

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)

-and-

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

**INTERVENERS**

---

## **PIONEER APPELLANTS' REPLY FACTUM**

(Pursuant to Order of this Honourable Court dated October 16, 2018)

---

**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**

**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

**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

**Counsel to the appellants Panasonic Corporation, Panasonic Corporation of North America and Panasonic Canada Inc. 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](mailto:stephen@scfl-law.com)

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

**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](mailto:rmogerman@cfmlawyers.ca)

**Counsel for the Respondent, Neil Godfrey**

**HARRISON PENZA LLP**

450 Talbot Street  
London, ON N6A 4K3

**Jonathan J. Foreman**

**Jean-Marc Metrailler**

Tel: 519.679.9660  
Fax: 519.667.3362  
Email : [jforeman@harrisonpensa.com](mailto:jforeman@harrisonpensa.com)

**Counsel for the Intervener, Consumers  
Council of Canada**

**MICHAEL J. SOBKIN**

331 Somerset Street West  
Ottawa, Ontario  
K2P 0J8

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

**Ottawa Agent for 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](mailto:msobkin@sympatico.ca)

**Ottawa agent for Counsel for the Intervener,  
Consumers Council of Canada**

**SOTOS LLP**

180 Dundas Street West, Suite 1200  
Toronto ,ON M5G 1Z8

**Jean-Marc Leclerc****Mohsen Seddigh**

Tel: 416.977.6857

Fax: 416.977.0717

E-mail: [jleclerc@sotosllp.com](mailto:jleclerc@sotosllp.com)**Counsel for the Intervener, the  
Consumers' Association of Canada****BELLEAU LAPOINTE, S.E.N.C.R.L.**

306, Place d'Youville, bureau B-10  
Montréal (Québec) H2Y 2B6

**Me Violette Leblanc****Me Maxime Nasr****Me Daniel Belleau**

Tel: 514.987.6700

Fax: 514.987.6886

Email: [vleblanc@belleaulapointe.com](mailto:vleblanc@belleaulapointe.com)**Counsel for the Intervener, Option  
consommateurs****DAVIES WARD PHILLIPS &  
VINEBERG LLP**

155 Wellington Street West  
Toronto ON M5V 3J7

**Sandra A. Forbes**

Tel: 416.863.5574

Email: [sforbes@dwpv.com](mailto:sforbes@dwpv.com)**Adam Fanaki**

Tel: 416.863.5564

Email: [afanaki@dwpv.com](mailto:afanaki@dwpv.com)

Tel: 416.863.0900

Fax: 416.863.0871

**Counsel for the Intervener Canadian  
Chamber of Commerce****MICHAEL J. SOBKIN**

331 rue Somerset Ouest  
Ottawa, Ontario  
K2P 0J8

Tel : 613.282.1712

Fax: 613.288.2896

E-mail: [msobkin@sympatico.ca](mailto:msobkin@sympatico.ca)**Ottawa agent for Counsel for the Intervener,  
the Consumers' Association of Canada****MICHAEL J. SOBKIN**

331 rue Somerset Ouest  
Ottawa, Ontario  
K2P 0J8

Tel : 613.282.1712

Fax: 613.288.2896

E-mail: [msobkin@sympatico.ca](mailto:msobkin@sympatico.ca)**Ottawa agent for Counsel for the Intervener,  
Option consommateurs****GOWLING WLG (Canada) LLP**

Suite 2600  
160 Elgin Street  
Ottawa, Ontario K1P 1C3

**Matthew Estabrooks**

Tel: 613.788.3573

Email: [matthew.estabrooks@gowlingwlg.com](mailto:matthew.estabrooks@gowlingwlg.com)**Ottawa agent for Counsel for the Intervener  
Canadian Chamber of Commerce**

## TABLE OF CONTENTS

	<u>Page</u>
<b>PART I – OVERVIEW .....</b>	<b>1</b>
<b>PART II – STATEMENT OF ARGUMENT .....</b>	<b>1</b>
A. Article 2904 of the <i>Civil Code of Quebec</i> cannot govern the interpretation of s. 36 of the <i>Competition Act</i> . .....	1
B. Policy considerations of fairness and deterrence do not vest the court with legislative power .....	3
<b>PART III – SUBMISSION ON COSTS.....</b>	<b>5</b>
<b>PART IV – TABLE OF AUTHORITIES.....</b>	<b>6</b>
A. Statutes .....	6
B. Cases .....	6
C. Other Authorities .....	6

## PIONEER'S REPLY FACTUM

### PART I – OVERVIEW

1. Pioneer adopts the submissions of Toshiba on behalf of all appellants in the companion appeal (37810) in reply to the intervenors the Consumers Council of Canada, the Consumers Association of Canada, and Option Consommateurs.
2. This reply factum addresses the submissions of those intervenors on the limitation period contained in s. 36(4) of the *Competition Act*.
3. Option consommateurs urges the application of article 2904 of the *Civil Code of Quebec*, which implements a form of discoverability. There is no need to resort to suppletive private law principles to interpret the s. 36(4) limitation period. Nor can article 2904 suspend the running of a federal limitation period.
4. The Consumers Council, Consumers Association, and Option consommateurs urge considerations of fairness and deterrence on this Court. Those considerations cannot vest this Court with legislative power.

### PART II – STATEMENT OF ARGUMENT

#### **A. Article 2904 of the *Civil Code of Quebec* cannot govern the interpretation of s. 36 of the *Competition Act*.**

5. Option consommateurs relies on article 2904 of the *Civil Code of Quebec* (CCQ).
6. This provision, like the codification of the discoverability principle in modern limitation statutes in common law provinces,<sup>1</sup> expressly provides for the suspension of the running of a limitation or prescription period in certain circumstances. It is of no assistance in interpreting s. 36(4)(a)(i) of the *Competition Act*.

---

<sup>1</sup> See eg. British Columbia: *Limitation Act*, SBC 2012, c 13, s 6(1).

7. Like its provincial counterparts, Parliament provided for the possibility that claimants might find that their s. 36 claim was extinguished before learning that it existed: a second limitation period, in s. 36(4)(a)(ii), extends for two years after the conclusion of any criminal proceedings relating to the conduct that provides the basis for the claim.

8. Option consommateurs notes that article 2904 has been used on a suppletive basis to suspend limitation periods in other *Quebec* statutes. This is consistent both with the status of the CCQ as the ordinary private law of Quebec, and with the principle that different enactments of the *same* legislature are presumed to be consistent with one another.<sup>2</sup>

9. Where a judge needs to resort to private law principles in order to interpret a federal statute, the CCQ is the suppletive law in Quebec.<sup>3</sup>

10. Equally, however, the presumption of coherence does not apply between statutes from different legislatures;<sup>4</sup> nor can doctrines used to resolve conflicts between two statutes from the same legislature, such as the doctrine of implied repeal, be used to resolve a conflict between a federal statute and a provincial statute.<sup>5</sup>

11. There is no need to resort to private law principles in the CCQ or the common law to interpret s. 36(4)(a)(i). This Court has already articulated a specific test for determining when discoverability applies to a limitation provision, in *Peixeiro v. Haberman*.<sup>6</sup> That test does not depend upon suppletive private law principles from either the common law or the CCQ.

12. Nor can article 2904 of the CCQ suspend the running of the s. 36(4) limitation periods. The Quebec legislature cannot amend or suspend s. 36(4) of the federal *Competition Act*, impliedly or otherwise.

---

<sup>2</sup> Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th (Toronto: Carswell, 2011), at 365 [Book of Authorities (“BOA”), Tab 4]; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at 422 [BOA, Tab 6]; *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 at ¶30.

<sup>3</sup> *Canada (Attorney General) v. St Hilaire*, [2001] 4 FC 289, 2001 FCA 63

<sup>4</sup> Côté, at p. 366-367 [BOA, Tab 4].

<sup>5</sup> Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007, loose-leaf, release 2018-1) at 16.1[BOA, Tab 5].

<sup>6</sup> *Peixeiro v Haberman*, [1997] 3 SCR 549



## **B. Policy considerations of fairness and deterrence do not vest the court with legislative power**

13. The Consumers Council of Canada urges that “realistic deterrence” and “effective pursuit of rights of redress for consumers require that the doctrines of discoverability and fraudulent concealment should apply to the applicable limitation period.” Option consommateurs refers to the “caractère juste et logique” of applying discoverability. While the Consumers’ Association of Canada does not address the limitation issue directly, it goes further still, urging the Court to maximise recovery to plaintiffs in order to achieve a policy of deterrence.

14. The task before this Court is one of statutory interpretation. Policy considerations of fairness and deterrence do not vest this Court or any other with legislative power. Absent a constitutional challenge, this Court is “charged with interpreting and applying [the statute] in accordance with the sovereign intent of the legislator”.<sup>7</sup> As Stratas JA recently said,

[51] We are a court of law whose judges have sworn to obey the law in a democracy governed by the rule of law; we are not free agents putting our personal policies into law. We do not make statutory law; we interpret and apply the law made by Parliament. We look at Parliament’s law to discern its real meaning; we do not look to our own policy preferences, our own worldviews, the opinions of the powerful, or the views of the public. We apply the real meaning of laws to the facts before us, neutrally and objectively, logically and dispassionately, without fear or favour, and come to a result; we do not skew the result to fit what we think is right or best, to advance values we prefer, or to meet the wishes and expectations of others.<sup>8</sup>

15. Section 36 is a statutory cause of action for a statutory wrong. In attaching civil liability for the first time in Canada to the serious criminal offences created by the *Combines Investigation Act*, Parliament chose a cautious approach.

16. One example of this cautious approach is the unusually complicated limitation period that runs from the date of the *conduct* of the defendant, and another that runs from the end of criminal proceedings. This choice must have been deliberate, as there were two, more obvious choices available to Parliament. Parliament could have used the loss suffered by the plaintiff – the

<sup>7</sup> *Bell ExpressVu Ltd. v. Rex*, 2002 SCC 42, at ¶62

<sup>8</sup> *Sharif v. Canada (Attorney General)*, 2018 FCA 205

essential threshold requirement for the s. 36 cause of action – as the starting point for the limitation period. Or Parliament could have followed the dominant model at the time and used the accrual or arising of the cause of action as the starting point.<sup>9</sup> It chose not to.

17. Similarly, Parliament chose to enact an unusually short limitation period of two years (for the time), as compared with the six year limitation then common in provincial limitations statutes.<sup>10</sup>

18. The re-activation of the cause of action that occurs once criminal proceedings are commenced (s. 36(4)(a)(ii)) shows Parliament's careful balancing of competing interests. This provision allows a claimant to bring an action even many years after a conspiracy, but only if the Crown has seen fit to lay charges after a Competition Bureau investigation. This, coupled with s. 36(2), which provides an evidentiary short-cut to plaintiffs after a conviction, evidences an expectation that private enforcement would typically follow state enforcement.

19. The cautious approach embodied in s. 36 is inconsistent with the contention of the three intervenors that Parliament intended a broader remedy. The policy arguments they make are arguments that s. 36 should be modernized.

20. If s. 36 should be modernized in the light of forty years' experience, that task is Parliament's alone. It is for Parliament, not the courts, to balance considerations of fairness to plaintiffs and businesses accused of serious crimes, as well as deterrence, and the relationship between state and private enforcement.

---

<sup>9</sup> Ontario: *The Limitations Act*, RSO 1970, c 246, s 45 [BOA, Tab 2]; BC: *Statute of Limitations*, RSBC 1960, c 370, s 3 [BOA, Tab 1]; Nova Scotia: *The Statute of Limitations*, RSNS 1967, c 168, s 2 [BOA, Tab 3], as quoted in *Central Trust Co. v. Rafuse*, [1986] 2 SCR 147 at 217.

<sup>10</sup> Ontario: *The Limitations Act*, RSO 1970, c 246, s 45 [BOA, Tab 2]; BC: *Statute of Limitations*, RSBC 1960, c 370, s 3 [BOA, Tab 1]; Nova Scotia: *The Statute of Limitations*, RSNS 1967, c 168, s 2 [BOA, Tab 3], as quoted in *Central Trust Co. v. Rafuse*, [1986] 2 SCR 147 at 217.

**PART III – SUBMISSION ON COSTS**

21. Pioneer does not seek costs from the intervenors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of December 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.

## PART IV – TABLE OF AUTHORITIES

### A. Statutes

<i>Civil Code of Quebec</i> , art. 2904	¶ 3, 5, 8, 9, 11, 12
<i>Competition Act</i> , RSC 1985, c C-34, s. 36	¶ 2, 3, 6, 7, 11, 12, 15, 16, 18, 19, 20
<i>Limitation Act</i> , SBC 2012, c 13, s 6(1)	¶ 6
<i>Statute of Limitations</i> , RSBC 1960, c 370, s 3	¶ 16, 17
<i>The Limitations Act</i> , RSO 1970, c 246, s 45(1)	¶ 16, 17
<i>The Statute of Limitations</i> , RSNS 1968, c 168	¶ 16, 17

### B. Cases

<i>Bell ExpressVu Ltd. v. Rex</i> , <u>2002 SCC 42</u>	¶ 14
<i>Canada (Attorney General) v. St Hilaire</i> , [2001] 4 FC 289, 2001 FCA 63	¶ 9
<i>Central Trust Co. v. Rafuse</i> , [1986] 2 SCR 147	¶ 16, 17
<i>Peixeiro v Haberman</i> , [1997] 3 SCR 549	¶ 11
<i>R. v. Ulybel Enterprises Ltd.</i> , <u>2001 SCC 56</u>	¶ 8
<i>Sharif v. Canada (Attorney General)</i> , <u>2018 FCA 205</u>	¶ 14

### C. Other Authorities

Pierre-André Côté, <i>The Interpretation of Legislation in Canada</i> , 4th (Toronto: Carswell, 2011)	¶ 8
Peter W. Hogg, <i>Constitutional Law of Canada</i> , 5th ed. (Toronto: Carswell, 2007, loose-leaf, release 2018-1)	¶ 10
Ruth Sullivan, <i>Sullivan on the Construction of Statutes</i> , 6th ed (Markham: LexisNexis, 2014)	¶ 8