IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bergen v. WestJet Airlines Ltd.,*
2021 BCSC 12

Date: 20210106
Docket: S197550
Registry: Vancouver

Between:

Dora Bergen and Phebe-Joy Trotman

Plaintiffs

And

WestJet Airlines Ltd. and WestJet Encore Ltd.

Defendants

Before: The Honourable Madam Justice Francis

Reasons for Judgment

Counsel for the Plaintiffs:	M.P. Good K. McLaren S. Lin
Counsel for the Defendants:	M. Dery N. Pimentel
Place and Date of Trial/Hearing:	Vancouver, B.C. November 16-18, 2020
Place and Date of Judgment:	Vancouver, B.C. January 6, 2021`

Table of Contents

INTRODUCTION **3**
BACKGROUND FACTS **4**
CERTIFICATION REQUIREMENTS **6**
SECTION 4(1)(A): CAUSE OF ACTION **7**
Double ticketing under s. 54 of the *Competition Act* 7
Were the two prices clearly expressed? 11
Were the two prices expressed at the time of supply? 12
Section 36 of the Competition Act 14
Other causes of action 16
SECTION 4(1)(B): CLASS DEFINITION **16**
Class members not resident in Canada 16
Class members who flew on codeshare flights 17
Class members who did not see the Tariffs 18
SECTION 4(1)(C): COMMON ISSUES **18**
Common issues re: *Competition Act* claim 19
Common issues re: breach of contract 19
Common issues re: unjust enrichment claim 23
Common issues re: remedies 24
General common issues 24
Punitive damages 24
SECTION 4(1)(D): PREFERABLE PROCEDURE **25**
Governing considerations in determining preferable procedure 25
The Canadian Transportation Agency as an alternative procedure 26
Parallel proceeding 28
Conclusion re: preferable procedure 29
SECTION 4(1)(E): PROPOSED REPRESENTATIVE PLAINTIFF **30**
CONCLUSION **30**

Introduction

[1] The plaintiff, Phebe-Joy Trotman,[1] seeks certification of a class proceeding against the defendants WestJet Airlines Ltd. and WestJet Encore Ltd. (collectively, "WestJet") relating to WestJet's charging of baggage fees. The defendants charged baggage fees to class members during a period of time when WestJet's tariffs indicated that customers would not have to pay a fee for their first checked bag. The plaintiff claims that, by charging fees for baggage carriage in a manner contrary to WestJet's own tariffs, WestJet violated the *Competition Act*, R.S.C 1985, c. C-34 [*Competition Act*], breached its contract with its customers, and was unjustly enriched. Though the plaintiff has also pled that WestJet breached consumer protection legislation, counsel for the plaintiff advised at the certification hearing that the consumer protection cause of action is no longer being pursued.

[2] The defendants resist the application for certification and raise the following issues for determination by this Court:

a) whether it is plain and obvious that the *Competition Act* claim has no reasonable prospect of success;

b) whether the class definition is overbroad;

c) whether the common issues proposed by the plaintiff are indeed common;

d) whether a class proceeding is the preferable procedure; and

e) whether the proposed plaintiff is a proper representative plaintiff.

[3] For the reasons that follow, I have determined that it is appropriate to certify this matter as a class proceeding.

[1] The named plaintiffs are Ms. Trotman and Dora Bergen. At the certification hearing, counsel for the plaintiffs advised that Ms. Bergen was no longer pursuing her claim. Therefore, the sole representative plaintiff advanced by class counsel at the certification hearing was Ms. Trotman.

Background Facts

[4] By law, every commercial airline in Canada must publish tariffs, which form part of the airline's contract with each of its customers. For domestic flights, the requirement to publish and display tariffs is set out in s. 67 of the *Canada Transportation Act*, S.C. 1996, c. 10 [*CTA*]. For international flights, this requirement is set out under Part V, Division II of the *Air Transportation Regulations*, SOR/88-58.

[5] From October 2014 to March 2016, WestJet's domestic tariff (the "Domestic Tariff") contained conflicting provisions with respect to the price of the first checked bag on a domestic WestJet flight. Section 7(d), titled "Acceptance of checked baggage", contained, *inter alia*, the following terms:

a) "The carrier will accept one piece of checked baggage without charge for a passenger only for the flight on which the passenger is travelling."

b) "a first, second, third or fourth piece of checked baggage […] will be charged according to the fee tables below…"

c) "for each fare paying passenger travelling the Carrier permits a free checked baggage allowance of one (1) item."

[6] The Domestic Tariff also contained a fee table stating that for "Econo Fare", "WestJet Vacations", and "Group Fares", the first checked bag would cost $25.

[7] The Domestic Tariff changed in March 2016 to remove the sentence: "The carrier will accept one piece of checked baggage without charge for a passenger only for the flight on which the passenger is travelling". Otherwise, the Domestic Tariff's provisions regarding fees for a first checked bag remained the same until February 2018. Specifically, the Domestic Tariff continued to contain a provision stating that each passenger was to receive one free checked bag, as well as a provision stating that the first checked bag would cost $25 for passengers flying on Econo Fare, WestJet Vacations or Group Fares.

[8] Between September 2014 and February 2018, WestJet charged passengers travelling domestically on Econo Farres, WestJet Vacations and Group Fares $25 for their first checked bag.

[9] WestJet's international tariff (the "International Tariff") contained a similar inconsistency from January 17, 2016 until March 2019. During this time, Rule 85 of the International Tariff contained the following conflicting terms under "Section B: Acceptance of Checked Baggage":

a) "a first, second, third or fourth piece of checked baggage […] will be charged in accordance with the fee table below."

b) "for each fare paying passenger travelling, the carrier permits a free checked baggage allowance of one (1) item."

[10] The International Tariff contained a fee table stating that Econo Fare and West Jet Vacation passengers would be charged $25-$35.40 for their first checked bag.

[11] From January 2016 to March 2019, WestJet charged passengers between $25 and $35.40 for their first checked bag on international flights.

[12] Ms. Trotman seeks to bring a claim on her own behalf and on behalf of all individuals residing anywhere in the world who travelled on a fare-paying itinerary on a WestJet-operated flight and paid a fee for their first checked bag during the following periods:

a) for Canada domestic flights, tickets issued on or after September 15, 2014 for travel on or after October 29, 2014 to February 22, 2018; and

b) for USA and International flights, travel on or after January 17, 2016 to March 20, 2019.

Certification Requirements

[13] Section 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*], requires the court to certify a class proceeding if all of the following requirements are met:

> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> > (i) would fairly and adequately represent the interests of the class,
> >
> > (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> >
> > (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[14] The class procedure has three principal goals: behaviour modification, judicial economy and access to justice: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 27.

[15] The certification analysis does not involve a consideration of the merits of the claim. The question at certification is not whether a claim is likely to succeed but rather whether the suit is appropriately brought as a class proceeding: *Hollick* at para. 16.

[16] Subsection 4(1)(a), the requirement that the pleadings disclose a cause of action, is assessed by means of the same test that would apply to a motion to strike. A plaintiff will satisfy this requirement unless, assuming all the facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed or has no reasonable prospect of success: *Pro-Sys Consultants v. Microsoft Corporation*, 2013 SCC 57 at para. 63 [*Pro-Sys*].

[17] With respect to the remaining subsections 4(b) – (e), the plaintiff must show "some basis in fact" to establish that the certification requirements have been met. In determining whether this standard has been met, the court is not to engage in any detailed weighing of evidence. Rather, at this stage, the court should confine itself only to considering to whether there is some basis in the evidence to support the certification requirements: *AIC Limited v. Fischer*, 2013 SCC 69 at para. 43.

Section 4(1)(a): Cause of Action

[18] In this case, the defendants do not dispute that the plaintiff has adequately pled a cause of action for breach of contract and unjust enrichment. However, the defendants submit that the plaintiff's claim under ss. 54 and 36 of the *Competition Act* is bound to fail.

[19] Whether the pleadings disclose a cause of action must be determined on the basis of the pleadings alone. The court may not consider evidence in determining whether the criteria under s. 4(1)(a) have been met: *Finkel v. Coast Capital Savings Credit Union,* 2017 BCCA 361 at para. 16 [*Finkel*].

Double ticketing under s. 54 of the *Competition Act*

[20] Section 54 of the *Competition Act* prohibits a practice called "double ticketing." It says:

> **54 (1)** No person shall supply a product at a price that exceeds the lowest of two or more prices clearly expressed by him or on his behalf, in respect of the product in the quantity in which it is so supplied and at the time at which it is so supplied,
>
> **(a)** on the product, its wrapper or container;
>
> **(b)** on anything attached to, inserted in or accompanying the product, its wrapper or container or anything on which the product is mounted for display or sale; or
>
> **(c)** on an in-store or other point-of-purchase display or advertisement.
>
> **(2)** Any person who contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding one year or to both.

[21] Section 54 makes it an offence for a merchant to express two or more prices to a customer at the time of purchase and to charge the higher price. Based on the language of the statute, there are a number of required elements to an offence under s. 54. A person must:

a) supply a product;

b) at a price that exceeds the lowest of two or more prices;

c) the two prices must be clearly expressed on the product, on something attached to or accompanying the product, or on a point of purchase display; and

d) the two prices must be expressed at the time the product is supplied.

[22] There is very little case authority on s. 54. However, double ticketing was recently considered by the Federal Court in *Lin v. Airbnb, Inc.,* 2019 FC 1563. *Lin* invoked s. 54 of the *Competition Act* in the context of Airbnb's platform, which shows a user one price for accommodation on the "search results page", and a second, higher price that includes service fees on the "listing page". The Airbnb customer is then charged the listing page's higher price when they book their accommodation.

[23] The plaintiff in *Lin* sought to certify a class proceeding on the basis that Airbnb violated s. 54 of the *Competition Act*, giving rise to a cause of action for class members under s. 36 of the *Competition Act*.

[24] In *Lin,* at para. 36, Justice Gascon noted that s. 54 only applies to situations "where different prices are expressed in respect of the same product in terms of quantity and time of supply" (emphasis in original). At para. 38, he reviewed the legislative history of s. 54 and remarked that the section was historically meant to prevent the display of two price tags on a single product.

[25] Justice Gascon acknowledged that in *Lin,* the plaintiff "certainly appears to be stretching the potential interpretation and application of s. 54 of the *Competition Act*, and … is extending it into unchartered territory": at para. 56. Nevertheless,

Gascon J. took a flexible approach. Being satisfied that Mr. Lin had pled all the elements of a s. 54 offence, the court found that he had met the requirement of pleading a cause of action that was not bound to fail.

[26] The plaintiff submits that I should apply the same reasoning that was applied in *Lin* and find that the pleadings in this case disclose a cause of action for the offence of double ticketing.

[27] In this case, the s. 54 claim is grounded in the Domestic and International Tariffs (collectively, the "Tariffs"). The Tariffs form part of the contract of carriage between every WestJet customer and WestJet. During the class period, the Tariffs contained contradictory provisions that set out two different prices for a single item. The Tariffs said that a passenger's first checked bag was free and they also said that a passenger's first checked bag would cost $25.00 - $35.40.

[28] However, the notice of civil claim does not assert, for the purposes of s. 54, that two "clear expressions" of price for a first checked bag are contained in the Tariffs. Rather, the plaintiff claims that WestJet clearly expressed a price of $0 for the first checked bag (the "First Price") to class members by way of the published Tariffs but that that the higher price of $25 - $35.40 (the "Second Price") was expressed to class members at the time of check-in.

[29] In Part 3: Legal Basis, the plaintiff pleads:

> 2. WestJet's published Domestic Tariff and International Tariff containing a contractual term providing for the Free Baggage Allowance is a clear expression that the price for the first checked baggage is zero ($0) dollars (hereinafter the "First Price").
>
> 3. During Class Period, when a Class Member attempts to check-in their first checked baggage Westjet (or its agents) clearly expressed a price of between $25 and $35.40 CAD or USD for each first checked baggage (hereinafter the "Second Price(s)").

[30] The material facts relied on by the plaintiff in support of the expression of the First Price and Second Price are set out in Part 1 of the notice of civil claim and they include:

> 22. Westjet authored, published and displayed the Domestic Tariff.
>
> 23. From on or about September 15, 2014 to on or about February 22, 2018, Westjet's Domestic Tariff contractually stipulated the Free Baggage Allowance.
>
> 24. The Domestic Tariff is displayed and/ or otherwise made available to the Class Members at or before the time each Class Member booked their itineraries.
>
> 25. At all material times, and despite the clear and plain wording of the Free Baggage Allowance, Westjet's Domestic Tariff concurrently in a table after the Free Baggage Allowance stipulated a contradicting price of $25 for the first checked baggage, without any language negating the applicability of the Free Baggage Allowance.
>
> 26. Despite the Free Baggage Allowance contractually stipulated above, between about September 15, 2014 to on or about February 22, 2018, Westjet charged passengers $25 for a passenger's first checked baggage for travel pursuant to the Domestic Tariff.
>
> ...
>
> 29. Westjet authored, published and displayed the International Tariff.
>
> 30. From on or about January 17, 2016 to March 20, 2019, Westjet's International Tariff contractually stipulated the Free Baggage Allowance.
>
> 31. The International Tariff is displayed and/or otherwise made available to the Class Members at or before the time each Class Member booked their itineraries.
>
> 32. At all material times, and despite the clear and plain wording of the Free Baggage Allowance, Westjet's International Tariff concurrently in a table after the Free Baggage Allowance stipulated a contradicting price of $25-$35.40 CAD/USD for the first checked baggage, without any language negating the applicability of the Free Baggage Allowance.
>
> 33. Despite the Free Baggage Allowance contractually stipulated above, between about January 17, 2016 to March 20, 2019, Westjet charged passengers between $25 and $35.40 CAD or USD for a passenger's first checked baggage for travel pursuant to the International Tariff.

[31] Unlike the plaintiff in *Lin*, the plaintiff has not framed the double ticketing offence as something that happened simultaneously at the point of purchase. Rather, the plaintiff has framed the legal basis of her case in such a way that The First Price and the Second Price were expressed in a different manner at different stages of the booking and travel experience.

[32] The defendants argue that the plaintiff has not pled two critical elements of an offence under s. 54. First, the defendants argue that the plaintiff has insufficiently

pled that the two prices are "clearly expressed" because the references to a free checked bag in the Tariffs do not constitute a clear expression. Second, the defendants argue that the two prices must be expressed at the same time, which must be the time of supply. By pleading that the First Price was expressed in the Tariffs and the Second Price was expressed at check-in, the defendants submit that the plaintiff's case is bound to fail because it does not accord with the temporal requirements of s. 54.

Were the two prices clearly expressed?

[33] The defendants argue that the plaintiff has insufficiently pled a clear expression of two prices "on the product, on anything attached to or accompanying the product, or on any point-of-purchase display or advertisement." The defendants note that it is possible to purchase an airline ticket with WestJet without ever looking at the Tariffs. Therefore, the defendants say the Tariffs are not clearly expressed as that term is used in s. 54 of the *Competition Act*.

[34] The plaintiff has pled that WestJet authored, published and displayed the Tariffs. In argument, the plaintiff described the Tariffs as "super contracts" because of their special role in the regulation of the passenger aviation industry. The legislation requires tariffs to be filed and publically displayed by all commercial airlines. Because of the special status of the Tariffs, the plaintiff argues that there can be no question that the contents of the Tariffs were clearly expressed.

[35] I am satisfied that in the notice of civil claim, the plaintiff adequately pleads that the two prices were clearly expressed. At para. 2 under Part 3: Legal Basis, the plaintiff describes the First Price as a "clear expression." In the next paragraph, the plaintiff states that the Second Price is "clearly expressed." There is therefore no basis for the defendants to argue that the pleadings are insufficient to establish this element of an offence under s. 54.

[36] The core of the defendants' objection to the plaintiff's position on "clear expression" is not that it is inadequately pled, but rather that publication of a price in a tariff, does not, in the defendants' submission, amount to a "clear expression."

[37] The defendant's concern may well be justified on the merits, but it is not an issue that I can determine at certification without recourse to evidence. The question of whether the First Price was clearly expressed may be informed by factors such as the prominence of the Tariffs on the WestJet website, whether the Tariffs are displayed in other places, and whether a customer can book a ticket without being given access to the Tariffs. These are all matters of evidence. On the basis of the pleadings alone, I cannot find the plaintiff's claim that two prices are clearly expressed is bound to fail.

Were the two prices expressed at the time of supply?

[38] While the "product" is not expressly defined in the notice of civil claim, the plaintiff argues that there can be no confusion about the nature of the product in this case: it is the service of transporting a passenger's first checked bag.

[39] The notice of civil claim does not assert that the First Price and the Second Price were expressed at the same time, even though both prices are contained in the Tariffs. Rather, the notice of civil claim refers to the First Price being expressed to the Class Members at or before the time each Class Member booked their itineraries, and the Second Price being expressed at the time of travel. In argument, the plaintiff argues that it is implicit in the special character of the Tariffs, which form part of every passenger's air travel contract, that they are continually expressed from the time of booking until the completion of travel. Because the Tariffs are continuously expressed, they are still being expressed when a passenger checks in and is told they must pay to check their bag. In this way, the plaintiff says she satisfies the requirement under s. 54 that the two prices be expressed at the same time, which must be the time of supply of the product.

[40] I am not persuaded that the temporal requirement is so easily met as the plaintiff suggests, at least not in the way the claim is presently framed in the notice of civil claim. The notice of civil claim clearly appears to set out a First Price and a Second Price expressed at two different points in time: (1) the time of booking, when

a class member receives a link to the applicable tariff; and (2) the time of travel, when a class member is required to pay to check a bag.

[41] The plaintiff's argument that, because the Tariffs bind WestJet and all its customers and are a contract of adhesion, the Tariffs are continually expressed, appears to conflate the enforceability of the Tariffs with the continuity of the expression of their terms. WestJet does not argue that it is not bound by the Tariffs. The Tariffs obviously bound the parties and were required by law. WestJet argues that the First Price of $0 for a first checked bag was not expressed, for the purposes of s. 54, at the time of check-in. This is a different issue from whether the Tariffs are a binding contract.

[42] However, the plaintiff's theory of the case, that because of the special nature of the Tariffs, they are continuously expressed from the time of booking to the time of travel, is not plainly and obviously wrong. It is possible that, with recourse to evidence about the Tariffs, how they are published, and the steps WestJet took to make passengers aware of the Tariffs, the plaintiff could establish that the Tariffs were clearly expressed at the time of booking and at the time of travel to all class members. If the plaintiff were able to establish these facts, the claim that WestJet violated s. 54 of the *Competition Act* would not be bound to fail.

[43] However, while the plaintiff's counsel made submissions at the certification hearing about how the plaintiff has met the temporal requirement under s. 54, the plaintiff has not pled that the two prices were expressed at the time of travel, or even that they were expressed at the same time.

[44] Since the temporal requirement is a necessary component of the offence under s. 54, material facts in support of this element ought to have been pled. The notice of civil claim as it is presently drafted is deficient.

[45] The court must read pleadings generously, with a view to accommodating inadequacies in a form attributable to deficient drafting: *Finkel* at para. 17. I must

consider whether this deficiency in the notice of civil claim can be rectified by amendment.

[46] In this case, while the plaintiff certainly could have set out her claim under s. 54 with more clarity, I am of the view that the defect in the pleading is likely capable of clarification by amendment. However, it is not the role of the court to propose amendments to pleadings, and a claim should not be certified absent pleadings that satisfy the requirements of the *CPA*: *Sandhu v. HSBC Finance Mortgages Inc.,* 2016 BCCA 301 at para. 45.

[47] As a result, should the plaintiff wish to proceed with her claim under s. 54, she has leave to propose amendments to the notice of civil claim that properly plead the elements of an offence under s. 54. The schedule for those submissions is set out at the end of this judgment.

Section 36 of the Competition Act

[48] Section 36 of the *Competition Act* creates a cause of action for a violation of certain sections of the *Competition Act*, including s. 54:

> **36 (1)** Any person who has suffered loss or damage as a result of
>
> > **(a)** conduct that is contrary to any provision of Part VI, or
> >
> > **(b)** the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

[49] Since the plaintiff will not have a cause of action under s. 36 absent a violation of s. 54, it is not strictly necessary for me to consider the s. 36 pleading as I have found that the s. 54 offence has not been properly pled. However, for completeness, and in the event the plaintiff amends her pleadings so as to properly plead a violation of s. 54, I have considered whether the notice of civil claim sets out a viable cause of action under s. 36 of the *Competition Act*.

[50] Section 36 gives parties who have suffered loss or damage as a result of a violation of s. 54 the right to recover their losses. The defendants argue that even if the plaintiff could establish that WestJet violated s. 54, she would not have a cause of action under s. 36 because it is not alleged that she saw both prices.

[51] The defendants rely on *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.,* 2014 BCCA 36, *Sandhu*, and *Singer v. Schering-Plough Canada Inc.,* 2010 ONSC 42 for the proposition that a cause of action under s. 36 of the *Competition Act* must include an element of reliance to prove causation. All three of these cases involve s. 52 of the *Competition Act*, the provision that prohibits the making of materially false or misleading representations to the public. In order to maintain a cause of action for a violation of s. 52 of the *Competition Act*, a plaintiff must demonstrate that they suffered a loss that was causally connected to the violation of s. 52. This makes perfect sense in the context of s. 52. As Justice Strathy noted in *Singer:*

> A consumer of sunscreen products cannot recover damages, in the abstract, simply by proving that the manufacturer made a false and misleading representation to the public. The failure of the plaintiff to plead a causal link is fatal to this claim.

[52] Section 54 is a very different provision from s. 52. Unlike the offence of false advertising, the loss suffered by anyone who purchases a product for the higher of two prices is embedded in the offence of double ticketing. If someone paid the higher price, it stands to reason that they suffered a loss.

[53] The defendants argue that it is necessary to plead that the plaintiff saw both prices to plead a cause of action under s. 36 for a violation of s. 54. A person who only saw the higher price would not, in the defendants' submission, be entitled to damages for double ticketing. The plaintiff argues that whether or not someone saw both prices is irrelevant to the cause of action. Section 36 gives a cause of action to anyone who suffers loss or damage as a result of a violation of s. 54. A violation of s. 54 is based entirely on the actions of the offender; it is focused on the expression of two prices, not on how the two prices are received. Under the plaintiff's analysis,

the loss or damage in a case of double ticketing arises solely from having paid the higher of two ticketed prices.

[54] For the purposes of the analysis under s. 4(1)(a), I need not resolve the dispute between the plaintiff and the defendants as to whether a consumer must have seen both prices in order to maintain a cause of action for double ticketing. In pleading that the class members suffered loss or damage as a result of WestJet's double ticketing, the plaintiff has tracked the language of s. 36, consistent with her theory of the case that damages arise from the payment of a higher price, irrespective of knowledge or reliance. While the defendants may successfully argue at trial that s. 36 requires some element of knowledge or reliance, I am not persuaded that the plaintiff's interpretation of s. 36 is bound to fail, and therefore I find that she has met the requirements of s.4(1)(a) with respect to this claim.

[55] Therefore, if the plaintiff amends her notice of civil claim to plead a viable offence under s. 54, she will have adequately pled a claim for relief under s. 36.

Other causes of action

[56] The defendants concede that the plaintiff has adequately pled claims for breach of contract and unjust enrichment.

Section 4(1)(b): Class Definition

Class members not resident in Canada

[57] The defendants take issue with the class definition because of its worldwide scope. They argue that a worldwide class would give rise to practical challenges. However, the defendants do not raise any form of jurisdictional challenge. They have not submitted that this Court lacks territorial competence over class members outside of Canada, nor have they asked this Court to decline jurisdiction under the doctrine of *forum non conveniens.*

[58] There are numerous examples of Canadian courts certifying class actions that include class members outside of Canada. In *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792, at para. 107, the Ontario Court of Appeal considered a

jurisdictional challenge in the context of a class action in which the class would include class members who resided outside of Canada. The court held that, in addition to establishing a real and substantial connection between the subject matter of the action and Ontario, courts hearing a jurisdictional challenge in the context of a class proceeding should consider two other factors:

a) There must be common issues between the claims of the representative plaintiff and the foreign claimants; and

b) The procedural safeguards of adequacy of representation, adequacy of notice, and the right to opt out must be provided.

[59] It is not strictly necessary for me to consider these factors in this case, since the defendants have not challenged jurisdiction; they have simply argued that a worldwide class action will be unwieldy and difficult to manage. However, the fact that the claim is based on a common contract of carriage is relevant both to jurisdiction and to the defendant's concerns about the practicality of a worldwide class. There is no distinction in the contractual obligations WestJet has to Canadian class members and foreign claimants. Further, procedural safeguards can be put in place, as they would be for domestic claimants, to ensure that no one is drawn into litigation that they do not wish to be a part of.

[60] I cannot find there is any reasonable basis for excluding from the class definition those passengers who reside outside of Canada.

Class members who flew on codeshare flights

[61] The defendants also raise an issue about passengers who booked through WestJet on codeshare flights in which WestJet was not the entity that received the baggage fees. The plaintiff has conceded this issue and has offered to amend the class definition to exclude passengers who did not pay WestJet for baggage carriage.

Class members who did not see the Tariffs

[62] The defendants argue that the class definition should exclude passengers who did not see the Tariffs prior to booking their itinerary or paying for baggage fees. The defendants say that passengers who did not see the relevant Tariffs have no cause of action against WestJet and should be excluded from the class definition.

[63] The breach of contract claim and the unjust enrichment claim are both based on the rights and obligations that arise from the contract of carriage between class members and WestJet. That contract binds the parties even if they have not read it. Therefore, I do not accept the defendants' argument that the class should be confined to passengers who have seen the Tariffs.

[64] I find that the following amended class definition proposed by the plaintiff is acceptable:

> All individuals residing anywhere in the world, who travelled on a WestJet Booking* made directly with WestJet, during the Class Period (defined below) and paid to WestJet a fee for the first checked bag (the "Baggage Fee(s)"):
>
> A: Canada domestic flights: tickets issued on or after September 15, 2014 for travel on or after October 29, 2014 to February 22, 2018; and
>
> B: USA and international flights: tickets issued on or after November 3, 2015 for travel on or after January 6, 2016 to March 20, 2019.
>
> "WestJet Booking" means a fare-paying itinerary on: (a) a WestJet-operated flight where WestJet was both the "marketing carrier" and "operating carrier"; or (b) a flight operated by WestJet's code-share partners where WestJet was the "marketing carrier."

Section 4(1)(c): Common Issues

[65] In determining commonality, the court does not need to resolve conflicts in the evidence. The common issues requirement will be met if there is some basis in fact for the proposition that the issues can be determined on a class wide basis: *Pro-Sys* at para. 99.

[66] Commonality must be approached purposively. It is not necessary that common issues predominate over non-common issues, however there must be

some commonality and the court should examine the significance of the common issues in relation to individual issues: *Pro-Sys* at para. 108.

[67] For common issues to be certifiable, they need only be "issues of fact or law that move the litigation forward": *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260 at para. 8.

[68] The plaintiff has proposed certain common issues that are reproduced as Schedule "A" to this judgment.

Common issues re: *Competition Act* claim

[69] I have found that the *Competition Act* claim, as framed in the notice of civil claim, is bound to fail. However, I have also given the plaintiff leave to propose amendments to the notice of civil claim to cure the deficiencies in her pleading. Should the plaintiff be successful in amending her notice of civil claim to plead the requisite elements of an offence under s. 54, I will consider whether to certify common issues under the *Competition Act.* For the purposes of this decision, I have not considered the common issues proposed by the plaintiff under s. 54 of the *Competition Act,* or s. 36 of the *Competition Act*, which sets out a cause of action for a breach of s. 54.

Common issues re: breach of contract

[70] The defendants take issue with the commonality of the plaintiff's claims for breach of contract. They argue that the terms of each contract for carriage will vary on the basis of representations made to each guest depending on the particular booking channel and their own interactions at the point of sale. In other words, WestJet submits that the terms of the contract will differ depending on the circumstances surrounding each class member entering into a contractual relationship with WestJet. As such, they argue that the interpretation of the contracts between class members and WestJet is not a common issue.

[71] The defendants rely on *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 [*Ledcor*], for the proposition that, if a standard form

contract is ambiguous, the court may consider evidence of surrounding circumstances to construe the terms of the contract.

[72] In *Ledcor,* the Supreme Court of Canada considered the proper interpretation of an exclusion clause in a standard form insurance contract. At para. 50, Justice Wagner (as he then was) discussed the circumstances under which the court will look to the reasonable expectations of the parties in construing a standard form contract:

> Where, however, the policy's language is ambiguous, general rules of contract construction must be employed to resolve that ambiguity. These rules include that the interpretation should be consistent with the reasonable expectations of the parties, as long as that interpretation is supported by the language of the policy; it should not give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which the insurance policy was contracted, and it should be consistent with the interpretations of similar insurance policies. [Citations omitted.]

[73] In *Ledcor*, Wagner J. found that the contract was ambiguous and therefore it was necessary to consider the reasonable expectations of the parties to interpret the contract. However, the Court in *Ledcor* never lost sight of the fact that recourse to the reasonable expectations of the parties means something different in a standard form contract than it does in a contract negotiated between two parties in a commercial context:

> [65] Parties' reasonable expectations with respect to the meaning of a contractual provision can often be gleaned from the circumstances surrounding the contract's formation: *Sattva Capital Corp.,* at paras. 46-47. However, as discussed above, there is no factual matrix here that would assist in ascertaining the parties' understanding of and intent regarding the Exclusion Clause. The Policy is a standard form contract.

[74] Justice Wagner considered the purpose behind builder’s risk policies in order to discern the parties’ reasonable expectations when interpreting an ambiguous standard form contract. He did not look to the reasonable expectations of a particular insured on the basis of that insured’s personal interactions with the insurance company. Such an approach, which is the approach the defendants urge the court to take in this case, would constitute a significant departure from the ordinary rules of interpretation of a standard form contract.

[75] A contract of adhesion is a contract in which the parties are so imbalanced in bargaining power that one party simply has no ability to negotiate terms. Standard form contracts are often contracts of adhesion: *Corless v. Bell Mobility Inc.,* 2015 ONSC 7682 (Div. Ct.) at para. 23.

[76] In *Corless*, Justice Lederer of the Ontario Divisional Court considered contracts of adhesion between cell phone providers and consumers in a proposed class proceeding. The specific issue was whether "billing per minute" contracts allowed cell phone providers to round up charges to the nearest minute or whether that practice was in breach of the standard form agreements the telephone companies had with their clients. The telephone companies made a similar argument to the one made by WestJet in this case, namely that the contract the phone companies had with each customer could be different based on that customer's experience with the phone company.

[77] Justice Lederer recognized the significant implications of the phone companies' argument:

> It may be worthwhile to consider the broader implications of this understanding. As a practical matter, when the interpretation of any widely-utilized consumer contract is the subject of a prospective class action, it will be open to the same concern. There will always be the argument that the surrounding circumstances will have to be investigated. What did the consumer know before he or she signed on? Who at the company did he or she talk to? What advertisements or notices did they receive? What research did they do before the contract was formed? The ability of the *Class Proceedings Act, 1992* to respond to these circumstances would be substantially hampered, if not lost.

[78] At para. 50, the court rejected the defendants' argument that the Supreme Court of Canada's decision in *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53, mandates an individual inquiry into the surrounding circumstances of each consumer's contract with their phone company:

> There is some basis in fact that supports the finding that the pleadings raise a common issue. These are contracts of adhesion. Billing "per minute" was the industry standard. These facts demonstrate an understanding that whatever "per minute" may mean, it is the same meaning in each of the contracts that rely on these words. The evidence does not support the suggestion that the

> contracts in issue and, in particular, those entered into by the two representative plaintiffs were subject to the sort of individual negotiation proposed by counsel for the telephone companies.

[79] Similarly, this case raises the question of the interpretation of the Tariffs, which are standard form contracts of adhesion not subject to individual negotiation. The meaning of the free baggage allowance provision in the Tariffs will not change from customer to customer based on their personal interactions with WestJet. To find that the meaning of the words in the Tariffs could differ from one customer's tariff to another would be to assume a level of negotiating power that simply does not exist for passengers booking travel with an airline.

[80] Nevertheless, I accept the defendants' submission that the Tariffs are ambiguous insofar as they contain terms that contradict one another with respect to the price of a first checked bag. Because of this, it will be necessary for the court to construe the Tariffs at a common issues trial, and to discern the meaning of the Tariffs as they pertain to baggage fees. I do not agree with the defendants that surrounding circumstances evidence about the booking experience of individual class members has any bearing on the proper construction of the Tariffs. However, I do find the plaintiff has drafted the common issues narrowly. The common issues should involve the court construing the meaning of the Tariffs on the whole as they pertain to baggage fees, not simply looking at a single term in isolation.

[81] For the purposes of the commonality analysis, the following issues are common:

a) Are the terms of the Domestic Tariff and International Tariff incorporated into every contract of carriage between WestJet and Class Members?

b) Are the Domestic Tariffs and the International Tariffs contracts and, if so, are they contracts of adhesion?

c) On a true construction of the Domestic Tariff and the International Tariff, was a passenger's first checked baggage free ("Free Baggage Allowance") during the Class Period?

d) Did WestJet charge Class Members for the first checked baggage ("Baggage Fees") in breach of the contractual Free Baggage Allowance?

Common issues re: unjust enrichment claim

[82] The defendants argue that the unjust enrichment claim lacks common issues because the question of whether or not there is a juristic reason for the enrichment of WestJet will require an individual analysis. This is because, according to the defendants, "each contract of carriage will vary depending on the circumstances of each proposed Class Member, the booking channel, and the representations made and information they were exposed to."

[83] For the same reason that I do not accept the defendants' characterization of the Tariffs as being subject to different terms depending on an individual class member's personal booking experience, I do not accept WestJet's argument that the juristic reason analysis will be informed by each class member's personal interactions with WestJet. Either the contract between WestJet and its customers, which includes the Tariffs, will provide a juristic reason for the enrichment of WestJet by way of baggage fees and the corresponding deprivation of those class members who paid baggage fees, or it will not. The answer to the juristic reason question will not differ from class member to class member.

[84] Consequently, I am satisfied that the following issue is common:

a) Was WestJet unjustly enriched by the collection of the Baggage Fees contrary to the Free Baggage Allowance, and were class members correspondingly deprived?

Common issues re: remedies

[85] The only argument raised by the defendants with respect to the commonality of issues with respect to remedies relates to the defendants' argument, which I have rejected, that each class member's contract with WestJet may be different based on the particular booking channel, representations made, and knowledge of each class member. As such, I find that the common issues proposed by the plaintiff as they relate to remedies for breach of contract and unjust enrichment are indeed common.

[86] These are:

a) Are Class Members entitled to claim damages from WestJet equivalent to the Baggage Fees charged by WestJet in breach of the contractual Free Baggage Allowance?

b) Should the court order restitution or disgorgement as a remedy and if so, in what amount?

General common issues

[87] The plaintiff raises a number of general common issues, none of which were seriously challenged by the defendants:

a) If WestJet is found liable to the class, should the court make an aggregate award or awards of damages and, if so, in what amounts?

b) Is WestJet liable to pay interest on the award(s) from the initial date WestJet collected the Baggage Fees from the Class Members?

c) What is the appropriate distribution of damages or disgorgement to the class and should WestJet pay the costs of distribution?

Punitive damages

[88] The defendants argue that punitive damages should not be certified as a common issue because the plaintiff has not sufficiently pled particulars of the conduct that gives rise to punitive damages.

[89] Paragraphs 39-41 of part 1 of the notice of civil claim set out the material facts the plaintiff relies on in support of a punitive damages remedy. These include allegations that WestJet knowingly breached its obligations and enacted an internal policy not to inform class members of its breach. If these material facts were proven with evidence, they would support a claim for punitive damages. In the circumstances, I find that the plaintiffs have adequately pled material facts in support of an award of punitive damages. Therefore, I am prepared to certify the following common issue:

a) Is WestJet's conduct deserving of an award of punitive damages and, if so, in what amount?

Section 4(1)(d): Preferable Procedure

Governing considerations in determining preferable procedure

[90] In considering whether a class proceeding is the preferable procedure, I am bound to consider the criteria set out in s. 4(2) of the *CPA:*

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[91] The term "preferable" captures two ideas: first the question of whether a class action is a "fair, efficient and manageable method" of advancing a claim and second, whether a class proceeding is preferable to other available processes: *Hollick* at para. 28.

[92] In determining whether a class action is preferable, the court must evaluate the common issues in the context of the proceeding as a whole: *Hoy v. Medtronic Inc.,* 2003 BCCA 316 at para. 43.

[93] The defendants argue that in this case, the individual issues overwhelm the common issues so that a class proceeding is not preferable. However, this argument depends on the court finding that the breach of contract and unjust enrichment claims are not common to all class members. Having found that these are common issues, there are few issues that require individual determination in this case.

The Canadian Transportation Agency as an alternative procedure

[94] The defendants also argue that the Canada Transportation Agency (the "Agency") provides a mechanism for passenger complaints to be adjudicated. The defendants submit that the Agency provides a preferable procedure to a class proceeding to resolve the complaints of the class members about baggage fees.

[95] The Agency is a specialized government body with expertise in adjudicating transportation disputes. Its power to adjudicate disputes about baggage fees with respect to domestic tariffs is found at s. 67.1 of the *CTA*:

> 67.1 If, on complaint in writing to the Agency by any person, the Agency finds that, contrary to subsection 67(3), the holder of a domestic licence has applied a fare, rate, charge or term or condition of carriage applicable to the domestic service it offers that is not set out in its tariffs, the Agency may order the licensee to
>
> (a) apply a fare, rate, charge or term or condition of carriage that is set out in its tariffs;
>
> (b) compensate any person adversely affected for any expenses they incurred as a result of the licensee's failure to apply a fare, rate, charge or term or condition of carriage that was set out in its tariffs; and
>
> (c) take any other appropriate corrective measures.

[96] The *Air Transportation Regulations* contain a similar term with respect to international flights:

> **113.1 (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, if it receives a written complaint, direct the air carrier 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 that are applicable to the service it offers and that were set out in the tariff.

[97] It is therefore not controversial that the Agency is empowered to hear individual claims with respect to WestJet's baggage fees. The issue is whether the Agency provides a process for adjudicating such complaints that is preferable to a class proceeding.

[98] Pursuant to ss. 25 and 25.1 of the *CTA*, the Agency has many of the same powers of a superior court. These include the power to order the attendance of witnesses and production of documents, as well as the power to award costs. The Agency also has the power to conduct inquiries.

[99] However, I am not persuaded that the Agency offers a preferable procedure to a class proceeding for adjudicating the claims of the class members. There are two primary reasons for this.

[100] First, the defendants estimate that the number of class members could be in excess of nine million people. Even a claim before an administrative tribunal like the Agency is not cost effective for most claimants when the dollar value in issue for each claim is $25-$35. A class proceeding is the only economically viable means for class members to obtain access to justice in a matter in which each traveller's individual claim is very small.

[101] Second, the Agency is limited in the types of relief it can provide. It is not a court, and it is certainly not a court of equity. Thus, the plaintiff's claims of unjust enrichment and punitive damages simply could not be adjudicated by the Agency.

Parallel proceeding

[102] The defendants have presented evidence about a Saskatchewan class action that has yet to proceed to certification, which has subject matter similar to this case. The case was commenced by Lorne Hoedel in the Saskatchewan Court of Queen's Bench in 2016 against WestJet and Air Canada ("Hoedel"). In that case, Mr. Hoedel alleges that WestJet and Air Canada colluded and engaged in price fixing when the two airlines introduced baggage fees for a first checked bag in 2014.

[103] Hoedel focuses on an entirely different cause of action than the case before me, although both cases plead unjust enrichment. The basis for the relief sought in Hoedel has to do with the anti-competitive behaviour of Canada's two major airlines; the claim is not grounded in the airlines' tariffs.

[104] The defendants point out that if Hoedel is certified, and the plaintiff is successful at trial, WestJet could be in a position where its passengers obtain double recovery. WestJet could be ordered to repay baggage fees in this case on the basis of breach of contract and in the Hoedel case on the basis of price fixing.

[105] The plaintiff points out that Hoedel is not registered in the CBA Class Action database and, as such, the plaintiff was unaware of it until the defendants submitted affidavit evidence referring to Hoedel in support of its position on this certification application. In any case, the plaintiff argues that Hoedel is not a related proceeding because it raises different causes of action and different facts. As such, the plaintiff submits that it should be irrelevant to my determination of this certification application.

[106] Hoedel has not yet proceeded to a certification hearing. It may never be certified. This case, being on the brink of certification, is more procedurally advanced than Hoedel. While I accept as reasonable the defendants' concerns about double recovery, at this point double recovery is not an imminent concern.

[107] Considering double recovery in a different context in *Pro-Sys*, Justice Rothstein noted that the courts are capable of managing the risk of double recovery.

For example, Rothstein J. stated at para. 39 that if a damages award is made in one proceeding, it is open to the defendants in a second proceeding to raise that award in the second proceeding and ask for any damages award to be reduced accordingly.

[108] At this point, any concerns about double recovery as between this proceeding and Hoedel are highly speculative. I therefore am unable to find that the disclosure by the defendants of the Hoedel action has any bearing on my determination with respect to the preferable procedure for adjudicating the class members' claims.

Conclusion re: preferable procedure

[109] The preferability question must be examined with a view to the three main purposes of class proceedings: judicial economy, behaviour modification and access to justice: *AIC Limited* at para. 16.

[110] In *Finkel,* our Court of Appeal expanded on the three goals at para. 13:

> Behaviour modification is facilitated by encouraging actual and potential wrongdoers to take full account of the harm they cause or might cause to the public; judicial economy, by avoiding unnecessary duplication in fact-finding and legal analysis: *Hollick* at para. 15. Access to justice is facilitated by providing class members with a fair, economical process to resolve their claims and, if the claims are established, with a just, effective remedy: *AIC Limited v. Fischer*, 2013 SCC 69 at para. 24.

[111] In this case, certification will advance all three of the goals of class proceeding legislation. The large number of claims, each for a small amount, make a class proceeding the only practical means of providing meaningful access to justice to the large number of individuals who may have a claim. Further, since almost all of the issues are common, judicial economy is served by a single process for fact finding and legal analysis. Finally, as in any case involving individuals and a large company, if it is proven at a common issues trial that WestJet had breached its contract with its customers, or was unjustly enriched, the case may serve to modify the behaviour of airlines in dealing with their customers in the future.

[112] Consequently, I find that a class proceeding is the preferable procedure for adjudicating the common issues in this case.

Section 4(1)(e): Proposed Representative Plaintiff

[113] I do not accept the defendants' argument that an appropriate representative plaintiff must be someone who can testify that they relied on the free baggage representation in one or both of the Tariffs. The breach of contract and unjust enrichment causes of action pled by the plaintiff do not require reliance as a component of the claim.

[114] Ms. Trotman, a person subject to a contract of carriage with WestJet during the class period, who paid baggage fees for her first checked bag, is an appropriate representative plaintiff.

Conclusion

[115] I find that the plaintiff has met the requirements for certification set out in s. 4 of the *CPA*. Accordingly, I certify this matter as a class proceeding.

[116] Should the plaintiff wish to propose amendments to her *Competition Act* pleadings, she may do so by way of written submissions provided to the court and opposing counsel within 21 days of the date of this judgment. The defendants shall provide any written submissions with respect to the plaintiff's proposed amendments within 14 days of receipt of the plaintiff's submissions.

[117] Irrespective of the proposed amendments, the parties shall set a case management conference to take place within 90 days of the date of these reasons to speak to the further advancement of this class proceeding.

"Francis J."

Schedule A

36

REVISED COMMON ISSUES

(20 issues total; original numbering preserved for ease of reference to parties' submissions)

Liability to the Class

1a. Are the terms of the Domestic Tariff and International Tariff incorporated into every contract of carriage between WestJet and Class Members?

Federal *Competition Act*

1. Did WestJet clearly express a first price of $0 for the first checked baggage in their Domestic Tariff and International Tariff?
2. Did WestJet also express a second price of $25-$35.40 CAD/USD for the first checked baggage?
3. Is the second price higher than the first price for all Class Members?

3a. Is it necessary for a person to have actually seen both prices to have a claim under section 54 of the *Competition Act*, including if the first price of $0 is incorporated by contract or otherwise deemed to be expressed operation of law?

4. Was WestJet only entitled to charge the first price under section 54 of the *Competition Act*?
5. Were the Class members entitled to pay to WestJet the first price ($0) under section 54 of the *Competition Act*?

The Law of Contract

6. Are the Domestic Tariff and/or the International Tariff contracts and, if so, are they contracts of adhesion?
7. Was it a term of the Domestic Tariff and the International Tariff that a passenger's first checked baggage is free ("Free Baggage Allowance") during the Class Period?
8. Did WestJet charge Class Members for the first checked baggage ("Baggage

Fees") in breach of the contractual Free Baggage Allowance?

Unjust Enrichment

9. Was WestJet unjustly enriched by the collection of the Baggage Fees contrary to the Free Baggage Allowance, and were Class Members correspondingly deprived?

Remedies for the Class Members

Recovery for the Class Under Section 36 of the *Competition Act*

19. Have the Class Members suffered actual damages equivalent to the second price minus the first price?
20. Are the Class Members entitled to claim the damages pursuant to s. 36 of the *Competition Act*?
21. Are the Class Members entitled to recovery of investigation costs and costs of this proceeding, including all legal costs and disbursements on a full indemnity basis?

Recovery for the Class Under Contract Law

22. Are Class Members entitled to claim damages from WestJet equivalent to the Baggage Fees charged by WestJet in breach of the contractual Free Baggage Allowance?

Recovery for the Class Under Unjust Enrichment

23. Should the court order restitution or disgorgement, and in what amount from WestJet?

General

31. If WestJet is found liable to the Class or Sub-Classes, should the court make an aggregate award or awards of damages and, if so, in what amount(s)?
32. Is WestJet liable to pay interest on the award(s) from the date of initial date

WestJet collected the Baggage Fees from the Class Members?

33. What is the appropriate distribution of damages or disgorgement to the Class or Sub-Classes, and should WestJet pay the costs of distribution?

34. Is WestJet's conduct deserving of an award of punitive damages and, if so, in what amount?