

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

Between:

**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)

RESPONDENT'S FACTUM

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

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This case involves serious allegations that the Pioneer Defendants engaged in criminal price-fixing and bid-rigging activity in the market for optical disk drives, which was deliberately concealed from the Plaintiff and the class he represents. The Pioneer Defendants seek to rely on the same secrecy that they used to defraud these class members to foreclose their attempts at recovery.

2. The Plaintiff commenced the underlying litigation in 2010; in 2013, he commenced a separate action against the Pioneer Defendants. These actions were consolidated at certification. The Pioneer Defendants opposed certification, arguing that the Plaintiff's claims under section 36 of the *Competition Act* were statute-barred and that neither discoverability nor fraudulent concealment applied to extend the statutory limitation period. The Courts of British Columbia disagreed.

3. Discoverability and fraudulent concealment both focus on fairness. They operate to avoid the inherent unfairness of time-barring a claim before plaintiffs even know they have one. The Pioneer Defendants wish to take advantage of that unfairness in this case.

4. The Pioneer Defendants argue that the British Columbia Court of Appeal erred and created a new and expanded test for discoverability that was based on the Ontario Court of Appeal's decision in *Fanshawe College of Applied Arts and Technology v AU Optronics Corp.*¹ But that is not true. Both Court of Appeal decisions are consistent with this Court's direction that discoverability applies where the limitation period is linked to the basis of the cause of action—the conduct described in the limitation period is the very core of the Plaintiff's cause of action in this case.

5. The Pioneer Defendants also argue that the British Columbia Court of Appeal erred and broadened the fraudulent concealment doctrine. But that is not true either. Fraudulent concealment is understood to be a fact-driven doctrine that responds to the equities of any given case. It is broad by nature and this Court has deliberately avoided defining its contours. The

¹ *Fanshawe College of Applied Arts and Technology v AU Optronics Corp.*, 2016 ONCA 621 [*Fanshawe*].

question of whether the doctrine applies in this case can only be determined once the full facts are known to the parties and the court.

6. A second appeal arising from the certification motion, *Toshiba Corporation et al v Godfrey*, SCC File No. 37810 (the “Toshiba Appeal”), will be heard at the same time as this appeal. The Toshiba Appeal will address, *inter alia*, whether s. 36 of the *Competition Act* prohibits the Plaintiff from advancing concurrent common law claims (the “concurrent claims” issue). The cumulative effect of the Defendants’ positions on this appeal and the Toshiba Appeal would be to create a perfect legal loophole that would allow cartels to profit from their misconduct at the expense of Canadians. Provided they can conceal their conduct until the two-year limitation period expires, conspirators will be free from civil liability and their victims will be left holding the proverbial (but empty) bag.

7. Even if the Plaintiff is successful in the Toshiba Appeal on the concurrent claims issue, the result of this appeal is significant. As described at paragraph 65 of the Plaintiff’s Toshiba Appeal factum, the statutory and common law claims are not duplicative. The statutory claim is easier to prove, but has a narrower set of remedies (thus, plaintiffs may seek to establish both claims).

8. The result intended by the Pioneer Defendants would undermine the objectives of the *Competition Act* and cannot possibly reflect the intentions of Parliament. Parliament created a civil right of action under section 36, noting a “vital” need to provide a remedy for victims of conspiracies.² Parliament would not have left the availability of this remedy subject to plaintiffs’ good fortunes that the conspiracy was exposed within the allotted time.

9. The Pioneer Defendants’ position on this appeal offends basic notions of justice. The British Columbia Court of Appeal was correct to conclude that it is not plain and obvious that the Plaintiff’s claims are time-barred. This appeal should be dismissed.

² “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, Appellants’ Authorities, Tab 22.

B. Statement of Facts

1. Procedural History

10. The Plaintiff alleges that the Pioneer Defendants participated in a global, criminal conspiracy to fix the prices of optical disk drives (“ODDs”), unlawfully increasing the prices of ODDs and certain products containing ODDs. The Plaintiff brought an action on behalf of residents of British Columbia who purchased ODDs or ODD products between January 2004 and January 2010, seeking to recover the amount of the unlawful price increase.

11. The Plaintiff alleges that the conspiracy was carried out in secret and the Pioneer Defendants “took active steps to, and did, conceal the unlawful conspiracy from their customers.”³

12. The Plaintiff commenced his action in 2010, but did not name the Pioneer Defendants as defendants. The Pioneer Defendants have not pleaded or been found guilty in any jurisdiction. They were named as defendants to the parallel US proceeding in May 2013. The Plaintiff promptly commenced a separate action against the Pioneer Defendants in August 2013, and the two actions were consolidated at the certification hearing.

13. The Pioneer Defendants have not filed a statement of defence. As part of the cause of action analysis in the certification motion, the Pioneer Defendants argued that it is plain and obvious that the Plaintiff’s claim against them is time-barred.

2. Decision of the British Columbia Supreme Court

14. The British Columbia Supreme Court held that limitation periods cannot be considered at certification. The Court observed that it “is well-established that limitation defences are affirmative defences that do not arise until pleaded”. The Court alternatively held that, if limitation periods can be considered at certification, “they can only bar claims where it is plain and obvious, based on the pleadings, that the limitation period has expired”. The Court

³ *Godfrey v Sony Corporation*, 2016 BCSC 844 [Certification Reasons] at para 24, citing the Plaintiff’s proposed consolidated notice of civil claim, (JRA Vol I, Tab 1).

concluded that it is not plain and obvious that the Plaintiff's claims were time-barred because it is not plain and obvious that discoverability and fraudulent concealment do not apply.⁴

3. Decision of the British Columbia Court of Appeal

15. The British Columbia Court of Appeal also concluded that the Pioneer Defendants' limitations arguments were premature. The Court held that "the certification stage is not designed to deal with [the] sorts of complex, fact-based issues" raised in this case.⁵

16. With respect to discoverability, the British Columbia Court of Appeal looked to the Ontario Court of Appeal's decision in *Fanshawe*, where the issue was determined on its merits (by way of summary judgment). The British Columbia Court of Appeal agreed with the Ontario Court's reasoning that discoverability applies to the section 36 limitation period because the limitation period is linked to an element of the cause of action (the conduct giving rise to the claim). The British Columbia Court of Appeal held that it was not plain and obvious that discoverability does not toll the limitation period on the facts of this case.⁶

17. The British Columbia Court of Appeal also held that it was not plain and obvious that fraudulent concealment does not apply in this case. The Court held that a pleading of special relationship is not essential for an equitable fraud claim and a purely commercial relationship may suffice. The Court was "not persuaded that the gravity of the conduct alleged in this case cannot be captured within the broad concept of equitable fraud".⁷

PART II - STATEMENT OF ISSUES

18. This appeal will focus on the question of whether it is "plain and obvious" that the Plaintiff's claims against the Pioneer Defendants are statute-barred. The Plaintiff agrees that this question engages the issues of whether the discoverability principle applies to the limitation period in section 36 of the *Competition Act* and whether the doctrine of fraudulent concealment requires a special relationship between the parties.

⁴ Certification Reasons, *supra* note 3 at paras 46, 49 and 63 (JRA Vol I, Tab 1).

⁵ *Godfrey v Sony Corporation*, 2017 BCCA 302 [Appeal Reasons] at para 68 (JRA Vol I, Tab 7).

⁶ Appeal Reasons, *supra* note 5 at paras 89-90 and 95 (JRA Vol I, Tab 7).

⁷ Appeal Reasons, *supra* note 5 at paras 103-104, 108 and 110 (JRA Vol I, Tab 7)

19. The Plaintiff argues that the section 36 limitation period is subject to discoverability and is not plain and obvious that the discoverability and fraudulent concealment doctrines do not toll the limitation period. The Plaintiff maintains that whether his claims were discoverable and/or fraudulently concealed can only be determined at trial, with the benefit of a full factual record.

PART III - STATEMENT OF ARGUMENT

A. The Statutory Limitation Period is Subject to Discoverability

20. Section 36 of the *Competition Act* creates a statutory right of action to recover damages or loss suffered as a result of a conspiracy:

Recovery of damages

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

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

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

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.⁸

21. This right of action is subject to the following limitation period (the “Limitation Period”):

Limitation

(4) No action may be brought under subsection (1),

(a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from

(i) a day on which the conduct was engaged in, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

⁸ *Competition Act*, RSC 1985, c C-34, s. 36(1).

whichever is the later...⁹

22. At the heart of this appeal is whether the Limitation Period is subject to discoverability. Few decisions have considered the issue and most of the cases have either decided the issue in *obiter* or with limited analysis.¹⁰

23. *Fanshawe* is the first appellate decision with any detailed analysis. In *Fanshawe*, the Ontario Court of Appeal found that, since the Limitation Period was triggered by defendant conduct that was “related to the accrual of the [plaintiff’s] cause of action”, the discoverability rule applied.¹¹

24. In the decision below, the British Columbia Court of Appeal followed the reasoning in *Fanshawe*, albeit on the lower “plain and obvious” standard for certification, and found that the rule applies because the Limitation Period is linked to the “basis of the cause of action”.¹²

⁹ *Competition Act*, RSC 1985, c C-34, s. 36(4).

¹⁰ In *CCS Corporation*, the issue was touched on in a single sentence with no analysis (*CCS Corporation v Secure Energy Services Inc.*, 2014 ABCA 96 at para 4). In *Garford*, the lower court held that discoverability applied; however this analysis was not necessary on the facts and can only be considered *obiter*. On appeal, the Federal Court of Appeal declined to opine on the issue because discoverability arguments were precluded on the facts of the case (*Garford Pty v Dywidag Systems International*, 2010 FC 996 at paras 28-38; *Garford Pty Ltd v Dywidag Systems International Canada Ltd*, 2012 FCA 48 at paras 10 and 16). In *Fairview*, *Eli Lilly*, and *Laboratoires Servier* the plaintiffs’ claims were barred notwithstanding the application of the discoverability rule. The courts’ observations on discoverability were therefore offered in *obiter* (*Fairview Donut Inc v The TDL Group Corp*, 2012 ONSC 1252 at para 647; *Eli Lilly and Company v Apotex Inc.*, 2009 FC 991 at para 730; and *Laboratoires Servier, Adir, Oril Industries, Servier Canada Inc. v. Apotex Inc.*, 2008 FC 825 at paras 488-489). The issue was not argued in *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59 [*Infineon*] (a case cited in the Pioneer Appellants’ Factum at para 34).

¹¹ *Fanshawe*, *supra* note 1 at para 45.

¹² Appeal Reasons, *supra* note 5 at paras 89-90 (JRA Vol I, Tab 7).

1. Discoverability is a Rule of Fundamental Fairness

25. Discoverability is a rule of “fundamental” fairness—it is fundamentally unfair to time-bar a claim before “the plaintiff is even aware of its existence”.¹³ The rule applies to “avoid the injustice of precluding an action before the person is able to raise it.”¹⁴ The rule stops a limitation period from running until “the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence”.¹⁵

26. Discoverability is a “general rule” of interpretation, which can apply even where “plain construction of the language used would appear to exclude” its application.¹⁶ In considering statutory limitation provisions, any ambiguity in the provision must be “resolved in favour of the [Plaintiff,] whose right of action is being truncated”.¹⁷

27. The discoverability principle “must not be applied systematically without a thorough balancing of competing interests.”¹⁸ Limitation periods reflect three policy rationales: the guarantee of repose, the risk of evidentiary issues (related to stale evidence and the obligation to preserve evidence), and the expectation of diligence. However, “[w]hatever interest a defendant may have in the universal application of a limitation period must be balanced against the concerns of fairness to the plaintiff who was unaware that his injuries met the conditions precedent to commencing an action.”¹⁹

¹³ *Peixeiro v Haberman*, [1997] 3 SCR 549 [*Peixeiro*] at para 39; *Central Trust Co. v Rafuse*, [1986] 2 SCR 147 at para 88.

¹⁴ *Peixeiro*, *supra* note 13 at para 36.

¹⁵ *Ryan v Moore*, 2005 SCC 38 [*Ryan*] at para 2.

¹⁶ *Peixeiro*, *supra* note 13 at para 38.

¹⁷ *Berardinelli v Ontario Housing Corp*, [1979] 1 SCR 275 at 280.

¹⁸ *Ryan*, *supra* note 15 at para 23.

¹⁹ *Peixeiro*, *supra* note 13 at para 34.

2. The Court of Appeal Properly Applied *Peixeiro* and *Ryan*

a. The Decision Below Did Not Create a New Test

28. Applying *Peixeiro v Haberman* and *Ryan v Moore*, the British Columbia Court of Appeal correctly held that discoverability applies when the limitation period is linked to the plaintiff's cause of action.²⁰

29. The Plaintiff agrees that the test for whether a limitation period is subject to discoverability is that articulated by this Court in *Peixeiro*:

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, 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.²¹

30. The same test was adopted by this Court in *Ryan*:

“...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”²²

31. In *Ryan*, this Court made the same point twice. First, the Court affirmed that discoverability generally applies where the limitation period is tied to “the arising or accrual of the cause of action”. The Court made this point a second time in the negative, adding that the rule does not apply where the triggering event is not related to the “basis of the cause of action”.²³

32. The Pioneer Defendants focus on the “negative” statement of the test. They submit that, in stating that the rule does not apply when the limitation period is explicitly linked to a fixed

²⁰ Appeal Reasons, *supra* note 5 at paras 90-95 (JRA Vol I, Tab 7).

²¹ *Peixeiro*, *supra* note 13 at para 37.

²² *Ryan*, *supra* note 15 at para 24.

²³ *Ryan*, *supra* note 15 at para 24.

event unrelated to the basis of the cause of action, the Court did not mean that the rule does apply when the limitation period is linked to the “basis of the cause of action”.²⁴ This is an overly technical interpretation that is not supported by a reading of *Peixeiro* and *Ryan* in their full contexts. The Pioneer Defendants’ argument should not succeed.

33. The Pioneer Defendants argue that the court below erred in applying the “new test” developed by the Ontario Court of Appeal in *Fanshawe*.²⁵ This position is misplaced. *Fanshawe* did not create a new test. *Fanshawe* applied the test set down in *Peixeiro*, as stated in *Ryan*:

Similarly, in this case, the term “conduct” in s. 36(4)(a)(i) of the *Competition Act* refers to the conduct giving rise to damages mentioned in s. 36(1) and is, therefore, also a constituent element of the cause of action subject to the limitation period. To use Bastarache J.’s language from *Ryan*, quoted above, the triggering event is related to the accrual of the cause of action.²⁶

34. On the decision below, the British Columbia Court of Appeal rejected the notion that *Fanshawe* improperly extended the test set down in *Peixeiro* and *Ryan*. The Court of Appeal found no basis 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’, nor can the Ontario Court of Appeal’s decision in *Fanshawe* be faulted for following that jurisprudence.”²⁷

35. The decision below is not an outlier. As demonstrated in the next section, *Peixerio* and *Ryan* have consistently been interpreted and applied in a manner that accords with the interpretation of the British Columbia and Ontario Courts of Appeal.

b. Discoverability Applies Where the Limitation Period is Linked to the Basis of the Cause of Action

36. The case law draws a clear distinction between limitation periods linked to the basis of the cause of action or an unrelated event.

²⁴ Pioneer Appellants’ Factum at paras 38-39.

²⁵ Pioneer Appellants’ Factum at paras 36-37.

²⁶ *Fanshawe*, *supra* note 1 at para 45.

²⁷ Appeal Reasons, *supra* note 5 at para 89 (JRA Vol I, Tab 7).

Limitation Period Linked to Basis of Cause of Action; Discoverability Applies

37. In *Peixeiro*, the plaintiff was injured in a car accident, but he did not know his injuries met the threshold for an *Insurance Act* action until after the limitation period in the *Highway Traffic Act* expired. The limitation period provided that claims must be commenced within two years from the “time when the damages were sustained”. There was no reference to “knowledge” in the limitation provision. This Court considered whether “damages were sustained” could incorporate the discoverability rule (discoverability was previously understood to apply to the language “the cause of action arose”). The Court held that this was a “distinction without a difference” and concluded that the limitation period was suspended until the plaintiff “first learned they had a cause of action”.²⁸

38. In *Grenier v Canadian General Insurance Co*, the plaintiffs were injured in a car accident and obtained a judgment against the other driver, whom they believed was uninsured. Several years later, the plaintiffs learned that the driver was in fact insured and brought an action against the insurer under the *Insurance Act*. The limitation period provided that claims could not be brought “after the expiration of one year from the final determination of the action against the insured”. The Ontario Court of Appeal held that the triggering event—being a final judgement against an insured person—was a constituent element of the plaintiffs’ cause of action, thus discoverability applied.²⁹

39. In *Burt v LeLacheur*, the plaintiff’s husband was killed in a car accident. The plaintiff believed her husband was the driver, but later learned that his nephew was driving at the time of the accident. The plaintiff commenced an action for wrongful death under the *Fatal Injuries Act*. The *Act*’s limitation period provided that actions must be commenced within twelve months after the death of the deceased person. The Nova Scotia Court of Appeal held that the limitation period was subject to discoverability and did not run until the plaintiff had knowledge of all the essential elements of the cause of action, including that the death was a “wrongful death.”³⁰

²⁸ *Peixeiro*, *supra* note 13 at paras 2, 16-17, 38-39, 44.

²⁹ *Grenier v Canadian General Insurance Co*. (1999), 43 OR (3d) 715 (CA) [*Grenier*] at paras 1, 5, 20-22.

³⁰ *Burt v LeLacheur*, 2000 NSCA 90 [*Burt*] at paras 2-4, 43-47.

40. In *Wood Waste Solutions Canada Inc. v Associated Paving Co*, the plaintiff sued a contractor for breach of contract when his pavement began to disintegrate. Years later, the contractor produced documentation showing that the engineering company that provided the paving specifications was at fault. The Ontario Divisional Court held that discoverability applied to the limitation period in the *Professional Engineers Act*, which provided that proceedings must be commenced within 12 months of the date the service was performed.³¹ The Court noted “a significant difference” between limitation periods based on service termination dates and those based on service performance dates. Because the latter involves the very services at issue, knowledge is considered.³²

Limitation Period Linked to Event Unrelated to Basis of Cause of Action; Discoverability Does Not Apply

41. In *Fehr v Jacob*, the plaintiff suffered ongoing complications following bladder surgery. She did not learn until 11 years after the surgery that her complications could have been caused by the surgeon’s negligence. Section 61 of the *Medical Act* barred claims commenced more than two years after termination of the doctor’s professional services. The Manitoba Court of Appeal held that this is “an event which occurs without regard to the patient’s knowledge of any injury. There is consequently no room for the application of the judge-made discoverability rule.”³³

42. In *Ryan*, the plaintiff was injured in a car accident. He commenced his claim within the time prescribed by the *Limitation Act*, but was unaware that the defendant had previously died. Section 5 of the *Survival of Actions Act* directed that proceedings against an estate must be commenced “within 6 months after letters of probate or administration of the estate of the deceased have been granted and proceedings shall not be started in an action under this Act after the expiration of 1 year after the date of death of the deceased.” This Court held that discoverability does not apply to this limitation period because the triggering events are specific events unrelated to the cause of action.³⁴

³¹ *Wood Waste Solutions Canada Inc. v Associated Paving Co.*, 2010 ONSC 6280 [*Wood Waste*] at paras 3-12.

³² *Wood Waste*, *supra* note 31 at paras 33-34.

³³ *Fehr v Jacob*, 1993 85 Man R (2d) 63 (MBCA) at paras 2-4, 22-24.

³⁴ *Ryan*, *supra* note 15 at paras 7, 26-27.

43. In *Waschkowski v Hopkinson Estate*, the plaintiff was injured in a car accident in which the defendant died. Five years later, the plaintiff commenced an action, arguing that she had not learned of her injuries until several years after the accident. The Court of Appeal considered whether discoverability could apply to s. 38(3) of the *Trustee Act*, which provides that an action against an estate must be commenced within two years from the death of the deceased. The Court held that discoverability did not apply because the limitation period ran from the date of death, an event unrelated to the plaintiff's cause of action.³⁵

c. The Limitation Period is Linked to the Plaintiff's Cause of Action

44. The cases described above show that discoverability generally applies where the limitation period is linked to a necessary element of the plaintiff's cause of action. This link is found in the Limitation Period (which runs from conduct in breach of Part VI of the *Competition Act*; in this case, participation in an unlawful conspiracy).

45. The conduct is a constituent element of a plaintiff's claim. Plaintiffs can only bring a claim pursuant to the *Competition Act* if they know about the conduct. In *Fanshawe*, the Ontario Court of Appeal held: "The limitation period in s. 36(4)(a)(i) is triggered by an event related to the underlying cause of action – specifically, conduct contrary to Part VI of the *Competition Act*. Therefore, it is subject to discoverability."³⁶ The British Columbia Court of Appeal was correct to adopt this conclusion.³⁷

46. This conclusion is consistent with the directive issued by this Court in *Peixiero and Ryan*, and the body of cases described above.

d. The Pioneer Defendants Have Not Distinguished *Peixeiro*

47. The Pioneer Defendants seek to distinguish *Peixeiro* on the basis that "conduct" is not equivalent to "damages were sustained".³⁸ The Pioneer Defendants' argument flows from this Court's decision in *Peixeiro*. As indicated above, in *Peixeiro*, this Court held that the phrase "damages were sustained" could incorporate the discoverability rule, even though the rule was

³⁵ *Waschkowski v Hopkinson Estate* (2000), 47 OR (3d) 370 (CA) at paras 8, 10-11, 16.

³⁶ *Fanshawe*, *supra* note 1 at para 18.

³⁷ Appeal Reasons, *supra* note 5 at paras 89 to 90 (JRA Vol I, Tab 7).

³⁸ Pioneer Appellants' Factum at para 48.

previously understood to attach where the legislature used the phrase “the cause of action arose”.³⁹

48. The Pioneer Defendants argue that “conduct” should not be equated with “damages sustained” for limitations purposes. The crux of the Pioneer Defendants’ argument is that the phrase “damages were sustained” leaves room for the mental element of knowledge, but that “conduct” does not because the conduct occurs “without regard to the injured party’s knowledge”.⁴⁰ To borrow the words of Major J in *Peixeiro*, this is a “distinction without a difference”. In *Peixeiro*, this Court framed the underlying issue as “whether the discoverability principle applies to postpone the running of time *until the material facts underlying the cause of action*, including extent of the injury, are known.”⁴¹

49. The same considerations apply here. The Pioneer Defendants’ conduct is a material fact, just as damages were in *Peixeiro*. The Plaintiff could not have commenced his claim under s. 36 until he knew of the Pioneer Defendants’ conspiratorial conduct. This leaves room for the mental element of knowledge. Moreover, the Plaintiff could not have known that he suffered damages (and therefore has a claim) until he became aware of the Pioneer Defendants’ secretive conspiracy to raise prices of the products he purchased.

3. Discoverability is Consistent with Legislative Intent

50. The *Competition Act* aims to “maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy”, as well as providing consumers with “competitive prices and product choices”.⁴² Its objectives include deterrence and compensation.⁴³ Section 36 is a statutory right of action that promotes these objectives. The intent and policy goals of the legislature would be undermined if the limitation period attached to this right is not subject to discoverability.

³⁹ *Peixeiro*, *supra* note 13 at paras 38-39.

⁴⁰ Pioneer Appellants’ Factum at para 50.

⁴¹ *Peixeiro*, *supra* note 13 at paras 33 and 38.

⁴² *Competition Act*, RSC 1985, c C-34, s. 1.1.

⁴³ *Infineon*, *supra* note 10 at para 111.

51. The Pioneer Defendants reference a passage from the Hansard debates describing the “vital” need to provide a remedy for persons injured by conspiracy.⁴⁴ Parliament could hardly have intended to create a remedy that allowed particularly secretive wrongdoers from escaping liability.

52. To this end, on the motion below, the Court of Appeal reasoned: “it cannot be said that Parliament intended to accord such little weight to the interests of injured plaintiffs in the context of alleged conspiracies so as to exclude the availability of the discoverability rule in s. 36(4)”.⁴⁵ In *Fanshawe*, the Ontario Court of Appeal similarly held that, if discoverability did not apply to the Limitation Period, the remedy would often prove meaningless “when the conspirators’ concealment has been particularly effective”.⁴⁶

53. These findings are consistent with the Ontario Court of Appeal’s comments in *Grenier*, when interpreting the limitation period in the *Insurance Act*. The Court held “[t]he legislative intent would not have been to impose a limitation period that would expire before the plaintiff could reasonably have knowledge of the cause of action which the Legislature created”.⁴⁷

54. The Pioneer Defendants reference the *Competition Act* having been amended 31 times to argue that the *Competition Act* is “actively managed” by Parliament and could have been amended to provide for discoverability.⁴⁸ This argument cuts both ways. The *Competition Act* has been amended four times since *Fanshawe* (the first appellate decision addressing the issue head-on) and none of these amendments has been to “correct” or “cure” the Ontario Court of Appeal’s interpretation of the Limitation Period.

⁴⁴ Pioneer Appellants’ Factum at para 63.

⁴⁵ Appeal Reasons, *supra* note 5 at para 93 (JRA Vol I, Tab 7).

⁴⁶ *Fanshawe*, *supra* note 1 at para 49.

⁴⁷ *Grenier*, *supra* note 29 at para 22.

⁴⁸ Pioneer Appellants’ Factum at para 71.

4. The Court of Appeal's Decision Reflects a Careful Balancing of Interests

55. The British Columbia Court of Appeal's decision is consistent with this Court's direction that the discoverability rule should not be applied "without a thorough balancing of competing interests".⁴⁹ The Court of Appeal considered the interests of the parties and concluded:

It would be unfair to require an injured party to bring a cause of action before that party could reasonably have discovered that it had such a cause of action, particularly in the context of alleged conspiracies which, by their very nature, are cloaked in secrecy (see *Fanshawe* at para. 46).⁵⁰

56. The Plaintiff agrees that, in *Peixeiro*, this Court observed that short limitation periods emphasize their function as statutes of repose. However, applying the discoverability rule in this case (as it was applied in *Peixeiro*) is consistent with the certainty, evidentiary, and diligence rationales for limitation periods.

- (a) With respect to certainty, "Parliament has hardly provided potential defendants with an iron-clad assurance that they may not be sued more [than] two years after the cessation of their conduct as the limitation period could start to run again in the event of criminal proceedings."⁵¹
- (b) With respect to evidence, Pioneer is named in parallel litigation in the United States and would be required to preserve evidence as part of that litigation. Further, to the extent there are evidentiary shortcomings due to the passage of time, this is more prejudicial to plaintiffs, who bear the burden of proving their case on a balance of probabilities.
- (c) With respect to diligence, postponing commencement of the Limitation Period until the victim is aware of the conspiratorial conduct hardly encourages plaintiffs to "sleep on their rights". The discoverability principle "still requires reasonable diligence by the plaintiff".⁵²

⁴⁹ *Ryan*, *supra* note 15 at para 23.

⁵⁰ Appeal Reasons, *supra* note 5 at para 93 (JRA Vol I, Tab 7).

⁵¹ Appeal Reasons, *supra* note 5 at para 78 (JRA Vol I, Tab 7); *Fanshawe*, note 1 at para 48.

⁵² *Peixeiro*, *supra* note 13 at para 39.

57. Secrecy is the foundation of the crime of conspiracy: “secrecy and deception are invariably elements of anti-competition agreements”.⁵³ There is no balance in allowing defendants to rely on the secrecy inherent in their illegal conduct to bar the claims of the victims of their crimes.

5. The Pioneer Defendants’ Floodgates Arguments are Meritless

58. The Pioneer Defendants warn that, if the discoverability rule is found to apply to the Limitation Period, the finding would impact other federal statutory causes of action. This is a doomsday argument.

59. The Pioneer Defendants cite a number of statutory limitation periods that they claim are similar to the Limitation Period. The Pioneer Defendants argue that, if discoverability applies to the Limitation Period, it may also be imported into these other limitation periods. The Pioneer Defendants ignore that, in at least some circumstances, discoverability already applies to these provisions (either by common law or statutorily). For example, the Pioneer Defendants point to the limitation period in s. 18 of the *Radiocommunication Act*, which runs from the date “the conduct giving rise to the action was engaged in.”⁵⁴ In *Bell ExpressVu Limited Partnership v Pieckenhagen*, the Ontario Superior Court of Justice held that discoverability applies to this provision.⁵⁵ The Pioneer Defendants also point to s. 2(1)(c) of Manitoba’s *The Limitation of Actions Act*, which provides that actions for defamation shall be commenced “within two years of the publication of the defamatory matter.” This provision is subject to the built-in discoverability provision at s. 14(1), which permits the court to grant leave to a plaintiff to commence their action if it is satisfied that no more than 12 months have passed since the plaintiff learned all the material facts.⁵⁶

60. In any event, statutory interpretation is a context-specific inquiry. As “an interpretive tool” for construing limitation statutes, application of the discoverability rule will depend on the

⁵³ *Fanshawe*, *supra* note 1 at para 46.

⁵⁴ Appendix A of Pioneer Appellants’ Factum; *Radiocommunication Act*, RSC 1985, c R-2, s. 18(5).

⁵⁵ *Bell ExpressVu Limited Partnership v Pieckenhagen*, 2012 ONSC 5650 [*Bell*] at paras 91-92.

⁵⁶ Pioneer Appellants’ Factum at para 77; *The Limitation of Actions Act*, CCSM c L150, s 2(1) and 14(1).

purpose, language, and legislative history of each piece of legislation. As directed by this Court, the test “ought to be considered each time a limitations provision is in issue”.⁵⁷ If the discoverability rule applies to the Limitation Period, it does not automatically follow that the rule will apply to the limitation periods in other federal statutes. Put simply, whether discoverability applies to those Acts is not before this Court. That is a consideration for another day and has no bearing on the matters at hand.

61. For all of these reasons, the British Columbia Court of Appeal was correct to conclude that it is not plain and obvious that the Limitation Period is not subject to discoverability. Whether the Plaintiff’s claims were, in fact, discoverable before the Limitation Period expired is a matter that can only be determined by trial on a full evidentiary record.

B. It is Not Plain and Obvious that Fraudulent Concealment Does Not Apply

62. Whereas discoverability is a matter of statutory interpretation, fraudulent concealment is a matter of equity. The doctrine of fraudulent concealment concerns how a limitation period operates on the unique circumstances of the case, regardless of how the applicable limitation provision is worded.⁵⁸ The foundational concern is whether, on the facts of the case, the limitation provision would serve as an instrument of fraud or injustice.⁵⁹ As such, the determination of whether the doctrine applies can only be made on a full evidentiary record when these facts are known. Applying the law to the Plaintiff’s allegations (which must be taken as true at this stage), it is not plain and obvious that the doctrine does not apply.

63. The Pioneer Defendants assert that it is plain and obvious that fraudulent concealment does not apply because the Plaintiffs have not pleaded a “special relationship” between the parties.⁶⁰ However, such a relationship is not a strict requirement of the doctrine. Alternatively, if a special relationship is required, it is not plain and obvious that the parties do not have a special relationship.

⁵⁷ *Peixeiro*, *supra* note 13 at para 37.

⁵⁸ *Peixeiro*, *supra* note 13 at para 37.

⁵⁹ *M (K) v M (H)*, [1992] 3 SCR 6 [*M(K)*] at para 66.

⁶⁰ Pioneer Appellants’ Factum at para 83.

1. There is No “Special Relationship” Requirement

64. Contrary to the Pioneer Defendants’ assertions, a “special relationship” is not “the very foundation of the fraudulent concealment doctrine” nor does it amount to an absolute requirement.⁶¹

65. This Court first applied the fraudulent concealment doctrine in *Massie & Renwick* and took guidance from the Privy Council’s foundational decision in *Bulli Coal Mining Co. v Osborne*.⁶² There is no mention of the need for a special relationship in either of these cases. By contrast, in *M (K) v M (H)*, this Court clarified that the doctrine is foundationally concerned with ensuring that limitation periods are not used as instruments of fraud or injustice.⁶³ The prevention of fraud and injustice is the operational concern of the doctrine of fraudulent concealment, not the delineation of relationships.

66. The Pioneer Defendants rely on this Court’s earlier decision in *R v Guerin* and the English case, *Kitchen v Royal Air Force Association* as support for their argument that fraudulent concealment requires a special relationship. Neither Court reached this conclusion. Both Courts emphasized the open-ended nature of the doctrine, but concluded that given the relationships at issue in those cases, the doctrine applied.⁶⁴

67. Similarly, while *Giroux Estate v Trillium Health Centre* focused on conduct within the context of a doctor-patient relationship, the Ontario Court of Appeal recognized that the “underlying rationale [for the doctrine] is grounded in the well-established principle...that equity will not permit a statute to be used as an instrument of fraud”.⁶⁵ In other words, the relationships in each of *Kitchen*, *Guerin*, and *Giroux* were operative factual concerns, not legal requirements.

⁶¹ Pioneer Appellants’ Factum at para 83.

⁶² *Bulli Coal Mining Co. v Osborne*, [1899] AC 351 (PC) [*Bulli*]; *Massie & Renwick*, [1940] SCR 218 at 244.

⁶³ *M(K)*, *supra* note 59 at 66.

⁶⁴ *R v Guerin*, [1984] 2 SCR 335 [*Guerin*], concerned conduct within the context of a relationship between the Crown and an indigenous community; *Kitchen v Royal Air Force Association*, [1958] 1 WLR 563 [*Kitchen*] Respondent Authorities, Tab 6, concerned conduct within the conduct of a solicitor-client relationship.

⁶⁵ *Giroux Estate v Trillium Health Centre* (2005), 74 OR (3d) 341 (CA) [*Giroux*] at para 28.

68. In *Kitchen*, the English Court of Appeal declined to define what is covered by equitable fraud, but held that the doctrine “covers 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”.⁶⁶ Indeed, a special relationship does not appear to be a required element under English law (which is more concerned with the “concealment” aspect of the doctrine),⁶⁷ and it is not required under US law.⁶⁸

69. Many years later, the Alberta Court of Appeal confirmed that “when viewed in its original context”, the statement above from *Kitchen* “was not intended as a definition, nor was it meant to import a requirement of a special relationship. Rather, it was simply stating that the factual situation in that case justified a finding of fraudulent concealment”.⁶⁹ The same conclusion may arguably be reached on the factual situation in this case (once the full situation becomes known): given the allegations of serious fraud and the grievous advantage taken by the Pioneer Defendants, their conduct is unconscionable with respect to the Plaintiff and the class.

70. None of the cases cited by the Pioneer Defendants stand for the conclusive proposition that a special relationship is a requisite component of the doctrine of fraudulent concealment. To the contrary, courts have emphatically declined to define the scope of the doctrine; this Court recently observed that equitable fraud is “so infinite in its varieties that the Courts have not

⁶⁶ *Kitchen*, *supra* note 64 at 249, Respondent Authorities, Tab 6.

⁶⁷ *King v Victor Parsons & Co*, [1973] 1 WLR 29 (CA) and *Cave v Robinson Jarvis & Wolf*, [2003] 1 AC 384, Respondent Authorities, Tab 5.

⁶⁸ Under US law, fraudulent concealment requires proof that: (1) the defendant concealed the conduct that constitutes the cause of action; (2) the defendant’s concealment prevented the plaintiff from discovering the cause of action; and (3) the plaintiff exercised due diligence in attempting to discover the cause of action. See: Richard L. Marcus, “Fraudulent Concealment in Federal Court: Toward a More Disparate Standard” (1983) 71 Geo LJ 829, Respondent Authorities, Tab 13; Amber Davis-Tanner, “Antitrust Law – Affirmative Acts and Antitrust – the Need for a Consistent Tolling Standard in Cases of Fraudulent Concealment” (2011) 33:3 U Ark Little Rock L Rev 331 at 332, Respondent Authorities, Tab 12.

⁶⁹ *T.P. v A.P.*, 1988 ABCA 352 at para 11.

attempted to define it”.⁷⁰ Whether the doctrine is available in any given case can only be determined once all the relevant facts are known.

2. This Case Will Not Expand the Doctrine

71. The Pioneer Defendants argue that, if fraudulent concealment applies in this case, then it would apply “to any cause of action, any time a defendant conducts its wrongdoing in secret”.⁷¹ That argument ignores both the law of fraudulent concealment and the fact-sensitive nature of the doctrine.

72. As noted above, in *M(K)*, this Court adopted *Halsbury’s* pronouncement with respect to fraudulent concealment: “it was not enough that there should be merely a tortious act unknown to the injured party...there had to be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts”.⁷²

73. Criminal price-fixing is not merely a tortious act—it involves a deliberate concealment of facts. Canadian courts have held that price-fixing is “analogous to fraud and theft” and ought to be treated as severely, “if not even more severely than those offences”.⁷³ *Bell ExpressVu Limited Partnership v Pieckenhagen* provides an example where the fraudulent nature of the conduct was the prevailing concern. In that case, the deliberate fraudulent misrepresentation by the defendants prevented the plaintiff from discovering the underlying unlawful acts. The Ontario Divisional Court held that, in view of the nature of the conduct, there was no need to rely on the doctrine of fraudulent concealment, let alone establish a special relationship, in order to extend the limitation period.⁷⁴

74. As with their discoverability arguments, the Pioneer Defendants again seek to rely on their acts of concealment to avoid liability. As stated by the Privy Council in *Bulli*, this contention is “opposed to common sense as well as the principles of equity”. In *Bulli*, the Court

⁷⁰ *Performance Industries Ltd. v Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 SCR 678 at para 39.

⁷¹ Pioneer Appellants’ Factum at para 89.

⁷² *M(K)*, *supra* note 59 at para 65.

⁷³ *Canada v Maxzone Auto Parts (Canada) Corp.*, 2012 FC 1117 at paras 54-56; see also *Sun-Rype Products Ltd. v Archer Daniels Midland Co.*, 2008 BCCA 278 at paras 94-100.

⁷⁴ *Bell ExpressVu Limited Partnership v Pieckenhagen*, 2013 ONSC 1567 (Div Ct) at para 11, Respondent Authorities, Tab 1.

quickly disposed of this “contention” using the example of two men who have independently set out to steal their neighbour’s coal. The Court refused to allow the limitation period to be used to allow one thief to “go scot-free”. The Court reasoned: “[i]t would be something of a mockery for courts of equity to denounce fraud as ‘a secret thing,’ and to profess to punish it sooner or later, and then to hold out a reward for the cunning that makes detection difficult or remote”.⁷⁵

75. Similar reasoning was expressed by the Supreme Court of the United States in *Bailey v Glover*, which incorporated the doctrine into US law. The Court recognized that “to hold that by concealing a fraud . . . in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure”.⁷⁶ The Pioneer Defendants here go so far as to assert that Parliament intended for this outcome in Canada. For the reasons described at paragraphs 50 to 54 above, this position is not tenable.

76. The Pioneer Defendants also argue that the fraudulent concealment doctrine would have the “court refashioning the [Limitation Period] based on the equities of the case”.⁷⁷ But the Pioneer Defendants ignore that that is exactly how the doctrine operates. The fraudulent concealment doctrine is fundamentally concerned with whether a limitation period would operate as an instrument of fraud given the equities of a case. The Pioneer Defendants’ argument that the doctrine “would apply in nearly every price-fixing case” is unconvincing.⁷⁸ They have offered no compelling reason as to why the doctrine should not apply in nearly every price-fixing case. Price-fixing conspiracies are, by nature, cloaked under a veil of secrecy.

77. The doctrine of fraudulent concealment acts to toll the limitation period until the plaintiff has had a reasonable opportunity to discover their cause of action. It allows equity to intervene “in circumstances where the retention of an advantage gained by one over another would be unconscionable”.⁷⁹

⁷⁵ *Bulli*, *supra* note 62 at 363.

⁷⁶ *Bailey v Glover*, 88 US (21 Wall) 342 (1874).

⁷⁷ Pioneer Appellants’ Factum at para 94.

⁷⁸ Pioneer Appellants’ Factum at para 95.

⁷⁹ *Bayerische v Rieder*, 2003 BCSC 1031 at para 10.

78. In the very least, if a special relationship is required, it is not plain and obvious that a purely commercial relationship cannot suffice and/or that the fraudulent nature of the Pioneer Defendants' conduct does not bring the parties within such a relationship. As held by the British Columbia Court of Appeal: "The allegations in the case at bar are serious. It is said that the [Pioneer Defendants] devised and implemented a complex and nefarious scheme aimed a secretly defrauding and harming consumers and downstream market participants".⁸⁰ The Court was correct to conclude that it is not plain and obvious that fraudulent concealment cannot apply to the circumstances of this case.

PART IV - SUBMISSIONS AS TO COSTS

79. The Plaintiff requests its costs in this Court. Under s. 37(1) of the *CPA* costs are not payable for the certification motion or its appeal to the Court of Appeal.

PART V - ORDER SOUGHT

80. The Plaintiff requests that the appeal be dismissed with costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED
THIS 23RD DAY OF OCTOBER, 2018**

Camp Fiorante Matthews Mogeran LLP

Siskinds LLP

**Lawyers for the Plaintiff/Respondent, Neil
Godfrey**

⁸⁰ Appeal Reasons, *supra* note 5 at para 108 (JRA Vol I, Tab 7).

PART VI - TABLE OF AUTHORITIES

	<u>Cases</u>	<u>Paragraph(s)</u>
1.	<i>Bailey v Glover</i> , <u>88 US (21 Wall) 342 (1874)</u>	¶75
2.	<i>Bayerische v Rieder</i> , <u>2003 BCSC 1031</u>	¶77
3.	<i>Bell ExpressVu Limited Partnership v Pieckenhagen</i> , <u>2012 ONSC 5650</u>	¶59
4.	<i>Bell ExpressVu Limited Partnership v Pieckenhagen</i> , 2013 ONSC 1567 (Div Ct)	¶73
5.	<i>Berardinelli v Ontario Housing Corp</i> , <u>[1979] 1 SCR 275</u>	¶26
6.	<i>Bulli Coal Mining Co. v Osborne</i> , <u>[1899] AC 351 (PC)</u>	¶65, 74
7.	<i>Burt v LeLacheur</i> , <u>2000 NSCA 90</u>	¶39
8.	<i>Canada v Maxzone Auto Parts (Canada) Corp</i> , <u>2012 FC 1117</u>	¶73
9.	<i>Cave v Robinson Jarvis & Wolf</i> , <u>[2003] 1 AC 384</u>	¶68
10.	<i>CCS Corporation v Secure Energy Services Inc.</i> , <u>2014 ABCA 96</u>	¶22
11.	<i>Central Trust Co. v Rafuse</i> , <u>[1986] 2 SCR 147</u>	¶25
12.	<i>Eli Lilly and Company v Apotex Inc.</i> , <u>2009 FC 991</u>	¶22
13.	<i>Fairview Donut Inc v The TDL Group Corp</i> , <u>2012 ONSC 1252</u>	¶22
14.	<i>Fanshawe College of Applied Arts and Technology v AU Optronics Corp.</i> , <u>2016 ONCA 621</u>	¶4, 23, 33, 45, 52, 57
15.	<i>Fehr v Jacob</i> , <u>1993 85 Man R (2d) 63 (MBCA)</u>	¶41
16.	<i>Garford Pty v Dywidag Systems International</i> , <u>2010 FC 996</u>	¶22
17.	<i>Garford Pty Ltd v Dywidag Systems International Canada Ltd</i> , <u>2012 FCA 48</u>	¶22
18.	<i>Giroux Estate v Trillium Health Centre</i> , <u>(2005), 74 OR (3d) 341 (CA)</u>	¶67
19.	<i>Grenier v Canadian General Insurance Co.</i> (1999), <u>43 O.R. (3d) 715 (CA)</u>	¶38, 53
20.	<i>Infineon Technologies AG v Option consommateurs</i> , <u>2013 SCC 59</u>	¶22

21.	<i>King v Victor Parsons & Co</i> , [1973] 1 WLR 29 (CA)	¶68
22.	<i>Kitchen v Royal Air Force Association</i> [1958] 1 WLR 563	¶66, 68
23.	<i>Laboratoires Servier, Adir, Oril Industries, Servier Canada Inc. v. Apotex Inc.</i> , <u>2008 FC 825</u>	¶22
24.	<i>Massie & Renwick</i> [1940] SCR 218	¶65
25.	<i>M (K) v M (H)</i> , [1992] 3 SCR 6	¶62, 65, 72
26.	<i>Peixeiro v Haberman</i> , [1997] 3 SCR 549	¶25, 26, 27, 29, 37, 47, 48, 56, 60, 62
27.	<i>Performance Industries Ltd. v Sylvan Lake Golf & Tennis Club Ltd.</i> , [2002] 1 SCR 678	¶70
28.	<i>R v Guerin</i> , [1984] 2 SCR 335	¶66
29.	<i>Ryan v Moore</i> , <u>2005 SCC 38</u>	¶25, 27, 30, 31, 42, 55
30.	<i>Sun-Rype Products Ltd. v Archer Daniels Midland Co.</i> , <u>2008 BCCA 278</u>	¶73
31.	<i>T.P. v A.P.</i> , <u>1988 ABCA 352</u>	¶69
32.	<i>Waschkowski v Hopkinson Estate</i> (2000), 47 OR (3d) 370 (CA)	¶43
33.	<i>Wood Waste Solutions Canada Inc. v Associated Paving Co.</i> , <u>2010 ONSC 6280</u>	¶40
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34.	<i>Competition Act</i> , RSC 1985, c C-34, <u>s. 1.1</u>	¶50
35.	<i>Competition Act</i> , RSC 1985, c C-34, <u>s. 36(1)</u>	¶20
36.	<i>Competition Act</i> , RSC 1985, c C-34, <u>s. 36(4)</u>	¶21
37.	<i>Radiocommunication Act</i> , RSC 1985, c R-2, <u>s. 18(5)</u>	¶59
38.	<i>The Limitation of Actions Act</i> , CCSM c L150, <u>s 2(1) and 14(1)</u> .	¶59

	<u>Secondary Sources</u>	
39.	Amber Davis-Tanner, “Antitrust Law – Affirmative Acts and Antitrust – the Need for a Consistent Tolling Standard in Cases of Fraudulent Concealment” (2011) 33:3 U Ark Little Rock L Rev 331 at 332	¶68
40.	“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)	¶8
41.	Richard L. Marcus, “Fraudulent Concealment in Federal Court: Toward a More Disparate Standard” (1983) 71 Geo LJ 829	¶68