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

BETWEEN: Court File No.: 37809

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)

Court File No.: 37810

BETWEEN:

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 CORPROATION, BENQ AMERICA CORPORATION and BENQ CANADA CORP.

APPELLANTS
(Appellants)

- and -

NEIL GODFREY

RESPONDENT
(Respondent)

- and -

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

INTERVENERS

FACTUM OF THE INTERVENER, CONSUMERS' ASSOCIATION OF CANADA

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

SOTOS LLP
Barristers & Solicitors
Suite 1200,180 Dundas Street West
Toronto, ON M5G 1Z8

Jean-Marc Leclerc
Mohsen Seddigh

Tel: (416) 977-0007
Fax: (416) 977-0717
Email: jleclerc@sotosllp.com
Email: mseddigh@sotosllp.com

Counsel for the Intervener,
Consumers' Association of Canada

MICHAEL J. SOBKIN
Barrister & Solicitor
331 Somerset Street West
Ottawa, ON K2P 0J8
Tel : 613.282.1712
Fax: 613.288.2896
E-mail: msobkin@sympatico.ca

Ottawa agent for Counsel for the
Intervener, Consumers' Association
of Canada

ORIGINAL TO:

THE REGISTRAR
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

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

Counsel for the Appellants Panasonic
Corporation, Panasonic Corporation of North
America and Panasonic 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
Panasonic Corporation, Panasonic Corporation
of North America and Panasonic Canada Inc.

FASKEN MARTINEAU DUMOULIN LLP
2400 – 333 Bay Street
P.O. Box 20
Toronto, ON M5H 2T6

Laura Cooper
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
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.

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 Toshiba Corporation, Toshiba Samsung Storage Technology Corporation, Toshiba America Information Systems, Inc., Toshiba Samsung Storage Technology Korea Corporation and Toshiba of Canada Limited

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 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.

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 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

Counsel for the Appellants BenQ Corporation, BenQ America Corporation and BenQ Canada Corp.

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 BenQ Corporation, BenQ America Corporation and BenQ Canada Corp.

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

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto ON M5V 3J7

Sandra A. Forbes
Tel: 416.863.5574
Email: sforbes@dwpv.com

Adam Fanaki
Tel: 416.863.5564
Email: afanaki@dwpv.com
Tel: 416.863.0900
Fax: 416.863.0871

Counsel for the Intervener Canadian Chamber of Commerce

GOWLING WLG (Canada) LLP
Suite 2600
160 Elgin Street
Ottawa, Ontario K1P 1C3

Matthew Estabrooks
Tel: 613.788.3573
Fax: 613.788.3573
Email: matthew.estabrooks@gowlingwlg.com

Ottawa agent for Counsel for the Intervener Canadian Chamber of Commerce

CAMP FIORANTE MATTHEWS MOGERMAN
#400-856 Homer Street
Vancouver, British Columbia, V6B 2W5

Reidar M. Mogerman
David Jones
Katie Duke
Tel: 604.689.7555
Fax: 604.689.7554
E-mail: rmogerman@cfmlawyers.ca

Counsel for the Respondent, Neil Godfrey

MICHAEL J. SOBKIN
Barrister & Solicitor
331 Somerset Street West
Ottawa, ON K2P 0J8
Tel : 613.282.1712
Fax: 613.288.2896
E-mail: msobkin@sympatico.ca
Ottawa agent for Counsel for the Respondent, Neil Godfrey

HARRISON PENSA 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

Counsel for the Intervener, Consumers Council of Canada

MICHAEL J. SOBKIN
Barrister & Solicitor
331 Somerset Street West
Ottawa, ON K2P 0J8
Tel : 613.282.1712
Fax: 613.288.2896
E-mail: msobkin@sympatico.ca

Ottawa agent for Counsel for the Intervener, Consumers Council 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

Counsel for the Intervener, Option consommateurs

MICHAEL J. SOBKIN
Barrister & Solicitor
331 Somerset Street West
Ottawa, ON K2P 0J8
Tel : 613.282.1712
Fax: 613.288.2896
E-mail: msobkin@sympatico.ca

Ottawa agent for Counsel for the Intervener, Option consommateurs

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PART I - OVERVIEW AND STATEMENT OF FACTS

1. The intervener Consumers' Association of Canada ("**CAC**") is an independent organization founded in 1947, with a mandate that includes consumer advocacy.[1] CAC takes no position on the facts.

2. This appeal raises issues regarding the viability of umbrella purchaser claims, whether the *Competition Act*[2] is a complete code, with the result that class members' remedies are limited to statutory damages, and the level of evidence required at certification to provide "some basis in fact" that harm can be determined on a class-wide basis.

3. CAC's submissions address these issues through the lens of the scheme and object of the Act. A key aspect of the Act is private enforcement, with the resulting goal of deterrence. The issues at stake concern crucial tools to achieve this goal. They ultimately go to the likelihood that wrongdoers will be required to account for their misconduct and the seriousness of the consequences that wrongdoers face in respect of their civil liability in Canada. The appellants' arguments seek to unfairly limit the arsenal in an area requiring heightened damages to strengthen deterrence.

PART II - POSITION ON THE QUESTIONS IN ISSUE

4. This appeal raises questions about whether umbrella purchasers have a cause of action against cartel defendants and whether the plaintiffs' expert methodology must be capable of showing harm to every class member.

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[1] Online: Consumers' Association of Canada <http://www.consumer.ca/>.

[2] RSC, 1985, c C-34 [the Act].

5. CAC submits that the policy objective of deterrence requires the recognition of the umbrella purchaser cause of action. Further, if the Court imposes a requirement that the expert methodology be capable of showing harm to every class member, as urged by the appellants, private antitrust enforcement would become eroded to the detriment of deterrence.

PART III - ARGUMENT

The seriousness of violations of the Act

6. Many decisions have recognized the seriousness of violations of competition laws. For example, in *General Motors of Canada Limited v City National Leasing*,[3] this Court described the purpose of the predecessor to the Act as discouraging "forms of commercial behaviour viewed as detrimental to Canada and the Canadian economy,"[4] concluding that "[t]he presence or absence of healthy competition may affect the welfare of the economy of the entire nation."[5] In *R v Nova Scotia Pharmaceutical Society*,[6] this Court held that price-fixing provisions were "one of the pillars of the Act"[7] that "remains at the core of the criminal part of the Act."[8]

7. Lower courts have expressed similar sentiments. In *Her Majesty the Queen v Maxzone Auto Parts (Canada) Corp*,[9] Chief Justice Crampton held that "[p]rice fixing agreements, like other forms of hard core cartel agreements, are analogous to fraud and theft."[10]

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[3] [1989] 1 SCR 641, [1989] SCJ No 28 (QL) [*General Motors*].

[4] *Ibid* at para 55 (QL).

[5] *Ibid* at para 65.

[6] [1992] 2 SCR 606, [1992] SCJ No 67 (QL).

[7] *Ibid* at para 83 (QL).

[8] *Ibid* at para 87.

[9] 2012 FC 1117 [*Maxzone*].

[10] *Ibid* at para 54. Chief Justice Crampton has extensive expertise in competition law matters. See online: Federal Court <http://www.fct-cf.gc.ca/fc_cf_en/Bio/Crampton.html>.

Importance of private enforcement

8. Private enforcement is a critical part of Canada's competition laws. The Court in *General Motors* recognized the important role private enforcement plays, concluding that the statutory remedy for damages was a "core provision of the very pith and substance of the Act,"[11] with an "intimate tie"[12] to the purpose of the Act. Private enforcement is "one of the arsenal of remedies created by the Act to discourage anti-competitive practices."[13] Its purpose "is to help enforce the substantive aspects of the Act."[14] The Court concluded there was a "close congruence between the goal of enhancing healthy competition in the economy and s. 31.1 [now s. 36], which creates a private remedy dependent for its effectiveness on individual initiative."[15] It is "as much a part of the legislative scheme regulating competition throughout Canada as is the criminal action for fines and imprisonment or the administrative action involving an inquiry or the reduction of customs duties."[16]

9. The Court in *General Motors* concluded that a combination of public and private remedies creates "a more complete and more effective system of enforcement in which public and private initiative can both operate to motivate and effectuate compliance."[17] The Court cited U.S. Supreme Court cases that were "premised on a recognition that the purposes of the antitrust laws are

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[11] *General Motors*, supra note 3 at para 72.

[12] *Ibid* at para 71.

[13] *Ibid* at para 70.

[14] *Ibid* at para 48.

[15] *Ibid* at para 71.

[16] *Ibid* at para 72.

[17] *Ibid* at para 72, citing *Attorney General of Canada v Québec Ready Mix Inc*, 1985 CanLII 3063 (FCA).

best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behaviour in violation of the antitrust laws."[18]

Importance of umbrella purchaser damages for deterrence

10. A U.S. commentator explains that "umbrella effects" (when a cartel causes prices in the rest of the market to increase) are a "virtually unawarded damage from market power."[19] The example offered is an increase in prices charged by members of the Organization of Petroleum Exporting Countries, resulting in impact on the prices charged by non-cartel members:

> For example, since 1970 the Organization of Petroleum Exporting Countries ("OPEC") never produced even 60% of the entire world's supply of petroleum and in most years produced less than 50%. Yet, when OPEC used its market power to raise the price of petroleum that its members produced, prices also increased for the petroleum sold by non-cartel members.[20]

11. By failing to take into account umbrella effects, penalties "do not adequately reflect the actual amounts by which cartels typically raise prices."[21] Umbrella effects represent a net harm to others from antitrust activity[22] and deserve to be recoverable as "losses" under Canadian law.

Importance of common law punitive damages for deterrence

12. Deterrence requires significant financial penalties. Effective deterrence is not obtained by simply requiring the defendant to pay losses on a 1:1 basis. As the Federal Court noted in *Maxzone*, penalties in price-fixing cases "must be set sufficiently high to ensure that they are

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[18] *General Motors*, supra note 3 at para 74.

[19] Robert H Lande, "Five Myths About Antitrust Damages" (2006) 40 USF L Rev 651 at 654 [Lande 2006].

[20] *Ibid* at 654.

[21] *Ibid* at 668.

[22] Robert H Lande, "Why Antitrust Damage Levels Should be Raised" (2004) 16:4 Loy Con L Rev 329 at 339 [Lande 2004].

more than a mere license fee or a cost of doing business."[23] To the same effect, in *Mancinelli v Royal Bank of Canada*,[24] the Ontario Superior Court of Justice held that a proposed settlement in a price-fixing class action must be more than simply "a licence fee for wrongdoing."[25]

13. The court in *Maxzone* gave an example of a conspiracy in which additional profits from a cartel were $1 million, and the combined probability of detection, prosecution and conviction was 50 percent. In that scenario, the court held, "the fine would need to exceed $2 million to render the expected value of joining the prospective cartel negative. In other words, to be an effective deterrent in this example, the fine would need to be more than double the expected gain from the Overcharge."[26]

14. There is limited data on the rate of detection of illegal cartels.[27] A former U.S. Assistant Attorney General estimated that antitrust enforcers detect no more than 10 percent of cartels.[28] The Organisation for Economic Co-operation and Development estimated one in six or seven cartels are detected.[29]

15. Similar conclusions about the need for damage awards over and above simple gains are almost universally accepted in the U.S., where treble damage awards are available. Trebling in

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[23] *Maxzone*, supra note 9 at para 60.

[24] 2017 ONSC 2324.

[25] *Ibid* at para 54.

[26] *Maxzone*, supra note 9 at para 61.

[27] See Maurice E Stucke, "Morality and Antitrust" (2006) 2006:1 Colum Bus L Rev 443 at 457 [Morality and Antitrust].

[28] *Ibid* at 457, fn 35.

[29] *Ibid*.

part "reflects the belief that some price-fixing and monopolization offences are not detected."[30] From the perspective of "optimal deterrence, if damages and fines only total actual damages, firms would be undeterred from committing violations. For this reason, most agree that there should be some kind of multiplier."[31]

16. While Canadian civil antitrust awards do not provide for multipliers like the U.S., punitive damages are an alternative tool that should be available to encourage deterrence under Canadian law. The appellants' arguments that s. 36 is a "complete code" would eliminate the availability of common law punitive damages or restitutionary remedies, for example. This would decrease the deterrent effect of civil penalties in Canada.

Importance of class proceeding certification for deterrence

17. Behaviour modification is a related principle to deterrence. The Court in *Hollick v Toronto (City)*[32] described behaviour modification as one of the three principal advantages of class actions.[33]

18. There is a "powerful economic barrier" to bringing individual actions for antitrust violations. Individual actions are not a "realistic or viable option," even for persons with large purchases.[34] Furthermore, in cases where the Competition Bureau does not pursue any action against a cartel, the class action offers the only procedure available to serve the objectives of

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[30] William M Landes, "Optimal Sanctions for Antitrust Violations" (1983) 50:2 U Chicago L Rev 652 at 676.

[31] Lande 2004, supra note 22 at 335.

[32] 2001 SCC 68, [2001] 3 SCR 158.

[33] *Ibid* at para 27.

[34] *Crosslink Technology Inc v BASF Canada*, 2014 ONSC 1682 at para 113, leave to appeal to Div Ct refused 2014 ONSC 4529.

deterrence and behaviour modification.[35] As a result, class actions are an essential aspect of enforcement and therefore deterrence. One U.S. study concluded that class actions provide the strongest deterrence against collusion.[36]

19. If class action certification in antitrust cases is restricted, there will be no civil liability. As described by one U.S. commentator, "the reality is that little or no effective private prosecution of antitrust cases will occur in most cases if a class isn't certified. [...] That possibility has little to do with the merits and yet it provides a strong reason for potential wrongdoers to take a chance on violating the law."[37] The more challenging the test for certification, the less defendants will be deterred from engaging in antitrust activities.

20. As described in this Court's decision in *Microsoft*, expert evidence is a critical part of any antitrust certification motion. Plaintiffs' expert evidence must provide a methodology to establish a reasonable prospect of showing harm to the indirect purchaser level.[38] We are aware of no decision involving an expert methodology that is capable of distinguishing between class members in an individualized fashion, the impossible standard the defendants exhort in their submissions. Since *Microsoft*, multiple courts have rejected arguments that the expert methodology must be capable of showing harm to every class member or to any particular class member.[39]

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[35] *Pro-Sys Consultants Ltd v Microsoft Corporation*, [2013] 3 SCR 477 at para 141 [*Microsoft*].

[36] Michael Kent Block et al, "The Deterrent Effect of Antitrust Enforcement" (1981) 89:3 J Pol Econ 429 at 444.

[37] Lande 2006, supra note 19 at 660 fn 39.

[38] *Microsoft*, supra note 35 at para 115: "In indirect purchaser actions, this means that the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain."

[39] See e.g., *Shah v LG Chem, Ltd*, 2015 ONSC 6148; *Fanshawe v Hitachi*, 2017 ONSC 2791; *Watson v Bank of America Corporation*, 2015 BCCA 362.

21. From a deterrence perspective, defendants should not be allowed to retain the fruits of their unlawful conduct due to excessive concern regarding proper allocation. As the academic commentary has stated: "[I]t does not matter whether direct purchasers or indirect purchasers recover the overcharges. It would be scandalous if defendants were permitted to keep their overcharges due to excessive concern about whether these overcharges should be given to the direct purchasers instead of to the indirect purchasers."[40] So long as the total amount of overcharge can be accurately and fairly calculated to determine the quantum of damages on behalf of the class, defendants should be unconcerned as to whether the class potentially includes outliers with no actual losses.[41]

22. This Court's decision in *Microsoft* greatly clarified the criteria for certification of antitrust class actions. Subsequent to *Microsoft*, many antitrust class actions have been successfully certified and have led to numerous settlements and distributions of settlement funds among class members.[42] Against the background of *Microsoft*, the defendants' arguments seek to decrease the efficacy of class actions as a means of private enforcement and, as a result, deterrence.

Conclusion

23. On this appeal, defendants seek to limit who can claim for antitrust damages, the available remedies for injured persons, and the ability to effectively pursue antitrust cases. Their arguments run contrary to the objectives of the Act.

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[40] Lande 2006, supra note 19 at 662, fn 45.

[41] *Sun-Rype Products Ltd v Archer Daniels Midland Company*, [2013] 3 SCR 545 at para 20.

[42] See e.g., *Fanshawe v Sony*, 2018 ONSC 2629; *Schimpf v Samsung Electronics Co Ltd*, 2015 BCSC 2154; *Airia Brands v Air Canada*, 2015 ONSC 5352; *Mancinelli v Royal Bank of Canada*, 2018 ONSC 4192.

PART IV - COSTS

24. CAC seeks no costs and requests that no costs be awarded against it.

PART V - ORAL ARGUMENT

25. By an Order dated October 16, 2018, the Court granted CAC leave to present oral argument not exceeding five minutes at the hearing of this appeal.

DATED at Toronto, Ontario, this 27th day of November, 2018

Jean-Marc Leclerc

Mohsen Seddigh

Counsel for the Intervener, Consumers' Association of Canada

PART VI - TABLE OF AUTHORITIES

CASES	AT PARAGRAPHS
General Motors of Canada Ltd v City National Leasing, [1989] 1 SCR 641, [1989] SCJ No 28 (QL)	Paras 7, 9 and 10
R v Nova Scotia Pharmaceutical Society, [1992] 2 SCR 606, [1992] SCJ No 67 (QL)	Para 7
Her Majesty the Queen v. Maxzone Auto Parts (Canada) Corp, .2012 FC 1117	Paras 8, 13 and 14
Attorney General of Canada v Québec Ready Mix Inc, 1985 CanLII 3063 (FCA)	Para 10
Hollick v Toronto (City), 2001 SCC 68	Para 18
Mancinelli v. Royal Bank of Canada, 2017 ONSC 2324	Para 13
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Crosslink Technology Inc v BASF Canada, 2014 ONSC 1682 at para 113, leave to appeal to Div Ct refused 2014 ONSC 4529	Para 19
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Fanshawe v Sony, 2018 ONSC 2629	Para 23
Schimpf v Samsung Electronics Co Ltd, 2015 BCSC 2154	Para 23
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SECONDARY SOURCES	**AT PARAGRAPHS**
Michael Kent Block et al "The Deterrent Effect of Antitrust Enforcement" (1981) 89:3 J Pol Econ 429	Para 19
Robert H Lande, "Why Antitrust Damage Levels Should be Raised" (2004) 16:4 Loy Con L Rev 329	Paras 12 and 16
Robert H Lande, "Five Myths About Antitrust Damages" (2006) 40 USF L Rev 651 at 654	Paras 11 and 12
William M Landes, "Optimal Sanctions for Antitrust Violations" (1983) 50:2 U Chicago L Rev 652	Para 16
Maurice E Stucke, "Morality and Antitrust" (2006) 2006:1 Colum Bus L Rev 443 at 457	Para 15

PART VII - STATUTES

Competition Act, RSC 1985, c C-34