

C A N A D A

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No : 500-06-000491-098

SUPERIOR COURT
(Class action)

E. BEN-ELI

Petitioner

-vs-

TOSHIBA OF CANADA LIMITED, legal person duly constituted, having its principal place of business at 1643, route Trans-Canada North, City of Dorval, Province of Quebec, H9P 1J1

-and-

TOSHIBA AMERICA INFORMATION SYSTEMS INC., formerly "Toshiba America Consumer Products, L.L.C.", legal person duly constituted, having its head office at 82 Totowa Road, City of Wayne, State of New Jersey, 07470, U.S.A.

Respondents

AMENDED MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION AND TO ASCRIBE THE STATUS OF REPRESENTATIVE
(Art. 1002 C.C.P. and following)

TO (...) THE HONOURABLE JUSTICE YVES POIRIER OF THE QUEBEC SUPERIOR COURT, (...) DISTRICT OF MONTREAL, DESIGNATED TO CASE-MANAGE AND HEAR THE PRESENT MOTION, YOUR PETITIONER STATES AS FOLLOWS:

I. GENERAL PRESENTATION

A) The Action

1. Petitioner wishes to institute a class action on behalf of the following group of which he is a member, namely:

(...) All physical and moral persons (having less than 50 employees in the year preceding the filing of the Motion for authorization) residing in Québec who own a 2004 or 2005 model year Toshiba Digital Light Projection (“DLP”) television or any other group to be determined by the Court.

The term “2004 model year” above (...) refers to the following Toshiba brand DLP TV models: 44NHM84, (...) 46HM84, (...) 52HM84, 52HMX84, (...) 62HM84, (...) 62HMX84, 62HMX94 (...);

The term “2005 model year” above (...) refers to the following Toshiba brand DLP TV models: 44HM85, (...) 46HMX85, 52HM85, (...) 52HMX85, (...) 56HM195, (...) 62HM85, (...) 62HMX85, 62HMX95, (...) 62MX195, 62HM95, (...) 72MX195, (...);

2. Petitioner contends that the Respondents designed, manufactured, distributed, and sold Digital Light Projection (“DLP”) televisions with a lamp unit that was defective and/or that did not have as long of a life span as was represented, thereby causing their televisions to fail prematurely and require the purchase of a replacement lamp unit;
3. By reason of these actions and omissions, the Petitioner and the members of the class have suffered damages which they wish to claim;

B) The Respondents

4. Respondent (...) Toshiba America Information Systems Inc. is an American electronic corporation;
5. Respondent Toshiba of Canada Ltd. is involved in the trade of major electronic household appliances (“comm. gros appareils ménagers électronique”), the whole as appears more fully from a copy of the Quebec Inspector General of Financial Institutions Report, produced herein as **Exhibit R-1**;
6. Respondent Toshiba of Canada Ltd. is a related company to Respondent (...) Toshiba America Information Systems Inc. and carries on business throughout Canada, including the Province of Quebec;
7. Respondents Toshiba of Canada Ltd. and (...) Toshiba America Information Systems Inc. have either directly or indirectly designed, manufactured, marketed, and distributed DLP TVs throughout Canada, including the Province of Quebec;

8. Given the close ties between the Respondents and considering the (...) foregoing, both Respondents are solidarily liable for the acts and omissions of the other. Unless the context indicates otherwise, both Respondents will be referred to as "*Toshiba*" for the purposes hereof;

C) The Situation

9. To (...) produce their picture, Toshiba DLP projection televisions utilize a high intensity 120 watt direct current (DC) lamp as a light source. This lamp contains electrodes which excite mercury vapour into a very bright and hot plasma state. The light is projected onto a digital light processor which contains active mirrors and an active color wheel. The DLP emits red-green-blue light that is modulated on a pixel by pixel basis and projected onto the televisions screen. If the lamp burns out, the television produces no image whatsoever;

10. Respondents represent to customers that "*The average useful service life for the lamp is approximately 8,000 hours in LOW POWER mode and 6,000 hours in HI BRIGHT mode*", the whole as appears more fully from a copy of the owner's manual, produced herein in English as **Exhibit R-2** and in French as **Exhibit R-3**;

11. The DLP TVs at issue are expensive, costing between \$2,000 to \$4,000 depending on the model. Buyers of these televisions expect to get years of worry-free service. However, such has not been the experience of most DLP TV owners;

12. In fact, the useful service life of the lamps used by the DLP TVs is significantly less than the 6,000 to 8,000 hours that Toshiba represents, sometimes being as low as 300 hours. This, in turn, will cause the DLP TVs to fail and necessitate the immediate replacement of the lamp;

13. The warranty for the original lamp unit is limited to one (1) year, as it states in the owner's manual (**Exhibit R-2**):

TCL warrants the original lamp unit contained in this DLP Television against defects in materials or workmanship for a period of one (1) year; after the date of original retail purchase.

14. However, when the original lamp fails beyond this one year period (as is often the case) and before the 6,000 to 8,000 hours that Toshiba represented it would last (as is also often the case), the consumer is left to purchase a replacement lamp at a cost of over \$200 plus taxes;

15. The warranty for the replacement lamp is limited to one hundred and eighty (180) days, as it stated in the Lamp Unit Replacement Instructions:

TCL warrants this Lamp Unit against defects in materials or workmanship for a period of one hundred eighty (180) days after the date of original purchase.

the whole as appears more fully from a copy of the said Lamp Unit Replacement Instructions, produced herein as **Exhibit R-4**;

16. However, when the replacement lamp fails beyond this 180 day period (as is often the case) and before the 6,000 to 8,000 hours that Toshiba represented it would last (as if also often the case), the consumer is left to purchase another replacement lamp at an additional cost of over \$200 plus taxes;
17. Respondents are well aware that the lamps burn out and cease functioning after far fewer than the 6,000 to 8,000 hours of useful service life that they promise. In fact, on or about March 2006, after receiving complaints from DLP TV owners, Toshiba instituted a "*Remediation Program*" in the United States and Canada of a one-year extension of warranty on original lamps only (as opposed to replacement lamps) with respect to certain (and not all) 2005 model year DLP TVs, in the following manner:

Toshiba is committed to customer service and to continuously improving the quality of its products. It has come to our attention that the lamp life of some lamps in a limited number of 2005 DLP television models and serial number ranges *may be less than our expectation*. As part of our ongoing commitment to customer service, Toshiba is extending the warranty on the originally-installed lamp in those particular 2005 DLP television models and serial number ranges for one additional year (for a total warranty period of two years for the originally-installed lamp) to enable customers with those televisions to obtain a new and improved lamp free of charge if the originally-installed lamp fails. If you own one of the DLP television models listed below, please enter your serial number in the box below to determine if your particular DLP television qualifies for this extended warranty. The serial number can be located on the back panel of the television. Be assured that Toshiba DLP televisions are of the highest quality and this update regards a limited issue.

18. Respondents' admission in this regard was made to consumers who had already purchased the DLP TVs and discovered on their own, through the failure of the lamp, that the lamp's performance was far less than what Toshiba had represented;

II. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER

19. Petitioner purchased a 2005 model Toshiba DLP TV on or about May 21st 2006 (model number 62HMX85) for approximately \$2,000 plus taxes at the Future Shop store located at 6877 Newman Blvd., in Lasalle, Quebec, the whole as appears more fully from a copy of the delivery form, produced herein as **Exhibit R-5**;

20. On or about February 2009, after approximately 3,000 hours of use, Petitioner's television stopped functioning. He immediately called Future Shop to find out what was wrong and was informed that it was likely a result of the lamp burning out. He was informed that the problem would be resolved when he replaced the bulb with a new D95-LMP lamp. When Petitioner asked how he could obtain this lamp, he was told that his television was no longer covered by the manufacturer's warranty and that the store had no lamps in stock to sell him;
21. Petitioner then called Toshiba and was informed again that his issue was not covered by the manufacturer warranty, however, he was referred to a Toshiba lamp reseller called Capri Electronics Inc. located at 7903 20th Avenue, in Montreal, Quebec. Petitioner purchased a replacement lamp from (...) that supplier for the price of \$225.75, the whole as appears more fully from a copy of said invoice, produced herein as **Exhibit R-6**;
22. On or about October 2009, after approximately 800 hours of use, Petitioner's television again stopped functioning. He then decided to do some internet research and discovered that a class action had been filed (on June 6th 2007) in the United States District Court for the Eastern District of New York and even settled (on August 11th 2008), the whole as appears more fully from a copy of the Amended Class Action Complaint and a copy of the Class Settlement Agreement and Release, produced herein as **Exhibit R-7** and **Exhibit R-8** respectively;
23. This US Class Action involved a class of American residents only, was not known to the Petitioner until then, and the claim deadline had already expired on June 24th 2009;
24. After realizing that he could not benefit from the US class action settlement, and rather than spending several more thousands of dollars on a new television, Petitioner went back to Capri Electronics Inc. and bought a new D95-LMP lamp for the price of \$248.33, the whole as appears more fully from a copy of said invoice, produced herein as **Exhibit R-9**;
25. Petitioner would not have purchased this Toshiba DLP TV had he known that the lamps needed to be replaced so often and he certainly would not have paid over \$2,000 plus taxes. Petitioner was specifically told when he purchased the television that he would not have to replace the lamps until between 6,000 to 8,000 hours of watching time, which he estimated would be between 6 and 7 years. This expectation was confirmed when the Petitioner read the owner's manual which stated that *"The average useful service life for the lamp is approximately 8,000 hours in LOW POWER mode and 6,000 hours in HI BRIGHT mode"*;
26. Petitioner's damages are a direct and proximate result of the Respondents conduct and their misrepresentation of the lifespan of their lamps and/or the defective nature of said lamps;

27. In consequence of the foregoing, Petitioner is justified in claiming damages;

III. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP

28. Every member of the class owns a 2004 or 2005 model year Toshiba DLP TV and has had their lamp fail prematurely;

29. Each member of the class is justified in claiming at least one or more of the following as damages:

- a) Costs of all replacement lamps;
- b) Loss of value of their DLP TVs and/or reduced purchase price;
- c) Loss of use and enjoyment of their DLP TVs;
- d) Trouble, inconvenience, and loss of time having to deal with the problem;
- e) Punitive and/or exemplary damages;

30. All of these damages to the class members are a direct and proximate result of the Respondents conduct and their misrepresentation of the lifespan of their lamps and/or the defective nature of said lamps;

IV. CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION

A) The composition of the class renders the application of articles 59 or 67 C.C.P. difficult or impractical

31. Toshiba DLP TVs have been sold in Quebec and Canada since at least the year 2004. Petitioner is unaware of the specific number of persons who purchased the DLP TVs, however, it is safe to estimate that it is in the tens of thousands (if not hundreds of thousands);

32. Class members are numerous and are scattered across the entire province and country;

33. In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Respondents. Even if the class members themselves could afford such individual litigation, the court system could not as it would be overloaded. Further, individual litigation of the factual and legal issues raised by the conduct of Respondents would increase delay and expense to all parties and to the court system;

34. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having

contradictory judgements on questions of fact and law that are similar or related to all members of the class;

35. These facts demonstrate that it would be impractical, if not impossible, to contact each and every member of the class to obtain mandates and to join them in one action;
36. In these circumstances, a class action is the only appropriate procedure for all of the members of the class to effectively pursue their respective rights and have access to justice;
- B) The questions of fact and law which are identical, similar, or related with respect to each of the class members with regard to the Respondents and that which the Petitioner wishes to have adjudicated upon by this class action
37. Individual questions, if any, pale by comparison to the numerous common questions that predominate;
38. The damages sustained by the class members flow, in each instance, from a common nucleus of operative facts, namely, Respondents' misconduct;
39. The recourses of the members raise identical, similar or related questions of fact or law, namely:
 - a) Are the lamps in the 2004 and 2005 model year Toshiba DLP TVs defective?
 - b) Did Toshiba make any misrepresentation, false promise, and/or omitted any material fact regarding the lifespan of the lamps in the 2004 and 2005 model year Toshiba DLP TVs?
 - c) Did Toshiba know or should they have known that the lamps in the 2004 and 2005 model year Toshiba DLP TVs were defective?
 - d) Did Toshiba know or should they have known of the reduced lifespan of the lamps in the 2004 and 2005 model year Toshiba DLP TVs?
 - e) Did Toshiba fail to adequately disclose to consumers that the lamps in the 2004 and 2005 model year Toshiba DLP TVs were defective and/or did not last as long as was represented?
 - f) Is Toshiba responsible for all related costs (including, but not limited to, replacement lamp costs, loss of value or reduced purchase price, loss of use and enjoyment, trouble, inconvenience, and loss of time) to class members as a result of the problems associated with the 2004 and 2005 model year Toshiba DLP TVs?

- g) Is Toshiba responsible to pay compensatory, moral, punitive and/or exemplary damages to class members and in what amount?
40. The interests of justice favour that this motion be granted in accordance with its conclusions;

V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

41. The action that the Petitioner wishes to institute on behalf of the members of the class is an action in damages;
42. The conclusions that the Petitioner wishes to (...) seek by way of a motion to institute proceedings are:

GRANT the class action of the Petitioners and each of the members of the class;

DECLARE the Defendants solidarity liable for the damages suffered by the Petitioners and each of the members of the class;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

A) The Petitioner requests that he be attributed the status of representative of the Class

43. Petitioner is a member of the class;
44. Petitioner is ready and available to manage and direct the present action in the interest of the members of the class that (...) he wishes to represent and is determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the class, as well as, to dedicate the time necessary for the present action before the Courts of Quebec and the *Fonds d'aide aux recours collectifs*, as the case may be, and to collaborate with his attorneys;
45. Petitioner has the capacity and interest to fairly and adequately protect and represent the interests of the members of the class;
46. Petitioner has given the mandate to his attorneys to obtain all relevant information with respect to the present action and intends to keep informed of all developments;
47. Petitioner, with the assistance of his attorneys, (...) is ready and available to dedicate the time necessary for this action and to collaborate with other members of the class and to keep them informed;
48. Petitioner is in good faith and has instituted this action for the sole goal of having his rights, as well as the rights of other class members, recognized and protected so that they may be compensated for the damages that they have suffered as a consequence of the Respondents' conduct;
49. Petitioner understands the nature of the action;
50. Petitioner's interests are not antagonistic to those of other members of the class;

B) The Petitioner suggests that this class action be exercised before the Superior Court of justice in the district of Montreal

51. A great number of the members of the class reside in the judicial district of Montreal and in the appeal district of Montreal;
52. Respondent Toshiba of Canada Ltd. has its principal place of business in the judicial district of Montreal;
53. The Petitioner's attorneys practice their profession in the judicial district of Montreal;
54. Petitioner purchased his DLP TV and lamp replacements in the judicial district of Montreal;
55. The present motion is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present amended motion;

AUTHORIZE the bringing of a class action in the form of a motion to institute proceedings in damages;

ASCRIBE the Petitioner the status of representative of the persons included in the class herein described as:

(...) All physical and moral persons (having less than 50 employees in the year preceding the filing of the Motion for authorization) residing in Québec who own a 2004 or 2005 model year Toshiba Digital Light Projection (“DLP”) television or any other group to be determined by the Court.

The term “*2004 model year*” above (...) refers to the following Toshiba brand DLP TV models: 44NHM84, (...) 46HM84, (...) 52HM84, 52HMX84, (...) 62HM84, (...) 62HMX84, 62HMX94 (...);

The term “*2005 model year*” above (...) refers to the following Toshiba brand DLP TV models: 44HM85, (...) 46HMX85, 52HM85, (...) 52HMX85, (...) 56HM195, (...) 62HM85, (...) 62HMX85, 62HMX95, (...) 62MX195, 62HM95, (...) 72MX195, (...);

IDENTIFY the principle questions of fact and law to be treated collectively as the following:

- a) Are the lamps in the 2004 and 2005 model year Toshiba DLP TVs defective?
- b) Did Toshiba make any misrepresentation, false promise, and/or omitted any material fact regarding the lifespan of the lamps in the 2004 and 2005 model year Toshiba DLP TVs?
- c) Did Toshiba know or should they have known that the lamps in the 2004 and 2005 model year Toshiba DLP TVs were defective?
- d) Did Toshiba know or should they have known of the reduced lifespan of the lamps in the 2004 and 2005 model year Toshiba DLP TVs?
- e) Did Toshiba fail to adequately disclose to consumers that the lamps in the 2004 and 2005 model year Toshiba DLP TVs were defective were defective and/or did not last as long as was represented?
- f) Is Toshiba responsible for all related costs (including, but not limited to, replacement lamp costs, loss of value or reduced purchase price, loss of use and enjoyment, trouble, inconvenience, and loss of time) to class

members as a result of the problems associated with the 2004 and 2005 model year Toshiba DLP TVs?

- g) Is Toshiba responsible to pay compensatory, moral, punitive and/or exemplary damages to class members and in what amount?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Petitioners and each of the members of the class;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioners and each of the members of the class;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

DECLARE that all members of the class that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;

FIX the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the class that have not exercised their means of exclusion will be bound by any judgement to be rendered herein;

ORDER the publication of a notice to the members of the group in accordance with article 1006 C.C.P. within sixty (60) days from the judgement to be rendered herein in LA PRESSE and the NATIONAL POST;

ORDER that said notice be available on the Respondent Toshiba's webs with a link stating "*Notice to 2004 and 2005 DLP TV Owners*";

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

THE WHOLE with costs including publications fees;

MONTREAL, July 5, 2012

(s) Jeff Orenstein

CONSUMER LAW GROUP INC.

Per: Me Jeff Orenstein

Attorneys for Petitioner