

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

JEFFREY CHARLES BONDY and NICHOLAS JOHN MacPHERSON

Plaintiffs

and

**TOSHIBA OF CANADA LIMITED
AND TOSHIBA CORPORATION**

Defendants

A Proceeding under the Class Proceedings Act

STATEMENT OF DEFENCE

1. The Defendants, Toshiba Corporation (“Toshiba Corp.”) and Toshiba of Canada Limited (“TCL”), admit the allegations in paragraphs 6 and 7 of the Amended Amended Statement of Claim (“Claim”).
2. Except as otherwise expressly admitted hereinafter, the Defendants deny all other allegations in the Claim.

The Class and the Parties

3. Pursuant to the Certification Order of Justice Brockenshire dated March 2, 2007 (the “Certification Order”), the Class was defined as:

“All persons in Canada who purchased, not for the purpose of resale, a new Toshiba brand Satellite Series 5000 notebook computer model X1Z or Z59 from a Canadian retailer.”

The Toshiba brand Satellite Series 5000 notebook computers models X1Z and Z59 are hereinafter collectively referred to as the “Notebooks”.

4. The Plaintiffs Jeffery Bondy (“Bondy”) and Nicholas MacPherson (“MacPherson”) are individuals residing in Windsor, Ontario, who were trained and employed as Information Technology (“IT”) workers. The Plaintiffs have alleged that they each purchased the model X1Z Notebook from different retailers at different prices.
5. Toshiba Corp. is a Japanese corporation. Toshiba Corp. designed and manufactured the Notebooks. TCL is a corporation duly incorporated under the provisions of the *Canadian Business Corporations Act*. TCL marketed and distributed the Notebooks in Canada.
6. Contrary to the allegations at paragraph 9 of the Claim, the Defendants did not license retailers to market and sell notebooks on their behalf. Neither Toshiba Corporation nor TCL controlled or dictated how retailers conducted their business or how and on what terms they marketed or sold the Notebooks to their customers.
7. The Z59 model of the Notebook was first distributed by TCL in Canada in or about October of 2001. The X1Z model was distributed sometime in or about January of 2002.

The Notebooks and their Design and Performance

8. The Plaintiffs allege that there was a design defect in the Notebooks that caused the Notebooks to overheat, which lead to performance degradation contrary to unspecified “stated performance specifications” of the Notebooks. More specifically, the Plaintiffs allege that, if and when the Notebooks repeatedly performed complex and difficult processor intensive operations or tasks (“processor intensive tasks”), the Notebooks would overheat and performance

would slow or stop. The Plaintiffs allege that the Notebook should have been capable of “functioning continuously at maximum performance” during such processor intensive tasks.

9. The Plaintiffs do not allege that the performance of the Notebooks was degraded or unsatisfactory when the Notebooks performed non-intensive or usual day-to-day computer operations or tasks.
10. A computer is a system. It is comprised of several different components, selected by the designer, to achieve a balance among various attributes such as, *inter alia*, performance, reliability, size, weight, price and cost of ownership over time.
11. The central processing unit (“CPU”) or processor is but one of many components of a computer that contributes to its processing capabilities and performance. A CPU or processor incorporates various features, only one of which is the clock speed of the CPU, which in this case was 1.1 GHz. The performance of a computer does not depend solely on the clock speed of the CPU.
12. The Notebooks were designed to, and did, provide strong overall performance at a competitive price, particularly when compared to other notebook computers available at the relevant time.
13. Several of the features and capabilities of the Notebooks were innovative and unavailable in other notebook computers in the market at the relevant time, including but not limited to the following:
 - a. a high resolution 15 inch UXGA 1,600x1,200 display LCD screen;
 - b. an nVidia GeForce 2 Go or nVidia GeForce4 440 graphics processor; .
 - c. a modular bay, which allowed consumers to customize their Notebooks;
 - d. an LCD display and control panel at the front of the Notebook;
 - e. DVD/CD-RW player;

- f. connection ports for, *inter alia*, still and video cameras, CompactFlash (CF) and SecureDigital (SD) data storage cards, IEEE 1394 (i.Link or FireWire) and MP3 players;
- g. a V90 modem;
- h. a 10/100 Mbps Ethernet adapter;
- i. utilizing the new Universal Serial Bus standard to connect to peripheral devices; and
- j. high quality Harmon-Kardon speakers and sub-woofer.

14. The Defendants deny that the Notebooks had any design defect, overheated, failed or suffered from performance degradation as alleged by the Plaintiffs.

15. The Notebooks were designed in accordance with accepted standards. The use of the Intel Pentium III 1.1 GHz processor was not a defect or error. Moreover, the design of the Notebooks incorporated accepted and effective mechanisms to address power and heat management, including (but not limited to) controlling heat generation by reducing the effective processor frequency (also known as “throttling”).

16. Such throttling was introduced by CPU designers, including IBM and Intel, to control heat generation and power consumption in personal computers. Processors used in personal computers include throttling as a fundamental element of their design. Computer designers and manufacturers routinely make use of throttling to manage heat in their systems.

17. Contrary to the allegation in paragraph 18(n) of the Claim, notebook computers are not designed to function continuously at maximum performance or speed. To the contrary, throttling of such computers, including the Notebooks, is an industry accepted and specific design requirement or feature. The presence of a throttling feature in the Notebooks is not a design defect. The throttling feature is referred to in the manuals that accompanied the Notebooks. Actual throttling of a

Notebook could occur in only rare and very limited circumstances. Even in such rare and limited circumstances, throttling would not negatively affect the performance or use of the Notebook from the user's perspective.

18. In accordance with established and accepted industry practices, and as is otherwise common in the industry, the Defendants released updates to a basic built-in layer of software in the Notebooks, known as the Basic Input/Output System ("BIOS"). The BIOS updates referred to in paragraph 15 of the Claim did not cripple or reduce the performance of the Notebooks as alleged. The Defendants plead that these BIOS improved the potential overall performance of the Notebooks.

Allegations of Negligence

19. Further, the Defendants deny that, as manufacturer and distributor, they owed any duty to the Plaintiffs or the Class for which the Defendants could be held liable in negligence. More particularly, there is no cause of action in negligence against a non-contracting party for pure economic loss suffered in connection with a product, where the product in question is not dangerous. The Notebooks are not, and are not alleged to be, dangerous. The claims advanced by the Plaintiffs are for pure economic losses.

20. The Defendants further assert that a duty of care to ensure that products were of merchantable quality and fit for their intended purpose as alleged by the Plaintiffs is a statutory duty arising only under the Sale of Goods Act as between a seller and direct buyer. Contrary to paragraph 16 of the Claim, there is no such duty of care owed by the Defendants to the Class. The Plaintiffs and the other Class members purchased their Notebooks from retailers, not from the Defendant manufacturer and distributor.

21. In any event, even if there was some such general duty in tort as alleged by the Plaintiffs (which is denied), the Defendants did not breach it.

22. The Defendants assert that, if the Plaintiffs or the other Class members experienced any performance degradation while operating their Notebooks, the cause of such degradation was not the alleged defect set out in the Claim.
23. The causes of performance degradation or problems for a computer are varied and many. The factors that may affect the performance of an individual computer may include, but are not limited to the following:
- a. user abuse or contamination of the computer;
 - b. improper use or operation of the computer;
 - c. wear, tear and lifespan of the components of the computer;
 - d. improper care and maintenance of the computer;
 - e. dust and lint blockages of the fan, remote heat exchanger and other components involved in heat management;
 - f. user configuration errors and incompatibility of both software and hardware; and
 - g. viruses, spyware or malware.
24. The Defendants allege that any performance degradation experienced by the Plaintiffs and the other Class members resulted from the above factors or other factors that are unrelated to the defect alleged in the Claim.
25. The Defendants assert that the Plaintiffs cannot, on a class-wide basis, establish any common design defect, common performance degradation, common failure of the Notebooks or a common cause for any alleged performance issues for each and every Class member as described in the Claim.
26. The Defendants plead that each and every allegation and instance of performance degradation (which degradation is not admitted but is denied) may be unique and cannot be determined without an inspection and testing of each individual Notebook. It is necessary to evaluate each Class Members' individual Notebook

and each alleged incident of performance degradation to determine the source, if any, for the alleged incident of performance degradation.

27. The Defendants further assert that MacPherson and Bondy are relatively sophisticated computer users whose usage and operation of the Notebook would not be typical or representative of the other members of the Class.

28. Each Class member could and did use the Notebooks for varied operations or tasks. Many, if not most, of the Class members would not have used, or expected to use, the Notebooks to perform any processor intensive tasks and, accordingly, could not have experienced the performance degradation alleged in the Claim. The Class members would typically and commonly use the Notebooks to perform non-intensive tasks.

29. If the Plaintiffs or any other Class members did suffer any performance degradation as alleged in the Claim (which is denied), the Defendants assert that such degradation was trivial, and does not justify any award of damages or any other relief. The Defendants plead and rely upon the doctrine of *de minimus non curat lex*.

Representations

30. At all material times, TCL and not Toshiba Corp. determined what marketing would be used, if any, in connection with the distribution of the Notebooks. The extent of the marketing of the Notebooks by TCL was quite limited. TCL did issue a press release for both Notebooks at or about the time they were released for distribution in Canada. TCL also made available on its website a list of the specifications of the Notebooks. TCL did not market or advertise the Notebooks in magazines, periodicals or newspapers.

31. The Defendants deny that:

- a. either of them are in a special relationship with the Plaintiffs or the other Class members;
- b. any representation made by them in relation to the Notebooks referred to in the Claim was untrue, inaccurate, or misleading;
- c. either of them acted negligently in making any representation referred to in the Claim; and,
- d. the Plaintiffs or the other Class members saw, understood or relied upon the representation referred to in the Claim to their detriment or otherwise.

32. At all material times, the statement that the Notebooks contained an Intel Pentium III 1.1 GHz processor was accurate. The Notebooks did in fact contain an Intel Pentium III 1.1 GHz processor.

33. The Defendants deny that the Notebooks were generally marketed or advertised by TCL as the “ultimate multimedia machine.” To the extent that the phrase “ultimate multimedia” was used, it was used in a very limited manner only in connection with the Z59 model of the Notebook. That phrase accurately described or summarized the features of that model at the time it was first distributed to the market in Canada. That phrase did not convey any more information than the specifications of the Notebook conveyed and was otherwise mere puffery. That phrase is not actionable.

34. The Defendants assert that the Plaintiffs themselves did not see or rely upon any reference to “ultimate multimedia” when they purchased their Notebooks.

35. Further, there is no particular representation about performance of the Notebooks generally implicit or implied in the Representation alleged by the Plaintiffs. Performance of a computer depends, as referred to above, on various factors. Even if any particular Class member may have drawn some understanding or implied representation from the alleged Representation, there is no common

factual understanding or common implicit representation of fact arising therefrom shared by all Class members.

36. The Class members would have varied and inconsistent information technology knowledge and sophistication as well as varied and inconsistent knowledge, expectations and understandings of the performance, specifications and capabilities of the Notebooks and computers in general. In particular, but without limiting the generality of the foregoing, many, if not most, of the Class members would either not have known that the Notebooks contained an Intel Pentium III 1.1 GHz processor or not have had any understanding or expectation of how such a CPU could impact on the performance of the Notebook.
37. There is no method of establishing on a class-wide basis at the trial of the common issues any common understanding of, or common assumed representation of fact arising from, the alleged Representation by the Defendants.
38. Moreover, the Defendants assert that the Class members may have heard or seen many statements or information about computers or the Notebooks in particular from various sources other than the Defendants, including but without limitation retail sales persons. The Defendants assert that Class members may have, and many did, rely upon varied information and varied sources of information (and not on the alleged Representation by the Defendants referred to in the Claim) when they purchased the Notebooks. The Defendants further assert that there is no method of establishing or evaluating, on a class-wide basis, the varied information and varied sources of information that Class members may have, and did, rely upon when purchasing the Notebooks.
39. The Defendants deny that either of them breached section 52 of the *Competition Act* and that the Plaintiffs or the other Class members are entitled to a remedy under section 36 of the *Competition Act*. In particular, but without limiting the generality of the foregoing, the Defendants deny that either of them, knowingly or

recklessly, made a representation to the public that was false or misleading in any material respect.

40. The Defendants further plead that the *Competition Act* claim is statute barred pursuant to section 36(4) of the *Competition Act* as it was launched more than two years following the making of the alleged Representation. The Plaintiffs allege that the marketing of the Notebooks ended in July 2002. The Plaintiffs purchased their Notebooks in April and March of 2002. The claim for breach of section 52 of the *Competition Act* was made or advanced by the Plaintiffs in February 2005, which is more than two years after April, March or July of 2002.

Plaintiffs' Breach of Warranty Claims Statute Barred

41. TCL, and not Toshiba Corp, did provide a written one-year limited warranty for Notebooks, which it distributed in Canada.

42. TCL pleads and relies upon the terms, limitations and exclusions of that written warranty.

43. The warranty specifically stated, among other things, that the Notebooks were not warranted: to operate uninterrupted or error free; or, to function properly in all circumstances. Personal computers do not operate uninterrupted or error free in all circumstances.

44. The warranty provided that, if a defective part caused the Notebook to fail within the one-year period, the purchaser of the Notebook had a contractual right to require TCL to repair or replace the defective part.

45. The Defendants assert that the Plaintiffs and the other Class members do not have a claim for breach of warranty herein unless they experienced a failure because of the alleged defect and elected to exercise their aforesaid contractual right to require TCL to repair or replace the defective part by specifically requesting

warranty service within one-year from the date of purchase of their Notebook. The Defendants assert that any Class member who did not make a request for warranty service for problems that could relate to the alleged defect within that one-year period does not have a claim for breach of warranty. The Defendants assert that the Plaintiffs did not make any such request for warranty service during the one-year period.

46. The Defendants deny, as stated above, that the Notebooks of the Plaintiffs or the other Class members failed because of the defect alleged in the Claim. The Defendants put the Plaintiffs and the other Class members to the strict proof of any such failure.
47. As stated above, it is not possible to establish any class-wide failure or the cause of any particular failure of a Notebook at the trial of the common issues herein.

Damages

48. If the Plaintiff Bondy owned a Notebook, it was stolen years ago from his automobile. Bondy subsequently made a claim under the terms of his insurance policy for the loss of the Notebook. Bondy was paid the full replacement value of his Notebook. He has suffered no loss and has no claim in damages. Further, the Defendants plead that Bondy is barred from bringing a claim without the express consent of his insurer.
49. The Defendants deny that the Plaintiffs or the other Class members suffered the damages as alleged in the Claim or any damages whatsoever. The Defendants deny that the Class members or any of them are entitled to any other relief. The Defendants put the Plaintiffs and the other Class members to the strict proof of any losses or damages.
50. To the extent that the Plaintiffs or the other Class members suffered any damages or losses as alleged in the Claim (which is denied), such damages or losses were

not caused by the defect alleged in the Claim. In the alternative, such damages or losses are trivial, remote, not foreseeable, unrecoverable at law, exaggerated and otherwise barred by the terms of the written warranty or the lapse of time. In the further alternative, any Class members were contributory negligent or failed to mitigate their losses and are otherwise responsible for their own losses.

51. Contrary to paragraph 11 of the Claim, the Defendants deny that the Plaintiffs paid a premium or otherwise overpaid for the Notebooks. The Defendants assert that the Notebooks were good value for money at all material times. In addition, the Defendants plead that the price paid by any individual Class member was the subject of a contract negotiated between individual Class members and retailers outside the control of the Defendants.
52. Any claim that the Plaintiffs or the other Class members may have in respect of the purchase price of their Notebook or their expectation interests, whether that be in terms of expectation of the performance of the Notebook or otherwise, is not a claim against the Defendant manufacturer and distributor. Such claims must be advanced against the retail sellers.
53. The Defendants assert that any Class member must have suffered performance degradation as a result of the alleged defect as set out in the Claim and suffered provable losses as a result thereof in order for the Class member to be eligible for any damage award or other relief. Any such losses must be established on an individual basis by each Class member. The Defendants assert that damages and other relief cannot be determined on an aggregate or class-wide basis.
54. The Defendants deny that there is any basis in fact or law for any award of punitive damages.

55. The Defendants therefore submit that this action be dismissed with costs.

Dated: November 12, 2007

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Defendants

Court file No. 03-CV-1679

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Windsor

STATEMENT OF DEFENCE

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