

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:

ROBERT FOSTER and MURRAY DAVENPORT

Plaintiffs

-and-

SEARS CANADA INC.; SEARS HOLDINGS CORPORATION; JOHN DEERE LIMITED; DEERE & COMPANY; TECUMSEH PRODUCTS OF CANADA, LIMITED; TECUMSEH PRODUCTS COMPANY; PLATINUM EQUITY, LLC; BRIGGS & STRATTON CANADA INC.; BRIGGS & STRATTON CORPORATION; CANADIAN KAWASAKI MOTORS INC.; KAWASAKI MOTORS CORP., USA; MTD PRODUCTS LIMITED; MTD PRODUCTS INC; THE TORO COMPANY (CANADA), INC.; THE TORO COMPANY; HONDA CANADA INC.; AMERICAN HONDA MOTOR CO., INC.; ELECTROLUX CANADA CORP.; ELECTROLUX HOME PRODUCTS, INC.; HUSQVARNA CANADA CORP.; HUSQVARNA CONSUMER OUTDOOR PRODUCTS N.A., INC.; KOHLER CANADA CO.; KOHLER CO.

Defendants

Proceeding Under the *Class Proceedings Act*, 1992.

**AMENDED STATEMENT OF CLAIM**

**TO THE DEFENDANTS**

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

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

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

AMENDED THIS 20 DAY OF JULY 2017  
PURSUANT TO THE ORDER OF Justice Leitch  
DATED THE 19 DAY OF JULY 2017  
LOCAL REGISTRAR SUPERIOR COURT OF JUSTICE

MODIFIÉ CE 19 19  
CONFORMÉMENT À L'ORDONNANCE DE  
FAIT LE  
(GREFFIER LOCAL COUR SUPÉRIEURE DE JUSTICE)

you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 188 prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your Statement of Defence.

**IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.** If you wish to defend this proceeding but are unable to pay legal fees, legal aid may be available to you by contacting a local legal aid office.

Date: March 19, 2010

Issued by: \_\_\_\_\_  
Local Registrar  
80 Dundas Street  
London, ON N6A 6A3

**TO: Sears Canada Inc.**  
290 Yonge Street, Suite 700  
Toronto, Ontario, Canada  
M5B 2C3

**AND TO: Sears Holdings Corporation**  
3333 Beverly Road  
Hoffman Estates  
Illinois, United States 60179

**AND TO: John Deere Limited**  
295 Hunter  
Grimsby, Ontario, Canada  
L3M 4H5

**AND TO: Deere & Company**  
One John Deere Place  
Moline, Illinois  
United States 61265

**AND TO: Tecumseh Products of Canada, Limited**  
185 Ashland Ave  
London, Ontario, Canada  
N5W 4E1

- AND TO: Tecumseh Products Company**  
30600 Telegraph Road  
Bingham Farms  
Michigan, United States  
48025
- AND TO: Platinum Equity, LLC**  
360 North Crescent Drive  
Beverly Hills, California  
United States 90210
- AND TO: Briggs & Stratton Canada Inc.**  
6500 Tomken Road  
Mississauga, Ontario, Canada  
L5T 2E9
- AND TO: Briggs & Stratton Corporation**  
12301 W. Wirth Street  
Wauwatosa, Wisconsin  
United States 53222
- ~~**AND TO: Canadian Kawasaki Motors Inc.**~~  
~~401 Thermos Road~~  
~~Toronto, Ontario, Canada~~  
~~M1L 4W8~~
- AND TO: Kawasaki Motors Corp., USA**  
9950 Jeronimo Road  
Irvine, California  
United States 92618
- AND TO: MTD Products Limited**  
97 Kent Avenue  
Kitchener, Ontario, Canada  
N2G 4J1
- AND TO: MTD Products Inc**  
5965 Grafton Road  
Valley City, Ohio  
United States 44280
- AND TO: The Toro Company (Canada), Inc.**  
Brunswick House  
44 Chipman Hill, Suite #1000  
Saint John, New Brunswick, Canada  
E2L 2A9

- AND TO: The Toro Company**  
8111 Lyndale Avenue South  
Bloomington, Minnesota  
United States 55420
- AND TO: Honda Canada Inc.**  
715 Milner Avenue  
Toronto, Ontario, Canada  
M1B 2K8
- AND TO: American Honda Motor Co., Inc.**  
1919 Torrance Blvd.  
Torrance, California  
United States 90501
- AND TO: Electrolux Canada Corp.**  
5855 Terry Fox Way  
Mississauga, Ontario, Canada  
L5V 3E4
- AND TO: Electrolux Home Products, Inc.**  
18013 Cleveland Parkway Suite 100  
Cleveland, Ohio  
United States 44135
- AND TO: Husqvarna Canada Corp.**  
200 Hamford Street  
Lachute, Quebec, Canada  
J8H 4L2
- AND TO: Husqvarna Outdoor Products N.A., Inc.**  
1030 Stevens Creek Road  
Augusta, Georgia  
United States 30907
- AND TO: Kohler Canada Co.**  
1959 Upper Water Street Suite #900  
Halifax, Nova Scotia, Canada  
B3J 3N2
- AND TO: Kohler Co.**  
444 Highland Drive  
Kohler, Wisconsin  
United States 53044

## CLAIM

1. **THE PLAINTIFFS CLAIM** on behalf of themselves and the class:
  - (a) an Order pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, CHAPTER 6, certifying this action as a class proceeding and appointing the plaintiffs as the Representative plaintiffs;
  - (b) a declaration that the defendants conspired and/or agreed with each other to fix, maintain, raise or stabilize the prices of lawn mowers and lawn mower engines in Canada from at least January 1, 1994 to the present;
  - (c) a declaration that the defendants conspired and/or agreed to lessen unduly, competition in the production, manufacture, sale and/or supply of lawn mowers and lawn mower engines in Canada during the conspiracy period;
  - (d) a declaration that the defendants conspired to conduct business in breach of section 52 of the *Competition Act* and section 7 of the *Consumer Packaging and Labelling Act*;
  - (e) general damages on an aggregate basis or otherwise for conspiracy and conduct which is contrary to Part VI of the *Competition Act*, R.S.C. 1985, C-34, in an amount sufficient to compensate the plaintiffs and the

class members for the harm done to them as a result of the defendants' illegal conduct;

- (f) an accounting, restitution, disgorgement and the creation of a constructive trust for common law conspiracy, unjust enrichment, the taking of inequitable profit by unlawful conduct and waiver of tort;
- (g) punitive, aggravated and exemplary damages;
- (h) costs of the investigation and prosecution of these proceedings pursuant to Section 36(1) of the *Competition Act*, R.S.C. 1985, Chapter C-34;
- (i) costs for the administration of the plan of distribution for relief obtained in this action;
- (j) an equitable rate of interest on all sums found due and owing to the plaintiffs and the class members or, in the alternative, pre- and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, Chapter C.43;
- (k) costs of this action on a substantial indemnity scale including applicable taxes; and,
- (l) such further and other relief as this Honourable Court deems just.

## **THE PLAINTIFFS AND THE CLASS**

2. The plaintiff, Robert Foster, is an individual resident in the City of St. Thomas in the Municipality of Central Elgin, in the Province of Ontario. During the class period, the plaintiff purchased a Club Cadet lawn mower, model number SLT1550, containing a 25 horsepower Kohler, gas combustible engine.
3. The plaintiff, Murray Davenport, is an individual resident in the Township of Smith, in the Township of Smith-Ennismore-~~Lakefield~~Lakefield, in the County of Peterborough, in the Province of Ontario. During the class period, the plaintiff purchased a John Deere lawn mower, model number LX188, containing a 17 horsepower John Deere, gas combustible engine.
4. The plaintiffs seek to represent a class consisting of all persons in Canada who purchased, for their own use and not for resale, a lawn mower containing a gas combustible engine of 30 horsepower or less provided that either the lawn mower or the engine contained within the lawn mower was manufactured and/or sold by a Defendant, or their co-conspirators, and/or any predecessors, subsidiaries or affiliates thereof between January 1, 1994 and the date of judgment.

## **THE DEFENDANTS**

### **The "Sears" defendants**

5. The Defendant, Sears Canada Inc. is a Canadian corporation with its principal place of business in the City of Toronto, in the Province of Ontario. Sears

Canada Inc. is a publicly traded company. The Defendant, Sears Holdings Corporation held approximately 72.7% of Sears Canada Inc., as of January 31, 2009. During the class period, Sears Canada Inc. manufactured, advertised, sold and distributed various brands of lawn mowers and lawn mower engines throughout Canada.

6. The Defendant, Sears Holdings Corporation (formerly Sears, Roebuck and Co. and Kmart Holdings Corporation) is a United States corporation with its principal place of business in the City of Hoffman Estates, in the State of Illinois. During the class period, Sears Holdings Corporation manufactured, advertised, sold and distributed various brands of lawn mowers and lawn mower engines throughout Canada.
7. The business and operations of the defendants, Sears Canada Inc. and Sears Holdings Corporation (together "Sears") and their respective parent corporations, subsidiaries, and affiliates in respect of the manufacturing, advertising, sale and distribution of lawn mowers and lawn mower engines are inextricably interwoven such that each is the agent of the other.

**The "Deere" defendants**

8. The Defendant, John Deere Limited is a Canadian corporation with its principal place of business in the City of Grimsby, in the Province of Ontario. During the class period, John Deere Limited manufactured, advertised, sold



and distributed various brands of lawn mowers and lawn mower engines throughout Canada.

9. The Defendant, Deere & Company is a United States corporation with its principal place of business located in the City of Moline, in the State of Illinois. During the class period, Deere & Company manufactured, advertised, sold and distributed various brands of lawn mowers and lawn mower engines throughout Canada.
10. The business and operations of the defendants, John Deere Limited and Deere & Company (together "Deere") and their respective parent corporations, subsidiaries, and affiliates in respect of the manufacturing, advertising, sale and distribution of lawn mowers and lawn mower engines are inextricably interwoven such that each is the agent of the other.

**The "Tecumseh" defendants**

11. The Defendant, Tecumseh Products of Canada, Limited is a Canadian corporation with its principal place of business in the City of London, in the Province of Ontario. Tecumseh Products of Canada, Limited is a subsidiary of the Defendant, Tecumseh Products Company. During the class period, Tecumseh Products of Canada, Limited manufactured, sold and distributed engines that were installed in lawn mowers which were advertised, sold and distributed throughout Canada.

12. The Defendant, Tecumseh Products Company, is a United States corporation with its principal place of business in the City of Ann Arbor, in the State of Michigan. During the class period, Tecumseh Products Company manufactured, sold and distributed engines that were installed in lawn mowers which were advertised, sold and distributed throughout Canada.
13. The Defendant, Platinum Equity, LLC, is a United States corporation with its principal place of business in the City of Beverly Hills, in the State of California. Platinum Equity, LLC, acquired the Defendant, Tecumseh Products Company's engines division in November 2007. During the class period, Platinum Equity, LLC manufactured, sold and distributed engines that were installed in lawn mowers advertised, sold and distributed throughout Canada.
14. The business and operations of the defendants, Tecumseh Products of Canada, Limited, Tecumseh Products Company and Platinum Equity, LLC (together "Tecumseh") and their respective parent corporations, subsidiaries, and affiliates in respect of the manufacturing, advertising, sale and distribution of lawn mowers and lawn mower engines are inextricably interwoven such that each is the agent of the other.

**The "Briggs & Stratton" defendants**

15. The Defendant, Briggs & Stratton Canada Inc., is an Ontario corporation with its principal place of business in the City of Mississauga, in the Province of Ontario. Briggs & Stratton Canada Inc. is a subsidiary of the Defendant, Briggs

& Stratton Corporation. During the class period, Briggs & Stratton Canada Inc. manufactured, sold and distributed engines which were installed in lawn mowers advertised, sold and distributed throughout Canada. Further, Briggs & Stratton Canada Inc. manufactured, advertised, sold and distributed its own brand of lawn mowers throughout Canada.

16. The Defendant, Briggs & Stratton Corporation is a United States corporation with its principal place of business in the City of Wauwatosa, in the State of Wisconsin. During the class period, Briggs & Stratton Corporation manufactured, sold and distributed engines which were installed in lawn mowers advertised, sold and distributed throughout Canada. Further, Briggs & Stratton Corporation manufactured, sold and distributed its own brand of lawn mowers throughout Canada.

17. The business and operations of the defendants, Briggs & Stratton Canada Inc. and Briggs & Stratton Corporation (together "Briggs & Stratton") and their respective parent corporations, subsidiaries, and affiliates in respect of the manufacturing, advertising, sale and distribution of lawn mowers and lawn mower engines are inextricably interwoven such that each is the agent of the other.

**The "Kawasaki" defendants**

~~18. The Defendant, Canadian Kawasaki Motors Inc., is a Canadian corporation with its principal place of business in the City of Toronto, in the Province of~~

~~Ontario. Canadian Kawasaki Motors Inc. is a subsidiary of the Defendant, Kawasaki Motors Corp., USA. During the class period, Canadian Kawasaki Motors Inc. manufactured, sold and distributed engines that were installed in lawn mowers advertised, sold and distributed throughout Canada.~~

18. ~~19.~~ The Defendant, Kawasaki Motors Corp., USA ("Kawasaki") is a United States corporation with its principal place of business in the City of Irvine, in the State of California. During the class period, Kawasaki ~~Motors Corp., USA~~ manufactured, sold and distributed engines which were installed in lawn mowers advertised, sold and distributed throughout Canada.

~~20. The business and operations of the defendants, Canadian Kawasaki Motors Inc. and Kawasaki Motors Corp., USA (together "Kawasaki") and their respective parent corporations, subsidiaries, and affiliates in respect of the manufacturing, advertising, sale and distribution of lawn mowers and lawn mower engines are inextricably interwoven such that each is the agent of the other.~~

#### **The "MTD" defendants**

19.~~21.~~ The Defendant, MTD Products Limited is an Ontario corporation with its principal place of business in the City of Kitchener, in the Province of Ontario. MTD Products Limited is a subsidiary of the Defendant, MTD Products Inc. During the class period, MTD Products Limited manufactured, advertised, sold

and distributed lawn mowers throughout Canada which contained engines manufactured by one or more co-defendants.

~~20.22.~~The Defendant, MTD Products Inc is a United States corporation with its principal place of business in Valley City, in the State of Ohio. During the class period, MTD Products Inc manufactured, advertised, sold and distributed lawn mowers throughout Canada which contained engines manufactured by one or more co-defendants.

~~21.23.~~The business and operations of the defendants, MTD Products Limited and MTD Products Inc (together "MTD") and their respective parent corporations, subsidiaries, and affiliates in respect of the manufacturing, advertising, sale and distribution of lawn mowers and lawn mower engines are inextricably interwoven such that each is the agent of the other.

#### **The "Toro" defendants**

~~22.24.~~The Defendant, The Toro Company (Canada), Inc. is a corporation with its principal place of business in the City of Saint John, in the Province of New Brunswick. The Toro Company (Canada), Inc. is a subsidiary of the Defendant, The Toro Company. During the class period, The Toro Company (Canada), Inc. manufactured, advertised, sold and distributed lawn mowers throughout Canada which contained engines manufactured by one or more co-defendants.

23.25.The Defendant, The Toro Company is a United States corporation with its principal place of business in the City of Bloomington, in the State of Minnesota. During the class period, The Toro Company manufactured, advertised, sold and distributed lawn mowers throughout Canada which contained engines manufactured by one or more co-defendants.

24.26.The business and operations of the defendants, The Toro Company (Canada), Inc. and The Toro Company (together "Toro") and their respective parent corporations, subsidiaries, and affiliates in respect of the manufacturing, advertising, sale and distribution of lawn mowers and lawn mower engines are inextricably interwoven such that each is the agent of the other.

#### **The "Honda" defendants**

25.27.The Defendant, Honda Canada Inc. is a Canadian corporation with its principal place of business in the City of Toronto, in the Province of Ontario. Honda Canada Inc. is a subsidiary of the Defendant, American Honda Motor Co., Inc. During the class period, Honda Canada Inc. manufactured, sold and distributed lawn mower engines for installation in lawn mowers advertised, sold and distributed by one or more co-defendants. Further, Honda Canada Inc. advertised, sold and distributed lawn mowers and lawn mower engines throughout Canada.

26.28.The Defendant, American Honda Motor Co., Inc. is a subsidiary of Honda Corporation with its principal place of business in the City of Torrance, in the

State of California. During the class period, American Honda Motor Co., Inc. manufactured, sold and distributed lawn mower engines for installation in lawn mowers advertised, sold and distributed by one or more co-defendants. Further, American Honda Motor Co., Inc. advertised, sold and distributed lawn mowers and lawn mower engines throughout Canada.

~~27.29.~~The business and operations of the defendants, Honda Canada Inc. and American Honda Motor Co., Inc. (together "Honda") and their respective parent corporations, subsidiaries, and affiliates in respect of the manufacturing, advertising, sale and distribution of lawn mowers and lawn mower engines are inextricably interwoven such that each is the agent of the other.

#### **The "Electrolux" defendants**

~~28.30.~~The Defendant, Electrolux Canada Corp. is a Canadian corporation with its principal place of business in the City of Mississauga, in the Province of Ontario. Electrolux Canada Corp. is a subsidiary of Electrolux Home Products, Inc. During the class period, Electrolux Canada Corp. manufactured, advertised, sold and distributed lawn mowers throughout Canada which contained engines manufactured by one or more co-defendants.

~~29.31.~~The Defendant, Electrolux Home Products, Inc. is a corporation with its principal place of business in the City of Cleveland, in the State of Ohio. During the class period, Electrolux Home Products, Inc. manufactured,

advertised, sold and distributed lawn mowers throughout Canada which contained engines manufactured, sold and distributed by one or more co-defendants. Further, Electrolux Home Products, Inc. also carried on business as Husqvarna Outdoor Products Inc., and Husqvarna AB until June 2006 when Electrolux's outdoor products segment was spun-off. A separate entity resulting from the spin-off is known as Husqvarna Outdoor Products, Inc.

~~30.32.~~The business and operations of the defendants, Electrolux Canada Corp. and Electrolux Home Products, Inc., (together "Electrolux") and their respective parent corporations, subsidiaries, and affiliates in respect of the manufacturing, advertising, sale and distribution of lawn mowers and lawn mower engines are inextricably interwoven such that each is the agent of the other.

#### **The "Husqvarna" defendants**

~~31.33.~~The Defendant, Husqvarna Canada Corp. is a Canadian corporation with its principal place of business in the City of Lachute, in the Province of Quebec. Husqvarna Canada Corp. is a subsidiary of Husqvarna Outdoor Products N.A., Inc. During the class period, Husqvarna Canada Corp. manufactured, advertised, sold and distributed lawn mowers throughout Canada which contained engines manufactured by one or more co-defendants.

~~32.34.~~The Defendant, Husqvarna Outdoor Products N.A., Inc. is a company with its principal place of business located in the City of Augusta, in the State of



Georgia. Husqvarna Outdoor Products N.A., Inc. manufactured, advertised, sold and distributed lawn mowers throughout Canada which contained engines manufactured by one or more co-defendants.

33.35-The business and operations of the defendants, Husqvarna Canada Corp. and Husqvarna Outdoor Products N.A., Inc., (together "Husqvarna") and their respective parent corporations, subsidiaries, and affiliates in respect of the manufacturing, advertising, sale and distribution of lawn mowers and lawn mower engines are inextricably interwoven such that each is the agent of the other.

#### **The "Kohler" defendants**

34.36-The Defendant, Kohler Canada Co. is a Nova Scotia corporation with its principal place of business in the City of Saint John, in the Province of New Brunswick. Kohler Canada Co. is a subsidiary of the Defendant, Kohler Co. During the class period, Kohler Canada Co. manufactured, sold and distributed lawn mower engines for installation in lawn mowers advertised, sold and distributed by other co-defendants.

35.37-The Defendant, Kohler Co. is a corporation with its principal place of business in the City of Kohler, in the State of Wisconsin. During the class period, Kohler Co. manufactured, sold and distributed lawn mower engines for installation in lawn mowers advertised, sold and distributed by other co-defendants throughout Canada.

36.38.The business and operations of the defendants, Kohler Canada Co. and Kohler Co. (together "Kohler") and their respective parent corporations, subsidiaries, and affiliates in respect of the manufacturing, advertising, sale and distribution of lawn mowers and lawn mower engines are inextricably interwoven such that each is the agent of the other.

#### **THE DEFENDANTS' CO-CONSPIRATORS**

37.39.The identity of each of the defendants' co-conspirators is not known to the plaintiffs at this time. During the class period, each of the defendants' co-conspirators was engaged in the business of manufacturing, marketing, advertising, selling and distributing gas combustible lawn mower engines of up to 30 horsepower and/or lawn mowers containing a gas combustible engine of up to 30 horsepower.

#### **THE NATURE OF THE ACTION**

38.40.This class proceeding arises out of a conspiracy among the defendants to overcharge class members by implementing of a false and misleading horsepower labelling program which caused the horsepower of various lawn mowers and lawn mower engines manufactured and sold by the defendants to be overstated. The conspiracy occurred among the defendants in Canada and around the world from at least January 1, 1994 and continuing to the present, the exact dates being unknown to the plaintiffs.

39.44-During the relevant class period, the defendants were members of certain industry organizations. Their participation in these organizations gave the defendants the opportunity to meet, correspond and conspire as alleged herein. These groups include but are not limited to:

- (a) The Power Labeling Task Force, an industry group which met regularly at a variety of locations. Agendas were circulated in advance and minutes of the meetings were kept;
- (b) The Outdoor Power Equipment Institute ("OPEI"), an international trade association who represents manufacturers of landscape, forestry, utility and lawn and garden equipment manufacturers. The organization currently represents more than 95% of the outdoor power equipment industry; and
- (c) The Society of Automotive Engineers ("SAE"), an automotive industry organization that creates and publishes engineering standards which are voluntarily followed by manufacturers.

40.42-It is alleged that:

- (a) the defendants and their co-conspirators combined, agreed, and/or conspired with each other and their co-conspirators to fix, raise, maintain and/or stabilize prices for lawn mowers and lawn mower engines in Canada by combining, agreeing and/or conspiring to implement a horsepower labelling program for lawn mowers and lawn

mower engines which constituted a false and misleading representation in violation of the *Competition Act and the Consumer Packaging and Labelling Act*;

- (b) the purpose and/or effect of the acts alleged herein was to suppress or eliminate competition, to restrain trade, and/or to affect, raise, fix, control, and/or maintain the prices charged for lawn mowers and lawn mower engines sold in Canada;
- (c) the defendants and their co-conspirators took extensive steps to conceal the conspiracy from the plaintiffs and the class members and to give legitimacy to their unlawful labelling practices;
- (d) the agents, officers, employees, and representatives of the defendants and their co-conspirators participated in correspondence, discussions and meetings in furtherance of the illegal conspiracy alleged herein and, in doing so, such agents, officers, employees and representatives of the defendants and their co-conspirators were acting within the scope of their authority and in furtherance of the defendants' and/or their co-conspirators' business interests; and
- (e) the conduct of the defendants and their co-conspirators caused injury to the plaintiffs and the class members.

41.43-Damages and equitable remedies are claimed. The application of the doctrine of waiver of tort is also sought.

## **FACTUAL BACKGROUND**

42.44.The defendants manufacture, advertise, sell and distribute lawn mowers and the engines installed in lawn mowers to consumers throughout North America, and specifically throughout Canada.

### ***Horsepower***

43.45.During the Class Period, the defendants used the unit of horsepower to label, categorize, price and market their lawn mowers and lawn mower engines.

44.46.The horsepower purportedly generated by the defendants' lawn mowers or lawn mower engines is identified as a number. This number is typically located on the lawn mower, the lawn mowers engine and/or is represented in various other promotional materials disseminated by the defendants, such as advertisements, packaging material, owners' manuals, point-of-sale material and/or company websites.

45.47.The higher the actual horsepower, the more power the engine produces and the better and faster the lawn mower is able to perform. The defendants market and offer for sale at higher prices lawn mowers labeled or otherwise advertised as containing higher horsepower.

## **THE DEFENDANTS' CONSPIRATORIAL CONDUCT**

46.48.Beginning in at least January 1, 1994 and continuing to the present, the exact dates being unknown to the plaintiffs, the defendants and their co-conspirators, and their senior executives, employees and agents, conspired

and agreed together to wrongfully, unlawfully, maliciously and without good faith:

- (a) to charge prices for lawn mowers and lawn mower engines sold in Canada at certain levels and to otherwise fix, increase, maintain or stabilize the prices charged for lawn mowers and lawn mower engines sold in Canada by;
  - i. overstating and mislabelling the amount of horsepower contained within lawn mowers and lawn mower engines;
  - ii. concealing, suppressing and/or failing to disclose material information to the plaintiffs and to each class member with respect to the actual horsepower of the lawn mowers and lawn mower engines sold to the plaintiffs and to the class members.
- (b) prevent or lessen, unduly, competition in the market in Canada for lawn mowers and lawn mower engines sold in Canada; and
- (c) monitor compliance with the agreements as among the members of the cartel.

***Power Labeling Task Force***

47.49. During the relevant class period, the "Power Labeling Task Force" would meet regularly at various locations, which provided the defendants with the means, opportunity and cover to discuss, conspire, conceal and further their conspiratorial conduct.

***OPEI Website***

48.50-In or about 2001, the Power Labeling Task Force, including representatives of several defendants, met and discussed various means by which to conceal their horsepower conspiracy and continue misrepresenting horsepower to their consumers. It was suggested that a "disclaimer" statement be placed on the OPEI's website which would contain confusing and misleading information about horsepower.

49.54-On or about July 10, 2001, William G. Harley and Patrick W. Curtiss of OPEI mailed to the defendants, a memorandum listing the uniform means by which the Power Labeling Task Force members intended to misrepresent horsepower testing procedure and conceal the defendants' deceitful horsepower labelling practices from consumers. The OPEI website was one means by which the defendants chose to conceal their conspiracy.

50.52-After the members of the Power Labeling Task Force voted in favour of the proposal, the disclaimer was created and posted on the OPEI's website. The disclaimer was titled "Understanding Horsepower" and included misleading information with respect to how horsepower is measured.

***SAE J1940***

51.53-During the relevant class period, several defendants were also members of SAE and SAE's Small Engine & Power Equipment Committee, which was the committee responsible for small engines, including lawn mower engines.

52.54. In or about the late 1980s, several of the defendants became aware of concerns expressed about horsepower fraud. In response, the SAE implemented a labelling standard called "SAE J1940" to conceal horsepower misrepresentations. The labelling standard was an attempt to give the defendants a purportedly legitimate reason for labelling their engines with a horsepower representation different than what their test results had achieved.

53.55. In or about 2000, the Power Labeling Task Force instructed its members, which were also SAE Small Engine & Power Equipment Committee members, to recommend to the rest of the Committee that the SAE J1940 labelling standard be revised.

54.56. Ultimately, the SAE J1940 was amended to allow for a "fudge factor" of up to 15% to be added to horsepower labels. The newly revised SAE J1940 allowed the defendants to make misrepresentations to their consumers about the horsepower of their products by using the labelling standard they had conspired to create as justification. The SAE J1940 was another means by which the defendants chose to conceal and perpetuate their conspiracy.

#### **SAE J1995**

55.57. In or about 1990, the defendants conspired to create another SAE standard to aid in the continued concealment of their conspiracy. Several of the defendants caused SAE J1995 to be created, published and disseminated. SAE J1995 was based on a "gross" horsepower testing protocol. Prior to the



creation of SAE J1995, the defendants had always used "net" horsepower, which is the horsepower used in other industries, such as the automotive industry.

56.58."Gross" horsepower is the theoretical horsepower that the engine could achieve under ideal laboratory conditions with all the legally required accessories removed from the engine — such as the air filter and exhaust mechanism.

57.59."Gross" horsepower is deceptive because by removing the necessary components, such as exhaust systems and air filters, which drain an engine of power, a higher horsepower can be achieved in the laboratory than that which could ever be achieved by a consumer during normal personal use of the engines.

58.60.The SAE J1995 labelling standard is another way in which the defendants concealed their conspiratorial conduct.

### ***"Torque" Power***

59.64.In or about 2004, the Power Labeling Task Force began meeting and discussing alternative means of labelling horsepower in a concerted effort to further their conspiracy.

60.62.In or about 2007, several defendants began labelling their lawn mowers and lawn mower engines with "torque." "Torque" is not an appropriate quantifier of power and should not be used in power labelling.

~~61.63~~.The advent and introduction of the "torque" power label is yet another way that the defendants concealed their conspiratorial conduct and caused harm to the plaintiffs and each member of the class.

***Anti-Competitive Conduct***

~~62.64~~.The anti-competitive conduct of the defendants was motivated by the predominant purpose of harming the class members by requiring them to pay artificially high prices for lawn mowers and lawn mower engines sold in Canada and to illegally increase the defendants' profits on the sale of lawn mowers and lawn mower engines in Canada.

~~63.65~~.In giving effect to the anti-competitive agreements between the defendants, the following acts were done by the defendants and their co-conspirators, and their senior executives, employees and agents without limitation:

- (a) they participated in meetings, conversations and communications in Canada and elsewhere in person, by telephone, facsimile, mail and electronic mail to discuss the sale of, the labelling of and the prices to be charged for, lawn mowers and lawn mower engines sold in Canada;
- (b) they agreed during such meetings, conversations and communications, to misrepresent and mislabel lawn mowers and lawn mower engines in such a way that allowed the defendants to charge prices at specified levels and to otherwise fix increase, maintain, or stabilize the prices for lawn mowers and lawn mower engines in Canada;

- (c) they sold lawn mowers and lawn mower engines in Canada at collusive, non-competitive and supra-competitive prices pursuant to the agreement reached;
- (d) they participated in meetings, conversations and communications to monitor compliance with the agreements;
- (e) they authorized or consented to the participation of their employees in the conspiracy; and
- (f) they concealed the conspiracy and conspiratorial contracts.

~~64.66~~ The purpose of the defendants' conduct during the conspiracy period was to foreclose price competition and to maintain artificially high prices for lawn mowers and lawn mower engines in Canada. Absent their coordinated activity, the defendants would have been forced to price lawn mowers and lawn mower engines competitively or risk losing the business of their customers.

~~65.67~~ As a direct and proximate result of the defendants' conspiracy, the plaintiffs and each class member have been forced to pay supra-competitive prices for lawn mowers and lawn mower engines in Canada.

#### **BREACH OF SECTION 45 OF THE *COMPETITION ACT***

~~66.68~~ The defendants' unlawful activities, as described herein, have deprived the plaintiffs and the class members of free and open competition in the purchase and distribution of lawn mowers and lawn mower engines.

~~67.69~~The plaintiffs and the class members did not discover, and could not discover through the exercise of reasonable diligence, the existence of the claims sued upon until recently, because the defendants and their co-conspirators actively, intentionally and purposively concealed the existence of the combination and conspiracy from the plaintiffs and others.

~~68.70~~The acts of the defendants and their co-conspirators particularized herein were in breach of section 45 of the *Competition Act* and render the defendants and their co-conspirators liable to pay damages to the plaintiffs and the class members pursuant to section 36 of the *Competition Act*. Further or alternatively, the Canadian subsidiaries of the foreign defendants are liable to the plaintiffs and the class members for a breach of s. 46(1) of the *Competition Act* and are liable to pay damages pursuant to s. 36 of the *Competition Act*.

#### **BREACH OF SECTION 52 OF THE *COMPETITION ACT***

~~69.71~~The defendants conspired to conduct business in a manner contrary to s. 52 of the *Competition Act*, in implementing the false and inaccurate horsepower labelling program for lawn mowers and lawn mower engines. In doing so, the defendants knowingly or recklessly made a representation to the public to promote their business interests which was false and misleading in a material respect.

~~70.72~~The plaintiffs plead that the general impression conveyed by the defendants' horse power labelling program as well as its literal meaning is false and

misleading in a material respect in the manner contemplated by s. 52(4) of the *Competition Act*.

~~71.73~~-In addition to all other remedies available at law, the plaintiffs plead entitlement to damages and costs of investigation and prosecution pursuant to s. 36 of the *Competition Act*. Without limitation, the plaintiffs plead that the defendants caused an artificial and unjustifiable increase in the price of lawn mowers and lawn mower engines due to their false and misleading labelling program between at least January 1, 1994 and the present.

#### **COMMON LAW CONSPIRACY**

~~72.74~~-Further, or alternatively, the acts particularized herein were unlawful acts directed towards the plaintiffs and other purchasers of lawn mowers and lawn mower engines in Canada. The defendants and their co-conspirators knew, or ought to have known, that the unlawful acts alleged herein would cause injury to the plaintiffs and the class members. The plaintiffs and the class members have suffered damages as a result of the unlawful acts of the defendants and their co-conspirators. The defendants and their co-conspirators therefore are liable to the plaintiffs and the class members for the tort of civil conspiracy.

#### **Breach of the Consumer Packaging and Labelling Act ("*CPLA*")**

~~73.75~~-The defendants are "dealers" and the class members' lawn mowers and lawn mower engines are "prepackaged products" for the purposes of the *CPLA*.

~~74.76.~~The defendants breached s. 7 of the *CPLA* by applying or causing to be applied the false and misleading horsepower labels to the class members' lawn mowers and lawn mower engines.

~~75.77.~~In particular, the overstated and mislabeled horsepower misrepresentations constituted a description of type, quality, performance and function of the class members' lawn mowers and lawn mower engines which can reasonably be regarded as likely to deceive in the present context on an objective basis.

~~76.78.~~The plaintiffs claim damages and all other remedies available at law for the defendants' breach of Section 7 of the *CPLA*.

#### **UNJUST ENRICHMENT**

~~77.79.~~The plaintiffs plead that the defendants have been unjustly enriched by their wrongful conduct.

~~78.80.~~The defendants were enriched through their receipt of monies extracted from the plaintiffs and the class members during the class period as described herein.

~~79.81.~~The plaintiffs and the class members suffered a corresponding deprivation through the payment of the same revenues to the defendants.

~~80.82.~~There is no juristic reason to uphold any payment by a class member to the defendants. The unlawful revenues cannot be justified by public policy or by the parties' reasonable expectations.

## **THE DEFENDANTS SHOULD NOT PROFIT FROM THEIR UNLAWFUL CONDUCT**

81.83.The plaintiffs plead that the defendants' horsepower labelling program breached Part IV of the *Competition Act*, a statute enacted pursuant to the criminal law power of the Government of Canada and the *Consumer Packaging and Labelling Act* and in doing so, the defendants and their co-conspirators reaped substantial financial benefits in excess of the actual value of the lawn mowers and the lawn mower engines through their conspiratorial conduct.

82.84.The plaintiffs plead that it is contrary to equity and good conscience that the defendants should retain any benefit obtained through any criminal, quasi-criminal or otherwise unlawful activity.

## **WAIVER OF TORT**

83.85.The plaintiffs plead and rely on the doctrine of waiver of tort and states that the defendants' conduct, including the alleged breaches of the *Competition Act* and the *Consumer Packaging and Labelling Act*, constitutes conduct which can be waived in favour of an election to receive restitutionary or other equitable remedies.

## **THE RESULTING DAMAGES TO THE PLAINTIFFS AND THE CLASS MEMBERS**

84.86.The plaintiffs and the class members have suffered damages in an amount presently undetermined which should be paid as a result of the illegal, anti-

competitive and inequitable conduct of the defendants and their co-conspirators particularized herein.

~~85.87.~~The combined damages of the plaintiffs and those of the other class members are capable of being, and should be, quantified on an aggregate basis, in whole or in part, as the amount by which class members' payments for the goods provided by the defendants exceeded the value of those goods.

~~86.88.~~Damages should be made payable to the class members through a plan of distribution established under the *Class Proceedings Act*.

#### **PUNITIVE DAMAGES**

~~87.89.~~The plaintiffs state that the defendants' and their co-conspirators' conduct in implementing the conspiracy was outrageous, disgraceful, reckless, deliberate, willful, high-handed and arrogant conduct constituting grounds for a punitive, aggravated or exemplary damages award.

#### **EQUITABLE RELIEF SOUGHT**

~~88.90.~~In respect of the equitable causes of action advanced herein, the plaintiffs seeks an accounting, restitution, disgorgement and the creation of a constructive trust to the benefit of the plaintiffs and all class members in respect of all unlawful revenues and other benefits obtained by the defendants in respect of the sale of the mislabeled lawn mowers and lawn mower engines.



89.94.The plaintiffs state that good conscience requires the defendants to hold all the unlawful revenue received from the sale of the mislabeled goods in trust for the plaintiffs and the other class members and to disgorge such revenue.

90.92.The plaintiffs state that the defendants are constituted as constructive trustees in favour of the plaintiffs and the class members in respect of all unlawful revenues received from the sale of the mislabeled lawn mowers and lawn mower engines during the class period because:

- (a) the defendants may not, in good conscience, retain the revenue received;
- (b) the imposition of a constructive trust is required by justice and good conscience;
- (c) the integrity of the consumer marketplace would be undermined if the Court did not impose a constructive trust;
- (d) the defendants engaged in wrongful conduct by combining, agreeing and/or conspiring to implement the false and misleading horsepower labelling program;
- (e) there are no factors which render the imposition of a constructive trust unjust.

#### **THE RELEVANT STATUTES**

91.93. The plaintiffs plead and rely upon the *Class Proceedings Act*, 1992, S.O. 1992, c.6 as amended, the *Competition Act*, R.S.C. 1985, c.19 as amended

and the *Consumer Packaging and Labelling Act*, R.S. 1985, c. C-38 as amended.

## **SERVICE OUTSIDE ONTARIO**

92.94. This originating process may be served without Court order outside of Ontario

in that the claim is:

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

**THE PLAINTIFFS** propose that this action be tried in the City of London, in the Province of Ontario.

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ROBERT FOSTER et al.

Plaintiff

v.

SEARS CANADA INC, et al.

Defendants

Court File No. 766-2010 CP

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
PROCEEDINGS COMMENCED AT LONDON

**AMENDED STATEMENT OF CLAIM**

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