

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 :

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
(Respondent)

- and -

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

INTERVENERS

FACTUM OF THE APPELLANTS, TOSHIBA CORPORATION, et al., IN RESPONSE TO INTERVENERS

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

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PART I: OVERVIEW

1. This factum responds to the submissions of the Consumers' Association of Canada ("CAC"), Consumers Council of Canada ("CCC") and Option Consommateurs ("OC"). Those interveners' submissions are flawed because they misunderstand the relationship between Parliament, provincial legislatures and the courts. Furthermore, they mischaracterize the defendants' position on this appeal. The defendants do not propose to restrict price-fixing class actions, or that there should be a merits analysis at the certification stage. Rather, the defendants submit that price-fixing claims should be subject to the same principles as any other type of harm-based claim, and that the scope of liability under the *Competition Act* should reflect Parliament's choices.

PART II: ARGUMENT

A. CAC and CCC submissions highlight faulty premises of plaintiff's position

2. CAC and CCC propose fundamental alterations to the competition regime enacted by Parliament. CCC states that "procedure must facilitate substantive outcomes",¹ and CAC states that price-fixing is "an area requiring heightened damages to strengthen deterrence". CAC then refers to the decision of the Federal Court in a *criminal sentencing case* to support an argument for permitting punitive damages and umbrella purchaser claims as additional deterrence under the statutory *civil* remedy in s. 36 of the *Competition Act*.²

3. Provincial legislatures have already calibrated the appropriate balance between procedure and substance in class proceedings legislation. And Parliament has already considered and rejected several of the suggestions made by CAC for additional deterrence:

(a) Parliament knew that treble damages were available under U.S. antitrust legislation, and the government proposed double damages in Bill C-256 (1970-71).

(b) Bill C-42 (1976-77) proposed to provide supplementary or alternative remedies

¹ CCC factum at para. 28.

² CAC factum at paras. 3, 7, 12-13, citing [R v Maxzone Autoparts \(Canada\) Corp](#), 2012 FC 1117.

besides compensatory damages.³

4. Both proposals were rejected. After extensive consultation and debate, the specific language that Parliament enacted restricts recovery to the actual damages “proved to have been suffered” by the claimant.

5. Contrary to CCC’s and CAC’s submissions, the defendants’ suggested approach to certification is not a novel one, and proposes no merits analysis. This Court has held that the plaintiff must put forward a methodology for proving class-wide harm to indirect purchasers for their claims to be certified. That methodology need not be proven to work at certification, but it must plausibly be capable of performing the required work at trial.⁴

6. Nor is it true, as CAC suggests, that defendants contend the methodology must be able to distinguish between individual class members. However, in no other area of the law would an issue be common unless one of the following conditions applied: (a) all class members were affected; (b) all members of some identifiable subset were affected; or (c) it is possible to determine with common evidence which class members were affected. Any issue that fails all of those conditions would be an individual issue in any other case, and the same principle should apply here. No reason has been provided for giving indirect purchasers more favourable treatment than direct purchasers or plaintiffs in other harm-based actions.

7. In any event, CAC’s suggestion that there is “no expert methodology capable of distinguishing between class members in an individualized fashion” goes too far. For example, the benchmarking methodology this Court accepted in *Pro-Sys* could potentially identify the individuals who were harmed: anyone who paid more than the benchmarked price.⁵

8. Finally, CAC mischaracterizes the holding of this Court in *Sun-Rype* and argues it established that the presence of unaffected members in the class is immaterial if the total overcharge can be calculated. To the contrary, *Sun-Rype* rejected the notion that harm to the

³ Bill C-256, cls. 55(1) and 80(1): Defendants’ Joint Book of Authorities for the main appeal factum (“JBA”) Tab 26; Bill C-42, c. 12 (proposed s. 31.1(1.1)): JBA Tab 24.

⁴ [*Pro-Sys Consultants v Microsoft Corporation*](#), [2013] 3 SCR 477 at paras. 115 and 118.

⁵ CAC factum at para. 20; [*Pro-Sys*](#), *ibid.*, at paras. 121-22.

class “as a whole” could lead to an aggregate damages award. The paragraph that CAC cites merely stated that defendants should not be concerned over the distribution between direct and indirect purchaser subclasses “upon the awarding of a settlement or *upon a successful action*”.⁶

B. Article 1457 CCQ is not relevant to the issue before this Court

9. Contrary to OC’s factum, the existence of a potential remedy under the *Civil Code of Québec* (“CCQ”) for persons harmed by conduct in breach of the *Competition Act* does not assist in assessing the effect of s. 36 for overlapping common law remedies. First, even in Quebec the common law provides the interpretive context for public law statutes such as the *Competition Act*, since only private law matters are governed by the civil law.⁷ Second, where such statutes intrude into property and civil rights, the federal *Interpretation Act* provides that the law applicable to such rights in a particular province may be considered, but only if it is necessary to do so.⁸

10. The application of the civil law where necessary in Quebec does not mean that similar principles apply outside of Quebec or that there must be harmonization with the rest of Canada. As the Federal Court of Appeal held in *French v Canada*, “[t]he objective of sections 8.1 and 8.2 of the *Interpretation Act* is to recognize the role of the civil law and the common law in the application of federal legislation which necessarily entails the possibility of diverging results.”⁹

11. In any event, the conflict raised by the enactment of a statutory cause of action is that between Parliament’s power to weigh multiple competing interests and implement a calibrated solution, and the power of the courts to develop incremental common law based on the facts of particular cases. That issue does not arise regarding article 1457, since Parliament and the Quebec legislature are equally supreme within their respective areas of legislative competence. However, Parliament has the power to pre-empt the courts from developing inconsistent

⁶ CAC factum at para. 21, citing to [Sun-Rype Products Ltd v Archer Daniels Midland Company](#), [2013] 3 SCR 545 at para. 20 (emphasis added, and see also paras. 75 and 76).

⁷ See e.g. [St-Hilaire v Canada \(Attorney General\)](#), 2001 FCA 63 at paras. 25-54 (Decary J.A., dissenting in part, although Létourneau and Desjardins J.J.A., agreed with the relevant analysis).

⁸ *Interpretation Act*, RSC 1985, c I-21, [ss. 8.1 and 8.2](#).

⁹ [French v Canada](#), 2016 FCA 64 at para. 43.

common law remedies, and that is what it chose to do in 1975 when it enacted the predecessor to s. 36 with full awareness of the Civil Code. The responsible Minister stated to the House of Commons Finance, Trade and Economic Affairs Committee that “The Civil Code provides the right to sue, but not the Common Law, and we would like to put them both on equal footing.”¹⁰

12. To adopt OC’s alternative suggestion that article 1457 *CCQ* should inform the conflict between the *Competition Act* and the common law would paradoxically enable the Quebec legislature to pre-empt Parliament.

C. Civil law causation principles exclude umbrella purchasers

13. Contrary to OC’s submissions regarding umbrella purchasers, civil law principles of causation support the defendants’ arguments that there must be a limit to liability under s. 36. Further, even if it were necessary to consider those principles for claimants in Quebec (an issue not engaged on this appeal), they do not support a cause of action for umbrella purchasers.

14. To have a viable cause of action under civil law, umbrella purchasers would need to demonstrate that the alleged prejudice (i.e. allegedly higher prices) of each class member was *an immediate and direct* result of the alleged cartel participants’ fault (article 1607 *CCQ*).¹¹

15. The directness and immediacy necessary to assert causation does not exist for umbrella purchaser claims. The price of a product purchased by an umbrella purchaser is not determined by the participants of an alleged “cartel”. Each non-participating vendor makes its own independent decisions as to the products, prices and terms of its sales to customers. Each may choose, for many reasons, to set its prices below (or above) rather than at the same level as the prices of its competitors. Pricing below the prices charged by alleged cartel members can provide an opportunity to increase sales, market share and profits. Moreover, each non-participating vendor may set its prices while having little or no knowledge of the prices agreed to between cartel members.

16. Even if a causal connection existed between the alleged fault and the alleged harm to

¹⁰ House of Commons Standing Committee on Finance, Trade and Economic Affairs, *Minutes of Proceedings and Evidence*, 30th Parl., 1st Sess., No. 45 (8 May 1975) at 11, 18-19: JBA Tab 29.

¹¹ *Civil Code of Québec*, CQLR c CCQ-1991, [art. 1607](#).

umbrella purchasers, it would be broken by the independent pricing decisions of the various non-participating vendors. An independent event that occurs outside of the at-fault parties' control constitutes a *novus actus interveniens*.¹²

17. OC relies on Kasirer J.A.'s comments in *Infineon* to argue that Quebec courts have recognized umbrella purchaser claims.¹³ However, Kasirer J.A.'s comments were not based on a detailed assessment of causation principles to umbrella purchasers. He did not consider the impact of the independent choices by non-participating vendors when setting their own prices or the doctrine of *novus actus interveniens*. Nor did Kasirer J.A. consider whether the allegedly anti-competitive conduct, and market environment it may create, constituted an "occasion" in which (rather than the "cause" by which) the prices paid by umbrella purchasers may be affected.¹⁴

18. When addressing the causation criteria in *Infineon*, this Court analyzed the matter in relation to *indirect purchasers*.¹⁵ It has not yet made a separate assessment of what can constitute a *prima facie* demonstration of causation (if any) for umbrella purchasers under Quebec civil law.

19. Further, the fault requirement that an umbrella purchaser relies upon in this and similar cases is the breach of s. 45 of the *Competition Act* as it existed up until early 2010. That provision refers to agreements, arrangements or conspiracies to raise prices (unreasonably), reduce supply (unduly) or otherwise lessen competition (unduly).¹⁶ In each case, the agreement, arrangement or conspiracy relates to the participants' sales to their customers, and does not involve the umbrella purchasers or the vendors that supply them.

¹² Baudouin, DesLauriers and Moore, *La responsabilité civile*, Volume 1, 8th Edition, Cowansville, Éditions Yvon Blais Editions, 2014, at paras. 1-691, 1-693-1-695: Book of Authorities, Tab 1.

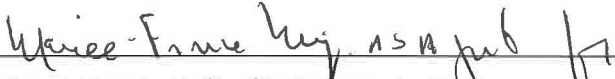
¹³ OC factum at paras. 25-26; [Option Consommateurs c Infineon Technologies, a.g.](#), 2011 QCCA 2116 at paras. 123-24.

¹⁴ For an explanation concerning the distinction between the "occasion" and "cause" as it relates to causation see Baudouin, *supra* note 12 at paras. 1-685 and 1-687: Book of Authorities, Tab 1.

¹⁵ [Infineon Technologies AG v. Option consommateurs](#), [2013] 3 SCR 600 at paras 142, 143

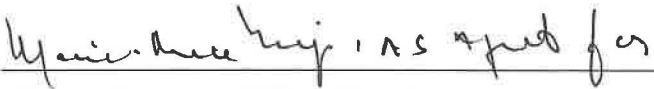
¹⁶ *Competition Act*, RSC 1985, c C-34, [ss. 45\(1\)-\(2.2\)](#) of the pre-March 12, 2010 Act.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of December, 2018.



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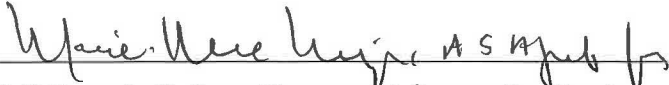
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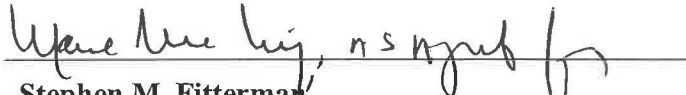


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PART III: TABLE OF AUTHORITIES

Jurisprudence	Cited At
<u>French v Canada</u> , 2016 FCA 64	¶10
<u>Infineon Technologies AG v Option consommateurs</u> , 2013 SCC 59, [2013] 3 SCR 600	¶18
<u>Option Consommateurs c Infineon Technologies, a.g.</u> , 2011 QCCA 2116	¶17
<u>Pro-Sys Consultants v Microsoft Corporation</u> , [2013] 3 SCR 477	¶5, 7
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<u>St-Hilaire v Canada (Attorney General)</u> , 2001 FCA 63	¶9
<u>Sun-Rype Products Ltd v Archer Daniels Midland Company</u> , [2013] 3 SCR 545	¶8
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Bill C-256, An Act to promote competition, to provide for the general regulation of trade and commerce, to promote honest and fair dealing, to establish a Competitive Practices Tribunal and the Office of the Commissioner, to repeal the Combines Investigation Act and to make consequential amendments to the Bank Act, 28 th Parl, 3d Sess (29 June 1971)	¶3
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Code civil du Québec, CQLR c CCQ-1991, [art. 1607](#).

Competition Act, RSC 1985, c C-34, [ss. 36 and 45\(1\)](#)

Loi sur la concurrence, LRC 1985 c C-34, [ss. 36 and 45\(1\)](#).

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LE 12 MARS 2010

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