

JAN 13 2005



No. L050069  
Vancouver Registry

**In the Supreme Court of British Columbia**

**Between:**

The Consumers' Association of Canada and Bruce Cran

**Plaintiffs**

**And:**

Coca-Cola Bottling Ltd., Coca-Cola Enterprises Inc., Pepsi-Cola Canada Beverages Ltd., Pepsi-QTG Canada Inc., Pepsi-Cola Canada Ltd., Pepsi Bottling Group, The Pepsi Bottling Group (Canada), Co., Cott Beverages West Ltd., Gray Beverage Ltd., The Minute Maid Company Canada Inc., Buy-Low Foods Ltd., Overwaitea Food Group/Save-On-Foods, Great Pacific Industries Inc., Canada Safeway Limited, London Drugs Limited, Shoppers Drug Mart, H.J. Heinz Company of Canada Ltd., Ocean Spray International Inc., 7-11 Canada, Inc., Snapple Beverage Group, Snapple Beverage Corp., Sun-Rype Products Ltd., McCain Foods (Canada), McCain Foods Limited, Motts Canada, Cadbury Beverages Canada, Motts' Inc., Nestle Canada Inc., Campbell Soup Company of Canada, Campbell Soup Company Ltd., Canada Pure Water Company Ltd., Canadian Springs Water Co., Clearly Canadian Beverage Corp., Costco Wholesale, Costco Canada Enterprises Inc., Dan-D Foods Ltd., Great Western Brewing Company Limited, Kmart Canada Limited, Kootenay Springs Ltd., Procter and Gamble Inc., SAAN Stores Ltd., Tetley Canada Inc., Wal-Mart Canada Inc., Zellers Inc., and Encorp Pacific (Canada)

**Defendants**

**Brought Pursuant to the *Class Proceedings Act***

**Writ of Summons**

**(Name and address of each plaintiff)**

Consumers' Association of Canada  
c/o 1300 – 355 Burrard Street,  
Vancouver BC V6R 3N2

Bruce Cran  
c/o 1300 – 355 Burrard Street,  
Vancouver, BC V6R 3N2

**(Name and address of each defendant)**

**(as above)**  
c/o Encorp Pacific (Canada)  
206 – 2250 Boundary Road  
Burnaby, BC V5M 3Z3

ELIZABETH THE SECOND, by the Grace of God, of the United Kingdom, Canada and Her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith.

*To the defendant(s):*

TAKE NOTICE that this action has been commenced against you by the plaintiff(s) for the claim(s) set out in this writ.

IF YOU INTEND TO DEFEND this action, or if you have a set off or counterclaim that you wish to have taken into account at the trial, YOU MUST

- (a) GIVE NOTICE of your intention by filing a form entitled "Appearance" in the above registry of this court, at the address shown below, within the Time for Appearance provided for below and YOU MUST ALSO DELIVER a copy of the Appearance to the plaintiff's address for delivery, which is set out in this writ, and
- (b) if a statement of claim is provided with this writ of summons or is later served on or delivered to you, FILE a Statement of Defence in the above registry of this court within the Time for Defence provided for below and DELIVER a copy of the Statement of Defence to the plaintiff's address for delivery.

YOU OR YOUR SOLICITOR may file the Appearance and the Statement of Defence. You may obtain a form of Appearance at the registry.

JUDGMENT MAY BE TAKEN AGAINST YOU IF

- (a) YOU FAIL to file the Appearance within the Time for Appearance provided for below, or
- (b) YOU FAIL to file the Statement of Defence within the Time for Defence provided for below.

#### TIME FOR APPEARANCE

If this writ is served on a person in British Columbia, the time for appearance by that person is 7 days from the service (not including the day of service).

If this writ is served on a person outside British Columbia, the time for appearance by that person after service, is 21 days in the case of a person residing anywhere within Canada, 28 days in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere.

[or, if the time for appearance has been set by order of the court, within that time.]

#### TIME FOR DEFENCE

A Statement of Defence must be filed and delivered to the plaintiff within 14 days after the later of

- (a) the time that the Statement of Claim is served on you (whether with this writ of summons or otherwise) or is delivered to you in accordance with the Rules of Court, and
- (b) the end of the Time for Appearance provided for above.

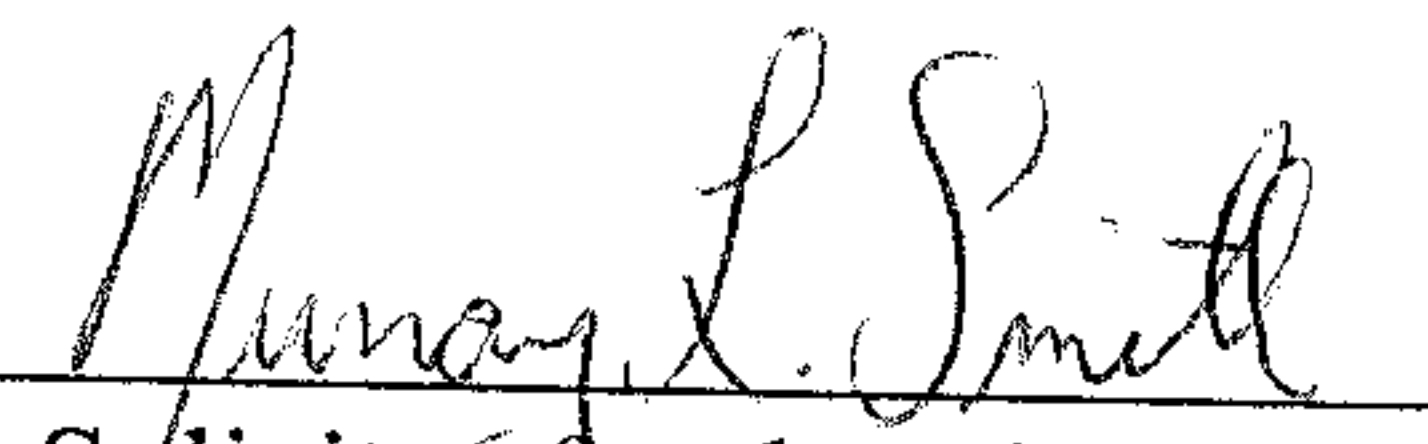
[or, if the time for defence has been set by order of the court, within that time.]

(1) The address of the registry is: 800 Smithe Street, Vancouver BC V6R 2E9
(2) The plaintiff's ADDRESS FOR DELIVERY is: <b>Arvay Finlay, Barristers</b> <b>1300 – 355 Burrard Street</b> <b>Vancouver BC V6C 2G8</b>  Fax number for delivery (if any): <b>604 689 4451</b>
(3) The name and office address of the plaintiff's solicitor is: as above

The Plaintiff's claim is set out on in the attached Statement of Claim.

**Place of Trial: Vancouver, British Columbia**

Dated January 13, 2005

  
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Solicitor for the Plaintiffs

**In the Supreme Court of British Columbia**

**Between:**

The Consumers' Association of Canada and Bruce Cran

**Plaintiffs**

**And:**

Coca-Cola Bottling Ltd., Coca-Cola Enterprises Inc., Pepsi-Cola Canada Beverages Ltd., Pepsi-QTG Canada Inc., Pepsi-Cola Canada Ltd., Pepsi Bottling Group, The Pepsi Bottling Group (Canada), Co., Cott Beverages Ltd., Gray Beverage Ltd., The Minute Maid Company Canada Inc., Buy-Low Foods Ltd., Overwaitea Food Group/Save-On-Foods, Great Pacific Industries Inc., Canada Safeway Limited, London Drugs Limited, Shoppers Drug Mart, H.J. Heinz Company of Canada Ltd., Ocean Spray International Inc., 7-11 Canada, Inc., Snapple Beverage Group, Snapple Beverage Corp., Sun-Rype Products Ltd., McCain Foods (Canada), McCain Foods Limited, Motts Canada, Cadbury Beverages Canada, Motts' Inc., Nestle Canada Inc., Campbell Soup Company of Canada, Campbell Soup Company Ltd., Canada Pure Water Company Ltd., Canadian Springs Water Co., Clearly Canadian Beverage Corp., Costco Wholesale, Costco Canada Enterprises Inc., Dan-D Foods Ltd., Great Western Brewing Company Limited, Kmart Canada Limited, Kootenay Springs Ltd., Procter and Gamble Inc., SAAN Stores Ltd., Tetley Canada Inc., Wal-Mart Canada Inc., Zellers Inc., and Encorp Pacific (Canada)

**Defendants**

***Brought Pursuant to the Class Proceedings Act***

**Statement of Claim**

1. The Plaintiff the Consumers' Association of Canada is a federally registered non-profit charitable society created by letters patent under the *Company Act*, R.S.C. c. 53, as amended. The Consumers' Association of Canada brings this action on behalf of all consumers in British Columbia.
2. The Plaintiff Bruce Cran is the National President of the Consumers' Association of Canada and is a resident of the Province of British Columbia. Bruce Cran brings this action on his own behalf and on behalf of all consumers in British Columbia.
3. The Defendant Encorp Pacific (Canada) is the beverage container agency (the "Beverage Container Agency") defined under the *Beverage Container Stewardship Program*

*Regulation*, B.C. Reg. 406/97 (the "Regulation") of the *Waste Management Act*, RSBC 1996 c. 482 (the "1996 Act"). The 1996 Act and the Regulation were repealed October 7, 2004 and replaced by the Recycling Regulation, Order in Council No. 995, (the "2004 Regulation") under the *Environmental Management Act*, S.B.C. 2003, c.53 (the "2003 Act"). The 2003 Act and 2004 Regulation have not materially altered the rights and duties of the parties relevant to the issues raised in this action as established under the Regulation.

4. The Regulation required that beverage containers sold in British Columbia be refilled or recycled by the Defendants.
5. The Beverage Container Agency is the authorized Steward approved by government under the Regulation. All of the Defendants other than the Beverage Container Agency were Brand Owners as defined under the Regulation. The Beverage Container Agency acted as the agent of the other Defendants to perform duties and obligations imposed by the Regulation. All of the Defendant Brand Owners manufactured or sold beverages in containers. The stated object in Section 14 of the Regulation was to prevent containers from being incinerated or sent to landfill.
6. The Beverage Container Agency was required under Section 6 of the Regulation to submit a Stewardship Plan for approval by the Director of Waste Management. The Regulation required that the Stewardship Plan provide for the recovery of containers in an environmentally responsible manner. Pursuant to the Regulation, the Beverage Container Agency submitted a Stewardship Plan on April 1, 1998.
7. The Regulation conferred authority upon the Defendants to impose a levy on the consumer on condition that the levy was refunded (the "Deposit"). Section 9 of the Regulation, required that sellers collect the Deposit from consumers as set out in a schedule to the Regulation. The Regulation required that the Deposit be shown on consumer receipts.
8. Section 10 of the Regulation required that the full amount of the Deposit be refunded to the consumer. Deposits collected by sellers under the Regulation were paid over to the Beverage Container Agency to be held by the Beverage Container Agency in trust until refunded to the consumer.

9. The Beverage Container Agency and the other Defendants jointly owed a trust obligation to hold all Deposits for the benefit of consumers. The Defendants intentionally diverted Deposits to purposes not authorized under the Regulation.
10. In the period 1998 to 2004, the Defendants unlawfully converted \$70,000,000.00 in Deposits in breach of trust. The Deposits were converted to the benefit of the Defendants without any permission or authority under the Regulation. The Regulation contained no provision giving any power to the Defendants to deal with Deposits other than by way of refund to the consumer.
11. The Regulation contained no provision giving the Beverage Container Agency any power to impose a levy or tariff on the consumer other than the Deposit. The Beverage Container Agency began to impose an environmental levy on consumers ("the Container Recycling Fee") in 1999 without any authority under the Regulation.
12. The Container Recycling Fee was shown on consumer receipts separate from any product price. The Deposit and the Container Recycling Fee as shown on the receipt appeared to be authorized by government. The Deposit was the only levy authorized by the Regulation. Following the instructions of the Beverage Container Agency, sellers did not adequately explain the Container Recycling Fee on consumer receipts. The Container Recycling Fee appeared on consumer receipts to be an environmental levy authorized by government similar to environmental levies authorized on the sale of automobile tires and batteries under the *Social Service Tax Act*, RSBC 1996 c.431.
13. In the years 1999 to 2004 the Beverage Container Agency collected unauthorized Container Recycling Fees totaling \$60,000,000.00. The duty and responsibility to recycle beverage containers was placed on the Defendants under the Regulation, not the consumer. The Beverage Container Agency, without any authority, transferred to the consumer all costs incurred by the Defendants under the Regulation. There was no authority for the Defendants to avoid obligations imposed by the Regulation by passing costs on to the consumer in the form of an environmental levy.
14. The Beverage Container Agency used Deposits and Container Recycling Fees for purposes not authorized under the Regulation. Unlawful uses by the Beverage Container Agency included payment of expenses of officers of the Beverage Container Agency and other

Defendants and payment of aggravated and punitive damages awarded against the Beverage Container Agency for improper conduct in the operation of the Stewardship Plan.

15. The Container Recycling Fee collected from consumers constituted an *ultra vires* and unlawful levy.
16. In the alternative, the Beverage Container Agency, the other Defendants, their principals and their agents, are liable under the *Trade Practice Act*, RSBC 1996 c.457 for deceptive and unconscionable acts or practices including the collection of the Container Recycling Fee represented as a lawful levy.
17. In the further alternative, the Defendants are liable under the *Competition Act*, RSC 1985 C-34 and at common law for conspiracy to injure, conspiracy to perform an unlawful act and for conduct in restraint of trade.
18. In the further alternative, the Defendants are liable for intentional interference with economic interests by the collection of the Container Recycling Fee and the conversion of Deposits.
19. In the further alternative, the Defendants are liable for abuse of statutory authority for the conversion of Deposits and the levy of the Container Recycling Fee.
20. The Defendants have been unjustly enriched through the conversion of Deposits and the levy of the Container Recycling Fee. All such monies improperly collected or converted are held on constructive trust for the consumers of British Columbia.
21. The Defendants are liable for punitive damages for conversion of trust monies and conspiracy to collect the Container Recycling Fee.
22. The Plaintiffs bring this claim on their own behalf and on behalf of all consumers of British Columbia under the *Class Proceedings Act*, R.S.B.C. 1996, c.50, as representative of the following class of persons:

**All consumers in British Columbia that purchased beverages  
subject to the Beverage Container Stewardship Program  
Regulation, B.C. Reg. 406/1997 (as amended) in the period 1997 to  
the date of trial.**

WHEREFORE the Plaintiffs claim on their own behalf and on behalf of the members of the Class as follows:

- (a) a declaration that Deposits under the Regulation were unlawfully converted by the Defendants;
- (b) a declaration that the Container Recycling Fee was not authorized by statute;
- (c) an accounting for and repayment of all monies collected as a Container Recycling Fee;
- (d) an order that all monies levied as a Container Recycling Fee and all converted Deposits are held by the Defendants on constructive trust;
- (e) compensation for unjust enrichment;
- (f) damages for conversion and abuse of statutory authority;
- (g) restitution of all monies unlawfully collected from consumers including sales tax paid on the Container Recycling Fee;
- (h) compensation for breach of trust;
- (i) damages for collecting an *ultra vires* levy;
- (j) damages for breach of the *Trade Practice Act* RSBC 1996 c.457;
- (k) damages for conspiracy to injure, conspiracy to perform an unlawful act, conduct in restraint of trade and breach of the *Competition Act*, RSC 1985 C-34 including the recovery of the cost of all investigations and proceedings;
- (l) general damages, to be assessed;
- (m) damages for intentional interference with economic interests;
- (n) punitive damages;
- (o) distribution of any award pursuant to section 34 of the *Class Proceedings Act*, RSBC 1996, c.50;
- (p) costs pursuant to section 37 of the *Class Proceedings Act*, RSBC 1996, c.50;
- (q) prejudgment interest; and
- (r) such further and other relief as this Honourable Court may consider just.

Place of Trial: Vancouver, British Columbia.

Dated: January 13, 2005

  
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 Solicitor for the Plaintiffs

This Writ of Summons and Statement of Claim is filed by Murray Smith, Esq., of Arvay Finlay, Barristers, #1300 – 355 Burrard Street, Vancouver BC V6C 2G8