SCC Court File No. 37809

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM A JUDGMENT OF THE BRITISH COLUMBIA COURT OF APPEAL)

B E T W E E N :

PIONEER CORPORATION, PIONEER NORTH AMERICA, INC., PIONEER ELECTRONICS (USA) INC., PIONEER HIGH FIDELITY TAIWAN CO., LTD. and PIONEER ELECTRONICS OF CANADA INC.

APPELLANTS
(Appellants)

- and -

NEIL GODFREY

RESPONDENT
(Respondent)

PIONEER APPELLANTS' FACTUM

Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 2V1

W. Michael G. Osborne
Brigeeta Richdale
Jessica Lewis
Tel.: 416.860.6732
Fax: 416. 360.8877
Email: mosborne@casselsbrock.com

Counsel for the Appellants Pioneer North America, Inc., Pioneer Electronics (USA) Inc., Pioneer High Fidelity Taiwan Co., Ltd. and Pioneer Electronics of Canada, Inc.

SUPREME ADVOCACY LLP
100-340 Gilmour St.
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613.695.8855
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Appellants

CAMP FIORANTE MATTHEWS MOGERMAN
#400-856 Homer Street
Vancouver, British Columbia
V6B 2W5

Reidar M. Mogerman
David Jones
Morgan Andersen
Michelle Segal
Tel: (604) 689-7555
Fax: (604) 689-7554
E-mail: rmogerman@cfmlawyers.ca

Counsel for the Respondent, Neil Godfrey

MICHAEL J. SOBKIN
331 Somerset Street West
Ottawa, Ontario
K2P 0J8

Tel : (613) 282-1712
Fax: (613) 288-2896
E-mail: msobkin@sympatico.ca

Ottawa Agent for counsel for the Respondent, Neil Godfrey

BENNETT JONES LLP
One First Canadian Place
Suite 3400
Toronto, ON M5X 1A4

John F. Rook, Q.C.
Christiaan A. Jordaan
Emrys Davis
Tel: 416.863-1200
Fax: 416.863.1716
Email: rookj@bennettjones.com

Counsel to the appellants Panasonic Corporation, Panasonic Corporation of North America and Panasonic Canada Inc.

SUPREME ADVOCACY LLP
100-340 Gilmour St.
Ottawa, ON
K2P 0R3

Marie-France Major
Tel: 613.695.8855
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Ottawa agent for counsel to the appellants.

FASKEN MARTINEAU DUMOULIN LLP
2400 – 333 Bay Street
P.O. Box 20
Toronto, ON M5H 2T6

Laura Cooper and Vera Toppings
Tel: 416.366.8381
Fax: 416.364.7813
Email: lcooper@fasken.com

Counsel for the appellants Toshiba Corporation, Toshiba Samsung Storage Technology Corporation, Toshiba America Information Systems, Inc., Toshiba Samsung Storage Technology Korea Corporation and Toshiba of Canada Limited

BLAKE, CASSELS & GRAYDON LLP
4000 – 199 Bay Street
P.O. Box 25
Toronto, ON M5L 1A9

Robert E. Kwinter and Litsa Kriaris
Tel: 416.863.2400
Fax: 416.863.2653
Email: rob.kwinter@blakes.com

Counsel for the appellants Samsung Electronics Co., Ltd., Samsung Electronics Canada Inc. and Samsung Electronics America, Inc.

McMILLAN LLP
Brookfield Place
4400 – 181 Bay Street
Toronto, ON M5J 2T3

Neil Campbell
Joan Young
Samantha Gordon
Tel: 416.865.7000
Fax: 416.865.7048
Email: neil.campbell@mcmillan.ca

Counsel for the appellants Koninklijke Philips Electronics N.V., Lite-On IT Corporation of Taiwan, Philips & Lite-On Digital Solutions Corporation, Philips & Lite-On Digital Solutions USA, Inc., Philips Electronics Ltd.

SHAPRAY CRAMER FITTERMAN LAMER LLP
670-999 Canada Place
Vancouver, BC V6C 3E1

Stephen M. Fitterman
Tel: 604.681.4496
Fax: 604.681.0920
Email: stephen@scfl-law.com

Counsel for the appellants BenQ Corporation, BenQ America Corporation and BenQ Canada Corp.

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PIONEER'S FACTUM

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Pioneer[1] adopts the submissions of the appellants in the Toshiba Appeal.[2]

2. Pioneer's appeal raises two issues that are unique to the case against Pioneer:

   a) Does the discoverability principle apply to the limitation period contained in the statutory cause of action in s. 36 of the *Competition Act*?

   b) Can fraudulent concealment toll the limitation period in s. 36 of the *Competition Act* in the absence of any special relationship?

3. The plaintiff filed its Notice of Civil Claim against Pioneer more than three years after the end of the conspiracy alleged by the plaintiff, which was more than one year after the two-year limitation period set out in s. 36(4) of the *Competition Act*[3] had already expired (unless it is subject to discoverability or tolled by fraudulent concealment).

4. The limitation period contained in s. 36(4) begins to run from the date of the unlawful conduct, which is an event that is unrelated to the injured party's knowledge. Under the test laid down by this Court in *Peixeiro v. Haberman*,[4] discoverability ought not to apply. Despite this, the British Columbia Court of Appeal held that it was not plain and obvious that discoverability does not apply to s. 36(4). The court reached this conclusion by applying a different test from the one mandated by this Court, holding that where time runs from an event that is related to the basis of the cause of action, discoverability applies, even if the event is unrelated to the injured party's knowledge. As a result, this new test directly contradicts the test in *Peixeiro*.

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[1] Pioneer North America, Inc., Pioneer Electronics (USA) Inc., Pioneer High Fidelity Taiwan Co., Ltd. and Pioneer Electronics of Canada Inc.

[2] *Toshiba Corporation et al v Godfrey*, SCC File No. 37810.

[3] *Competition Act*, RSC 1985, c C-34, s. 36(4).

[4] *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549.

5. The new test adopted by the BC Court of Appeal constitutes an impermissible incursion into the legislative process. The *Competition Act* embodies a complex scheme of economic regulation and includes a carefully constructed civil cause of action, in s. 36, that includes a two-year limitation period that is baked into the provision delimiting the cause of action.

6. Applying discoverability and fraudulent concealment to the limitation period in s. 36(4)(a)(i) fundamentally changes that limitation period from the short two-year period contemplated by Parliament to one that is potentially limitless. There is no cause for this Court to overturn the policy choices made by Parliament in constructing s. 36. Absent unconstitutionality, to do so would constitute an impermissible incursion into the legislative process.

7. Similarly, there is no need to broaden the application of the doctrine of fraudulent concealment beyond cases involving a "special relationship" to cases involving commercial transactions and economic loss. Since price-fixing conspiracies are almost by definition conducted in secret, applying the doctrine to price-fixing class actions would nullify Parliament's policy choice in enacting a two-year limitation period.

B. Statement of Facts

8. Pioneer adopts the statement of facts set out in the Factum of the Appellants in the Toshiba Appeal (the "Toshiba Appellants' Factum"). The following sets out the facts as they relate to the issues unique to Pioneer.

1. The Pioneer Claim was commenced more than three years after the end of the alleged conspiracy

9. In his Third Amended Notice of Civil Claim in this case, the plaintiff pleads that Pioneer was part of a conspiracy to fix the price of optical disk drives ("ODD"), contrary to s. 45 of the *Competition Act* during the "Class Period", which, the plaintiff pleads, ran from January 1, 2004, until January 1, 2010.[5]

10. Thus, according to the plaintiff, the conspiracy ended on January 1, 2010.

[5] Third Amended Notice of Civil Claim, ¶2 ("Class Period"), ¶78-79 (alleging a conspiracy "During the Class Period"), Joint Record of the Appellants ("JRA"), vol. 2, tab 12.

11. The limitation period thus began to run on January 1, 2010, and, expired on January 1, 2012, unless it was subject to discoverability or tolled by fraudulent concealment.

12. The claim against Pioneer was commenced as a separate action on August 16, 2013.[6]

2. The decision of the BC Supreme Court (Masuhara J.)

13. The certification judge held that limitation periods cannot be considered under s. 4(1)(a) of the *Class Proceedings Act*,[7] because a limitation defence is an affirmative defence that cannot be raised until pleaded.[8]

14. Nonetheless, the certification judge went on to hold that it is not plain and obvious that the limitation period in s. 36(4)(a)(i) of the *Competition Act* cannot be tolled on the basis of discoverability or fraudulent concealment.

15. The certification judge accepted that the text of s. 36(4) provides that the limitation period runs from the occurrence of the prohibited conduct without regard to the knowledge of the injured party, but noted that there is conflicting case law on whether discoverability can apply.[9]

16. The certification judge also accepted that the plaintiff had not pleaded a special relationship, but held that fraudulent concealment may nevertheless be available, relying on a case that suggested that a claim of equitable fraud may be possible in commercial relationships.[10]

3. The decision of the BC Court of Appeal

17. The BC Court of Appeal held that "a limitation period argument can be considered at the certification stage, in exceptional circumstances, but generally should not". In this case, the court

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[6] Notice of Civil Claim in *Godfrey v. Pioneer Corporation*, BC Supreme Court File No. S-136205, JRA, vol. 2, tab 11.

[7] *Class Proceedings Act*, RSBC 1996, c 50.

[8] *Godfrey v. Sony Corporation*, 2016 BCSC 844 ("Certification Decision"), JRA, vol. 1, tab 1.

[9] Certification Decision, at ¶54-55, JRA, vol. 1, tab 1.

[10] Certification Decision, at ¶61-62, JRA, vol. 1, tab 1.

held that it would not be appropriate to do so as the "limitation period issue in this case is intimately connected with the facts of the alleged conspiracy".[11]

18. The court then held that it is not plain and obvious that the discoverability rule can never apply to toll the limitation period in s. 36(4) of the *Competition Act*.[12] The court adopted the reasoning of the Ontario Court of Appeal in *Fanshawe College of Applied Arts and Technology v AU Optronics Corporation*,[13] which held that discoverability does apply to s. 36(4).

19. On the issue of fraudulent concealment, the BC Court of Appeal noted that it had previously held that a special relationship was not essential for a claim in equitable fraud.[14] Thus, the absence of a special relationship does not preclude the doctrine of fraudulent concealment.

PART II – QUESTIONS IN ISSUE

20. Pioneer adopts the statement of the questions in issue set out in the Toshiba Appellants' Factum.

21. Pioneer's appeal raises two additional questions:

a) Does the discoverability principle apply to the limitation period contained in the statutory cause of action in s. 36 of the *Competition Act*?

b) Can fraudulent concealment toll the limitation period in s. 36 of the *Competition Act* in the absence of any special relationship?

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[11] *Godfrey v. Sony Corporation*, 2017 BCCA 302 ("BCCA Decision"), at ¶67, JRA, vol. 1, tab 7.

[12] BCCA Decision, at ¶94, JRA, vol. 1, tab 7.

[13] *Fanshawe College of Applied Arts and Technology v AU Optronics Corporation*, 2016 ONCA 621 ("*Fanshawe*").

[14] BCCA Decision, at ¶103, , JRA, vol. 1, tab 7, citing *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2008 BCCA 278, at ¶99, leave to appeal refused [2008] SCCA No. 416.

PART III – STATEMENT OF ARGUMENT

22. Pioneer adopts the submissions in the Toshiba Appellants' Factum.

23. These submissions therefore only address the two issues raised by Pioneer's appeal.

A. The statutory cause of action in s. 36 and its internal limitation period

24. Section 36 of the *Competition Act* creates a statutory cause of action that is available to anyone who has suffered loss or damage as a result of a breach of one of the criminal provisions of the Act, or a breach of an order of the Competition Tribunal or of a court.

25. This cause of action contains a number of important internal limits, including limitation periods in s. 36(4).

26. The limitation period runs for two years from the later of "a day on which the conduct was engaged in" or "the day on which any criminal proceedings relating thereto were finally disposed of":

Limitation	*Restriction*
(4) No action may be brought under subsection (1),	(4) Les actions visées au paragraphe (1) se prescrivent :
(a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from	a) dans le cas de celles qui sont fondées sur un comportement qui va à l'encontre d'une disposition de la partie VI, dans les deux ans qui suivent la dernière des dates suivantes :
(i) a day on which the conduct was engaged in, or	(i) soit la date du comportement en question,
(ii) the day on which any criminal proceedings relating thereto were finally disposed of,	(ii) soit la date où il est statué de façon définitive sur la poursuite;
whichever is the later;	

[Emphasis added]

27. The cases interpreting the limitation period in s. 36(4) in the context of actions based on breaches of s. 45 confirm that:

a) The "conduct", for purposes of s. 36(4)(a)(i), refers to the offence of conspiracy.

b) The limitation period starts to run on the last day on which the "conduct was engaged in", that is, the last day on which the offence of conspiracy was engaged in.[15]

c) The "conduct" constituting the offence of conspiracy may be an isolated event or ongoing conduct.

d) Where the conspiracy offence consists of an isolated event, the limitation period runs from the date of unlawful agreement. For example, the limitation period for a transaction that violates s. 45 will run from the date of the transaction.[16]

e) Where the conspiracy offence consists of an ongoing agreement, the limitation period will start to run once the unlawful agreement comes to an end. Thus the limitation period for a price-fixing conspiracy that continues for a certain period of time will start to run when the conspiracy comes to an end.[17]

f) The offence of conspiracy is complete upon the making of the agreement; the effects of the agreement (such as any undue lessening of competition) form no part of the offence and thus do not extend the limitation period, even if they persist after the termination of the agreement.[18]

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[15] *Eli Lilly and Company v. Apotex Inc*, 2009 FC 991 at ¶728 ("*Eli Lilly*").

[16] *Eli Lilly*, ¶729; *Les Laboratoires Servier v. Apotex Inc*, 2008 FC 825, ¶481-482 ("*Laboratoires Servier*"); *Garford Pty Ltd v. Dywidag Systems International, Canada, Ltd*, 2010 FC 996, at ¶19 ("*Garford FC*"), affirmed 2012 FCA 48 ("*Garford FCA*"); *Fairview Donut Inc v. The TDL Group Corp*, 2012 ONSC 1252, at ¶643 ("*Fairview*").

[17] *351694 Ontario Limited v. Paccar of Canada Ltd*, 2004 FC 1565, at ¶18-21, 27-28; *Eli Lilly*, at ¶736-737; *Watson v. Bank of America Corporation*, 2014 BCSC 532, at ¶124 ("*Watson BCSC*"), affirmed in part, overturned in part, 2015 BCCA 362, at ¶122 ("*Watson BCCA*"); *Wong v. Sony of Canada Ltd*, [2001] OJ No 1707 (SCJ), at ¶20; *Laboratoires Servier*, at ¶483-486.

[18] *Laboratoires Servier*, at ¶479*ff*; *Eli Lilly*, at ¶743; *Garford FC*, at ¶43; *Garford FCA*, at ¶19; *Fairview*, at ¶642.

B. Discoverability does not apply to the limitation period contained in the statutory cause of action in s. 36 of the *Competition Act*

28. As set out below:

a) Based on the test laid down by this Court in *Peixeiro*, the discoverability principle does not apply to the s. 36(4) limitation period.

b) The BC Court of Appeal did not apply the *Peixeiro* test, but instead applied a test that nullifies the *Peixeiro* test.

c) There is no sound reason to replace the *Peixeiro* test with a new test.

1. Based on the *Peixeiro* test, discoverability does not apply to the s. 36(4) limitation period

29. When it applies, the discoverability rule postpones the running of a limitation period until the material facts underlying the cause of action are known or are reasonably discoverable.[19]

30. In *Peixeiro*,[20] this Court held that the discoverability rule is simply "an interpretative tool for the construing of limitations statutes" which ought to be considered each time a limitations provision is in issue. This Court adopted the following two-part test for determining when discoverability applies:

> When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, <u>when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed</u>. [Emphasis added][21]

31. This test was confirmed by this Court in *Ryan v. Moore* in 2005.[22] *Ryan* involved the limitation period in Newfoundland's *Survival of Actions Act*. The *Survival of Actions Act*

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[19] *Peixeiro v. Haberman*, [1997] 3 SCR 549 at ¶33 ("*Peixeiro*").

[20] *Peixeiro*, at ¶37, citing *Fehr v. Jacob*, [1993] 5 WWR 1, [1993] MJ No 135 ("*Fehr*").

[21] See *Peixeiro*, at ¶37, quoting from *Fehr*.

[22] *Ryan v. Moore*, 2005 SCC 38 ("*Ryan*").

contains an exception to the common law rule that a personal action in tort is extinguished on the death of the victim or the wrongdoer, by permitting actions to be maintained, but only for a limited period of time.[23] This Court held that discoverability could not apply to this limitation period because there was no relationship between the events triggering the limitation period and the injured party's knowledge.[24]

32. As recently as 2015, this Court confirmed this approach, in *Canadian Imperial Bank of Commerce v. Green*, where Côté J observed that "[s]ection 138.1 [of the *Ontario Securities Act*] does not have an internal suspension mechanism, and the limitation period begins to run regardless of knowledge on the plaintiff's part".[25]

33. The limitation period contained in s. 36(4)(a)(i) of the *Competition Act* is triggered by "a day on which the conduct was engaged in". The "conduct" is conduct that breaches Part VI of the Act. That conduct occurs without regard to the injured party's knowledge. There is no room to construe the unlawful conduct as only occurring once the injured party has knowledge of it. Consequently, this limitation period falls within the second branch of the *Peixeiro* test, and discoverability cannot apply.

34. A number of decisions have acknowledged this. The Alberta Court of Appeal recently held that "[w]ith respect to the claim under s 36 of the *Competition Act*, … time runs from the conduct, not discoverability".[26] Similarly, Ontario Superior Court Justice Strathy (as he then was) held that discoverability does not apply to s. 36(4).[27] The Federal Court has held that discoverability does not apply to s. 36(4),[28] though the Federal Court of Appeal has yet to decide the issue.[29] In *Infineon Technologies AG v. Option consommateurs*, this Court noted the Quebec Superior Court's finding that the plaintiff`s s. 36 action was statute-barred.[30] However, in that

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[23] *Ryan*, at ¶18.

[24] *Ryan*, at ¶27.

[25] *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 ("*Green*"), at ¶79.

[26] *CCS Corporation v. Secure Energy Services Inc.*, 2014 ABCA 96, at ¶4.

[27] *Fairview*, at ¶647.

[28] *Garford FC*, at ¶28*ff*; *Les Laboratoires Servier*, at ¶488; see also *Eli Lily*, at ¶729.

[29] In *Garford FCA*.

[30] *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, at ¶19.

case, the plaintiff admitted that the action was statute-barred and the point does not appear to have been argued.[31]

35. Indeed, in this case, Masuhara J. acknowledged that the limitation period is triggered by conduct that occurs without regard to the injured party's knowledge.[32] The BC Court of Appeal did not challenge this; it decided the case based on a different test, as discussed below.

2. The BC Court of Appeal applied a new test to determine whether discoverability applies

a) The new test

36. In this case, the BC Court of Appeal applied a new test that directly contradicts the test laid down by this Court in *Peixeiro* and confirmed in *Ryan*. This new test comes from the Ontario Court of Appeal's decision in *Fanshawe*.[33]

37. The Ontario Court of Appeal developed this new test by misreading the following passage from *Ryan*:

> 24 Thus, the Court of Appeal of Newfoundland and Labrador is correct in stating that the rule is "generally" applicable where the commencement of the limitation period is related by the legislation to the arising or accrual of the cause of action. The law does not permit resort to the judge-made discoverability rule when the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge or the basis of the cause of action (see Mew, at p. 55). [Emphasis added][34]

38. In *Fanshawe*, the Ontario Court of Appeal erred by assuming that if discoverability *does not* apply where the triggering event is unrelated to the basis of the cause of action, then it follows that it *does* apply if the triggering event is related to the basis of the cause of action.

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[31] *Option Consommateurs c. Infineon Technologies, a.g.*, 2008 QCCS 2781, at ¶198.

[32] Certification Decision, at ¶54, JRA, vol. 1, tab 1.

[33] *Fanshawe*, at ¶ 114-120.

[34] *Ryan*, at ¶24.

39. This simply does not follow. The fact that discoverability does *not* apply where the triggering event is unrelated to the basis of the cause of action does not logically imply that it *does* apply where the triggering event is so related.

40. This error can be demonstrated by a simple example: a person who is not yet 16 is not permitted to drive an automobile. It does not follow that a person who is over the age of 16 can drive an automobile; that person also needs a driver's licence.

41. This misreading of *Ryan* resulted in both the BC and Ontario Courts of Appeal applying the discoverability rule to a limitation period whose triggering event is a fixed event unrelated to the injured party's knowledge. In other words, those courts applied discoverability to a limitation period that falls within the second branch of *Peixeiro*, where discoverability does not apply.

42. Remarkably, the BC Court of Appeal even ascribed this error to this Court:

> I do not think it open to this court to call into question the Supreme Court's unequivocal statement in *Ryan*, that the rule can apply where the limitation period is linked to "the basis of the cause of action"…[35] [Emphasis added]

43. This Court did not make the statement attributed to it in the passage above. On the contrary; in *Ryan*, this Court reaffirmed, unequivocally, in the paragraph immediately preceding the passage relied on by the Ontario and BC Courts of Appeal, that discoverability cannot apply where time runs from an event which clearly occurs without regard to the injured party's knowledge. In fact, Bastarache J. underlined this second branch of the test.[36]

44. Moreover, this Court decided *Ryan* on the basis that the limitation period was triggered by an event that occurred without regard to the injured party's knowledge, and not on the basis that the event was unrelated to the cause of action:

> 27 Pursuant to the *Survival of Actions Act*, the limitation period is triggered by the death of the defendant or the granting by a court of the letters of administration or probate. The section is clear and explicit: time begins to run from one of these two specific events. The Act does not establish a relationship between these events and

[35] BCCA Decision, at ¶89, JRA, vol. 1, tab 7.

[36] *Ryan*, at ¶23.

> the injured party's knowledge. I agree with the appellants that knowledge is not a factor: the death or granting of the letters occurs regardless of the state of mind of the plaintiff. We face here a situation in respect of which, as recognized by this Court in Peixeiro, the judge-made discoverability rule does not apply to extend the period the legislature has prescribed. Thus, I agree with the Court of Appeal that by using a specific event as the starting point of the "limitation clock", the legislature was displacing the discoverability rule in all the situations to which the *Survival of Actions Act* applies.[37]

45. There is thus nothing in *Ryan* to suggest that this Court intended to replace the *Peixeiro* test with a new and very different test.

b) The new test is inconsistent with the **Peixeiro** *test*

46. The new test for discoverability adopted by the BC and Ontario Courts of Appeal effectively replaces the test adopted by this Court in *Peixeiro*. Under this new rule, only limitation periods that have nothing to do with the cause of action, such as survival of actions (as in *Ryan*) are not subject to discoverability. Discoverability applies to all other limitation periods, even those that run from a fixed event unrelated to the injured party's knowledge, resulting in a near-universal application of the discoverability rule.

47. Applying the discoverability rule to all limitation periods apart from rare exceptions (such as survival of actions legislation) would be fundamentally inconsistent with the principle established in *Peixeiro* that "the discoverability rule is an interpretive tool for the construing of limitations statutes".[38]

c) "Conduct" is not equivalent to "damages were sustained"

48. In *Peixeiro*, the phrase "damages were sustained" was equivalent to "cause of action arose" for purposes of determining whether discoverability applied.[39] That is, both left room for construing the trigger as occurring only when the injured party had knowledge of the injury sustained.

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[37] *Ryan*, at ¶27.

[38] *Peixeiro*, at ¶37.

[39] *Peixeiro*, at ¶38.

49. In this case, the BC Court of Appeal suggested that because the unlawful conduct, which triggers the s. 36(4)(a)(i) limitation period, is also what causes the damages, "conduct" is equivalent to "damages were sustained".[40]

50. This is a false equivalence, for two reasons. First, the phrase "damages sustained" leaves room for the mental element upon which the discoverability rule applies. The date of the "conduct" does not. The conduct occurs without regard to the injured party's knowledge.

51. Second, the s. 36 cause of action has two separate elements: "conduct", namely a breach of Part VI, and loss or damage. The limitation period runs from the conduct element, not loss or damages. The conduct alleged in this case is conspiracy contrary to s. 45. The offence of conspiracy is complete upon the making of the unlawful agreement; it is not necessary that the agreement be implemented or that prices actually increase.[41] Thus the overcharge for which recovery is sought in a s. 36 action forms no element of the offence or the "conduct" element.

3. There is no reason to replace the *Peixeiro* test with a new test

a) The new test constitutes an impermissible incursion into the legislative process

52. *Peixeiro* put an end to a debate as to whether the discoverability rule was a universal rule that applied to all limitation periods, or was a principle of statutory interpretation that applied to some limitation periods but not to others.

53. Previous cases had established that a cause of action does not accrue before it is possible to discover any injury.[42] What was not clear was whether the discoverability rule applied to all limitation periods, or just those triggered by the accrual of a cause of action.

54. In 1993, in *Fehr*, the Manitoba Court of Appeal adopted what became the *Peixeiro* test, holding that discoverability did not apply to a limitation period that was triggered by an event that occurred without regard to the injured party's knowledge.

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[40] BCCA Decision, at ¶91-92, JRA, vol. 1, tab 7.

[41] *Laboratoires Servier*, at ¶479*ff*; *Eli Lilly*, at ¶743; *Garford FC*, at ¶43; *Garford FCA*, at ¶19; *Fairview*, at ¶642**.**

[42] See for example *Kamloops (City of) v. Nielsen*, [1984] 2 SCR 2, and *Central Trust Co. v. Rafuse*, [1986] 2 SCR 147.

55. The Newfoundland Court of Appeal adopted *Fehr* in 1995, in *Snow v Kashyap*.[43] Marshal J.A. explained the rationale behind the rule:

> Where the limitation period is set by the terms of the statute to run from the time when an action arises or accrues, as in *Kamloops* and *Central Trust*, there is room to imply that the legislation does not intend the period to commence until the injured party has, or ought to have, an awareness of the claim's existence. The criteria under such legislation provisions, therefore, imports a mental element. However, when the limitation statute explicitly ties the prescription period to a specific occurrence, such as the termination of professional services, knowledge of the claimant cannot be construed as a factor. In such instances it is the happening of the factual event which is explicitly relevant and any interpretation implying the period to be related to the claimant's consciousness of the circumstances is precluded. No scope exists to imply the discoverability rule into the legislative intent.[44]

56. By contrast, in *Peixeiro*, the Ontario Court of Appeal took the view that the discoverability rule was a universal rule, and even described it as "a singular example of the court's engagement in legislating".[45]

57. In its decision in *Peixeiro*, this Court implicitly rejected the notion that the discoverability rule was one of universal application, by describing the discoverability rule as a rule of statutory interpretation, and prescribing a test for when it does and does not apply. This exclusion of the discoverability as a universal rule was made concrete in *Ryan*, where the *Peixeiro* test resulted in the conclusion that discoverability did not apply.

58. Indeed, in *Ryan*, this Court adopted the caution that "[w]e must avoid the accusation of usurping the role of the Legislature",[46] and concluded:

> to apply the rule of construction of reasonable discoverability to such a provision would be tantamount to mounting a fiction transcending the limits of logical statutory interpretation. Hence, it

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[43] *Snow v. Kashyap* (1995), 125 Nfld & PEIR 182, 1995 CarswellNfld 233 ("*Snow*").

[44] *Snow*, at ¶38.

[45] *Peixeiro v Haberman* (1995), 25 OR (3d) 1 (CA) ("*Peixeiro ONCA*"), at ¶9.

[46] *Ryan*, at ¶30.

> would constitute an impermissible incursion into the legislative process.[47]

59. The same reasoning applies here: adopting the discoverability rule as a rule of nearly universal application by applying it to a limitation period that is triggered by unlawful conduct that occurs without regard to the injured party's knowledge would be tantamount to a fiction transcending the limits of logical statutory interpretation and constitute an impermissible incursion into the legislative process.

60. If the limitation period in s. 36(4)(a)(i) is harsh or unfair, it is for Parliament to fix.

b) The section 36(4) limitation period is part of a carefully limited and balanced statutory cause of action for a wrong created by statute

61. As noted in the Factum of the Appellants in the Toshiba Appeal, s. 36 was introduced into the *Competition Act* as part of a general overhaul of Canada's competition regime.

62. Section 36 is part of what this Court described as a "well-orchestrated" and "complex scheme of economic regulation" in *General Motors of Canada Ltd. v City National Leasing Ltd.*[48] Section 36 itself was "carefully constructed".[49]

63. This careful construction reflects Parliament's cautious approach to this new cause of action. Voices were raised both for and against the new cause of action. The Hon. Herb Gray summarized these views during a committee hearing:

> If I may turn to another area, I have noticed also that large business spokesmen have opposed the proposal to create a right of civil damages for breaches of the Combines Investigation Act. I gather that you are saying that this is a useful and necessary change in our law and, as I understood you, they indicate it could be vital to a small-businessman who has suffered serious financial loss through anti-competitive practices of large business and who would not be assisted in recouping that loss if the unlawful agreement on the

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[47] *Ryan*, at ¶34, borrowing the words of Mashall J.A. in *Snow*, at ¶44.

[48] *General Motors of Canada Ltd. v. City National Leasing Ltd.*, [1989] 1 SCR 641 ("*City National*"), at ¶52 and ¶57.

[49] *City National*, at ¶79.

> part of larger businessmen simply resulted in some fine that went to the state.[50]

64. The limitation period in s. 36(4)(a)(i) forms part of this carefully constructed provision. It must be read as part of s. 36. Read as a whole, s. 36 creates a cause of action that contains both limitations as well as aids to plaintiffs. In particular:

a) Section 36 is only available for breaches of Part VI of the Act (offences in relation to competition) or for failure to comply with an order of the Tribunal or another court under the Act. It is not available for any of the conduct contained in Part VII (other offences), Part VII.1 (deceptive marketing practices), or Part VIII (matters reviewable by Tribunal).

b) Section 36 is expressly limited to those who suffer a loss or damage, and it limits recovery to an amount "equal to the loss or damage proved to have been suffered by" the plaintiff. In foreclosing aggravated and punitive damages, as well as disgorgement, Parliament appears to have been concerned with avoiding the perceived US excess of treble damages.

c) Section 36 contains a shortcut to proving conspiracy, as plaintiffs can use the record of court proceedings in which a person was convicted as proof that the person engaged in the unlawful conduct (s. 36(2)).

d) The s. 36 cause of action is only available for two years after the unlawful conduct, or two years after the termination of criminal proceedings in relation to the conduct (s. 36(4)). This means that the limitation period can expire and then be revived if the Crown lays charges.

65. The limitation period in s. 36(4) is thus part and parcel of the s. 36 cause of action; it is not an extrinsic limitation, but forms part of Parliament's delineation of the cause of action.

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[50] "Bill C-2, An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code", Proceedings of the House of Commons Standing Committee on Finance, Trade and Economic Affairs, 30th Parl, 1st Sess, No 25 (11 March 1975) at 21, Joint Book of Authorities ("JBA"), vol. 1, tab 22.

66. There are, moreover, a number of differences between the limitation periods in s. 36(4) and provincial limitation periods that existed at the time.

67. First, at the time it was introduced (1976), the two-year limitation period was short by comparison with provincial limitations statutes, which typically applied a prescription period of six years to most actions in common law provinces.[51] In Quebec, certain actions of a commercial nature were subject to a five-year prescription; others were subject to a prescription of thirty years.[52] In *Peixeiro*, Major J. commented that "[s]hort limitation periods indicate that the legislature put a premium on their function as a statute of repose".[53] In *Pro-Sys*, this Court referred to the short two-year limitation period in s. 36 as a basis for not being concerned about plaintiffs sitting on their rights.[54]

68. Second, Parliament included a unique provision that revives the cause of action upon the commencement of a prosecution (s. 36(4)(a)(ii)), thus providing a partial remedy for cases where the limitation period expires before a plaintiff learns about the conspiracy. If the Crown, in the exercise of its discretion, chooses to prosecute the conspiracy, plaintiffs will again have a cause of action under s. 36.

69. Third, the trigger chosen by Parliament for s. 36(4)(a)(i) – the "conduct" – was also different from that typically employed in provincial limitations statutes, namely when "the cause of action arose".[55]

70. Fourth, unlike provincial limitations statutes, s. 36(4) is not an extrinsic limitation on a pre-existing legal right. Rather, it is part of the provision that creates the right. Indeed, the wrong for which s. 36 provides a remedy is itself created by statute. However heinous price-fixing may

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[51] See for example *The Limitations Act*, RSO 1970, c 246, s 45(1)(g); *Statute of Limitations*, RSBC 1960, c 370, s 3.

[52] *Senez v. Montreal Real Estate Board*, [1980] 2 SCR 555 at p. 560.

[53] *Peixeiro*, at ¶34.

[54] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 SCR 477, at ¶38.

[55] *The Limitations Act*, RSO 1970, c 246, s 45(1); see also *Statute of Limitations*, RSBC 1960, c 370, s 3**.**

appear to us today, at common law it was neither an offence nor a tort;[56] Parliament made it an offence by enacting the *Competition Act* and its predecessors, and created a cause of action by enacting s. 36. Parliament fundamentally overhauled the Act's conspiracy provision in 2010, by repealing "old" s. 45, which made it an offence to conspire to lessen competition unduly, and replacing it with "new" s. 45, which makes it an offence for competitors to agree to fix prices, allocate markets, or restrict output. The result – which manifested itself in *Watson* – was that s. 36 is no longer available for conduct that may have violated old s. 45 but not new s. 45.[57]

71. What is more, the complex regulatory scheme in the *Competition Act* is actively managed by Parliament. The Act has been amended 31 times since the passage of the 1986 Act, including twice in 2017 and twice more in 2018.[58] Parliament has even decriminalized certain conduct by removing it from Part VI of the Act, and thus also from the ambit of s. 36. For example, in 2009, Parliament repealed criminal provisions relating to price discrimination (s. 50), discriminatory allowances (s. 51), and price maintenance (s. 61).[59] In *Watson*, the BC Supreme Court held that a s. 36 claim based on a breach of s. 61 that was commenced more than two years after the repeal of s. 61 was bound to fail.[60]

72. Similarly, in 1999, Parliament made misleading advertising a full *mens rea* offence (s. 52), and repealed criminal provisions relating to performance claims (s. 53), referral selling (s. 56), bait and switch selling (s. 57), sale above advertised price (s. 58), and promotional contests (s. 59), replacing these provisions with a regulatory scheme for deceptive marketing practices (Part VII.1), thus narrowing the ambit of the s. 36 cause of action.[61]

73. Given this history, the words of Côté J. in *Green* are apposite:

> Part XXIII.1 OSA strikes a delicate balance between various market participants. The interests of potential plaintiffs and

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[56] *Mogul Steamship Company, Limited v McGregor, Gow & Co.*, [1892] AC 25, JBA, vol. 1, tab 11; *Norris v United States of America*, [2008] UKHL 16, JBA, vol. 1, tab 12.

[57] *Watson BCSC*, ¶116-124; *Watson BCCA*, ¶108-123.

[58] Table of Public Statutes – *Competition Act*, *Canada Gazette*, Part II, Vol. 152, No. 17.

[59] *Budget Implementation Act*, SC 2009, c 2, s 413.

[60] *Watson BCSC*, at ¶126.

[61] SC 1999, c 2, s 12, 14, 17.

> defendants and of affected long term shareholders have been weighed conscientiously and deliberately in light of a desired precise balance between deterrence and compensation. The legislative history reveals a long, meticulous development of this balance, one that found expression in all the limits built into the scheme.[62] [Emphasis added]

74. The long and meticulous development of the *Competition Act* by Parliament makes it all the more important for courts to respect Parliament's policy choices. What is more, the active management of the *Competition Act* demonstrates that Parliament could easily amend s. 36 to import discoverability into the limitation period.

75. As the Alberta Court of Appeal stated in *Engel v Edmonton (City) Police Service*, a decision applying *Fehr*:

> The Legislature may distinguish between claims and set different limitations for them. The Legislature may, as it did in connection with workers' compensation, apply a compromise procedure barring an entire class of actions. Absent unconstitutionality, the courts do not gainsay these decisions of the Legislature.[63] [Emphasis added]

c) Replacing the Peixeiro test would impact other statutory causes of action

76. While most provinces have adopted limitations statutes that codify the discoverability rule, there remain a number of limitation periods in federal statutory causes of action that are similar to the limitation period in s. 36(4)(a)(i). A list of examples is in Appendix A.

77. As well, some provincial limitations provisions relating to defamation continue to run from a fixed event without regard to the injured party's knowledge. In particular, Manitoba, Yukon, Northwest Territories, and Nunavut's limitations statutes provide that actions for defamation shall be commenced "within two years of the publication of the defamatory matter."[64]

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[62] *Green*, at ¶69.

[63] *Engel v. Edmonton (City) Police Service*, 2008 ABCA 152, at ¶30.

[64] *The Limitation of Actions Act*, CCSM c L150, s 2(1). See also: *Limitation of Actions Act*, RSNWT 1988, c. L-8, s 2(1)(c) (also in force in Nunavut); *Limitation of Actions Act*, RSY 2002, c. 139, s 2(1)(c).

78. Importing discoverability into s. 36(4)(a)(i) would likely have the effect of importing discoverability into these other statutory schemes.

d) The test for overruling Peixeiro *and* Ryan *is not met*

79. As set out above, the BC Court of Appeal in this case (and the Ontario Court of Appeal in *Fanshawe*) adopted a test that nullifies the *Peixeiro* test.

80. There are no grounds showing that two unanimous decisions of this Court, *Peixeiro* and *Ryan*, are incorrect and should not be followed.[65] Those decisions have been repeatedly followed and have not been subject to significant judicial or academic criticism. Nor have they led to untenable results.[66]

81. This Court's decision in *Peixeiro* and *Ryan* that the discoverability rule is a principle of statutory interpretation is correct. It confines the rule to cases where the statutory language leaves room for the mental element, and avoids an impermissible incursion by the courts into the legislative process.

C. Fraudulent concealment cannot toll the limitation period in s. 36 of the *Competition Act* in the absence of any special relationship between the plaintiff class and Pioneer

1. Special relationship is the foundation of fraudulent concealment

82. The BC Court of Appeal wrongly held that it was not plain and obvious that the doctrine of fraudulent concealment cannot toll the s. 36(4) limitation period in the absence of any special relationship between the plaintiff and the defendants.

83. The existence of a special relationship between the parties is the very foundation of the fraudulent concealment doctrine. In *Guerin v. The Queen*, Dickson J. (as he then was), writing for the majority, observed:

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[65] *Canada v. Craig*, 2012 SCC 43, at ¶24-25, aff'd *Teva Canada Ltd v TD Canada Trust*, 2017 SCC 51 at ¶65-6; *Ontario (Attorney General) v. Fraser*, [2011] 2 SCR 3, at ¶57; *Nishi v. Rascal Trucking Ltd.*, [2013] 2 SCR 438, at ¶23, 29.

[66] *R v. Henry*, 2005 SCC 76, at ¶42, 45.

> 40 Nevertheless, there was a concealment amounting to equitable fraud. It was "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other" (*Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563, per Lord Evershed M.R., at p. 573).[67] [Emphasis added]

84. In *M. (K.) v. M. (H.)*, after citing the passage from *Kitchen* that Dickson J. had relied on, this Court characterized the need for a "special relationship" between the parties as an "important restriction" on the doctrine of fraudulent concealment:

> 65 There is an important restriction to the scope of fraudulent concealment, which Halsbury's, 4th ed., vol. 28, para. 919, at p. 413, describes as follows:
>
> > In order to constitute such a fraudulent concealment as would, in equity, take a case out of the effect of the statute of limitation, it was not enough that there should be merely a tortious act unknown to the injured party, or enjoyment of property without title, while the rightful owner was ignorant of his right; there had to be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts. [Emphasis added] [68]

85. More recently, the Ontario Court of Appeal restated the doctrine in *Giroux Estate v. Trillium Health Centre*. Moldaver J.A. (as he then was), writing for the court, noted that fraudulent concealment is not a rule of construction, but an equitable principle whose application is not dependent on the wording of the limitation provision.[69] He concluded:

> Fraudulent concealment is concerned with the operation of the provision, not its interpretation. Stated succinctly, it is aimed at preventing unscrupulous defendants who stand in a special relationship with the injured party from using a limitation provision as an instrument of fraud.[70]

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[67] *Guerin v. The Queen*, [1984] 2 SCR 335, at ¶40 (p. 390).

[68] *M (K) v. M (H)*, [1992] 3 SCR 6, at ¶65.

[69] *Giroux Estate v. Trillium Health Centre*, [2005] O.J. No 226 (CA), at ¶28-29 ("*Giroux*").

[70] *Giroux*, at ¶29.

86. In *Fairview Donut*, Strathy J. applied *Giroux*, holding that fraudulent concealment could not extend the s. 36(4) limitation period because there was no basis to conclude that Tim Hortons had engaged in conduct like that of the physician in *Giroux*.[71]

87. *Fairview Donut* was a franchise case that involved claims under s. 36 based allegations of conspiracy and price maintenance. In *Giroux*, a doctor failed to diagnose a cancer. After the patient died, he told the family that the patient had declined cancer treatments and created a false set of notes to cover his tracks. *M.(K.)* involved incest, while *Guerin* involved a breach of fiduciary duty owed by the Crown to an Indian Band.

88. There is no conduct alleged in this case that is akin to that in *Giroux*, *M.(K.)*, or *Guerin*. The relationships here are entirely commercial in nature, that is, between buyers and sellers of ODDs and ODD Products. Only direct purchasers have a customer-supplier relationship with the defendants. Indirect purchasers, likely the bulk of the class, purchased from distributors or retailers. The representative plaintiff, for example, bought a laptop containing a Blu-ray drive from London Drugs.[72] There is nothing special about the relationship.

2. There is no reason to enlarge the scope of the fraudulent concealment doctrine

89. Removing the special relationship requirement would make the doctrine applicable to any cause of action, any time a defendant conducts its wrongdoing in secret.

90. Here, there is no reason to enlarge the scope of the doctrine to commercial relationships involving economic loss, even if the loss is caused by criminal price-fixing as alleged.

91. Parliament must have been aware that price-fixing conspiracies take place in secret. They are, "by their very nature, cloaked in secrecy", as the BC Court of Appeal recognized.[73] As early as 1951, courts recognized the secret nature of conspiracies:

> There is no cause for surprise that one does not find in the minute books the text of the agreements or arrangements which could have been made by defendants. In the case of such offences one seldom

[71] *Fairview*, at ¶649.

[72] Affidavit #1 of N Godfrey, ¶8.

[73] BCCA Decision, at ¶93, JRA, vol. 1, tab 7.

> finds, if ever, concrete, clear-cut evidence of agreements the purpose of which is to create a monopoly or to operate it.[74]

92. There are several provisions in the *Competition Act* that demonstrate Parliament's awareness that conspiracies tend to be conducted in secret. As noted above, Parliament provided a partial remedy for cases where the limitation period expires before the conspiracy comes to light, by providing, in s. 36(4)(a)(ii), a limitation period related to criminal proceedings.

93. Subsection 45(4) provides that the court may infer the existence of a conspiracy from circumstantial evidence, without direct evidence of communication amongst the conspirators. Section 69 creates an evidentiary presumption that actions and records written or received by, or in the possession of, agents of a participant, are attributable to the participant. Both of these provisions alleviate difficulties of proving conspiracies.

94. Fraudulent concealment is by its nature, and because of the way it operates regardless of the wording of the statute, an exceptional doctrine. In the case of a statutory cause of action such as s. 36, applying the doctrine involves the court in allowing one part of the statute to operate (the part granting the right) but not other (the part limiting it temporally). In short, it involves the court refashioning the legislative provision based on the equities of the case.

95. As the BC Court of Appeal acknowledged, price fixing conspiracies tend to be cloaked in secrecy. If the mere fact that price-fixers conduct their conspiracy behind closed doors is enough to invoke the fraudulent concealment doctrine, then the doctrine would not be exceptional in price-fixing cases, but routine; it would apply in nearly every price-fixing case. This would render Parliament's policy choice in enacting the s. 36(4)(a)(i) limitation period all but meaningless, expanding the cause of action temporally beyond what Parliament intended. This would constitute an impermissible incursion into the legislative process.

D. Plain and obvious that the claim against Pioneer is statute-barred

96. In *Watson*, the BC Court of Appeal recognized an exception to the general rule that limitations defences cannot be dealt with on pleadings motions, namely where it is plain and

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[74] *R. v. Eddy Match Company Ltd.*, (1951), 13 CPR 217, JBA, vol. 1, tab 14, as cited in *R. v. Canada Packers Inc*., 1988 CanLII 3796.

obvious that a cause of action is statute-barred.[75] *Peixeiro* itself involved a motion to determine a point of law,[76] and *Ryan*, an application to strike the statement of claim.[77]

97. Based on the facts pleaded in the Claim itself, more than two years elapsed from the end of the alleged conspiracy (January 1, 2010) and the commencement of the claim against Pioneer. Since, as set out above, neither discoverability nor fraudulent concealment can toll the limitation period contained in s. 36(1)(a)(i), it is plain and obvious that the claim against Pioneer is statute-barred.

PART IV – SUBMISSIONS ON COSTS

98. Pioneer requests its costs in this Court.

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[75] *Watson BCCA*, at ¶126.

[76] *Peixeiro ONCA*, at ¶2.

[77] *Ryan*, at ¶10.

PART V – ORDERS SOUGHT

99. Pioneer requests that this Court allow the appeal, set aside the order of Masuhara J., and dismiss the plaintiff's application for certification.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of August 2018

W. Michael G. Osborne

Brigeeta Richdale

Jessica Lewis

Counsel to Pioneer North America, Inc., Pioneer Electronics (USA) Inc., Pioneer High Fidelity Taiwan Co., Ltd. and Pioneer Electronics of Canada, Inc.

APPENDIX A – COMPARABLE LIMITATION PROVISIONS

Statute	***Cause of Action***	***Limitation runs from***
Patent Act, s. 55.01[78]	Patent infringement action	Date of act of infringement
Industrial Design Act, s. 18[79]	Industrial design infringement action	Date of act of infringement
Radiocommunication Act, s. 18 & 19[80]	Action for damages for conduct contrary to s. 9(1)(c) and s. 9(1.1)	The date the conduct giving rise to the action was engaged in
Telecommunications Act, s. 72[81]	Action for loss or damages for act or omission contrary to the Act	The day on which the act or omission occurred
Bank Act, s. 76[82]	Action to compel shareholder or other person to pay money or return property improperly paid or distributed as a consequence of reduction of capital contrary to s. 75	The date of the act complained of
Canada Business Corporations Act, s. 38(5)[83]	Claim against shareholder for amount of liability reduced as a result of reduction of stated capital contrary to s. 38 of the Act	The date of the act complained of

[78] *Patent Act*, RSC 1985, c P-4, s. 55.01.
[79] *Industrial Design Act*, RSC 1985, c I-9, s.18.
[80] *Radiocommunication Act*, RSC 1985, c R-2, s. 18 & 19.
[81] *Telecommunications Act*, SC 1993, c 38, s. 72.
[82] *Bank Act*, SC 1991, c 46, s. 76.
[83] *Canada Business Corporations Act*, RSC 1985, c C-44, s. 38(5).

Statute	***Cause of Action***	***Limitation runs from***
Cooperative Credit Associations Act, s. 83(3)[84]	Action by creditor for money paid to a member as a consequence of reduction of capital contrary to s. 82	The date of the act complained of
Insurance Companies Act, s. 80(3), s.758(1)[85]	Action by creditor for money paid to a shareholder as a consequence of reduction of capital contrary to s. 79	The date of the act complained of
Trust and Loan Companies Act, s. 79(3)[86]	Action by creditor for money paid to a shareholder as a consequence of reduction of capital contrary to s. 78	The date of the act complained of
Employment Insurance Act, s. 46.1[87]	Action to recover penalties imposed on corporation from directors of the corporation	Day on which the act or omission for which a penalty is imposed occurred
Canadian Human Rights Act, s. 41[88]	Complaint to Human Rights Commission	The last occurrence of the acts or commissions complained of
Securities Act, s. 138 (Ontario)[89]	Action for rescission or damages for misrepresentation in a prospectus (s. 130), offering memorandum (s. 130.1), or take-over bid circular (s. 131)	Action for rescission and ultimate limitation for actions for damages, from the date of the transaction

[84] *Cooperative Credit Associations Act*, SC 1991, c 48, s. 83(3).
[85] *Insurance Companies Act*, SC 1991, c 47, s. 758(1).
[86] *Trust and Loan Companies Act*, SC 1991, c 45, s. 79(3).
[87] *Employment Insurance Act*, SC 1996, c 23, s. 46.1.
[88] *Canadian Human Rights Act*, RSC 1985 c H-6, s 41.
[89] *Securities Act*, RSO 1990, c S.5, s. 138.

Statute	***Cause of Action***	***Limitation runs from***
Securities Act, 138.14 (Ontario)[90]	Secondary market liability – action for damages for misrepresentation in a document released by responsible issuer, oral statements by responsible issuer, etc. (s. 138.3)	Date of release of document, issuance of news release, making of oral statement, etc.
Residential Tenancies Act, s. 29 (Ontario)[91]	Tenant application to Board	The day the conduct giving rise to the application occurred

[90] *Securities Act*, RSO 1990, c S.5, s. 138.14.

[91] *Residential Tenancies Act*, SO 2006, c. 17, s. 29 (2).

PART VI – TABLE OF AUTHORITIES

A. Statutes

B. Cases

C. Other Authorities