No. S-250121
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36

BETWEEN:

KINGSETT MORTGAGE CORPORATION

PETITIONER

AND:

LUMINA ECLIPSE LIMITED PARTNERSHIP
BETA VIEW HOMES LTD.
LUMINA ECLIPSE GP LTD.
and
D-THIND DEVELOPMENT BETA LTD.

RESPONDENTS

BOOK OF AUTHORITIES (APPLICANTS) – federal paramountcy

Lawyer for the Applicants,
Chung Hei Wong, Liping Ding and
Wai Thing Nicole Wong:
Counsel: **James Un**

ATAC LAW CORPORATION
Barristers & Solicitors
308 – 8988 Fraserton Court
Burnaby, BC V5J 5H8
Tel: (604) 359-8786
E-mail: james@ataclaw.ca

Lawyers for the Application Respondent and
Court-Appointed Monitor,
KSV Restructuring Inc.:
Counsel: **Sean Zweig, Andrew Froh and Joshua Foster**

BENNETT JONES LLP
Barristers & Solicitors
2500 – 666 Burrard Street
Vancouver, BC V6C 2X8
Tel: (604) 891-5166
E-mail: zweigs@bennettjones.com
E-mail: froha@bennettjones.com
E-mail: fosterj@bennettjones.com

June 15, 2026 at 10:00 a.m., Vancouver
Time estimate: 4 days
To be heard before Justice Masuhara
Book of Authorities provided by the Applicants

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RESPONDENTS

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Unlu v. Air Canada,*
2012 BCSC 60

Date: 20120118
Docket: S102554
Registry: Vancouver

Between:

Bulent Unlu

Plaintiff

And

Air Canada

Defendant

- and -

Docket: S102555
Registry: Vancouver

Between:

Bulent Unlu

Plaintiff

And

Deutsche Lufthansa Aktiengesellschaft

Defendant

Brought under the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50

Before: The Honourable Madam Justice Adair

Reasons for Judgment

Counsel for the plaintiff (in both actions):	James M. Poyner, Kenneth Baxter and Samuel Poyner
Counsel for the defendant Air Canada (Action No. S102554) and the defendant Deutsche Lufthansa Aktiengesellschaft (Action No. S102555):	David T. Neave, Violet A. Allard and T. Siddiqui
Counsel for the Attorney General of British Columbia	Nancy Brown and E. W. (Heidi) Hughes
Place and Date of Hearing:	Vancouver, B.C. May 9, 10 and 11, 2011 and January 13, 2012
Place and Date of Judgment:	Vancouver, B.C. January 18, 2012

Introduction

[1] These are proposed class proceedings in which the plaintiff, Bulent Unlu, asserts that by including an international fuel surcharge coded as "YQ" within the "XT" or tax portion of his electronic airline tickets, the defendants Air Canada and Deutsche Lufthansa Aktiengesellschaft ("Lufthansa") engaged in a deceptive act or practice, contrary to the ***Business Practices and Consumer Protection Act***, S.B.C. 2004, c. 2 (the "***BPCPA***"). Mr. Unlu alleges that Air Canada and Lufthansa (the "Airlines") falsely represented that the "YQ" charge is a tax charged and collected by the Airlines on behalf of a third-party government body, rather than a surcharge collected for the Airlines themselves.

[2] Each Airline denies Mr. Unlu's allegations.

[3] Moreover, the Airlines assert that the ***BPCPA*** is constitutionally inapplicable to airline ticketing practices, and that the ***BPCPA*** is inapplicable to them because they are federally regulated undertakings. In October 2010, Lufthansa filed and served a Notice of Constitutional Question pursuant to the ***Constitutional Question Act***, R.S.B.C. 1996, c. 68, challenging the constitutional applicability of the ***BPCPA*** to the matters at issue in the Lufthansa Action, and in December 2010, Air Canada did likewise in respect of the Air Canada Action.

[4] The Airlines have now applied for a summary trial of the constitutional question. Each Airline seeks a declaration that the ***BPCPA*** is constitutionally inapplicable to it by virtue of the doctrine of paramountcy, or, alternatively, the doctrine of interjurisdictional immunity. The Airlines say that, since the claims in Mr. Unlu's Actions are entirely dependent on a finding that each Airline has breached the ***BPCPA***, if they obtain the declarations they seek, the Actions must be dismissed.

[5] The Airlines' applications are opposed by both Mr. Unlu and by the Attorney General of B.C. (the "AGBC"), who appears in response to the notices of constitutional question. Both say the applications should be dismissed. Although

served with the notices of constitutional question, the Attorney General of Canada did not file any application response and did not attend the hearing.

Background

[6] I will first review the allegations in the notices of civil claim and the Airlines' responses, relevant to the constitutional question. The pleadings, particularly the allegations in the notices of civil claim, provide essential context for the discussion of the constitutional question. I will then set out the relevant federal and provincial legislation, and, finally, review the affidavit evidence.

(a) Mr. Unlu's claims and the Airlines' response

[7] In his notice of civil claim in the Air Canada Action, Mr. Unlu alleges that:

> 5. On or about October 15, 2008 . . ., the Plaintiff purchased a ticket to travel . . . from the Agent [a travel agent alleged to be Air Canada's agent in the sale of airplane travel tickets]. The price quoted by the Agent . . . was $870.26 plus taxes of $445.74 for a total price of $1,316.00 which the Plaintiff paid to the Agent and received the airplane ticket in return.
>
> 6. . . . [T]he Agent also delivered to the Plaintiff a document entitled "ELECTRONIC TICKET ITINERARY/RECEIPT" . . . which coded the tax portion of the cost of the airplane ticket as "XT". Within the "XT" or tax portion of the cost of the airplane ticket is an item coded as "YQ" and the cost of that item was $340.40.
>
> 7. By including the $340.40 "YQ" item within the "XT" or tax portion of the cost of the airplane ticket, the Defendant [Air Canada] knowingly and willingly represented the "YQ" item as a tax charged to and collected from the Plaintiff by the Defendant on behalf of a third party government agency or body (the "Representation").
>
> 8. Contrary to the Representation, the $340.40 "YQ" item was not a third party tax at all. Rather, the Defendant retained and diverted the monies paid by the Plaintiff for the "YQ" item to its own use.
>
> **Part 2: RELIEF SOUGHT**
>
> 1. The Plaintiff seeks a declaration pursuant to s. 172(1)(a) of the [***BPCPA***] that the Defendant's representation contravenes the BPCPA.
>
> 2. The Plaintiff also seeks a permanent injunction pursuant to s. 172(1)(b) BPCPA restraining the Defendant from contravening the BPCPA by way of the Representation.
>
> 3. The Plaintiff seeks an order pursuant to s. 172(3)(a) of the BPCPA that the Defendant restore to him and all other putative class members any

and all monies which the Defendant has acquired in contravention of the BPCPA, including an order that the Defendant refund all monies charged by the Defendant to the class members for "YQ". In the alternative, the Plaintiff seeks an order that . . . the Defendant disgorge to the class members all revenues collected in respect of "YQ".

. . .

6. The Plaintiff claims on his own behalf and on behalf of all putative class members, the following:

(a) a declaration pursuant to s. 172(1)(a) of the BPCPA that the Defendant's Representation contravenes the provisions of the BPCPA;

(b) a permanent injunction pursuant to s. 172(1)(b) BPCPA restraining the Defendant from contravening the BPCPA by way of the Representation;

(c) an Order pursuant to s. 172(3)(a) of the BPCPA that the Defendant restore to him and all other putative class members any and all monies which the Defendant has acquired in contravention of the BPCPA, including an order that the Defendant refund all monies charged by the Defendant to the class members for "YQ".

. . .

Part 3: LEGAL BASIS

1. This is a proposed class proceeding on behalf of the Plaintiff and a putative class of people in British Columbia who, when purchasing an airline travel ticket, were improperly charged a "tax" by the Defendant which was not in fact a third-party tax but was a charge collected by the Defendant and retained for its own use. . . .

. . .

4. The transaction by which the Plaintiff purchased a plane ticket from the [Agent] . . . was a "consumer transaction" within the meaning of that term as defined in s. 1 of the BPCPA.

5. The Representation constitutes a "deceptive act or practice" within the meaning of s. 4 of the BPCPA in that it had the capability, tendency or effect of deceiving or misleading the Plaintiff by creating a false impression that the $346.40 "YQ" item included within the "XT" or "total taxes" portion of the airplane ticket invoice was a tax collected by the Defendant for remittance to a third party government agency, when in fact it was simply additional monies charged, collected and retained by the Defendant on its own behalf and for its own use.

[8] In the notice of civil claim in the Lufthansa Action, after alleging facts concerning the purchase of his ticket and delivery of the "electronic ticket itinerary/receipt" document, Mr. Unlu alleges:

> 6. . . . Within the "XT" or tax portion of the cost of the airplane ticket is an item coded as "YQ" and the cost of that item was $331.86.
>
> 7. By including the $331.86 "YQ" item within the "XT" or tax portion of the cost of the airplane ticket, the Defendant [Lufthansa] knowingly and willingly represented the "YQ" item as a tax charged to and collected from the Plaintiff by the Defendant on behalf of a third party government agency or body (the "Representation").
>
> 8. Contrary to the Representation, the $331.86 "YQ" item was not a third party tax at all. Rather, the Defendant retained and diverted the monies paid by the Plaintiff for the "YQ" item to its own use.

The "Relief Sought" and "Legal Basis" are substantially the same as the allegations in the Air Canada Action.

[9] I pause here to note several important points. There is no challenge anywhere in either notice of civil claim to the Airline's right or ability to charge a fuel surcharge. Mr. Unlu does not take issue with the terms of any tariff or the tariff's validity. There is no allegation that the YQ item is unreasonable, or that charging a fuel surcharge is unreasonable or contrary to the ***BPCPA***. Rather, Mr. Unlu's complaint and allegation is that, in the circumstances pleaded, the surcharge was misrepresented as a tax.

[10] In its Response, Air Canada pleads in Part 1 that (among other things):

> 10. . . . [Air Canada] is federally regulated pursuant to, *inter alia*, the *Canada Transportation Act*, S.C. 1996, c. 10 (the "Act") and the Air Transport Regulations (the "Regulations").
>
> 11. Regulatory and decisional authority under the Act is exercised by the Canadian Transportation Agency (the "Agency"). In particular, the Agency has been given and exercises authority to regulate tariffs, fares, rates, charges and terms and conditions of carriage for international service and, in specific cases, to disallow fares, rates and charges set out in the tariff of an international airline.

[11] In Part 3 (the "Legal Basis") of its Response, Air Canada pleads on the jurisdiction issue:

> 1. Pursuant to Section 91 of the *Constitution Act, 1867*, the federal Parliament exercises exclusive legislative jurisdiction over the subject matter of aeronautics.

> 2. In the exercise of its authority over aeronautics, Parliament has enacted the Act, and has vested final decisional authority over questions of airline tariffs, fares, charges and ticketing in the Agency.
>
> 3. The [***BPCPA***] is constitutionally inapplicable to airplane ticketing practices by virtue of the doctrine of paramountcy.
>
> 4. Alternatively, the BPCPA is inapplicable to Air Canada, as a federally regulated undertaking, by virtue of the doctrine of interjurisdictional immunity.
>
> 5. In the further alternative, the Plaintiff's complaint lies within the exclusive jurisdiction of the Agency.

[12] Lufthansa's pleadings on the jurisdiction issue are to the same effect.

[13] In the notices of constitutional question, the Airlines repeat allegations from their Responses and say (quoting from the Air Canada notice):

> 10. In the exercise of its authority over aeronautics, Parliament has enacted the Act, and has vested final decisional authority over questions of airline tariffs, fares, charges and ticketing in the Agency.
>
> 11. The BPCPA is constitutionally inapplicable to airline ticketing practices by virtue of the doctrine of paramountcy.
>
> 12. The BPCPA is also inapplicable to Air Canada, as a federally regulated undertaking, by virtue of the doctrine of interjurisdictional immunity.

(b) The Legislation

(i) Federal

[14] The main federal statute in issue is the ***Canada Transportation Act***, S.C. 1996, c. 10 (the "***Transportation Act***").

[15] The "National Transportation Policy" is set out in s. 5, which provides:

> 5. It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when
>
> > (a) competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;

> (b) regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;
>
> (c) rates and conditions do not constitute an undue obstacle to the movement of traffic within Canada or to the export of goods from Canada;
>
> (d) the transportation system is accessible without undue obstacle to the mobility of persons, including persons with disabilities; and
>
> (e) governments and the private sector work together for an integrated transportation system.

[16] By s. 7, the "National Transportation Agency" is continued as the "Canadian Transportation Agency" (the "Agency"). The ***Transportation Act*** establishes the Agency as an administrative tribunal. With respect to the powers of Agency, the ***Act*** provides (among other things) that:

> 25. The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property, all the powers, rights and privileges that are vested in a superior court.
>
> . . .
>
> 26. The Agency may require a person to do or refrain from doing any thing that the person is or may be required to do or is prohibited from doing under any Act of Parliament that is administered in whole or in part by the Agency.
>
> 27. (1) On an application made to the Agency, the Agency may grant the whole or part of the application, or may make any order or grant any further or other relief that to the Agency seems just and proper.
>
> . . .
>
> 30. The fact that a suit, prosecution or proceeding involving a question of fact is pending in any court does not deprive the Agency of jurisdiction to hear and determine the same question of fact.
>
> 31. The finding or determination of the Agency on a question of fact within its jurisdiction is binding and conclusive.

[17] Under s. 33, a decision or order of the Agency may be made an order of the Federal Court or of any superior court and is enforceable in the same manner as

such an order. Section 36.1 provides for mediation (by agreement) of disputes concerning a matter within the Agency's jurisdiction.

[18] Part II of the ***Transportation Act*** deals specifically with air transportation.

[19] Section 55 sets out a number of defined terms. "Air service" is defined as "a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both." "Tariff", a key term for purposes of the applications before me, is defined to mean "a schedule of fares, rates, charges and terms and conditions of carriage applicable to the provision of an air service and other incidental services."

[20] Section 69 gives the Agency the power to issue a licence to operate a scheduled international service. Both Air Canada and Lufthansa operate such a service. Section 71 provides that the Agency:

> . . . may, on the issuance of a scheduled international licence or from time to time thereafter, make the licence subject, in addition to any terms and conditions prescribed in respect of the licence, to such terms and conditions as the Agency deems to be consistent with the agreement, convention or arrangement pursuant to which the licence is being issued, including terms and conditions respecting . . . tariffs, fares, rates and charges . . . .

The holder of a scheduled international licence is required to comply with every term and condition to which its licence is subject: s. 71.(2). Where the Agency determines that a licensee has contravened or does not meet the requirements of its licence, the Agency may suspend or cancel the licence: s. 72(2)(a).

[21] Under s. 76, where the Minister of Transport determines that it is necessary or advisable to provide direction to the Agency in respect of the exercise of any of the Agency's powers or the performance of any of its duties or functions under Part II in relation to international travel, the Ministry may issue directions to the Agency.

[22] The Agency is given the power to act in relation to international agreements, conventions or arrangements, where the Agency is identified as the aeronautical authority for Canada under those agreements, conventions or arrangements: see

sections 77 and 78 of the ***Transportation Act***. Examples of such international agreements are found at Exhibit "W" (stated to be an "Air Transport Agreement between the Government of Canada and the Government of the Federal Republic of Germany") (the "Canada-Germany Air Transport Agreement") and Exhibit "X" (stated to be an "Agreement on Air Transport between Canada and the European Community and its Member States") to the affidavit of Daniel Magny.

[23] In respect of "air travel complaints," s. 85.1 provides in part:

> (1) If a person has made a complaint under any provision of this Part, the Agency, or a person authorized to act on the Agency's behalf, shall review and may attempt to resolve the complaint and may, if appropriate, mediate or arrange for mediation of the complaint.
>
> (2) The Agency or a person authorized to act on the Agency's behalf shall report to the parties outlining their positions regarding the complaint and any resolution of the complaint.
>
> (3) If the complaint is not resolved under this section to the complainant's satisfaction, the complainant may request the Agency to deal with the complaint in accordance with the provisions of this Part under which the complaint has been made.
>
> (4) A member of the Agency or any person authorized to act on the Agency's behalf who has been involved in attempting to resolve or mediate the complaint under this section may not act in any further proceedings before the Agency in respect of the complaint.

[24] Section 86 provides that the Agency may make regulations, including regulations:

> (h) respecting traffic and tariffs, fares, rates, charges and terms and conditions of carriage for international service and
>
> > (i) providing for the disallowance or suspension by the Agency of any tariff, fare, rate or charge,
> >
> > (ii) providing for the establishment and substitution by the Agency of any tariff, fare, rate or charge disallowed by the Agency,
> >
> > (iii) authorizing the Agency to direct a licensee or carrier to take corrective measures that the Agency considers appropriate and to pay compensation for any expense incurred by a person adversely affected by the licensee's or carrier's failure to apply the fares, rates, charges or terms or conditions of carriage applicable to the service it offers that were set out in its tariffs, and

> (iv) requiring a licensee or carrier to display the terms and conditions of carriage for its international service on its Internet site, if the site is used for selling the international service of the licensee or carrier;

[25] Section 86.1 is entitled "Advertising Regulations," and provides:

> (1) The Agency shall make regulations respecting advertising in all media, including on the Internet, of prices for air services within, or originating in, Canada.
>
> (2) Without limiting the generality of subsection (1), regulations shall be made under that subsection requiring a carrier who advertises a price for an air service to include in the price all costs to the carrier of providing the service and to indicate in the advertisement all fees, charges and taxes collected by the carrier on behalf of another person in respect of the service, so as to enable a purchaser of the service to readily determine the total amount to be paid for the service.
>
> (3) Without limiting the generality of subsection (1), the regulations may prescribe what are costs, fees, charges and taxes for the purposes of subsection (2).

[26] Section 86.1 was brought into force by order-in-council on December 15, 2011: see SI/2011-119 in the ***Canada Gazette***, Part II, vol. 146, no. 1, at p. 222. The publication in the ***Canada Gazette*** includes an "explanatory note" that is not part of the order, and which states:

> ***Proposal***
>
> This Order would bring into force section 27 of *An Act to amend the Canada Transportation Act and the Railway Safety Act and to make consequential amendments to other Acts* (the Act), assented to on June 22, 2007. This would bring into force sections 86.1 and 86.2 of the *Canada Transportation Act*.
>
> ***Objective***
>
> The result of bringing into force section 86.1 will require the Canadian Transportation Agency (the Agency) to make regulations requiring air carriers to include all fees, charges and taxes in their advertised prices. This would ensure greater transparency of advertised airfares by airlines and allow consumers to readily determine the cost of an air service.
>
> . . .
>
> ***Implications***
>
> By bringing into force section 27, the Government would promote fair competition and enhance consumer protection by making the full costs of an airline ticket more transparent and clear in advertising.

> This is in keeping with similar initiatives in major trading partners, notably the United States and the European Union.
>
> ***Consultations***
>
> The Agency will carry out consultations with key air and travel industry stakeholders before commencing the process of drafting regulations requiring air carriers to include all fees, charges and taxes in their advertised prices. In addition, a consultation document will be made available to the general public on the Agency's Web site with an invitation for comments.
>
> The consultation process will begin as soon as possible after the bringing into force of section 27 and is expected to last approximately four months. Based on the outcome of this consultation process, the Agency will begin the process of creating drafting instructions. The development of the required regulations will follow the normal regulatory process, including pre-publication in the *Canada Gazette*, Part I.

[27] The Airlines rely on the power given to the Agency under s. 86.1 in support of their paramountcy and interjurisdictional immunity arguments, including the argument that consumer protection lies at the protected "core" of the federal jurisdiction over aeronautics. For the purposes of the Airlines' arguments, it is the fact of the power given to the Agency that is important. From the Airlines' perspective, it does not matter that no regulations have been made, and the content of any regulations that might be made in the future under s. 86.1 is irrelevant.

[28] The relevant Regulations made under s. 86 of the ***Transportation Act*** are the ***Air Transport Regulations***, SOR/88-58 (the "***Regulations***").

[29] Section 18 of the ***Regulations***, concerning licence conditions, provides (in s. 18(b)) that "the licensee shall not make publicly any statement that is false or misleading with respect to the licensee's air service or any service incidental thereto." The Airlines point to this section as an example where the Agency has been given specific legislative authority to deal with consumer protection matters, including false or misleading statements.

[30] Section 110 deals with the filing of tariffs for an airline that operates an international service (with some exceptions that are not relevant here), and provides in part that:

> (1) Except as provided in an international agreement, convention or arrangement respecting civil aviation, . . . an air carrier or its agent shall file with the Agency a tariff for that service, . . . in the style, and containing the information, required by this Division.
>
> (2) Acceptance by the Agency of a tariff or an amendment to a tariff does not constitute approval of any of its provisions, unless the tariff has been filed pursuant to an order of the Agency.
>
> (3) No air carrier shall advertise, offer or charge any toll [defined as "any fare, rate or charge established by an air carrier in respect of the shipment, transportation, care, handling or delivery of passengers or goods, or in respect of any service incidental thereto] where
>
> > (a) the toll is in a tariff that has been rejected by the Agency; or
> >
> > (b) the toll has been disallowed or suspended by the Agency.
>
> . . .

[31] Section 111(1) provides that:

> All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

The Airlines point to this section as another example of the consumer protection provisions contained in the federal legislation.

[32] In that regard, the Airlines also note sections 113 and 113.1 of the ***Regulations***, which provide that:

> 113. The Agency may
>
> > (a) suspend any tariff or portion of a tariff that appears not to conform with subsections 110(3) to (5) or section 111 or 112, or disallow any tariff or portion of a tariff that does not conform with any of those provisions; and
> >
> > (b) establish and substitute another tariff or portion thereof for any tariff or portion thereof disallowed under paragraph (a).
>
> 113.1 If an air carrier that offers an international service fails to apply the fares, rates, charges or terms and conditions of carriage set out in the tariff that applies to that service, the Agency may direct it to
>
> > (a) take the corrective measures that the Agency considers appropriate; and

> (b) pay compensation for any expense incurred by a person adversely affected by its failure to apply the fares, rates, charges or terms and conditions set out in the tariff.

[33] Air carriers must keep tariffs available for public inspection, including on their Internet sites: see sections 116 and 116.1. of the ***Regulations***.

[34] Section 122 of the ***Regulations*** describes what every tariff for international service must contain, and provides (among other things) that:

> Every tariff shall contain
>
> (a) the terms and conditions governing the tariff generally, stated in such a way that it is clear as to how the terms and conditions apply to the tolls named in the tariff;
>
> (b) the tolls, together with the names of the points from and to which or between which the tolls apply, arranged in a simple and systematic manner . . . ; and
>
> (c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,
>
> (i) the carriage of persons with disabilities,
>
> (ii) acceptance of children for travel,
>
> (iii) compensation for denial of boarding as a result of overbooking,
>
> (iv) passenger re-routing,
>
> (v) failure to operate the service or failure to operate on schedule,
>
> (vi) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,
>
> (vii) ticket reservation, cancellation, confirmation, validity and loss,
>
> (viii) refusal to transport passengers or goods,
>
> (ix) method of calculation of charges not specifically set out in the tariff,
>
> (x) limits of liability respecting passengers and goods,
>
> (xi) exclusions from liability respecting passengers and goods, and
>
> (xii) procedures to be followed, and time limitations, respecting claims.

[35] The Airlines rely on all of these provisions in the ***Transportation Act*** and the ***Regulations*** in support of their arguments that Parliament intended to provide a complete code regulating contracts for international carriage by air and that the

Agency has been granted exclusive authority to regulate all of the business and economic matters relating to air travel.

(ii) The *BPCPA*

[36] Mr. Unlu pleads and relies on s. 4 of the ***BPCPA***. That section defines a "deceptive act or practice" to mean:

> in relation to a consumer transaction
>
> (a) an oral, written, visual, descriptive or other representation by a supplier, or
>
> (b) any conduct by a supplier
>
> that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;

A "representation" includes "any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction."

[37] Section 5 of the ***BPCPA*** provides that:

> 5 (1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.
>
> (2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

[38] Compliance orders may be made under s. 155, which provides in part:

> 155 (1) After giving a person an opportunity to be heard, an inspector may order the person to comply with this Act and the regulations if satisfied that the person is contravening, is about to contravene or has contravened this Act or the regulations.
>
> (2) A compliance order must
>
> . . .
>
> (b) describe the person's act or practice that is contravening, is about to contravene or has contravened this Act or the regulations,
>
> . . .
>
> (3) In a compliance order, an inspector may order a person to stop engaging in or not engage in a specified act or practice.

> (4) The director may include one or more of the following orders in a compliance order:
>
> . . .
>
> (c) that a person take specified action to remedy an act or practice by which the person is contravening, is about to contravene or has contravened this Act or the regulations;

A compliance order made under s. 155 may be filed with the court, and, when so filed, it is deemed for all purposes (except appeal) to be an order of the B.C. Supreme Court and enforceable as such: see s. 157.

[39] Mr. Unlu seeks relief under s. 172, which provides in part:

> 172 (1) The director or a person other than a supplier . . . may bring an action in Supreme Court for one or both of the following:
>
> (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
>
> (b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.
>
> . . .
>
> (3) If the court grants relief under subsection (1), the court may order one or more of the following:
>
> (a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;
>
> . . .

(c) The Affidavit of Daniel Magny

[40] The Airlines have filed an affidavit sworn by Daniel Magny, and Mr. Magny's affidavit was the only affidavit evidence submitted in connection with the applications. Since I am not being asked to rule on the merits of either the claims or the defences, the Airlines' intention was to confine Mr. Magny's evidence to matters relevant only to the constitutional question. Thus, even though copies of Mr. Unlu's ticket receipts (Exhibit "A") and Air Canada's tariff issued August 11, 2008 (Exhibit "G") were included among the exhibits to Mr. Magny's affidavit, I make no findings

that are relevant to the merits of the claims or defences (other than the constitutional question), based on them.

[41] Mr. Magny is a lawyer and has been a member of the Québec bar since 1996. He joined Air Canada in 2002 as its counsel for Regulatory and International Affairs. Currently, Mr. Magny is senior counsel for International, Alliances & Regulatory Affairs for Air Canada, working in Montréal. Mr. Magny says that, as a result of his training and experience, he has extensive knowledge of and expertise with the national and international airline industry, and, in particular, with:

(a) Canadian, U.S. and international regulations and bilateral treaties applicable to the airline industry, including those applicable to ticketing, taxes, tariffs and surcharges issues; and

(b) the applicable regulatory agencies that oversee the airline industry in Canada and elsewhere, and specifically the Agency and Transport Canada.

[42] In his affidavit, Mr. Magny describes the Canadian legislation and bilateral treaties which, in his experience, are applicable to international airlines with respect to the tariffs that such airlines (including Air Canada and Lufthansa) levy on tickets for international flights from and to Canada. He also describes, from his perspective as senior counsel within Air Canada, the role that the Agency performs in regulating international airlines that operate passenger services from and to Canada, and, in particular, the regulation of tariffs on international airline tickets.

[43] Of course, Mr. Magny is not a representative of the Agency. Moreover, I treat his statements, opinions and conclusions about the nature of the Agency (for example “The Agency is an independent, quasi-judicial, federal administrative tribunal”) and what it does, and the scope of the Agency’s mandate under the applicable legislation, as in the nature of argument, rather than evidence. That must be so, particularly since these applications are brought under Rule 9-7. Attaching a copy of the Agency’s 2008-2009 Annual Report as an exhibit to Mr. Magny’s affidavit

does not mean that the Report is thereby admissible to prove the truth of its contents.

[44] Despite that, I note the following comments concerning air travel complaints in the Agency's Annual Report, at pp. 22-23 (**bold** in original):

> **Resolving Air Travel Complaints**
>
> Each year, the Agency receives a large number of complaints from air travellers related to the problems they have experienced with air carriers operating publicly available services to, from or within Canada.
>
> The Agency can deal with such issues as:
>
> - Baggage (e.g., damages, delayed, excess, liability, lost, size limits, theft);
> - Flight disruptions (e.g., cancellation, missed connection, revised schedules);
> - Tickets and reservations (e.g., lost, refunds, restrictions, availability of seats, cancellation);
> - Denied boarding (e.g., inability to fly as a result of carrier overbooking);
> - Refusal to transport (e.g., late check-in, reconfirmation, travel documents);
> - Passenger fares and charges;
> - Cargo . . . ; and
> - Carrier-operated loyalty programs . . . .
>
> . . .
>
> **Facilitating the resolution of air travel complaints**
>
> The majority of air complaints are resolved informally through a facilitation process [i.e., s. 85.1 of the ***Transportation Act***]. Complaints are assessed against the carrier's tariff – the published terms and conditions of services, including fares, rates and charges – as well as Canadian transportation law and international conventions.
>
> . . .

[45] These comments, together with the decisions and orders attached as exhibits to Mr. Magny's affidavit, provide examples of the types of matters that the Agency deals with.

[46] Mr. Magny provides a helpful discussion of international fuel surcharges. He explains that many airlines operating international flights (including those to and from

Canada) levy such a surcharge and add it to the base fare of an airline ticket as a temporary measure to offset partially the volatility and fluctuations in the price of jet fuel. To illustrate the Agency's involvement with and oversight of surcharges (including under international air transport agreements), Mr. Magny has attached as exhibits to his affidavit a number of decisions and orders made by the Agency, pertaining to filings that airlines have made regarding these surcharges.

[47] Mr. Magny explains that the filings are generally made under the airline's "International Passenger Rules and Fare Tariff" under Rule C27 in Tariff CTA(A) No. 458. He has attached as exhibits to his affidavit examples of Air Canada's filings in this regard, including for the period in issue in Mr. Unlu's claim. Mr. Magny explains that each of the filings sets out in detail the international fuel surcharge that Air Canada added to the cost of each international airline ticket, in addition to the base price. He says that each filing provided that such surcharges for trans-Atlantic or trans-Pacific flights were to be shown separately in the TAX/FEE/Charge box of the ticket under the code "YQ" (except for fares originating in certain South American countries where the surcharge was to be under the code "Q"). Mr. Magny explains that the coding system used by airlines has been developed by IATA, an international trade body representing about 230 airlines (including Air Canada and Lufthansa). The "YQ" and "Q" codes are "airline use only" codes used by IATA members to designate various charges collected by the airline, such as international fuel surcharges.

[48] Included among the orders and decisions of the Agency that are attached as exhibits to Mr. Magny's affidavit are several involving Air Canada. For example, in "Order No. 2002-A-216", the Agency concluded that the proposed surcharge was not reasonable under s. 111(1) of the ***Regulations***. In Order No. 2007-A-89, the Agency concluded that a proposed extension of an international fuel surcharge for one year was unreasonable, and substituted a different expiry date.

[49] In Decision No. 456-C-A-2009, the Agency ruled in Air Canada's favour on a complaint by a consumer (Mr. Wyant) that the international fuel surcharge on two

tickets was unjust, unreasonable and discriminatory. The Agency noted its jurisdiction under sections 111 and 113 of the ***Regulations*** to consider the complaint, concluded that, given the fuel price volatility and taking into account competitive considerations, the addition of the fuel surcharge to Mr. Wyant's tickets was not unreasonable. The Agency concluded further that if Air Canada were required to incorporate the fuel surcharge into its base fares, it would be at a competitive disadvantage.

[50] Mr. Magny sets out his views on the potential impact of provincial regulation on Air Canada. He says that Air Canada's operations would be "impaired" if the consumer legislation in each of the ten provinces and three territories were to be applied to ticket pricing and the tariffs Air Canada has filed or will file with the Agency. He explains that Air Canada has applied and continues to apply an international fuel surcharge "to attempt to recover unstable and unavoidable operating costs resulting from fluctuating fuel prices." According to Mr. Magny, the surcharge is not used to cover the total cost of fuel, but rather is a means to offset the volatility of, and fluctuations in, fuel costs. He explains why it is not feasible for Air Canada to include the international fuel surcharge amounts in its base fares, citing among other things the complex competitive environment. Mr. Magny says that the Agency has accepted such considerations as justifying a separate fuel surcharge, referring to a ruling by the Agency from March 2007 involving Air Canada ("Order No. 2007-A-89") as an example.

[51] Mr. Magny says that the Agency "has the expertise and familiarity with the realities of air transportation, both domestic and international, to appreciate the practical and competitive position of air carriers in this regard." He says that provincial consumer regulators, by contrast, "do not have the same expertise and as a result may purport to impose upon air carriers requirements that are practically and commercially unfeasible." In this regard, Mr. Magny refers to a letter sent to Air Canada's president in October 2010 by the Office de la protection du consummateur of Québec, which (among other things) advised that under the applicable consumer protection legislation the advertised price for goods or services must correspond with

the total amount that the consumer will have to pay, with limited exceptions. Mr. Magny says that:

> 57. It is not reasonable to expect Air Canada, or other international air carriers, to comply with various provincial regulatory schemes in the various provinces regarding pricing and ticketing practices, in addition to the federal regime. This would entail compliance with varying and potentially conflicting regulations while maintaining a single tariff for all Canadian purposes in compliance with the pricing, publication of prices and tariff requirements of the *Canada Transportation Act* and the *Air Transportation Regulation*.
>
> 58. I believe that it is unlikely that Air Canada can comply with the current regime for pricing, publication of prices and tariff requirements under *Canada Transportation Act* and the *Air Transportation Regulation* and at the same time comply with provincial consumer protection legislation in each of the Canadian jurisdictions.

Discussion and Analysis

(a) Should consideration of the Constitutional Question be postponed?

[52] As a preliminary point in response to the Airlines' applications, the AGBC argues that the court should first consider whether the airline tickets in issue violate the ***BPCPA*** – in other words, first determine the merits of the plaintiff's claims – before deciding whether the ***BPCPA***, as a matter of constitutional law, applies to the Airlines. The AGBC argues that, for example, if statutory interpretation or some other non-constitutional issue determines the merits (for example, Mr. Unlu is unable to prove, in relation to the Airlines, a "representation" made by a "supplier"), or if the factual basis no longer supports the constitutional question, or if the constitutional question becomes hypothetical, it would then be unnecessary to address that question. The AGBC also notes that constitutional questions should not be discussed in a factual vacuum, citing ***Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)***, 2002 SCC 31, [2002] 2 S.C.R. 146, at para. 46, in support.

[53] In response, the Airlines say that the constitutional question is neither hypothetical nor moot. They say that there is a sufficient factual underpinning (in Mr. Magny's affidavit) to determine the constitutional question and that the basic facts

underlying that question are not in dispute. The Airlines say that the determination of the constitutional question will be dispositive of the Actions and the question should be decided at the earliest opportunity. In support of their position, they cite ***Shapray v. British Columbia (Securities Commission)***, 2009 BCCA 322, where, in responding to an argument similar to that advanced by the AGBC here, the Court said (at para. 27):

> At the end of the day, if it is the legislation that is being challenged, the issue should be addressed directly, not only in the interests of efficiency but in the interests of ensuring that laws that may be unconstitutional are recognized as such and set aside or modified at the earliest date.

[54] The Airlines also argue that the Court is given a more active role in the supervision and management of class proceedings, as compared with traditional litigation. They argue that one of the purposes of class action legislation is judicial economy and the efficient handling of potentially complex cases. The Airlines say that, for the Court to refrain from deciding the constitutional question (as the AGBC suggests) could lead to a significant waste of judicial resources. The Airlines argue that a party to a class action faces the possibility of defending two "trial" battlegrounds: a certification hearing and a common issues trial. The Airlines say that, as a result, courts have looked favourably on pre-certification applications, in appropriate circumstances, citing ***Consumers' Assn. of Canada v. Coca-Cola Bottling Co.***, 2006 BCSC 863, at para. 35, in support.

[55] The Airlines argue that resolution of the constitutional question may significantly reduce the judicial resources necessary to resolve matters in issue, and that the possibility of two "trial" battlegrounds militates in favour of the constitutional question being determined first. The Airlines say, citing ***Unifund Assurance Co. v. Insurance Corporation of British Columbia***, 2003 SCC 40, [2003] 2 S.C.R. 63, at para. 17, that if the ***BPCPA*** is constitutionally inapplicable to them, there is no practical or principled reason for either of them to endure a certification hearing and possible common issues trial before a determination of the constitutional question.

[56] However, the other side of the Airlines' argument based on efficiency and allocation of judicial resources is that, in the context of class proceedings, litigation by instalments can be inefficient: see Mr. Justice Iacobucci's observations in ***Garland v. Consumers' Gas Co.***, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 90.

[57] Here, I accept the Airlines' arguments that, in the interests of efficiency and judicial economy, the constitutional question should be determined first, and they should not have to endure a certification hearing and possible common issues trial before determination of that question. I recognize that this creates a risk of the scenario described (and criticized) by Mr. Justice Iacobucci in ***Garland***. However, I have concluded that the Airlines are entitled to have a ruling at this time on the constitutional question they have brought before the Court. Based on the authorities discussed below, the Airlines bear the burden of proof.

(b) Analytical Framework for the Constitutional Question

[58] It is well established that the resolution of a case involving the constitutionality of legislation in relation to the division of powers must begin with an analysis of the "pith and substance" of the impugned legislation: see ***Canadian Western Bank v. Alberta***, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 25. However, in this case, the Airlines do not challenge the constitutional validity of the ***BPCPA***. Rather, they dispute its applicability, based first on the doctrine of paramountcy, and secondly, and, in the alternative, on the doctrine of interjurisdictional immunity.

[59] It is also well established that the federal government has jurisdiction over matters relating to air travel under its general power "to make Laws for the Peace, Order, and good Government of Canada" (also known as the "POGG" power) under s. 91 of the ***Constitution Act, 1867***. See ***Québec (Attorney General) v. Canadian Owners and Pilots Association***, 2010 SCC 39, [2010] 2 S.C.R. 536 ("***COPA***"), at paras. 2 and 28-31. In this case, there is a dispute between the Airlines and the AGBC concerning the scope of that jurisdiction: whether the Agency has been given the exclusive and final decision-making authority with respect to matters of air travel,

and whether consumer protection lies at the protected "core" of the Agency's mandate.

[60] As I observed above, no representative of the Attorney General of Canada participated in this hearing. The Airlines therefore had no support in advancing their arguments that the ***BPCPA*** is constitutionally inapplicable on the basis of paramountcy and concerning the law's effects on what they asserted is the core of a federal power. In that regard, I note Chief Justice Dickson's comments in ***OPSEU v. Ontario (Attorney General)***, [1987] 2 S.C.R. 2, at p. 19, that "the Court should be particularly cautious about invalidating a provincial law when the federal government does not contest its validity."

[61] On this same point, I also note the court's comments in ***Northwestern Outback Aviation Ltd. v. Ontario (Attorney General)***, 2011 ONSC 1063, [2011] O.J. No. 1081 (Div. Ct.), which involved a constitutional challenge by a flight training school to the ***Private Career Colleges Act, 2005***, S.O. 1990, c. 28. The Court rejected both the paramountcy and interjurisdictional immunity arguments of the flight school, and concluded the legislation was constitutionally applicable and operative. The Court said, at para. 22:

> There is one further consideration to be mentioned. It is our understanding that the Attorney-General for Canada has been served with a Notice of Constitutional Question in respect of this proceeding and has elected not to intervene. . . . While the position taken by the Attorney-General for Canada on this application is not per se an independent consideration bearing on the constitutionality of the [Act], it does inform the Court's approach to the conduct of the analysis set out above.

(c) Is the *BPCPA* inapplicable based on Paramountcy?

[62] The doctrine of paramountcy deals with the way in which the federal power is exercised: see ***COPA***, at para. 62. When the operational effects of provincial legislation are incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility: see ***Canadian Western Bank***, at para. 69.

[63] In ***COPA***, Chief Justice McLachlin explained, at para. 64, that claims in paramountcy may arise from two different forms of conflict:

> The first is operational conflict between federal and provincial laws, where one enactment says "yes" and the other says "no", such that "compliance with one is defiance of the other": *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191, per Dickson J. In *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, at p. 155, La Forest J. identified a second branch of paramountcy, in which dual compliance is possible, but the provincial law is incompatible with the purpose of federal legislation [citations omitted]. Federal paramountcy may thus arise from either the impossibility of dual compliance or the frustration of a federal purpose: *Rothmans* [*Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13], at para. 14.

See also ***Québec (Attorney General) v. Canada (Human Resources and Social Development)***, 2011 SCC 60, at para. 17.

[64] The Airlines say that both types of conflict – operational and frustration of a federal purpose – exist here. The AGBC says that neither exists.

[65] The party seeking to invoke the doctrine of federal paramountcy on the basis of frustration of a federal purpose bears the burden of proof: see ***Canadian Western Bank***, at para. 75 and ***British Columbia (Attorney General) v. Lafarge Canada Inc.***, 2007 SCC 23, [2007] 2 S.C.R. 86, at para. 77. To prove that the impugned legislation frustrates the purpose of a federal enactment, that party must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose. Moreover, the standard for invalidating provincial legislation on the basis of frustration of federal purpose is high: see ***COPA***, at para. 66. Invocation of federal paramountcy on the basis of frustration of purpose, as opposed to operational conflict, requires clear proof of purpose; mere permissive federal legislation does not suffice: see ***COPA***, at para. 68.

[66] The Airlines' primary argument is that the ***BPCPA*** is inapplicable because it frustrates the purpose of the federal law. However, they also say that there is an operational conflict between the federal law and the ***BPCPA***. I will deal first with their operational conflict argument.

[67] In my view, there is no operational conflict. For an operational conflict to exist, and in the context of the issues raised in Mr. Unlu's pleadings, the Agency would have to require that an airline display a tariff containing a statement or statements that have the capability, tendency or effect of deceiving or misleading a consumer, something prohibited under the ***BPCPA***. To put it another way, there would be an operational conflict if the Agency accepted an act or practice that would be deceptive under the ***BPCPA***. However, I see nothing in either the ***Transportation Act*** or the ***Regulations*** to suggest that the Agency would impose such a requirement on an air carrier, or conclude it was acceptable. The idea borders on the absurd.

[68] In my view, the requirement under s. 86.1 of the ***Transportation Act*** that the Agency make regulations respecting advertising does not advance the Airlines' case. Since no regulations have been made, there is nothing potentially in conflict. Moreover, the logic of the Airlines' argument is that an operational conflict could result because the Agency could require an airline to advertise something as a tax (thus creating the possibility of a deceptive act or practice under provincial legislation such as the ***BPCPA***), when in fact it was a charge, not a tax. However, the express provisions of s. 86.1(2) – including the separate reference to "fees," "charges," and "taxes" – support the opposite conclusion, in my view. The Airlines' argument is premised on the Agency requiring an airline to engage in conduct that, rather than ensuring greater transparency of advertised airfares, would have the opposite result. Again, the idea borders on the absurd.

[69] The Airlines also argue that a compliance order could be issued under s. 155 of the ***BPCPA***, even though the Airline was in full compliance with the ***Transportation Act***, the ***Regulations*** and international agreements. This argument appears to be based on the premise that Mr. Unlu's complaint is about the fact of the international fuel surcharge. However, based on the pleadings, it is not. There is no challenge in either Action to the Agency's acceptance of a tariff allowing the Airline to charge a fuel surcharge, or to describe the surcharge using the code "YQ." If (hypothetically) a determination were to be made in either Action that an Airline had

identified the surcharge as a tax and that was a deceptive act or practice, such a determination would not conflict with the Agency's decision concerning the contents of the tariff.

[70] The Airlines argue further that the Agency has specifically approved their tariffs, which permit them to impose an international fuel surcharge, to impose the surcharge separately rather than include it in the base fare, and to code it "YQ" on the tickets. They say that to the extent the ***BPCPA*** forbids these practices, there is a direct operational conflict between it and the ***Transportation Act***. I note that, under s. 110(2) of the ***Regulations***, acceptance by the Agency of a tariff or amendment does not constitute approval of any of its provisions, unless the tariff has been filed pursuant to an order of the Agency. In my view, the evidence does not support a finding that the Agency has "specifically approved" the Airlines' tariffs. "Acceptable" and "accepted" (rather than "approved") are the words used in Article 12 of the Canada-Germany Air Transport Agreement.

[71] In any event, the Airlines' argument is based on the premise that Mr. Unlu is challenging the tariff and the ability of the Airlines to charge a fuel surcharge in accordance with an accepted tariff. That premise is false. Mr. Unlu does not allege that charging a fuel surcharge is a deceptive act or practice. He does not complain about advertising. He complains about a statement he claims was made on his electronic ticket receipt.

[72] I turn then to the Airlines' main argument: that the ***BPCPA*** is incompatible with or "frustrates" the purpose of the federal legislation.

[73] The Airlines argue that the ***Transportation Act*** and the ***Regulations*** vest the Agency with final decisional authority over all economic aspects of air travel, in accordance with the objects in s. 5 of the ***Act***. They say that Parliament intended the legislation to be a complete code for regulating contracts for international carriage by air. The Airlines say that the Agency has been given exclusive and final decision-making authority with respect to matters relating to air travel. They assert that the Agency's authority (including its authority under s. 18 of the ***Regulations***)

would be frustrated by the application of the ***BPCPA***, and, further, that the scheme of the ***BPCPA*** would completely nullify the Agency's decision-making authority concerning the terms and conditions of a contract for carriage by air. The Airlines say that, in order for relief to be granted under sections 171 and 172 of the ***BPCPA***, the Court would have to find that the Agency was wrong in accepting a tariff whereby an international fuel surcharge was charged and shown separately, and thereby override the Agency's decision-making power in respect of tariffs, including international tariffs.

[74] Further, the Airlines assert that the application of the ***BPCPA*** could interfere with the policy objective of the ***Transportation Act*** by permitting a provincial regulator, or the Court, to proscribe practices that might be considered misleading, but without taking into account the larger context and implications for the air travel industry, air carriers and Canada's international commitments. The Airlines point out that the Agency has on many occasions considered the potentially misleading effect of adding surcharges to base fares, sometimes rejecting surcharges, sometimes permitting them. Because of its mandate and expertise, the Agency has been able to take into account the practical realities of the airline industry and the policy considerations underlying the ***Transportation Act***. The Airlines say that, inherent in the creation of a single federal authority (the Agency) to oversee all economic aspects of air travel is a policy choice in favour of a uniform set of laws across the country and internationally. Permitting a patchwork of provincial legislation to regulate airline practices would frustrate this federal purpose.

[75] However, Mr. Unlu's complaints are not about tariffs or the fact of a fuel surcharge or whether charging a fuel surcharge is just or reasonable. The complaints are not about the terms and conditions for carriage. The complaints are not about advertising. In that sense, Mr. Unlu's claims do not challenge anything within the mandate of the Agency. The Agency's jurisdiction and authority to deal with matters falling within its jurisdiction are unaffected.

[76] I do not accept the Airlines' argument that the federal legislation has as its purpose making the Agency the exclusive and final decision-making authority with respect to matters relating to air travel, particularly in relation to the subject matter of Mr. Unlu's complaints. The legislation is limited when it comes to consumer remedies. For example, s. 18(b) of the ***Regulations*** does not provide for any compensatory relief to a consumer, in the event a licensee has made a false or misleading statement. I do not see anything in the legislation to suggest that remedies described are to be the only remedies available to a consumer dealing with an air carrier. The Agency's handling of the types of complaints it describes in its Annual Report would not be frustrated if Mr. Unlu was able to prove the breach of the ***BPCPA*** he alleges in his notices of civil claim.

[77] In argument, Mr. Neave (on behalf of the Airlines) submitted that s. 113.1 of the ***Regulations*** provides the Agency with broad remedial powers. However, from the perspective of the consumer, any compensation would be limited to "any expense incurred by a person adversely affected by [the air carrier's] failure to apply the fares, rates, charges or terms and conditions set out in the tariff." This would not provide any compensation to Mr. Unlu, assuming he were able to prove what he alleges in his pleadings.

[78] Accordingly, in my view, no federal purpose is frustrated if the ***BPCPA*** applies to the act or practice about which Mr. Unlu complains in his notices of civil claim.

(d) Is the *BPCPA* inapplicable on the basis of interjurisdictional immunity?

[79] The analysis with respect to the doctrine of interjurisdictional immunity presumes the validity of a law and focuses exclusively on the law's effects on the core of a federal power. What matters, from the perspective of interjurisdictional immunity, is that the law has the effect of impairing the core of a federal competency. In those cases where the doctrine applies, it serves to protect the immunized core of federal power from any provincial impairment. See ***COPA***, at para. 57.

[80] The first step in the analysis is to determine whether a provincial law trenches on the protected "core" of a federal competence. If it does, then the second step is to determine whether the provincial law's effect on the exercise of the protected federal power is sufficiently serious to invoke the doctrine of interjurisdictional immunity. See ***COPA***, at para. 27.

[81] With respect to the first step, Chief Justice McLachlin said in ***COPA***, at paras. 35-36:

> [35] The test is whether the subject comes within the essential jurisdiction — the "basic, minimum and unassailable content" — of the legislative power in question [citations omitted]. The core of a federal power is the authority that is absolutely necessary to enable Parliament "to achieve the purpose for which exclusive legislative jurisdiction was conferred": *Canadian Western Bank*, at para. 77.
>
> [36] In *Canadian Western Bank*, Binnie and LeBel JJ. explained that the jurisprudence will frequently serve as a useful guide to identify the core of a federal head of power, and they concluded that interjurisdictional immunity should "in general be reserved for situations already covered by precedent" (para. 77).

[82] With respect to the second step, Chief Justice McLachlin wrote, at paras. 42-45:

> [42] . . . [I]t must be shown that this interference is constitutionally unacceptable. This raises the issue of how serious an interference must be to render a provincial law inapplicable.
>
> [43] After a period of inconsistency, it is now settled that the test is whether the provincial law impairs the federal exercise of the core competence: *Canadian Western Bank*, per Binnie and LeBel JJ. . . .
>
> [44] The impairment test established in *Canadian Western Bank* marks a midpoint between sterilization and mere effects. . . .
>
> [45] "Impairment" is a higher standard than "affects". It suggests an impact that not only affects the core federal power, but does so in a way that seriously or significantly trammels the federal power. In an era of cooperative, flexible federalism, application of the doctrine of interjurisdictional immunity requires a significant or serious intrusion on the exercise of the federal power. It need not paralyze it, but it must be serious.

[83] Here, and as an alternative to their paramountcy argument, the Airlines argue that the application of the ***BPCPA*** would seriously interfere with the Agency's

decision-making power as regards the terms and conditions of carriage, a core aspect of air travel. The AGBC says there is no precedent establishing that airline tickets are at the "core" of the federal jurisdiction over aeronautics and the "core" of that jurisdiction would not be impaired by the application of the ***BPCPA*** to the complaints made by Mr. Unlu.

[84] The Airlines say that the first element of the test – whether the provincial law trenches on the protected "core" of a federal competence – is clearly met on the facts of this case. The Airlines say that the ***BPCPA*** trenches on federal regulatory jurisdiction over the business of carrying passengers by air, a core area of federal competence. The AGBC says that the ***BPCPA*** does not intrude on the core of the federal jurisdiction over aeronautics, as that core does not include consumer transactions.

[85] As I noted above, in ***Canadian Western Bank***, Binnie and LeBel JJ. concluded that interjurisdictional immunity should in general be reserved for situations already covered by precedent. The Airlines look to maritime cases to argue that the situation here is covered by precedent. They argue that there is no principled basis to distinguish between contracts for carriage by air, and contracts for carriage by sea. In support of their argument concerning federal legislative authority to deal with the contractual aspects of transportation services that are within federal regulatory power, the Airlines cite (among other cases) ***Tropwood A.G. and others v. Sivaco Wire & Nail Co.***, [1979] 2 S.C.R. 157, at pp. 165-166.

[86] However, unlike ***COPA***, here there is no precedent available, in my view. I agree with the AGBC's submission that it is important to consider the source of Parliament's authority over aeronautics, which is distinct from those subject matters enumerated in s. 91 of the ***Constitution Act, 1867***. That provides a reasonable basis to distinguish the Airlines' cases discussing bills of lading in maritime shipping.

[87] However, even if I were to accept the Airlines' argument that the business of carrying passengers by air lies at the core of the federal jurisdiction over aeronautics, and that the ***BPCPA*** trenches on that protected core, I do not accept

that the impact of the ***BPCPA*** on the federal power is sufficiently serious to attract the doctrine of interjurisdictional immunity. Again, it is important to remember the context in which this question arises: Mr. Unlu's complaints as alleged in his notices of civil claim.

[88] As I noted above, the Airlines argue that the application of the ***BPCPA*** to air carriers would seriously interfere with and indeed would nullify the Agency's decision-making power concerning the terms and conditions of carriage. However, Mr. Unlu makes no complaint about those terms and conditions. The Airlines' argument is therefore based on a false premise.

[89] The Airlines argue further that the evidence here demonstrates that the application of the ***BPCPA*** to international airline tariffs would seriously impair the operation of air carriers as federally regulated undertakings. However, Mr. Unlu's claims do not raise any issue concerning the application of the ***BPCPA*** to tariffs. He does not assert the ***BPCPA*** applies to tariffs in any way.

[90] The Airlines raise the concern that air carriers would become subject to the decisions of provincial regulators who, unlike the Agency, have neither the mandate nor the expertise to take into account unique features of the airline industry or to take into account international fuel surcharges. However, Mr. Unlu does not complain about the fact of the fuel surcharges, or challenge the ability of the Airlines to levy them. For the doctrine of interjurisdictional immunity to apply, the impairment must seriously or significantly trammel the federal power. Provincial regulation of the deceptive acts and practices alleged by Mr. Unlu would not impair Parliament's power to regulate airline tariffs, tolls, terms and conditions of carriage or advertising, as contemplated by the ***Transportation Act*** and the ***Regulations***. In those circumstances, the Airlines' arguments based on the doctrine of interjurisdictional immunity cannot succeed.

Summary and Disposition

[91] In summary, the applications of the Airlines for declarations that the ***BPCPA*** is constitutionally inapplicable to them are dismissed.

[92] Unless the parties wish to make submissions on costs, costs will follow the event. If any party wishes to make submissions, that party must contact Trial Scheduling within 21 days of the date of this judgment to make arrangements to do so.

[93] I also direct that, within the next 45 days (and after consulting with counsel for the Airlines concerning convenient dates), counsel for Mr. Unlu contact Trial Scheduling to schedule a case planning conference for the purpose of (among other things) setting a schedule for the hearing of the certification applications.

"Adair J."

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *WestJet v. Gauthier,*
2025 BCCA 134

Date: 20250429
Docket: CA49723

Between:

WestJet

Appellant
(Defendant)

And

Paul Gauthier and Christopher Reaume

Respondents
(Plaintiffs)

And

Attorney General of British Columbia

Respondent
(Pursuant to the *Constitutional Question Act*)

Before: The Honourable Madam Justice Fenlon
The Honourable Justice Dickson
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated February 12, 2024 (*Gauthier v. Air Canada*, 2024 BCSC 231, Vancouver Docket S217110).

Counsel for the Appellant:	M. Dery K.A. McGoldrick
Counsel for the Respondents, Paul Gauthier and Christopher Reaume:	D.G.A. Jones R.L. Coad B.A. Leibel
Counsel for the Respondent, Attorney General of British Columbia:	E. Lapper K. Kotliarsky

Place and Date of Hearing:	Vancouver, British Columbia September 16–17, 2024
Place and Date of Judgment:	Vancouver, British Columbia April 29, 2025

Written Reasons by:
The Honourable Justice Dickson

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Justice Winteringham

Summary:

The appellant, WestJet, is a commercial airline operating domestically and internationally. The respondents are persons with disabilities who require extra seating or space on airplanes in order to accommodate their disabilities. Pursuant to the common law and provincial consumer protection legislation, the respondents brought a proposed class action against WestJet seeking a declaration that the standard form contracts pursuant to which WestJet charges disabled passengers for extra seating are unconscionable, rescission of those contracts, restitution of the extra fares charged, and injunctive relief.

The appeal arises from a Supreme Court judge's refusal to grant the appellant's application to strike the proposed class action. WestJet submits that the Supreme Court of British Columbia lacks subject matter jurisdiction over the action and that the relevant federal regulations grant it a positive entitlement to charge per-seat fares to disabled passengers; as such, to the extent that the common law or provincial legislation might preclude the practice, they are rendered inoperative as per the doctrine of federal paramountcy.

Held: The appeal is dismissed. It is not plain and obvious that the Supreme Court lacks subject matter jurisdiction over the proposed class action, as it is not plain and obvious that the respondents' claim is fundamentally a claim of discrimination. It is also not plain and obvious that the regulations that WestJet relies upon engage the doctrine of federal paramountcy.

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Reasons for Judgment of the Honourable Justice Dickson:

Introduction

[1] This appeal centers on whether the Supreme Court of British Columbia has jurisdiction to hear and decide a proposed class action claiming reimbursement and damages for airfare rates charged to persons with disabilities. It raises issues with respect to statutory interpretation, unconscionability, and federal paramountcy.

[2] The appellant, WestJet, provides air travel services, domestically and internationally. Prior to 2008, it charged airfare rates based on “per-seat” pricing policies, as opposed to “one-person, one-fare” policies. This meant that people with disabilities who require extra seating or space to accommodate their disabilities could not fly with WestJet without paying for the extra seating or space required.

[3] In 2008, the Canadian Transportation Agency decided that per-seat pricing for domestic flights imposed undue obstacles to the mobility of people with disabilities: Decision No. 6-AT-A-2008 (“*Norman*”). It prohibited WestJet and Air Canada from charging additional fares for the extra seating or space required on domestic flights to accommodate certain disabilities and gave them twelve months to modify their pricing policies. In response, WestJet changed its domestic tariffs to incorporate one-person, one-fare policies.

[4] However, the prohibition in *Norman* did not extend to international travel, and carriers are not prohibited from charging for extra seating to accommodate disabilities “for the purpose of a transportation service between Canada and a foreign country” under s. 31(2) of the *Accessible Transportation for Persons with Disabilities Regulations*, S.O.R/2019-244 (the “*AT Regulation*”), which codifies the *Norman* prohibition. As a result, WestJet continues to charge per-seat fares for international travel and incorporates its international tariffs into its standard-form contracts with passengers.

[5] The respondents, Paul Gauthier and Christopher Reaume, are persons who use wheelchairs, travel domestically and internationally, and need extra seating to

accommodate their disabilities. They commenced a proposed class action against WestJet and Air Canada in the Court below on behalf of all persons with disabilities resident in Canada, except Quebec residents, in respect of the additional fares paid or to be paid for extra seating or space required to accommodate their disabilities. In the action, the respondents claim that the contracts for carriage of class members contravene provincial consumer protection legislation, and are unconscionable, void, and unenforceable at common law. They seek various forms of relief, including a declaration that WestJet has been unjustly enriched by receipt of the additional fares, rescission of any contract requiring payment of the additional fares, and damages, together with injunctive relief.

[6] WestJet applied for an order striking the respondents' claim on the basis that the Court had no jurisdiction because the claim is, in substance, a claim for discrimination that depends for its legitimation on the *Canada Transportation Act*, S.C. 1996, c. 10, the *Canadian Human Rights Act*, R.S.C 1985, c. H-6, or the public policy expressed therein. Alternatively, WestJet submitted, the Court should decline jurisdiction. It also submitted that the claim is bound to fail because s. 31(2) of the *AT Regulation* permits it to charge per-seat fares for international travel, which practice is neither unconscionable nor subject to provincial consumer protection legislation, based on federal paramountcy. In other words, WestJet argued, the respondents' pleadings fail to disclose a reasonable cause of action.

[7] Following a three-day hearing, Chief Justice Hinkson dismissed WestJet's application to strike the proposed class action. WestJet appeals the dismissal order, relying on many of the arguments rejected in the Court below.

[8] I am not persuaded by WestJet's arguments. In particular, I am not persuaded that the Supreme Court of British Columbia lacks subject matter jurisdiction over the claim or that it is plainly and obviously a claim for discrimination based on human rights legislation or its underlying public policy. Nor am I persuaded that the claim is bound to fail because it is plain and obvious that s. 31(2) of the *AT*

Regulation permits WestJet to charge class members per-seat fares for international travel or that s. 31(2) is incompatible with provincial consumer protection legislation.

[9] For these reasons and those that follow, I would dismiss the appeal.

[10] To explain my conclusions, I will summarize the relevant legislation, legal principles and case authorities, as well as the pleadings, procedural history, and reasons of the Chief Justice. With that background in mind, I will then discuss the issues for determination on appeal.

Legal Framework

Federal Legislation

Canada Transportation Act and Canadian Human Rights Act

[11] Section 5 of the *Canada Transportation Act* declares the objectives of Canada's national transportation policy. It provides, in relevant part:

> 5 It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when
>
> …
>
> (d) the transportation system is accessible without undue obstacle to the mobility of all persons;
>
> (d.1) the transportation system is accessible without barriers to persons with disabilities; and …

[12] To achieve its objectives, the *Canada Transportation Act* grants several powers to the Canadian Transportation Agency (the "Agency"). For example, to the extent necessary for the proper exercise of its jurisdiction, the Agency has "all the powers, rights and privileges that are vested in a superior court": s. 25. A decision or order of the Agency may be made an order of the Federal Court or any superior court, and is enforceable as such in the same manner as an order of the court: s. 33.

[13] Pursuant to s. 37 of the *Canada Transportation Act*, the Agency "may inquire into, hear and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done" under any federal statute administered by the Agency. In *Delta Air Lines Inc. v. Lukacs*, 2018 SCC 2, the Court held that s. 37 confers discretion on the Agency in deciding whether to hear and determine an application or decline to do so: at paras. 10, 14.

[14] The *Canada Transportation Act* also includes mechanisms for the review, variation and appeal of Agency decisions. Section 40 provides that the Governor in Council may review and rescind or vary any decision of the Agency. In addition, with leave of the Court and within prescribed time limits, an appeal lies from the Agency to the Federal Court of Appeal on a question of law or jurisdiction: s. 41; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 at para. 49.

[15] Part II of the *Canada Transportation Act* deals specifically with air transportation. Under the heading "Duties and Functions of Agency under International Agreements", s. 77 identifies the Agency as the aeronautical authority for Canada under an international agreement, convention, or arrangement respecting civil aviation to which Canada is a party. Pursuant to s. 78(1), the Agency is obliged to exercise its powers in accordance with any such agreement, convention or arrangement. Pursuant to s. 86(h), the Agency is empowered to make regulations respecting "tariffs, fares, rates, charges and terms and conditions of carriage for international service", including for "the disallowance or suspension … of any tariff, fare, rate or charge".

[16] Among its many responsibilities, the Agency is mandated to protect the right of persons with disabilities to an accessible federal transportation system. Under the heading "Transportation of Persons with Disabilities" in Part V of the *Canada Transportation Act*, it is authorized to deal with their human rights in connection with transportation-related matters. In particular, s. 170 grants the Agency broad regulation-making powers regarding the transportation of persons with disabilities, with a view to identifying, removing or preventing barriers to their mobility. In

addition, s. 172 provides the Agency with adjudicative authority to inquire into complaints related to the transportation of persons with disabilities, and, if it identifies an undue barrier to their mobility, to grant specified remedies.

[17] Sections 170 and 172 of the *Canada Transportation Act* provide, in relevant part:

> **170(1)** The Agency may, after consulting with the Minister, make regulations for the purpose of identifying or removing barriers or preventing new barriers … in the transportation network under the legislative authority of Parliament to the mobility of persons with disabilities, including regulations respecting
>
> …
>
> **(c)** tariffs, rates, fares, charges and terms and conditions of carriage applicable in respect of the transportation of persons with disabilities or incidental services; …
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> …
>
> **172(1)** The Agency may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1), regardless of whether such a regulation has been made, in order to determine whether there is an undue barrier to the mobility of persons with disabilities.
>
> **(2)** On determining that there is an undue barrier to the mobility of persons with disabilities, the Agency may do one or more of the following:
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> **(a)** require the taking of appropriate corrective measures;
>
> **(b)** direct that compensation be paid for any expense incurred by a person with a disability arising out of the barrier, including for any costs of obtaining alternative goods, services or accommodation; …
>
> **(3)** If the Agency is satisfied that regulations made under subsection 170(1) that are applicable in relation to a matter have been complied with or have not been contravened, the Agency may determine that there is an undue barrier in relation to that matter but if it does so, it may only require the taking of appropriate corrective measures.

[18] In *Via Rail Canada Inc. v. Canadian Transportation Agency*, 2007 SCC 15, the Court affirmed that the Agency is to apply the human rights principles articulated in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, in exercising its statutory mandate. This includes the principle of reasonable accommodation, as adapted in the context of the federal transportation network: *Via Rail* at paras. 109, 117–121, 127–139.

[19] The Agency's jurisdiction to decide disputes related to the mobility rights of persons with disabilities in the federal transportation network is not exclusive. Under the *Canadian Human Rights Act*, the Canadian Human Rights Commission (the "CHR Commission") has concurrent jurisdiction to inquire into such complaints. Moreover, in *WestJet v. Chabot*, 2016 QCCA 584 (leave to appeal denied, 2016 CanLII 72704), the Court rejected WestJet's argument that, under the *Canada Transportation Act*, Parliament implicitly granted the Agency exclusive jurisdiction to decide mobility-related disputes in the federal transportation network. It also held that the jurisdiction of the superior court to decide a class action claiming reimbursement and damages for additional fares for extra seating or space on domestic and international flights was not ousted by the legislation: at paras. 5, 20, 36, 58–59; see also *Air Canada v. P.A.*, 2021 QCCA 873 (leave to appeal denied, 2022 CanLII 16716).

[20] Pursuant to s. 171 of the *Canada Transportation Act*, the Agency and the CHR Commission must coordinate their activities in relation to the transportation of persons with disabilities "in order to foster complementary policies and practices and to avoid jurisdictional conflicts". The CHR Commission may decline to deal with a complaint if it appears that it "could more appropriately be dealt with" under another federal statute: *Canadian Human Rights Act*, s. 41(1). In *Via Rail*, the Court affirmed that the Agency is generally the more appropriate body to deal with transportation-related complaints, including complaints with human rights components, because of its specialized knowledge and expertise in transportation practices and policies: *Via Rail* at paras. 98–99, 138.

AT Regulation

[21] In 2016, the Agency commenced a Regulatory Modernization Initiative involving public consultation with respect to accessible transportation. The first stage of the process preceded the enactment of the *AT Regulation* in 2019. In force since June 25, 2020, the *AT Regulation* requires a carrier to provide a range of services to persons with disabilities, including services related to seating on airplanes. Among other things, a carrier must: accept for transport a support person in specified

circumstances, together with an adjacent passenger seat for that person (s. 50); accept a service dog for transport, together with any necessary adjacent passenger seat (s. 51); and provide additional adjacent seating space to a passenger who needs more than one seat because of the nature of their disability (s. 52).

[22] Pursuant to s. 31 of the *AT Regulation*, a carrier is prohibited from charging for the services it must provide to persons with disabilities, except for additional seating under ss. 50, 51, or 52 in respect of flights between Canada and a foreign country:

> **31(1)** Subject to subsection (2), it is prohibited for a carrier to impose a fare or any other charge for any service that the carrier is required by this Part to provide to any person.
>
> **(2)** The prohibition in subsection (1) does not apply to a carrier in respect to any service that the carrier is required to provide under section 50, 51 or 52 if that service is provided by the carrier for the purpose of a transportation service between Canada and a foreign country.

[23] In effect, the *AT Regulation* mandates the implementation of one-person, one-fare pricing policies for domestic travel, codifying the requirement imposed on WestJet and Air Canada in *Norman* in 2008.

[24] As to international travel, s. 111 of the *AT Regulation* provides that all rates and terms of carriage "shall be just and reasonable". It also provides that no air carrier shall "make any unjust discrimination against any person" in respect of its international travel rates and terms of carriage. Under s. 113, the Agency is empowered to suspend, disallow or replace any international tariff that does not conform with the requirements of s. 111.

[25] In its Regulatory Impact Analysis Statement regarding the *AT Regulation*, the Agency noted that the disability community had expressed support for one-person, one-fare policies for both domestic and international travel. It also noted that carriers had expressed concerns regarding unfair competition with international counterparts, international treaty implications, and revenue loss. It went on to affirm that most of the service provisions in the *AT Regulation* apply to both domestic and international travel. However, the Agency said this regarding one-person, one-fare airfare rates:

> The [one-person, one-fare] requirement only applies to domestic travel, however, due to the need for further analysis and consultations at the international level (for example, with respect to the implications for international treaties). The [one-person, one-fare] domestic requirement is included in this package given that it has been a well-established human right in Canada since 2008.

Provincial Legislation

[26] The *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*] regulates the sale of goods and services where a sale occurs within British Columbia. Like other provincial consumer protection statutes, its objects include the protection of vulnerable consumers, consistency, and fairness in the consumer marketplace. In furtherance of those objects, the *BPCPA* establishes, administers, and enforces several statutory rights and obligations that apply in a wide range of contexts: *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 58.

[27] Section 9(1) of the *BPCPA* prohibits suppliers from engaging in unconscionable acts or practices in respect of consumer transactions. Section 8 codifies the criteria applied at common law for determining whether an act or practice is unconscionable: *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122 at para. 54. Section 9(2) modifies the common law by placing the onus on a supplier to prove that a transaction is not unconscionable: *Vanguard Mortgage Investment Corporation v. Dietterle*, 2022 BCSC 1512 at para. 98 (aff'd, 2022 BCCA 1512). If a court determines that an unconscionable act or practice occurred, the consumer transaction is not binding on the consumer: s. 10(1).

[28] Sections 8, 9 and 10(1) of the *BPCPA* provide, in relevant part:

> **8(1)** An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.
>
> **(2)** In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.
>
> **(3)** Without limiting subsection (2), the circumstances that the court must consider include the following:
>
> …

> **(b)** that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;
>
> …
>
> **(e)** that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable …
>
> **9(1)** A supplier must not commit or engage in an unconscionable act or practice in respect of a consumer transaction.
>
> **(2)** If it is alleged that a supplier committed or engaged in an unconscionable act or practice, the burden of proof that the unconscionable act or practice was not committed or engaged in is on the supplier.
>
> **10(1)** Subject to subsection (2), if an unconscionable act or practice occurred in respect of a consumer transaction, that consumer transaction is not binding on the consumer or guarantor.

[29] Sections 171 and 172 of the *BPCPA* create statutory causes of action for consumers to recover pecuniary losses caused by unconscionable acts and practices. In particular, s. 171 provides that a person who suffers damage or loss caused by a contravention of the *BPCPA* may bring an action against a supplier who engaged in the contravention, and s. 172 provides for remedies, including declaratory relief, injunctive relief, and restitution.

Federal Paramountcy

[30] The principle of cooperative federalism allows for the interplay and some overlap between federal and provincial legislation: *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53 at para. 22. However, under the doctrine of federal paramountcy, "where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency": *Lemare Lake Logging* at para. 15, quoting from *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13.

[31] Where a question of federal paramountcy arises, the court conducts a two-step analysis. First, it determines whether the federal and provincial laws are validly

enacted. Second, if they are validly enacted, it considers whether any overlap between the two laws constitutes a conflict sufficient to render the provincial law inoperative. As explained in *Lemare Lake Logging*, "[a] provincial law will be deemed to be inoperative to the extent that it conflicts with or is inconsistent with the federal law": at para. 16.

[32] Two kinds of possible conflict trigger application of the paramountcy doctrine: i) an operational conflict, where compliance with both the federal and provincial law is actually impossible; and ii) frustration of purpose, where the provincial law thwarts the purpose of the federal law: *Lemare Lake Logging* at paras. 17–19. Importantly for present purposes, the fact that a federal law was enacted in respect of a matter does not lead to the presumption that Parliament intended to rule out any possible provincial action in respect of that subject. Paramountcy must be construed narrowly, and harmonious interpretations of federal and provincial legislation are favoured over those that result in incompatibility. Where a federal statute can be properly interpreted so as not to interfere with a provincial statute, that interpretation will be preferred: *Lemare Lake Logging* at paras. 20–21; *Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10 at paras. 84–85.

[33] To prove that a provincial law frustrates the purpose of a federal law, the party seeking to rely on the paramountcy doctrine must clearly establish the purpose of the federal law and prove that the provincial law is incompatible with that purpose. In *Lemare Lake Logging*, the Court stated that "[t]he burden a party faces in successfully invoking paramountcy is accordingly a high one; provincial legislation restricting the scope of permissive federal legislation is insufficient on its own": at para. 26, quoting from *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39; *Murray-Hall* at paras. 84–85.

Common Law and Equitable Claims

Claims for Breach of Statute

[34] As a general rule, there is no cause of action at common law to enforce a right conferred by statute *per se*. Where a right arises solely from a statute, unless

the legislature intended that it could be enforced by civil action, a claimant must look to the mechanisms contemplated or provided for by the statute to vindicate the statutorily-conferred right: *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182 at para. 73, leave to appeal ref'd [2008] S.C.C.A. No. 293; *Lewis v. WestJet Airlines Ltd.*, 2019 BCCA 63 at para. 22.

[35] Cases in which a claimant asserts a common law or equitable cause of action to enforce a statutorily-conferred right are distinguishable from cases in which a claimant seeks a common law or equitable remedy where the right is not conferred by statute but a statutory breach is relied upon to establish an element of the cause of action. In the latter category of cases, the claimant is seeking to advance an independent and pre-existing cause of action, available as such: *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at 225; *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307 at paras. 68–70.

[36] In *Lewis*, this Court rejected WestJet's argument that the courts lacked jurisdiction to hear a dispute involving workplace harassment on the basis that the essential character of the claim engaged breaches of statutory rights created by the *Canadian Human Rights Act* or the *Canada Labour Code*, R.S.C. 1985, c. L-2. In explaining why, Justice Harris observed that "the same facts may be the source of different legal rights or legal rights sounding in different causes of action" and that concurrent causes of action "may have different substantive legal consequences yet arise from the same facts": at para. 21. He also observed that the employment contracts in issue incorporated conditions related to harassment, and emphasized that "a contract is a recognized source of legal rights grounding remedies for breach in the courts": at para. 26.

Doctrine of Unconscionability

[37] At common law, contracts are generally enforceable based on the traditional assumptions that: i) contracting parties are autonomous, self-interested, and equal in the bargaining process; and ii) contracts are negotiated, freely agreed to, and therefore fair. In other words, at common law the general rule is freedom of contract.

However, where the traditional, idealized assumptions of contract theory break down, the equitable doctrine of unconscionability may be used to set aside an unfair agreement that resulted from an inequality of bargaining power: *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at paras. 54–59, 86; *Pearce v. 4 Pillars Consulting*, 2021 BCCA 198 at paras. 195–198.

[38] Writing for the majority in *Uber*, Justices Abella and Rowe explained that courts "do not ignore serious flaws in the contracting process that challenge the traditional paradigms of the common law of contract, such as faith in the capacity of the contracting parties to protect their own interests": at para. 58. They went on to clarify and develop the law of unconscionability. In conducting their analysis, they affirmed the purpose of the doctrine, namely, "to protect those who are vulnerable *in the contracting process* from loss or improvidence to that party in the bargain": *Uber* at para. 60. They also affirmed that unconscionability has two elements: i) an inequality of bargaining power stemming from some weakness or vulnerability affecting the claimant; and ii) an improvident transaction: *Uber* at para. 62; *4 Pillars Consulting* at para. 200.

[39] An inequality of bargaining power will exist where one party cannot adequately protect their interests in the contracting process. The class of inequities that may result in a finding of inequality is not subject to rigid limitation. Relevant weaknesses may involve a claimant's personal characteristics or circumstantial vulnerabilities peculiar to certain situations. Moreover, the inequities need not be so serious as to negate the weaker party's capacity to enter a valid contract. Nor are circumstances of duress or undue influence required: *Uber* at paras. 66–70; *4 Pillars Consulting* at paras. 201–202.

[40] A bargain that unduly advantages the stronger party or unduly disadvantages the more vulnerable is improvident. As explained in *Uber*, improvidence is measured when the contract is formed, highly fact-dependent, and assessed contextually:

> [74] A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable … Improvidence is measured at the time the contract is formed; unconscionability does not assist parties

> trying to "escape from a contract when their circumstances are such that the agreement *now* works a hardship upon them" …
>
> [75] Improvidence must be assessed contextually (McInnes, at p. 528). In essence, the question is whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized. An undue advantage may only be evident when the terms are read in light of the surrounding circumstances at the time of contract formation, such as market price, the commercial setting or the positions of the parties …

[41] For example, almost any agreement will improve the *status quo* for a person in desperate circumstances. For that reason, when assessing improvidence in such cases, the court focuses on whether the stronger party has been unduly enriched such that the bargain is unconscionable and thus unenforceable. If so, the elements of unjust enrichment must be considered, namely an enrichment of the defendant, a corresponding deprivation of the plaintiff, and an absence of juristic reason for the enrichment. Improvidence can take many forms, and the flaw in the contracting process is part of the relevant context for consideration. Importantly, "proof of a manifestly unfair bargain may support an inference that one party was unable adequately to protect their interests": *Uber* at paras. 76–79; *4 Pillars Consulting* at paras. 204–205; *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30.

[42] The stronger party in the bargaining process need not knowingly take advantage of the weaker party for the doctrine of unconscionability to apply in a given set of circumstances: *Uber* at para. 84; *4 Pillars Consulting* at para. 207. Properly applied, the requirements of inequality and improvidence strike the right balance between fairness and commercial certainty: *Uber* at para. 86.

[43] The doctrine of unconscionability has significant implications for standard form contracts. While a standard form contract does not itself establish an inequality of bargaining power in the relevant sense, the fact that such contracts are drafted by one party on a "take it or leave it" basis creates a risk that they will create an inequality of bargaining power, enhancing the stronger party's advantage at the expense of the more vulnerable party: *Uber* at para. 89; *4 Pillars Consulting* at para. 208. In *Uber*, the Court explained that this development of the law with respect to unconscionability and standard form contracts is not radical. Rather, it is a modern

application of the doctrine to situations where “the normative rationale for contract enforcement [is] stretched beyond the breaking point”: at para. 90.

Ouster of Common Law and Equitable Claims

[44] On occasion, a statutory code comprehensively regulates a particular domain and completely replaces the common law, thus eliminating the ability of an aggrieved party to pursue a common law cause of action: *Tucci v. Peoples Trust Company*, 2020 BCCA 246 at paras. 19, 39. However, as Justice Groberman explained in *Tucci*, statutes of this kind are comparatively rare:

> [19] … More often statutes modify the common law in particular ways, leaving it intact except to the extent that it has been displaced. As a general rule, then, the common law and a statutory regime will be allowed to co-exist where they do not conflict with one another.
>
> [20] Of course, where a statute is in direct opposition to a common law principle, the two cannot co-exist. As statutes overlay the common law, the statute will prevail in cases of direct conflict.
>
> [21] A statute may also specifically state that it is intended to displace the common law, and such a statement will be effective. For example, the *Criminal Code*, R.S.C. 1985, c. C-46 specifically sets out the rules for applying the common law in criminal cases in ss. 8 and 9.
>
> [22] Finally, there are statutes that, while not in direct conflict with the common law, are drafted in such a way as to make it clear that they are intended to comprehensively govern an area, leaving no room for the application of the common law. Such statutes are often referred to as “comprehensive codes”. They are intended to supplant rather than supplement the common law.

[45] There is a presumption that Parliament has not intended to abrogate common law entitlements. A common law cause of action will only be ousted where legislation rebuts the presumption, either expressly or by necessary implication: *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 85. In deciding whether there is an implicit legislative intent to exclude their jurisdiction, courts consider the factors identified by Justice Cromwell, then of the Nova Scotia Court of Appeal, in *Pleau v. Canada (A.G.)*, 1999 NSCA 159; leave to appeal refused, [2000] S.C.C.A. No. 83. In *Hopkins v. Kay*, 2015 ONCA 112, the Ontario Court of Appeal summarized those factors this way:

> [31] … First, a court is to consider "the process for dispute resolution established by the legislation" and ask whether the language is "consistent with exclusive jurisdiction". Courts should look at "the presence or absence of privative clauses and the relationship between the dispute resolution process and the overall legislative scheme": *Pleau*, at para. 50 (emphasis in original).
>
> [32] Second, a court should consider "the nature of the dispute and its relation to the rights and obligations created by the overall scheme of the legislation". The court is to assess "the essential character" of the dispute and "the extent to which it is, in substance, regulated by the legislative … scheme and the extent to which the court's assumption of jurisdiction would be consistent or inconsistent with that scheme": *Pleau*, at para. 51 (emphasis in original).
>
> [33] The third consideration is "the capacity of the scheme to afford effective redress" by addressing the concern that "where there is a right, there ought to be a remedy": *Pleau*, at para. 52 (emphasis in original).
>
> [Emphasis added.]

[46] In *Tucci*, the appellant in class proceedings concerning a data breach submitted that the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 [*PIPEDA*] is a complete code in respect of the collection, retention, and disclosure of personal information by federally regulated businesses. Accordingly, it argued, no action apart from the Federal Court application contemplated in the *PIPEDA* could be brought in respect of such a breach. The Court rejected this argument, and found the plaintiffs were not "attempting to enforce legal rights that had their genesis in the *PIPEDA* through a private law action". Rather, they were "seeking common law remedies not founded on the statute". Moreover, Justice Groberman stated, "[n]othing in the *PIPEDA* suggests that it is intended to abolish existing private law duties or to eliminate the ability of aggrieved parties to pursue common law causes of action": at paras. 36, 39.

[47] The Court reached a similar conclusion in *Lewis* when considering whether the courts' jurisdiction to hear a breach of contract claim brought against an employer was implicitly ousted by the *Canadian Human Rights Act* or the *Canada Labour Code*:

> [45] I am unable to discern a basis to oust the jurisdiction of the courts in a case alleging breach of an employment contract engaging discrimination or harassment. Neither statute has an exclusive jurisdiction clause applicable to this case. The breach of contract claim could be advanced even if the

> [*Canadian Human Rights Act*] was never enacted. If Parliament intended the [*Canadian Human Rights Act*] to oust the court's jurisdiction over matters otherwise subject to its jurisdiction, I would expect it to do so expressly. It has not.
>
> [46] Further, I am not persuaded that it is plain and obvious that the [*Canadian Human Rights Act*] ousts the jurisdiction of the courts by necessary implication. Recognizing that the legislation creates an administrative regime that is intended to be flexible, efficient, and expeditious, suggests that Parliament intended to create statutory rights capable of being vindicated by an administrative tribunal. Alone, this is not enough in my view to support an argument that by creating such a scheme Parliament intended to deprive plaintiffs of access to the courts they would otherwise enjoy.

[48] Justice Harris went on to reject the argument that "recognizing the general principle that a plaintiff can choose his or her forum frustrates the statutory objectives of the statutory human rights scheme": *Lewis* at para. 47.

Agency Decisions on Per-Seat Pricing

[49] As I noted at the outset, prior to the Agency's decision in *Norman*, WestJet charged airfare rates for both domestic and international travel based on per-seat pricing policies. However, in *Norman*, the Agency held that per-seat pricing for domestic air services imposed undue obstacles to the mobility of persons with disabilities, contrary to s. 172 of the *Canada Transportation Act*. As a result, WestJet changed its domestic airfare rates.

[50] In conducting its analysis in *Norman*, the Agency considered several long-standing principles of accessibility, including that: persons with disabilities have the same rights as others to full participation in all aspects of society; to provide equal access, transportation service providers may have to provide different access; and persons with disabilities should not be placed at an economic disadvantage as a result of their disabilities. It rejected WestJet's arguments that per-seat pricing was reasonably necessary to achieve the legitimate objectives of profit and cost recovery, and that one-person, one-fare pricing would be prohibitively expensive and heavily abused. Based on the evidence presented at the hearing, the Agency found that WestJet would forego approximately $.16 in revenue per domestic trip, which

represented an annual decrease of 0.16 per cent. It concluded that this did not amount to undue hardship.

[51] In 2009, WestJet implemented one-person, one-fare pricing for domestic travel in response to the *Norman* decision. However, it continued to charge airfare rates based on per-seat pricing for international travel, including the domestic segments of international itineraries.

[52] Since 2009, the Agency has considered three applications seeking a determination with respect to per-seat pricing for international travel: Decision No. 324-AT-A-2015 ("*Cheung*"), Decision No. 1-AT-C-A-2019 ("*Lukacs*") and Decision No. 95-AT-A-2022 ("*Yale*"). In addition, it released Decision No. 33-AT-A-2019 in which it described its approach to accessibility complaints in 2019 (the "*Interpretive Decision*").

[53] In *Cheung*, Sarah Cheung applied under s. 172 of the *Canada Transportation Act* seeking to use her orthotic positioning device and an extra seat, free-of-charge, for an attendant when traveling internationally with WestJet. The Agency held that these were appropriate accommodations and that WestJet's failure to provide them constituted an obstacle to Ms. Cheung's mobility. As to whether the obstacle arising out of WestJet's failure was "undue", Ms. Cheung asked the Agency to extend the *Norman* principle to international travel: at para. 51. WestJet responded that the Agency should not address the issue because a decision "would require the analysis, consideration and balancing of a plethora of factors" and impact hundreds of air carriers when WestJet was the sole respondent to the application: at para. 50.

[54] The Agency accepted WestJet's argument and declined to decide the issue of one-person, one-fare pricing for international travel. In doing so, it emphasized the systemic nature of the *Norman* dispute, which involved broadly-based participants, a voluminous evidentiary record, and a lengthy oral hearing. In contrast, the Agency stated, Ms. Cheung's application was against WestJet alone and the dispute did not "easily lend itself to a systemic solution" because Ms. Cheung sought a remedy for herself personally: at para. 62. Moreover, it observed, "the international air industry

is complex and involves many factors not applicable in the domestic context, including foreign laws and regulations and bilateral air transport agreements": at para. 63. It went on to say this:

> [67] In the absence of a proceeding that would provide the Agency with the breadth of perspective required to properly assess and evaluate this significant remedy, the Agency cannot discharge its responsibilities in a fair and informed way. The Agency is limited by the legislative mandate provided to it in the [*Canada Transportation Act*] which does not, at this time, include own motion powers to conduct broader, more systemic investigations.
>
> [68] In light of the above, the Agency grants WestJet's request that the Agency dismiss this aspect of Ms. Cheung's application and will not consider expanding the application of the one-person, one-fare principle to transborder or international routes in the context of this application and at this time.

[55] In 2016, the Council of Canadians with Disabilities (the "CCD") filed a complaint against Air Canada seeking to bring the type of systemic case referred to in the *Cheung* decision. Shortly thereafter, the Agency stayed the application, in part because of the ongoing Regulatory Modernization Initiative.

[56] When the *AT Regulation* was enacted, the Agency released the *Interpretive Decision*, explaining its two-part approach to applications related to accessibility. In summary, it stated, first, the applicant must demonstrate on a balance of probabilities that they have a disability and faced a barrier related to that disability: at paras. 13–23. Second, the respondent must explain how it proposes to remove the barrier or demonstrate on a balance of probabilities that it cannot do so without experiencing undue hardship, which is reached where there are constraints that make the removal of the barrier impossible, impractical, or unreasonable and may be related to cost, economic viability, or safety: paras. 24–28.

[57] In 2019, the Agency released *Lukacs*, in which it declined to decide a complaint against Delta Air Lines for requiring obese passengers to pay for a second seat on international flights. In explaining this decision, it noted that Mr. Lukacs did not seek adjudication under s. 172 of the *Canada Transportation Act* and emphasized the multitude of affected stakeholders and complex nature of one-person, one-fare pricing in the international context. It concluded that adjudicating "a

single complainant is not the most appropriate means of addressing the systemic question of whether the one-person, one-fare principle should be expanded to international air services": at paras. 56–65.

[58] In 2022, in *Yale*, the Agency exercised its s. 37 discretion again and declined to decide a complaint against Air Canada regarding the lack of one-person, one-fare pricing to ensure sufficient space for a service dog for international travel. After observing that it could consider whether the claim aligned with its "workload and prioritization of cases", the Agency noted that it had been asked before to extend the one-person, one-fare principle to international flights but declined because doing so "in the context of an individual application would not be appropriate": at para. 22. It went on to describe the consultation process regarding one-person, one-fare policies and noted the carriers' position that implementing those policies for international travel would interfere with pricing, which is a key element in binding bilateral air transport agreements between countries. It also emphasized the absence of international consensus on one-person, one-fare pricing, and stated that the imposition of such a requirement in Canada for international carriage may be opposed by foreign carriers or governments: at paras. 23–26.

[59] Then the Agency said this:

> [27] Should the Agency conclude that [one-person, one-fare] for international carriage should be imposed, conflicting views internationally would very likely lead to the dispute resolution or disallowance provisions of air transport agreements being triggered by other states. Disjointed international standards would introduce a greater level of uncertainty for passengers with disabilities, particularly in the case of codeshare flights or where a government or governments reject or disallow these provisions. Moreover, such disjointed international standards would put Canadian carriers at a competitive disadvantage vis-à-vis foreign carriers, as the cost of applying [one-person, one-fare] to accommodate persons with disabilities would be borne by Canadian carriers and would not be borne by their direct competitors. In light of the objectives of the national transportation Policy found in section 5 of the [*Canada Transportation Act*], which include the competitiveness of Canada's national transportation system, the Agency is not willing to impose such an obligation on Canadian carriers unless and until international carriers are bound by the same obligations, as this particular type of competitive disadvantage would constitute undue hardship on Canadian carriers.

> [28] It should be noted that although the Agency now has own-motion powers to initiate the type of broad inquiry that was referred to in *Cheung v. WestJet*, these powers will not enable the Agency to overcome the challenges that exist based on the international scope of the requested remedy described above.
>
> [29] Accordingly, in order for Canada to respect the commitments it has made to other states, the Agency finds that the application of [one-person, one-fare] to international carriage is best addressed through ongoing efforts to achieve international cooperation and coordination among governments. The Agency will continue its efforts to highlight the importance of a unified [one-person, one-fare] international carriage policy as part of its participation in transportation forums, including the International Civil Aviation Organization, and to proactively influence the international civil aviation environment with the objective of ensuring that it becomes more responsive to the needs of persons with disabilities.
>
> [30] Noting that [one-person, one-fare] applied to international carriage is the only corrective measure requested in this application, the Agency exercises its discretion under section 37 of the [*Canada Transportation Act*] and declines to determine the application.

[60] In 2022, the CCD withdrew its 2016 complaint against Air Canada in favour of the respondents' proposed class action. Counsel for the CCD explained the decision by stating that the CCD could "no longer be complicit in a process that has failed to address the issue of [one-person, one-fare] by having an application pending before the Agency, while persons with disabilities continue to experience hardship by being required to pay additional fares for the right to travel by air as any other air traveller."

Rule 9-5(1)(a), *Supreme Court Civil Rules*

[61] Rule 9-5(1)(a) provides:

> **(1)** At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> **(a)** it discloses no reasonable claim or defence, as the case may be,

[62] The standard of proof that applies on a motion to strike out pleadings is the same as that which applies to the first requirement for certification under s. 4(1) of the *Class Proceedings Act,* R.S.B.C. 1996, c. 50, namely, whether, assuming the pleaded facts are true, it is plain and obvious that the action cannot succeed: *Finkel*

at para. 16; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 20.

[63] In *Finkel*, the Court described how the adequacy of pleadings is to be assessed:

> [17] In deciding whether pleadings disclose a cause of action, the judge should read them generously, with a view to accommodating inadequacies in form attributable to deficient drafting. Where such inadequacies exist, the plaintiff should propose amendments to cure the or, to the extent reasonable, the certification application should be adjourned to allow such a proposal to be made: *Sandhu v. HSC Financial Mortgages Inc.*, 2016 BCCA 301 at para. 44-46. Even if the plaintiff's argument is novel and may require an expansion of the law as it currently stands, this is not necessarily fatal: *Sherry* at para. 53. On the contrary, the absence of jurisprudence fully settling an issue may be a good reason to exercise restraint in striking a claim at the pleadings stage: *Trillium Motor World Inc. v. General Motors of Canada Limited*, 2011 ONSC 1300, aff'd 2012 ONSC 463 at paras. 61, 74. To satisfy the s. 4(1)(a) requirement, the plaintiff need only satisfy the judge that the action is not bound to fail.
>
> [18] Nevertheless, the *Hunt* test will not be met in all cases. Difficult questions of law may arise on the pleadings and, insofar as reasonably possible, they should be addressed directly at the certification stage. This approach benefits the parties and the justice system by ensuring that only claims with a realistic prospect of success proceed and, therefore, that time and resources are only expended on moving such claims forward. As Justice Newbury observed in *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 at para. 64: "… scarce judicial resources may be squandered when difficult questions of law are continually side-stepped in the class action context".

[64] The burden is on the plaintiff to establish that an impugned pleading discloses a reasonable cause of action. However, the bar is not high. Where the question turns on statutory interpretation, it is met if the proposed interpretation is arguable. Where an application to strike is founded on a complex question of statutory interpretation, the court need not reach a conclusion on the proper interpretation of the provision in issue: *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22 at para. 26; *Aubichon v. Grafton*, 2022 BCCA 77 at para. 47.

Pleadings against WestJet

[65] The respondents claim against WestJet in unjust enrichment and for breaches of provincial consumer protection statutes. They bring the proposed class

action on behalf of all persons with disabilities resident in Canada, except Quebec residents, who require an attendant for disability-related care when flying or otherwise require additional seating for disability-related reasons and who paid additional fares to accommodate their disabilities on international flights from December 5, 2005 onwards.

[66] In their Second Amended Notice of Civil Claim (the "SANCC"), the respondents plead that class members purchased tickets for air travel services from WestJet on the terms and conditions contained in its tariffs, which are incorporated into its standard form contracts and impose per-seat pricing. They plead further that this has the effect of charging class members more for airline travel than other Canadians based on their disabilities, because to travel by air they have no alternative other than to pay the additional fares. They allege that this requirement is substantially unfair and discriminatory.

[67] The respondents go on to plead that the contracts for carriage of class members are unconscionable under the common law and provincial consumer protection legislation, and thus void and unenforceable. They claim that class members are entitled to recover the additional fares paid, based on equitable and restitutionary principles.

[68] Specifically, in Part 3 of the SANCC, the respondents plead:

> 43. The Classes paid the Additional Fares due to an unfair bargaining process, which led [to] unfair contracts. These contracts are unenforceable because they are unconscionable:
>
> a) There is inequality of bargaining power between the Classes and the Defendants. The Classes are not able to negotiate the terms of their contracts with the Defendants. The Defendants' contracts are standard form and unilaterally drafted and imposed. The Classes are unable to protect their interests in the contracting process: their options are to pay the Additional Fares or not travel by air.
>
> b) The Defendants obtained an unfair advantage through the parties' inequality of bargaining power, which resulted in improvident bargains. The Defendants effectively impose a premium on persons with Disabilities who wish or need to travel by air. By requiring the Additional Fares, the Defendants make it more difficult, and sometimes cost prohibitive, for persons with Disabilities to travel by

> air. This impacts Class members' employment opportunities as well as their personal and family lives; causes economic distress; exacerbates the disadvantages faced by persons with Disabilities; and can be humiliating.
>
> 44. The contracts requiring Additional Fares are unenforceable on the basis that it would be contrary to public policy to enforce contracts that are blatantly discriminatory. As stated above, by requiring the Additional Fares, the Defendants charge persons with Disabilities a premium to travel by air, when compared to others who do not have the same disabilities.
>
> …
>
> 47. The Plaintiffs and members of the Classes are entitled to claim and recover the Additional Fares paid based on equitable and restitutionary principles.
>
> 48. The Defendants caused the Plaintiffs and members of the Classes to pay more for air travel than other Canadian residents on the basis of their Disabilities.
>
> 49. The Defendants were enriched by the Additional Fares and the Plaintiffs and members of the Classes suffered a deprivation corresponding to the Defendants' enrichment.
>
> 50. The contracts requiring the Additional Fares are void and unenforceable therefore there is no juristic reason for the Defendants' enrichment and the Plaintiffs' and Class members' corresponding deprivation. The Plaintiffs and members of the Classes are entitled to restitution for the Defendants' unjust enrichment.
>
> 51. The Plaintiffs and members of the Classes plead and rely on [provincial consumer protection statutes].
>
> 52. The Defendants' contracts and policies for charging the Additional Fares constituted unfair, unconscionable and/or otherwise prohibited practices under the Consumer Protection statutes …

[69] In addition to an order certifying the action as a class proceeding, the respondents seek damages, restitution, and other relief in respect of additional fares paid or to be paid for disability-related additional seating, including declarations that WestJet has been unjustly enriched by receipt of the additional fares and that its per-seat fare policies are unconscionable and unfair pursuant to the *BPCPA* and other provincial consumer protection legislation.

[70] In its response to the SANCC, WestJet pleads that the terms of its tariff and the charging of per-seat fares "were at all material times consistent with applicable legislation governing the transportation of persons with disabilities in the federal transportation network". It denies that its per-seat pricing was "discriminatory, harsh,

adverse, excessively one-sided, inequitable, or unconscionable" and relies on s. 31(2) of the *AT Regulation*, which it claims expressly permits the charging of per-seat fares on international flights.

[71] WestJet also pleads that the Supreme Court of British Columbia has no jurisdiction over the subject matter of the claim because the *Canada Transportation Act* and the *Canadian Human Rights Act* "foreclose any civil action based directly on a breach of either statute, and also exclude any common law action based on an invocation of the public policy expressed therein". It pleads further that even if provincial consumer protection statutes would otherwise apply, they do not apply to the charging of per-seat fares based on the doctrine of federal paramountcy.

Application to Dismiss Proposed Class Action

[72] In March 2023, WestJet applied for an order striking the proposed class action for lack of jurisdiction or failure to disclose a reasonable cause of action. In May 2023, it served a Notice of Constitutional Question pursuant to s. 8(2)(a) of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, on the Attorney General of Canada and the Attorney General of British Columbia. In the Notice of Constitutional Question, WestJet stated that the respondents rely on ss. 8, 9, 10, 171 and 172 of the *BPCPA*, and that:

> (c) To the extent these sections prohibit the charging of Additional Fares as alleged by the plaintiffs, their applicability to WestJet's charging of Additional Fares will be challenged by WestJet, as they:
>
> i. Frustrate a federal purpose (the express permission for airlines to charge Additional Fares under s. 31 of the [*AT Regulation*] enacted under the [*Canada Transportation Act*] and the finding of the Agency that to require airlines to provide additional seating required by persons with disabilities on international itineraries free of charge would constitute undue hardship, and thus are inapplicable on the basis of federal paramountcy; …

[73] As she did on the appeal, the Attorney General of British Columbia participated in the hearing below and presented argument on the *AT Regulation*, the *BPCPA* and application of the federal paramountcy doctrine. The Attorney General for Canada chose not to participate in the hearing below or on the appeal.

[74] WestJet's application came on for hearing before the Chief Justice in August 2023. On February 12, 2024, he dismissed the application.

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[75] Following a detailed review of the relevant statutory, legal, and factual context, the Chief Justice discussed the parties' arguments on the issues for determination. Then he decided each issue in turn.

[76] The Chief Justice rejected WestJet's arguments that the substance of the respondents' claims is discrimination. In doing so, he noted the respondents' reliance on the doctrine of unconscionability and stated he was "not satisfied that the plaintiffs will not be able to establish an inequality of bargaining power": at para. 138. He also noted the respondents' argument that their common law claims are not merely duplicative of discrimination claims under the *Canada Transportation Act* "because they do not suffer from the same jurisdictional limitations as an order from the Agency" and "the remedies available through the courts are broader than those applicable in the Agency context": at para. 143. After quoting the Court's reminder in *Uber* that "improvidence can take so many forms", he found that the respondents had pleaded an independent cause of action:

> [145] I am satisfied that the plaintiffs have pleaded bases of improvidence that may not arise from alleged differential treatment. The Supreme Court of Canada has been clear that improvidence must be assessed contextually, and the circumstances of the weaker party are relevant. It is not apparent that the plaintiffs' claim depended on the [*Canadian Human Rights Act*] of [*Canada Transportation Act*] for their legitimation, or, in the alternative, the public policies expressed in those acts.

[77] Next, the Chief Justice considered whether the *Canada Transportation Act* ousted the Court's jurisdiction by necessary implication. Citing *Tucci*, *Hopkins*, and other authorities on when a common law right of action has been "legislatively ousted", he concluded that it did not:

> [175] Having regard to the law and submissions canvassed, I am not satisfied that the jurisdiction of this Court in a case alleging, *inter alia*, unconscionability is ousted. The applicable statutes do not lead to exclusive jurisdiction, and an unconscionability claim could be advanced absent their existence. Parliament has also not made express that jurisdiction over the

> instant matters should be ousted. Moreover, I am not satisfied that it is plan and obvious that this Court's jurisdiction has been ousted by necessary implication.

[78] Turning to the impact of the *AT Regulation*, the Chief Justice summarized WestJet's argument that s. 31(2) expressly permitted it to charge additional fares on international flights, and thus that it was plain and obvious that doing so could not be discriminatory or unconscionable. However, he rejected this argument and found that there is a sufficiently arguable interpretation of s. 31(2) to permit the claim to proceed, namely, that the *AT Regulation* is not intended to be exhaustive and does not create a positive entitlement to charge additional fares for extra seating: at paras. 187–197. As to application of the doctrine of federal paramountcy, he concluded that the respondents and the Attorney General of British Columbia had proposed an interpretation that could render s. 31(2) compatible with the *BPCPA*.

[79] In the result, the Chief Justice dismissed WestJet's application to strike the proposed class action.

On Appeal

[80] The issues that emerge from the pleadings, the law, and the arguments on appeal are:

a) Does the Supreme Court of British Columbia lack subject matter jurisdiction over the claim because it is plainly and obviously a claim for discrimination based on human rights legislation or its underlying public policy?

b) Is it plain and obvious that the claim will fail because s. 31(2) of the *AT Regulation* permits WestJet to charge the impugned additional fares for international travel?

c) Is it plain and obvious that s. 31(2) of the *AT Regulation* is incompatible with provincial consumer protection legislation?

Discussion

Standard of Review

[81] The question of whether the Supreme Court of British Columbia has jurisdiction over the subject matter of a claim is a question of law, subject to appellate review on a standard of correctness. The same is true of the question of whether the pleadings disclose a reasonable cause of action: *Ewert v. Hoegh Autoliners AS*, 2020 BCCA 181 at paras. 42–44; *Trotman* at para. 41.

Does the Supreme Court of British Columbia lack subject matter jurisdiction over the claim because it is plainly and obviously a claim for discrimination based on human rights legislation or its underlying public policy?

[82] WestJet contends that the respondents' claim is plainly and obviously a claim for discrimination based on an invocation of the public policy expressed in human rights legislation. In particular, it says, the plea of improvidence is based entirely on the differential treatment of persons with disabilities because of their disabilities, which the respondents allege is unjustifiable and unfair. In other words, WestJet submits, the claim depends in substance for its legitimation on human rights legislation or its underlying public policy, and seeks remedies for discriminatory conduct. Accordingly, it cannot be accurately characterized as an unconscionability claim based in contract law.

[83] In advancing this submission, WestJet emphasizes that persons with disabilities are charged the same per-seat fares as any other passenger and pay for the seats they use, which normally could not be improvident. It says it is only because they have disabilities that class members claim they are charged a "premium" rather than being provided additional seating at no charge to accommodate their disabilities. WestJet also says it would be entitled to respond to the unconscionability plea by adducing evidence of the competitive disadvantage associated with international one-person, one-fare pricing, which, in effect, would be evidence of undue hardship, which the Agency found in the *Yale* decision. It

contends that it follows that the substance of the claim is discrimination based on human rights legislation or the public policy expressed therein.

[84] However, WestJet submits, courts lack jurisdiction over claims that depend on a comprehensive legislative scheme for the protection and enforcement of human rights, such as the scheme to protect and enforce the mobility rights of persons with disabilities enacted by Parliament in the *Canada Transportation Act*. In support of this submission, WestJet relies on the principles articulated in *Bhadauria v. Seneca College of Applied Arts & Technology*, [1981] 2 S.C.R. 181 and subsequent authorities, including *Honda Canada Inc. v. Keays*, 2008 SCC 39, *Jaffer v. York University*, 2010 ONCA 654 and *Yashcheshen v. Law School Admission Council*, 2021 SKCA 149.

[85] Specifically, WestJet notes, the Court held in *Bhadauria* that there is no common law tort of discrimination and affirmed in *Honda Canada* that "a plaintiff is precluded from pursuing a common law remedy when human rights legislation contains a comprehensive enforcement scheme for violations of its substantive terms": at para. 63. In addition, it says, in *Jaffer* the Court struck a claim for breach of the defendant's obligation to accommodate the plaintiff's disabilities based on its finding that the plaintiff had failed to plead a tenable cause of action for breach of contract because, absent a specifically pleaded contractual term and material facts, any duty to accommodate arose solely from human rights legislation and the underlying public policy: at paras. 7, 36, 49. Further, it says, although the Court in *Yashcheshen* permitted a contract claim to proceed based on pleadings of an express contractual term to accommodate the plaintiff's disabilities, it also stated that "simply attaching a cause of action label to a claim that is based on discrimination will not insulate a plaintiff from having their statement of claim struck": at para. 41.

[86] In WestJet's submission, the respondents have simply attached a contract label to a claim that is clearly based, in substance, on discrimination. However, it says, unlike the contracts in *Lewis*, the contracts in this case do not incorporate a promise not to discriminate and are not an independent source of the right sought to

be enforced, namely, a right to extra seating to accommodate disabilities free of charge.

[87] WestJet goes on to contend that Parliament enacted a comprehensive scheme in the *Canada Transportation Act* for the adjudication of complaints related to the treatment of persons with disabilities in the federal transportation system and expressly provided for specified remedies, including appeals and judicial review of Agency decisions. In doing so, it says, Parliament did not intend to create a new common law cause of action for discrimination, nor did it intend to permit claimants to do an end-run around human rights law by bringing discrimination claims under the common law doctrine of unconscionability.

[88] According to WestJet, the respondents are attempting to do both by bringing a discrimination claim, creatively pleaded and clothed in the doctrine of unconscionability. In effect, it says, they are asking the court to act as a human rights tribunal by determining that the impugned contracts are unfair, unjustified, and unenforceable because they are discriminatory. However, it says, Parliament intended the Agency to adjudicate discrimination cases in the complex context of the federal transportation network. In WestJet's submission, it follows that we should strike the claim for lack of jurisdiction based on the principles articulated in *Bhadauria*.

[89] I am not persuaded by these submissions.

[90] In my view, the respondents' claim is not based in substance on a right that arises out of the *Canada Transportation Act*, the *Canadian Human Rights Act*, or their underlying public policy. Rather, the claim is based on an independent common law right to have an unconscionable contract set aside and on equitable principles of unjust enrichment. The Supreme Court of British Columbia has jurisdiction to adjudicate such claims.

[91] I reach this conclusion for the following reasons.

[92] First, the respondents do not seek to enforce a right to extra seating to accommodate disabilities free of charge pursuant to the provisions or underlying policy of human rights legislation. Nor do they seek to advance a new common law tort of discrimination. Rather, the respondents seek to recover charges paid or payable under allegedly unfair and thus unenforceable contracts, pursuant to equitable and restitutionary principles.

[93] The source of the right to have a contract set aside based on the doctrine of unconscionability is the common law. That right is not conferred by, nor does it arise from, the *Canada Transportation Act*, *Canadian Human Rights Act*, or the public policy expressed therein, solely or at all. On the contrary, it is an independent common law right that exists irrespective of the enactment, content, or purpose of the *Canada Transportation Act* and *Canadian Human Rights Act*.

[94] Second, the respondents have pleaded material facts in support of both elements of the unconscionability doctrine, namely, an inequality of bargaining power stemming from the claimant's weakness or vulnerability and an improvident transaction. As to the former, they plead that the impugned contracts are "standard form", "unilaterally drafted" and "imposed" by WestJet (the stronger party), and that they (the weaker party) are "people with disabilities" who are "unable to protect their interests in the contracting process" and can only either "pay the Additional Fares or not travel by air". As to the latter, they plead that they are unduly disadvantaged by the unequal bargaining power, which results in "blatantly discriminatory" bargains, and that WestJet effectively charges them a "premium" that makes it "more difficult and sometimes cost prohibitive" to fly, causes them "economic distress", exacerbates the disadvantages they face, and is unfair.

[95] Bearing in mind the Court's guidance in *Uber*, the unique circumstances in question, and the normative rationale for contract enforcement, in my view it is not plain and obvious that the pleaded facts are incapable of supporting a finding that the impugned contracts, assessed contextually, are unconscionable.

[96] Moreover, while the facts they rely upon to prove an unfair and unenforceable contract may also support a finding that WestJet's international per-seat pricing policies present an undue barrier to the mobility of persons with disabilities under s. 172 of the *Canada Transportation Act*, that is not the substance of the claim pleaded by the respondents. Nor do they seek a remedy under the regulatory scheme for the protection of mobility rights of persons with disabilities in the *Canada Transportation Act* and *Canadian Human Rights Act*. As Justice Harris explained in *Lewis*, the same facts may "be the source of different legal rights" and "have different substantive legal consequences": at para. 21. Justice Tholl made a similar point when he observed in *Yashcheshen* that "on an application to strike a statement of claim, the mere presence of allegations of discrimination in pleadings is not sufficient to oust the jurisdiction of the [superior court] when an otherwise valid common law cause of action is pleaded": at para. 37.

[97] Third, I see no basis for concluding that the regulatory scheme ousts the jurisdiction of the courts to adjudicate the respondents' common law cause of action, expressly or by necessary implication. Neither the *Canada Transportation Act* nor the *Canadian Human Rights Act* include an exclusive jurisdiction clause. In addition, as noted, there is a presumption that Parliament has not intended to abrogate common law entitlements: *Godfrey* at para. 85.

[98] Moreover, nothing in the features of the scheme suggests a legislative intention "to deprive plaintiffs of access to the courts they would otherwise enjoy": *Lewis* at para. 46; *Chabot* at paras. 58–59. For example, the statutory remedies do not duplicate remedies available at common law, and the Agency may decline to resolve a complaint, as it did in *Cheung*, *Lukacs* and *Yale*, thus limiting access to redress for impugned conduct. Given the overall nature of the scheme, I agree with the Court in *Chabot* that it "allows the Agency to rule on some complaints within a specific legislative framework without stripping [a superior court's] jurisdiction over similar proceedings based on contractual liability": at para. 58. The same is true of a superior court's jurisdiction over proceedings based on unconscionability and liability for unjust enrichment, such as the proposed class action.

[99] I would not give effect to this ground of appeal.

Is it plain and obvious that the claim will fail because s. 31(2) of the *AT Regulation* permits WestJet to charge the impugned additional fares for international travel?

[100] Next, WestJet contends that it is plain and obvious that the respondents' claim will fail because s. 31(2) of the *AT Regulation* expressly permits it to charge per-seat airfares for international travel. In its submission, the only plausible interpretation of s. 31(2) is that Parliament intended to create a positive entitlement to charge such airfares, even where doing so would conflict with the common law or valid provincial legislation. Therefore, WestJet says, even if a breach could be found on the pleaded facts, it is plain and obvious that common law of general application does not apply and the impugned contracts cannot be unconscionable. Nor, it says, does provincial consumer protection legislation apply based on the doctrine of federal paramountcy.

[101] In support of its submission, WestJet emphasizes that s. 31(1) prohibits air carriers from charging for certain services provided to persons with disabilities, including for additional seating to accommodate their disabilities. However, s. 31(2) expressly carves out an exemption in respect of international flights. In other words, WestJet argues, on its face s. 31(2) expressly permits airlines to do what they otherwise could not do, namely, charge per-seat airfares for international travel. According to WestJet, the clear purpose of s. 31(2) is to create that entitlement.

[102] In WestJet's submission, the Agency explained that the purpose of s. 31(2) is to permit airlines to charge per-seat airfares for international travel in its Regulatory Impact Analysis Statement and its decision in *Yale*. For example, it emphasizes, in the Regulatory Impact Analysis Statement the Agency affirmed that the one-person, one-fare requirement applies only to domestic travel and in *Yale* it held that imposing one-person, one-fare pricing for international travel would be inconsistent with the objectives of the *Canada Transportation Act* and would constitute undue hardship on Canadian carriers. It also held that the issue of one-person, one-fare pricing is best addressed through efforts to achieve international cooperation and coordination.

[103] WestJet goes on to say that validly enacted legislation is paramount over the common law, which cannot be resorted to if doing so would interfere with the policies embodied in legislation or defeat its purpose, citing Ruth Sullivan in *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis Canada, 2022) at pp. 530 and 544. It submits that *Jackson v. Canadian National Railway*, 2013 ABCA 440, leave to appeal ref'd [2014] S.C.C.A. No. 57, provides a helpful illustration of how this principle applies.

[104] In particular, WestJet says, in *Jackson* the Court upheld the dismissal of a claim seeking restitution for the imposition of excessive grain freight rates that fell within the legislatively prescribed "maximum revenue entitlement" but allegedly breached a common law duty to charge fair and reasonable rates. However, assuming the existence of such a duty, it found that it was implicit in the legislation that railways were permitted to recover up to the maximum revenue entitlement, which permission would be rendered meaningless if common law courts could also determine whether rates were fair and reasonable. In the result, the Court held that the regulation amounted to a comprehensive code regarding freight rates that permitted railways to recover up to the legislatively prescribed entitlement. That being so, it found there was no gap for the common law to fill and that any common law obligations that might otherwise exist in relation to freight rates were ousted by the legislation.

[105] According to WestJet, given the clear purpose of s. 31(2), a similar analysis applies in this case. It says it follows that there is no gap for the common law to fill on the question of whether airlines can charge per-seat fares for additional seating to accommodate passengers' disabilities on international flights—any common law constraints on their ability to do so are ousted by s. 31(2).

[106] I do not accept these submissions.

[107] To repeat, s. 31 of the *AT Regulation* provides:

> 31(1) Subject to subsection (2), it is prohibited for a carrier to impose a fare or any other charge for any service that the carrier is required by this Part to provide to any person.
>
> (2) The prohibition in subsection (1) does not apply to a carrier in respect to any service that the carrier is required to provide under section 50, 51 or 52 [for additional seating] if that service is provided by the carrier for the purpose of a transportation service between Canada and a foreign country.

[108] The governing principles of statutory interpretation are uncontroversial. Applying Driedger's modern principle on a strike application, the court is to "interpret the words of legislation in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of that legislation, the object of the legislation and the intention of Parliament": *Aubichon* at para. 49. In addition, in the case of regulations the court must attend to the terms of the enabling statute. As Justice Binnie explained in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533 at para. 38, quoting from Driedger:

> It is not enough to ascertain the meaning of a regulation when read in light of its own object and the facts surrounding its making; it is also necessary to read the words conferring the power in the whole context of the authorizing statute. The intent of the statute transcends and governs the intent of the regulation.

[109] In my view, applying the modern principle of statutory interpretation, it is arguable that s. 31(2) does not positively entitle airlines to charge per-seat fares for additional seating to accommodate passengers' disabilities on international flights regardless of existing common law rules and principles, which will not hold weaker parties to unconscionable contracts and may require restitution of benefits conferred pursuant to such bargains. Rather, s. 31(2) does not prohibit airlines from charging per-seat fares for international travel, which is not necessarily the same as an outright, statutorily-specified permission. In other words, it is at least arguable that s. 31(2) leaves airlines unregulated on the matter of per-seat pricing for international travel. However, by doing so, it does not confer upon them an unbounded entitlement to charge persons with disabilities per-seat fares for extra seating required to accommodate their disabilities.

[110] Various arguments tend to support the foregoing interpretation. For example, the regulation in *Jackson* is arguably distinguishable from s. 31(2) because it expressly conferred an "entitlement" to charge specified rates on railways, whereas s. 31(2) expressly confers no more than an exemption to a prohibition. In addition, in 2008, when both domestic and international per-seat pricing were not expressly regulated under the *Canada Transportation Act*, the Agency held that Air Canada and WestJet were not entitled to impose per-seating pricing on persons with disabilities. Further, in its Regulatory Impact Analysis Statement regarding the *AT Regulation*, the Agency did not state that airlines are entitled to charge per-seat airfares for international travel. Rather, it stated that the one-person, one-fare requirement "only applies to domestic travel … due to the need for further analysis and consultations at the international level".

[111] Moreover, it is arguable that interpreting s. 31(2) as positively entitling airlines to charge persons with disabilities per-seat fares for additional seating on international flights by extinguishing their existing common law rights would be inconsistent with the object of the *Canada Transportation Act*, the intention of Parliament, and the Agency's enabling provision, s. 170. In particular, it is arguable that WestJet's proposed interpretation of s. 31(2) is inconsistent with the ameliorative purpose of the legislation, which is the removal of barriers to the mobility of persons with disabilities.

[112] The respondents' burden in demonstrating that the pleadings disclose a reasonable cause of action is to propose an arguable interpretation of s. 31(2): *Trotman* at para. 26. Bearing in mind the foregoing, in my view they have discharged that burden. I would not accede to this ground of appeal.

Is it plain and obvious that s. 31(2) of the *AT Regulation* is incompatible with provincial consumer protection legislation?

[113] Finally, WestJet submits that it is plain and obvious that s. 31(2) of the *AT Regulation* is incompatible with provincial consumer protection legislation. In advancing this submission, it relies on substantially the same interpretation and

arguments summarized above, namely, that the purpose and effect of s. 31(2) is to positively entitle airlines to charge per-seat airfares for international travel. On the assumption that imposing such charges would violate provincial consumer protection legislation, WestJet says, such legislation would be inconsistent with s. 31(2) and would frustrate its purpose. Therefore, it submits, provincial consumer protection legislation is inoperative to the extent it may be breached by the imposition of per-seat charges for international travel, based on the doctrine of federal paramountcy.

[114] As I have explained, under the doctrine of federal paramountcy "where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency": *Lemare Lake Logging* at para. 15. However, the doctrine is to be applied with restraint and "harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility": *Murray-Hall* at para. 88. Moreover, the party invoking the doctrine of federal paramountcy bears a high burden, and "provincial legislation restricting the scope of permissive federal legislation is insufficient on its own": *Canadian Owners and Pilots Association* at para. 66.

[115] As I have also explained, the purpose of the *Canada Transportation Act* includes the protection of the right of persons with disabilities to an accessible federal transportation system and the removal of barriers to their mobility. In my view, the respondents' proposed interpretation of s. 31(2) would not frustrate that purpose and would allow the provincial and federal legislation to be interpreted harmoniously. In particular, the respondents' proposed interpretation would not confer a positive entitlement on airlines to charge per-seat airfares for international travel, and, to the extent s. 31(2) may be interpreted as permitting such charges, the paramountcy doctrine would not apply. Accordingly, I would not give effect to this ground of appeal.

Conclusion

[116] For all of these reasons, I would dismiss the appeal.

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Justice Winteringham"

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fong v. British Columbia (Minister of Justice),* 2019 BCSC 1003

Date: 20190621
Docket: S111826
Registry: New Westminster

Between:

Michael Kwok Shuen Fong

Plaintiff

And

Her Majesty the Queen in Right of British Columbia as represented by The Minister of Justice for British Columbia

Defendant

Before: The Honourable Mr. Justice Blok

Ruling on Application to Reopen

Counsel for the Plaintiff:	P.G. Kent-Snowsell
Counsel for the Defendant:	O. Kowarsky A. Mallek
Counsel for the Attorney General of B.C.	P. Ameerali
Place and Dates of Hearing	New Westminster, B.C. May 31, 2019
Place and Date of Judgment:	New Westminster, B.C. June 21, 2019

I. Introduction

[1] On May 31, 2019, the Attorney General of British Columbia (the "AGBC") applied to have the Court reopen the judgment pronounced in this matter on March 1, 2019.

[2] In brief, the AGBC says that as a result of a failure to give notice under the *Constitutional Question Act*, R.S.B.C. 1996, c. 68 [*CQA*], the portion of the judgment by which *Charter* damages of $2,000 were awarded to the plaintiff is a nullity and ought to be set aside.

[3] Given the modest sum involved, all parties sensibly agreed that the situation might be remedied by vacating the award of *Charter* damages and instead increasing the award of non-pecuniary damages by the same amount. I agreed that this was an appropriate, pragmatic solution and so I made an order to that effect upon the conclusion of submissions.

[4] The parties had some minor disagreements on the law, focused on the basis by which such an order should be made, so I agreed to provide some brief reasons on that issue. These are those reasons.

II. Background

[5] On March 11, 2006, Michael Fong was injured as a result of a "hard takedown" arrest carried out by officers of the RCMP.

[6] Mr. Fong commenced this action by writ of summons filed on March 7, 2008. Counsel said this writ of summons was served on the AGBC, but not the Attorney General of Canada (the "AG Canada"). Having reviewed the court file, I note that the writ of summons was an endorsed writ and the endorsement made no mention of any *Charter* claims. An appearance was filed on behalf of Her Majesty the Queen in Right of the Province of B.C., the Minister of Public Safety and the Solicitor General of B.C. (the then-named defendants) on March 17, 2008.

[7] On May 15, 2008, Mr. Fong filed a statement of claim which, among other things, claimed breaches of his *Charter* rights and sought damages for those breaches. On November 3, 2009, a statement of defence was filed on behalf of all defendants by counsel from the (federal) Department of Justice.

[8] On August 20, 2015, the plaintiff filed a notice of civil claim in order to comply with the new format brought in by the *Supreme Court Civil Rules*. Among other things, the plaintiff alleged various *Charter* breaches and claimed "relief pursuant to s. 24 of the *Charter*".

[9] In reasons for judgment issued on March 1, 2019, I concluded that the arrest of Mr. Fong was unlawful and I awarded damages as compensation for his injuries. I also awarded $2,000 to Mr. Fong as *Charter* damages. These damages were awarded not as compensation, but as a vindication of Mr. Fong's ss. 8 and 9 *Charter* rights.

[10] Unfortunately, through all the years of this litigation and changes of counsel on both sides, no notice was given to the AGBC under the *CQA*. Counsel for the AGBC said notice was given to the AG Canada, but not to the AGBC, though I was not referred to any actual document by which notice was said to have been given to the AG Canada. Counsel for the AGBC said the judgment for *Charter* damages only came to his attention because the March 2019 reasons for judgment were posted on the Court's website.

[11] On learning of the judgment, counsel for the AGBC asked counsel for the parties not to enter the order until the issue was resolved. Since the order had not been entered, I was not *functus officio* at the time this application was heard.

III. The *Constitutional Question Act*

[12] The relevant provision in the *CQA* is s. 8:

> 8 (1) In this section:
>
> "constitutional remedy" means a remedy under section 24 (1) of the *Canadian Charter of Rights and Freedoms* other than a remedy consisting of the exclusion of evidence or consequential on such exclusion;

> "law" includes an enactment and an enactment within the meaning of the *Interpretation Act* (Canada).
>
> (2) If in a cause, matter or other proceeding
>
> (a) the constitutional validity or constitutional applicability of any law is challenged, or
>
> (b) an application is made for a constitutional remedy,
>
> the law must not be held to be invalid or inapplicable and the remedy must not be granted until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of British Columbia in accordance with this section.
>
> …
>
> (4) The notice must
>
> (a) be headed in the cause, matter or other proceeding,
>
> (b) state
>
> (i) the law in question, or
>
> (ii) the right or freedom alleged to be infringed or denied,
>
> (c) state the day on which the challenge or application under subsection (2) or (3) is to be argued, and
>
> (d) give particulars necessary to show the point to be argued.
>
> (5) The notice must be served at least 14 days before the day of argument unless the court authorizes a shorter notice.

IV. Discussion

A. Jurisdiction to Reopen

[13] I am satisfied that, given that the order has not been entered, I retain a discretion to reopen the trial to reconsider any aspect of the judgment. While that discretion has long been described as being “unfettered”, the Court of Appeal in *Hansra v. Hansra*, 2017 BCCA 199 [*Hansra*], made it clear that it is in fact fettered to some extent because the discretion must be exercised judicially, that is to say, in “a principled and considered way”:

> [44] It is beyond doubt that a trial judge who has pronounced reasons for judgment has the ability, before a formal order has been entered, to reopen a matter. This power is often said to involve the exercise of an "unfettered discretion". Although the word "unfettered" continues to be used in the context of reopening, the discretion to do so is in fact fettered, in the sense that, "as with any exercise of discretion, it must be exercised 'judicially', in a principled and consistent way": *Fan v. Chana*, 2011 BCCA 516 at para. 61, 345 D.L.R. (4th) 453 (per Levine J.A.). This is reflected, in particular, in

> decisions of this Court in which the discretion has been held to have been exercised improperly. In my view, the time has come to jettison the adjective "unfettered" which, by definition incorrectly describes the discretion.

[14] Generally, the discretion is to be used sparingly and only for the purpose of ensuring that a miscarriage of justice does not occur: *Clayton v. British American Securities Limited*, [1934] 3 W.W.R. 257 at 295 (B.C.C.A.); *Hansra*, at paras. 44 to 52.

B. Requirement of *CQA* Notice

[15] The *CQA* makes the giving of notice to the provincial and federal attorneys general mandatory in any case involving a challenge to the constitutional validity or constitutional applicability of any law or where an application is being made for a constitutional remedy.

[16] Although there is no prescribed form of notice, s. 8(4) of the *CQA* sets out the necessary content, requiring that the notice be headed with the style of cause of the matter and that it contain certain specific information along with “particulars necessary to show the point to be argued”. Although no form of notice is prescribed, counsel said informal versions of *CQA* notices are in common use.

C. Effect of Failing to Give *CQA* Notice

[17] In *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 [*Eaton*], the Supreme Court of Canada noted there were two lines of authority concerning the effect of a failure to give notice of a constitutional challenge. One line of cases favoured the view that any resulting decision is invalid, while the other said a decision rendered in the absence of notice was voidable upon a showing of prejudice. Ultimately, the court found that it did not have to resolve that debate, although the majority inclined to the view that a failure to give notice rendered a decision invalid without a showing of prejudice.

[18] In *Eaton*, the appeal court below (the Ontario Court of Appeal) had concluded that a certain statutory provision offended s. 15 of the *Charter* and, by way of remedy, read a limiting direction into the statute. The court did so on its own motion

and in the absence of the prescribed constitutional notice. In the subsequent appeal to the Supreme Court of Canada, Sopinka J., for the majority, said (at 267):

> [53] In view of the purpose of s. 109 of the *Courts of Justice Act* [the requirement for notice of a constitutional challenge], I am inclined to agree with the opinion of the New Brunswick Court of Appeal in *D.N. v. New Brunswick (Minister of Health & Community Services)*, *supra*, and Arbour J.A. dissenting in *Mandelbaum*, supra, that the provision is mandatory and failure to give the notice invalidates a decision made in its absence without a showing of prejudice. It seems to me that the absence of notice is in itself prejudicial to the public interest. I am not reassured that the Attorney General will invariably be in a position to explain after the fact what steps might have been taken if timely notice had been given. As a result, there is a risk that in some cases a statutory provision may fall by default.
>
> [54] There is, of course, room for interpretation of s. 109 and there may be cases in which the failure to serve a written notice is not fatal either because the Attorney General consents to the issue's being dealt with or there has been a *de facto* notice which is the equivalent of a written notice. It is not, however, necessary to express a final opinion on these questions in that I am satisfied that under either strand of authority the decision of the Court of Appeal is invalid. No notice or any equivalent was given in this case and in fact the Attorney General and the courts had no reason to believe that the Act was under attack. Clearly, s. 109 was not complied with and the Attorney General was seriously prejudiced by the absence of notice.
>
> [Explanatory phrase added.]

[19] In *Saskatchewan Government Insurance v. Gorguis*, 2013 SKCA 32, an application judge declared a provision of the Saskatchewan automobile insurance scheme inoperative to the extent it conflicted with federal bankruptcy legislation. However, no notice of constitutional challenge had been given in that case. On appeal, the Saskatchewan Court of Appeal concluded that the notice provisions were mandatory and amounted to a legislated precondition to the exercise of jurisdiction to declare a law invalid (at para. 29). The judgment was set aside and the matter remitted to the court below.

[20] In other cases, the failure to give *CQA* notice or, in some cases, *proper CQA* notice, has resulted in the constitutional challenge being struck (*The Law Society of British Columbia v. Parchment*, 2018 BCSC 2246), dismissed (*Aziz v. Aziz*, 2000 BCCA 358), or adjourned so that proper notice could be given.

D. The Issue

[21] The plaintiff noted that the cases cited by the AGBC all involved challenges to legislation and so the forceful, imperative remarks found in those cases, emphasising the importance of full and proper notice, is understandable. The plaintiff said, however, that cases involving damages for breaches of an individual's *Charter* rights are quite different. Cases involving constitutional challenges to the validity of legislation involve the public interest at large, whereas claims for *Charter* damages involve individual rights only. For that reason, the plaintiff argues, there should be a more relaxed standard for *CQA* notice in cases where *Charter* damages are claimed.

[22] The plaintiff says that while no *formal CQA* notice was given in this case, *effective* notice was given by way of its pleadings, and that is good enough here.

[23] The AGBC responded by noting the *CQA* itself does not distinguish between cases involving constitutional challenges to legislation and cases involving claims for a constitutional remedy, including damages. Based on ordinary principles of statutory interpretation, there is no basis for distinguishing the two types of cases.

E. Analysis

[24] I agree that the wording of the *CQA* does not support a distinction being drawn between cases involving constitutional challenges and cases involving claims for other forms of *Charter* relief. I note, however, that in *Eaton* (see para. 54 quoted above) the Supreme Court of Canada left open the possibility of *de facto* notice being sufficient, or even that prejudice arising from the lack of notice *might* have to be shown. From this, it is reasonable to surmise that in cases involving modest or perhaps minimal consequences, for example, a finding of *de facto* notice might be more readily made.

[25] I do not have to come to a firm conclusion on that point, however, because in this case there is no reasonable basis on which I could conclude that *de facto* notice was given to the AGBC in this case. From what I can discern, the pleadings in

which *Charter* issues were raised in this case were only sent to federal counsel, not to the AGBC or to counsel acting for the AGBC, and so there was no notice whatsoever to the AGBC in this case. In these circumstances, the award of *Charter* damages could not stand.

[26] I agree with the AGBC that the Court's options were: (1) decline to vacate the award of *Charter* damages and require the parties to deal with the issue through an appeal; (2) reopen the trial to allow the AGBC to make submissions on the issue; or (3) with the consent of the parties, vary the award to delete the *Charter* damages and add the same sum to the award of non-pecuniary damages. In light of the consent that was given by all parties in this matter, the third option was the obvious choice.

[27] These, then, are the reasons why I reopened and varied the judgment.

[28] As agreed by the parties, there were no costs awarded.

"Blok J."