

**ONTARIO
SUPERIOR COURT OF JUSTICE
(EAST REGION)**

Court file no

12560

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34;

AND IN THE MATTER OF an inquiry under section 10 of the *Competition Act*, concerning alleged activities of Hershey Canada Inc, Mars Canada Inc and Nestlé Canada Inc and other persons known and unknown, contrary to paragraphs 45(1)(b) and (c) of the *Competition Act*;

AND IN THE MATTER OF an *ex parte* application by the Commissioner of Competition for the issuance of warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

-and-

**HERSHEY CANADA INC, MARS CANADA INC,
NESTLÉ CANADA INC and ITWAL LIMITED**

Respondents

**INFORMATION OF DANIEL WILCOCK
SWORN NOVEMBER 19, 2007**

INFORMATION TO OBTAIN WARRANTS TO ENTER, SEARCH AND COPY OR SEIZE FOR EXAMINATION OR COPYING CERTAIN RECORDS OR THINGS PURSUANT TO SECTIONS 15 & 16 OF THE *COMPETITION ACT*.*

DÉNONCIATION VISANT À OBTENIR DES MANDATS POUR ENTRER, PERQUISITIONNER, ET PRENDRE COPIE, OU EMPORTER POUR EXAMEN OU POUR PRENDRE COPIE DE CERTAINS DOCUMENTS OU CHOSSES CONFORMÉMENT AUX ARTICLES 15 ET 16 DE LA *LOI SUR LA CONCURRENCE*.*

* This information has been sworn in English. The French version is provided as a translation only.

* Cette dénonciation a été assermentée en anglais. La version française n'est fournie qu'à titre de traduction.

This is the information of Daniel Wilcock [the "affiant"] of the City of Ottawa, in the Province of Ontario, an authorized representative of the Commissioner of Competition [the "Commissioner"] for the purposes of obtaining warrants to enter, search and copy or seize records or things pursuant to sections 15 and 16 of the *Competition Act* [the "Act"].

La présente constitue la dénonciation de Daniel Wilcock ["le dénonciateur"] de la ville d'Ottawa dans la province d'Ontario, un représentant autorisé par la commissaire de la concurrence ["la commissaire"] visant à obtenir des mandats pour entrer, perquisitionner, et prendre copie, ou emporter certains documents ou choses aux articles 15 et 16 de la *loi sur la concurrence* ["la Loi"].

1. I, **Daniel Wilcock**, make oath and say as follows:

1.1 I hold a Bachelor of Commerce and a Bachelor of Laws from the Australian National University (2000). I am working at the Competition Bureau ("the Bureau") under a governmental interchange agreement with the Australian Competition and Consumer Commission ("ACCC"). I have been employed by the ACCC as a lawyer since 2000. In 2004/2005 I participated in an interchange to the Bureau where I worked as a competition law officer with the Criminal Matters Branch of the Bureau. In 2007, I returned to the Criminal Matters Branch for a second interchange, during which time I have worked as a

Special Advisor to the Senior Deputy Commissioner of Competition, Criminal Matters and a Senior Competition Law Officer. While at the Bureau and the ACCC, I have participated in competition law inquiries in a responsible position, involving conduct such as price-fixing, market allocation and bid-rigging. My roles in competition law enforcement have included assessing complaints, analysing evidence, conducting interviews, providing advice and recommending the initiation of court proceedings.

1.2 I have personal knowledge of the matters set out here except where such knowledge is specifically stated to be based on information and belief. I am responsible for the investigation of allegations that: Hershey Canada Inc ("Hershey"); Mars Canada Inc previously known as Effem ("Mars"); Nestlé Canada Inc ("Nestlé"); the Cooperating Party; and other persons known and unknown have engaged in conduct contrary to paragraphs 45(1)(b) and 45(1)(c) of the *Competition Act*. An inquiry was commenced on November 2, 2007 pursuant to subparagraph 10(1)(b)(iii) of the *Competition Act*, to investigate allegations that: Hershey; Mars; Nestlé; the Cooperating Party; and other persons known and unknown, participated in a conspiracy to fix prices and control discounts for the supply of chocolate confectionery products in Canada for the period from at least February 2004 to the present.

1.3 In addition to my own actions, observations and personal knowledge, I have relied on a number of sources for the information set out below. I have carefully considered the reliability of all my sources of information and I am satisfied that they are trustworthy.

1.4 I have reasonable grounds to believe and do believe the information provided by each of these sources on which I rely for the purposes of this Information, except where otherwise stated.

1.5 In this Information, the terms:

"*computer password*" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;

"*computer program*" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;

“*computer service*” has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
“*computer system*” has the meaning provided by section 16 of the *Competition Act*, as set out in subsection 342.1(2) of the *Criminal Code*;

“*Cooperating Party*” is a corporate person that has applied for immunity from prosecution under the *Competition Act*, pursuant to the Competition Bureau’s Immunity Program. A copy of the Immunity Program is attached as Annex A to this Information. A number of current and former employees of the Cooperating Party (“Cooperating Individuals”) have engaged in relevant conduct and/or provided information in furtherance of this inquiry. Information with respect to the identity of the Cooperating Party and Cooperating Individuals is contained in Confidential Appendix “1”, attached to this Information, for which a sealing order is requested.

“*data*” has the meaning provided by section 16 of the *Competition Act*, as set out in subsection 342.1(2) of the *Criminal Code*;

“*Effem*” refers to Effem Inc, which changed its corporate name to Mars Canada Inc, effective May 8, 2007.

“*Hershey*” refers to Hershey Canada Inc and includes its predecessors, successors, subsidiaries, divisions, and affiliates engaged in business in Canada;

“*ITWAL*” refers to ITWAL Limited (Ontario corporation number 146066), and includes its predecessors, successors, subsidiaries, divisions, and affiliates engaged in business in Canada;

“*Mars*” refers to Mars Canada Inc and includes its predecessors, successors, subsidiaries, divisions, and affiliates engaged in business in Canada, specifically including its predecessor in corporate name, Effem Inc;

“*Nestlé*” refers to Nestlé Canada Inc and includes its predecessors, successors, subsidiaries, divisions, and affiliates engaged in business in Canada;

“*trade spend*” means the industry practice of providing discounts, rebates and allowances to customers, often linked to promotions; and

“record” has the meaning provided by section 2 of the *Competition Act* and includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record (including computer data and electro-magnetic recordings in tape or disc form for use in computer systems or other devices for storing information), and any other documentary material, regardless of physical form or characteristics, and any copy or portion thereof.

OFFENCE

2. The affiant says that he has reasonable grounds to believe and does believe that the following offences under the Act have been committed by the following named persons or entities:

L'INFRACTION

2. Le dénonciateur affirme qu'il a des motifs raisonnables de croire et croit que l'infraction suivante à la Loi a été commise par les personnes ou les entités suivantes, à savoir:

- 2.1 That Hershey, Mars, Nestlé and other persons known and unknown, during the period commencing at least as early as February 2004, and continuing until the present, the exact dates being unknown, did conspire, combine, agree or arrange with each other and with the Cooperating Party to enhance unreasonably the price of chocolate confectionery products in Canada, and did thereby commit an indictable offence contrary to paragraph 45(1)(b) of the *Competition Act*, RSC 1985, c C-34; and
- 2.2 That Hershey, Mars, Nestlé and other persons known and unknown, during the period commencing at least as early as February 2004, and continuing until the present, the exact dates being unknown, did conspire, combine, agree or arrange with each other and with the Cooperating Party to prevent or lessen, unduly, competition in the supply of chocolate confectionery products in Canada, and did thereby commit an indictable offence contrary to paragraph 45(1)(c) of the *Competition Act*, RSC 1985, c C-34.

RECORDS OR OTHER THINGS TO BE SEARCHED FOR:

3. The affiant says that he has reasonable grounds to believe and does believe that the following records or other things exist at the premises described in paragraph 4 and will afford evidence with respect to the offences described in paragraph 2, or will assist in retrieving, copying, reading, deciphering, or acquiring the substance or meaning of any data contained therein:

DOCUMENTS OU AUTRES CHOSES QUI FONT L'OBJET DE LA PERQUISITION:

3. Le dénonciateur affirme de plus qu'il a des motifs raisonnables de croire et croit que les documents ou autres choses suivants se trouvent dans les locaux décrit au paragraphe 4 et qu'ils fourniront la preuve de la commission de l'infraction décrite au paragraphe 2, ou contribueront à la copie, la lecture, le décodage ou la compréhensions de toute information ou donnée contenues dans ces documents:

RECORDS AND OTHER THINGS TO BE SEARCHED FOR

- 3.1 Based on my experience in dealing with business records at the Bureau and at the ACCC, and based on the information disclosed here, I believe that the records or other things to be searched for are the sorts of records that would be created in the course of conduct such as that alleged in paragraph 2, and would likely be in the possession of the persons mentioned in paragraph 5. I have reasonable grounds to believe, and do believe, that the following records or other things, whenever created, are linked directly or indirectly to the commercial activities of the respondents, their employees, representatives or agents and will afford evidence with respect to the offences described in paragraphs 2.1 and 2.2.
- 3.2 The records or other things to be searched for are all records, whenever created, relating to the period February 2004 to the present, that directly or indirectly relate to the supply of chocolate confectionery products in Canada and that will afford evidence with respect to the commission of the offences described in paragraph 2, specifically these are:
- (a) records or other things relating to the corporate structure of the respondents and

the ownership or control of the entities named in the alleged offences and any other records relating to the ownership and management, roles, duties, tasks, remuneration and responsibilities of the directors and administrators, employees or agents of those entities;

- (b) records or other things relating to the names, positions, duties, responsibilities, compensation and authority of owners, officers, directors, employees or other representatives of the entities named in the alleged offences engaged in the formulation, implementation, interpretation or dissemination of policies, procedures, rules, practices or directives concerning the prices, trade spend or other associated promotional or marketing policies for the supply of chocolate confectionery products;
- (c) records or other things relating to meetings, communications, agreements or arrangements, direct or indirect, between or among any of the entities named in the alleged offences or competitors, customers or others in the supply of chocolate confectionery products, or between or among their owners, managers, directors, agents, representatives, employees or other persons unknown, concerning prices or trade spend for those products;
- (d) records or other things relating to the preparation, formulation, adoption, revision, adjustment, rescission, continuation, implementation, observance, application or determination of prices, trade spend levels or other associated promotional or marketing policies for the supply of chocolate confectionery products in Canada by the entities named in the alleged offences; and
- (e) studies, surveys, evaluations, reports, data, statistics or other sources of information concerning barriers to entry, sales, revenues, expenses, geographic markets, product markets or customer markets, market shares and profits, including historical, actual and forecast of the entities named in the alleged offences or other persons, that show or that would assist in showing the market positions of suppliers in the chocolate confectionery market.

OTHER THINGS TO BE SEARCHED FOR

- 3.3 any records or other things that contain examples of the handwriting of directors, managers, agents, representatives or employees of the entities or individuals named in the alleged offences, that could be used for the purpose of identifying the author of any unidentified handwriting appearing on records being seized or produced under the authority of the warrants;
- 3.4 any records sent or received by means of facsimile (fax) transmission including records of fax transmissions sent and received that could be used for the purpose of identifying the source or recipient of communications between or among the persons named in the alleged offences;
- 3.5 computer passwords, computer programs, computer services, computer systems, data storage devices, and associated documentation including operating instructions, manuals, and service records that will assist in retrieving, copying, reading, printing, deciphering, or acquiring the substance and meaning of any data seized, together with all passwords, log-on codes, encryption keys or other security devices relating to these things; and
- 3.6 all records or other things described in paragraph 3, contained in, or available to any computer system on the premises to be searched.

PREMISES TO BE SEARCHED

4. The premises to be searched are described as:

4.1 I have reasonable grounds to believe, and do believe, that the records or other things to be searched for are located on the following premises:

(a) Hershey Canada Inc
2350 Matheson Blvd. East

LOCAUX À ÊTRE PERQUISITIONNÉS

4. Les endroits visés par la perquisition sont les suivants:

Mississauga, Ontario L4W 5E9

(b) Hershey Canada Inc
500 - 5750 Explorer Drive
Mississauga, Ontario L4W 0B1

(c) Mars Canada Inc
37 Holland Drive
Bolton, Ontario L7E 5S4

(d) Nestlé Canada Inc
25 Sheppard Avenue West
Floors 18, 19, 20, 21 and 22
North York, Ontario M2N 6S8

(e) Nestlé Canada Inc
9050 Airport Road
Suite 101
Brampton, Ontario L6S 6G9

(f) ITWAL Limited
440 Rainside Drive
Brampton, Ontario L7A 1L1

including all storage and record-keeping areas, computer systems and data-storage devices, located in and about these premises, accessible from these premises, or available to computer systems or data-storage devices from these premises.

REASONABLE GROUNDS

5. The following information constitutes the reasonable grounds for my belief supporting my information to obtain search warrants:

MOTIFS RAISONNABLES

5. Les renseignements suivants contiennent les motifs raisonnables qui fondent ma croyance, afin que soit décerné les mandats de perquisition demandés dans cette dénonciation:

A) OVERVIEW OF THE INVESTIGATION

5.1 The alleged conspiracy arises from communications between employees of the Cooperating Party, Hershey, Mars, Nestlé and others known and unknown, who exchanged confidential pricing information. The information reveals a pattern of communications via email, telephone, private meetings and meetings on the margins of industry association conferences, from at least February 2004 to the present. The relevant industry associations are the Confectionery Manufacturers Association of Canada ("CMAC") and the Food and Consumer Products of Canada ("FCPC"). Information obtained by the Commissioner provides reason to believe that the above mentioned parties entered an agreement or arrangement to fix prices and control discounts relating to the supply of chocolate confectionery products in Canada contrary to paragraphs 45(1)(b) and 45(1)(c) of the Act. The Commissioner became aware of the matter after a participant in these alleged offences (the "Cooperating Party") approached the Bureau under its Immunity Program. Additional information with respect to the Cooperating Party is contained in Appendix "1", attached to this Information, for which a sealing order is requested.

B) INVESTIGATIVE SOURCES

(i) Colleagues

- 5.2 Where information is stated in this Information to have been received by me or other competition law officers or other peace officers, unless the contrary is specified I (and any other officers receiving the information, as the case may be) truly believe such information in each and every case, because the officers giving or relaying the information were acting in the execution of their duties as officers at the relevant time and were under a legal and moral obligation to relate only the truth in relation to the events perceived or transmitted by them.
- 5.3 The Competition Bureau colleagues upon whom I have relied are: legal research officer, Julie-Anne Pesce; senior electronic evidence investigator, Dianne Rathwell; and competition law officers, Robert Jackson, Frédéric LaBonté, Andrea Burke, Elizabeth Eves and Marisa Ferraiuolo.

(ii) Databases

- 5.4 Where information is stated in this Information to have been received by me or peace officers or competition law officers from the records of police forces, public bodies, communications carriers, corporations, or private businesses, unless the contrary is specified, I (and the other officers receiving the information, as the case may be) truly believe such information in each and every case because of the manner in which the information is generated and the purposes for which it is retained -- in the sense that it is created by people paid for accuracy and it is intended to be used by the same bodies that created it. This includes police surveillance information and data from computerized police information networks such as, but not limited to, CPIC (Canadian Police Information Centre). The same also applies to information from records ordinarily maintained by foreign or domestic government agencies such as, but not limited to, provincial or state motor vehicle registries and municipal tax assessment rolls. I and other competition law officers have found these to be credible sources for business information. I have consulted the records of the following sources:

- (i) Ontario Business Information System ["ONBIS"]: ONBIS is an electronic

database of all companies registered within the province of Ontario as controlled by the Ministry of Consumer and Business Services. Information provided by this system includes, but is not limited to, the following: business names and addresses, dates of incorporations (registration), dates of dissolution, registration numbers as generated by the system, business officials' names and addresses, business ownership and status. I believe this system to be reliable as it is maintained by the Government of Ontario and contains registered corporate information.

(ii) Dun & Bradstreet (D&B) administers one of the world's leading commercial databases containing information on over 84 million businesses. The most commonly used D&B report by competition law officers is the Business Information Report (BIR), which provides information about a company, including: marketing information (legal name, address, phone/fax and business name/tradestyle), history (the structure, ownership, antecedents and corporate linkages), operations (line of business, number of employees and location/facilities), financial data (financial statements, starting capital, sales projections and trends) and public records (law suits, liens, judgments, business failure and media items). Information is collected by D&B by conducting phone interviews with key business executives in a company, mail-outs to targeted companies, contacting business references, examining court house records, monitoring the media, and obtaining data from Industry Canada, for such things as bankruptcy information.

(iii) Canada 411 Directory: the Canada 411 website is the web site situated at the following address: <http://www.canada411.ca/>.

C) THE PARTIES

5.5 Based on a review of information obtained from: records filed with ONBIS; corporate

Internet pages and Dun & Bradstreet, I believe on reasonable grounds that the following corporate information is true and accurate:

The Cooperating Party

- 5.6 Information with respect to the identity of the Cooperating Party and the Cooperating Individuals is contained in Confidential Appendix "1", attached to this Information, for which a sealing order is requested.

Hershey

- 5.7 Hershey Canada Inc is a corporation registered in the province of Ontario since May 25, 1997 (Ontario corporation number 1239549), upon amalgamation with Hershey Canada Candy Inc. Hershey is a wholly owned subsidiary of the Hershey Company that manufactures, distributes and sells confectionery, snack, refreshment and grocery products in Canada.
- 5.8 Mr Eric Lent ("Lent") holds the position of General Manager of Hershey Canada Inc. Lent was appointed to this position in approximately December 2006. The primary business office of Mr. Lent is located at the premises of Hershey in Mississauga, Ontario.

Mars

- 5.9 Mars Canada Inc is a corporation registered in the province of Ontario since May 8, 2007 (Ontario corporation number 875391), after changing its corporate name from Effem Inc. Mars is the Canadian division of Mars, Incorporated a privately held multi-national company and world leader in food, pet care products and confectionery products.
- 5.10 Mr Martin Lebel ("Lebel") is an employee of Mars Canada Inc. I am informed by my colleague, Frédérick LaBonté, and do believe, that he telephoned Mars on October 24, 2007 and was informed by the receptionist that Lebel works out of a home office at an unspecified address in Montreal, Quebec.

Nestlé

- 5.11 Nestlé Canada Inc is a corporation registered in the province of Ontario since January 1, 2003 (Ontario corporation number 1555685) upon amalgamation with Ralston Purina Canada Inc. Nestlé is a wholly-owned subsidiary of Nestlé SA. Nestlé is grouped into key divisions including: chocolate and confectionery, coffee and beverages, food services, ice cream meals, nutrition, Nestlé waters and Nestlé Purina Petcare.
- 5.12 Mr Robert (Bob) Leonidas (“Leonidas”) holds the position of President and Chief Executive Officer of Nestlé Canada Inc. Leonidas was appointed to this position on March 1, 2006. Prior to this during the relevant time period, Leonidas was president of Nestlé Canada’s confectionery business.
- 5.13 Ms Sandra Martinez de Arevalo (“Martinez”) holds the position of president of Nestlé Canada’s confectionery business since approximately March, 2006. The primary business office of Martinez is located at the premises of Nestlé in North York, Ontario.
- 5.14 Ms Lynn Hashinsky (“Hashinsky”) was an employee of Nestlé during the relevant time period specified. The primary business office of Hashinsky is located at the premises of Nestlé in Brampton, Ontario.
- 5.15 Mr Steve Morris (“Morris”) was an employee of Nestlé during the relevant time period specified. The primary business office of Morris was located at the premises of Nestlé in North York, Ontario.

D) GROUNDS TO BELIEVE THAT AN OFFENCE WAS COMMITTED

- 5.16 My reasonable grounds for belief in this matter are based on information provided to me by counsel for the Cooperating Party, on interviews with employees of the Cooperating Party and on records received from the Cooperating Party, as part of its cooperation pursuant to its application for immunity under the Bureau's Immunity Program. My grounds for belief are also based on records made available to me by

corporate-information services and on other public records, including industry publications, newspaper articles and Internet web sites. Copies of documents provided to the Bureau by the Cooperating Party and referred to in this Information, are attached to this Information as Confidential Exhibits 1 to 23, for which a sealing order is requested.

- 5.17 I personally interviewed Cooperating Individual 1 at the offices of his legal counsel on September 10, 2007. Some of the witness recollections in that interview are inconsistent either with information Cooperating Individual 1 previously provided to counsel for the Cooperating Party or with information provided by other Cooperating Individuals. I have not yet put the inconsistencies back to Cooperating Individual 1 to assess whether they prompt further or different recollections on his part. However, the Cooperating Party has provided the Bureau with written documentation that is consistent with, and that helps to corroborate, most of the information that Cooperating Individual 1 has provided to the Bureau. I believe that the information provided by Cooperating Individual 1 is generally reliable, but that at this point, he may not have disclosed the full extent of his knowledge of, or involvement in, the alleged offences. I believe the information provided by Cooperating Individual 1 on which I rely for the purposes of this Information.
- 5.18 I personally interviewed Cooperating Individual 2 at the Competition Bureau's offices in Gatineau, Quebec on October 4, 2007. The Cooperating Party has provided the Bureau with written documentation, that is consistent with, and that helps to corroborate, the allegations that Cooperating Individual 2 has made. For these reasons, I regard Cooperating Individual 2 as a reliable and credible source of information. I believe the information that Cooperating Individual 2 has provided to the Bureau, and I have relied upon this information.
- 5.19 I interviewed Cooperating Individual 9 by telephone on October 30, 2007. I also personally interviewed Cooperating Individual 9 in Toronto on November 6, 2007. I regard Cooperating Individual 9 as a reliable and credible source of information. I believe the information that Cooperating Individual 9 has provided to the Bureau, and I have relied upon this information.

5.20 The following is a summary of the information obtained by the Commissioner in the course of the investigation. I have attended the interviews and been involved in the investigation from July 2007, as explained below. While the information is summary in nature, I am confident that the information properly and adequately reflects the substance and tenor of the matters referred to.

a) ***Grounds to Believe that the Offence described in Paragraph 2.1 of the Information was Committed***

(i) Communications between Nestlé and the Cooperating Party

5.21 On September 10, 2007, I received information from Cooperating Individual 1 indicating that he participated in a breakfast meeting with the President of Nestlé, Bob Leonidas ("Leonidas") on February 23, 2004. During the meeting, one topic of discussion was trade spend. Cooperating Individual 1 indicated that it was known in the industry that he disagreed with the industry's prevailing approach to trade spend and that the Cooperating Party was going to reduce trade spend on chocolate. Cooperating Individual 1 indicated that he left the meeting with the impression that Leonidas "sees the world the way" that he did. Cooperating Individual 1 also understood that he had an open line to call Leonidas if there were any issues in the market, including trade spend practices. The Cooperating Party has also provided the Bureau with a copy of a calendar entry dated February 23, 2004 and a receipt from the breakfast restaurant, corroborating that the meeting took place, copies of which are attached as Confidential Exhibit 1 to this Information.

5.22 Counsel for the Cooperating Party provided the Bureau with a copy of an internal email exchange starting on June 1, 2005 and relating to a discussion with their customer, ITWAL Limited, a distributor. A copy of these emails are attached as Confidential Exhibit 2 to this Information. Cooperating Individual 11 sent an email with the subject heading "Chocolate pricing" to Cooperating Individual 12 and Cooperating Individual 13 stating:

At ITWAL I was informed by a reliable source that both Nestlé and Effem have been to customers hinting at 2005 price increases. No details or confirmation. I suggested that we would seriously consider appropriate

actions once firm details known, and that I would be concerned about the other leading player not following. Which [sic] my contact said they would inquire about. This is similar to info we had picked up a couple of months ago. Martin I would send out a note to ADM's to start digging.

- 5.23 On September 10, 2007 Cooperating Individual 1 informed me that he met Leonidas at Manoir Richelieu - during a Confectionery Manufacturers Association of Canada (CMAC) annual meeting held June 2-5, 2005. Leonidas sought out Cooperating Individual 1 and they had a short meeting. Cooperating Individual 1 stated that Leonidas said words to him to the effect of "I want you to hear it from the top - I take my pricing seriously" or "We are going to take a price increase and I want you to hear it from the top." Leonidas handed Cooperating Individual 1 an envelope. Cooperating Individual 1 accepted the envelope without objection. Cooperating Individual 1 said "I may have said 'we like to take pricing too, we take it seriously.' I don't think [Leonidas] took a negative impression. I just don't know if he thought it was favorable." Cooperating Individual 1 agreed that Leonidas would have left the meeting with the idea that the Cooperating Party would follow a price increase led by Nestlé.
- 5.24 During separate interviews with counsel for the Cooperating Party and with the Bureau, there has been some inconsistency in Cooperating Individual 1's recollection of exactly when he opened the envelope. On September 10, 2007 I received information from Cooperating Individual 1 that he opened the envelope given to him by Leonidas some time after the meeting, but before he went to Europe on vacation in late June or early July, 2005. Cooperating Individual 1 explained the delay in opening the letter, "Because you shouldn't talk about pricing. I didn't want to be rude to Bob so I said OK, was neutral, but I didn't want him to think, in any way, that I was coordinating with him." Cooperating Individual 1 says that when he opened the envelope, it contained a document with information about Nestlé's planned price increase on chocolate in 2005. Cooperating Individual 1 states that he put it in his drawer and later compared it to another Nestlé price increase letter he received and observed that they were similar. Cooperating Individual 1 says it is likely he put the letter in his outbox with a slash through it, indicating it was to be shredded. On August 29, 2007 counsel for the Cooperating Party

informed the Bureau in interviews they had done, Cooperating Individual 1 stated that he opened the envelope when he returned to the office from vacation on July 23, 2005. This recollection about when he opened the envelope varied from his recollection when I interviewed him.

- 5.25 On August 29, 2007 counsel for the Cooperating Party provided the Bureau with a copy of an email exchange dated July 6, 2005 indicating that by at least that date a letter containing confidential Nestlé price increase information was circulating around the Cooperating Party's office. A copy of these emails is attached as Confidential Exhibit 3 to this Information. One of the emails observed that the letter was a draft, as it was dated July 15, 2005 ("the July 15 letter"), was unsigned and contained spelling mistakes. The information was that Nestlé was increasing the price of its confectionery portfolio by approximately 5 to 7%, effective October 31, 2005 for base confectionery and April 18, 2006 for seasonal confectionery. This pricing information was discussed among the Cooperating Party's leadership team and prompted the Cooperating Party to consider and announce a price increase on chocolate. The Cooperating Party has also provided the Bureau with a copy of a letter located in its files that appears to be the July 15 letter, a copy of which is attached as Confidential Exhibit 4 to this Information, corroborating the information discussed in the email exchange.
- 5.26 On October 4, 2007 Cooperating Individual 1's assistant, Cooperating Individual 2 informed me that Cooperating Individual 1 called her on July 6, 2005 from Europe and instructed her to go to the Nestlé offices to pick something up from Leonidas. Cooperating Individual 2 got Leonidas' phone number from Cooperating Individual 1's contacts and called Leonidas to arrange a time. Cooperating Individual 2 went to the Nestlé offices with a colleague and was met by Leonidas downstairs. He said something to the effect that it was better not to be seen in his office and handed Cooperating Individual 2 an envelope. Cooperating Individual 2 subsequently opened the envelope and it contained information about a planned price increase by Nestlé. Counsel for the Cooperating Party provided the Bureau with a copy of the document that Cooperating Individual 2 had retrieved from the files and Cooperating Individual 2 believes it is the

document that was contained in the envelope from Leonidas. The document is an unsigned letter on Nestlé letterhead announcing a chocolate price increase to the trade and was forward dated July 19, 2005 ("the July 19 letter"). A copy of the July 19 letter is attached as Confidential Exhibit 5 to this Information. The July 19 letter is substantively the same as the July 15 letter, except that spelling mistakes had been corrected and the percentage price increase had been increased to "5 to 8%".

- 5.27 On October 4, 2007 Cooperating Individual 2 told me that when she returned to the office on July 6, 2005, she called Cooperating Individual 1 in Europe, as he had requested, and left a voice-mail reading the contents of the letter. Cooperating Individual 2 also states that she sent an email message to Cooperating Individual 1 informing him that she had left him a voice-mail regarding the Nestlé letter. The Cooperating Party has provided the Bureau with a copy of an email from Cooperating Individual 2 to Cooperating Individual 1 dated July 6, 2005 that states "Sent voice-mail re Nestlé letter." A copy of this email has been provided to the Bureau and a copy is attached as Confidential Exhibit 6 to this Information.
- 5.28 On November 15, 2007, counsel for the Cooperating Party provided the Bureau with a copy of a cell phone invoice for Cooperating Individual 1, that included call details for July 6, 2005 and a copy is attached as Confidential Exhibit 7 to this Information. That invoice shows that on July 6, 2005 a call was made from the phone of Cooperating Individual 1 in Austria to the Toronto number 416 218-2627. Counsel for the Cooperating Party have provided the Bureau with access to the electronic contact list of Cooperating Individual 1 and a copy of the listing for Leonidas is attached as Confidential Exhibit 8 to this Information. The listing for Leonidas shows his business number as 416 218-2627.
- 5.29 When I interviewed Cooperating Individual 1 on September 10, 2007, he did not inform me about a phone call to Leonidas or sending Cooperating Individual 2 to pick up something from Leonidas at the Nestlé offices on July 6, 2007. I asked Cooperating Individual 1 about the email from Cooperating Individual 2 dated July 6, 2007. Cooperating Individual 1's explanation was that earlier that day he had got a confirmation

on voice-mail that Nestlé was going to have a price increase. Cooperating Individual 1 thinks he sent a voice-mail or email message to Cooperating Individual 2 and asked her to forward the message by voice-mail to others in the Cooperating Party along the lines of "If Nestlé is going to take a price increase then we will too."

- 5.30 As neither the July 15 nor the July 19 letters are signed, it is not clear at this stage whether either of these were final letters. I have not yet been able to confirm that either of these letters were provided to customers by Nestlé. I note that a further Nestlé price increase letter that was in a customer's possession, discussed in paragraph 5.48 below, was not signed.
- 5.31 On August 29, 2007, counsel for the Cooperating Party provided the Bureau with a price increase letter from the Cooperating Party dated July 29, 2005 and a copy is attached as Confidential Exhibit 9 to this Information. The Cooperating Party announced a price increase on average of 5.2% on its Chocolate portfolio, effective October 31, 2005. The price increase for the Cooperating Party was such as to align its prices on a number of common formats with those of Nestlé.
- 5.32 On August 29, 2007, counsel for the Cooperating Party provided the Bureau with a Hershey price increase letter dated August 23, 2005 that was located in the files of the Cooperating Party and a copy is attached as Exhibit 10 to this Information. Hershey announced a price increase of an unknown percentage on most chocolate and candy products effective 31 October, 2005.
- 5.33 On August 29, 2007, counsel for the Cooperating Party provided the Bureau with a Mars price increase letter dated September 6, 2005 and a copy is attached as Exhibit 11 to this Information. Mars announced a price increase on average of 6% on select items in its confectionery portfolio, effective November 7, 2005.
- 5.34 On August 29, 2007, counsel for the Cooperating Party informed me that Cooperating Individual 3 was contacted by Nestlé employee Lynn Hashinsky in late fall 2005 regarding pricing at a key account. Cooperating Individual 3 reported this to the Cooperating Party's in-house counsel who in turn informed Cooperating Individual 1 of

the incident.

- 5.35 On August 29, 2007 counsel for the Cooperating Party provided the Bureau with a copy of an email exchange between Leonidas and Cooperating Individual 1 beginning on January 18, 2006 and a copy is attached as Confidential Exhibit 12 to this Information. Cooperating Individual 1 congratulated Leonidas on his promotion to President and CEO of Nestlé. Leonidas responded on January 19, 2006: "Thanks [first name of Cooperating Individual 1], still want to see you Feb 7th 8am to TALK".
- 5.36 On August 29, 2007 counsel for the Cooperating Party provided the Bureau with a copy of an entry from Cooperating Individual 1's calendar dated February 15, 2006 showing a meeting scheduled for 7:30am with Leonidas at a Second Cup coffee shop, a copy of which is attached as Confidential Exhibit 13 to this Information. On September 10, 2007 Cooperating Individual 1 informed me that he met Leonidas in February, 2006 at a Second Cup coffee shop in Toronto. During this meeting they discussed the price of seasonal chocolate. Leonidas said he wanted Cooperating Individual 1 to take a price increase. Cooperating Individual 1 states that he refused to commit to taking a price increase. On October 19, 2007 counsel for the Cooperating Party informed me that on October 30, 2006 the Cooperating Party announced a price increase on seasonal chocolate to take effect on February 5, 2007 - 5% for Halloween products and 4% for Easter products.
- 5.37 On September 10, 2007 Cooperating Individual 1 informed me that he received a phone call from the new President of Nestlé Confectionery, Sandra Martinez de Arevalo ("Martinez") in mid 2007. Martinez wanted to meet and talk. Cooperating Individual 1 and Martinez met for lunch at Auberge du Pommier on July 4, 2007 in Toronto. The discussion covered a number of issues, both personal and professional. Martinez suggested that the Cooperating Party lead a price increase in 2007, as Nestlé wanted to take a price increase in the third quarter. Cooperating Individual 1 replied that he was not prepared to take a price increase in 2007, but indicated that the Cooperating Party might take one in 2008. Cooperating Individual 1 said he would follow on chocolate but not

lead. Martinez said she would call him back in two weeks. Cooperating Individual 1 said that he was of the view that the discussion did not matter because he was leaving the Cooperating Party; he could lead her down the garden path because he would not be making the decisions. Martinez could “say whatever she wants and hear whatever she wants” because Cooperating Individual 1 would not be making pricing decisions. Cooperating Individual 1 also states that Martinez would have understood that “they were on the same page.” Counsel for the Cooperating Party provided the Bureau with a copy of the receipt and expense report for the lunch on July 4, 2007, a copy of which is attached as Confidential Exhibit 14 to this Information.

- 5.38 On August 29, 2007, counsel for the Cooperating Party informed me that Cooperating Individual 5, received a call from Nestlé employee Steve Morris (“Morris”) on July 5, 2007. Morris told Cooperating Individual 5 that Nestlé was thinking about taking a price increase in early March 2008. Cooperating Individual 5 said that the Cooperating Party was thinking of taking a price increase too. They also discussed that if Nestlé and the Cooperating Party took a price increase, Mars would probably follow too. Cooperating Individual 5 provided this information to his supervisor, Cooperating Individual 6, Cooperating Individual 7 and Cooperating Individual 8. Cooperating Individual 8 informed in-house counsel of the Cooperating Party, who in turn informed Cooperating Individual 1.
- 5.39 On September 10, 2007 Cooperating Individual 1 informed me that Martinez left a voice mail for him on August 30, 2007 stating that she wanted to say goodbye before he left the Cooperating Party and requested a meeting with him during the week of September 11th to 14th. Cooperating Individual 1 believes that Martinez wanted to meet to follow up on the pricing discussions that took place on July 4, 2007. This meeting never occurred due to scheduling issues. Counsel for the Cooperating Party provided the Bureau with a transcribed copy of the voice-mail that was sent by Martinez to Cooperating Individual 1 on August 30, 2007.
- 5.40 On September 21, 2007, counsel for the Cooperating Party informed Andrea Burke that

on September 19, 2007 both Cooperating Individual 1 and Leonidas were in Vancouver attending an event hosted by Overwaitea, a mutual customer. Cooperating Individual 1 said that during this event, Leonidas encouraged Cooperating Individual 1 to attend an upcoming meeting of the Food and Consumer Products of Canada ("FCPC"). Leonidas said that it was "public news" that Nestlé was taking a price increase in February 2008 of 4-6% on everything and that they had told their customers. Cooperating Individual 1 did not reply and Leonidas said to him words to the effect of: "You don't need to say anything." Leonidas also encouraged Cooperating Individual 1 to contact Martinez.

(ii) Communications between Mars and the Cooperating Party

- 5.41 Counsel for the Cooperating Party provided the Bureau with access to a number of its internal emails. In emails dated November 7, 2005, February 27, 2006 and February 6, 2007 Cooperating Individual 4 refers to discussions with Martin Lebel ("Lebel"), an employee of Effem (now known as Mars).
- 5.42 In an email dated November 7, 2005, Cooperating Individual 4 referred to a discussion with Lebel related to Mars' "dead net cost" on chocolate singles and trade spend issues. A copy of the email is attached as Confidential Exhibit 15 to this Information.
- 5.43 In an email dated February 27, 2006, Cooperating Individual 4 referred to a discussion with Lebel, about the level of margins on certain chocolate products. A copy of the email is attached as Confidential Exhibit 16 to this Information.
- 5.44 In an email dated February 6, 2007, Cooperating Individual 4 referred to a discussion with Lebel indicating that Cooperating Individual 4 obtained information from Effem and Hershey about presentations made to one of their common customers. A copy of the email is attached as Confidential Exhibit 17 to this Information.

(iii) Communications between Hershey and the Cooperating Party

5.45 Counsel for the Cooperating Party provided the Bureau with a copy of an email sent on January 3, 2007, by Bert Alfonso, now senior vice president, Chief Financial Officer of the Hershey Company in the USA, to both Lent and Cooperating Individual 1; a copy is attached as Confidential Exhibit 18 to this Information. This email included the following statement:

As we discussed, Hershey has recently appointed Eric Lent as VP/GM for the Canada business. In keeping with the good advice from 'The Godfather', keep close to your competition, I am including contact info below in an effort to introduce you both. All kidding aside, I know Eric is looking forward to meeting you.

Subsequent email communications between Lent and Cooperating Individual 1 on January 3, 2007 set up a phone call between the two for 3:30 on January 4, 2007.

5.46 Counsel for the Cooperating Party provided the Bureau with a copy of an email sent on March 15, 2007 by Lent to Cooperating Individual 1 with the subject heading "Interesting times" and the text, "I'm back in town the week after next. Let's get together!" A copy of this email is attached as Confidential Exhibit 19 to this Information.

5.47 On October 30, 2007, Cooperating Individual 9 told me that he first met Lent at a dinner hosted by the FCPC trade association at Niagara-on-the-Lake on September 27, 2007. As he was getting ready to sit down at a dinner table, Cooperating Individual 9 was approached by Lent. Lent said words to the following effect to Cooperating Individual 9: "Hey [Cooperating Individual 9], welcome back to Canada. Congratulations on your new job. Hey, by the way, Nestlé is taking a price increase." Lent continued with either "So we should take advantage" or "we should increase our prices too." Cooperating Individual 9 replied either "We should not be having this conversation" or "I am not comfortable having this conversation." Lent continued: "Don't worry we can talk about it. Bob and I talk all the time [Lent pointed to an individual that Cooperating Individual 9 later identified as Bob Leonidas, President of Nestlé]. It's public knowledge that Nestlé is

taking its prices up." Cooperating Individual 9 contacted a member of the Cooperating Party's in-house counsel after the dinner and left a message detailing the conversation.

- 5.48 Discussions about Nestlé's planned 2008 price increase for chocolate confectionery took place: between Leonidas and Cooperating Individual 1 on September 19, 2007, and between Lent and Cooperating Individual 9 on September 27, 2007. I have not been able to confirm that Nestlé's planned price increase was in fact announced to the trade, or was "public knowledge" at those dates, or indeed until October 31, 2007. On October 30, 2007, Cooperating Individual 9 told me that he had not heard specific information about a proposed Nestlé price increase from any source other than Lent. Andrea Burke, a competition law officer at the Bureau conducted internet searches on October 31, 2007 for information about price increases on Nestlé chocolate confectionery products for 2008 and did not find any relevant information. On November 9 and 13, 2007, counsel for the Cooperating Party informed me that a sales representative of the Cooperating Party had been given a copy of a Nestlé memorandum and price increase letter by a mutual customer, Core-mark, on November 7, 2007. The Nestlé price increase letter provided to the Cooperating Party by Core-mark was not signed. The Cooperating Party has provided the Bureau with a copy of that memorandum and letter, dated October 31, 2007 ("the October 31 letter") and a copy is attached as Confidential Exhibit 20.
- 5.49 On October 30, 2007, Cooperating Individual 9 told me that he had received a message from Lent requesting a meeting. Cooperating Individual 9 received the message on October 17, 2007. On October 19, 2007 Cooperating Individual 9 sent an email reply to his assistant, and also the assistant general counsel for the Cooperating Party, adding the comment "our friend at Hershey seems to need a reminder re: Competition Act." A copy of this email is attached as Confidential Exhibit 21 to this Information. On October 19, 2007, counsel for the Cooperating Party called me to bring the issue to the Bureau's attention in light of their obligations under the Immunity Program. I informed counsel for the Cooperating Party of my concern that a rejection of the request may provide a tip off about the investigation and that the Bureau's preference would be for Cooperating Individual 9 to attend the meeting. The objective was for Cooperating Individual 9 to

attend the meeting with no intention to agree on price increases or commit an offence, but to listen to what the other party had to say.

- 5.50 On October 26, 2007, counsel for the Cooperating Party advised me that a lunch meeting between Lent and Cooperating Individual 9 was scheduled for November 6, 2007. On October 30, 2007 Cooperating Individual 9 told me that a meeting had been scheduled with Lent, but he did not yet have a specific location or time of the meeting and that no specific purpose or agenda was identified in the request for the meeting.
- 5.51 On November 6, 2007, I interviewed Cooperating Individual 9 immediately after his lunch meeting with Lent. Cooperating Individual 9 said that there was no discussion about pricing for chocolate confectionery and that most of the discussion related to CMAC issues in Lent's capacity as Chairman of the CMAC Board. At the lunch meeting, Lent indicated to Cooperating Individual 9 that he plans to meet one-on-one with leaders of CMAC member companies to gauge their point of view on CMAC issues.

(iv) Other Relevant Communications

- 5.52 On September 10, 2007, Cooperating Individual 1 informed me that there had been some discussion about pricing at CMAC meetings in late 2006 related to Imperial Tobacco Ltd's introduction of a direct store delivery ("DSD") strategy and the cost implications for confectionery suppliers due to changes in the convenience distribution channel. Cooperating Individual 1 was not certain whether the pricing discussions had happened at a Category Development Committee ("CDC") meeting in or around September, 2006 or at a Board Meeting with the CDC present on November 9, 2006. The Cooperating Party has provided the Bureau with a copy of the draft minutes for the CMAC meeting on November 9, 2006 and a copy is attached as Confidential Exhibit 22. The draft minutes indicate that attendees at that meeting included: Cooperating Individual 1, Martinez, Bruce Brown from Hershey, John Rowsome from the CMAC and Dr Neil Campbell from McMillan Binch Mendelsohn. One of the items in the minutes was titled "Convenience

Trade Channel Distribution” and it states that Dr Campbell outlined competition law and advice to the association about the distribution matter. The minutes also state “Concerns over the adaptation of a DSD program by other convenience channel suppliers that could result in incremental costs to retailers and possibly the consuming public were voiced.” Cooperating Individual 1 stated that Mr Rowsome had prepared a PowerPoint presentation related to this topic. Cooperating Individual 1 made some notes on the corner of the presentation to the effect of "Should we take a price increase, what happens to our margins." Cooperating Individual 1 did not know if the notes reflected his own thoughts or those of someone else. In or around July 2007, Cooperating Individual 1 says he looked through his file for anything controversial on prices, took that presentation out of the file and destroyed it. Accordingly, that document is not available for my review.

- 5.53 Counsel for the Cooperating Party informed me on October 5, 2007 that Ross Robertson (“Robertson”), Vice President/General Manager, ITWAL Limited, called Cooperating Individual 10 on September 26, 2007. While the two individuals had a history of business dealings, Robertson had never called Cooperating Individual 10 before. Robertson advised Cooperating Individual 10 that one of the Cooperating Party’s competitors within chocolate will be taking a price increase in February 2008 between 4-6%, but did not specify which competitor. The Cooperating Party has also provided the Bureau with a copy of an email exchange on September 26, 2007 where Cooperating Individual 10 passed on this information to others in the Cooperating Party, corroborating that the discussion took place. A copy of the email is attached as Confidential Exhibit 23 to this Information.
- 5.54 A number of the relevant individuals referred to above have also had, and will continue to have, meetings and communications about non-pricing matters. A number of the communications referred to above also contained discussion of legitimate or innocuous matters. For example, Cooperating Individual 1, Leonidas and Martinez were all, from time to time, members of the Board of the CMAC. Lent's predecessor at Hershey, Bruce Brown, was also a member of the Board of the CMAC. Lent was confirmed on the CMAC Board of Directors in January 2007.

- 5.55 Subsection 45(2.1) of the *Competition Act* states that “. . . the court may infer the existence of a conspiracy, combination, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties thereto”
- 5.56 Based on both the direct evidence and on circumstantial evidence provided to the Bureau, I have reasonable grounds to believe that at least a tacit agreement existed between Hershey, Mars, Nestlé and other persons, known and unknown, with each other and with the Cooperating Party regarding the price of chocolate confectionery products in Canada.

Enhance unreasonably the price of the product

- 5.57 I refer to my reasonable grounds to believe in paragraph 5.56 above that at least a tacit pricing agreement existed between the Cooperating Party, Hershey, Mars, Nestlé and other persons, known and unknown. The price increase letters referred to at paragraphs 5.25, 5.26 and 5.30 to 5.33 above indicate that the Cooperating Party, Nestlé, Mars and Hershey in fact increased prices of chocolate confectionery during the relevant period. In late 2005, Nestlé increased prices by 5 to 8%, Cooperating Party increased prices by 5.2%, Hershey increased prices by an unknown amount and Mars increased prices by 6%. The recent communications referred to at paragraphs 5.40, 5.47 and 5.48 above suggest that at least Nestlé is proposing a price increase for chocolate confectionery in early 2008 of 4 - 6%. I have reasonable grounds to believe that the agreement is to enhance the price of chocolate confectionery products.
- 5.58 I understand that the issue of what is needed to prove the unreasonable character of the price enhancement is an issue that has not been determined authoritatively in Canadian courts at the appellate level: it could take a quantitative meaning (an objective increase in

price)¹ or a qualitative meaning (the means used to enhance prices).² Further work needs to be done to make the case on a quantitative basis, but I have reasonable grounds to believe that on a qualitative meaning, the price increases are unreasonable.

- 5.59 The price increase letters referred to at paragraphs 5.25, 5.26 and 5.30 to 5.33 above state that the Cooperating Party, Nestlé, Mars and Hershey increased prices of chocolate confectionery in response to a range of cost increases, such as cocoa, sugar, energy and packaging.
- 5.60 However, I believe the means used to enhance prices was by way of a deliberate, secretive and high level price fixing agreement. In the case of at least the Cooperating Party, Hershey and Nestlé, the alleged conspiracy was brought about and sanctioned at the highest levels of the companies involved. The companies reached an agreement or arrangement whereby they would collaborate on increasing transaction prices for chocolate confectionery by raising list prices and/or reducing trade spend to customers.
- 5.61 Paragraphs 5.24, 5.26, 5.40 and 5.52 above provide examples of a number of occasions that participants in such communications made it clear that they were aware of the very sensitive nature of communications between competitors about price information. Nevertheless, the price-fixing communications were often at the most senior levels of the companies involved and they have continued over a number of years.
- 5.62 On a qualitative construction of "unreasonably" in paragraph 45(1)(b), I have reasonable grounds to believe that the enhancement of the price of chocolate confectionery products is unreasonable.

¹See for example *R v Canadian Import* (1933), 61 CCC 114 (Que KB)

²See for example *R v Container Materials* (1941), 76 CCC 18 (Ont CA)

b) *Grounds to Believe that the Offence described in Paragraph 2.2 of the Information was Committed*

Agreement or Arrangement

5.63 I refer to paragraphs 5.21 to 5.56 above concerning the existence of a pricing agreement between Hershey, Mars, Nestlé and other persons, known and unknown, with each other and with the Cooperating Party regarding chocolate confectionery products in Canada.

Lessen competition unduly

5.64 According to the Supreme Court in *R v Nova Scotia Pharmaceutical Society*³ (PANS), an inquiry into whether an agreement would or would likely prevent or lessen competition unduly involves three steps: (i) defining the relevant market, (ii) determining its structure, and (iii) analyzing the behaviour of the parties to the agreement.

5.65 The analytical framework set out in PANS is a partial rule-of-reason analysis that examines the structure of a market, and the behaviour of the firms in that market, in order to determine the effects on competition that would likely result from such structure/behaviour combination. The first stage in an assessment of "unduly lessening competition" involves defining the relevant market. The relevant market is defined so that a determination can then be made about how much market power a firm (or group of firms acting collectively) has in that market. A relevant market is assessed from two perspectives: the product market, consisting of those products that purchasers consider to be reasonable substitutes for the product in question, and the geographic market, consisting of those suppliers who are located close enough to the purchasers to constitute viable substitute sources of supply of the product. The second stage in an assessment as to undueness involves determining the market structure and assessing the market power of the conspirators. The market structure analysis looks at issues such as market share, barriers to entry, product differentiation, countervailing power and cross-elasticities of

³[1992] 2 SCR 606; [1992] SCJ No 67 (QL)

demand to assess whether the structure of the market would facilitate successful conspiracy conduct. Market power is the ability to behave relatively independently of the market.⁴ The third stage involves an analysis of the behaviour of the parties to the agreement. Section 45 offences require, in addition to some market power, some behaviour likely to injure competition. It is the combination of the two that makes a lessening of competition undue. According to the PANS decision, particularly injurious behaviour may also trigger liability even if market power is not so considerable.⁵

Defining the relevant market

Product market

5.66 On July 27, 2007, my colleague Frédéric LaBonté obtained information on the Canadian Confectionery Industry from the website of Agriculture and Agri-Food Canada and I have reviewed the information. That information indicates that the confectionery industry contains a chewing gum segment and a sugar and chocolate confectionery segment. Sugar confectionery companies produce products such as hard candy, gummy bears, licorice, ju-jubes and toffee. Chocolate confectionery products can be divided into three product categories: boxed chocolates, chocolate bars and/or seasonal novelties. Demand for chocolate bars tends to be steady year-round. Demand for seasonal chocolate products tends to be focussed on particular holidays, such as Easter and Halloween. Counsel for the Cooperating Party informed me on October 29, 2007 that the Cooperating Party's chocolate business has always been managed as a completely separate category from other confectionery and that attempts to manage all confectionery categories together have not been successful with major customers.

5.67 A product market is a single market that is comprised of products that are reasonable

⁴*Ibid* at para 100 (QL)

⁵*Ibid* at para 109 (QL)

substitutes for one another. I am not aware of any authoritative judicial consideration in Canada of chocolate related product markets; however in forming my belief about the product market, I have reviewed the conduct of the parties concerned and some foreign merger decisions.

5.68 On October 30, 2007, Frédéric LaBonté obtained information on the UK Office of Fair Trading's website about Cadbury Schweppes plc's acquisition of Green & Black's Limited and I have reviewed that decision. The full text of the decision was published on September 6, 2005. Eighty percent of Green & Black's sales were in the supply of chocolate confectionery and that decision considered the relevant product market for the purposes of the merger analysis. The parties submitted that the relevant product market was the market for the supply of chocolate confectionery, which included a number of segments of chocolate confectionery "because of the high degree of demand side substitutability between block chocolate and chocolate confectionery bars." The parties pointed to internal research that indicated that one of Cadbury's block chocolate products lost sales to other chocolate confectionery bars. In terms of supply side substitution, third parties contacted by the OFT generally confirmed that there are no significant barriers to switching production between the different types of chocolate confectionery products. The OFT did not find it necessary to reach a conclusion on whether the narrower (block chocolate) or broader (chocolate confectionery) market applied.

5.69 On October 30, 2007, my colleague Frédéric LaBonté obtained information on the European Commission's website about a merger notification by Philip Morris/Nabisco, published on October 16, 2000 and I have reviewed the decision. That decision considered the relevant product market for the purposes of the merger analysis and identified that chocolate confectionery can be categorised into a number of product segments. The decision observes that: "It follows from the market investigation that, in any event, the relevant product market is not wider than that for chocolate confectionery. A number of respondents (in particular, competitors) indicate that a narrow segmentation of the chocolate confectionery [sic] market is appropriate." The decision then concluded on this issue: "In the context of the present case, the precise definition of the relevant

product markets can be left open, since whatever market definition is chosen, the concentration does not lead to the creation or strengthening of a dominant position."

- 5.70 I have considered the information in paragraphs 5.21 to 5.56 above and the communications referred to are primarily focussed on chocolate confectionery prices. I have also considered the analysis of chocolate confectionery and product segments of chocolate confectionery referred to in the foreign merger decisions in paragraphs 5.68 and 5.69 above. Accordingly, I have reasonable grounds to believe that the relevant product market is the market for chocolate confectionery products.

Geographic Market

- 5.71 A geographic market is a single market that is composed of alternative geographic sources of supply that are reasonable substitutes for one another. On October 16, 2007, counsel for the Cooperating Party informed me and my colleague, Marisa Ferraiuolo, that amongst the major national chocolate suppliers, there are generally no regional differences across Canada. The national market share is used as a proxy for regional markets because there is minimal regional variation.
- 5.72 I have reviewed the information that my colleague Frédéric Labonté obtained on the Canadian Confectionery Industry from the website of Agriculture and Agri-Food Canada on July 27, 2007. That information indicates that there are Canadian labelling requirements on products that fall under the *Consumer Packaging and Labelling Act* and *Food and Drugs Act*. To supply confectionery products in Canada, importers and domestic manufacturers bear substantial labelling costs to comply with those Acts.
- 5.73 I have reviewed information that Frédéric LaBonté obtained on October 30, 2007 from the UK Office of Fair Trading's website about Cadbury Schweppes plc's acquisition of Green & Black's Limited. The full text of the decision was published on September 6, 2005. That decision considered the relevant geographic market for the purposes of the

merger analysis. The OFT found that the appropriate geographic market was a national market (the UK), "since many suppliers in this sector, and the major customers of the parties, operate on a national basis."

- 5.74 I have considered the information in paragraph 5.71 above that chocolate confectionery suppliers operate on a national basis and the analysis of geographic market in the foreign merger decision referred to in paragraph 5.73 above. I have also considered the barriers to supplying chocolate confectionery into the Canadian market referred to in paragraph 5.72. Accordingly, I have reasonable grounds to believe that the relevant geographic market is that national market for Canada.
- 5.75 Accordingly, I have reasonable grounds to believe that the relevant market is the market for the supply of chocolate confectionery products in Canada.

Determining market structure

Market Share

- 5.76 On the basis of the market information I have reviewed to date, including some market share data, I have reasonable grounds to believe that the alleged participants had market power during the relevant period. I have not yet obtained market share data for the entire period of the alleged offences. On October 31, 2007, the Bureau obtained the following 2005 market share information on chocolate confectionery in Canada from Datamonitor:

Canada Chocolate company share, by value, 2004-2005 (%)

Company	(%)
Cadbury	26.9
Nestlé	26.4
Hershey	25.9
Mars	18.6
Private Label	1
Others	1.3
Total	100

5.77 On October 31, 2007, the Bureau obtained the following company value information on chocolate confectionery in Canada from Datamonitor:

Canada Chocolate value, by company, 2004-2005 (C\$ m nominal price)

Company	C\$ m
Cadbury	455.6
Nestlé	447.1
Hershey	438
Mars	314.7
Private Label	17.5
Others	21.3
Total	1694.3

5.78 The Cooperating Party provided the Bureau with other data sourced from AC Nielsen for the 52 weeks to September 29, 2007. That data shows total chocolate sales of \$1.45 billion with market shares of Nestle - 20.1%, Hershey - 17.4%, Cadbury -16.5%, Mars 10.0%, Lindt - 6.4% and others 29.5%. The market share and sales information that I have reviewed indicates that the Canadian chocolate confectionery industry is highly concentrated. Nestlé, Hershey, Cadbury and Mars are the top four manufacturers of chocolate confectionery products in Canada. Collectively, they accounted for 97.8% of Canada chocolate company share in 2004-2005 (Datamonitor). The four top manufacturers collectively accounted for 64% of total chocolate sales dollars in 2007 (AC Nielsen).

Barriers to Entry

5.79 A barrier to entry is any obstacle that impedes or prevents a firm from entering a market and thereby limits the amount of competition faced by existing firms. Entry barriers can be structural, behavioural or regulatory. On July 27, 2007, my colleague Frédérick LaBonté obtained information on the Canadian Confectionery Industry from the web-site of Agriculture and Agri-Food Canada. That information indicates that technology is an issue that is extremely important to confectionery manufacturers. The information states: "The manufacture of confectionery products can be highly technical, requiring considerable understanding of food technology, including hardware (processing machinery and computers), software and formulation technology. Technical know-how is required to integrate these elements in an effective production system that is efficient and results in a high-quality, innovative product."

5.80 On August 29, 2007, counsel for the Cooperating Party informed me that brand loyalty is very important in the chocolate industry and that there is significant spending on advertising in the industry. On July 27, 2007, my colleague Frédérick LaBonté obtained information on the Canadian Confectionery Industry from the web-site of Agriculture and

Agri-Food Canada and I have reviewed the information. That information indicates that most of the top ten chocolate bars in Canada today have been among the top ten for over sixty years.

- 5.81 On July 27, 2007, my colleague Frédérick LaBonté obtained information on the Canadian Confectionery Industry from Datamonitor. That information indicates that confectionery suppliers in Canada operate through a number of supply channels. Supermarkets and hypermarkets (a combination of a department store and a supermarket) form the most significant distribution channel for confectionery sales in Canada. On August 29, 2007, counsel for the Cooperating Party informed me that some customers could have countervailing power in the supply chain.
- 5.82 I have reasonable grounds to believe that the combined market shares and barriers to entry are sufficiently high to enable a finding of market power according to the PANS test, particularly given the nature of the injurious behaviour as discussed below.

Behaviour of the parties to the agreement

- 5.83 According to the PANS decision, particularly injurious behaviour may also trigger liability even if market power is not so considerable. An agreement that lessens competition in respect of prices should be taken to be particularly injurious as "prices" is one of the "impermissible" fields in what is now sub-section 45(4), referred to in PANS.⁶
- 5.84 The alleged behaviour in this matter is a deliberate, secretive and high level price fixing agreement. In the case of at least the Cooperating Party, Hershey and Nestlé, the alleged conspiracy was brought about and sanctioned at the highest levels of the companies involved. I believe the companies reached an agreement or arrangement whereby they would collaborate on increasing transaction prices for chocolate confectionery by raising list prices and/or reducing trade spend to customers.

⁶*Ibid* at para 108 (QL)

- 5.85 Paragraphs 5.24, 5.26, 5.40 and 5.52 above provide examples of a number of occasions that participants in such communications made it clear that they were aware of the very sensitive nature of communications between competitors about price information. Nevertheless, the price-fixing communications were often at the most senior levels of the companies involved and they have continued over a number of years.
- 5.86 Harm to competition is more likely to occur where the structural characteristics of a market are such that a firm (or group of firms acting collectively) is able to exercise market power and where it engages in particularly serious anti-competitive behaviour. I have reasonable grounds to believe that the alleged participants had market power and that they engaged in serious price-fixing behaviour.
- 5.87 I have reasonable grounds to believe that the agreement, if carried out, would lessen competition unduly in the market for chocolate confectionery products in Canada.

Conclusion on Commission of an Offence

- 5.88 I believe that given the substitution options on the demand side for chocolate confectionery products, a supplier would have little incentive to increase prices, thereby risking substantial volume losses on sales, without a high degree of confidence that its competitors would follow. If price increases are coordinated between competitors, customers lose the ability to push back on price changes because they would not have the choice to switch purchases away from the leader of price changes to other major suppliers who had not changed price.
- 5.89 I refer to paragraphs 5.21 to 5.56 above concerning the numerous communications between competitors to exchange confidential information about pricing. I believe the communications resulted in the establishment and maintenance of an agreement where one competitor led a price increase or reduction in trade spend, other competitors would support such an initiative by also implementing a price increase. The supplier leading

such a pricing initiative is provided comfort that its competitors are aware of planned changes and will respond consistently.

5.90 By virtue of the early communication of confidential information about future pricing decisions, the timing and level of price changes were coordinated with other parties to the agreement. I believe that the exchange of confidential pricing information among competitors limited independent pricing or other marketing activity regarding chocolate confectionery.

5.91 On the basis of information provided to me by the Cooperating Party, interviews conducted with Cooperating Individuals and other information set out above, I have reasonable grounds to believe that the Cooperating Party, Hershey, Mars, Nestlé and others known and unknown, by exchanging confidential pricing information, conspired, combined, agreed or arranged to:

- (a) unreasonably enhance the prices of chocolate confectionery products, contrary to paragraph 45(1)(b) of the *Competition Act*; and
- (b) prevent or lessen, unduly, competition in the sale and supply of chocolate confectionery products in Canada, contrary to paragraph 45(1)(c) of the *Competition Act*.

E) GROUNDS TO BELIEVE THAT THINGS TO BE SEARCHED FOR ARE AT THE PREMISES TO BE SEARCHED

5.92 Based on my experience in dealing with business records at the Bureau and at the ACCC, I believe that records or other things to be searched for and described above are the kinds of records that would be created in the course of conduct such as that alleged in paragraph 2, and would likely exist and be found on the premises named in paragraph 4 of this Information, and that they would afford evidence with respect to the commission of the offences set forth in paragraphs 2.1 and 2.2 of this Information.

5.93 I have spoken to fellow competition law officer Robert Jackson on November 15, 2007. He has participated in more than 100 searches and has informed me that based on his experience on these searches, he believes that records and other things to be searched for and described at paragraph 3 are the kinds of records that would be created in the course of conduct such as that alleged in paragraph 2, and would likely exist and be found on the premises named in paragraph 4 of this Information, and that they would afford evidence with respect to the commission of the offences set forth in paragraphs 2.1 and 2.2 of this Information.

F) GROUNDS TO BELIEVE THAT THE THINGS TO BE SEARCHED FOR WILL AFFORD EVIDENCE WITH RESPECT TO THE COMMISSION OF THE OFFENCES ALLEGED

5.94 I believe that records or other things relating to the corporate structure of the respondents and the ownership or control of the entities described in paragraph 3.2 of my Information, will afford evidence of the corporate entities, the identity of, and the role exerted by, their officers and managers relating to the marketing, sales and operations of the respondents' businesses and their agents and employees.

5.95 I believe that records relating to the names, positions, duties, responsibilities, compensation and authority of owners, officers, directors, employees or other representatives of the entities named in the alleged offences as described in paragraph 3.2 of my Information, will afford evidence to demonstrate the participation and the role played by these persons in the alleged offence.

5.96 I believe that records or other things relating to meetings, communications, agreements or arrangements, direct or indirect, between or among any of the entities named in the alleged offences, or competitors, customers or others in the supply of chocolate confectionery products as described in paragraph 3.2 of my Information, will afford evidence to establish that the persons named in the alleged offence entered into an agreement or arrangement and had knowledge of the terms of the agreement or

arrangement.

- 5.97 I believe that records or other things relating to prices, trade spend levels or other associated promotional or marketing policies for the supply of chocolate confectionery products as described in paragraph 3.2 of my Information, will afford evidence required to establish that the persons named in the alleged offence entered into an agreement or arrangement and had knowledge of the terms of the agreement or arrangement.
- 5.98 I believe that records relating to the preparation, formulation, adoption, revision, adjustment, rescission, continuation, implementation, observance, application or determination of prices, trade spend levels or other associated promotional or marketing policies for chocolate confectionery products as described in paragraph 3.2 of my Information, will afford evidence to establish that the persons named in the alleged offence entered into an agreement or arrangement and had knowledge of the terms of the agreement or arrangement.
- 5.99 I believe that records or other things relating to barriers to entry, sales, revenues, expenses, geographic markets, product markets or customer markets, market shares and profits, including historical, actual and forecast of the entities named in the alleged offences, as described in paragraph 3.2 of my Information, will afford evidence of the unreasonable enhancement of price and undue lessening of competition.
- 5.100 I believe that samples of handwriting as described in paragraph 3.3 of my Information may be required to identify the author of any unidentified handwriting appearing on records seized or produced under the authority of the warrants.
- 5.101 I believe that existing samples of facsimile communications sent or received as described in paragraph 3.4 of my Information may be required to identify the source or recipient of any telephone facsimile communications that relate to the formulation or implementation of pricing, trade spend, promotion, or marketing policies, or other competitive practices.
- 5.102 I believe that personal belongings on the premises as described in paragraph 8.3 of my Information may contain records as described under paragraph 3.2 that can be seized or produced under the authority of the warrants.

- 5.103 I believe that computer passwords, computer programs, computer services, computer systems, data storage devices and associated documentation, as described in paragraph 3.5 of my Information may be required to retrieve, copy, read, print, decipher, or acquire the meaning of any records or other things seized or produced under the authority of the warrants.
- 5.104 I believe that records or other things described in paragraph 3 may be contained in, or available to any computer system on the premises to be searched.

**G) GROUNDS TO BELIEVE THAT THE THINGS TO BE SEARCHED FOR
WILL BE FOUND ON THE PREMISES TO BE SEARCHED**

- 5.105 I believe that the "Records and Other Things to be Searched for", described in paragraph 3 of this Information, will be found on the premises listed in paragraph 4 of this Information.
- 5.106 I have informed myself by referring to some or all of the following sources of information on the addresses of the premises occupied by, or on behalf of, Hershey, Mars, Nestlé and ITWAL:
- (a) online telephone directories maintained by Canada411;
 - (b) corporation reports obtained from Dun & Bradstreet Canada and from other services specializing in the provision of corporate information;
 - (c) Internet web sites operated by Hershey, Mars, Nestlé and ITWAL;
 - (d) addresses listed on correspondence originating from Hershey, Mars and Nestlé.

Hershey

- 5.107 From Dun & Bradstreet reports, I have determined that Hershey is an active corporation situated at 2350 Matheson Blvd E Mississauga, Ontario L4W 5E9, which is the address

indicated in paragraph 4(a) of my Information. The Hershey letter referred to in paragraph 5.32 of this Information, and reproduced in Confidential Exhibit 10 to this Information, shows this same address. The Internet web site for Hershey (www.hersheycanada.com), which my colleague Andrea Burke checked as recently as November 15, 2007, provides contact details for Hershey at the address indicated in paragraph 4(a) of my Information.

- 5.108 I visited 2350 Matheson Blvd E Mississauga, Ontario with my colleague Andrea Burke on November 6, 2007 and observed that there is a two storey office building with a sign "Hershey Canada" at that address.
- 5.109 On October 23, 2007 a search of the Canada411 telephone directory showed two addresses for the head office of "Hershey Canada Inc": 2350 Matheson Blvd E Mississauga, Ontario L4W 5E9 indicated in paragraph 4(a) of my Information and 500-5750 Explorer Drive Mississauga, Ontario L4W 0B1 indicated in paragraph 4(b) of my Information. I was informed by my colleague, Frédéric LaBonté, and do believe that he telephoned Hershey on November 14, 2007 and was informed by the receptionist that the head office is located at 2350 Matheson Blvd E until noon on Friday November 16, 2007, then from Monday November 19, 2007, the head office will be located at 5750 Explorer Drive. No information was provided to Mr LaBonté about whether there would be a transition period between the two offices.
- 5.110 I am informed by my colleague, Frédéric LaBonté, and do believe, that on November 15, 2007 he located an article from the Mississauga News (www.mississauganews.com) dated November 2, 2007 and titled "Hershey Canada is on the move." I have reviewed a copy of that article and it states Hershey: "recently announced that it is relocating its headquarters to the Airport Corporate Centre at 5750 Explorer Dr. in Mississauga. . . . The new offices will open on Nov. 19."
- 5.111 I believe that the records sought may be found at 2350 Matheson Blvd E. Mississauga, Ontario because:
- (a) it is currently the head office of Hershey and may continue to hold corporate records for a period after the move to a new location on November 19, 2007; and

- (b) I am informed by my colleague, Marisa Ferraiuolo, and do believe, that she telephoned Hershey on October 24, 2007 and was informed by the receptionist that Eric Lent works out of the premises at 2350 Matheson Blvd East, Mississauga, ON, L4W 5E9.

5.112 I believe that the records sought may be found at 500 - 5750 Explorer Drive Mississauga, Ontario because:

- (a) it will be the head office of Hershey from November 19, 2007;
- (b) I am informed by my colleague, Elizabeth Eves, and do believe, that she visited 500 - 5750 Explorer Drive Mississauga, Ontario on November 16, 2007. Ms Eves was told by a person at that site that Hershey was in the process of moving its offices to that premises.

Mars

5.113 From Dun & Bradstreet reports, I have determined that Mars is an active corporation situated at 37 Holland Drive Bolton, Ontario L7E 5S4, which is the address indicated in paragraph 4(c) of my Information. The letter sent by Mars to its customers, referred to in paragraph 5.33 of this Information, and reproduced in Confidential Exhibit 11 to this Information, shows this same address. The Internet web site for Mars (www.mars.com), which my colleague Andrea Burke checked as recently as November 15, 2007, provides contact details for Mars in Canada at the address described above in this paragraph. The Canada411 telephone directory did not show a listing for "Mars Canada Inc."

5.114 I visited 37 Holland Drive Bolton, Ontario with my colleague Andrea Burke on November 6, 2007 and observed that there is an office building in front of a manufacturing plant at that address. At the driveway entrance to the premises, there is a sign that says "Mars Canada Inc 37 Holland Drive" and indicates that it is the "National Office Reception."

5.115 I believe that the records sought may be found at 37 Holland Drive Bolton, Ontario

because it is the head office of Mars.

Nestlé

- 5.116 From Dun & Bradstreet reports, I have determined that Nestlé is an active corporation with the headquarters situated at 25 Sheppard Ave W Toronto, Ontario M2N 6S8, which, apart from using the general "Toronto" instead of the specific "North York", is the same address indicated in paragraph 4(d) of my Information. The letters to customers on Nestlé letterhead, referred to in paragraphs 5.25, 5.26 and 5.48 of this Information, and reproduced in Confidential Exhibits 4, 5 and 20 to this Information, show the address as 25 Sheppard Ave W North York, Ontario M2N 6S8. The Internet web site for Nestlé (www.nestle.ca), which my colleague Andrea Burke checked as recently as November 15, 2007, provides contact details for Nestlé as 25 Sheppard Ave W North York, Ontario M2N 6S8. The Canada411 telephone directory likewise shows the home office of "Nestlé Canada Inc" as being located at the same address indicated in paragraph 4(d) of my Information.
- 5.117 I am advised by my colleague, Elizabeth Eves, and do believe, that she visited 25 Sheppard Ave W North York, Ontario with her colleague Julie-Anne Pesce on October 30, 2007 and observed that there is a multi-storey office building with a sign "Nestlé" at that address. I am advised by Elizabeth Eves, and do believe, that she entered the building at that address and visited Nestlé's reception on the 22nd floor, as well as stopping at the 15th - 21st floors. Ms Eves observed that Nestlé logos are located at the elevators on the 18th - 22nd floors.
- 5.118 I believe that the records sought may be found at 25 Sheppard Ave W North York, Ontario because:
- (a) it is the head office of Nestlé;
 - (b) I was informed by my colleague, Marisa Ferraiuolo, and do believe that she telephoned Nestlé on October 24, 2007 and was informed by the receptionist that

Leonidas is an employee of Nestlé and his mailing address is 25 Sheppard Avenue West, North York, ON; and

- (c) I was informed by my colleague, Frédérick LaBonté, and do believe that he telephoned Nestlé on October 29, 2007 and was informed by the receptionist that the mailing address for Martinez is 25 Sheppard Avenue West, North York, Ontario.

5.119 From Dun & Bradstreet reports, I have determined that Nestlé is an active corporation with a branch location situated at 9050 Airport Road, Suite 101, Brampton, ON, L6S 6G9, which is the same address indicated in paragraph 4(e) of my Information.

5.120 I am advised by my colleague, Elizabeth Eves, and do believe, that she visited 9050 Airport Road, Brampton, Ontario on November 14, 2007 and observed that there is a building at that address identified as a Nestlé building. That building contains both warehouse and office facilities. At the main entrance of suite 101 there was a telephone list that included the name Lynn Hashinsky.

5.121 I believe that the records sought may be found at 9050 Airport Road, Suite 101, Brampton, Ontario because:

- (a) it is a branch office of Nestlé; and
- (b) I was informed by my colleague, Andrea Burke, and do believe that she telephoned Nestlé on November 1, 2007 and was informed by the receptionist that Hashinsky is an employee of Nestlé and works out of the premises at 9050 Airport Road, Suite 101, Brampton, Ontario, L6S 6G9.

ITWAL

5.122 From Dun & Bradstreet reports, I have determined that ITWAL is an active corporation situated at 440 Railside Drive Brampton, ON L7A 1L1, which, is the same address indicated in paragraph 4(f) of my Information. The Internet web site for ITWAL (www.itwal.com), which my colleague Andrea Burke checked as recently as November

15, 2007, provides contact details for ITWAL as 440 Railside Drive Brampton, Ontario L7A 1L1. The Canada411 telephone directory did not identify a listing for "ITWAL".

- 5.123 I am advised by my colleague, Julie-Ann Pesce, and do believe, that she visited 440 Railside Drive Brampton, Ontario on October 31, 2007 and observed that there is a building at that address with a large ITWAL sign on it and there were many trucks with ITWAL written on them. That building contains both warehouse and office facilities.
- 5.124 I believe that the records sought may be found at 440 Railside Drive Brampton, Ontario because:
- (a) it is the head office of ITWAL; and
 - (b) I was informed by my colleague, Frédéric LaBonté, and do believe that he telephoned ITWAL on November 14, 2007 and was informed by the receptionist that Ross Robertson is Vice President and General Manager of ITWAL and works out of the premises at 440 Railside Drive Brampton, Ontario.

H) GROUNDS FOR BELIEVING IN THE NECESSITY OF PROVISION FOR SEARCHING COMPUTER SYSTEMS

- 5.125 Based on my experience in investigating competition matters at the Bureau and at the ACCC, I have observed that, in the normal conduct of business, companies use computer systems for their day to day operations. I believe that some of the records to be searched for described above in this Information will be found in the form of data suitable for use in a computer system. I believe that forensic practices and procedures are used when conducting searches for data.
- 5.126 The Bureau has competition law officers trained to conduct searches of computer systems, electronic storage devices and media ("electronic evidence investigators") pursuant to sections 15 and 16 of the *Competition Act*.
- 5.127 Dianne Rathwell, a senior electronic evidence investigator trained to examine and seize

electronic evidence, has informed me on November 15, 2007, and I believe that:

- a) Data is stored in a variety of different formats, some of which are not readily accessible without the specific software and/or hardware on which they were created;
- b) Data may be recovered from computer systems months or even years after it has been created, deleted, copied to a data storage device or media or viewed via the Internet;
- c) Data may be stored on data storage devices. Some of these are as small as postage stamps. The devices may hold large volumes of data and are used in office environments as removable storage for data, eg, digital cameras, USB (universal serial bus) devices (eg, watches, pens, Swiss army knives), SP flash drives, cell phones or smart cards;
- d) Many operating systems and computer programs, create temporary files containing records such as a history of web sites visited, files printed or fax transmissions, in order to facilitate efficient operation of these operating systems and computer programs. This may result in the creation of data without user knowledge or intervention;
- e) Traces of transient, erased or deleted data persist on data storage devices until the space allocated to them are over written;
- f) Global security concerns have increased the use of passwords, log-on codes, encryption keys or other hardware security devices.

5.128 In this case, I request that authorization be granted to access, search, examine, copy and seize data that may be found on computer systems, data storage devices or media. I also request that authorization be granted to seize the computer system, data storage device or media that may contain data, if it is necessary to examine and/or extract relevant data off-site.

5.129 Dianne Rathwell has conducted searches of computer systems and is familiar with

practices and procedures that may be required to search any data contained in or available to computer systems, data storage devices or media.

5.130 The information which Dianne Rathwell has provided to me, and which I believe, is as follows:

- a) It is not possible to determine, in advance, which practices and procedures may be required to access, search, examine, copy, extract data or used to acquire the substance and meaning of data;
- b) The persons authorized to execute the warrant will use accepted practices and procedures for acquiring electronic evidence, while attempting to minimize the impact on business functions. The following practices and procedures may be used as circumstances dictate:
 - (i) Search the computer system, data storage device, or media and produce an image to examine and extract relevant data off-site;
 - (ii) Search the computer system, data storage device, or media and reproduce an electronic copy of relevant data on-site;
 - (iii) Search the computer system, data storage device, or media and print a copy of relevant data on-site; or
 - (iv) Seize the computer system, data storage device, or media and remove it/them from the premises, to examine and extract relevant data off-site.
- c) Some of these practices and procedures, specifically the steps described above in sub-paragraphs (b)(i) and (b)(iv), may result in the seizure of data that are not relevant to the warrant. In these cases, electronic evidence investigators will take steps to ensure that material seized, that falls outside of the warrant, will not become part of the investigation file. The following procedure will be followed:
 - (i) where electronic evidence investigators consider it necessary to produce an image of a computer system, data storage device, or media found on the premises, and in order to examine and extract relevant data off-site ((b)(i)),

- a true copy and a working copy of the image produced on the premises will be made;
- the image produced on the premises and the true copy will then be sealed to protect the integrity of the data;
- the working copy will be examined and data believed to be relevant will be extracted and provided to competition law officers;
- electronic evidence investigators will not transmit to the competition law officers data or information found within the working copy that are not believed to be relevant;
- access to the working copy will thereafter remain under the control of electronic evidence investigators;
- further access to data in the working copy will be confined to data believed to be relevant, or as required within proceedings that may arise from the search or investigation;

(ii) A similar process will be followed where competition law officers consider it necessary to seize a computer system, data storage device, or media from the premises ((b)(iv)). In such a case:

- the computer system, data storage device, or media will be transferred, if not seized by him/her, to an electronic evidence investigator, who may produce an image and/or extract relevant data;
- further handling will be as described above.

e) It may be necessary to use, or cause to be used, and/or to seize any computer system, data storage device, media, computer programs, or associated documentation, including operating instructions, manuals and service records, present on the premises;

- f) It may be necessary to use, or cause to be used, any computer system, data storage device, media, or computer program brought on to the premises by the persons authorized to execute the warrant;
- g) The persons authorized to execute the warrant will require the company's computer system administrator, or other custodian of information relating to the computer programs, computer systems, data storage devices, or media, to provide them with all passwords, log-on codes, encryption keys or other related security devices;
- h) The persons authorized to execute the warrant may find encrypted, security protected or other data from which they cannot acquire the substance and meaning of at the premises, requiring seizure or reproducing of such data for further off-site examination; this may result in the seizure of data not relevant to the warrant;
- i) It may be necessary to employ, retain, direct or engage other persons to assist in the search of the said premises including the services of computer consultants or diagnosticians, which persons would, in the presence of persons authorized in the warrant, attend at the premises and perform such tasks as may assist the persons authorized in the warrant to carry out their functions thereunder.

D) COMPUTER SYSTEMS AUTHORIZATIONS

5.131 I request authorization for those persons named in paragraph 6 who have been trained to search and seize data from computer systems and persons under their direction and supervision to do what has been described in the above paragraph.

AUTHORIZED PERSONS

6. The affiant therefore asks that a warrant be issued authorizing the Commissioner and the following named persons to enter and search the premises described in paragraph 4 and, seize the records or other things described in paragraph 3 in accordance with the search warrant herein requested:

6.1 Guillaume Couillard, Marie-Claude Touchette, Rick Harrison, Gwill Allen, Tony Marrocco, Frédéric LaBonté, Robert Jackson, Stephan Luciw, Marisa Ferraiuolo, Kiran Mubarak, Andrea Burke, Rambod Behboodi, Chris Cook, Kelly Mahoney, Anthony Durocher, Diana Skimming, Julie-Anne Pesce, Laura Grieveson, Frédérique Delaprée, Allison Fillier, Daniel Ikonov, Daniel Wilcock, Elizabeth Eves, Ellen Creighton, Mark Batstone, Greg Andrews, Tammy Smith; and electronic evidence investigators, including the following: Robert Tait, Jeff Chamberlain, Eric Daoust, Jacob Heilik, Matthew Kyrytow, Duncan Monkhouse, Dianne Rathwell, Marcel Thérien and Lynne Perrault; any other authorized representative of the Commissioner of Competition; peace officers in the province of Ontario; and for the purpose of assisting the above mentioned officers, under the supervision of these officers, any person who can assist in the electronic search or to gain access to the premises.

DURATION OF THE WARRANT

7. The affiant requests that:

7.1 The warrant be valid from the 26th day of November, 2007, up to and including the 7th day

PERSONNES AUTORISÉES

6. Le dénonciateur demande donc qu'un mandat soit délivré pour autoriser la commissaire et les personnes ci-après nommées à pénétrer, perquisitionner les locaux décrits au paragraphe 4 et saisir les documents ou autres choses décrits au paragraphe 3 conformément au mandat de perquisition demandé dans la présente dénonciation:

DURÉE DU MANDAT

7. Le dénonciateur demande que:

of December, 2007, or, if issued after the 26th day of November, 2007, for such identical period of time, commencing from the date of issuance of the within sought warrant (approximately 12 days inclusive). This period of validity is necessary to ensure that competition law officers have a sufficient amount of time to search, copy, examine and seize a potentially large volume of records and other materials.

- 7.2 The Act (subsection 15(3)) and thus the warrant normally authorizes the search and seizure of records or other things only between the hours of 6:00 am and 9:00 pm. I ask that where the discontinuance of the search at or before 9:00 pm may result in loss of records, data or other things to be seized the search be allowed to continue after 9:00 pm in the evening on any day, to the extent necessary to avoid loss of records, data or other things to be seized provided the particular search process commenced prior to 9:00 pm. I also ask that the search may also continue after 9:00 pm to allow for the completion of a search process involving a computer system or the capture of data, which based on the length of the process, will extend after 9:00 pm in order to be successfully completed.

SEARCH AND ASSISTANCE:

PERQUISITION ET ASSISTANCE :

8. The affiant further requests:

8. Le dénonciateur demande l'autorisation supplémentaire :

- 8.1 Because the search will last for more than one day, I ask that the persons authorized to execute this warrant may enter the premises, leave them and return to them from time to time during the period of validity of the warrant for the purpose of executing it. By searching during the normal business hours of the premises, any inconvenience and disruption to the persons being searched is minimised.
- 8.2 I ask that one or more authorized competition law officers be allowed to videotape the

events of the search in order to create a visual record of the manner in which the search was conducted, and to photograph or videotape records or other things to be seized. Such visual recordings can assist in the resolution of any allegation based on the conduct of the search, should such an allegation arise, and can provide a means of capturing records or other relevant information from the premises that cannot readily be physically seized, eg, writings on a large white board or layout of space.

8.3 I ask that the warrant authorize competition law officers to search anything found on the premises including personal belongings which the officers believe on reasonable grounds contain records or other things to be searched for and seized. Personal belongings include, but are not limited to, briefcases, bags, purses, knapsacks, wallets, electronic devices such as personal digital assistants, pagers, telephones, and other devices containing electronic data, and that the authorized peace officers be further authorized to lend any necessary assistance in searching personal belongings of individuals.

8.4 Because the search will last for more than one day, I request that the persons authorized to execute the search warrant be authorized to temporarily remove from the search premises any pre-selected record identified to be examined at the end of any day of searching for the purposes of safekeeping. These records, data or other things will remain sealed and will be kept in the custody of the competition law officers executing the search warrant during this period of temporary removal. These records, data or other things will be returned to the premises on the day when the competition law officers next return to the search premises. This procedure will be implemented in order to prevent the loss or destruction of pre-selected records, data or other things that officers have not yet had the chance to examine and seize.

SOLICITOR-CLIENT PRIVILEGE

9. The following information constitutes the reasonable grounds to believe that a law office will, or will not be on, or part of, the premises:

PRIVILÈGE AVOCAT-CLIENT

9. Les renseignements suivants contiennent les motifs raisonnables de croire qu'un bureau d'avocat se trouvera ou non, ou en partie, sur les lieux:

- 9.1 I have reasonable grounds to believe that an office of in-house counsel may exist on each of the premises to be searched, and I wish to search those offices. I have not been able to specifically confirm that the premises referred to in paragraph 4 contain offices of in-house counsel. On November 11, 2007 my colleague Andrea Burke checked the Internet web-sites of Hershey, Mars, Nestlé and ITWAL, but did not find any direct reference to the location of corporate in-house counsel. However, based on my experience at the Bureau and at the ACCC, I believe that corporations of this size and with operations of this scope often have in-house counsel at their corporate headquarters and major offices.
- 9.2 In any event, only non-privileged records are being sought and a representative of the client is almost certain to be present, given the nature of the premises to be searched.
- 9.3 A reasonable opportunity to claim privilege over records subject to search and seizure will be afforded to those in control of the premises to be searched, prior to the commencement of the search.
- 9.4 Although the relevant records may be obtained from at least one alternative location on the search premises and/or other sources beyond the search premises, the records located in the office of in-house counsel may be unique “records”, because of the broader managerial role often played by in-house counsel, and there is no reasonable alternative source for such “records” even if the content of the records to be seized is available in copies at other locations.
- 9.5 The office of in-house counsel will not be searched without the presence of either a representative of the client, or the in-house counsel or external counsel for the client to claim privilege.
- 9.6 If a competition law officer has reason to believe that a document may be subject to solicitor-client privilege, the document will be sealed whether or not a claim of solicitor-client privilege is made, unless the representative of the client determines at that time, after examining the document in question, that no privilege applies or waives any privilege over the document. In making this determination, the competition law officer makes a preliminary assessment only. He or she neither examines the document

extensively nor decides whether the privilege applies.

9.7 Documents which are sealed will be placed in the custody of one of the following parties, as authorized by subsection 19(3) of the *Competition Act*:

a) the registrar, prothonotary or other like officer of the Superior Court of Ontario, or of the Federal Court;

b) a sheriff of the district or county in which the record was ordered to be produced or in which it was found; or

c) some person agreed on between the Commissioner's representative and the person who makes the claim of privilege.

9.9 I propose that the search warrants contain the following wording to deal with unforeseen discovery of solicitor-client privileged records:

When a claim is made that a record about to be examined, copied or seized is subject to solicitor-client privilege or when a Competition Bureau officer has reason to believe that a record may be subject to solicitor-client privilege, the record must be placed in a package, suitably sealed and placed in the custody of the persons named in section 19 of the *Competition Act*.

CONCLUSION

10. The affiant requests that a warrant be granted to search the premises described in paragraph 4 for the records or other things described in paragraph 3, and to copy them or seize them for examination and copying.

10. Le dénonciateur demande qu'un mandat soit émis afin de perquisitionner les lieux mentionnés au paragraphe 4 en vue d'obtenir les documents ou autres choses décrits au paragraphe 3, et d'en prendre copie, ou de les emporter pour en faire l'examen ou en prendre des copies.



Daniel Wilcock,
Affiant

Sworn before me at the
City of Gatineau in the Province of Quebec
This 19th day of November, 2007



Commissioner of Oaths
EDITH CAMPBELL
QUEBEC BAR # 198469-1