IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ware v. Airbnb, Inc.,* 2024 BCSC 2240

Date: 20241211
Docket: S223172
Registry: Vancouver

Between:

Margot Ware

Plaintiff

And

Airbnb Inc., Airbnb Travel, LLC, Airbnb Stays Inc., Airbnb Ireland Unlimited Company, Airbnb Global Services Limited, Airbnb Payments UK Limited and Airbnb Canada Inc.

Defendants

Before: The Honourable Justice E. McDonald

Reasons for Judgment

Counsel for the Plaintiff:	K.J. McLaren S. Lin S. Cheong
Counsel for the Defendants:	S. Rodrigue G.B. Dingle A. Bogach
Place and Date of Hearing:	Vancouver, B.C. February 5-9 and March 1, 2024
Place and Date of Judgment:	Vancouver, B.C. December 11, 2024

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OVERVIEW

[1] The plaintiff, Margot Ware, the proposed representative plaintiff, applies to certify the action as a class proceeding pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*]. The plaintiff states that the claim against Airbnb, Inc. and its related entities is brought on behalf of consumers who used the defendants' services to rent an accommodation for leisure and vacation travel and paid a commission or fee for that service.

[2] In the April 14, 2022 notice of civil claim, which was amended on July 17, 2023 (the "Claim"), the plaintiff says the defendants' services offered on the Airbnb Platform, which she calls "Accommodation Rental Services", are illegal. For simplicity's sake, I will use the terms as defined by the plaintiff in these reasons. The plaintiff describes her causes of action against all or some of the defendants as a breach of provincial consumer laws, unjust enrichment and/or restitution, statutory illegality, and breach of contract.

[3] The defendants are Airbnb, Inc. ("AI"), Airbnb Travel, LLC ("ATL"), Airbnb Stays, Inc. ("ASI"), Airbnb Ireland Unlimited Company ("AIUC"), Airbnb Global Services Limited ("AGSL"), Airbnb Payments UK Ltd. ("APUL") and Airbnb Canada Inc. ("ACI"), collectively, (the "defendants" and "Airbnb"). No response to the Claim has been filed.

[4] There are numerous applications before the court and the main issues are: (1) whether to certify this action as a class proceeding; (2) whether to strike the Claim on the basis that it is an abuse of process; and (3) whether to strike the Claim as against certain defendants on jurisdictional grounds.

THE CLAIM

[5] In para. 6 of the Claim, the plaintiff pleads that:

> 6. Airbnb is the operator of an online marketplace and hospitality services, enabling people anywhere in the world to lease or rent (including obtaining a license to enter, occupy, and/or use) short-term accommodation from any other person in the world who is offering such accommodation for

> lease and/or rental <u>(including a license to enter, occupy, and/or use)</u> (hereinafter the "**Accommodation Rental Service(s)**").
>
> [Emphasis in original]

[6] In paras. 17-19 of the Claim, the plaintiff alleges that the defendants are not "licensed to provide real estate services in relation to any Canadian province or territory" and yet each of the defendants' Accommodation Rental Services, as listed in para. 8, constitute "trading in real estate or rental property management" pursuant to British Columbia's *Real Estate Services Act*, S.B.C. 2004, c. 42 [*RESA*] (and parallel provisions in Ontario, Alberta, and Saskatchewan). This allegedly wrongful conduct is referred to in the Claim as the "Real Estate Services Prohibition".

[7] In paras. 20-23 of the Claim, the plaintiff alleges the defendants are not licensed to provide travel agent services in relation to BC, Ontario, or Quebec, yet the defendants' Accommodation Rental Services (as listed in para. 8), are "a service for reserving accommodations and is part of the business of a travel agent" pursuant to British Columbia's *Travel Industry Regulation*, B.C. Reg. 296/2004 [*TIR*] (and parallel legislative provisions in Ontario and Quebec). This allegedly wrongful conduct is referred to in the Claim as the "Travel Agent Services Prohibition".

[8] In paras. 23.1 to 23.5 of the Claim, the plaintiff alleges that as part of the Accommodation Rental Services, APUL provides users residing in Canada and/or Quebec, "a money transfer feature for transfer of monetary funds between the class members and the owner(s) of the rental accommodation". The plaintiff also claims that APUL is a foreign entity not licensed at the federal level or in Quebec, respectively, as required by the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 [*PCMLTFA*] or the *Money-services Businesses Act*, CQLR c. E-12.000001 [*MSBA*]. This allegedly wrongful conduct is referred to in the Claim as the "MSB Prohibition".

[9] The pleaded Real Estate Services Prohibition, Travel Agent Services Prohibition, and MSB Prohibition are collectively referred to in these reasons as the "Prohibitions".

[10] In the notice of application for certification, the plaintiff and the proposed class state, at para. 17, that they plead and rely upon the following causes of action against the defendants respecting the Accommodation Rental Services:

a) breach of provincial consumer laws;

b) unjust enrichment and/or restitution;

c) statutory illegality invalidating any agreements with Airbnb in respect to Travellers Service Fee and/or receipt of Accrued Interest; and

d) breach of contract in respect of the defendants, AIUC and APUL.

[11] The Claim alleges that certain statutory consumer protection measures ensure that only licenced professionals may provide the regulated services purportedly provided by the defendants. The defendants' services referred to in the Claim that allegedly contravene statutory prohibitions are described as follows:

a) "accommodation rental services" provided by the defendants and covered by the *RESA* (and parallel provisions in Ontario, Alberta and Saskatchewan): paras. 17-19, Claim;

b) "travel agents services" provided by the defendants and covered by the *TIR* (and parallel provisions in the Ontario and Quebec legislation): paras. 20-23, Claim; and

c) "money transfer feature" provided by the defendants and covered federally by the *PCMLTFA* and in Quebec by the *MSBA*: paras. 23.1 to 23.5, Claim.

[12] The proposed class period is as follows:

Canadian Province of Residence or Alternatively Where the Reserved Accommodation is Situated	Class Period

Quebec	June 27, 2019 to the date of final judgment in this action
Rest of Canada other than Quebec	July 10, 2009 to the date of final judgment in this action

[13] In the notice of application for certification, the plaintiff seeks on behalf of the class the following relief: (1) a refund of the commissions or fees charged by the defendants in supplying the impugned services; and/or, (2) restitution and/or disgorgement of the interest earned by the defendants in holding the rent monies, security deposits, and/or taxes prepaid to the defendants by the class members.

PRELIMINARY ADMISSIBILITY OBJECTIONS

[14] Each party raises evidentiary issues in respect of the evidence tendered by the other side.

[15] The plaintiff submits that the defendants have, by tendering the affidavit of Stephen Scott, a manager of Advanced Analytics at AIUC, made October 3, 2023 (the "Scott Affidavit"), failed to comply with the requirements of s. 5(5) of the *CPA*. I have considered the Scott Affidavit and the 4th affidavit of Owen Cotterill, filed February 5, 2024, tendered by the plaintiff in response to the Scott Affidavit. In my view, the various arguments raised about the requirements of s. 5(5) and the weight to be given to the evidence, including emails attached to affidavits, have minimal impact on the central issues to be determined on the application.

[16] While the Scott Affidavit lacks the attestation required by s. 5(5)(b) of the *CPA*, I agree with the defendants that this may affect the weight to be accorded to it, but that defect does not impede the court's ability to consider and determine the issues on the certification application.

[17] The plaintiff also challenges the admissibility of an affidavit by Killian Pattwell, a Director of Tax at AIUC, made December 9, 2022 (the "Pattwell Affidavit"), which is tendered in support of the jurisdiction application brought by certain defendants.

I will address the issues raised in respect of the Pattwell Affidavit at the same time as I consider the jurisdiction application.

ABUSE OF PROCESS ISSUE

[18] The defendants, ATL, ASI, AIUC, and APUL, apply to strike the Claim pursuant to Rule 9-5(1)(d) on the ground that it is an abuse of process. As not all the defendants are applicants, I will refer to the defendants bringing the abuse of process application as the “AOP Applicants”.

[19] The AOP Applicants submit that the Claim is an abuse of process because it is the latest in a series of repeated, piecemeal attacks on the legality of the fee that Airbnb charges the users of its services. Rather than seeking to determine the legality of the fee with finality in a single proceeding, the AOP Applicants say that Airbnb faces improper attempts to divvy up various causes of action in successive proceedings that undermine judicial economy and finality.

[20] The AOP Applicants allege that the Claim concerns the same dispute or subject matter, i.e. the legality of the fee that Airbnb charges, as advanced in other proceedings that have been settled: I will address the settled proceedings below:

A. Arthur Lin v. Airbnb Inc., Airbnb Ireland Unlimited Company, Airbnb Payments UK Limited and Airbnb Canada Inc. (the “Arthur Lin FC Action”)

[21] In *Lin v. Airbnb, Inc.*, 2021 FC 1260, at paras. 4-9, Justice Gascon described the subject of the Arthur Lin FC Action and the procedural history of that class action as part of his reasons for approving the settlement:

> [4] This Class Action was commenced on October 31, 2017. In his statement of claim, Mr. Lin alleged that Airbnb breached section 54 of the *Competition Act*, RSC 1985, c C-34 [*Competition Act*], a rarely used criminal offence known as "double ticketing," by charging Guests, for the booking of an accommodation offered by Hosts on the Airbnb Platform, a final price that was higher than the price displayed at the first stage of browsing on the Airbnb Platform. More specifically, Mr. Lin contested the fact that Airbnb added "service fees" to the final price charged for its accommodation booking services, although these fees were not included in the initial price per night displayed on the Airbnb Platform. <u>The heart of Mr. Lin's claim was that the inclusion of an additional service fee at a later stage of the sale process</u>

> resulted in a higher price than the first price expressed to Guests, in contravention of section 54 of the *Competition Act*. [Emphasis added.]
>
> [5] For the purpose of the Settlement Agreement, the class members are defined as all individuals residing in Canada, other than Quebec, who, from October 31, 2015 to June 25, 2019: i) reserved an accommodation for non-business travel anywhere in the world using Airbnb; ii) whose reserved accommodation matched the parameters of a previous search made by the individual on the search results page of Airbnb; and iii) paid, for the reserved accommodation, a price (excluding applicable sales and/or accommodation taxes) that is higher than the price displayed by Airbnb on the said search results page for this accommodation [Class]. Mr. Lin claimed that the Class members having experienced this situation were entitled to the benefit of the lower price, and sought damages equal to the difference between the first price and the final price displayed on the Airbnb Platform.
>
> [6] Following a contested hearing, I certified the proceeding as a class action in a judgment issued on December 5, 2019 (*Lin v Airbnb, Inc*, 2019 FC 1563 [Certification Judgment]).
>
> [7] As of June 27, 2019, prior to the issuance of the Certification Judgment, Airbnb adjusted the Airbnb Platform so that Airbnb now displays an all-inclusive price for all accommodation bookings, excluding applicable taxes, at every step of the search and booking process.
>
> [8] On December 16, 2019, Airbnb filed a Notice of Appeal of the Certification Judgment at the Federal Court of Appeal [FCA]. The appeal was heard on March 4, 2021 by way of Zoom. After the hearing, the FCA reserved its judgment, and the decision on the appeal was under deliberation when the Settlement Agreement was reached by the parties. The FCA is holding the appeal in abeyance pending the completion of the settlement process.
>
> [9] A few weeks before Mr. Lin launched his class action proceeding before this Court in late October 2017, Mr. Preisler-Banoon had filed a similar class action before the Superior Court of Quebec in the matter *Preisler-Banoon c Airbnb Ireland*, 500-06-000884-177 [Quebec Action]. On September 13, 2019, prior to the hearing of the "authorization" (as the certification process is known in Quebec) of the Quebec Action, Airbnb and the Quebec plaintiff executed a settlement agreement. On February 3, 2020, the Superior Court of Quebec rendered a judgment approving the settlement of the Quebec Action (*Preisler-Banoon c Airbnb Ireland* 2020 QCCS 270 [Quebec Settlement]). The Quebec Settlement has a gross value of $3,000,000 and provides to the Quebec class members (as they are defined in the Quebec Settlement) a credit of up to $45 on their next booking with Airbnb after confirming their eligibility.

[22] The AOP Applicants point out that in the Arthur Lin FC Action, the plaintiff, Arthur Lin, was represented by Simon Lin, among others. Simon Lin is also one of a number of counsel acting for Ms. Ware in the present Claim.

[23] After the AOP Applicants served the present application to strike for abuse of process, the plaintiff amended the Claim to change the proposed class definition to specifically exclude reservations made on the Airbnb platform "between October 31, 2015 to June 25, 2019 by individuals that submitted a claim for the settlement" in the Arthur Lin FC Action.

[24] The AOP Applicants submit that this amendment effectively acknowledges that the Claim is an abuse of process because Ms. Ware received notification of the settlement of the Arthur Lin FC Action.

[25] The plaintiff submits that just because she might have received notification of settlement does not mean that she met the definition of a class member for purposes of the settlement agreement. It is admitted that Ms. Ware was an Airbnb user for 12 years. She provided an affidavit responding to this application and she states that she did not submit any claim in the settlement of the Arthur Lin FC Action. While the AOP Applicants are critical of Ms. Ware for not explicitly denying that she was eligible to make a settlement claim, there was no cross-examination of Ms. Ware on her affidavit.

[26] The plaintiff points out that the Claim concerns transactions *after* 2021, which are clearly outside the timeframe of the Arthur Lin FC Action. Further, to avoid double recovery issues, but not as an admission that the Claim is duplicative or otherwise an abuse of process, the plaintiff's counsel has amended the class definition in the certification application to exclude "reservations made between October 31, 2015 to June 25, 2019 by individuals that submitted a claim for the settlement in the Federal Court of Canada claim: *Lin v. Airbnb, Inc., et al* (T-1663-17)".

[27] The plaintiff points out that it is undisputed that the Federal Court lacks subject matter jurisdiction over the allegations in the present Claim that Airbnb's services contravene provincial laws concerning real estate services, travel agent services and money service businesses. On that basis, the plaintiff submits it is obvious that the Claim does not overlap with the Arthur Lin FC Action.

[28] With respect to the AOP Applicant's submission that the Federal Court could have transferred the action to the British Columbia Supreme Court, the plaintiff points out that it is unclear if that could occur given that there is no equivalent to our *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*], granting the Federal Court power to make such an order. In any event, the plaintiff submits that the AOP Applicant's submissions about what "could have" happened, engages in speculative and hypothetical reasoning that does not ground an allegation that the Claim is an abuse of process. The plaintiff points out that the Federal Court could not have considered allegations that Airbnb was contravening British Columbian or equivalent provincial statutes by acting as an unlicensed rental agent or travel agent.

[29] The plaintiff also submits that there is no basis for suggesting that the settlement agreement in the Arthur Lin FC Action settled the matters raised in the Claim. The plaintiff says that even if that were the case, the question of whether the Claim is covered is a matter for the Federal Court to determine since the settlement agreement forms part of the Federal Court's order approving the settlement.

[30] The plaintiff submits that the Federal Court reasons already provide an interpretation of the applicable release. The reasons indexed as *Lin v. Airbnb, Inc.*, 2021 FC 1260, confirm that it is limited to price representations (i.e. displaying of prices only) and nothing more:

> 31. Turning to the Release clause, the Court has to review the scope of releases granted in class action settlement agreements to ensure that defendants do not unfairly obtain a broad release (or even a release for future claims), beyond the claims that are or could have been raised in the action. … I agree … that there are no concerns relating to the scope of the Release granted to Airbnb … The Release is qualified by the words "relating in any way to the display of prices on the Airbnb platform, including conduct alleged (or which could have been alleged) in the Proceeding," which was the subject matter of Mr. Lin's Class Action. The Release is thus circumscribed to those price-related practices at the source of the Class Action. While the Release extends to all forms of price "display", including arguably false or misleading pricing representations, I am satisfied that it is not overbroad in the context of what was alleged by Mr. Lin in his Class Action.

[31] The plaintiff points out that "Proceeding" was a defined term that captured only the Federal Court action. While the language in the release might have been worded to state, "could have been alleged in *any* proceeding", it was not so worded. Instead the language of the release is confined to state, "could have been alleged in *the* Proceeding".

[32] The plaintiff submits that the AOP Applicants are seeking to do an end-run around the Federal Court's decision concerning the settlement agreement in the Arthur Lin FC Action to have this court effectively extend the scope of the settlement agreement and release far beyond the Federal Court's findings on its circumscribed nature.

[33] I agree that the court is being asked to overlook the Federal Court's reasons and find the Settlement Agreement applies far more broadly to capture the matters raised in the Claim. I decline to do so based on a plain reading of the settlement agreement and the Federal Court's reasons.

B. Bains v. Airbnb Ireland UC, Supreme Court of British Columbia Action No. S-196303, Vancouver Registry (the "Bains Action")

[34] On May 31, 2019, Iqbal Bains commenced the Bains Action against AIUC, AI, Airbnb Payments, Inc., APUL, and others. The Bains Action alleged unlawful rental due to the defendants operating an online property rental business without the consent of the rightful owners/residents of each property in breach of municipal bylaws, strata corporation or condominium corporation bylaws.

[35] The Bains Action further alleged that the Airbnb defendants:

a) directly profited from each unauthorized rental "without any compensation to the rightful owners" by offering rental services and collecting a percentage commission from both hosts and guests; and

b) acted as a "rental broker" and "travel agent" as defined by the *TIR* pursuant to the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2

> [*BPCPA*], contrary to the licensing requirements of the *BPCPA* or the *RESA* or equivalent legislation across Canada.

[36] The AOP Applicants submit that the Bains Action sought, among other things, an accounting and disgorgement of revenue obtained by the defendants for the unauthorized rentals.

[37] Prior to the certification or settlement of the Bains Action and the settlement of the Arthur Lin FC Action, Simon Lin wrote to the defendants on May 21, 2021, in his capacity as class counsel for the class in the Arthur Lin FC Action advising that there “may be a potential for overlap with the class already certified by the Federal Court in *Lin v. Airbnb*” and reminding of the requirement to serve plaintiffs in other class actions that may involve the same or similar subject matter.

[38] The plaintiff submits that the AOP Applicants have failed to refer to the many communications that took place between Simon Lin and counsel for Airbnb wherein counsel for Airbnb continually rejected the notion of overlap between the Bains Action and the Arthur Lin FC Action. For example, on May 21, 2021, Ms. Rodrigue responded to Simon Lin’s letter of that date stating, “The only thing the two cases have in common is Airbnb named as a defendant. There is no overlap whatsoever. These are two different cases with respect to different causes of action, different facts and different classes.”

[39] Obviously, the AOP Applicant’s perception of the overlap has significantly evolved. Currently, it is alleged that with the filing of the Claim, the Bains Action and the Arthur Lin FC Action significantly overlap with the Claim to the point of engaging the doctrine of abuse of process.

[40] In February 2022, the Bains Action was settled before the certification hearing.

Applicable Legal Principles - Abuse of Process

[41] In the present context, the doctrine of abuse of process “engages ‘the inherent power of the court to prevent the misuse of its procedure, in a way that would … bring the administration of justice into disrepute”: *Toronto (City) v. C.U.P.E.*, 2003 SCC 63 at para. 37 [*Toronto*], citing *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.) at para. 55, per Goudge J.A., dissenting (approved 2002 SCC 63).

[42] After discussing the development of modern doctrine and its relationship to *res judicata*, Justice Arbour describes the features of abuse of process as:

a) Having the attractive quality of being unencumbered by the specific requirements of *res judicata* while providing discretion to prevent relitigation “essentially for the purpose of preserving the integrity of the court’s process”: *Toronto*, para. 42.

b) The primary focus of the doctrine of abuse of process in all its applications is on “the adjudicative functions of the courts” and the “integrity of judicial decision-making as a branch of the administration of justice”, with less of the focus on the interests of the parties: *Toronto*, para. 43.

c) When the primary focus of the concern for the adjudicative functions of the courts is understood, “the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle”: *Ibid*.

d) When the focus is properly on the integrity of the judicial process, “the motive of the party who seeks to relitigate … cannot be decisive factors in the application of the bar against relitigation”: *Toronto*, para. 45.

e) The doctrine of abuse of process is not constrained only to cases where the plaintiff initiates the relitigation, since the designation of parties to the second litigation may “mask the reality of the situation” and such designation makes

no difference from the point of view of the integrity of the adjudicative process: *Toronto*, para. 47.

[43] No specific test or rule defines the flexible doctrine of abuse of process and "the categories of abuse of process are open" and the categories are capable of capturing "any circumstances in which the court's process is used for an improper purpose": *SWS Marketing Inc. v. 1125003 B.C. Ltd.*, 2023 BCCA 225 at para. 37 [*SWS*], quoting *SWS Marketing Inc. v. 1125003 B.C. Ltd.*, 2022 BCSC 2166 at para. 41. The doctrine of abuse of process does not require duplication to apply: *SWS* at para. 48.

[44] While the doctrine of abuse of process is often used to prevent relitigation, the scope of the doctrine extends beyond the context of relitigation: *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at para. 41.

[45] A party alleging abuse of process must overcome a high threshold demonstrating that it is plain and obvious; further, only egregious conduct will warrant summary dismissal of an action: *Hare v. Lit*, 2013 BCSC 33, at paras. 24-25.

[46] Both parties referred me to *Reid v. Google LLC*, 2022 BCSC 158 [*Reid*], where Justice Tucker considered two applications regarding three actions against Google LLC under the *CPA*. The three actions were: (1) Ryan Kett v. Google LLC, (2) Brian Reid v. Google LLC; and (3) Harondel Sibble v. Google LLC, Google Canada Corporation and Alphabet Inc. Each action involved allegations of unlawful collection or use of personal information of users by the defendant(s).

[47] One of the applications before Tucker J. involved plaintiff's counsel in the Harondel Sibble action applying for carriage of the claims in the Brian Reid action. Plaintiff's counsel in the Reid action opposed the carriage motion alleging that the Sibble and Reid actions were distinct causes of action and that both should proceed. Google submitted that the Reid and Sibble actions were duplicative and that one of them had to be stayed to avoid abuse of process.

[48] Justice Tucker concluded that Reid and Sibble shared the same cause of action: *Reid* at para. 99. As a result, the Reid action was stayed pending the final outcome of the certification application in the Sibble action: *Reid* at para. 119.

[49] After determining the carriage motion, Tucker J. then considered Google's application to stay either the Kett or Sibble action pending certification in the other. In other words, Google sought a stay pending certification so that only one of the actions would proceed to the certification stage.

[50] While Google argued that the Kett and Sibble actions were duplicative and an abuse of process, the Kett and Sibble plaintiffs took the position that the claims were distinct and while there was some overlap, that could be addressed by *res judicata* and the rule against double recovery.

[51] On the appeal of *Kett*, Justice Fitch addressed the appellant's allegation that the application judge erred by focussing her analysis on "generic pleadings common to both actions" to reach the conclusion that the claims were duplicative, addressing that ground as follows:

> [61] In my view, the appellant has failed to identify an extricable error in law justifying interference with the chambers judge's determination of the matter. In my view, the judge identified and applied the correct test—whether the two causes of action were about the same dispute or subject matter. The appellant's submission that the judge erred in law by failing to engage with the "core allegations" underlying the Kett claim posits a different articulation of the same test, but one that is not recognized in the jurisprudence. Although presented as a legal error, I consider the appellant's submission to be a disguised invitation to hear the application a second time with the aim of having this Court substitute our view for the discretionary order made by the chambers judge. We cannot do this.
>
> [62] I am also of the view that it was open to the judge to conclude that Kett and Sibble advance the same cause of action. <u>Both Kett and Sibble plead the existence of the same factual situation entitling them to recover damages from Google—the unauthorized collection of Location Data from users of Google Services as a result of misrepresentations made by Google concerning the manner and extent to which users could protect their own privacy.</u> Because the judge applied the correct legal framework, the judge's decision is entitled to deference and must reflect palpable and overriding error to warrant appellate intervention. I see no palpable and overriding error in the judge's conclusion that Kett and Google are about the same subject

> matter or dispute, and no proper basis upon which this Court could interfere with her discretionary decision.
>
> [Emphasis added.]

[52] To identify whether there is an abuse of process, the correct analytical framework involves asking whether the claims are "about the same dispute or subject matter": *Kett v. Google LLC*, 2023 BCCA 350 at para. 53 [*Kett*].

[53] The doctrine of abuse of process will be engaged "where allowing the litigation to proceed would violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice": *Toronto* at para. 37.

[54] Applying the analytical framework identified in *Kett*, I will address whether the claims are about the same subject matter.

Are the claims about the same dispute or subject matter?

[55] The AOP Applicants submit that the Claim is an abuse of process for the following reasons:

> 35. By no later than May 2021, Lin became aware of the allegation in the Bains Action that Airbnb was acting improperly because it was alleged that Airbnb needed to be registered under various real estate and travel agent laws. He was also aware that the Bains Action was seeking a return of the Fee because of this allegedly improper conduct.
>
> 36. At the same time, Lin had carriage of the Arthur Action, which also sought disgorgement of the Fees based on statutory illegality. The class members were different—the class members in the Arthur Action were Guests and, in the Bains Action, they were non-users—but the core elements of the claim were the same: disgorgement of the Fees because of an alleged statutory illegality, whether under real estate, travel agent or money service business regimes. In an email to Airbnb's counsel, Lin acknowledged that the Bains Action "appears to be seeking a return of the service fees collected by Airbnb" and that the Arthur Action also "seeks a return of the service fees collected by Airbnb."
>
> 37. In November 2021, the Federal Court approved the Arthur Action settlement. Though Lin was aware of the real estate and travel agent claims prior to settlement, Lin did not rely on those theories in that proceeding.
>
> 38. Instead, five months later, in April 2022, Lin commenced this action. Like the Arthur Action, it attacks the legality of the same Fee and does so, again, on the basis of breaches of consumer protection

> legislation, as was done in the Bains Action. As a consequence, the Fee's legality is being litigated repeatedly and in pieces.
>
> 39. This undermines judicial economy and finality. Both this Court and the defendants are now burdened with a claim for the same fees at issue in the Arthur Action. It is also directly contrary to Airbnb's desire, as expressed in the Arthur Action settlement agreement, "to achieve a final and nation-wide resolution of all claims asserted or which could have been asserted" so that it could "avoid further expense, inconvenience and the distraction of burdensome and protracted litigation."
>
> 40. The core allegation and relief sought—the illegality of the Fee on consumer protection grounds and its return—are the same. It is impermissible to "divvy up" causes of action under the same legal umbrella and advance them in separate proceedings. Whether this piecemeal litigation is by design or "by happenstance" is irrelevant. That the Arthur Action failed to assert additional legal theories on the basis of the facts pled regarding the Fees does not require the judicial system and Airbnb to endure a further, residual allegation that the Fees were collected improperly.
>
> [Footnotes omitted.]

[56] The AOP Applicants allege that the Claim is an abuse of process because it shares common core elements with the Bains Action and Arthur Lin FC Action, namely, the disgorgement of the fees because of an alleged statutory illegality, whether under the real estate, travel agent or money service business regimes. The AOP Applicants submit that the Claim is an abuse of process even though the classes in the Bains Action and Arthur Lin FC Action were, respectively, non-users of Airbnb services and guests.

[57] In *Kett*, Fitch J. noted that it was open to the judge to conclude that the Kett and Sibble actions advanced the same cause of action since they "plead the existence of the same factual situation entitling them to recover damages from Google": *Kett* at para. 62.

[58] To establish that the Claim involves the same dispute or subject matter as the causes of action in the Bains Action and Arthur Lin FC Action, the AOP Applicants point to the May 21, 2021 email and letter that Mr. Simon Lin sent to Airbnb in the Bains Action, in his capacity as plaintiff's counsel in the Arthur Lin FC Action. In these communications, Mr. Simon Lin states that there may be potential for overlap

with the class already certified in the Arthur Lin FC Action and he notes that the "Bains case appears to be seeking a return of the service fees collected by Airbnb" when the Arthur Lin FC Action also "seeks a return of the services fees collected by Airbnb from guests".

[59] In the Arthur Lin FC Action, the plaintiff alleged that Airbnb fees were "double ticketing" in contravention of the *Competition Act*, R.S.C. 1985, c. C-34 [*Competition Act*]. In the Bains Action the plaintiff, who was not a user of the Airbnb platform but rather an owner of property rented out by persons on the platform, alleged that Airbnb was charging fees from which the owners received no benefit.

[60] In the context of collateral attack and abuse of process, courts are encouraged to look behind the cause of action pled to determine the "pith and substance" of the action to disallow the use of framing to disguise the true cause of action: *Leroux v. Canada (Revenue Agency)*, 2012 BCCA 63 at para. 12. When the "pith and substance" of the cause of action laid out in the Claim is considered, I do not find that it essentially pleads the existence of the same factual situation as a basis for the entitlement to damages from Airbnb as existed in the Arthur Lin FC Action and the Bains Action.

Is the Doctrine of Abuse of Process Engaged?

[61] There is no need for the AOP Applicants to establish duplication of the claims and the flexible doctrine may apply beyond circumstances involving relitigation. However, as the court notes in *Toronto* at para. 37, the doctrine of abuse of process is engaged where allowing the litigation to proceed would "violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice".

[62] When I consider all the evidence and the authorities, I am not satisfied that it is plain and obvious that the doctrine of abuse of process is engaged, including because:

a) The Claim, the Arthur Lin FC Action and the Bains Action cannot be regarded as dealing with the same dispute or subject matter:

   i. The Arthur Lin FC Action concerned an allegation that double ticketing, or price display issues, breached the *Competition Act*. There is no suggestion that the Federal Court had subject matter jurisdiction over the plaintiff's real estate and travel agency claims of breaches of BC consumer protection legislation. Instead, the AOP Applicants rely on hypothetical musings about whether the Federal Court could have transferred the proceeding to this court; and

   ii. The Bains Action did not raise statutory illegality nor plead a claim based on violation of s. 4 of the *RESA* or ss. 171-172 of the *BPCPA*. Counsel for Airbnb stated repeatedly in response to inquiries about potential overlap made by counsel for the plaintiff in the Arthur Lin FC Action, that the Bains Action was entirely distinct; and

b) The AOP Applicants have not demonstrated that the same dispute or subject matter in the Claim is caught by the Arthur Lin FC Action settlement agreement and release.

[63] In my view, the AOP Applicants have not met the heavy onus establishing that the Claim should be struck for abuse of process. This is unlike the situation in *Reid* and *Kett* because there is no overlap of the type at issue in those cases. The only overlap is that Airbnb is yet again a defendant in an action that questions its entitlement to charge and collect fees.

[64] The plaintiff sought the opportunity to make further submissions on the issue of costs in respect of the application by the AOP Applicants should the court grant the application. As the application is not granted, I assume the plaintiff relies on its submission that presumptively no costs apply to this application. Therefore, no costs shall be awarded for this Rule 9-5 application.

JURISDICTION CHALLENGE

[65] AI, AGSL, and ACI have filed jurisdictional responses (the "Contested Airbnb Entities"). The Contested Airbnb Entities apply to strike the Claim for failure to allege facts establishing that the court has jurisdiction and territorial competence. Alternatively, they seek to stay the Claim and have the court decline jurisdiction.

[66] Some of the orders sought by the Contested Airbnb Entities are agreed to. Specifically, the plaintiff consents to the dismissal of the Claim against AGSL and an order staying the claims of those USA residents who had a reservation. However, the plaintiff submits that the jurisdiction defences otherwise raised have no merit and should be dismissed.

The Legal Principles

[67] Section 3(e) of the *CJPTA* provides territorial competence over defendants if there is a real and substantial connection between British Columbia and the facts on which the proceeding against them is based. Section 10 sets out a non-exhaustive list of circumstances, or "connecting factors", that presumptively constitute a real and substantial connection: *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 41 [*Van Breda*].

[68] The analytical approach that applies to challenging jurisdiction in British Columbia is set out in *Ewert v. Höegh Autoliners AS*, 2020 BCCA 181 at paras. 16-17 [*Höegh*]:

> [16] At the first stage of the analysis, the plaintiff must show that one of the connecting factors listed in s. 10 exists. The basic jurisdictional facts relied on by the plaintiff are taken to be true if pleaded (sometimes referred to as a presumption that the pleaded facts are true). The defendant challenging jurisdiction is entitled to contest the pleaded facts with evidence. If the defendant contests the pleaded facts with evidence, the plaintiff is required only to show that there is a good arguable case that the pleaded facts can be proven. The role of the chambers judge is not to prematurely decide the merits of the case or to determine whether the pleaded facts are proven on a balance of probabilities; the plaintiff's burden is low: *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 at para. 34; *Fairhurst v. De Beers Canada Inc.*, 2012 BCCA 257 at para. 20, leave to appeal ref'd (2013), [2012] S.C.C.A. No. 367 [*Fairhurst*]; *Environmental Packaging Technologies, Ltd. v. Rudjuk*, 2012 BCCA 343 at para. 26.

> [17] At the second stage, if one of the connecting factors is established either on undisputed pleadings or on disputed pleadings but with a good arguable case, the "mandatory presumption" of a real and substantial connection (and, therefore, territorial competence) is triggered: *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592 at para. 20, leave to appeal ref'd [2010] S.C.C.A. No. 68 [*Stanway*]. This is, of course, distinct from the "presumption" that pleaded facts are true. At this stage, because the connecting factor has already been established, it is presumed that a real and substantial connection exists, and therefore that the court has territorial competence. The defendant may now attempt to rebut the presumption of real and substantial connection by establishing "facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them": *Van Breda* at para. 95; [*Canadian Olympic Committee v. VF Outdoor Canada Co.,* 2016 BCSC 238] at para. 24. However, the presumption is strong and "likely to be determinative": *Stanway* at paras. 20–22. The burden on the defendant to rebut the presumption is heavy: *Fairhurst* at paras. 32, 42; *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2014 BCSC 715 at para. 35, aff'd 2015 BCCA 200; *Mazarei v. Icon Omega Developments Ltd.*, 2011 BCSC 259 at para. 33. At this stage of the analysis, a connecting factor is already established: the defendant's task is to show why a real and substantial connection does not follow, despite the strong presumption that it does.

[69] A plaintiff need only show one connecting factor to establish a presumptive real and substantial connection to British Columbia. For a defendant to rebut the existence of a mandatory presumption, the relevant evidence must be directed at *that* particular connecting factor and not to the "absence of other connecting factors": *NHK Spring Co., Ltd. v. Cheung*, 2024 BCCA 236 at paras. 38-39.

Does the court have territorial competence?

[70] The Contested Airbnb Entities submit that, with the exception of AI for the period between July 10, 2009 and June 30, 2014, the court lacks jurisdiction *simpliciter* over them and that there is no evidence capable of supporting the grounds alleged for jurisdiction *simpliciter* or common issues jurisdiction.

[71] The Contested Airbnb Entities submit that the Claim fails to plead material facts to support the court's jurisdiction over them because there is no pleading of:

a) a contract related to the Claim;

b) a restitutionary obligation that arose in BC;

c) a tort committed in BC;

d) a business carried on in BC; or,

e) for the injunctive relief, which of the defendants provide services in BC that could be enjoined.

[72] In the Claim, the plaintiff pleads that the court has jurisdiction *simpliciter*, in respect of the Canadian Resident Subclass and the Non-Canadian Resident Subclass (excluding U.S. residents), over the Contested Airbnb Entities based on pleaded territorial facts and due to common issues jurisdiction.

[73] The plaintiff submits that there are numerous facts pled, and supporting evidence, to establish a good arguable case of territorial competence. The plaintiff submits that the Contested Airbnb Entities have failed to rebut the presumption of a real and substantial connection.

[74] The facts pled in the Claim that are alleged to establish jurisdiction *simpliciter* over AI include:

a) between July 10, 2009 and June 30, 2014, AI contracted with Canadian Resident Subclass Members for reservations of accommodation physically located in BC using the Defendant's Accommodation Rental Services;

b) AI performs advertising directed to the Canadian market via the Airbnb.ca website and distribution of mobile applications on the Canada-specific Apple App Store or Google Play Store;

c) AI developed, operated, managed and/or directed the operations of the global Airbnb Platform where the Accommodation Rental Services are offered; and

d) the accommodations reserved through the Airbnb Platform are Accommodation Rental Services physically located in British Columbia.

[75] The facts alleged to establish jurisdiction *simpliciter* over ACI include that it acts as the "front-facing" entity for other Airbnb entities in Canada and engages in the marketing of Airbnb's Accommodation Rental Services. In the legal basis of the Claim, the plaintiff alleges that in Canada, ACI acts on behalf of, represents and markets the services of the other defendants.

[76] The Contested Airbnb Entities allege that they are part of the Airbnb group of companies but they do not contract with Canadian users. Their evidence is that:

a) AI is a California-based company that contracts with U.S. resident users to access an online accommodation platform in the U.S., but it does not carry on business in Canada.

b) ACI is a company incorporated in New Brunswick that does not carry on business in Canada or contract with Canadian users or collect fees. ACI is a party to a service agreement with AIUC, under which it provides marketing and business assistance to AIUC.

[77] According to the Contested Airbnb Entities, none of them operate the Airbnb platform in Canada, ACI has never contracted with Canadian users, and AI has not contracted with Canadian users since June 30, 2014. They rely on the Pattwell Affidavit as support for the application.

[78] The plaintiff submits that Mr. Pattwell's affidavit should be afforded little weight, for example, because of his specific duties and his employment by only one of the defendant's. Mr. Pattwell was cross-examined on his affidavit and I was taken to certain of his answers during the hearing.

[79] In his affidavit, Mr. Pattwell states that:

> 4. … [AIUC] operates an online marketplace (the "Airbnb Platform") to connect travelers ("Guests") with individuals who have unique accommodations to offer ("Hosts"). Airbnb is a tool that Hosts and Guests can use to identify accommodations in which a Guest may want to reserve a stay.

> 5. Different Airbnb entities act as operating companies around the world. For example, [AIUC] is the Airbnb Group's operating company for Canadian Guests and Hosts and provides business and customer support services to Canadian Guests and Hosts.
>
> 6. When Guests make bookings on the Airbnb Platform, they enter separate contracts with specific Airbnb entities and with their Host. They contract with an Airbnb entity for use of the Airbnb Platform and to facilitate payment for that use. Separately, they contract with a Host for an accommodation or other service. A Host similarly enters a separate contract with an Airbnb entity for use of the Airbnb Platform and to facilitate payment for that use.
>
> 7. The contracts between Guests or Hosts and an Airbnb entity are standard form contracts found on the Airbnb Platform. For both Hosts and Guests, the two contracts entered into with an Airbnb entity are the terms of services (the "Terms of Service") and the payment terms of services (the "Payment Terms").

[80] In paras. 26-36 of Mr. Pattwell's affidavit, he deposes that ACI does not contract with Guests and Hosts, neither AI nor ACI operate the online Airbnb Platform in Canada, and that for eight years, AI has not contracted with Canadian resident guests and hosts. While I agree that there are some bald conclusory statements in his affidavit, that goes to weight. As a result, I have taken Mr. Pattwell's evidence into account as part of deciding the issues before me.

[81] The plaintiff specifically points to the six connecting factors set out in the Claim as establishing this court's jurisdiction over AI and ACI. I will address the factors individually.

Contractual Obligations in BC - s. 10(e)(i), *CJPTA*

[82] The plaintiff submits that the facts in the Claim demonstrate a good arguable case capable of proof of contractual obligations that, to a substantial extent, were to be performed in BC due to AI and ACI's involvement and facilitation in the contract between users for the provision of accommodation, or the contract between AI and ACI and BC users. The plaintiff points to the facts pled and supporting evidence that the Airbnb Platform facilitates the contract between a host and guest, which is clearly performed in BC where either the host or guest are in BC.

[83] As such, the plaintiff says that AI, by providing the Airbnb Platform, is clearly "connected" to the host/guest contract: *Saskatchewan Power Corporation v. Mitsubishi Power Canada Ltd.*, 2022 SKQB 147 at paras. 91-93. The plaintiff also points out that her booking was for accommodation physically located in BC.

[84] The plaintiff further points to facts pled and supporting evidence that allegedly shows AI contracted with users prior to June 30, 2014, and arguably, that its services would be provided in BC or that the contract was entered into in BC.

[85] As already noted, the Contested Airbnb Entities agree that the court has territorial competence over certain claims from Canadian guests prior to June 30, 2014. However, they say BC is not a convenient forum for resolving those claims and the court should decline jurisdiction. I will address that argument later.

[86] The Contested Airbnb Entities dispute the pleaded facts in the Claim with Mr. Pattwell's evidence. In light of that, the plaintiff is "required only to show that there is a good arguable case that the pleaded facts can be proven": *Höegh* at para. 16. The burden on the plaintiff is low and the application judge is not to "prematurely decide the merits of the case or to determine whether the pleaded facts are proven on a balance of probabilities": *Ibid.*

[87] Mr. Pattwell states that the terms of the service clearly establish separate contracts between: (1) the user and AI for the use of the Airbnb Platform; and, (2) the host and guest. Mr. Pattwell does not provide an example of the alleged separate contract between the host and guest such as the one that involved the plaintiff's accommodation booking. He does not indicate whether the defendants have access to the host and guest contracts.

[88] On the other hand, the plaintiff's evidence is that as a Canadian user of the Airbnb Platform, she received only a single copy of her contract, namely, the confirmation email for her transaction that clearly stated that it was sent from AI.

[89] In my view, the evidence provided by the Contested Airbnb Entities falls short of discharging the heavy burden of showing why there is not a good arguable case

capable of proof of contractual obligations involving the Contested Airbnb Entities that, to a substantial extent, were to be performed in BC.

[90] The plaintiff also submits that the two-contract questions raised by the Contested Airbnb Entities cannot be resolved at this stage without a full evidentiary record. The plaintiff points out that a similar conceptual argument made by the defendants at the certification in the Arthur Lin FC Action was rejected, with the Federal Court concluding that arguments about whether Airbnb was providing "two products" required factual assessments at the trial on the merits with a full evidentiary record: *Lin v. Airbnb, Inc.*, 2019 FC 1563 at para. 54 [*Lin* (Certification)].

[91] In *Lin* (Certification), Justice Gascon made findings about the Airbnb Platform. Justice Gascon also conditionally certified the Arthur Lin FC Action and while an appeal was filed, it was dismissed by consent. In *Lin* (Certification), the relevant findings included the following:

> [8] Airbnb operates the Airbnb Platform. In Canada, the Airbnb Platform is available through the website www.airbnb.ca, as well as through various mobile applications. The Airbnb Platform allows Guests to book overnight stays from Hosts anywhere in the world.
>
> [9] Airbnb operates what can be described as a two-sided transaction platform, providing services simultaneously to two different groups of customers (identified as Hosts and Guests) who depend on the platform to conclude a transaction. In other words, the Airbnb Platform brings together providers and consumers of a particular service, namely the booking of overnight stays in other people's accommodations.
>
> [10] In its Terms of Service, various versions of which are attached to the affidavit of Airbnb's deponent, Mr. Kyle Miller, Airbnb states that it provides an online platform connecting Hosts, who have accommodations to list and book, with Guests seeking to book such accommodations. In its Terms of Service, Airbnb itself defines these as its "Services" accessible on different websites. The Terms of Service also state that Airbnb makes available an online platform or marketplace with related technology for Guests and Hosts to meet online and arrange for bookings of accommodations, directly with each other.
>
> [11] Various entities are involved in operating Airbnb in Canada. First, Airbnb Ireland Unlimited Company is the entity entering into contractual relationships with Canadian users. Second, Airbnb, Inc. (also referred to as "Airbnb US" by Airbnb) owns and operates the www.airbnb.com website. Airbnb, Inc. employs Mr. Miller, whose team is responsible for the localized versions of the Airbnb Platform, and its name is mentioned on the www.airbnb.ca website. The same contact address is used on the

> www.airbnb.ca and www.airbnb.com websites, and Airbnb, Inc. owns four registered Canadian trademarks displayed on the www.airbnb.ca website. Third, Airbnb Canada Inc. is involved in procuring and holding the domain www.airbnb.ca, although Airbnb claims it is only a marketing entity. Fourth, Airbnb Payments collects and distributes payments made on the Airbnb Platform.

[92] The plaintiff takes issue with the Contested Airbnb Entities' submission that there are two separate contracts. The plaintiff says that even if this submission is correct, the Host-Guest contract involves property in British Columbia and that provides a strong ground to exercise jurisdiction. The plaintiff also denies the assertion that the Claim is primarily focused on the contract between the Guest and Airbnb, as opposed to the contract between the Host and the Guest.

[93] The plaintiff further alleges that the Contested Airbnb Entities' arguments regarding jurisdiction are *res judicata*. No jurisdictional defences are addressed in the Federal Court's reasons for judgment.

[94] In my view, the Federal Court's reasons are of assistance, along with the evidence in the record and the pleaded facts, for considering the question of whether AI and ACI have operated the Airbnb Platform for Canadian users after October 31, 2015. I agree with the plaintiff that the Contested Airbnb Entities have not explained how to approach the question of jurisdiction in light of the Federal Court's reasons beyond pointing out that the issue of jurisdiction was neither raised nor addressed.

[95] After considering all of the facts pled and the evidence in the record. I find the plaintiff has made out at least a good arguable case that the pleaded facts can be proven. I also find the defendant has not met the burden of rebutting the mandatory presumption of a real and substantial connection on this connecting factor.

Contractual obligations for services for use primarily for personal, family or household reasons - s. 10(e)(iii), *CJPTA*

[96] The plaintiff states that due to the pleading that the plaintiff and the proposed class members were acting primarily for personal, family or household reasons, she

satisfies the requirements of s. 10(e)(iii) of the *CJPTA*. The plaintiff also points out she proposes amending the class definition to carve out users who made bookings on the Airbnb Platform for business travel.

[97] The plaintiff pled in the Claim that the defendants, including AI, solicited business from individuals residing in BC, and Mr. Pattwell provides no evidence to rebut that. Mr. Pattwell was unsure if AI does online or offline advertising in Canada. I find that there is no evidence to contest that particular fact as pled in the Claim.

[98] The plaintiff addresses Mr. Pattwell's evidence with documents and information in an affidavit showing AI's registered trademarks in Canada, that AI provides the mobile application on the Apple platform, and that the plaintiff's booking confirmation and receipt stated they were sent from an Airbnb.com email address owned by AI. The email with the booking confirmation and receipt sent to the plaintiff includes the trademark and identifies the email sender as AI at its California, USA address.

[99] The Contested Airbnb Entities submit that the plaintiff's evidence of the booking confirmation coming from a domain name allegedly owned by AI is unreliable since Mr. Cotterill does not explain what the terms on the "WhoIs.com" website mean. As well, they point out that Mr. Cotterill does not provide any evidence to establish the reliability of the information. In their view, the information from "WhoIs.com" does not displace the Contested Airbnb Entities' evidence that the Terms of Service stipulate that AIUC contracted with the plaintiff and Canadian users on the Airbnb.ca website, not the Airbnb.com website. However, at this stage, the factual record is incomplete and the Contested Airbnb Entities have provided no evidence to contradict the WhoIs.com information, including as to ownership.

[100] On this application, I am only to decide if the plaintiff has shown, in light of the defendant's evidence, a good arguable case that the facts can be proven. I am not to prematurely decide the merits of the case or determine whether the pleaded facts are proven on a balance of probabilities.

[101] In my view, given the low threshold, and based on the evidence in the record and the pleadings, I find that the plaintiff has shown a good arguable case establishing the connecting factors in s. 10(e)(i) and (iii), which presumptively constitute a real and substantial connection.

[102] Bearing in mind the heavy burden to do so and all of the evidence and arguments made, I find that the Contested Airbnb Entities have not rebutted the presumption of real and substantial connection by establishing "facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them": *Höegh* at para. 17, citing *Van Breda* at para. 95.

Interpretation of a contract for property in BC – s. 10(c), *CJPTA*

[103] The plaintiff says there is a good arguable case that the Claim relates to the interpretation of an implied contract related to accommodation physically located in BC. The substance of this implied contract directly concerns whether AI was acting as a real estate broker or travel agent contrary to a statutory or regulatory provision.

[104] For the same reasons set out in respect of the other connecting factors already discussed, I conclude that the plaintiff has shown a good arguable case establishing the connecting factors related to the interpretation of a contract for property located in BC, which presumptively constitutes a real and substantial connection. I further conclude that the Contested Airbnb Entities have not met the onus to rebut the presumption.

Restitutionary obligations substantially arising in BC – s. 10(f), *CJPTA*

[105] The plaintiff says that there is a good arguable case that the Claim relates to restitutionary obligations substantially arising in BC. The plaintiff points out that Mr. Pattwell acknowledges that AI reports the fees and commissions collected from Class Members in its consolidated financial statements. In my view, based on the facts pled and the evidence in the records, the plaintiff has shown a good arguable

case that the pleaded facts can be proven and there is a presumption of a real and substantial connection based on alleged restitutionary obligations.

[106] The Contested Airbnb Entities take the position that merely because certain amounts are included in consolidated financial statements filed by the parent, AI, in the United States does not support a claim that AI and ACI are collecting fees and/or potentially incurring restitutionary obligations arising in BC. However, at this stage, where there is an incomplete factual record, bald statements about, for example, the nature of consolidated financial statements are not sufficient to rebut the presumption of real and substantial connection.

Tort Committed in BC. – s. 10(g), *CJPTA*

[107] The plaintiff says that the statutory claim arising from a breach of consumer protection legislation as pled in the Claim is a tort committed in BC: *British Columbia v. Pro Doc Limitee*, 2023 BCSC 662 at paras. 95-115.

[108] In my view, when I consider the facts pled and the evidence on the application, the plaintiff has shown a good arguable case that the pleaded facts can be proven and there is a presumption of a real and substantial connection based on a tort committed in BC. For example, the Claim includes facts, which when assumed to be true, are capable of establishing a claim for damages under s. 171 of the *BPCPA.*

[109] While the Contested Airbnb Entities submit that they have not violated any statutory provisions and contest the facts pled, I am not to prematurely decide the merits of the case or determine whether the pleaded facts are proven. At this stage and in these circumstances, the plaintiff is only required to show that there is a good arguable case that the pleaded facts can be proven. I conclude that the plaintiff has done so and the Contested Airbnb Entities have not met the burden of showing why a real and substantial connection does not follow.

Request for Injunction – s. 10(i), *CJPTA*

[110] The relief sought in the Claim includes a request for an injunction restraining the defendants, including AI, from operating the Airbnb Platform contrary to the Real Estate Services Prohibition, the Travel Agent Services Prohibition and the MSB Prohibition.

[111] The Contested Airbnb Entities submit that the request for an injunction is a very weak connecting factor since they cannot be enjoined from doing something that they are not actually doing. In my view, this is an argument going to the merits and the issue at the heart of the Claim.

[112] While the plaintiff may fail to establish the Claim, the question at this juncture is whether the plaintiff has shown a good arguable case that the pleaded facts of conduct by the Contested Airbnb Entities are capable of being proven, and potentially enjoined, giving rise to a presumption of a real and substantial connection. In my view, the plaintiff has shown a good arguable case and the Contested Airbnb Entities have not shown why a real and substantial connection does not follow.

Forum non-conveniens issue

[113] The Contested Airbnb Entities allege that the forum selection, arbitration and class action waiver clauses found in the Terms of Service should be respected and enforced in respect of AI by granting a stay. They submit the plaintiff has failed to show a strong cause for such clauses not to be enforced.

[114] Again, the Contested Airbnb Entities concede that this court has territorial jurisdiction over certain claims related to AI from Canadian Guests before June 30, 2014. However, their position is that B.C. is not a convenient forum for the resolution of those claims, which are necessarily very limited in number for reasons including a modification of the terms of service and a statute of limitations defence.

[115] In my view, there is insufficient evidence to allow me to assess the scope of the pre-2014 transactions involving Canadian users and AI. There is no explanation

about the availability of evidence to support the submission that the scope of potential claims is extremely minor. This is notable in light of AI's admitted role as a contracting party for approximately six years.

[116] I also agree with the plaintiff that to the extent there is a limitation defence, such an argument is not generally considered at this stage of the proceeding without exceptional circumstances: *Rorison v. Insurance Corporation of British Columbia*, 2023 BCCA 474 at para. 172. I also note that even in the context of an application to strike for lack of jurisdiction, considering limitation arguments in circumstances where the matter has not been raised in the pleadings has the potential to prejudice the party facing the statute-barred argument.

[117] The plaintiff denies the terms of service are a forum selection clause for the Non-Canadian Resident Subclass. The plaintiff says the terms of service are a "non-exclusive jurisdiction clause" giving the Non-Canadian Resident Subclass the ability to sue wherever they have the right to do so: *Sugar v. Megawheels Technologies Inc.*, 2006 CanLII 37880 (ON SC) at para. 28. If the plaintiff is wrong on whether there is a forum selection clause, she submits that the clause in favour of the foreign court should not be enforced because only some of the defendants are seeking to enforce it: *Douez v. Facebook Inc.*, 2014 BCSC 953 at para. 35 [*Douez*].

[118] The plaintiff submits that beyond bald statements that California is the appropriate forum, there is no evidence about the location of witnesses or where records are maintained. For example, Mr. Pattwell states that due to the passage of time, AI's records migrated from Canada to California. However, there is nothing to explain how or when that occurred and nothing to explain the scope or nature of the records that he is referring to.

[119] I agree with the plaintiff that the Contested Airbnb Entities have offered very little evidence to assist me in assessing whether California is clearly a more appropriate forum. There is also no meaningful evidence to assist me in understanding the alleged inconvenience and expense associated with forcing AI,

which operates a web-based business, to litigate in British Columbia. Further, there is no evidence of duplicative proceedings in California.

[120] The Contested Airbnb Entities submit that a stay of the Claim against AI is justified by the s. 11 *CJPTA* factors including that the terms of service state that the agreement will be interpreted in accordance with California and American laws. As the Claim is mainly about whether the defendants have violated Canadian real estate and travel agency laws, the implication of the Contested Airbnb Entities' submission appears to be that those laws would not be applied. I agree that this raises the prospect of gutting any potential remedy that might otherwise be available to certain class members, which provides a basis to refuse a *forum non-conveniens* application: *Avenue Properties Ltd. v. First City Development Corp. Ltd*. [1986] B.C.J. No. 843, 1986 CanLII 169 (B.C.C.A.); *Douez v. Facebook, Inc.*, 2017 SCC 23.

[121] Therefore, I am not convinced that the Contested Airbnb Entities have shown that California is the clearly more appropriate forum.

Conclusion on Jurisdiction

[122] In my view, the facts pled and the evidence provided establishes a real and substantial connection to British Columbia that has not been rebutted. For the reasons explained, the Contested Airbnb Entities' jurisdictional challenge is dismissed.

[123] In the application response, the plaintiff stated that she did not seek costs on the jurisdiction application consistent with the no-costs presumption in s. 37(1) of the *CPA*. However, in submissions at the hearing, the plaintiff sought costs including because she characterizes the conduct of the Contested Airbnb Entities as abusive.

[124] In my view, the plaintiff's original position that s. 37(1) presumes no costs on this application is the appropriate approach. While the Contested Airbnb Entities have not been successful on the jurisdiction application, I am unable to agree that their conduct was abusive or that there are exceptional circumstances, for example, associated with the applicants not replying to the Claim and relying on authorities

that were not referred to in the notice of application. I am not convinced that I have before me the type of exceptional circumstances that would make it unjust to deprive the plaintiff of costs as contemplated by s. 37(2)(c) of the *CPA*. Therefore, no costs shall be awarded in respect of the jurisdiction application.

STATUTORY REQUIREMENTS FOR CERTIFICATION

[125] Section 4(1) of the *CPA* provides the circumstances under which the court must certify a proceeding:

> **4**(1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 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.

[126] On a certification application, the court performs a gatekeeping function and while the merits of the claim are not determined, it is a “meaningful screening device to ensure that only claims in the common interest of class members are advanced”: *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 15. The threshold of certification is low, but mere “symbolic scrutiny” of the claim will be insufficient to fulfil the court’s gatekeeping function: *Ibid*.

[127] To meet the standard at a certification hearing, the plaintiff must satisfy the court that there is "some basis in fact" for the requirements in s. 4(1)(b)-(e) of the *CPA*: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25 [*Hollick*].

DOES THE CLAIM DISCLOSE A CAUSE OF ACTION?

[128] If there is a reasonable prospect of success, the claim should be allowed to proceed: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17, citing *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980, 1990 CanLII 90 (SCC) [*Hunt*]. A strong defence, novel causes of action and complex issues are not, without more, sufficient grounds to prevent the plaintiff from proceeding with a claim: *Hunt* at 980.

[129] In *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22 [*Trotman*], Chief Justice Bauman considered an appeal from a certification order where the issue turned on a question of statutory interpretation. In upholding the certification order and the finding that it was not plain and obvious that the claims as pleaded would fail, Bauman C.J. stated:

> [46] This Court has been clear that the ultimate question when assessing whether there is a cause of action is the *Hunt v. Carey* test: "assuming that the facts as stated in the statement of claim can be proved, is it 'plain and obvious' that the plaintiff's statement of claim discloses no reasonable cause of action?" While the burden is on the plaintiff, the bar is not high. <u>Where the question turns on statutory interpretation, "if it is arguable," the certification judge should not engage in a merits-based analysis. The gate-keeping role of the certification judge at this stage is to avoid squandering judicial resources when it is clear that the correct statutory interpretation would leave the pleadings bound to fail. This could be the case where there is previous binding case law squarely on point or where the interpretive exercise is so straightforward the answer is plain and obvious even without previous case authority. [Emphasis added.]</u>
>
> [47] In my view, on the interpretation of the manner of expression required by s. 54, this case is far from that line, especially as s. 54 [*Competition Act*] was drafted in a time before the emergence of online commerce. After a review of the case authority, I agree that no previous case has substantively developed the interpretation of s. 54. It is not plain and obvious that the ways in which the plaintiff has pleaded the availability of tariffs or signs referring to them cannot be the clear expression that is required by s. 54. WestJet's argument on this point relies on a particular interpretation of s. 54 and goes to the merits of the claim.

[130] The plaintiff acknowledges the Claim is novel since it includes causes of action arising from allegations that the defendants were statutorily prohibited from providing the Accommodation Rental Services. The plaintiff submits the Claim involves mainly questions of law or application of the law to the facts concerning the defendants' conduct.

[131] I will now consider whether the Claim discloses each cause of action.

Breach of Provincial Consumer Laws

[132] In Part 1 of the Claim, para. 16, the plaintiff pleads that the Class Members are Travellers who rented accommodation using Airbnb's Accommodation Rental Services for leisure purposes.

[133] Under the legal basis in Part 3 of the Claim, the plaintiff states that:

a) the Canadian Resident Subclass are "consumers" entitled to protection under specific consumer protection legislation including the *BPCPA;* and

b) by offering and/or providing the Accommodation Rental Services contrary to the Prohibitions, Airbnb engaged in "deceptive acts or practices" or "unconscionable acts or practices" contrary to consumer protection legislation, including the *BPCPA*.

[134] Alternatively, the plaintiff alleges that by imposing Travellers Service Fees when Airbnb was not legally licensed to offer the Accommodation Rental Services, Airbnb subjected the Class Members to terms so harsh or adverse that they were inequitable. As a result, the plaintiff alleges in the Claim that any agreement to pay the Travellers Service Fees is not binding on the Class Members giving rise to a claim for damages under s. 171 and a declaration, injunction and restoration order under s. 172 of the *BPCPA*.

[135] Under Part 3 of the Claim, the plaintiff seeks remedies for respective Class Members for breaches of the consumer protection laws in other provinces:

> 57. The Class Members further plead and relies that Airbnb has breached the consumer protection laws of other provinces in Schedule C, and those respective Class Members are entitled to remedies under those respective consumer protection laws.
>
> 58. The Class Members plead and relies upon the applicable consumer protection laws that guarantees access to the courts for relief, including class action relief.

[136] The defendants submit that it is plain and obvious there were no deceptive or unconscionable acts or practices and even taking the facts pleaded as true, the remedies sought under the various consumer protection statutes referenced in the Claim are unavailable.

[137] More specifically, the defendants submit that there are no material facts pled capable of supporting the bald legal conclusion in the Claim that “Airbnb has breached the consumer protection laws of other provinces”: para. 57, Claim. They state that Schedule C, which enumerates various sections from other statutes, does nothing to cure this defect or to assist them in knowing the case to be met.

[138] The defendants submit that it is plain and obvious based on Airbnb’s terms of service, which they submit are incorporated by reference into the Claim, that Airbnb is not a travel agent or real estate broker. Therefore, no Class Member could have been misled into believing that they were dealing with a licensed travel agent or real estate broker.

[139] While the defendants may have a valid defence arising from the terms of the service, in my view, I am being invited to venture into the merits on the issue by interpreting those terms to invalidate the Claim. I do not see any explicit reference to Airbnb’s standard terms of service in the Claim but there is a reference (at paras. 58.1-58.2 of the Claim) to a contract between AIUC and the Class Members with an express or implied term that AIUC will comply with applicable laws.

[140] Whether the standard terms of service are explicitly referred to or incorporated by reference into the Claim, our Court of Appeal has recently discussed the danger of engaging in interpretive issues respecting documents such as terms of service and going beyond the court's limited role of determining if it is plain and obvious that a pleading discloses no cause of action: *Situmorang v. Google, LLC*, 2024 BCCA 9 at para. 67 [*Situmorang*]. While I recognize the court's important gatekeeping function at this stage, in my view, interpreting the terms of service in the manner urged by the defendants clearly runs the risk of engaging in the kind of "inherently fact-specific" process that goes well beyond the question of law to be decided at this stage: *Situmorang* at para. 70.

[141] The Claim pleads the material facts necessary to establish, under the *BPCPA*, that a transaction is a "consumer transaction" and that she and the other proposed Class Members used Airbnb's Accommodation Rental Services for "leisure purposes (i.e., primarily personal, family or household purposes)": para. 16, Claim.

[142] The Claim also pleads that by offering the Accommodation Rental Services in breach of the Prohibitions, is a "deceptive act or practice" or "unconscionable act or practice" by Airbnb contrary to the *BPCPA*. The plaintiff also pleads that there is no need to show reliance by the Class Members because the loss alleged is the payment of the Travellers Service Fees and the Accrued Interest on same that is retained by Airbnb.

[143] The material facts that must be pled to establish a claim for damages under s. 171 of the *BPCPA* are "what the damages are, that the statute was breached, and that the damages arose from that breach": *Bhangu v. Honda Canada Inc.*, 2021 BCSC 794 at para. 51 [*Bhangu*].

[144] In my view, the Claim pleads the material facts necessary to establish a claim for damages under s. 171 of the *BPCPA*. In respect of a claim for restoration order under s. 172, I also find that the Claim pleads the material facts necessary to fulfill the prerequisites in s. 172(3). More specifically, the Claim contains material facts supporting the prerequisites that Airbnb is alleged to have acquired the Travellers

Services Fees paid by the plaintiff and the proposed class members, as the source, for the Accommodation Rental Services contrary to the *BPCPA* and that the plaintiff and the proposed Class Members have an interest in the Travellers Services Fees as the money paid.

[145] The defendants point out that only British Columbia's travel agent regulation is made under the *BPCPA* and pursuant to Airbnb's terms of service, it was clear Airbnb was not acting as a travel agent. However, for reasons already explained, that submission invites the court to venture into the merits by interpreting the terms of service when that is not part of the plain and obvious analysis at this stage.

[146] In respect of the claim for damages under s. 171 and a restoration order under s. 172 of the *BPCPA*, for the reasons explained, I find that the Claim discloses a claim pursuant to the *BPCPA*.

[147] The Claim also pleads breaches of the consumer protection statutes of other jurisdictions described in Schedule C. The defendants point to important differences in the elements of the statutory causes of action and key terms between the *BPCPA* and the legislation in other jurisdictions. I agree with the defendants that courts routinely consider legislation in other provinces in the context of class action proceedings and they do not require expert evidence to engage in that consideration: *MacKinnon v. Pfizer Canada Inc.,* 2023 BCSC 2223 at paras. 24-88.

[148] I also agree with the defendants that the Claim fails to plead sufficient material facts to avert to the differences that exist on the face of the *BPCPA* and the consumer protection statutes in the other jurisdictions. Merely identifying the statutory provisions of the other jurisdictions in a schedule has been found insufficient to satisfy the requirement for material facts. As Justice Iyer (as she then was) notes in *Bhangu*, "Without these material facts, the claims under these other provincial consumer protection statutes are bound to fail": *Bhangu* at para. 60, citing *Williamson v. Johnson & Johnson*, 2020 BCSC 1746 at paras. 132-133.

[149] Therefore, I find that as currently pleaded, the Claim discloses a consumer protection claim but only in respect of the *BPCPA,* not in respect of the other jurisdictions or statutes referred to in Schedule C. In its present form, the Claim fails to disclose a cause of action for a consumer protection claim in respect of the non-British Columbia jurisdictions or statutes in Schedule C.

[150] I further conclude that any amendment to fix the deficiency in material facts that I have identified would be more technical than fundamental. Therefore, the plaintiff has leave to further amend the Claim to plead material facts necessary to disclose consumer protection causes of action under the consumer protection laws in the Canadian Provinces other than British Columbia identified in Schedule C.

Statutory Illegality

Breach of Real Estate Services Prohibition

[151] The Claim alleges that the Accommodation Rental Services are covered by the various real estate laws specified and Airbnb lacked the necessary real estate licence to engage in the business for or in expectation of remuneration. Importantly, the material facts pleaded in the Claim are that the Accommodation Rental Services involve leasing, renting or a license or enter/occupy/use short-term accommodation: para. 6., Claim.

[152] The defendants submit it is plain and obvious that Airbnb is not a real estate agent within the meaning of *RESA* because of the definition of "real estate" and because bookings only convey licenses from a host to a guest to occupy the Host's property and there is no real or leasehold interest in the property.

[153] The defendants point to authorities finding that certain temporary accommodations, such as hotels and temporary furnished accommodation stays, confer only a license to occupy a property and not a lease: *HighStreet Accommodations Ltd. v. The Owners, Strata Plan BCS2478* [*HighStreet*], 2017 BCSC 1039 at para. 49, aff'd 2019 BCCA 64; *Condominium Corporation No. 042 5177 v. Kuzio*, 2019 ABQB 814 at para. 61 [*Kuzio*].

[154] In my view, recognizing that this novel claim turns on a question of statutory interpretation, and while there may be a strong defence, in *Trotman* at para. 46, Bauman C.J. states that "if it is arguable", a merits-based analysis should be avoided. None of the cases that the defendants referred me to, such as *Kuzio* or *HighStreet*, are squarely on point and as such, they do not provide the kind of clear answer required to find that no reasonable cause of action is disclosed in the Claim.

Breach of Travel Agent Services Prohibition

[155] The plaintiff also pleads that the Accommodation Rental Services is a service for reserving accommodations and is part of the business of a travel agent under the *TIR* (and parallel provisions in Ontario and Quebec). As Airbnb lacks the necessary license to engage in the business, the plaintiff submits that the defendants are acting contrary to law by providing the services of a travel agent: paras. 20-23, Claim.

[156] The defendants submit that based on the facts pleaded, together with the terms of service, it is plain and obvious that Airbnb falls outside the statutory definition of a travel agent in Ontario, British Columbia and Quebec. The defendants submit that common to the travel agent laws of each jurisdiction is the requirement for the travel agent to act in the capacity as "agent". The defendants say that the terms of service are clear that Airbnb is not acting as agent for any guest or host.

[157] In the plaintiff's written submissions, counsel submits that the plaintiff's proposed interpretation of the definition of "travel agent" in the relevant travel agency laws "is consistent with the administrative guidance of regulators in Ontario and B.C.". For example, in BC, Consumer Protection BC confirms in online publications that an "accommodation provider" must be licensed and an "accommodation provider" is described as business that "arranges short-term vacation rentals for locations or units that they don't own."

[158] Again, as Bauman C.J. notes in *Trotman*:

> [46] …question turns on statutory interpretation, "if it is arguable," the certification judge should not engage in a merits-based analysis. The gate-keeping role of the certification judge at this stage is to avoid squandering judicial resources when it is clear that the correct statutory interpretation

> would leave the pleadings bound to fail. This could be the case where there is previous binding case law squarely on point or where the interpretive exercise is so straightforward the answer is plain and obvious even without previous case authority.

[159] The problem with the defendants' response is that it again invites me to engage in a merits-based analysis where I do not find that the interpretive exercise is so straightforward that the answer is plain and obvious, and no authority has been provided to convince me that there is a binding case. Put another way, it is not plain and obvious to me that the way in which the plaintiff pled the supply by Airbnb of Accommodation Rental Services, and the charging fees that are services which require licenses as covered by various statutory provisions described in the Claim, is bound to fail.

[160] My concern is that the defendants' arguments rely on particular interpretations of the various statutory provisions and documents, such as the terms of service, thereby going to the merits of the Claim.

Breach of MSB Prohibition

[161] Finally, the plaintiff pleads that Airbnb's Accommodation Rental Services, namely, the money transfer feature for the transfer of monetary funds between the Class Members and the Owner(s) of the rental accommodation, are covered by federal and Quebec legislative provisions, and Airbnb lacks the necessary license to engage in this business.

[162] In arguing that there is no reasonable cause of action for breaching the MSB Prohibition, the defendants rely on evidence consisting of emails, as well as regulatory guidance and determinations by the regulator that they say establishes that Airbnb is not a money services business under federal law. They say that the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") determination is admissible as authority and not as evidence. They also say that FINTRAC's determination and the reasoning employed applies similarly to Quebec's regime.

[163] The plaintiff disagrees that there has been a determination by FINTRAC as alleged by the defendants. The plaintiff raises a variety of questions concerning the emails relied on by the defendants for that determination.

[164] In my view, for the same reasons I have described above, I am unable to agree with the defendants' argument because it relies on particular interpretations of the various statutory provisions and documents, such as emails between Airbnb and a federal government official, and it goes to the merits of the Claim.

[165] Considering the pleading as a whole, I find that the Claim sets out material facts capable of supporting the claims that by providing the Accommodation Rental Services, Airbnb has breached the Real Estate Services Prohibition, the Travel Agent Services Prohibition and the MSB Prohibition. The defendants have not shown that it is plain and obvious that no such statutory cause of action is disclosed.

Claim for Unjust Enrichment and/or Restitution

[166] The Claim seeks a remedy for unjust enrichment and/or restitution respecting the allegation that Airbnb was enriched by collecting fees from the plaintiff and the proposed class members and earning accrued interest on the monies paid for the fees. The Claim also pleads that the plaintiff and the proposed class members suffered a corresponding deprivation, and Airbnb lacked a juristic reason for the enrichment since Airbnb was statutorily prohibited from providing or charging for the Rental Accommodation Services.

[167] I have already addressed the claims with respect to alleged statutory illegality and I determined that such causes of action are disclosed in the Claim. In the context of examining the Claim for unjust enrichment and restitution, I will not repeat my analysis that led me, for the reasons explained, to conclude that claims for statutory illegality are disclosed in the Claim.

[168] The plaintiff submits that privity of contract is not required for unjust enrichment and based on the Claim, there is an arguable case respecting unjust enrichment.

[169] The defendants submit that the claim for unjust enrichment is doomed to fail for numerous reasons including that the terms of service clearly provide a juristic reason. Again, for the reasons that I have already explained, interpreting the terms of service, which are disputed, to determine that it shows the claim for unjust enrichment is bound to fail would go well beyond the question of law to be decided under s. 4(1)(a) of the *CPA*.

[170] The defendants also submit that the plaintiff has pled no material facts establishing a deprivation because the plaintiff got the accommodation she bargained for. That the plaintiff received her accommodation is not disputed.

[171] However, as the plaintiff's counsel points out, the Claim does not seek relief for any amount paid by the plaintiff or the proposed Class Members to Airbnb other than for the Travellers Service Fees, as well as the Accrued Interest on the fees that Airbnb retained.

[172] The defendants also submit that there is public policy and reasonable expectations of the parties that bar the claim for unjust enrichment. They submit that many adjudicative bodies have determined that short-term accommodations including those found on Airbnb's platform are mere licenses not conveying an interest in the property. However, I have already determined that none of the cases that the defendants referred me to provide the kind of clear answer required to find that no reasonable cause of action is disclosed, including for unjust enrichment and/or restitution.

[173] I agree with the plaintiff that the authorities establish examples where the courts have certified claims for unjust enrichment against defendants alleged to have breached a statute. For example, in *Sherry v. CIBC Mortgage Inc.*, 2020 BCCA 139 at para. 113, our Court of Appeal confirms that a plaintiff is not precluded from asserting an unjust enrichment claim based on statutory illegality as long as the plaintiff is not seeking a restitutionary remedy inconsistent with or in addition to remedies that the statute confers.

[174] Considering the pleading as a whole, I find that the Claim sets out material facts capable of supporting the claims that the defendants were unjustly enriched by providing the Accommodation Rental Services contrary to the Real Estate Services Prohibition, the Travel Agent Services Prohibition and the MSB Prohibition.

[175] The defendants have not shown that it is plain and obvious that no cause of action for unjust enrichment and/or restitution is disclosed in the Claim.

Breach of Contract

[176] As mentioned earlier, the plaintiff pleads breach of contract due to AIUC and APUL having an express, or alternatively, implied term in their contract with the plaintiff and the proposed class members that they would comply with applicable laws. The Claim alleges breach of contract due to these defendants failing to comply with the Real Estate Services Prohibition, Travel Agent Services Prohibition and MSB Prohibition.

[177] The plaintiff submits that in the standard form terms of service, it states that Airbnb’s role includes an obligation to “comply with applicable law”. The Claim alleges that these defendants failed to abide by their contractual obligations in that regard and since the facts pleaded must be assumed to be true, the low threshold of disclosing a cause of action for breach of contract is cleared.

[178] The defendants deny that the terms of service or contract promise that “Airbnb will be licensed under the Regulatory Provisions” and they point out that in the terms, Airbnb explicitly states it is not a “real estate broker” or a “travel agency”. They point out that the term gives Airbnb the right, but not the obligation, to take certain actions to comply with applicable law and it falls short of amounting to a promise to comply with any particular law.

[179] In my view, the defendants are seeking to have the court consider the merits. When the facts pleaded are assumed to be true, I find that it cannot be said that it is plain and obvious that the claim for breach of contract is doomed to failure.

[180] In my view, based on a generous reading of the Claim as a whole, and being mindful of the guidance in the authorities about the threshold for establishing a cause of action, I find that the Claim meets the requisite threshold for disclosing the various causes of action, with the exception for the claim of breaches of non-BC provincial consumer protection legislation. In reaching that conclusion, I have kept in mind the guidance in *Trotman* that "if it is arguable" on a question of statutory interpretation, and where there is no "previous binding case law squarely on point or where the interpretive exercise is so straightforward the answer is plain and obvious even without previous case authority", the plaintiff will likely clear the low threshold on this factor at the certification stage: para. 46.

Is there an Identifiable Class?

[181] The principles governing the requirement for an identifiable class were summarized in *Jiang v. Peoples Trust Company*, 2017 BCCA 119 [*Jiang*]:

> [82] In sum, the principles governing the identifiable class requirement may be summarized as follows:
>
> - the purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment;
> - the class must be defined with reference to objective criteria that do not depend on the merits of the claim;
> - the class definition must bear a rational relationship to the common issues — it should not be unnecessarily broad, but nor should it arbitrarily exclude potential class members; and
> - the evidence adduced by the plaintiff must be such that it establishes some basis in fact that at least two persons could self-identify as class members and could later prove they are members of the class.

[182] The Claim seeks certification on behalf of a proposed class that is defined as:

> All individuals that made a reservation using the Defendants' Accommodation Rental Services and paid a Travellers Service Fee to the Defendants during the Class Period and either:
>
> > reside in Canada (the "Canadian Resident Subclass"), or
> >
> > reside outside of Canada and the reserved accommodation is physically situated in the provinces of British Columbia, Alberta, Saskatchewan, Ontario, or Quebec (the Non-Canadian Resident Subclass").

Excluding:

reservations made via “Airbnb for Work”;

reservations marked as a business trip; or

reservations made between October 31, 2015 to June 25, 2019 by individuals that submitted a claim for the settlement in the Federal Court of Canada claim: *Lin v. Airbnb, Inc., et al.* (T-1663-17);

(collectively the “Class” or “Class Members”).

[183] The defendants allege the proposed class definition is overinclusive in ways that will be addressed below.

[184] During submissions, counsel for the plaintiff agreed with the defendants that the proposed defined class should exclude residents of the United States of America. As a result, the plaintiff now proposes to specifically exclude guests who are American residents. In my view, this concession addresses the defendants' concern about American residents.

[185] The defendants submit that non-Canadian guests should be excluded due to the statutory and constitutional limits of provincial laws.

[186] In *Sharp v. Authorité des marchés financiers*, 2023 SCC 29 at para. 10 [*Sharp*], the Supreme Court of Canada concluded that a provincial regulatory scheme or law could apply to individuals outside of Quebec where there is a “real and substantial connection to Quebec” and the out-of-province person. The plaintiff alleges that the fact that the booked accommodation is physically situated in BC, Alberta, Saskatchewan, Ontario or Quebec creates the kind of “sufficient connection” or “real and substantial connection” that was sufficient for determining that provincial legislation applied to out-of-province persons in *Sharp*.

[187] In *Bergen v. WestJet Airlines Ltd.*, 2021 BCSC 12 at paras. 57-60 [*Bergen*], the court certified a class action that included non-Canadian residents where the non-Canadian residents entered into a contract similar to the contract entered into by Canadian residents as long as there was a sufficient connection to British Columbia. In my view, *Sharp* and *Bergen* are authority for certifying a class action involving class members not resident in Canada including where the claim is based

on a common contract and where there is some basis in fact for a sufficient connection to British Columbia in light of the material facts presently set out in the Claim.

[188] I agree with the plaintiff that the defendants' objection concerning the territorial reach of provincial laws raises an argument on the merits. Since the defendants have not provided notice to the various Attorneys General under the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, it is not to be resolved at this stage.

[189] However, given my conclusion that at this point, there are insufficient material facts related to the consumer protection legislation in other provinces besides British Columbia, I am of the view that until the Claim is further amended to remedy that technical deficiency, the class definition is likewise to be limited to accommodation that is physically situated in BC.

[190] The defendants submit that the class definition must exclude Arthur Lin FC Action class members and persons bound by that settlement. The defendants are concerned the class definition will include individuals who are bound by the settlement of the Arthur Lin FC Action.

[191] In my view, the exclusion for reservations made during the period covered by the settlement in the Arthur Lin FC Action by individuals that submitted a claim appropriately reduces the risk of double recovery. It also limits the proposed Class Members to those who may have had future reservations completely outside the scope of the Federal Court settlement.

[192] The defendants also submit that the proposed class definition is over-inclusive as it may include Guests who were business users and not "consumers" under the *BPCPA*. The defendants are concerned that some Guests may have failed to make their reservation using "Airbnb for Work" or to mark their reservation as a "Business Trip".

[193] The plaintiff points out that according to Mr. Scott's evidence on behalf of Airbnb, the defendants can identify from their records reservations made via "Airbnb for Work" and marked by the Guest as a "Business Trip". The plaintiff argues, and I agree, that to the extent Airbnb intends to dispute if any specific reservation not made via "Airbnb for Work" or marked as a "Business Trip" is for a business purpose, then it is able to do so in the normal course at trial. The fact that Airbnb does not require Guests to declare to Airbnb that their reservation is for business is not relevant to the issue of whether there is an identifiable class.

[194] Finally, the defendants submit that the class period must end at certification not the date of final judgment. I agree with the defendants that the period should end as of the date of the present judgment for certification: *Douez* at para. 150.

Revised Class Definition

[195] Based on the reasons above and the current Claim, the proposed class definition shall be amended, subject to a further amendment to the Claim, to include a temporal limit that ends as of the date of my reasons for certification, to exclude residents of the United States and to only include reserved accommodation situated in British Columbia. For clarity, the revisions are set out in the following definition:

> All individuals that made a reservation using the Defendants' Accommodation Rental Services and paid a Travellers Service Fee to the Defendants during the Class Period and either:
>
> (1) reside in Canada, or
>
> (2) reside outside of Canada, except for residents of the United States of America, and the reserved accommodation is physically situated in the province~~s~~ of British Columbia, ~~Alberta, Saskatchewan, Ontario, or Quebec~~ (the "Non-Canadian Resident Subclass").
>
> Excluding:
>
> (a) reservations made via "Airbnb for Work";
>
> (b) reservations marked as a business trip; or
>
> (c) reservations made between October 31, 2015 to June 25, 2019 by individuals that submitted a claim for the settlement in the Federal Court of Canada claim: Lin v. Airbnb, Inc., et al. (T-1663-17).

Does the Claim Raise Common Issues?

[196] Section 4(1)(c) of the *CPA* requires the plaintiff to demonstrate that the claims of the class members raise common issues, whether or not they predominate over issues affecting only individual members. Under this factor, the inquiry is limited to deciding whether common issues of law or fact exist: *Rumley v. British Columbia*, 2001 SCC 69 at para. 33.

[197] The principles applicable to considering the common issues are set out in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 108 [*Pro-Sys*]:

> In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that "the underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis" (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:
>
> (1) The commonality question should be approached purposively.
>
> (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
>
> (4) It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
>
> (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[198] There must be some evidence the common issues actually exist, which is not proof on the merits, but only enough evidence that the certification of common issues operates as a “meaningful screening device”: *Bhangu* at para. 99.

[199] The plaintiff proposes 12 common issues that are categorized as factual, legal and remedies questions.

Proposed Common Factual Questions 1-5

[200] The plaintiff proposes common factual questions 1-5, as follows:

> 1. During the Class Period did the Defendants, or some of them provide or offered to provide all or some of the Accommodation Rental Services (including the features listed in paragraph 8 of the Amended Notice of Civil Claim)?
>
> > a. If so, were those services provided to class members situated in Canada or otherwise in relation to accommodations physically situated in Canada?
>
> 2. During the Class Period, were the Defendants:
>
> > a. licensed real estate agents in any Canadian jurisdiction, except Quebec?
> >
> > b. licensed travel agents in British Columbia, Ontario, or Quebec?
> >
> > c. licensed or registered to engage in a money service business in Canada or Quebec?
>
> 3. Did the Defendants, or some of them, charge the Class Members the Travellers Service Fees (defined in paragraph 12 of the Amended Notice of Civil Claim)?
>
> 4. Did the Defendants, or some of them, earn the Accrued Interest (defined in paragraph 10 of the Amended Notice of Civil Claim) for monies received from the Class Members that were intended to be paid to Owners (defined in paragraph 8 of the Amended Notice of Civil Claim)?
>
> 5. If Question 3 or 4 is YES, how much was received by each Defendant?

[201] The defendants submit that questions 1-5 improperly slide all of Airbnb's business and services into various statutory definitions which fails to recognize that Airbnb's business is global, and its business has varied throughout time and across locations. According to the defendants, the court will not be able to make common determinations about the nature of Airbnb's business for an extended period and on an international basis.

[202] The defendants are also concerned that the plaintiff has provided no basis in fact to show that a guest from 2009 had a similar experience to a guest from 2019. They point out that most documents provided by the plaintiff to offer some basis in fact are from 2023.

[203] In my view, when I approach the commonality question purposively and in light of the applicable principles, I find there is some basis in fact for concluding that the resolution of the proposed common factual questions 1-5, which focus on the defendants' conduct, is necessary to the resolution of each Class Members' claim.

[204] However, in light of my conclusions set out above that the Claim does not disclose a cause of action save and except for the *BPCPA*, I conclude that proposed questions 1 and 2 must be restricted, at present and subject to a further amendment to the Claim, to accommodations physically situated in British Columbia and licenses held or not held in British Columbia.

Proposed Common Legal Questions 6-7

[205] The plaintiff proposes common legal questions 6-7 as follows:

> 6. During the Class Period, did the Defendants, or some of them, comply with:
>
> > a. the Real Estate Services Prohibition (listed in Schedule A of the Amended Notice of Civil Claim) in every Canadian jurisdiction, except Quebec?
> >
> > b. the Travel Agent Services Prohibition (listed in Schedule B of the Amended Notice of Civil Claim) in British Columbia, Ontario and/or Quebec?
> >
> > c. the Proceeds of *Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 and/or the *Money-services Businesses Act*, CQLR c E-12.000001 to obtain a license or registration?
>
> (collectively the "**Applicable Laws**").
>
> 7. If Question 6 is YES, did any of the Defendants breach their contracts with the Class Members in failing to comply with the Applicable Laws?

[206] Regarding common legal questions 6-7 included in Schedule A to the notice of application, the plaintiff submits that the common factual issues raise these common issues of law. The defendants, relying on many of the same arguments for denying that the Claim discloses a cause of action for statutory illegality or breach of the *BPCPA*, deny that there is any basis in fact for the common legal questions 6-7. While the defendants disagree with the allegations and submit that their evidence and arguments will prevail, the underlying question for the court at this stage "is

whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis": *Pro-Sys* at para. 108.

[207] After considering the evidence tendered and the applicable legal principles, I am unable to agree with the defendants that there is no basis in fact to even show that the proposed common legal issues exist. Further, when I apply a purposive approach to the commonality issue associated with the plaintiff's proposed common legal issues, I conclude that the class members' claims share a substantial common ingredient and success for one class member would mean success for all.

Proposed Common Remedies Questions 8-12

[208] The plaintiff proposed common remedies questions 8-12 are as follows:

> 8. Should the Defendants be ordered to pay, as damages, restitution, disgorgement, and/or accounting of profits, for either or both of the following monies:
>
> a. Accrued Interest?
>
> b. Travellers Service Fees?
>
> 9. If Question 7 is YES, should the Defendants be ordered to pay nominal damages for breach of contract?
>
> 10. Should punitive damages be awarded against some or all of the Defendants?
>
> 11. If the answer to any part of questions 7, 8, or 9 is YES, should the Court make an aggregate monetary award and, if so, in what amount?
>
> 12. Should a permanent injunction be issued that the Defendants cease providing the Accommodation Rental Services to Class Members in Canada, or otherwise in relation to accommodations physically situated in Canada, until the Defendants comply with the Applicable Laws?

[209] The defendant points out that determining certain consumer protection claims requires individual assessments, for example, related to unconscionability. However, the mere existence of individual issues is not a bar to commonality as long as common issues predominate over non-common issues.

[210] I agree with the defendants that because the plaintiff offers no workable methodology for determining aggregate damages in question 11, other than

summing up the fees collected during the Class Period from those Class Members, the court ought not to certify question 11 as a common issue at this time.

[211] In respect of all other proposed common remedies questions, except for question 11, I conclude that the commonality requirement in s. 4(1)(c) is met and answering questions nos. 8, 9, 10 and 12, will avoid duplication of fact-finding or legal analysis.

Is a Class Proceeding the Preferable Procedure?

[212] Section 4(2) of the *CPA* sets out what the court is to consider in deciding whether a class proceeding is the preferable procedure:

> 4(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> > (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.

[213] The task of considering whether a class proceeding is the preferable procedure is limited to determining if the action can be managed as a class proceeding taking into account the available tools: *Jiang* at paras. 112-122. The court is also to consider the goals of class proceedings: access to justice, judicial economy and behaviour modification: *Lewis v. WestJet Airlines Ltd.*, 2022 BCCA 145 at para. 36.

[214] I will specifically focus on the factors in s. 4(2) that the defendants allege do not support the proposed class proceeding as being the preferable procedure.

[215] The defendants submit that the regulatory process is the preferable procedure. They point out that it is noteworthy that no regulator has taken action against Airbnb despite class counsel writing to inform them of the Claim. The defendants also submit that the Claim is potentially dense and complicated as a result of at least 26 unique statutory schemes. However, given the material facts pleaded in the present Claim, and while the Claim is subject to further amendment, there are now far fewer statutory and regulatory schemes at issue.

[216] As the regulator in BC has confirmed that Airbnb is not subject to the applicable regime, I do not accept that the regulatory process is a viable avenue for recovery.

[217] When I consider the factors in s. 4(2), I am of the view that on balance, the factors militate in favour of a class proceeding as the preferable procedure.

Is there a Representative Plaintiff?

[218] The plaintiff, Margot Ware, is a British Columbia resident who used Airbnb's Accommodation Rental Services for leisure travel for many years, including in August 2021, when she reserved accommodation in Penticton, BC from August 12 to 25, 2021, for which she paid Airbnb $7,466.92.

[219] The defendants rely on the Scott Affidavit for their submission that Ms. Ware is not a suitable representative plaintiff because she is bound by the release in the Arthur Lin FC Action. In Ms. Ware's affidavit, she states that she did not make a claim for benefits under the settlement agreement for the Arthur Lin FC Action.

[220] The plaintiff's counsel submits that Ms. Ware never acknowledged that she was an eligible class member in the Arthur Lin FC Action and that the settlement agreement in the Arthur Lin FC Action only covers claims up to June 25, 2019. Since Ms. Ware claims for transactions from 2021, those are well outside of the temporal scope of the settlement agreement in the Arthur Lin FC Action.

[221] In my view, the plaintiff meets the statutory requirements in s. 4(1)(e) of the *CPA* for acting as representative plaintiff. I reach that conclusion because I accept there is evidence Ms. Ware would fairly and adequately represent the interests of the class, she has produced a plan setting out a workable method of advancing the litigation, and she does not have a conflict of interest with other Class Members.

[222] Justice Perell has stated that concerns about deficiencies in a plaintiff's litigation plan is not a standalone basis to refuse certification: *Doucet v. The Royal Winnipeg Ballet*, 2018 ONSC 4008 at para. 153.

Conclusion

[223] This action is certified as a class proceeding, save and except for the breach of non-BC provincial consumer protection statutes and jurisdictions referred to in these reasons respecting Schedule C of the Claim.

[224] Subject to further amendment of the Claim and a further order of the court, the class shall be comprised of:

> All individuals that made a reservation using the Defendants' Accommodation Rental Services and paid a Travellers Service Fee to the Defendants during the Class Period and either:
>
> (1) reside in Canada, or
>
> (2) reside outside of Canada, except for residents of the United States of America, and the reserved accommodation is physically situated in the province~~s~~ of British Columbia, ~~Alberta, Saskatchewan, Ontario, or Quebec~~ (the "Non-Canadian Resident Subclass").
>
> Excluding:
>
> (a) reservations made via "Airbnb for Work";
>
> (b) reservations marked as a business trip; or
>
> (c) reservations made between October 31, 2015 to June 25, 2019 by individuals that submitted a claim for the settlement in the Federal Court of Canada claim: Lin v. Airbnb, Inc., et al. (T-1663-17).

[225] The relief sought in paras. 3-6 of the plaintiff's application for certification is granted.

[226] The common issues set out in Schedule A to the certification application, subject to the changes specified in the above reasons to questions 1 and 2, and with the exception of question 11, are certified.

[227] The litigation plan set out in Schedule B to the certification application is approved.

[228] The parties are directed to confer regarding the form and manner of notice pursuant to s. 19 of the *CPA* and if agreement is not reached, the parties are directed to set a further hearing to decide the issue.

[229] The AOP Applicants' application to strike the pleadings as an abuse of process pursuant to Rule 9-5 is dismissed.

[230] The Contested Airbnb Entities' application for summary judgment under Rule 9-6 on the issue of jurisdiction is dismissed.

[231] By consent, the Claim is dismissed as against Airbnb Global Services Limited.

[232] By consent, the claims of USA residents against the defendants are stayed.

[233] The parties request an opportunity, after issuance of these reasons for judgment, to make further submissions on costs. If the parties do not consensually resolve the matter of costs, they have leave to contact SC Scheduling with their time estimates and mutually agreeable dates, to request a date and time to appear by MS Teams to make submissions on costs.

"E. McDonald J."