

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

Between

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

Applicants (Appellants)

and

NEIL GODFREY

Respondent (Respondent)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

Counsel for the Respondent

**Reidar Mogerman, David G. A. Jones
and Katie Duke**

CAMP FIORANTE MATTHEWS MOGERMAN
#400 - 856 Homer Street
Vancouver BC V6B 2W5
Tel: (604) 689-7555
Fax: (604) 689-7554
Email: service@cfmlawyers.ca

Ottawa Agent for the Respondent

Michael Sobkin

Barrister & Solicitor
331 Somerset Street W.
Ottawa, ON K2P 0J8
Tel.: (613) 282-1712
Fax: (613) 228-2896
Email: msobkin@sympatico.ca

Counsel for the Applicants

W. Michael G. Osborne

AFFLECK GREENE McMURTRY LLP

365 Bay Street, Suite 200
Toronto, ON M5H2V1
Tel.: (416)360-5919
Fax: (416)360-5919
Email: mosbome@agmlawvers.com

Ottawa Agent for Counsel for the
Applicants

Marie-France Major

SUPREME ADVOCACY LLP

100-340 Gilmour St.
Ottawa ON K2P OR3
Tel: 613-695-8855
Fax: 613-695-85-80
Email: mfmajor@supremeadvocacy.ca

TABLE OF CONTENTS

PART I - OVERVIEW AND STATEMENT OF FACTS	1
A. Overview	1
B. Background	2
C. Decisions Below	3
PART II - STATEMENT OF ISSUES	4
PART III - ARGUMENT	4
A. Whether it is “plain and obvious” that discoverability does not apply to the limitation period contained in s. 36(4)(a)(i) of the <i>Competition Act</i> is not an issue of national importance	4
(i) The issue of whether discoverability applies has not been finally determined	4
(ii) The Court of Appeal did not create a “new and expanded test” for discoverability	5
(iii) There is no conflict in the law that requires resolution	7
B. Whether it is “plain and obvious” that Pioneer’s alleged conduct does not invoke the equitable doctrine of fraudulent concealment is not an issue of national importance	9
(i) There is no “special relationship” requirement	9
(ii) Determining whether the doctrine of fraudulent concealment is available requires a factual record	12
PART IV - SUBMISSIONS REGARDING COSTS	12
PART V - ORDER SOUGHT	13
PART VI - TABLE OF AUTHORITIES	14
PART VII - LEGISLATION AT ISSUE	16

PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The applicants,¹ seek leave to appeal to this Court from an order of the British Columbia Court of Appeal certifying the respondent's action against Pioneer and other defendants as a class proceeding. Pioneer argues that the proposed appeal raises issues of national importance concerning the interpretation and application of statutory limitation periods. Contrary to Pioneer's submissions, the Court of Appeal did not introduce any changes to the test for discoverability or the doctrine of fraudulent concealment. Rather, the Court merely confirmed that it was not plain and obvious that the respondent's *Competition Act* claim against Pioneer was barred by s. 36 of the *Act*.² No issues of national importance are raised by this narrow, preliminary determination.

2. In reaching its decision that it was not plain and obvious that discoverability could not apply, the Court of Appeal applied well established law set down by this Court in *Ryan v Moore* to a specific set of facts.³ The British Columbia Court of Appeal's conclusion is entirely consistent with the Ontario Court of Appeal's recent decision in *Fanshawe College of Applied Arts and Technology v AU Optronics Corporation*.⁴ Its analysis does not conflict with other provincial appellate authority, nor does it give rise to an issue of public importance.

3. Further, contrary to Pioneer's suggestion, the Court of Appeal did not change the test for fraudulent concealment by leaving open the possibility of not requiring the existence of a "special relationship". The foundational cases issued by this Court indicate that the existence of a special relationship is one of several factors to be considered in determining whether the doctrine of fraudulent concealment applies. It is not a determinative factor. The Court of Appeal concluded it was not plain and obvious that the doctrine could not apply to suspend the limitation period in this particular factual matrix. In doing so, the Court of Appeal properly held that the precise level of egregious conduct necessary to invoke the doctrine remains an open question.

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

² *Competition Act*, RSC 1985, c C-34.

³ 2005 SCC 38, [2005] 2 SCR 53 ["*Ryan*"].

⁴ 2016 ONCA 621 ["*AU Optronics*"].

The Court of Appeal's conclusion is supported by both Supreme Court of Canada and provincial appellate authority. There is no appellate controversy. Whether Pioneer's participation in a secret, global, criminal price-fixing conspiracy is conduct serious enough to attract the doctrine of fraudulent concealment is an issue that should be resolved on a full evidentiary record.

4. If leave were to be granted, the impact of an appeal would be of limited relevance to both the wider legal system and this action. Even if Pioneer were to be successful on appeal, the decision would only resolve the respondent's *Competition Act* claim against Pioneer. The respondent has also advanced tort and unjust enrichment claims against Pioneer that would remain unresolved. After many long delays, it is time for the action to be heard on its merits – where the fact-based limitation issues raised by the applicant can be considered on the necessary evidentiary record. Leave to appeal should be denied.

B. Background

5. This class proceeding relates to an alleged secret and criminal conspiracy to fix prices of optical disk drives (“ODDs”), leading to an unlawful increase in the prices of both ODDs and certain products containing ODDs. The respondent, the plaintiff in the underlying action, seeks to bring a class action on behalf of all British Columbia residents who purchased ODDs or ODD products between January 1, 2004 and January 1, 2010. The initial action commenced in 2010 did not name Pioneer as a defendant (the “Main Action”). A separate action was filed against Pioneer in August 2013.⁵ The two actions were consolidated at the certification hearing.⁶

6. The allegations advanced are serious. The respondent alleges that the defendants participated in a global, criminal price-fixing cartel, leading to increased prices and downstream effects through each level of the distribution chain, including the consumer level.⁷ The respondent advances claims under both s. 36 of the *Competition Act*, as well as claims for civil conspiracy, unjust enrichment and waiver of tort.⁸ Price-fixing conspiracies notoriously take

⁵ *Godfrey v. Pioneer Corporation et al*, Vancouver Registry No.: S1366205.

⁶ *Godfrey v Sony Corporation*, 2016 BCSC 844 at paras 13-14 (“*Godfrey BCSC*”).

⁷ *Ibid* at para 2

⁸ Plaintiff's Third Amended Notice of Civil Claim, Application Record (“AR”), Tab 11.

place in the smoke filled back rooms of international commerce. The allegation of deliberately concealed criminality is central to the claim.⁹

7. Put in simpler terms, the alleged price-fixing and bid rigging, which must be taken as true for the purposes of the certification hearing, is the “supreme evil of anti-trust”.¹⁰ In *Canada v Maxzone Auto Parts (Canada) Corp.*, Chief Justice Crampton of the Federal Court of Canada stated that:

[54] Price fixing agreements, like other forms of hard core cartel agreements, are analogous to fraud and theft. They represent nothing less than an assault on our open market economy. Buyers in free market societies are entitled to assume that the prices of the goods and services they purchase have been determined by the forces of competition. When they purchase products that have been the subject of such an agreement, they are effectively defrauded.

[55] Indeed, such agreements have a greater adverse economic impact on society than do theft and fraud. This is because, in addition to leading to a transfer of wealth from victims of the agreement to the participants in the agreement, they also generally result in further detrimental effects on the economy. [...]

[56] Price fixing and other hard core cartel agreements therefore ought to be treated at least as severely as fraud and theft, if not even more severely than those offences.¹¹

C. Decisions Below

8. At the certification hearing, the defendants in the Main Action conceded that the respondent’s statutory claim under s. 36 of the *Competition Act* disclosed a cause of action.¹² Pioneer, however, argued that it was plain and obvious that the respondent’s *Competition Act* claim against it was barred by the limitation period set out in s. 36(4)(a)(i) of the *Competition Act*. Despite doubt about whether it was appropriate to even consider a limitation period argument at certification, Justice Masuhara addressed Pioneer’s arguments on discoverability and fraudulent concealment. He concluded that it was not plain and obvious that the doctrines of

⁹ Plaintiff’s Third Amended Notice of Civil Claim at para 80, AR, Tab 11.

¹⁰ *Verizon Communications Inc. v Law Offices of Curtis v Trinko, LLP*, 540 US 398 at 408 (2004).

¹¹ *HMTQ v Maxzone Auto Parts (Canada) Corp.*, 2012 FC 1117 at paras 54-56.

¹² *Godfrey BCSC*, *supra* note 6 at para 30.

discoverability and fraudulent concealment could not apply to toll the limitation period in s. 36(4)(a)(i) of the *Competition Act*.¹³

9. The Court of Appeal reached a similar conclusion. In its view, this is not one of those exceptional cases where it might be appropriate to consider a limitations argument at the certification stage, especially since Pioneer had not filed a cross-motion or statement of defence. Given that the issue was “intimately connected” with the factual matrix, the Court concluded that Pioneer’s arguments about the limitation period were premature. The Court of Appeal also rejected Pioneer’s submissions that it was plain and obvious that the doctrines of discovery and fraudulent concealment could not apply.¹⁴

PART II - STATEMENT OF ISSUES

10. The question to be determined is whether this application raises matters of such public importance that this Court should grant leave to appeal.¹⁵ If this Court grants leave to appeal, the issues on appeal would be:

- (i) should the limitation period issues be considered at this stage of the case;
- (ii) if it is to be considered, is it “plain and obvious” that discoverability does not apply to the limitation period contained in s. 36(4)(a)(i) of the *Competition Act*?
- (iiI) if it is to be considered, is it “plain and obvious” that Pioneer’s alleged conduct does not engage the equitable doctrine of fraudulent concealment?

PART III - ARGUMENT

11. This application raises no issues of public importance and there are no relevant conflicting appellate authorities.

A. Whether it is “plain and obvious” that discoverability does not apply to the limitation period contained in s. 36(4)(a)(i) of the *Competition Act* is not an issue of national importance

(i) The issue of whether discoverability applies has not been finally determined

¹³ *Ibid*, at paras 46-48.

¹⁴ *Godfrey v Sony Corporation*, 2017 BCCA 302 at paras 67-68 [“*Godfrey BCCA*”].

¹⁵ *Supreme Court Act*, RSC 1985, c S-26, s. 40(1).

12. Pioneer overstates the Court of Appeal’s holding. The Court did not hold that “discoverability applies” to s. 36(4) of the *Competition Act*, as Pioneer suggests.¹⁶ Rather, the inquiry was limited to whether it was plain and obvious that discoverability *does not* apply. The Court of Appeal did not conclusively decide the issue on its merits in either party’s favour. The Court of Appeal made a preliminary conclusion with little precedential value for the wider legal system. This is not an issue of national importance.

13. As this Court confirmed in *Hollick v Toronto (City)*, the standard for assessing whether pleadings disclose a cause of action is the *Hunt v Carey* standard.¹⁷ This is a low bar. The plaintiff will meet this requirement unless, assuming all the pleaded facts are true, it is “plain and obvious” the claim will not succeed.¹⁸ Thus, the question before the Court of Appeal was not whether or not discoverability actually applies, but whether it was plain and obvious that discoverability could *never apply* to a claim brought under s. 36 of the *Competition Act*.¹⁹

14. By deciding that the respondent’s claim was not bound to fail, the Court of Appeal made no final ruling on the application of the discoverability principle. It is open for Pioneer to raise this issue in the merits stage of the litigation. Questions of statutory interpretation are not conclusively decided on a certification motion.²⁰ It would be inappropriate and undesirable for a court to do so. Such questions are best decided on the basis of a full evidentiary record, when the issue can be fully considered on the merits.

(ii) The Court of Appeal did not create a “new and expanded test” for discoverability

15. Pioneer argues that the Court of Appeal created a new and expanded test for discoverability and that this proposed appeal would address whether such a test should be adopted.²¹ To the contrary, the Court of Appeal examined and applied well established law on the application of discoverability to statutory limitation periods, including binding authority laid down by this Court in *Ryan*. The Court of Appeal did not establish a new test for discoverability.

¹⁶ Pioneer’s Memorandum of Argument at para 16.

¹⁷ *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 SCR 158 at para 25.

¹⁸ *Hunt v Carey*, [1990] 2 SCR 959, at 980 [“*Hunt*”].

¹⁹ *Godfrey BCCA*, *supra* note 14 at para 95.

²⁰ *Jiang v Peoples Trust Company*, 2017 BCCA 119 at paras 59-60, 66-67.

²¹ Pioneer’s Memorandum of Argument, at para 33.

16. The law relating to discoverability is well settled. The *Fehr v Jacob*²² test to determine whether a limitation period is subject to the discoverability doctrine was adopted by this Court in *Peixeiro v Haberman*²³ and again in *Ryan*.²⁴ In *Ryan*, this Court endorsed the *Fehr* test and offered further guidance on the application of discoverability to limitation periods, holding that “[t]he 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”.²⁵ The applicant attempts to characterize this additional guidance as inconsistent with *Fehr* and suggests that the law requires clarification. To the contrary, this further commentary simply demonstrates the evolution of common law. It creates no uncertainty requiring further review.

17. Moreover, contrary to the position of Pioneer, *Ryan* has consistently been recognized as standing for the proposition that the discoverability principle can apply where the limitation period is related to the “basis of the cause of action”.²⁶

18. Pioneer incorrectly asserts that the Court of Appeal’s interpretation of *Ryan* would have changed the result in *Fehr* and *Canadian Imperial Bank of Commerce v Green*.²⁷ In *Fehr*, the limitation period ran from the termination of the professional services.²⁸ This triggering event is unrelated to the basis of the cause of action. In *Green*, the legislative history revealed that the statutory limitation period was designed to run without regard to the plaintiff’s knowledge of facts giving rise to the cause of action.²⁹ Furthermore, as Pioneer acknowledges, discoverability was not even at issue in *Green*.³⁰ These cases appropriately turned on the particular language of the statute and legislative history. They do not cast any doubt on the correctness of the Court of Appeal’s decision in this case.

²² *Fehr v Jacob* (1999) 14 CPC (3d) 364, 1993 CarswellMan 109 (CA) [cited to Carswell] [“*Fehr*”].

²³ *Peixeiro v Haberman*, [1997] 3 SCR 549 at para 37 [“*Peixeiro*”].

²⁴ *Ryan*, *supra* note 3 at para 23.

²⁵ *Ibid* at para 24 [emphasis added].

²⁶ *AU Optronics*, *supra* note 4 at para 45; *Wood Waste Solutions Canada Inc v Associated Paving Co.*, 2010 ONSC 6280 at para 34 (Div Ct).

²⁷ 2015 SCC 60, [2015] 3 SCR 801 [“*Green*”].

²⁸ *Fehr*, *supra* note 22 at para 23.

²⁹ *Green*, *supra* note 27 at para 66.

³⁰ Pioneer’s Memorandum of Argument at para 32.

19. In an effort to elevate the issues to be of “national importance”, Pioneer cites to a number of other statutes that contain a limitation period that on their face run from a fixed event without regard to the injured party’s knowledge. Statutory interpretation is a context specific inquiry. Whether the discoverability principle applies to these statutes depends on the language of the statutes, the legislative history, and the purpose of the statutes.

(iii) There is no conflict in the law that requires resolution

20. There is no appellate controversy about whether it is plain and obvious that discoverability cannot apply to s. 36(4) of the *Competition Act*. The Ontario Court of Appeal in *AU Optronics* was the first appellate court in Canada to undertake an analysis of whether discoverability applies to the limitation period found in s. 36(4)(a)(i) of the *Competition Act*. Unlike the present case, *AU Optronics* decided the issue on its merits, since the question arose out of a summary judgment motion. In holding that discoverability applies, the Ontario Court of Appeal examined and applied well established law on the application of the discoverability doctrine to statutory limitation periods, including binding authority laid down by this Court in *Ryan*.³¹ Given this persuasive authority directly on point, it is not “plain and obvious” that the opposite result sought by Pioneer is correct.

21. Pioneer asserts that there are five conflicting decisions in which courts have held that s. 36(4) is not subject to discoverability.³² A review of these cases reveals that the statements Pioneer relies on were either *obiter*, not upheld on appeal, or rendered orally without any analysis of the relevant authorities. None of the cited cases constitute conflicting appellate level decisions.

22. In *CCS Corp v Secure Energy Service Inc.*, the claim arose after an employee took confidential information and formed a company to compete with its former employee.³³ In oral reasons running less than a page in length and involving issues beyond the *Competition Act*, the Alberta Court of Appeal commented in a single sentence that, with respect to a claim under s. 36 of the *Competition Act*, the limitation period runs from the conduct, not discoverability.³⁴ The

³¹ *AU Optronics*, *supra* note 4 at paras 32-48.

³² Pioneer’s Memorandum of Argument at para 35.

³³ *CCS Corp v Secure Energy Services Inc*, 2014 ABCA 96 [“*CCS Corp*”].

³⁴ *Ibid* at para 4.

Alberta Court of Appeal offered no analysis with respect to the limitation issue and did not consider the governing cases, such as *Ryan* or *Peixeiro. CCS Corp.* ought not to be considered a conflicting appellate decision.

23. *Laboratoires Servier v Apotex* concerned a patent dispute.³⁵ The Federal Court held that the plaintiff's claim for damages under the *Competition Act* must fail because: "ADIR was merely exercising its rights under the *Patent Act* to obtain patents and nothing more".³⁶ The claim was struck for reasons unrelated to the limitation period. The Federal Court went on to state that one party's submission that discoverability did not apply was "likely a correct view of the law".³⁷ This tentative opinion on the limitation issue was offered in *obiter*, was not binding on the British Columbia Court of Appeal and is not a conflicting appellate authority.

24. The Federal Court also addressed the application of discoverability to the s. 36 limitation period in *Garford Pty v Dywidag Systems International*.³⁸ The need for such analysis did not arise on the facts of the case and can only be considered *obiter*. In reviewing the decision of the lower court, the Federal Court of Appeal held that "[t]he issue of discoverability does not arise on the facts of this case".³⁹ The Federal Court of Appeal further commented that the facts of the case "preclude any argument based on discoverability, assuming without deciding, it is legally available".⁴⁰ The *Garford* case is not in conflict with the decision of the Court of Appeal in this case.

25. In *Fairview Donut v TDL*, the plaintiff franchisees alleged that they were required to buy ingredients from the defendants at unreasonably high prices.⁴¹ They commenced a class proceeding that included claims based on an alleged breach of the *Competition Act*. Having concluded that the pleading survived the applicable "plain and obvious" test, on a motion for summary judgment, the Ontario Superior Court of Justice dismissed the *Competition Act* claims

³⁵ *Laboratoires Servier v Apotex*, 2008 FC 825.

³⁶ *Ibid*, at para 478.

³⁷ *Ibid*, at para 488.

³⁸ *Garford Pty v Dywidag Systems International*, 2010 FC 996 at paras 28-38 ["*Garford*"].

³⁹ *Garford Pty Ltd v Dywidag Systems International Canada Ltd*, 2012 FCA 48 at para 10.

⁴⁰ *Ibid* at para 16.

⁴¹ 2012 ONSC 1252 ["*Fairview Donut*"].

on their merits.⁴² In *obiter*, the Court commented on the s. 36 limitations defence raised by defendants. In those *obiter* comments, the Court considered only the initial Federal Court decision in *Garford*. The appellate level decision in *Garford* was released after the hearing of the motion in *Fairview* and was not considered by the Court. *Fairview* is not an appellate level decision and has now been overtaken by the Ontario Court of Appeal decision in *AU Optronics*.

26. Given the lack of conflicting appellate authority on this issue and the preliminary, procedural nature of the issue, the question of whether it is plain and obvious that discoverability does not apply to s. 36(4)(a)(i) of the *Competition Act* raises no issue of national or public importance.

B. Whether it is “plain and obvious” that Pioneer’s alleged conduct does not invoke the equitable doctrine of fraudulent concealment is not an issue of national importance

(i) There is no “special relationship” requirement

27. Pioneer’s fraudulent concealment arguments fail to raise an issue of national importance. The Court of Appeal’s decision that it was not plain and obvious that the doctrine of fraudulent concealment could not apply is consistent with established law. Numerous courts have reiterated that the breadth of conduct the doctrine may attach to is varied and have declined to delineate clear boundaries. Courts have also stressed the need to consider the unique facts of every case. Pioneer’s contention that the doctrine requires a special relationship is one that is best resolved on a full evidentiary record.

28. As this Court explained in *M(K) v M(H)*, the underlying premise of the doctrine of fraudulent concealment is that “the courts will not allow a limitation period to operate as an instrument of injustice.”⁴³ Where it applies, the doctrine will suspend the running of a limitation period until the injured party has had a reasonable opportunity to discover the cause of action. “Fraud” in this context has a broad meaning, it includes both common law and equitable fraud. The necessary element of concealment may arise through either an active act of concealment or through the way in which the act that gives rise to the cause of action is performed.⁴⁴

⁴² *Ibid* at paras 614, 620, 624, 632, 634.

⁴³ [1992] 3 SCR 6 at 58-59 [*M(K)*].

⁴⁴ *Ibid*, at 57.

29. Contrary to Pioneer’s assertion, a special relationship is not necessarily required. Pioneer’s argument on this point is based on a misreading of this Court’s jurisprudence. In *M(K)*, the Court did not describe a “special relationship” as being a necessary element of the doctrine. Rather, it described it as one of several conditions that may lead to a finding of fraudulent concealment:

...there had to be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts.⁴⁵

30. While Pioneer makes much of this statement, it disregards that “abuse of a confidential relationship” is only one of three possible types of conduct listed.⁴⁶ The conjunction “or” in the list makes this clear. *M(K)* emphasized the special relationship type of equitable fraud because it was concerned with whether the doctrine could apply to a case involving incestuous child abuse. But it did not limit the doctrine to this type of conduct.

31. In *M(K)*, this Court relied on the following passage from the English Court of Appeal decision in *Kitchen v Royal Air Forces Association* to explain the broad range of conduct that can give rise to the doctrine’s application:

It is now clear . . . that the word "fraud" in s. 26(b) of the *Limitation Act*, 1939, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v. A.R.T.S., Ltd.*, [1949] 1 All E.R. 465, that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which LORD HARDWICKE did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase 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.⁴⁷

32. As the passage makes clear, unconscionable conduct in the context of a special relationship is *one* type of conduct that is serious enough to amount to equitable fraud. But equitable fraud is not restricted to this sort of conduct and the Court in *Kitchen* purposively avoided limiting the concept to one definition. Rather, the Court simply recognized that the type

⁴⁵ *Ibid*, citing *Halsbury’s Law of England*, 4th ed, vol 28, para 919 at 413 [emphasis added].

⁴⁶ Pioneer’s Memorandum of Argument, at para. 42.

⁴⁷ [1958] 2 All ER 241 at 249 [“*Kitchen*”].

of conduct at issue in that case clearly fell within the parameters of equitable fraud and thus gave rise to fraudulent concealment. As the Alberta Court of Appeal has recognized:

...when viewed in its original context, the statement [in *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.⁴⁸

33. More recently, this Court has also refrained from setting out one definitive definition of equitable fraud, as it “is so infinite in its varieties that the Courts have not attempted to define it”, but “all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken”.⁴⁹

34. Similarly, earlier cases from this Court do not make a special relationship “the foundation of fraudulent concealment” as Pioneer asserts.⁵⁰ In *Guerin v The Queen*, the Court recognized that equitable fraud involving unconscionable conduct within a special relationship was sufficient to attract the doctrine of fraudulent concealment.⁵¹ But it should not be read as limiting fraudulent concealment to this type of conduct.

35. In one of the first Supreme Court cases to consider the doctrine, *Massie & Renwick Limited v Underwriters’ Survey Bureau Ltd.*, there is no mention of the need for a special relationship between the parties.⁵² Similarly, there is no reference to the need for a special relationship in *Bulli Coal Mining Co. v Osborne*, which *Massie & Renwick* cites as the source of the doctrine.⁵³

36. As the cases discussed above demonstrate, it is not “plain and obvious” that a special relationship is a necessary element of fraudulent concealment. The breadth of conduct covered by it is vast and courts have avoided exhaustively defining it.

⁴⁸ *Photinopoulos v Photinopoulos*, 92 AR 122, 1988 CarswellAlta 220 at para 17 (WL CA).

⁴⁹ *Performance Industries Ltd. v Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678 at para 39, citing *McMaster University v Wilchar Construction Ltd.*, [1971] 3 OR 801, 1971 CarswellOnt 775 at para 48 (HC) (WL CA).

⁵⁰ Pioneer’s Memorandum of Argument at para 40.

⁵¹ *Guerin v The Queen*, [1984] 2 SCR 335 at 390.

⁵² *Massie & Renwick Limited v Underwriters’ Survey Bureau Ltd.*, [1940] SCR 218 [“*Massie & Renwick*”].

⁵³ *Bulli Coal Mining Co. v Osborne*, [1899] AC 351; *Massie & Renwick supra* note 52 at 244.

(ii) **Determining whether the doctrine of fraudulent concealment is available requires a factual record**

37. In the past, this Court has declined to define the limits of equitable fraud and fraudulent concealment for good reason. Allegations of fraud are factual in nature. The type of circumstances and conduct that may ultimately prove to be unconscionable are many and should not be restricted by artificial limitations. “Generally, equity intervenes in circumstances where the retention of an advantage gained by one over another would be unconscionable.”⁵⁴ Determining what types of circumstances involve such unconscionability is not something to be done in the abstract.

38. For this reason, courts have commented on the need to consider the unique facts of every case when considering whether the doctrine of fraudulent concealment ought to apply.⁵⁵

39. This is not the right case to provide guidance on the limits of the doctrine of fraudulent concealment. Unconscionable conduct comes in many forms. Because of the fact-specific nature of equitable fraud, the issues raised by Pioneer should not be decided on a certification motion, where the Court does not have the benefit of a factual record.

40. This is a preliminary conclusion decided on the low *Hunt*⁵⁶ standard. The British Columbia Court of Appeal’s conclusion that it is not plain and obvious that fraudulent concealment cannot apply in these circumstances raises no issues of national importance.

PART IV - SUBMISSIONS REGARDING COSTS

41. The respondent seeks costs.

⁵⁴ *Bayerische v Rieder*, 2003 BCSC 1031 at para 10.

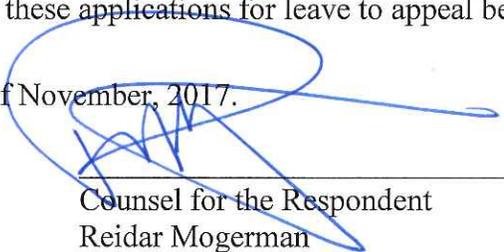
⁵⁵ *Union Square Apartments Ltd v Academy Contractors Inc (Abalon Construction)*, 2016 ABQB 575 at para 63.

⁵⁶ *Hunt*, *supra* note 18.

PART V - ORDER SOUGHT

42. The respondent seeks an order that these applications for leave to appeal be dismissed.

DATED at Vancouver, BC this 24th day of November, 2017.



Counsel for the Respondent
Reidar Mogerman

PART VI - TABLE OF AUTHORITIES

AUTHORITY	Paragraph(s) Referenced in Memorandum of Argument
CASES	
<i>Bayerische v Rieder</i>, 2003 BCSC 1031	37
<i>Bulli Coal Mining Co. v Osborne</i>, [1899] AC 351	35
<i>Canadian Imperial Bank of Commerce v Green</i>, 2015 SCC 60, [2015] 3 SCR 801	18
<i>CCS Corp v Secure Energy Services Inc</i>, 2014 ABCA 96	22
<i>Fairview Donut v TDL</i>, 2012 ONSC 1252	25
<i>Fanshawe College of Applied Arts and Technology v. AU Optronics Corporation</i>, 2016 ONCA 621	2 and 20
<i>Fehr v Jacob</i> (1999) 14 CPC (3d) 364, 1993 CarswellMan 109 (CA)	16 and 18
<i>Garford Pty Ltd v Dywidag Systems International Canada Ltd</i>, 2012 FCA 48	24
<i>Garford Pty v Dywidag Systems International</i>, 2010 FC 996	24 and 25
<i>Godfrey v Sony Corporation</i>, 2016 BCSC 844	5 and 8
<i>Godfrey v Sony Corporation</i>, 2017 BCCA 302	9 and 13
<i>Guerin v The Queen</i>, [1984] 2 SCR 335	34
<i>HMTQ v Maxzone Auto Parts (Canada) Corp.</i>, 2012 FC 1117	7
<i>Hollick v Toronto (City)</i>, 2001 SCC 68, [2001] 3 SCR 158	13
<i>Hunt v Carey</i>, [1990] 2 SCR 959	13 and 40
<i>Jiang v Peoples Trust Company</i>, 2017 BCCA 119	14
<i>Kitchen v Royal Air Forces Association</i> , [1958] 2 All ER 241	31 and 32

AUTHORITY	Paragraph(s) Referenced in Memorandum of Argument
<i>Laboratoires Servier v Apotex</i>, 2008 FC 825	23
<i>M(K) v M(H)</i>, [1992] 3 SCR 6	28-31
<i>Massie & Renwick Limited v Underwriters' Survey Bureau Ltd.</i>, [1940] SCR 218	35
<i>McMaster University v Wilchar Construction Ltd.</i>, [1971] 3 OR 801, 1971 CarswellOnt 775 (HC) (WL CA)	33
<i>Peixeiro v Haberman</i>, [1997] 3 SCR 549	16 and 22
<i>Performance Industries Ltd. v Sylvan Lake Golf & Tennis Club Ltd.</i>, 2002 SCC 19, [2002] 1 S.C.R. 678	33
<i>Photinopoulos v Photinopoulos</i>, 92 AR 122, 1988 CarswellAlta 220 (WL CA)	32
<i>Ryan v Moore</i>, 2005 SCC 38, [2005] 2 SCR 53	2, 17-18 and 22
<i>Union Square Apartments Ltd v Academy Contractors Inc (Abalon Construction)</i>, 2016 ABQB 575	38
<i>Verizon Communications Inc. v Law Offices of Curtis v Trinko, LLP</i>, 540 US 398 (2004)	7
<i>Wood Waste Solutions Canada Inc v Associated Paving Co.</i>, 2010 ONSC 6280	17
SECONDARY SOURCES	
<i>Halsbury's Law of England</i> , 4th ed, vol 28	29

PART VII - LEGISLATION AT ISSUE

1. *Competition Act, R.S.C. 1985, c. C-34*
2. *Supreme Court Act, RSC 1985, c. S-26, s.40(1)*