**Canadian Antitrust Class Actions: The Indirect Purchaser Class Hangs by a Thread**

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# Introduction

Class actions are an increasingly significant feature of international cartel enforcement. In Canada, antitrust class actions have seen more developments in the last three years than in the preceding decade. Whereas defendants had enjoyed a distinct advantage and successfully defended many contested certification motions, more recently, courts appeared to relax previously strict evidentiary requirements on certification, arguably giving plaintiffs the upper hand.

However, no sooner was the law looking more plaintiff-friendly, than Canadian appellate courts suddenly and surprisingly dealt plaintiffs a blow by engaging with a long-settled issue in American antitrust law, but one hardly considered in Canada. Can indirect purchasers sue for antitrust losses?

The first appellate decision proved a victory for defendants and dealt a blow to indirect purchaser classes across Canada. The second appellate decision gave plaintiffs the victory. With the Supreme Court of Canada set to consider the issue (although not until late 2012 or early 2013), its decision will likely be the most significant decision in Canadian antitrust law in recent times.[[2]](#footnote-2)

In the authors' view, the Supreme Court should bring Canadian antitrust law in line with American federal jurisprudence. Indirect purchasers do not have a cause of action in Canadian law.

This paper briefly outlines the development of Canadian antitrust jurisprudence over the last decade and the recent trend of plaintiff-friendly decisions. It also examines the Canadian appellate decisions that suddenly and unexpectedly confronted the indirect purchaser issue and their implications as the Supreme Court of Canada considers the merits of the issue.

# canadian experience with antitrust class actions

Canadian antitrust plaintiffs typically make three types of claims: statutory, tort, and restitutionary. The statutory claims arise under section 36 of the *Competition Act*,[[3]](#footnote-3) which creates a private right of action for harm caused by criminal antitrust conduct prohibited by the *Act*. Prohibited conduct includes price-fixing, bid-rigging and other "hardcore" cartel offences. Unlike the US, plaintiffs cannot claim treble damages. Instead, plaintiffs may recover costs and investigation expenses, which can themselves be large depending on the complexity of the matter.

In tort, plaintiffs usually allege an unlawful conspiracy. Critically, the conspiracy must have harmed the plaintiffs. This is a key element of the cause of action and plaintiffs must plead actual harm and prove it on a balance of probabilities at trial. Likewise, actual harm is a requirement of the private cause of action in section 36.

Plaintiffs' restitutionary claims usually rest on allegations that the defendants have been unjustly enriched. Plaintiffs demand that the defendants remedy the wrong, such as by disgorging their ill-gotten profits. An actual loss that corresponds to the defendants' gain is a prerequisite for a finding of unjust enrichment.

Thus, actual harm suffered by the plaintiffs is critical not just to damages calculations but to determining the liability of the defendants. Early on, Canadian defendants' counsel targeted plaintiffs' vulnerability on this issue at certification.

American antitrust jurisprudence was more mature than Canadian jurisprudence and American counsel had already advanced two main arguments to address this issue on certification. First, plaintiffs who did not purchase directly from the defendants had not suffered any harm. Second, if plaintiffs had suffered harm, they could not prove harm on a class-wide basis, negating any of the efficiencies of a class proceeding.

In the early leading decision of *Chadha v. Bayer*,[[4]](#footnote-4) the Ontario Court of Appeal adopted the second argument but appeared to reject the first. The *Chadha* plaintiffs had alleged a price-fixing conspiracy related to the iron oxide pigments which colour some types of concrete bricks and paving stones used in home construction. As home buyers, the plaintiffs claimed that higher prices for these pigments had raised the price of their homes because brick manufacturers passed on the higher price of the pigments to them (i.e. charged a higher price for bricks used to build the homes).

The Ontario Court of Appeal acknowledged American federal jurisprudence which does not recognize claims by indirect purchasers, such as the *Chadha* home buyers. However, the Court did not foreclose an action by indirect purchasers as the US Supreme Court had done in *Illinois Brick Co. v. Illinois.*[[5]](#footnote-5) Instead, it refused to certify the plaintiffs' claim as a class proceeding because of the plaintiffs' inadequate evidentiary record. Focusing on whether plaintiffs could prove harm on a class-wide basis, the Court held that the plaintiffs' expert evidence was insufficient to demonstrate that harm could be proved on a class-wide basis.[[6]](#footnote-6) Without class-wide damages as a common issue, the Court held that individual trials would be necessary to establish loss and therefore liability. This would render the action unmanageable as a class proceeding.[[7]](#footnote-7)

However, the Court did not foreclose certification of any antitrust class action. Instead, it stated that better expert evidence in future cases might satisfy the court that liability could be proved as a common issue.[[8]](#footnote-8)

Despite this proviso, the result in *Chadha* continued to frustrate plaintiffs' attempts to certify complex antitrust class actions with classes of direct and indirect purchasers.[[9]](#footnote-9) Defendants led their own expert evidence on certification to demonstrate that proving class-wide harm was impossible or far too complex.

Defendants successfully defended many certification motions on this basis until a series of decisions in 2009 and 2010 largely eliminated the advantage defendants enjoyed post-*Chadha*. These decisions arose in three actions.

First, in 2009 Justice Rady of the Ontario Superior Court certified a class of direct and indirect purchasers of hydrogen peroxide in *Irving Paper Ltd. v. Atofina Chemicals Inc*.[[10]](#footnote-10) In June 2010, Justice Leitch denied the defendants leave to appeal from Justice Rady's decision. Whereas courts after *Chadha* had scrutinized plaintiffs' expert evidence to determine if plaintiffs could prove harm on a class-wide basis, Justice Leitch held that such strict scrutiny was not required. Instead, plaintiffs need only demonstrate a "viable" or "credible and plausible" methodology to establish the fact of loss on a class-wide basis.[[11]](#footnote-11) Detailed evaluation or weighing of conflicting expert reports was discouraged.[[12]](#footnote-12)

Likewise, the British Columbia Court of Appeal certified a class of direct and indirect purchasers of DRAM (a component in electronic devices) in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG.[[13]](#footnote-13)* The Court of Appeal held that plaintiffs only had to show a credible or plausible methodology for proving class-wide damages.[[14]](#footnote-14)

Perhaps most surprisingly, in June 2010 in *Quizno's Canada Restaurant Corporation v. 2038724 Ontario Ltd*.,[[15]](#footnote-15) the Ontario Court of Appeal appeared to take a much more liberal approach to antitrust class actions than it had in *Chadha*. In *Chadha*, the Court had held that inability to prove damages on a class-wide basis made a class proceeding unmanageable. In contrast, in *Quizno's,* it held that proving of class-wide damages may not even be necessary in *certain* antitrust actions (*Quizno's* plaintiffs alleged price maintenance in the franchise context, not cartel activity). The Court held that establishing the elements of liability other than harm on a class-wide basis would advance each class members' claim and avoid duplication.[[16]](#footnote-16) In other words, because most of the action was appropriately prosecuted as a class proceeding, the entire action could be certified notwithstanding the manageability concerns expressed in *Chadha*. The Court even added that "it is unnecessary at this stage to engage in the debate about the relative strengths and weaknesses of the expert evidence"[[17]](#footnote-17) raising questions about whether defendants should bother leading expert evidence on certification at all.

Taken together, these decisions seemed to make certification much easier for Canadian antitrust plaintiffs to obtain. Yet as soon as the courts appeared to have made certification easier, they dealt plaintiffs a surprising blow.

# the recent Indirect purchaser debate

American federal law has for the last three decades limited antitrust actions to direct purchasers (being those persons or entities that purchased goods directly from the defendants). Indirect purchasers, who purchased goods from the direct purchasers, do not have a cause of action in federal antitrust law. Although briefly considered in *Chadha*, other Canadian appellate courts only recently engaged squarely with this issue.

On April 15, 2011, the British Columbia Court of Appeal released companion reasons for judgment in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*[[18]](#footnote-18) and *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*.[[19]](#footnote-19) In a decision that surprised many (although a result some thought was long overdue), the Court refused to certify the claims of indirect purchaser classes on the basis that indirect purchasers do not have a cause of action in Canadian antitrust law.

The plaintiffs in *Microsoft* and *Sun-Rype* alleged that the defendants had engaged in anticompetitive behaviour which produced overcharges paid by consumers. In *Microsoft*, a class comprised entirely of indirect purchasers alleged that Microsoft and computer manufacturers had conspired to reduce competition for Microsoft’s products. The plaintiff alleged that indirect purchasers had paid higher prices for Microsoft’s software as a result. In *Sun-Rype*, both direct and indirect purchasers claimed that the defendants had conspired to fix the price of high fructose corn syrup. The plaintiffs in both actions alleged that direct purchasers had passed on some of the initial overcharge causing indirect purchasers to pay higher prices. Lower courts had certified both actions.

On appeal, the defendants argued that indirect purchasers have no cause of action. They relied heavily on *Kingstreet Investments Ltd. v. New Brunswick (Finance)*,[[20]](#footnote-20) a recent Supreme Court of Canada decision in which the Supreme Court had conclusively rejected the passing-on defence.

In *Kingstreet*, the plaintiff restaurant had sued to recover a user charge tax that it argued had been unconstitutional. The government claimed that the restaurant had suffered no damage because it had passed on the tax charge to its customers. The Supreme Court rejected the government’s defence of passing-on because it was inconsistent with restitution law, economically misconceived, and created serious difficulties of proof.[[21]](#footnote-21) In complex commercial cases, the Court said that the quantum of losses a business might have passed on to its customers was "virtually unascertainable."[[22]](#footnote-22)

In *Microsoft* and *Sun-Rype*, the defendants argued that *Kingstreet* permits direct purchasers to recover 100 percent of any overcharge paid by them, no matter how much of the overcharge they passed on to their own customers. If this is the case, then defendants cannot also be liable to indirect purchasers (the customers of the direct purchasers) or they would have to pay twice: once to the direct purchasers for the total overcharge and again to the indirect purchasers for the amount of the overcharge passed on to them.

The majority of the Court of Appeal accepted the defendants' arguments. Justice Lowry relied on *Kingstreet* and reasoned that if defendants cannot use the passing-on defence as a shield, plaintiffs cannot use it as a sword. Indirect purchasers cannot rely on the fact of passing on when the law has rejected it as a defence. If they could, the result would be double recovery since direct purchasers could recover 100 percent of the overcharge and indirect purchasers could recover the amount of the overcharge that was passed on to them.

The *Sun-Rype* defendants had advanced this argument in the court below but Justice Rice, the application judge, had rejected the defendants’ arguments and had, for two main reasons, certified the indirect purchaser claims.[[23]](#footnote-23) First, Justice Rice had found that, although courts do not allow a defendant to use passing on as a defence, courts can still find that passing on had occurred as a fact. Thus, indirect purchasers could claim for the amount of the overcharge actually passed on to them. Second, Justice Rice had said that there would be no double recovery in a class action in which both direct and indirect purchasers are class members. In these circumstances, the court could assess damages on a class-wide basis using the total amount of the overcharge to the entire class.

The Court of Appeal respectfully disagreed with Justice Rice’s reasons. Justice Lowry held that because the law has rejected the passing on defence, the fact that some of the overcharge has been passed on cannot be relevant to establishing a cause of action. [[24]](#footnote-24) He also held that the composition of the class is irrelevant. To return anything less than 100 percent of the overcharge to direct purchasers would compromise their legal entitlement. The *Class Proceedings Act* is a procedural statute that cannot affect the substantive legal rights of direct and indirect purchasers. Courts cannot allocate the overcharge between direct and indirect purchasers using the *Class Proceedings Act* and thereby reduce the legal entitlement of direct purchasers.[[25]](#footnote-25) Justice Lowry distinguished other class proceedings that had certified indirect purchaser classes on the basis that those decisions were in the context of settlement, the issue had not been argued, or they were distinguishable on the facts.[[26]](#footnote-26)

Justice Lowry also considered the American federal jurisprudence in *Hanover Shoe, Inc. v. United Shoe Machinery Corp*.[[27]](#footnote-27) and *Illinois Brick.* These two cases had produced the long-standing rule in US federal law that indirect purchasers do not have a cause of action.[[28]](#footnote-28) Justice Lowry noted that some American state legislatures have enacted repealer statutes to permit indirect purchaser actions and that some state courts permit indirect purchaser actions to proceed. However, he found that the decisions of these courts are usually based on policy rather than legal principles. He commented that the decisions “do not come to grips with the absence of a legal basis for an indirect purchaser’s cause of action once it is accepted there is no passing-on defence, as since *Kingstreet*, I consider it must be accepted here.”[[29]](#footnote-29)

On the basis that indirect purchasers have no cause of action, Justice Lowry allowed the defendants' appeals with respect to the indirect purchaser classes and refused to certify the indirect class in both *Microsoft* and *Sun-Rype*. However, he dismissed the appeal with respect to the *Sun-Rype* direct purchasers.

In dissent, Justice Donald would have followed Justice Rice's reasons in the court below and would have upheld certification of the indirect purchaser claims.

Likewise, on November 16, 2011, the Quebec Court of Appeal rejected Justice Lowry's analysis and certified a class of direct and indirect purchasers of DRAM.[[30]](#footnote-30) The Court expressly adopted the minority's position from the *Microsoft* & *Sun-Rype* decisions. In the Court's view, it was too early to determine whether any damages had been passed on to indirect purchasers, although it commented on several occasions that such proof might be very difficult at trial.

It rejected the defendants' arguments that recognizing a claim by indirect purchasers would result in double recovery. Like Justice Donald, it held that the fusion of direct and indirect purchasers into one class eliminated the possibility of double recovery. Justice Kasirer for the Quebec Court wrote that the direct and indirect purchasers have "banded together to claim the aggregate of the losses they have suffered from the respondents… The aggregate character of the claim made at this stage and the structure of the class preclude the overcharges from being exacted more than once from the respondents."[[31]](#footnote-31)

Justice Kasirer then rejected Justice Lowry's hypothetical scenario in which direct and indirect purchasers litigated separately. He reasoned that although direct purchasers may recover 100 percent of the overcharge when litigating on their own, indirect purchasers could demonstrate as a matter of evidence that the direct purchasers had been unjustly enriched because they had passed on some of the total overcharge to the indirect purchasers.[[32]](#footnote-32) This would permit the indirect purchasers to recover their losses from the direct purchasers.

Just days after the Quebec Court's decision in the DRAM case, in Ontario, Justice Rady granted the defendants leave to appeal certification in *Fanshawe College v. LG Philips LCD Co. et al[[33]](#footnote-33)* because of the uncertainty surrounding the existence of an indirect purchaser cause of action. She held that "the availability of the passing on defence is a fundamental issue underlying most price-fixing cases and as such, warrants review by an appellate court in Ontario."[[34]](#footnote-34)

Given the conflicting appellate decisions, few were surprised when on December 1, 2011 the Supreme Court granted the *Microsoft* and *Sun-Rype* plaintiffs leave to appeal.

# Considering the merits of the appeals

How the Supreme Court will decide the merits of the *Microsoft* and *Sun-Rype* appeals is an open question. With a decision on the merits likely two years away, the intervening period should produce significant analysis from commentators that will assist the Court in its determination.

In the authors' view, the Supreme Court should dismiss the plaintiffs' appeals and uphold the result from the BC Court of Appeal for at least the following two reasons.

First, although Justices Donald and Kasirer have strongly attacked Justice Lowry's reasoning in *Sun-Rype*, they do not offer a compelling argument to support an indirect purchaser cause of action post-*Kingstreet*. Instead, their analysis suggests that any indirect purchaser claims lie against direct purchasers in unjust enrichment not against antitrust defendants.

Second, as first identified in *Hanover Shoe* and *Illinois Brick* over thirty years ago, several policy reasons weigh in favour of limiting access to antitrust class actions to direct purchasers.

## Indirect purchasers have no cause of action

Justice Lowry concluded that indirect purchasers do not have a cause of action against antitrust defendants. Justices Donald and Kasirer strongly disagreed. First, they say the Supreme Court in *Kingstreet* rejected the defence of passing on. It did not preclude plaintiffs proving the fact of passing on as a matter of evidence. Such proof should be considered at trial rather than at certification. Second, the fusion of direct and indirect purchasers into one class eliminates the possibility of double recovery for plaintiffs.

In the authors' view, these two arguments are insufficient to address Justice Lowry's fundamental concern that plaintiffs will obtain double recovery from defendants. Justice Donald agrees that separate litigation by direct and indirect purchasers may raise the specter of double recovery for plaintiffs. However, he suggests that the "fact that a problem case can be hypothesized is not a good reason to deny a claim in an actual case that does not have the problem. This is such a case."[[35]](#footnote-35) Respectfully, he ignores that the direct and indirect purchasers in *Microsoft* and *Sun-Rype* were not yet fused into one cohesive and inseparable class. Class members had yet to receive certification notices and yet to exercise their right to opt out of the class. Had direct purchasers opted out, the hypothetical scenario Justice Donald feared would have materialized.

More fundamentally, fusion of direct and indirect purchasers fails to address the underlying question at issue in the *Microsoft* and *Sun-Rype* appeals: in circumstances where defendants cannot argue that direct purchasers passed on some of the harm to others and where direct purchasers can recover 100 percent of any overcharge, do indirect purchasers have a cause of action against antitrust defendants?

In the authors' view, it is plain and obvious that they do not. This is best demonstrated by reference to Justice Kasirer's response to the hypothetical scenario Justice Lowry posits in which direct and indirect purchasers litigate separately.

Justice Lowry theorized that "if both the DPs [direct purchasers] and the IPs [indirect purchasers] had independent causes of action against the defendants who could not raise a passing-on defence – the defendants could be liable to the DPs for 100% of the overcharge they paid and could also be liable to the IPs for whatever amount of the overcharge may have been passed on: double recovery (the recovery of the same loss twice by different plaintiffs), which our law will not sanction".[[36]](#footnote-36)

Justice Kasirer responded that Justice Lowry's analysis blurred the distinction between the rejection of the passing-on defence and the fact of passing-on as a matter of evidence.[[37]](#footnote-37) He reasoned that if the two groups litigated separately and direct purchasers recovered 100 percent of the overcharge, indirect purchasers could still prove the fact that harm had been passed on to them and could subsequently recover from the direct purchasers who would have been unjustly enriched at their expense.[[38]](#footnote-38) He held that:

The rule in *Hanover Shoe* precluding the alleged wrongdoer from avoiding liability to the direct purchasers by raising the passing-on defence does not mean, as a matter of fact, that the passing on of the losses down to the indirect purchasers did not take place. The matter is an evidentiary issue. If the respondents faced an independent action by direct purchasers and paid them 100% of the losses, notwithstanding evidence that the loss was passed on to indirect purchasers, the direct purchasers would have unjustly enriched themselves at the expense of the indirect purchasers. The amount of that impoverishment exists, as a matter of fact, whether or not **the indirect purchasers would, in this hypothetical situation, be legally entitled to seek its recovery subsequently *from the direct purchasers* who were unjustly enriched at their expense**.[[39]](#footnote-39)

Justice Kasirer's example may be sufficient to certify class actions in Quebec where any damages suffered by the indirect purchaser may be sufficient to certify the class.

However, in Canada's common law provinces including Ontario and BC, plaintiffs must demonstrate a cause of action *against the defendants* to certify an action against them. Justice Kasirer's example demonstrates that, post-*Kingstreet*, indirect purchasers do not have a cause of action against antitrust defendants. Instead, indirect purchaser claims lie *against direct purchasers in unjust enrichment*.

## Promoting actions by direct purchasers

In *Hanover Shoe*, the US Supreme Court identified two compelling policy reasons to reject the pass-on defense: to reduce the complexity of antitrust actions and to incentivize direct purchasers to prosecute them. Justice White aptly summarized these objectives in *Illinois Brick*:

The first reason for the Court's rejection of this offer of proof was an unwillingness to complicate treble damages actions with attempts to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge. A second reason for barring the pass-on defense was the Court's concern that unless direct purchasers were allowed to sue for the portion of the overcharge arguably passed on to indirect purchasers, antitrust violators "would retain the fruits of their illegality" because indirect purchasers "would have only a tiny stake in the lawsuit," and hence little incentive to sue.[[40]](#footnote-40)

Later, Justice White reiterated the Court's desire for effective prosecution of private antitrust actions and its belief that direct purchasers were likely more effective prosecutors:

the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers, rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it.[[41]](#footnote-41)

These dual policy rationales are as compelling today for Canadian antitrust actions as for American actions thirty years ago.

For the last decade, Canadian litigants and courts have spent enormous resources litigating at certification whether plaintiffs could prove damages on a class-wide basis when the proposed class included both direct and indirect purchasers. Courts have wrestled with the appropriate scrutiny to give to plaintiffs' expert evidence. Defendants have cautioned that the eventual common issues trial will be unmanageable if courts certify direct and indirect purchaser classes. Plaintiffs have not had to face the rigours of a common issues trial and the associated burden of proof because Canadian antitrust actions have invariably settled before any trial.

This should not continue. Limiting access to antitrust damages to direct purchasers will simplify and streamline prosecution of Canadian antitrust claims both on certification and at an eventual common issues trial. Certification of direct purchaser actions should be less complicated, time consuming, and costly than current certification motions. Plaintiffs will not need to demonstrate a credible and plausible methodology for proving pass-through to indirect purchasers on a class-wide basis. Simpler certification motions may liberate plaintiffs' counsel to spend more time investigating and prosecuting complicated but meritorious antitrust actions. These currently go unprosecuted by plaintiffs' counsel who tend to prosecute actions after American actions commence and settle or after defendants plead guilty to criminal conduct. This would be a welcome development for Canadian antitrust plaintiffs.

# Conclusion

The *Microsoft* and *Sun-Rype* appeals have yet to be briefed, let alone argued or decided by the Supreme Court. While the Canadian antitrust bar waits for a decision on the merits (likely in 2013), it is unlikely that 2012 will see the significant developments of 2011. However, given the increasing role of class actions in international cartel practice, the Supreme Court's decision on the merits of these appeals may have a significant impact this practice as it relates to Canada.

1. Published as Randal T. Hughes and Emrys Davis, "Canadian Antitrust Class Actions: The Indirect Purchaser Class Hangs by a Thread", (2012) 1-1 Antitrust Report 1. [↑](#footnote-ref-1)
2. After the preparation of this paper, the Supreme Court scheduled a hearing for October 17, 2012. It also granted the defendants leave to appeal the Quebec Court of Appeal's decision in the Quebec DRAM case, discussed herein, with that appeal to be heard on October 17, 2012 as well. [↑](#footnote-ref-2)
3. RSC 1985, c. C-34. [↑](#footnote-ref-3)
4. (2003), 63 OR (3d) 22 (CA) [*Chadha*]. Randal T. Hughes was one of the counsel for the Bayer defendants in *Chadha*. [↑](#footnote-ref-4)
5. 431 U.S. 720 (1977) [*Illinois Brick*]. [↑](#footnote-ref-5)
6. *Chadha*, *supra* note 3 at para 52. [↑](#footnote-ref-6)
7. *Ibid*. at para 56. [↑](#footnote-ref-7)
8. *Ibid*. at para 68. [↑](#footnote-ref-8)
9. See for example *Matoni v. C.B.S. Interactive Multimedia Inc*.. [2008] OJ No 197 (SCJ), *Price v. Panasonic Canada Inc.,* [2002] OTC 426 (Ont SCJ), & *Steele v. Toyota Canada Inc.,* 2008 BCSC 1063. [↑](#footnote-ref-9)
10. [2009] O.J. No. 4021. [↑](#footnote-ref-10)
11. *Irving Paper -and- Atofina*, 2010 ONSC 2705 (Div. Ct.) at paras 45 & 55. [↑](#footnote-ref-11)
12. *Ibid*. at para 62 [↑](#footnote-ref-12)
13. 2009 BCCA 503, 98 BCLR (4th) 272. [↑](#footnote-ref-13)
14. *Ibid*. at para 68. [↑](#footnote-ref-14)
15. 2010 ONCA 466 [*Quizno's*]. [↑](#footnote-ref-15)
16. Ibid. at para 44. [↑](#footnote-ref-16)
17. *Ibid*. at para 45. [↑](#footnote-ref-17)
18. 2011 BCCA 186 [*Microsoft*]. [↑](#footnote-ref-18)
19. 2011 BCCA 187 [*Sun-Rype*]. [↑](#footnote-ref-19)
20. 2007 SCC 1 [*Kingstreet*]. [↑](#footnote-ref-20)
21. *Ibid*. at paras 42-51. [↑](#footnote-ref-21)
22. *Ibid*. at para 48 citing LeBel J. in *British Columbia v. Canadian Forest Products Ltd*., [2004] 2 SCR 74, 2004 SCC 38 at para 205. [↑](#footnote-ref-22)
23. *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2010 BCSC 922. [↑](#footnote-ref-23)
24. *Sun-Rype*, *supra* note 18 at para 83. [↑](#footnote-ref-24)
25. *Ibid*. at paras 84-87. [↑](#footnote-ref-25)
26. *Ibid*. at para 89. [↑](#footnote-ref-26)
27. 392 U.S. 481 (1968) [*Hanover Shoe*]. [↑](#footnote-ref-27)
28. *Sun-Rype*, *supra* note 18 at paras 90-1. [↑](#footnote-ref-28)
29. *Ibid*. at para 92. [↑](#footnote-ref-29)
30. *Option Consommateurs et al v Infineon Technologies AG et al*, 2011 QCCA 2116 [*Option Consommateurs*]. [↑](#footnote-ref-30)
31. *Ibid*. at para 11. [↑](#footnote-ref-31)
32. *Ibid*. at para 113. [↑](#footnote-ref-32)
33. 2011 ONSC 6645. [↑](#footnote-ref-33)
34. *Ibid*. at para 12. [↑](#footnote-ref-34)
35. *Sun-Rype*, *supra* note 18 at paras 29-31. [↑](#footnote-ref-35)
36. *Ibid*. at para 82. [↑](#footnote-ref-36)
37. *Option Consommateurs*, *supra* note 29 at para 113. [↑](#footnote-ref-37)
38. *Ibid*. at para 113. [↑](#footnote-ref-38)
39. *Ibid*. at para 113. [↑](#footnote-ref-39)
40. *Illinois Brick*, *supra* note 4 at 725. [↑](#footnote-ref-40)
41. *Ibid.* at 734-735. [↑](#footnote-ref-41)