

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

MARCY DAVID, BRENDA BROOKS and ANDREW BALODIS

Plaintiffs

- and -

LOBLAW COMPANIES LIMITED, GEORGE WESTON LIMITED,  
WESTON FOODS (CANADA) INC., WESTON BAKERIES LIMITED,  
CANADA BREAD COMPANY, LIMITED, GRUPO BIMBO, S.A.B. DE C.V.,  
MAPLE LEAF FOODS INC., EMPIRE COMPANY LIMITED,  
SOBEYS INC., METRO INC., WAL-MART CANADA CORP.,  
WAL-MART STORES, INC. and GIANT TIGER STORES LIMITED

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF DEFENCE AND CROSSCLAIM**

1. Except as expressly admitted herein, Metro Inc. (**Metro**) denies each of the allegations in the Plaintiffs' Fourth Fresh As Amended Statement of Claim (the **Claim**).

**Overview**

2. Metro did not conspire to fix the price of Packaged Bread in Canada.<sup>1</sup>

3. Contrary to the narrative presented by the Plaintiffs in their Claim, the retail market for Packaged Bread in Canada was competitive and inherently dynamic at all relevant times. The

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<sup>1</sup> In the Order certifying this proceeding as a class action, and in this pleading, the term "Packaged Bread" is defined as "industrially-produced bread products and bread alternatives manufactured and packaged by the Defendant producers, including only bagged bread, buns, rolls, bagels, naan bread, English muffins, wraps, pita and tortillas for resale." Packaged Bread does not include "Fresh Bread", which is defined as "bread products and bread alternatives that are partly or fully baked in retail stores or foodservice providers, or otherwise finished in retail stores or foodservice providers."

Plaintiffs have mischaracterized the retail Packaged Bread market by oversimplifying the economics of the sector, ignoring the role of promotional prices, and confusing the effects of competitive activity for evidence of anti-competitive conduct.

4. To the extent the Plaintiffs suffered damage as a result of a Packaged Bread price-fixing conspiracy, Metro is not responsible. This action should be dismissed as against Metro.

5. The Plaintiffs' misguided characterization of the retail packaged bread market appears to be based on statements made by George Weston Limited (**George Weston**), Loblaw Companies Limited (**Loblaw**), Weston Foods (Canada) Inc. (**Weston Foods**) and Weston Bakeries Limited (**Weston Bakeries**) (collectively, the **Weston Defendants**) in (a) press releases and other public commentary in which the Weston Defendants admitted their own participation in a price-fixing conspiracy and (b) proffer meetings with the Commissioner of Competition.

6. In 2015, the Weston Defendants elected to report themselves and others to the Commissioner of Competition for alleged price-fixing. The Weston Defendants obtained immunity from prosecution (an "immunity marker") for coming forward, but remained exposed to civil liability and brand damage for allegedly participating in a price-fixing conspiracy.

7. Facing substantial brand and liability risk, the Weston Defendants conspired to falsely implicate other entities, including Metro, in their alleged cartel, in an effort to: (a) disperse potential civil liability across the retail sector, including Metro, and (b) avoid the public perception that Loblaw was the sole retailer involved in a price-fixing conspiracy.

8. The Weston Defendants' conduct was unlawful and caused damages to Metro.

## **Metro**

9. Metro is a Québec corporation. It was founded in 1947 as Magasins Lasalle Stores Ltée. and is headquartered in Montreal. Its shares are publicly traded.

10. Metro is a holding company. Metro does not sell Packaged Bread today and did not sell Packaged Bread during the Class Period.

### Metro in Ontario

11. Metro is the parent company of Metro Ontario Inc. (**Metro Ontario**), which is federally incorporated. Metro Ontario is not a party to this action.

12. Metro Ontario carries on business in Ontario as a grocery retailer, selling, among other things, Packaged Bread. Metro Ontario operates about 272 retail grocery stores in Ontario under the banners (i.e. brands) “Metro” and “Food Basics”.

13. Metro Ontario is the corporate successor to A&P Canada Inc. and Loeb Canada Inc., which carried on business in Ontario as grocery retailers until approximately 2007.

14. Metro is also the indirect parent company of Groupe Adonis Inc. (**Adonis**), which is federally incorporated. One of Metro’s subsidiaries, Metro Richelieu Inc. (**Metro Richelieu**), which is federally incorporated, acquired a majority stake in Adonis in 2011 and the outstanding shares of Adonis in 2017. Neither Metro Richelieu nor Adonis are parties to this action.

15. Adonis carries on business in Ontario and Quebec as a grocery retailer in the speciality grocery market, with a focus on Middle Eastern and Mediterranean foods. During the Class Period, Adonis sold, among other things, a relatively small quantity of Packaged Bread. Adonis opened its first store in Ontario in 2013 and currently operates 4 retail stores in Ontario.

### Metro in New Brunswick

16. Metro is the parent company of The Jean Coutu Group Inc. (**Jean Coutu**), which is a Québec corporation. Metro acquired Jean Coutu in 2018. Jean Coutu is not a party to this action.

17. Jean Coutu is the franchisor of about 28 independent retail pharmacies in New Brunswick operating under the Jean Coutu drugstore chain brand, some of which may have sold, among other things, Packaged Bread during the Class Period. All of the Jean Coutu pharmacies in New Brunswick are independently owned and operated by franchisees of Jean Coutu.

18. Metro Richelieu is the franchisor of about 8 independent neighborhood stores in New Brunswick, some of which sell, among other things, Packaged Bread. These neighborhood stores are independently owned and operated by retailers affiliated with Metro Richelieu's network.

### Metro elsewhere in Canada

19. None of Metro, Metro Ontario, Adonis, Jean Coutu, Metro Richelieu or their affiliates sell Packaged Bread in Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan or Yukon.

### **The Packaged Bread retail market**

20. The Plaintiffs' claim fundamentally mischaracterizes the retail market for Packaged Bread in an effort to lump Metro and other defendants into the alleged conspiracy. As explained in more detail below, the Plaintiffs' claim confuses pro-competitive communications involving retailers and suppliers of Packaged Bread as being suggestive of a conspiracy. In particular, the Plaintiffs:

- (a) suggest that communications with suppliers about future pricing are evidence of agreements to fix prices, when in fact they show efforts to manage promotional spend; and
- (b) suggest that communications with suppliers about competitor pricing are evidence of conspiracy enforcement measures, when in fact they show retailers pushing for equitable treatment in the face of unwanted price increases.

### The Retail Market in Ontario

21. The retail market for Packaged Bread in Ontario is highly competitive and characterized by a number of unique features:

- (a) **Bread is a staple:** consumers see Packaged Bread as a necessary pantry item, making it a consistent feature of grocery retailers of all types and sizes;
- (b) **Bread is perishable:** Packaged Bread has a short shelf-life, which means that: (a) consumers tend to buy bread in small, consistent quantities; and (b) as a result, retailers cannot stockpile supply and must work with suppliers to ensure consistent supply and avoid spikes or shortages. Unsold bread approaching the end of its shelf life is typically returned to the producer in exchange for a credit;
- (c) **Bread is a basket-builder:** consumers build their grocery “basket” around staples like bread, such that retailers tend to compete aggressively on staple categories like Packaged Bread in order to win the customer’s business on the balance of the basket, which will typically contain many other items;

- (d) **Bread is fungible:** there is relatively little customer loyalty in the Packaged Bread market, both across products of a similar variety and between retailers. Many customers look for the best price and most convenient option for purchasing Packaged Bread within a geographical area rather than adhere to any particular store banner or brand preference;
- (e) **Bread markets are regional and local:** there is intense regional and local competition in micro markets between grocers in the bread category as retailers try to win as many customer baskets in each region, city and neighborhood as they can by underselling each other on bread and other staples in that area; and
- (f) **Bread sales are promotion-driven:** the retail market for Packaged Bread in Ontario is characterized by frequent sales, discounts and other promotions by competing retailers. Many customers, particularly in discount segments, watch for Packaged Bread promotions and arrange their grocery shopping accordingly.

22. While all grocery retailers compete to sell Packaged Bread, the nature of Metro Ontario's Packaged Bread competition varies by market segment:

- (a) under its "Metro" banner, Metro Ontario competes directly against retailers of Packaged Bread in the conventional grocery retail market; and
- (b) under its "Food Basics" banner, Metro Ontario competes directly against retailers in the discount grocery retail market.

23. Each market segment in Ontario has unique competitive characteristics. For retailers of Packaged Bread like Metro Ontario, the differences in procurement, pricing and promotional strategies between the conventional market and the discount market are often significant.

24. Metro Ontario's retail prices for Packaged Bread are set by the bakery merchandising departments for each of its banners, based on the banner merchandising and pricing strategy.

25. The retail prices of Packaged Bread in Ontario vary based on consumer demand and other factors, including promotional spend, as detailed below.

26. During the Class Period, Metro Ontario (through both its conventional and discount banners) regularly sold Packaged Bread in Ontario at discounted, promotional prices. Promotional prices for Packaged Bread sold by Metro Ontario in particular varied by week, by product type, by banner, by region or "zone" and by the nature of the discount offered.

27. In addition, during the Class Period, individual store managers at Metro Ontario stores had the flexibility to lower Packaged Bread prices even further in certain circumstances, including, for example, when products were nearing the end of its shelf life.

### **Suppliers of Packaged Bread in Ontario**

28. During the Class Period, there were two principal suppliers of Packaged Bread in Ontario to Metro Ontario: Canada Bread Company, Limited (**Canada Bread**) and Weston Bakeries (collectively, the **Suppliers**). For Food Basics, one of Metro Ontario's discount banners, Canada Bread was the exclusive supplier of Packaged Bread during the Class Period.

29. During the Class Period, the primary supplier of Packaged Bread to Metro Ontario and its predecessors was Canada Bread.

30. Metro Ontario also purchased Packaged Bread from smaller, regional and specialty bread suppliers during the Class Period.

31. None of Metro, Metro Ontario, Adonis, Jean Coutu or Metro Richelieu manufactured or produced Packaged Bread for sale in the wholesale market in Canada during the Class Period.

32. None of Metro, Metro Ontario, Adonis, Jean Coutu, Metro Richelieu or their affiliates competed with Canada Bread or Weston Bakeries in the wholesale Packaged Bread market in Canada during the Class Period.

33. In addition to the national Packaged Bread brands produced by the Suppliers, which were available at Metro's retail competitors, Metro also offered several tiers of private label products, exclusive to Metro, under its *Selection* and *Irresistibles* brands during the Class Period, including Packaged Bread products. Metro's *Selection* Packaged Bread products, for example, were of equal or superior quality to national brands but generally offered at lower prices.

#### **Promotional spend for Packaged Bread in Ontario**

34. During the Class Period, suppliers of Packaged Bread, including Canada Bread and Weston Bakeries, agreed to provide discounts and rebates to Metro Ontario. These supplier-based discounts and rebates included, among other things, promotional rebates. The provision of promotional rebates from a supplier to a retailer, often referred to as "promotional spend", was a significant driver of wholesale Packaged Bread pricing offered by Canada Bread and Weston Bakeries during the Class Period.

35. Given the importance of promotional spend allocation to Packaged Bread pricing at the retail level, and, by extension, to competition for a retail customer's entire grocery basket, promotional spend was frequently and vigorously negotiated with the various Packaged Bread suppliers. In addition, Metro Ontario closely tracked the retail prices, and the timing, quantum and nature of promotions run by its competitors to ensure that (a) other retailers were not receiving



more favourable wholesale pricing treatment from shared suppliers, and (b) it was competitive in the local and regional retail markets where they also sold Packaged Bread. At all relevant times, the information tracked by Metro Ontario was publicly available.

36. Metro denies that the negotiation of promotional rebates from suppliers of Packaged Bread, or the routine monitoring of its competitor's publicly available retail prices and publicly advertised promotions on Packaged Bread, were unlawful or improper in any respect.

37. To the contrary, the negotiation of promotional rebates from suppliers of food products, like the tracking of competitors' publicly available retail prices or publicly advertised promotions, is a standard industry practice in all dynamic and highly competitive retail markets. The negotiation of promotional rebates from suppliers of Packaged Bread increased competition in the retail market and had the direct consequence of lowering the retail prices paid by the public for Packaged Bread during the Class Period.

38. During the Class Period, aggregate promotional spend was typically negotiated annually and individually with each supplier of Packaged Bread, but allocated weekly by the merchandizing teams within the banners of Metro Ontario on a regional or "zone" basis, in coordination with the relevant supplier to ensure, among other things, sufficient inventory.

39. As a result of promotional spend, retail prices charged by Metro Ontario for Packaged Bread were often lower than both its own regular listed prices as well as the regular listed prices of their competitors in the retail Packaged Bread market.

40. Further, as a result of promotional spend, the retail prices charged by Metro Ontario for Packaged Bread varied considerably during the Class Period, even across the same Packaged

Bread products and types. The specific allocation of promotional spend varied from week to week, from season to season, and from banner to banner.

### **Resisting wholesale price increases**

41. Weston and Canada Bread hold substantial market share over the supply of wholesale Packaged Bread and thus maintained an ability to influence both wholesale pricing and retail pricing of their Packaged Bread products during the Class Period.

42. Each of Weston and Canada Bread periodically increased the wholesale prices they charged to Metro Ontario during the Class Period.

43. Given the importance to retailers of maintaining aggressively competitive pricing on Packaged Bread, Metro Ontario often resisted and/or negotiated these wholesale price increases when they were announced by the Suppliers.

44. On or about June 21, 2023, Canada Bread plead guilty to four counts under s. 45 of the *Competition Act* for conspiring with Weston Foods to raise the wholesale price of fresh commercial bread,<sup>2</sup> which resulted in price increases on two occasions – one in October 2007 and another in February 2011. Neither Metro, Metro Ontario, Adonis, Jean Coutu, Metro Richelieu or any of their affiliates were implicated as conspirators in Canada Bread's guilty plea.

45. Typically, the most Metro Ontario could do in response to a coordinated price increase by the Suppliers would be to:

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<sup>2</sup> "Fresh commercial bread" was defined in Canada Bread's Agreed Statement of Facts as "sliced bagged bread and rolls."

- (a) request justification for the price increases (e.g. inflation on raw material, commodities and/or labour prices);
- (b) seek assurances that it was being treated equitably compared to other retailers competing in the same market segments in the face of price increases; and
- (c) negotiate increased promotional spend as a means of offsetting price increases imposed by the Suppliers.

46. Given the effective duopoly of Canada Bread and the Weston Defendants over the wholesale Packaged Bread market in Canada during the Class Period, Metro Ontario had no other commercially viable options for sourcing the quantities and types of Packaged Bread that were required to compete effectively in the retail market.

47. Metro Ontario did nothing illegal or anticompetitive in relation to its negotiations with each of the respective Suppliers during the Class Period.

48. The respective negotiations between Metro Ontario and each of the Suppliers ultimately had the effect of lowering prices for consumers due to Metro Ontario consistently advocating for increased promotional spend in the form of discounts and rebates.

#### **No unlawful conduct**

49. Metro did not:

- (a) engage in conduct contrary to Part VI of the *Competition Act*, as alleged in paragraphs 79 to 83 of the Statement of Claim or otherwise;

- (b) enter into any agreement or arrangement with any of the other Defendants to fix, raise, maintain or stabilize the retail or wholesale prices of Packaged Bread sold to Class Members;
- (c) participate or have involvement in any conspiracy, agreement or arrangement that had the purpose or effect of preventing or lessening competition unduly in Canada with respect to Packaged Bread; or
- (d) breach section 45 of the *Competition Act*, as alleged, and Metro denies that the Plaintiffs or the Class Members are entitled to any remedy under section 36 of the *Competition Act*.

50. Contrary to the allegations of civil conspiracy made in paragraphs 86-91 of the Claim, neither Metro nor any of its employees agreed or conspired to fix the prices of Packaged Bread.

51. Neither Metro nor any of its servants or agents directed unlawful acts toward the Plaintiffs or Class Members. Metro further denies that it, or any of its servants or agents, acted with the predominant purpose of causing the Plaintiffs or Class Members harm or economic loss, and states that they did not cause any such harm or economic loss.

52. Metro is not liable for the actions of, and/or any damages allocable to, any of the alleged co-conspirators.

### **No unjust enrichment**

53. In answer to paragraphs 92 to 98 of the Claim, Metro denies that it was unjustly enriched by the Plaintiffs or the Class Members, as pleaded or otherwise. Metro was not part of any

conspiracy to increase the price of Packaged Bread and did not charge excessive or illegal prices for Packaged Bread.

### **No constructive trust**

54. In answer to paragraphs 99 to 106 of the Claim, Metro denies that the Plaintiffs or the Class Members are entitled to the remedy of a constructive trust. Metro was not unjustly enriched, the Claim is purely monetary, and there is no link or causal connection between the Claim and any specific property of Metro.

### **No damage**

55. In answer to paragraphs 128 to 131 of the Claim, Metro denies that the Plaintiffs or the Class Members have suffered damages as alleged, or otherwise, and puts the Plaintiffs and the Class Members to the strict proof thereof.

56. Throughout the Class Period, there was active and vigorous competition with respect to the retail pricing of Packaged Bread in Canada. Metro expressly denies that there was an artificially-induced overcharge on the retail price of Package Bread.

57. Further, or in the alternative, the damages claimed by the Plaintiffs and the Class Members are excessive and remote.

### **Limitations**

58. The claims of the Plaintiffs and the Class Members asserted under the *Competition Act* are statute-barred, in whole or in part, pursuant to section 36(4).

59. Further, the common law claims of the Class Members are statute-barred, in whole or in part, because these claims were brought outside the prescribed statutory limitations periods in the provincial legislation applicable to those claims.

60. Metro pleads and relies on the *Limitations Act, 2002*, SO 2002, c 24, Sch B and corresponding statutes in other Canadian provinces and territories, and the doctrine of laches.

61. Metro asks that this action be dismissed with costs.

## CROSSCLAIM

62. Metro claims against the Weston Defendants:

- (a) damages for breaching s. 52 of the *Competition Act* and unlawful conduct conspiracy in an amount to be determined at trial;
- (b) punitive, aggravated and exemplary damages in an amount to be determined at trial;
- (c) contribution and indemnity under sections 2 and 3 of the *Negligence Act*, R.S.O. 1990, c. N.1, as amended, for any amounts which Metro may be found to be responsible to the Plaintiffs;
- (d) contribution and indemnity under the common law and equity for any amounts which Metro may be found to be responsible to the Plaintiffs;
- (e) the costs of the main Action, plus all applicable taxes;
- (f) the costs of this Crossclaim, plus all applicable taxes; and,
- (g) such further and other Relief as to this Honourable Court may deem just.

63. Metro repeats and relies upon the allegations contained in the Statement of Defence in support of this Crossclaim. Unless otherwise stated, capitalized terms in the Crossclaim have the same meaning as the Statement of Defence.

## **The Weston Defendants**

64. George Weston is a publicly-traded corporation registered pursuant to the laws of Canada. George Weston is headquartered in Toronto. It is the parent company of Loblaw and was the parent company of Weston Foods and Weston Bakeries (collectively, the **Weston Defendants**).

65. Loblaw is a publicly-traded corporation registered pursuant to the laws of Canada. Loblaw is headquartered in Toronto. Loblaw is a subsidiary of George Weston and carries on business as the largest food retailer in Canada, selling, among other things, Packaged Bread.

66. Loblaw is a major competitor of Metro Ontario in the Packaged Bread retail market.

67. Weston Foods was a corporation registered pursuant to the laws of Ontario. Weston Foods was headquartered in Toronto. At all relevant times, Weston Foods was a subsidiary of George Weston and carried on business in Canada producing, among other things baked products, including Packaged Bread.

68. Weston Bakeries was a corporation registered pursuant to the laws of Canada. Weston Bakeries was headquartered in Toronto. At all relevant times, Weston Bakeries was a subsidiary of George Weston and carried on business in Canada producing, among other things baked products, including Packaged Bread.

69. On or about January 1, 2020, Weston Bakeries was amalgamated with and continued as Weston Foods.

70. On or about July 18, 2021, Weston Foods was amalgamated with and continued as George Weston.



71. Since on or about July 18, 2021, George Weston has been the corporate successor of both Weston Bakeries and Weston Foods, and is legally responsible for wrongdoing and liability incurred by Weston Bakeries and Weston Foods prior to the amalgamations.

72. On December 10, 2021, Weston announced the closing of the sale of Weston Foods' fresh and frozen bakery businesses to affiliated entities of FGF Brands Inc.

73. On December 29, 2021, Weston announced the closing of the sale of Weston Foods' ambient bakery business to affiliated entities of Hearthside Food Solutions, LLC.

#### **Weston Defendants report themselves to Commissioner of Competition**

74. At some point in or around 2015 known only to the Weston Defendants, they reported their conduct in the bread market to the Commissioner of Competition and sought an immunity marker.

75. In approaching the Commissioner of Competition, the Weston Defendants knew how the Packaged Bread market operated at both the supplier and retail level. They had a fulsome understanding of market dynamics and the nature and objectives of the retailers for which Weston acted as Packaged Bread supplier. Accordingly, the Weston Defendants knew that:

- (a) they had increased prices for retailers, including Metro Ontario, several times during what would become the Class Period;
- (b) retailers, including Metro Ontario, had been resistant to those price increases and had sometimes refused price increases and sought increased promotional spending allocations to offset or limit the impact of the price increases in some cases;

- (c) when it became apparent that the Weston Defendants would be proceeding with price increases notwithstanding retailers' concerns, retailers, including Metro Ontario, tended to seek assurances that the price increases would be applied equitably among retailers; and
- (d) throughout the relevant period, retailers, including Metro Ontario, worked to maximize the impact of their allocated promotional spend, which had the effect of ensuring that Packaged Bread was sold competitively and at discounted prices.

76. The Weston Defendants also knew that Metro had never entered into any agreement with any of the Weston Defendants to fix, raise, maintain or stabilize the retail or wholesale price of Packaged Bread.

77. At the same time, having approached the Commissioner of Competition to seek immunity in respect of potential illegal conduct in the Packaged Bread market, the Weston Defendants knew, or ought to have known, that they faced the risk of substantial civil liability stemming from the reported misconduct that would not be barred by an immunity marker.

78. The Weston Defendants further understood that, as public companies maintaining a recognizable retail grocery brand in Canada, they would face severe public backlash if it were to be reported that Loblaw was the sole retailer involved in a conspiracy to fix the price of a staple grocery item like Packaged Bread. Customers would see such conduct as a significant betrayal of trust, and would boycott the brand, not just on Packaged Bread, but on their entire grocery basket. The reputational damage would be swift and irreversible.

79. The Weston Defendants ultimately determined that they could not risk having Loblaw be the sole retailer facing the liability and reputational risks that would flow from its self-reporting to the Commissioner of Competition and subsequent public disclosure.

80. Instead, as described below, the Weston Defendants conspired with one another to falsely represent to the public and to the Commissioner of Competition that other retailers and their parent companies, including Metro, were participants in the conspiracy to which they were apparently confessing.

### **Weston Defendants falsely implicate other retailers in price-fixing conspiracy**

81. On December 19, 2017, the Weston Defendants issued a press release entitled “George Weston and Loblaw take action to address industry-wide anti-competitive activity.”

82. In that release, the Weston Defendants admitted that they had elected to apply to the Commissioner of Competition for, and obtained, an immunity marker in relation to their conduct relating to the market for Packaged Bread. They further claimed they were taking actions to address their role in an “industry-wide price-fixing arrangement” involving Packaged Bread. Among other things, the Weston Defendants stated that they had terminated the employees involved and enhanced their compliance measures.

83. The Weston Defendants’ December 19, 2017 release stated that the participants in the conspiracy “included Loblaw and the Weston Bakeries division of George Weston as well as other major grocery retailers and another bread wholesaler”, and that the Weston Defendants’ expected that Loblaw’s exposure in this class action “will be somewhat larger than George Weston’s because the majority of the overcharge accrued to retailers”.

84. The Weston Defendants further announced that they would be offering customers a “\$25 Loblaw Card”, which could be used to purchase items sold in Loblaw grocery stores across Canada. Eligible customers could register for a Loblaw Card at [www.LoblawCard.ca](http://www.LoblawCard.ca).

85. According to the FAQ on the Loblaw Card website, the Loblaw Cards were being offered because “Loblaw discovered that Canadians were overcharged for the cost of some packaged bread products in our stores and other grocery stores across Canada”.

86. The Weston Defendants’ December 19, 2017 press release noted that “class action lawsuits have been commenced against the Companies as well as a number of major grocery retailers and another bread wholesaler on the basis of the searches initiated by the Competition Bureau”. It further stated that they “also expect that Loblaw’s exposure will be somewhat larger than George Weston’s because the majority of the overcharge accrued to retailers”.

87. The Weston Defendants held an investor call on December 19, 2017 to discuss the subject matter of the December 19, 2017 press release. During that call, Galen G. Weston, CEO and Chairman of Loblaw at that time, reiterated the contents of the December 19, 2017 press release. When asked by an analyst for confirmation that other companies were involved in the price-fixing conspiracy, Weston represented that the Weston Defendants were not alone.

88. Similarly, on January 31, 2018, during another investor call, Kevin Groh, Loblaw’s Senior Vice President of Corporate Affairs and Communications stated “we have admitted our role, and you cannot price fix alone”.

89. Loblaw later incorporated similar commentary into its continuous public disclosure, stating as recently as July 26, 2023 that in 2017, it and Weston “announced actions taken to address their role in an industry-wide price-fixing arrangement involving certain packaged bread products.”

90. The intended implications of these statements included that (a) Metro and other retailers were participants in the alleged price-fixing conspiracy and (b) Metro and other retailers had profited to a greater degree than the bread Suppliers from that alleged price-fixing conspiracy. Both implications were false.

### **Misrepresentations made to the Commissioner of Competition**

91. In January 2018, the Informations to Obtain (the **ITOs**) by which the Commissioner of Competition sought the production of documents from Metro and its subsidiaries, as well as other retailers, were publicly disclosed. The ITOs describe information provided to the Commissioner of Competition by confidential informants acting on behalf of the Weston Defendants.

92. The ITOs indicate that, similar to the Weston Defendants' public disclosure described above, the information provided by the Weston Defendants to the Commissioner of Competition included several false assertions regarding Metro's alleged involvement in a price-fixing conspiracy (the **False Statements**), including, among other things:

- (a) that Metro and other Defendants had participated in an industry-wide conspiracy to fix the wholesale and retail price of Packaged Bread in Canada;
- (b) that Metro and other Defendants coordinated industry-wide price increases through the Weston Defendants and Canada Bread;
- (c) that Metro and other Defendants engaged in dealings of a "secretive nature" in furtherance of the alleged conspiracy;
- (d) that Metro and other Defendants committed to set their retail prices no lower than the "price floors" established by the Weston Defendants and Canada Bread;

- (e) that Metro and other Defendants contacted the Weston Defendants “threatening to reject a price increase if another Retailer was offside in terms of pricing alignment”; and
- (f) that certain correspondence from Metro representatives was evidence of communications in furtherance of a price-fixing conspiracy, when instead the correspondence is of an innocuous nature consistent with rational, legal commercial behaviour in the retail grocery industry.

93. The Weston Defendants, either directly or indirectly, caused its affiliates, their officers, directors, employees, and/or agents to make the False Statements identified above. The particulars of the False Statements made by the Weston Defendants are not fully known to Metro but are known to the Weston Defendants. The False Statements identified Metro expressly or by implication.

**Breach of s. 52 of the *Competition Act***

94. Subsection 52(1) of the *Competition Act* provides that “no person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.”

95. The Weston Defendants’ December 19, 2017 press release, and their subsequent comments to the media reiterating the contents of the December 19, 2017 press release, contained several materially false or misleading representations, including that:

- (a) the price-fixing conspiracy was “industry-wide”;

- (b) other major grocery retailers were involved in the price-fixing conspiracy; and
- (c) the majority of the overcharge accrued to retailers.

96. The Weston Defendants made these materially false or misleading representations for purposes of promoting their business interests – namely the Weston Defendants’ competitive and brand position vis-à-vis other market participants, including Metro and its affiliates.

97. The Weston Defendants appreciated that Loblaw would suffer significant brand and liability risk if it was the only retailer implicated in the price-fixing conspiracy. They therefore used the December 19, 2017 press release and subsequent public comments to falsely represent to the market that Metro and other entities were involved in the price-fixing conspiracy, when in fact they were not; instead of having customers walk away from Loblaw as a result of its betrayal of their trust, customers were left with the misleading impression that they had practically no choice but to buy bread from retailers that were involved in the price-fixing conspiracy.

98. Breaches of s. 52(1) of the *Competition Act* (which subsection is contained in Part VI of the *Act*) are actionable pursuant to s. 36(1):

36 (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, or

(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

## Unlawful Act Conspiracy

99. In making the False Statements, the Weston Defendants acted in combination, either by agreement or with a common design to carry out unlawful conduct. The Weston Defendants conducted their conspiracy in secret; the details of their communications in furtherance of their conspiracy are known only to the Weston Defendants.

100. The Weston Defendants' making of the False Statements to the Commissioner of Competition was unlawful.

101. The False Statements constitute Public Mischief, pursuant to section 140 of the *Criminal Code* of Canada, insofar as they were made with the intention to mislead and caused representatives of a law enforcement agency to enter on or continue an investigation by:

- (a) making a false statement accusing some other person of having committed an offence, namely breaches of section 45 of the *Competition Act*;
- (b) doing anything with the intention to cause some other person to be suspected of having committed an offence that the other person has not committed, namely breaches of section 45 of the *Competition Act*; and/or
- (c) reporting that an offence has been committed when it has not been committed, namely breaches of section 45 of the *Competition Act* by Metro.

102. The Weston Defendants knew or ought to have known that in the circumstances, their actions were likely to have resulted in harm and injury to Metro.



### **Metro suffers reputational damage**

103. Metro has suffered, and continues to suffer, significant and unjustifiable damage to its reputation, having been falsely painted as involved in a criminal price-fixing conspiracy when it was not.

104. The Weston Defendants are liable to Metro for any and all consequential damages resulting from the conduct described in this Crossclaim.

### **Punitive, aggravated and exemplary damages**

105. The Weston Defendants chose to make statements they knew or should have known to be false for purposes of promoting their own business interests at the expense of their competitors.

106. In doing so, the Weston Defendants were motivated by self-interest and a desire to avoid losing market share to competitors in circumstances where Loblaw risked being the only retailer implicated in the price-fixing conspiracy. They therefore misrepresented the nature of the market for Packaged Bread, and mischaracterized their communications with Metro and other parties, in an effort to disperse civil liability and customer outrage across several significant grocery brands.

107. The Weston Defendants acted in a high-handed and callous manner. Their conduct displayed a blatant disregard for Metro's rights and interests as a competitor and corporate citizen, and the interests of Metro's many stakeholders – including its shareholders and employees.

108. Such conduct warrants an award of punitive, aggravated and exemplary damages on the highest possible scale to ensure that the Weston Defendants are punished for their conduct and deterred from such conduct in the future.

## **Contribution and Indemnity**

109. Metro denies any involvement in a conspiracy to fix the price of Packaged Bread as alleged by the Plaintiffs in the Claim and Metro denies that it is jointly and severally liable with the Weston Defendants or any other person.

110. In the alternative, if Metro is found to have any liability for any loss or damages sustained by the Plaintiffs or the Class Members (which is denied), such loss or damage were caused or contributed to by the conduct of the Weston Defendants, and Metro is entitled to contribution, indemnity and other relief over from the Weston Defendants under sections 2 and 3 of the *Negligence Act*, R.S.O. 1990, c. N.1, as amended, or at common law and equity.

111. Metro proposes that this action be tried simultaneously with the Main Action.

October 17, 2023

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**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT  
TORONTO

**STATEMENT OF DEFENCE AND CROSSCLAIM**

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