Court File Nos. 37809/37810

**IN THE SUPREME COURT OF CANADA**
(ON APPEAL FROM 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)

- and -

**CANADIAN CHAMBER OF COMMERCE, CONSUMERS' ASSOCIATION OF CANADA, CONSUMERS COUNCIL OF CANADA, and OPTION CONSOMMATEURS**
INTERVENERS

A N D B E T W E E N

**TOSHIBA CORPORATION, TOSHIBA SAMSUNG STORAGE TECHNOLOGY CORP., TOSHIBA SAMSUNG STORAGE TECHNOLOGY CORP. KOREA, TOSHIBA OF CANADA LTD., TOSHIBA AMERICA INFORMATION SYSTEMS, INC., SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS CANADA INC., SAMSUNG ELECTRONICS AMERICA, INC., 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., PANASONIC CORPORATION, PANASONIC CORPORATION OF NORTH AMERICA, PANASONIC CANADA INC., BENQ CORPORATION, BENQ AMERICA CORPORATION and BENQ CANADA CORP.**

APPELLANTS
(Appellants)

- and -

**NEIL GODFREY**

RESPONDENT
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- and -

**CANADIAN CHAMBER OF COMMERCE, CONSUMERS' ASSOCIATION OF CANADA, CONSUMERS COUNCIL OF CANADA, and OPTION CONSOMMATEURS**
INTERVENERS

**FACTUM OF THE INTERVENER,**
**CANADIAN CHAMBER OF COMMERCE**
**(Pursuant to Rule 37 of the *Rules of the Supreme Court of Canada*)**


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## PART I - OVERVIEW

1. The Canadian Chamber of Commerce (the "**Chamber**") takes no position on the outcome of the Appeals. Instead, the Chamber limits its submissions to three issues raised in the appeals that impact its membership: first, whether "umbrella purchasers" may pursue a claim under s. 36 of the *Competition Act* (the "**Act**"); second, whether the courts should certify a class without a credible or plausible expert methodology to answer the question of whether each class member suffered harm; and, third, whether common law and/or equitable principles apply to extend the two-year limitation period prescribed in s. 36(4)(a)(i) of the Act.[1]

2. The Chamber is Canada's largest and most representative business organization, with numerous members of all sizes, from every sector and region of the economy and across Canada. Given its broad, diverse membership, the Chamber's members include both potential direct and indirect purchasers in competition class actions, as well as potential defendants in such litigation (and in other proposed class actions involving umbrella purchasers and other pure economic loss claims).

3. The Chamber submits that it is critical to the proper functioning of Canada's economy that an appropriate balance is struck between the interests of claimants and defendants in competition class action proceedings. Appropriate claims that can be resolved based on common evidence should be permitted to be pursued by way of class action. At the same time, fairness requires that the scope of potential liability of participants in the marketplace be ascertainable and appropriately circumscribed.

4. This Court's decision in *Pro-Sys*[2] struck the appropriate balance. Indirect purchasers were given the opportunity to pursue a claim, regardless of the complexity associated with proving damages. At the same time, the Court recognized the importance of certification as a meaningful screening device in complex price-fixing cases and set a standard designed to ensure that the case could proceed on the basis of common evidence without foundering at the merits stage.[3] The balance

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1 *Competition Act*, RSC 1985, c C-34, s 36.
2 *Pro-Sys Consultants Ltd v Microsoft Corp*, 2013 SCC 57 [*Pro-Sys*].
3 *Pro-Sys*, at paras 103-104.

struck by the Court also respected the purely procedural nature of the *Class Proceedings Act* (the "**CPA**") and the language and purpose of s. 36 of the Act.[4]

5. The decisions in the courts below threaten to upset that balance in two main respects. First, by expanding the scope of potential liability and exposure to significant class actions in a manner not intended by the CPA or the Act, the decisions below would inject an unhealthy dose of unpredictability and uncertainty into the economy. In particular, by extending a cause of action under s. 36 to umbrella purchasers and lengthening the limitation period for asserting claims under s. 36, the courts below have created the risk of potentially ruinous liability through economic loss claims, a result Parliament could not have intended. Second, by significantly relaxing the standard for certification of the issue of harm to class members as a common issue, the decisions below would remove certification as a meaningful screening device in price-fixing class actions and undermine the crucial gatekeeping role of the certification judge.

6. If properly scrutinized at the certification stage to ensure they are suitable for class treatment, class actions can benefit both consumers and the business community by providing an efficient method for resolving cases involving common issues. Without appropriate scrutiny, however, class actions have the potential to unduly and unjustifiably burden Canada's economy. Price-fixing class actions raise particular concerns in this regard because of their structure, often massive size and scope and considerable cost of defence and potential for significant damages or restitutionary awards. Extending the scope of potential liability or exposure to significant class actions and allowing certification without carefully considered and reliable methodologies increases the pressures on defendants to settle, not for fear of being found to have engaged in wrongdoing, but because of the enormous cost of litigating these claims. These types of settlements distort the legal system, create significant risks of over-deterrence and over-compensation, and impose substantial costs on the Canadian economy.

7. For these reasons, the Chamber requests that this Court restore the balance contemplated by *Pro-Sys.* In summary, the Chamber's submissions on the three issues are:

(a) The Chamber submits that allowing certification of class proceedings including umbrella purchasers would undermine economic certainty for sellers and require businesses to face

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4 *Pro-Sys*, at paras 114-126.

virtually unbounded liability. Alternatively, to the extent that this Court finds that umbrella purchasers have a cause of action under s. 36 of the Act, the class should be restricted to persons who purchased the specific products at issue in the action. A person who is not a purchaser of the specific products at issue in the action should not be able to pursue a claim under s. 36 of the Act due to the lack of a sufficient causal link or proximate connection between that person and the defendants' conduct.

(b) This Court should clarify that in certifying class proceedings that include indirect purchasers, it is not sufficient for the plaintiff to simply show that harm has been passed to the indirect purchaser level, without demonstrating that such methodology could answer the issue of harm for each member of the indirect purchaser class. Rather, the plaintiff should be required to convince the certification judge that it has provided a credible or plausible expert methodology that has a realistic prospect of being used at trial to show impact common to all members of the proposed class. This can be achieved by a methodology that is capable of showing harm to all class members or one that is capable of identifying which of the proposed class members were harmed and which were not (the latter not being entitled to a remedy under s. 36 of the Act). This standard respects the purely procedural nature of the CPA, the elements of the causes of action asserted, the role of certification as a meaningful screening device especially in complex cases such as price-fixing class actions, the appropriate role and treatment of expert evidence and the prohibition against addressing the merits of the case at the certification stage. In short, this approach balances the relevant factors in a way that achieves fairness and predictability for both claimants and defendants.

(c) This Court should confirm the balance struck by Parliament in creating the statutory cause of action in s. 36 of the Act, including the two-year limitation period in s. 36(4)(a)(i). [5] Overlaying the principle of discoverability or the doctrine of fraudulent concealment onto the clear wording of s. 36(4)(a)(i) in price-fixing class actions renders the limitation period virtually meaningless, thereby upsetting the balance clearly intended by Parliament and creating significant uncertainty about the scope of liability and likelihood and timing of significant litigation for the Chamber's members.

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[5] *City National Leasing v General Motors of Canada Ltd*, [1989] 1 SCR 641 at 674-676, 684 [*City National*].

8. The Chamber accepts the adjudicative facts of the appeals as set out in the Panasonic and Pioneer Appellants' Facta.[6]

## PART II - QUESTIONS IN ISSUE

9. As set out in detail in Parts I and III of this Factum, the Chamber is addressing the issues of umbrella purchasers, the standard for certification of harm as a common issue, and the limitation period in s .36 of the *Act*.

## PART III - STATEMENT OF ARGUMENT

### 1. Umbrella Purchasers

10. The courts below, as well as courts in other recent certification decisions, have concluded that umbrella purchasers have a cause of action under s. 36 of the Act, because such purchasers claim to have suffered loss or damage as a result of the defendants' unlawful conduct. In reaching this conclusion, the courts rejected the argument that the plaintiffs had to establish some causal link or proximity between the defendants' conduct and harm to umbrella purchasers. Rather, the courts accepted that it is sufficient at the certification stage for the plaintiffs to plead that, as a result of the defendants' market power, the defendants' unlawful conduct moved the entire market (i.e., increased prices for all relevant products, regardless of who they were purchased from) and therefore all purchasers were harmed, including purchasers from non-defendants.

11. The Chamber submits that allowing umbrella purchasers to advance claims in competition class actions raises insurmountable issues of remoteness and indeterminate, uncircumscribed liability. The inherent lack of certainty in the scope of potential liability to umbrella purchasers and the practical implications of allowing umbrella purchasers to assert claims are of great concern to the Chamber's membership.

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6 *Pioneer Corporation, Pioneer North America, Inc, Pioneer Electronics (USA) Inc, Pioneer High Fidelity Taiwan Co, Ltd and Pioneer Electronics of Canada Inc v Neil Godfrey* (28 August 2018) Ottawa 37809 (SCC) (Factum of the Appellant Pioneer); *Toshiba Corporation, Toshiba Samsung Storage Technology Corp, Toshiba Samsung Storage Technology Corp. Korea, Toshiba of Canada Ltd, Toshiba America Information Systems, Inc., et al v Neil Godfrey* (27 August 2018) Ottawa 37810 (SCC) (Factum of the Appellant Panasonic).

12. The Chamber recognises the Respondent's admission that he is only seeking in this case to advance a claim on behalf of British Columbia residents who purchased ODDs or ODD Products.[7] Nevertheless, the reasoning adopted by the courts below does not provide for a principled or predictable "cut-off" for potential exposure. If followed, this reasoning creates liability not only to umbrella purchasers in the relevant market, but to an indeterminate group consisting of any purchaser of any product when its price may have been impacted by the conduct. Such an interpretation could lead to allegations of harm across an unlimited group of products, so long as there exists some argument that the price of the product was in some way impacted by the alleged conduct.

13. Scope of liability is an important consideration for a business in determining how, when and if to do business in Canada, and imposing potential limitless and indeterminate liability is inconsistent with Parliament's stated goal for the Act, which is to promote competition. As this Court has recognized in the tort context, "potential defendants must be able to gauge the extent of the risk they incur",[8] and, in respect of liability for pure economic loss, "the limits should be relatively clear … such that commercial enterprises have some appreciation of what risk is to be borne by whom".[9]

14. For these reasons, the Chamber submits that allowing certification of class proceedings including umbrella purchasers would undermine economic certainty for sellers and require businesses to face unbounded liability.

15. In the alternative, if this Court rejects the submissions above and concludes that umbrella purchasers have a cause of action that may be recognized under s. 36 of the Act, the Chamber requests that the Court clarify that this finding is restricted to persons who purchased the products directly at issue in the action (i.e., ODDs and ODD Products). A person who is not a purchaser of the products directly at issue in the action but who alleges that they suffered harm as a result of the defendants' conduct should not be able to pursue such a claim under s. 36 of the Act, given the lack of a sufficient causal link or proximate connection between that person and the defendants' conduct.

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7 *Toshiba Corporation, Toshiba Samsung Storage Technology Corp, Toshiba Samsung Storage Technology Corp Korea, Toshiba of Canada Ltd, Toshiba America Information Systems, Inc, et al v Neil Godfrey* (23 October 2018) Ottawa 37810 (SCC) (Factum of the Respondent) at para 89.

8 *Canadian National Railway v Norsk Pacific Steamship Co*, [1992] 1 SCR 1021at 1139.

9 *Ibid*.

### 2. Standard For Certification of Harm as a Common Issue

16. The courts below concluded that, in order to certify the issue of harm as a common issue in an indirect purchaser case, the plaintiff need only show that there is a methodology that can establish that harm has been passed to the indirect purchaser level, without having to demonstrate that such methodology could answer the issue of harm for each member of the proposed class. In effect, this means that the plaintiffs are only required to provide a methodology that shows that at least some harm was suffered by some indirect purchasers and are not required to satisfy the certification judge that there is a methodology that can be used at trial to decide the issue of harm for each class member using common evidence.

17. This standard is of significant concern to the Chamber as it conflicts with the balance achieved by this Court in *Pro-Sys* in several respects:

(a) It lowers the bar for certification of price-fixing class actions down to mere superficial scrutiny;[10]

(b) It fails to recognize that proof of harm by the claimant is a condition of liability under s. 36 of the Act, however difficult that task may be, and ignores this Court's clear statements in *Pro-Sys* about the significant burden that indirect purchasers have to prove that they suffered loss and to trace the overcharge to its ultimate end;[11]

(c) It suggests that class members can pursue claims as a group that individual class members could not pursue, contrary to the well-established jurisprudence regarding the purely procedural nature of the CPA;[12]

(d) It ignores this Court's finding that, at certification, the plaintiff must provide a credible or plausible expert methodology that offers a realistic prospect of establishing loss on a class-wide basis at trial;[13] and

(e) It prevents certification from fulfilling its intended role as a meaningful screening mechanism in these complex price-fixing cases.[14]

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10 *Pro-Sys*, at para 103.
11 *Pro-Sys*, at paras 1-2, 44-45, 131, 133.
12 *Pro-Sys*, at para 133.
13 *Pro-Sys*, at paras115, 118.
14 *Pro-Sys*, at paras 103,104.

18. The problem with the standard applied by the courts below is illustrated by the approach taken by the British Columbia Supreme Court in *Ewert v. Nippon Yusen Kabushiki Kaisha.*[15] In that case, the Court considered whether, in a case where there are multiple levels of indirect purchasers, this standard meant that the methodology had to show that harm passed to each one of these indirect purchaser levels. The Court concluded that it did not, resulting in the prospect of certification of a class including multiple levels of indirect purchasers, even where there was no methodology at all to show that some individuals in certain of those levels suffered harm.

19. The certification decision is typically the most important decision a court will make in a proposed class action, because the enormous costs of class action litigation and the risk of potentially ruinous liability puts intense pressure on defendants to settle even unmeritorious claims rather than proceed to trial. The importance of class certification and the pressure to settle weak and unmeritorious claims are particularly pronounced in antitrust class actions because of, among other things, the size and costs of such litigation. If permitted to stand, the application of the standard followed by the courts below will significantly increase the pressures on defendants to settle this type of class action, not for fear of being found to have engaged in wrongdoing, but because of the enormous costs of litigating these massive claims.

20. The Respondent argues that certification based on a methodology that can plausibly trace harm to a group does not mean that all members in that group will ultimately share in an award. This submission simply postpones the question of how the trial judge is going to determine who within the group is entitled to an award and begs the question of what needs to be established at certification to provide comfort that such a determination can be done. This Court in *Pro-Sys* has already confirmed that, at the certification stage, the plaintiff must provide a credible or plausible methodology that can be used by the trial judge to determine the issue of loss on a class-wide basis. An approach that simply certifies an indirect purchaser action because it is likely that some indirect purchasers were harmed falls far short of this requirement.

21. The Chamber submits that the Court should reject the standard articulated by the courts below and clarify that the question of individual harm must be answerable for each class member in order for the issue of harm to be certified as a common issue. The plaintiff must establish that there is a

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15 2017 BCSC 2357.

credible or plausible expert methodology that has a realistic prospect of being used by the trial judge to answer the question of harm for each class member using evidence common to the class. The methodology could be one that will show that all class members were harmed or it could be one that allows the trial judge to determine which class members were harmed, and which were not, the latter group having no entitlement to any remedy. The methodology may be different depending on whether one is concerned with harm to direct purchasers, indirect purchasers or umbrella purchasers, if permitted by this Court. However, the methodology cannot be to simply assume harm to individuals that are members of a particular group, such as umbrella purchasers.

22. The standard articulated by this Court in *Pro-Sys*, as articulated by the Chamber above, does not require a preliminary merits assessment at certification of which class members suffered harm or were likely to suffer harm. Nor is the Chamber arguing that certification should be defeated because of a hypothetical possibility that the class includes some persons who did not suffer harm Rather, the Chamber submits that, for harm to be certified as a common issue, the certification judge must be satisfied that the trial judge will have the tools in the form of a methodology that provide a realistic prospect of determining the issue of harm for each class member using common evidence at the trial of the merits of the action.

### 3. Limitation Period in Section 36 of the *Competition Act*

23. Section 36 of the Act is a "carefully constructed" remedy [16] that reflects Parliament's chosen balance between fairness and access to justice, and between economic efficiency and consumer protection. For example, s. 36 provides assistance to plaintiffs in pursuing a claim in some respects and also imposes restrictions.

24. One of the restrictions is the limitation period in s. 36(4)(a), which itself strikes a balance. Section 36(4)(a) provides that the limitation period expires two years from the later of (i) the day on which the conduct was engaged in, and (ii) the day on which any criminal proceedings relating thereto were finally disposed of. In crafting the section in this way, Parliament chose to provide partial relief when the limitation period expires before the claimant has knowledge of the conspiracy by recommencing the limitation period only in the event of a criminal prosecution. Parliament struck this balance knowing that conspiracies are often conducted in secrecy and knowing that the two-year

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16 *City National*, at 689.

limitation period in s. 36(4)(a)(i) could easily expire without a claimant having knowledge of the conspiracy.

25. The Chamber's concern is that the decisions of the courts below disrupt the balance that Parliament carefully constructed in s. 36 and impermissively usurp the role of Parliament, by importing principles of discoverability and fraudulent concealment to extend the limitation period beyond the two-year period explicitly established in s. 36. This results in the limitation period in s. 36 being broadened so as to be virtually meaningless.[17]

26. If permitted to stand, this result will contribute significantly to uncertainty for the Chamber's members. Limitation periods are crucial to protect the Chamber's members from having to mount costly defences or engage in expensive, time-consuming settlement processes in instances where the evidence available to the defendants has been lost to time. Allowing claims to proceed that would otherwise be barred by the clear wording and intent of s. 36 makes it difficult for all litigants to assess liability or determine whether or when significant litigation will be commenced against them.

27. The two-year limitation period in s. 36(4)(a)(i) runs from the day that the conduct was engaged in. It is not linked to the arising or accrual of the cause of action, or to when the claimant suffers damages, and is not at all related to whether the claimant had knowledge of the alleged conduct. Despite this fact, the courts below concluded that the discoverability principle applies because time runs from an event (i.e., the conduct) that is related to the basis of the cause of action. If this decision stands, the two-year limitation period in s. 36(4)(a)(i) would be rendered meaningless because the conduct that gives rise to a s. 36 claim will virtually always be related to the cause of action asserted and therefore the discoverability principle will apply to extend that period for some uncertain period of time.

28. The Respondent argues that this Court's decision in *Peixeiro v Haberman*,[18] should be interpreted as meaning that a limitation period that is triggered by *any* element of the cause of action must allow for discoverability. The Chamber submits that this interpretation should be rejected as it conflicts with the principle underlying the decision in *Peixeiro v Haberman*, which is that "when

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17 See *Ryan v Moore*, 2005 SCC 38 at paras 23-24, 34 (discussing impermissibly displacing the intentions of the *legislature* by importing discoverability into a statutory limitations period).

18 *Peixeiro v Haberman*, [1997] 3 SCR 549 [*Peixeiro*].

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".[19] The conduct engaged in which triggers the commencement of the limitation period is a conspiracy. The conspiracy, while an element of the cause of action, clearly occurs without regard to the claimant's knowledge.

29. The courts below also concluded that the doctrine of fraudulent concealment extends to situations where there is no special relationship between the defendant and the injured party, which is the case in a pure commercial relationship and in a claim for pure economic loss. The implication of the lower courts' decisions is that the doctrine of fraudulent concealment can apply to any cause of action where it is asserted that the defendants conducted their wrongdoing in secret, including claims by indirect purchasers and umbrella purchasers who have no relationship with the defendants (let alone a special one).

30. If the mere fact that conduct is conducted in secret is sufficient to invoke the doctrine of fraudulent concealment, the Chamber is concerned that this doctrine will be consistently applied in price-fixing cases in respect of all claims by direct, indirect and umbrella purchasers. As the B.C. Court of Appeal recognized, price-fixing cases tend to be conducted in secrecy.[20] The result will be to render meaningless the balance struck by Parliament in s. 36(4)(a)(i) and (ii) of the Act and to create significant uncertainty about the scope of liability and likelihood and timing of significant litigation for the Chamber's members.

## PART IV - SUBMISSIONS ON COSTS

31. The Chamber undertakes not to seek any costs and asks that no costs be awarded against the Chamber.

## PART V - REQUEST FOR ORAL ARGUMENT

32. The Chamber respectfully requests leave to present oral argument at the hearing of the appeals.

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19 *Peixeiro* at para 37.

20 *Godfrey v Sony Corporation*, 2017 BCCA 302 at para 93.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 27th day of November, 2018.

Sandra Forbes

Adam Fanaki

Counsel for the Intervener,
Canadian Chamber of Commerce

## PART VI - TABLE OF AUTHORITIES

| Tab | Authority | Paragraph Reference |
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| 2. | *City National Leasing v General Motors of Canada Ltd*, [1989] 1 SCR 641 (SCC) | 7, 23 |
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