

Between:

COMMISSIONER OF COMPETITION

- and -

H.J. HEINZ COMPANY OF CANADA LTD.

UNDERTAKING

Definitions

1. In this Undertaking:
 - (a) "agreement or arrangement" means any contract, written or verbal, including any documents amending such contracts between Heinz Canada and its Customers specifying the terms under which such Customers purchase commercially prepared baby food or infant cereal from Heinz Canada;
 - (b) "commercially prepared baby food" means prepared baby food, presently sold in glass jars in Canada, containing finely homogenized vegetables, fruit and/or meat which may include some visible pieces of not more than 6.5 mm in size, and strained juice, put up for retail sale as food and beverages for infants of ages 4 to 18 months, in containers of a net volume not exceeding 250 ml, including organic baby food, and toddler food, but excluding frozen baby food preparations;
 - (c) "Commissioner" means the Commissioner of Competition appointed from time to time under the *Competition Act*;

- (d) "Customer" means a customer that purchases or wishes to purchase commercially prepared baby food or infant cereal directly from Heinz Canada, including any grocery, drug or warehouse store, chain or wholesaler but does not include an end-user or consumer;
- (e) "discount" means any "discount, rebate, allowance, price concession or other advantage" within the meaning of section 50(1)(a) of the *Competition Act*, as clarified by the *Price Discrimination Enforcement Guidelines*;
- (f) "Heinz Canada" means the H.J. Heinz Company of Canada Ltd., its affiliates, nominees, designates, successors and assigns;
- (g) "infant cereal" means dry cereal marketed for consumption by infants of ages 4 to 18 months; and
- (h) "Term" means the period of time which ends at 11:59 p.m. (EST) on the day that is the earlier of (i) three (3) years from the date of expiration or termination of the duties imposed under the *Special Import Measures Act* in respect of certain prepared baby food from the United States by virtue of the Finding of the Canadian International Trade Tribunal dated April 29, 1998, or any extension or renewal thereof, and (ii) ten (10) years from the date hereof.

Marketing Practices

2. For the Term hereof, Heinz Canada hereby undertakes as follows:
 - (a) Not to enforce any term of an agreement or arrangement with a Customer for the supply of commercially prepared baby food or infant cereal purchased from Heinz Canada which requires the Customer to purchase exclusively or primarily commercially prepared baby food or infant cereal from Heinz Canada. For greater certainty, it is understood that nothing in this Undertaking prohibits Heinz Canada from fulfilling any of its obligations under any such existing agreements or arrangements or from continuing to provide discounts or payments thereunder provided this requirement is no longer a condition of the agreement or arrangement.

- (b) Not to enter into any term of an agreement or arrangement with a Customer for the supply of commercially prepared baby food or infant cereal which requires the Customer to purchase exclusively or primarily commercially prepared baby food or infant cereal from Heinz Canada, or which, subject to paragraph 3 below, provides more favourable terms and conditions if the Customer agrees to meet such a requirement.
 - (c) Not to enter into a term of an agreement or arrangement with a Customer for the supply of commercially prepared baby food which either (i) requires the Customer to purchase any other product (including but not limited to infant cereal) from Heinz Canada, or to refrain from purchasing another product (including but not limited to infant cereal) from a supplier other than Heinz Canada, or (ii) provides more favourable terms and conditions if the Customer agrees to meet such a requirement.
 - (d) To inform all Customers who have purchased or who will purchase gravity feed racks during the Term hereof that such racks may be used by the Customer to display any brand of commercially prepared baby food, not just commercially prepared baby food purchased from Heinz Canada. For greater certainty, nothing in this Undertaking prohibits Heinz Canada from proposing or arranging for the use of such racks by its Customers, so long as such proposals and arrangements for the use of gravity feed racks are not part of agreements or arrangements for the supply of commercially prepared baby food, and so long as the Customers pay the full cost of the racks.
 - (e) Not to enter into an agreement or arrangement with a Customer for the supply of commercially prepared baby food purchased from Heinz Canada with a duration longer than one (1) year, unless in response to a competitive offer of a longer duration wherein Heinz Canada can match the said competitive offer.
3. (a) For greater certainty, it is understood that nothing in this Undertaking prohibits Heinz Canada from entering into an agreement or arrangement with a Customer for the supply of commercially prepared baby food or infant cereal which provides for larger discounts to a Customer conditional upon that Customer purchasing larger annual volumes of

commercially prepared baby food or infant cereal from Heinz Canada (a "volume discount"), so long as any such volume discount is available to all competing Customers who enter into such agreements or arrangements in the same time period and who purchase products of like quantity and quality, and so long as increments of minimum purchase volumes and the increments of discounts conditional thereon are evenly spaced within any such schedule, and provided that if any such volume discounts are based on historical or estimated purchases from Heinz Canada, they are adjusted appropriately to reflect actual purchases.

- (b) Without limiting the generality of the foregoing, the parties hereto agree that, if volume discounts are paid periodically based on estimated purchase volumes for the year, an adjustment will be made to the final payment such that the total annual payment reflects actual purchase volumes for the year.
4. For greater certainty, nothing in this Undertaking prohibits Heinz Canada from entering into an agreement or arrangement for the supply of commercially prepared baby food with a Customer who purchases greater than 50,000 cases annually which requires that Customer to purchase a minimum of up to twenty (20) stock keeping units ("SKUs") of commercially prepared baby food from Heinz Canada

Enforceability

- 5. Heinz Canada shall forthwith deliver a copy of this Undertaking to each existing Customer identified in the attached Schedule "1" and to each new Customer during the Term hereof to which it sells commercially prepared baby food or infant cereal, and shall provide evidence of such delivery to the Commissioner.
- 6. Upon request of the Commissioner, Heinz Canada shall provide the Commissioner with any agreement or arrangement with a Customer for the supply of commercially prepared baby food or infant cereal from Heinz Canada, in force during the Term hereof.
- 7. All documents and information provided to the Commissioner by Heinz Canada pursuant to this Undertaking shall be treated as confidential by the Commissioner, in accordance with the general statement of practice issued by the

Commissioner (then the Director of Investigation and Research) dated May 5, 1995, and as if it were subject to section 29 of the *Competition Act*.

8. Heinz Canada acknowledges that the Commissioner's decision to terminate the *Competition Act* inquiry pursuant to the abuse of a dominant position, tied selling and exclusive dealing provisions with respect to jarred baby food and infant cereal and the decision not to refer the matter to the Competition Tribunal pursuant to sections 77 and 79 of the *Competition Act* is conditional upon, and subject to, the Commissioner's continuing jurisdiction under sections 77 and 79 of the *Competition Act* in respect of matters unrelated to the subject matter of this Undertaking or in the event of a breach of this Undertaking in which case the provisions of paragraphs 10 through 12 (inclusive) will apply.
9. Heinz Canada further acknowledges that the Commissioner's decision not to refer the matter to the Competition Tribunal is conditional upon and provides adequate consideration for the enforcement of this Undertaking. Accordingly, subject to paragraph 10 below, Heinz Canada acknowledges and agrees that the Commissioner shall be entitled to injunctive relief to prevent breaches of this agreement and to specifically enforce the terms and provisions hereof, in addition to any other remedy under the *Competition Act* or at law, in the Federal Court of Canada or any court of superior jurisdiction in a province.
10. In the event of a dispute regarding or arising out of this Undertaking (including any alleged breach of this Undertaking), notwithstanding anything to the contrary herein, Heinz Canada and the Commissioner agree to appoint representatives to attempt in good faith to resolve the dispute in accordance with the terms of this paragraph. Upon written notification of either party to the other of a dispute, setting out in reasonable detail the nature of the alleged breach or other dispute, each party shall within seven (7) days of receipt of such notice appoint a representative and provide written notice to the other party of the identify of such representative. The representatives shall forthwith attempt in good faith to resolve the dispute. If the representatives have not resolved the dispute (for greater certainty, such resolution may include, subject to the agreement of both parties, reference to arbitration pursuant to paragraph 11 below) or in the case of a breach which is capable of being cured if Heinz Canada has not cured such breach, within twenty-one (21) days of the date on which notice is received of the later of the two appointments of representatives, or such

other period of time as the parties may mutually agree, then the Commissioner shall be entitled to proceed pursuant to any or all of paragraphs 9 or 12 of this Undertaking.

11. As may be initiated by either party, Heinz Canada and the Commissioner acknowledge that any dispute(s) arising between the parties in respect of a breach of this Undertaking or any application for an interpretation of this Undertaking may, subject to the agreement of both parties, be submitted for resolution in accordance with the procedure outlined in Schedule "2" attached.
12. Subject to paragraph 10 above, where the Competition Tribunal determines upon application by the Commissioner that there has been a breach by Heinz Canada of this Undertaking, Heinz Canada consents to the issuance by the Competition Tribunal of an order of the Tribunal in the terms of this Undertaking and on the basis of the attached Statement of Grounds and Material Facts (Schedule "3"), which forms an integral part of this Undertaking, subject to modification of those facts and others to reflect the circumstances at the time of the application, in accordance with section 105 of the *Competition Act* and Part II of the *Competition Tribunal Rules* as each may be amended from time to time.
13. Notices or other communications required or permitted by this Undertaking shall be in writing and shall be given by personal delivery to the party to whom such notice is given or by registered mail or by confirmed facsimile to the address or facsimile number below:

(a) If to the Commissioner:

Konrad von Finckenstein, Q.C.
Commissioner of Competition
Competition Bureau
Industry Canada
Place du Portage, Phase I, 21st Floor
50 Victoria Street
Hull, Quebec, K1A 0C9
Telephone: (819) 997-3301
Facsimile: (819) 953-5013

With a copy to:

Josephine A.L. Palumbo
Crown Counsel
Department of Justice, Competition Law Division
Industry Canada, Legal Services
Place du Portage, Phase I, 22nd Floor
50 Victoria Street
Hull, Quebec, K1A 0C9
Telephone: (819) 953-3902
Facsimile: (819) 953-9267

If to Heinz Canada:

Brian Falck
President and Chief Executive Officer
H.J. Heinz Company of Canada Ltd.
5700 Yonge Street
Suite 2000
North York, Ontario, M2M 4K6
Telephone: (416) 226-5757
Facsimile: (416) 226-7557

With a copy to:

Lawson A.W. Hunter, Q.C.
Susan M. Hutton
STIKEMAN ELLIOTT
Barristers & Solicitors
50 O'Connor Street, Suite 914
Ottawa, Ontario, K1P 6L2
Telephone: (613) 234-4555
Facsimile: (613) 230-8877

14. This Undertaking may be amended with the written consent of both parties. Without limiting the generality of the foregoing, the Commissioner agrees to vary or rescind this Undertaking, as appropriate, upon the request of Heinz Canada, in the event of a change of circumstances as described in paragraph 106(a) of the *Competition Act*. Without limiting the generality of the foregoing, the parties agree that circumstances shall be deemed to have so changed in the event that commercially prepared baby food not sold by Heinz Canada accounts for more than thirty-five percent (35%) of all such products sold in Canada, as

measured by A.C. Nielsen or any similar, reputable third party. In the event of a dispute as to whether such a change of circumstances has taken place then, subject to paragraph 10 above, Heinz Canada shall be at liberty to apply to the Competition Tribunal pursuant to section 106 of the *Competition Act*.

15. Other than with respect to the consent granted by Heinz Canada in paragraph 12 above, nothing in this Undertaking shall be taken as an admission now or in the future of any facts, submissions or legal arguments for any other purposes, including without limitation an application under sections 77 or 79 of the *Competition Act*, nor shall it derogate from any rights or defences of Heinz Canada under the *Competition Act* or otherwise.
16. This Undertaking may be executed in counterparts (including counterparts by facsimile) and all such counterparts taken together shall be deemed to constitute one and the same instrument.

DATED this _____ day of _____, 2000.

This Undertaking is provided by the undersigned in his capacity as President and Chief Executive Officer on behalf of H.J. Heinz Company of Canada Ltd., its affiliates and assigns.

Brian Falck

This Undertaking is accepted by the Commissioner of Competition without prejudice in any manner whatsoever to his jurisdiction under the *Competition Act*, including without limiting the foregoing, the right to make an application to the Competition Tribunal as provided for therein.

Konrad von Finckenstein, Q.C.

SCHEDULE '1'

Customers to whom the Undertaking should be sent

CONFIDENTIEL

SCHEDULE "2"

The procedure for arbitration referred to in paragraph 11 of the Undertaking between the Commissioner of Competition and Heinz Canada of which this Schedule 2 forms an integral part is as follows:

- a. the initiating party shall deliver written notice setting out in reasonable detail the nature of the alleged breach or the application for interpretation and requesting an arbitration in accordance with this undertaking;
- b. both parties shall each select a person to serve as a member of the arbitral tribunal within seven (7) days of the receipt of the written notice described in a) above and shall within such seven (7) days provide written notice to the other party setting out the identity of that member;
- c. the two members of the arbitral tribunal selected by the Commissioner and Heinz Canada in accordance with the above shall jointly within seven (7) days of their appointment or such longer time as may be agreed among the parties select a third person to serve as the third and final member of the arbitral tribunal;
- d. the arbitral tribunal shall have the same power and jurisdiction to resolve the matters in issue between the parties as would a judge of a superior court in a province, except as hereinafter modified;
- e. the rules and procedures to be followed in the arbitration proceedings shall be determined by a majority of the arbitral tribunal in their discretion, except as hereinafter agreed to by the parties;
- f. there shall be no oral or documentary discovery in the arbitration proceedings;
- g. unless the parties otherwise agree, the sole evidence to be submitted in the arbitration proceedings shall consist of affidavits that may be filed by the Commissioner and/or Heinz Canada;
- h. unless the parties otherwise agree, an affidavit filed by the initiating party shall be filed within seven (7) days of the date the written notice is received in accordance with a) above;

1. unless the parties otherwise agree, an affidavit filed by the responding party shall be filed within seven (7) days of the date of receiving the affidavit in accordance with a) above;
- j. unless the parties otherwise agree, the arbitral tribunal shall conduct a hearing and issue a decision with written reasons within seven (7) days of the date all affidavits have been filed;
- k. the decision of the majority of the arbitral tribunal shall be the decision of the arbitral tribunal;
- l. an appeal lies from the decision of the arbitral tribunal on questions of law alone to the Ontario Superior Court of Justice. An appeal lies from the decision of the Ontario Superior Court of Justice to the Court of Appeal for Ontario, with leave of that court;
- m. the costs of the arbitration shall be in the discretion of the arbitral tribunal; and
- n. except as provided above, the arbitration shall take place in accordance with the *Arbitrations Act*, 1991, S.O. 1991, c. 17.

SCHEDULE "3"

THE COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Commissioner of Competition pursuant to sections 77 and 79 and 105 of the *Competition Act*, R.S.C. 1984, c. C-34;

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

H.J. HEINZ COMPANY OF CANADA LTD.

Respondent

STATEMENT OF GROUNDS AND MATERIAL FACTS

CONFIDENTIAL