

# Supreme Court of Canada Decision Provides Important Access to Justice for Victims of Price-Fixing



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TORONTO, Sept. 23, 2019 /CNW/ - The following statement is being issued by Siskinds LLP (Toronto, Canada) regarding the Supreme Court of Canada decision, *Pioneer Corp. v Godfrey*, 2019 SCC 42. The *Godfrey* decision arose from an appeal of the certification decision. Siskinds LLP, together with Camp Fiorante Matthews Mogerman, were counsel to the plaintiff in the appeal.

This class action relates to the alleged unlawful price-fixing of optical disc drives, which are used to read/write data to CDs, DVDs, Blu-ray drives, etc. The plaintiff alleged that the defendants agreed to sell these optical disc drives at higher prices. This is called price-fixing and is unlawful under the *Competition Act*. Price-fixing has been described as the "very antithesis of the *Competition Act's* objective" - maintaining and encouraging competition in Canada.

The SCC decision represents an important outcome from an access to justice perspective. The decision provides clarity on who can assert a claim based on price-fixing and what claims can be brought.

First, the SCC held that "umbrella purchasers" have a cause of action under the *Competition Act*. Umbrella purchasers are people who purchased the relevant product directly or indirectly from a non-defendant manufacturer. Their claim is based on the theory that defendants' conduct resulted in market prices being artificially inflated and non-defendant manufacturers relied on those inflated prices to increase their own prices. The SCC held that allowing umbrella purchaser claims is consistent with the deterrence and compensatory objectives of the *Competition Act*. The SCC found that "allowing umbrella purchaser claims furthers deterrence because it increases the potential liability falling upon those who engage in anti-competitive behaviour". The SCC found that the objective of compensation was furthered because allowing such claims "affords umbrella purchasers recourse to recover from loss arising from what, for the purpose of these appeals, is assumed to have been anti-competitive conduct."

Second, the SCC held that the limitation period contained in the *Competition Act* is subject to discoverability (i.e., an assessment of when the conduct could have been reasonably discovered by the plaintiff). Pioneer, a defendant in the case, argued that because the claim was commenced more than two years after the alleged conspiracy, the claim was limitation barred under the *Competition Act*. The SCC rejected this argument, noting among other things, that conspiracies are secretive in nature and not applying the discoverability principle would "create perverse incentives, encouraging continued concealment of anti-competitive behaviour until the two-year limitation period has elapsed."

Third, the SCC held that plaintiffs are not precluded from bringing common law tort and equitable claims alongside a *Competition Act* claim. The SCC noted that the claims are not duplicative – the common law claims are subject to different limitation periods and allow for a broader set of remedies.

Fourth, the SCC rejected defendants attempt to increase the bar for the expert evidence required by plaintiffs at certification. The SCC held that it was not necessary to provide a methodology to establish that each and every class member suffered a loss nor must the methodology be capable of establishing which class members did or did not suffer a loss. The SCC affirmed its earlier decision in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 that the methodology need only establish that loss reached one or more claimants at the purchaser level of the distribution chain. In an indirect purchaser claim, this means providing a methodology to establish pass-through to the indirect level. This approach provides a fair and reasonable evidentiary requirement.

### **About Siskinds**

Siskinds LLP is a full-service law firm with offices in Toronto, Canada, and London, Canada. Siskinds LLP is the largest plaintiff-side class action firm in Canada.

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CONTACT: Linda Visser, Siskinds LLP, 519-660-7700, [linda.visser@siskinds.com](mailto:linda.visser@siskinds.com)

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