4. A Declaration that the Cadbury Settlement Agreement is incorporated by reference into and forms part of the Cadbury Order and is binding upon the representative plaintiffs and all Ontario Settlement Class Members who have not validly opted-out of this action;
5. An Order and Declaration that, upon the Effective Date, each Ontario Settlement Class Member who has not validly opted-out of this action shall consent and shall be deemed to have consented to the dismissal as against the Releasees of any Other Actions he, she or it has commenced, without costs and with prejudice;
6. An Order and Declaration that, upon the Effective Date, each Other Action commenced in Ontario by any Ontario Settlement Class Member who has not validly opted-out of this action shall be dismissed against the Releasees, without costs and with prejudice;
7. An Order and Declaration that the Order, including the Cadbury Settlement Agreement, is binding upon each Ontario Settlement Class Member who has not validly opted-out of this action including those persons who are minors or mentally incapable and the requirements of Rules 7.04(1) and 7.08(4) of the *Rules of Civil Procedure* are dispensed with in respect of this action;
8. An Order and Declaration that, upon the Effective Date, each Releasor has released and shall be conclusively deemed to have forever and absolutely released the Releasees from the Released Claims (including, without limitation, the ITWAL Claims held and released by the Ontario Settlement Class as Released Claims);
9. An Order that each Releasor shall not now or hereafter institute, continue, maintain or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other Person, any action, suit, cause of action, claim or demand against any Releasee or any other Person who may claim contribution or indemnity, or other claims over relief, from any Releasee in respect of any Released

Claim (including, without limitation, the ITWAL Claims held and released by the Ontario Settlement Class as Released Claims) or any matter related thereto, except for the continuation of the Main Proceedings against the Non-Settling Defendants or unnamed co-conspirators that are not Releasees;

10. An Order and Declaration that the use of the terms "Releasors" and "Released Claims" in the Cadbury Order does not constitute a release of claims by those Ontario Settlement Class Members who are resident in any province or territory where the release of one tortfeasor is a release of all tortfeasors;
11. An Order and Declaration that each Ontario Settlement Class Member who is resident in any province or territory where the release of one tortfeasor is a release of all tortfeasors covenants and undertakes not to make any claim in any way nor to threaten, commence, or continue any proceeding in any jurisdiction against the Releasees in respect of or in relation to the Released Claims (including, without limitation, the ITWAL Claims held and released by the Ontario Settlement Class as Released Claims);
12. An Order that all claims for contribution, indemnity or other claims over, whether asserted, 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 Ontario 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 any Non-Settling Defendant, are barred, prohibited and enjoined in accordance with the terms of the Cadbury Order (unless such claim is made in respect of a claim by a Person who has validly opted-out of this action);
13. An Order that if the Court ultimately determines that there is a right of contribution and indemnity between the Defendants, the Plaintiffs in the Ontario Proceeding and the Ontario Settlement Class Members shall restrict their joint and several claims against the Non-Settling Defendants such that the Plaintiffs in the Ontario Proceeding and the Ontario Settlement Class Members 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;

14. An Order that a Non-Settling Defendant may, on motion to the Court determined as if the Settling Defendant remained a party to this action, and on at least ten (10) days notice to counsel for the Settling Defendant, 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 orders for the following:
- (a) documentary discovery and an affidavit of documents in accordance with the *Rules of Civil Procedure* O.Reg. 194 from the Settling Defendant;
 - (b) oral discovery of a representative of the Settling Defendant, the transcript of which may be read in at trial;
 - (c) leave to serve a request to admit on the Settling Defendant in respect of factual matters; and/or
 - (d) the production of a representative of the Settling Defendant to testify at trial, with such witness to be subject to cross-examination by counsel for the Non-Settling Defendants.

The Settling Defendant retains all rights to oppose such motion(s). Notwithstanding any provision in this Order, on any motion brought pursuant to this paragraph, the Court may make such orders as to costs and other terms as it considers appropriate;

15. An Order that a Non-Settling Defendant may effect service of the motion(s) referred to in paragraph 14 above on the Settling Defendant by service on counsel of record for the Settling Defendant in this action;
16. An Order that for purposes of administration of the Cadbury Order, this Court will retain an ongoing supervisory role and the Settling Defendant and Cadbury Holdings Limited acknowledge the jurisdiction of this Court solely for the purpose of implementing, administering and enforcing the Cadbury Settlement Agreement, and subject to the terms and conditions set out in the Cadbury Settlement Agreement;
17. An Order that, except as provided herein, this Cadbury Order does not affect any claims or causes of action that any Settlement Class Member has or may have against the Non-Settling Defendants or unnamed co-conspirators who are not Releasees in this action;
18. An Order that the Settling Defendant shall have no responsibility or liability relating to the administration, investment, or distribution of the Trust Account;

19. An Order that the Settlement Amount, plus any Pre-Deposit Interest and any accrued interest, be held in trust by the Escrow Agent for the benefit of the Settlement Class, pending further order of the Courts;
20. An Order and Adjudication that, except as aforesaid, this action be dismissed against the Settling Defendant without costs and with prejudice;
21. An Order that approval of the Cadbury Settlement Agreement is contingent upon approval by the Quebec Court and the British Columbia Court and the Cadbury Order shall have no force and effect if such approval is not secured in Quebec and British Columbia;
22. An Order that the Cadbury Order shall be declared null and void in the event that the Settlement Agreement is terminated in accordance with its terms;
23. An Order that the short-form and long-form of the Notice of Settlement Approval be approved substantially in the form attached respectively hereto as Schedule “A” and “B”;
24. An Order that the plan of dissemination for the short-form and long-form of the Notice of Settlement Approval (the “Plan of Dissemination”) be approved in the form attached hereto as Schedule “C”;
25. An Order that the short-form and long-form Notice of Settlement Approval shall be disseminated in accordance with the Plan of Dissemination approved as part of the Cadbury Order; and
26. Such further and other relief as counsel may request and this Honourable Court deem just.

Order for Approval of ITWAL Settlement Agreement (“ITWAL Order”)

1. An Order and Declaration that, except to the extent they are modified by the ITWAL Order, the definitions set out in the ITWAL Settlement Agreement apply to and are incorporated into the ITWAL Order;
2. A Declaration that the ITWAL Settlement Agreement is fair, reasonable and in the best interests of the Ontario Settlement Class;

3. An Order that the ITWAL Settlement Agreement be approved pursuant to s. 29 of the *Class Proceedings Act, 1992* and shall be implemented in accordance with its terms;
4. A Declaration that the ITWAL Settlement Agreement is incorporated by reference into and forms part of the Order and is binding upon the representative plaintiffs and all Ontario Settlement Class Members who have not validly opted-out of this action;
5. An Order and Declaration that, upon the Effective Date, each Ontario Settlement Class Member who has not validly opted-out of this action shall consent and shall be deemed to have consented to the dismissal, as against the Releasees, of any Other Actions he, she or it has commenced, without costs and with prejudice;
6. An Order and Declaration that, upon the Effective Date, each Other Action commenced in Ontario by any Ontario Settlement Class Member who has not validly opted-out of this action shall be dismissed, against the Releasees, without costs and with prejudice;
7. An Order and Declaration that the Order, including the Settlement Agreement, is binding upon each Ontario Settlement Class Member who has not validly opted-out of this action including those persons who are minors or mentally incapable and the requirements of Rules 7.04(1) and 7.08(4) of the *Rules of Civil Procedure* are dispensed with in respect of this action;
8. An Order and Declaration that, upon the Effective Date, each Releasor who has not validly opted-out of this action has released and shall be conclusively deemed to have forever and absolutely released the Releasees from the Released Claims (including without limitation, the ITWAL Claims held and released by the Ontario Settlement Class as Released Claims);
9. An Order that each Releasor who has not validly opted-out of this action shall not now or hereafter institute, continue, maintain or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other Person, any action, suit, cause of action, claim or demand against any Releasee or any other Person who may claim contribution or indemnity from any Releasee in respect of any Released Claim (including, without limitation, the ITWAL Claims held and released by the Ontario Settlement Class as Released Claims) or any matter related thereto, except for

the continuation of the Proceedings against the Non-Settling Defendants or unnamed co-conspirators that are not Releasees;

10. An Order and Declaration that, upon the Effective Date, the Releasees have released and shall be conclusively deemed to have forever and absolutely released each of the other from any and all claims for contribution and indemnity with respect to the Released Claims;
11. An Order and Declaration that the use of the terms "Releasers" and "Released Claims" in the ITWAL Order does not constitute a release of claims by those Ontario Settlement Class Members who are resident in any province or territory where the release of one tortfeasor is a release of all tortfeasors;
12. An Order and Declaration that each Ontario Settlement Class Member who is resident in any province or territory where the release of one tortfeasor is a release of all tortfeasors covenants and undertakes not to make any claim in any way nor to threaten, commence, or continue any proceeding in any jurisdiction against the Releasees in respect of or in relation to the Released Claims (including, without limitation, the ITWAL Claims held and released by the Ontario Settlement Class as Released Claims);
13. An Order that ITWAL shall be conclusively deemed to have forever and absolutely released the Non-Settling Defendants from the ITWAL Claims, subject to paragraph 15 below;
14. An Order that ITWAL shall not now or hereafter institute, continue, maintain or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other person, any action, suit, cause of action, claim or demand against any Non-Settling Defendant or any other Person who may claim contribution or indemnity from any Non-Settling Defendant in respect of any ITWAL Claim or any matter related thereto, subject to paragraph 15 below;
15. An Order that ITWAL absolutely and unconditionally assigns and transfers to the Settlement Class the ITWAL Claims;

16. An Order that all claims for contribution, indemnity or other claims over, whether asserted, 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 Ontario Settlement class as Released Claims), which were or could have been brought in the Main Proceeding or otherwise, by any Non-Settling Defendant or any other Person or party, against a Releasee, or by a Releasee against any Non-Settling Defendant or any other Person or party, are barred, prohibited and enjoined in accordance with the terms of the Order (unless such claim is made in respect of a claim by a Person who has validly opted-out of this action);
17. An Order that if the Courts ultimately determine that there is a right of contribution and indemnity between the Defendants, the Plaintiffs in the Ontario Proceeding and the Ontario Settlement Class Members shall restrict their joint and several claims against the Non-Settling Defendants such that the Plaintiffs in the Ontario Proceeding and the Ontario Settlement Class Members 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 sales by the Non- Settling Defendants;
18. An Order that a Non-Settling Defendant may, on motion to the Court determined as if the Settling Defendant remained party to this action, and on at least ten (10) days notice to counsel for the Settling Defendant, 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 Orders for the following:
 - (a) documentary discovery and an affidavit of documents in accordance with the *Rules of Civil Procedure* O.Reg. 194 from the Settling Defendant;
 - (b) oral discovery of a representative of the Settling Defendant, the transcript of which may be read in at trial;
 - (c) leave to serve a request to admit on the Settling Defendant in respect of factual matters; and/or
 - (d) the production of a representative of the Settling Defendant to testify at trial, with such witness to be subject to cross-examination by counsel for the Non-Settling Defendants.

The Settling Defendant retains all rights to oppose such motion(s). Notwithstanding any provision in the Order, on any motion brought pursuant to this paragraph 18, the Court may make such orders as to costs and other terms as it considers appropriate;

19. An Order that a Non-Settling Defendant may effect service of the motion(s) referred to in paragraph 18 above on the Settling Defendant by service on counsel of record for the Settling Defendant in this action;
20. An Order that for purposes of enforcement of the Order, this Court will retain an ongoing supervisory role and the Settling Defendant will attorn to the jurisdiction of this Court solely for the purpose of implementing, administering and enforcing the ITWAL Settlement Agreement;
21. An Order that, except as provided herein, the Order does not affect any claims or causes of action that any Settlement Class Member has or may have against the Non-Settling Defendants or unnamed co-conspirators who are not Releasees in this action;
22. An Order and Adjudication that this action be dismissed against the Settling Defendant without costs and with prejudice;
23. An Order that approval of the ITWAL Settlement Agreement is contingent upon approval by the Quebec Court and the British Columbia Court and the Order shall have no force and effect if such approval is not secured in Quebec and British Columbia;
24. An Order that the short-form and long-form of the Notice of Settlement Approval be approved substantially in the form attached respectively hereto as Schedule "A" and "B";
25. An Order that the plan of dissemination for the short-form and long-form of the Notice of Settlement Approval (the "Plan of Dissemination") be approved in the form attached hereto as Schedule "C";
26. An Order that the short-form and long-form Notice of Settlement Approval shall be disseminated in accordance with the Plan of Dissemination approved as part of this ITWAL Order; and

27. Such further and other relief as counsel may request and this Honourable Court deem just.

THE GROUNDS FOR THE MOTION ARE:

1. The action was certified for settlement purposes on behalf of the following Ontario Settlement Class:

All persons in Canada who, during the Settlement Class Period, purchase chocolate Products in Canada, except the Excluded Persons and Persons who are included in the Quebec Settlement Class or the BC Settlement Class.

2. David Osmun and Metro (Windsor) Enterprises Inc. were appointed as representative plaintiffs;
3. The proposed settlements are fair, reasonable and in the best interests of the class;
4. The *Class Proceedings Act, 1992*, S.O. 1992, c 6; and
5. Such further and other grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE MOTION:

1. The Affidavit of Jay Strosberg, sworn February 6, 2010;
2. The Affidavit of David Osmun, sworn October 27, 2009;
3. The Affidavit of Edmond Soulliere, sworn October 26, 2009; and

4. Such further and other material as counsel may advise and the Honourable Court may permit.

Date: March 9, 2010

Siskinds LLP
Barristers & Solicitors
680 Waterloo Street
London, ON N6A 3V8

Charles M. Wright LSUC # 36599Q
Andrea DeKay LSUC #43818M
Tel: (519) 672-2121
Fax: (519) 672-6065

Sutts Strosberg LLP
600 Westcourt Place
215 Goyeau Street
Windsor, ON N9A 6V4

Harvey T. Strosberg LSUC # 126400
Heather Rumble Peterson LSUC # 24671V
Tel: (519) 561-6248
Fax: (519) 561-6203

Lawyers for the Plaintiffs

TO: Osler, Hoskin & Harcourt LLP
PO Box 50
1 First Canadian Place
Toronto, ON M5X 1B8

Christopher P. Naudie
Jean-Marc LeClerc
Tel: (416) 362-2111
Fax: (416) 862-6666

Lawyers for the Defendant Cadbury Adams Canada Inc.

AND TO: McMillan LLP
Brookfield Place, Suite 4400
Bay Wellington Tower, 181 Bay Street
Toronto, ON M5J 2T3

J. Scott Maidment
Jonathan Hood
Tel: (416) 865-7000
Fax: (416) 865-7048

Lawyers for the Defendants The Hershey Company and Hershey Canada Inc.

AND TO: Blake Cassels & Graydon LLP

199 Bay Street
2800 Commerce Court
Toronto, ON M5L 1A9

Robert Kwinter
Tel: (416) 863-3283
Fax: (416) 863-2653

Lawyers for the Defendant Nestlé Canada, Inc.

AND TO: Davies Ward Phillips & Vineberg LLP

44th Floor, 1 First Canadian Place
Toronto, ON M5X 1B1

Davit Akman
Sandra Forbes
Tel: (416) 863-0900
Fax: (416) 863-0871

Lawyers for the Defendants Mars, Incorporated and Mars Canada Inc.

AND TO: McCarthy Tetrault LLP

Suite 4700
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Randal T. Hughes
Donald B. Houston
Tel: (416) 362-1812
Fax: (416) 868-0673

Lawyers for the Defendant ITWAL Limited