CITATION: Gifford v. Air Canada, 2025 ONSC 3335
COURT FILE NO.: CV-15-2120
DATE: 20250604

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JENNIFER GIFFORD	)	Ruby Egit, Michelle Segal, Elizabeth Cunningham, and David Jones, for the Plaintiff
Plaintiff	)	
-and-	)	
AIR CANADA, DELTA AIR LINES, INC., AMERICAN AIRLINES, INC., and UNITED AIRLINES, INC.	)	Linda Plumpton, James Gotowiec, for the Defendant Air Canada
Objector (Responding Party)	)	Matthew Milne-Smith, Chantelle Cseh, for the Defendant Delta Air Lines
	)	Mike Eizenga, Emrys Davis for the Defendant American Airlines
	)	Scott Kugler, Marco Romeo, for the Defendant United Airlines
	)	**HEARD:** November 12, 13 and 14, 2024

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LEITCH J.

[1] The Plaintiff seeks certification of this action pursuant to the *Class Proceedings Act*, 1992, S.O. 1992, c. 6.

[2] The Plaintiff also sought leave to file an Amended Statement of Claim. However, leave is not required at this stage of the proceeding.

[3] During the hearing, the Plaintiff presented a further amended Statement of Claim, which importantly included an amendment to the Class Period as I will describe below.

The Action

[4] As set out in para. 3 of the Plaintiff's factum, the Plaintiff describes this action as a claim for damages arising from alleged price fixing of airline tickets:

> The defendants are alleged to have engaged in price fixing airline tickets imposed for air travel between Canada and the USA and in a uniform course of anticompetitive conduct, by conspiring to lessen the supply of air travel between USA and Canada (referred to as "capacity discipline") thereby unreasonably enhancing the price of air travel services in Canada for travel between the USA and Canada, causing like harms to all members of the class. Proof of the defendants' conduct will be the same for all class members.

[5] The Defendants emphasize that this case is not a "simple" price fixing case – it is a supply suppression case. As a result, the Defendants submit that the circumstances considered in

Jensen v. Samsung Electronics Co Ltd., [2022] 3 F.C.R. 34 ("*Jensen*"), aff'd 2023 FCA 89, are the only comparator.

[6] The Defendants also advise that this is a case where, as in *Jensen,* it is argued, at this certification stage, that the pleadings do not disclose a conspiracy, the foundation for all the Plaintiff's claims.

[7] I agree with the Defendants that the observations of Gascon J., the motions judge in *Jensen*, at paras. 38, 40 and 43 are apposite on this motion:

> 38. First, this proposed competition law class action differs significantly from the usual price-fixing class actions brought before Canadian courts under the conspiracy provision of the Act (i.e. section 45 and its predecessors) … the conspiracy alleged by the plaintiffs in this case is not a typical price-fixing conspiracy under section 45 of the Act; it is instead an alleged conspiracy to suppress the supply of [a product], which has allegedly resulted in an increase in prices for the product. …
>
> 40. Second, this competition law class action is a rare case where the very existence of the alleged conspiracy at the source of the claim for loss and damages under section 36 of the Act is disputed and challenged at the certification stage. A review of the Canadian case law on competition law class actions involving price-fixing and other competition-related conspiracies under section 45 and its predecessors reveals that the existence of an alleged conspiracy is typically not an issue in such class actions. In fact, the battleground is usually beyond the allegation of an illegal agreement and focuses on whether the harm or loss allegedly resulting from the actionable conspiracy is common to the class members.
>
> 43. The present case is definitely different from all these precedents, as the formation and existence of the alleged conspiracy at the source of this proposed class action is not admitted or unchallenged, but is rather strongly disputed by the defendants. In fact, this is the main battleground between the parties with respect to both the viable cause of action requirement and the common issues requirement. The above list of precedents is by no means exhaustive, but it illustrates the highly exceptional nature of the proposed class action advanced by the plaintiffs in this matter.

Background

[8] This action has a protracted procedural history.

[9] Multiple related actions were filed across Canada beginning in 2015. According to the Defendants, these are "copycat claims" arising from allegations in the United States ("U.S.") that four airlines, including three of the Defendants (but not Air Canada), conspired to restrict capacity for U.S. domestic air travel.

[10] The Plaintiff describes the U.S. litigation in para. 30 of her factum as follows:

> The plaintiffs in the US Litigation are purchasers of air passenger transportation for domestic travel from the defendants and/or through websites such as Expedia.ca. The plaintiffs alleged that the defendants colluded to limit capacity on their respective airlines in a conspiracy to fix, raise, maintain, and/or stabilize the prices for air passenger transportation services within the United States, its territories, and the District of Columbia in violation of Sections 1 and 3 of the Sherman Antitrust Act and that plaintiffs suffered pecuniary injury by paying artificially inflated ticket prices as a result of this purported antitrust violation.

[11] The Canadian actions include Air Canada as a defendant and originally included the same allegations as the U.S. litigation as well as the allegation of a conspiracy with respect to Canada-U.S. transborder air travel.

[12] Several agreements have been entered into, including a tolling agreement, stay agreements, and discontinuance agreements. In particular, pursuant to Minutes of Settlement dated May 2016, the actions in the Federal Court of Canada, the British Columbia Supreme Court and the Quebec Superior Court were stayed allowing this action to proceed. It was agreed that this action would be conducted on a "no costs" basis and no party would seek costs from another party in respect of this action.

[13] The Plaintiff delivered a proposed Amended Statement of Claim that removed the allegations of a conspiracy related to U.S. domestic air travel.

[14] As the Defendants emphasize, the Plaintiff's claim now rests solely on an alleged conspiracy related to transborder air travel between the U.S. and Canada involving the four Defendants.

[15] The action has been discontinued against Southwest Airlines Co., which does not fly into Canada, and other proposed defendants.

[16] The Plaintiff's certification motion record was filed in November 2017.

[17] The certification schedule was revised pending the release of the Supreme Court of Canada decision in *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295 ("*Godfrey")*.

[18] A new certification schedule was agreed to after the *Godfrey* decision was released.

[19] In the meantime, the U.S. litigation has proceeded with the denial of a motion to dismiss, discovery, a settlement with two defendants and the dismissal of a summary judgment motion brought by Delta Air Lines, Inc. and United Airlines, Inc. These two defendants have sought a reconsideration of the dismissal of their summary judgment motion. This reconsideration decision is on reserve. The proposed U.S. class action remains uncertified. There have been no regulatory proceedings in the U.S. No defendant in the U.S. litigation has pled guilty or otherwise admitted wrongdoing.

[20] As I will discuss below, the existence of, and the nature and subject of, the U.S. litigation, is critical on this motion. There is a contentious issue as to whether information and judicial

commentary in the U.S. litigation is relevant to, and can be relied on, in relation to the evidentiary issues on this motion.

The Statement of Claim

[21] As referenced above, the Statement of Claim was amended in 2017 to delete all references to air travel within the U.S.

[22] In the Amended Statement of Claim, the Class Period was defined as between January 1, 2010 and November 17, 2017.

[23] During the certification hearing, the Class Period was further amended to conclude on July 1, 2015. I will refer to the version of the Statement of Claim delivered during the certification hearing as 'the Statement of Claim' and all references will be to that version of the claim.

[24] In the Statement of Claim, the Plaintiff seeks, amongst other things, a declaration that the Defendants participated in a conspiracy with each other and with other airlines to fix, maintain, increase or control the price for the supply of tickets for air travel; allocate sales, territories, customers or markets for the supply of air travel; and fix, maintain, control, or lessen the supply of air travel services between the U.S. and Canada, in violation of statutory, common law and equitable laws as alleged.

[25] The Statement of Claim contains allegations of "Conspiracy Acts" in paras. 14-16 and 18. These allegations will be reviewed in more detail below.

[26] The Plaintiff asserts that the Conspiracy Acts breach s. 45 of Part VI of the *Competition Act*, R.S.C., 1985, c. C-34, and the Defendants are liable to pay damages and costs of the investigation pursuant to s. 36 of that act. Section 45 provides the following:

> 45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
>
> (a) to fix, maintain, increase or control the price for the supply of the product;
>
> (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
>
> (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.
>
> (2) Every person who commits an offence under subsection (1) or (1.1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine in the discretion of the court, or to both.
>
> (3) In a prosecution under subsection (1) or (1.1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to

> it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.
>
> (4) No person shall be convicted of an offence under subsection (1) or (1.1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if
>
> (a) that person establishes, on a balance of probabilities, that
>
> (i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and
>
> (ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and
>
> (b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.
>
> ….
>
> (8) The following definitions apply in this section.
>
> *Competitor i*ncludes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c). (concurrent)
>
> *price* includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product. (prix)

[27] Alternatively, the Plaintiff claims that the Conspiracy Acts contain the central elements of civil conspiracy – both unlawful means conspiracy and predominant purpose conspiracy.

[28] In the further alternative, the Plaintiff claims at para. 26 that the Defendants:

> … have each been unjustly enriched by the receipt of artificially high prices for their tickets for air travel between Canada and the USA. The Plaintiff and other Class Members have suffered a deprivation in the amount of the difference between what they paid for those tickets, and what they would have paid absent the conspiracy (the "Ticket Overcharge").

The Certification Record

[29] The Plaintiff's motion record includes three affidavits.

[30] The Plaintiff swore an affidavit November 17, 2017 providing details of her acquisition of tickets for her air travel between Canada and the U.S. using Air Miles. She also provided her litigation plan.

[31] Ms. Graham, a lawyer in the Class Action Group of the law firm formerly representing the Plaintiff, swore an affidavit November 17, 2017 describing the parallel actions making similar allegations commenced in the Federal Court of Canada, the Supreme Court of British Columbia and the Superior Court of Quebec, and outlining the procedural steps undertaken in those actions.

[32] Ms. Graham outlined the Plaintiff's claim; the proposed class (which at that time included all Canadian residents who purchased a ticket from any of the Defendants for air travel within the U.S. or between Canada and the U.S.); the alleged causes of action (which at that time included the conspiracy causes of action, unjust enrichment, and waiver of tort); and the proposed common issues. She commented on the appropriateness of the class action procedure, the representative Plaintiff and the litigation plan.

[33] Ms. Graham's affidavit also explained what has occurred in the U.S. litigation and appended the following items: the Memorandum of Opinion of the U.S. District Court dated October 28, 2016 denying a motion to dismiss the plaintiffs' consolidated amended complaint; a Scheduling Order Regarding Discovery and Briefing on Motion for Class Certification dated January 30, 2017; and a Joint Status Report dated September 14, 2017. Her affidavit highlighted that according to the Joint Status Report the defendants had produced at least 1.2 million documents including sales transaction data and customer purchase records.

[34] The third affidavit filed by the Plaintiff, also sworn November 17, 2017, was that of Dr. Douglas West. Attached to Dr. West's affidavit was his curriculum vitae, an acknowledgement of his expert's duty in compliance with rule 53, and his report. Dr. West is an expert economist who is currently Professor Emeritus at the University of Alberta. His areas of research specialization are competition policy, industrial organization, and urban economics and spatial competition.

[35] The Plaintiff delivered a supplementary motion record containing the supplementary affidavit of Ms. Graham sworn November 29, 2019, in which she indicated that after her first affidavit was sworn there were two settlements in the U.S. litigation - on December 20, 2017 with Southwest Airlines Co. and on June 14, 2018 with American Airlines, Inc. The May 9, 2019 Memorandum Opinion and Final Approval Order of the U.S. District Court for the District of Columbia was attached to her affidavit. She noted these settling defendants had agreed to provide cooperation in the further prosecution of the claims against the non-settling defendants in the U.S. litigation – Delta Air Lines, Inc. and United Airlines, Inc.

[36] The Defendants filed an affidavit of Mr. Donald S. Garvett sworn March 16, 2020, to which was attached his curriculum vitae. Mr. Garvett has served as an officer for four different airlines and consulted for over 80 airlines and about 100 other aviation, travel and tourism clients. He described some of the key concepts related to airline capacity management and pricing.

[37] The Defendants also filed an affidavit of Dr. James Levinsohn sworn October 21, 2020, to which was attached his acknowledgment of his expert's duty in compliance with rule 53

and a copy of his report dated March 16, 2020. Dr. Levinsohn is the Charles W. Goodyear Professor of Global Affairs at Yale University, Professor of Economics at the Yale School of Management and a Research Associate of the National Bureau of Economic Research.

[38] The Plaintiff delivered a reply motion record on May 15, 2020, containing an affidavit of Dr. West sworn May 15, 2020. The Plaintiff also attached Dr. West's report prepared in response to the expert reports of Dr. Levinsohn and Mr. Garvett.

[39] Cross examinations of the affiants were completed by the end of 2020.

[40] The Plaintiff filed the Memorandum Opinion of the U.S. District Court for the District of Columbia dated September 5, 2023 in relation to a motion for summary judgment filed by Delta Air Lines, Inc. and United Airlines, Inc. in the U.S. litigation.

[41] The Plaintiff delivered an affidavit of a law clerk employed by counsel for the Plaintiff sworn November 1, 2024, and attached the Air Miles General Booking Terms and Conditions available on the internet on November 1, 2024. The law clerk described accessing waybackmachine.com, "which allowed her to look at the Terms and Conditions page of the Air Miles website as of March 2015," and she also attached a copy of those Terms and Conditions to her affidavit.

The Certification Requirements

[42] This action was commenced in 2015. Therefore, the "older", five-part test for certification applies – i.e. the criteria set out at s. 5 of the *Class Proceedings Act* prior to the 2020 amendments.

[43] Pursuant to that legislative criteria, a court shall certify an action as a class proceeding if:

> a. the pleadings disclose a cause of action;
>
> b. there is an identifiable class of two or more persons that would be represented by the representative plaintiff;
>
> c. the claims of the class members raise common issues;
>
> d. a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> e. there is a representative plaintiff who,
>
> i. would fairly and adequately represent the interest 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 for the class, an interest in conflict with the interest of other class members.

[44] Each of these certification criteria were in issue on this motion. However, as explained below, the issues relating to the identification of the class – the s. 5(1)(b) requirement – became redundant with the amendment of the Class Period and the delivery of the Statement of Claim during the hearing of the motion.

[45] In determining whether the s. 5(1)(a) requirement is met, the Plaintiff must meet the standard applied on a motion to strike pursuant to rule 21 as described below.

[46] The Plaintiff must establish some basis in fact for each of the other certification criteria. This is a low evidentiary threshold, as the Plaintiff notes, and there is no determination of the merits of the action. However, the Supreme Court of Canada in *Pro-Sys Consultants Ltd. v. Microsoft Corp*., 2013 SCC 57, [2013] 3 S.C.R. 477 ("*Microsoft*") at para. 103, reaffirmed "the importance of certification as a meaningful screening device" and that the standard for assessing evidence at certification does not "involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny".

[47] The recognition of the certification stage as an important gatekeeping mechanism, and the court's role and duty to conduct a rigorous review of a plaintiff's certification motion and to scrutinize with care the allegations, the material facts and the evidence put forward by a plaintiff on the motion was recently referenced by the Federal Court of Appeal in *Jensen v. Samsung Electronics Co.*, 2023 FCA 89, 482 D.L.R. (4th) 504, at para. 49.

Issue 1 – Do the pleadings disclose a reasonable cause of action?- the s.5(1)a requirement

[48] In addressing this issue, the law is clear that the facts pleaded are assumed to be true, no evidence is admissible, and the question is whether it is plain and obvious that the claim has no reasonable prospect of success. (See *Hollick v. Toronto (City),* 2001 SCC 68, [2001] 3 S.C.R. 158).

[49] I note also that rule 25.06(1) requires that every pleading shall contain a concise statement of the material facts on which the party relies for the claim, but not the evidence by which these facts are to be proved. I further note that rule 25.06(8), which requires the pleadings of full particulars in relation to certain claims, such as fraud and breach of trust, does not apply to a claim of conspiracy.

(a) What are the requirements of each cause of action plead by the Plaintiff?

(i) the cause of action for breach of the Competition Act

[50] As the Plaintiff notes, a statutory cause of action under s. 36 of the *Competition Act*, arising from allegations of conduct contrary to s. 45 of that act, has been certified. (See for example, *Shah v. LG Chem, Ltd.*, 2015 ONSC 6148, 390 D.L.R. (4th) 87 ("*Shah"*)).

[51] The Plaintiff asserts that she has plead the material facts to support this statutory cause of action, noting in paras. 80 and 81 of her factum that:

> 80. … The *actus reus* elements for section 45(1)(a) are:
>
> a. The defendant conspired, agreed or arranged with a competitor in respect to a product; and
>
> b. The agreement was to fix, maintain, increase or control the price for the supply of the product.
>
> 81. The *mens rea* elements are:
>
> c. Subjective intent to agree knowing the terms;
>
> d. Objective intention to fix, maintain, increase or control the price of the product.

(see *Watson v Bank of America Corporation* ("*Watson*"), 2015 BCCA 362 at paras. 75 and 76)

(ii) the causes of action for civil conspiracy - the predominant purpose conspiracy and the unlawful means conspiracy

[52] The Supreme Court of Canada in *Microsoft*, referencing *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.,* [1983] 1. S.C.R. 452, provided helpful guidance in relation to these torts. The Court advised at paras. 74 and 80 that:

> … a "predominant purpose conspiracy is made out where the predominant purpose of the defendant's conduct is to cause injury to the plaintiff using either lawful or unlawful means, and the plaintiff does in fact suffer loss caused by the defendant's conduct."
>
> … "Unlawful means conspiracy", requires no predominant purpose but requires that the unlawful conduct in question be directed toward the plaintiff; that the defendant should know that injury to the plaintiff is likely to result and that the injury to the plaintiff does in fact occur.

[53] The Plaintiff notes that the "unlawful" element of the tort is satisfied by a breach of s. 45(1) of the *Competition Act*. (See *Godfrey* at para. 89).

(iii) the cause of action for unjust enrichment

[54] In *Microsoft* at para. 85, the Supreme Court set out the "well known elements required to establish an unjust enrichment," as follows*:*

> a. an enrichment of the defendant;

b. a corresponding deprivation of the plaintiff; and

c. an absence of a juristic reason for the enrichment.

[55] The Plaintiff acknowledges that there must be a causal link between the benefit and the detriment but there need not be a "direct link" between the plaintiff and defendant (see *Microsoft* at para. 87). The Plaintiff notes that anti-competitive conduct has grounded claims for unjust enrichment which have been certified in other class action proceedings (see *Microsoft*; and *Kalra v. Mercedes Benz*, 2017 ONSC 3795).

(b) does the Plaintiff's pleading meet the s. 5(1)(a) requirement?

[56] The liability allegations – the alleged Conspiracy Acts - are set out in paragraphs 14 -16 and 18 of the Statement of Claim:

> 14. During the Class Period, senior executives and employees of the Defendants, acting in their capacities as agents for the Defendants, engaged in communications, conversations, and attended meetings with each other at times and places, some of which are unknown to the Plaintiff. As a result of the communications and meetings the Defendants and unnamed co-conspirators unlawfully conspired and/or agreed to:
>
> a. unreasonably enhance the prices of air travel services in Canada for travel between the USA and Canada;
>
> b. fix, maintain, increase or control the price for the supply of tickets for air travel between the USA and Canada;
>
> c. allocate sales, territories, customers or markets for the supply of air travel between the USA and Canada;
>
> d. fix, maintain, control, or lessen the supply of and capacity for air travel services within the USA or between the USA and Canada;
>
> e. monitor and enforce adherence to an agreed-upon pricing scheme;
>
> f. restrain trade in the provision of air travel services; and
>
> g. lessen unduly competition in the provision of air travel services between the USA and Canada.
>
> 15. In furtherance of the conspiracy, during the Class Period, the following acts were done by the Defendants and their respective executives, officers, employees, servants and agents:

a. they shared information about passenger-carrying capacity and profitability of routes;

b. they had communications about their plans or other airlines' plans for passenger carrying capacity;

c. they had communications about the undesirability of increases to passenger carrying capacity;

d. they had communications about their plans for adding new flights, routes and extra seats;

e. they reached agreements to limit flying routes;

f. they reached agreements to limit increases to passenger-carrying capacity;

g. they took advantage of business meetings, such as the June 2015 annual International Air Transport Association ("IATA") conference, to have discussions regarding the matters outlined at subparagraphs "a" through "f" above and to further the conspiracy;

h. they took steps to disguise meetings and communications in which they discussed the conspiracy, such as using the word "discipline" as a euphemism for limiting flights and seats, with the effect of higher prices and fatter profit margins for the Defendants;

i. they instructed members of the conspiracy not to divulge its existence;

j. they engaged in monitoring activities to determine whether their co-conspirators were abiding by their agreements; and

k. they threatened to take retaliatory measures such as engaging in a "price war" with any airline which failed to abide by their agreements.

16. Further details regarding the implementation of the conspiracy, include comments made at the 2015 IATA annual meeting:

a. Delta's president, Ed Bastian, stated that Delta was "continuing with the discipline that the market place is expecting";

b. Air Canada's chief executive, Calin Rovinescu, stated, "People were undisciplined in the past, but they will be more disciplined this time"; and

c. American Airlines' chairman and chief executive officer, Doug Parker, stated that the airlines had learned their lessons from past price wars: "I think everybody in the industry understands that".

[I will refer to these alleged statements at the June 2015 meeting described in para. 16 of the Statement of Claim as "the 2015 Comments"]

> 18. The Defendants were motivated to conspire and their predominant purpose was to harm the Plaintiff and other members of the Class by requiring them to pay illegal and artificially high prices for air travel within the USA, and between Canada and the USA. The Defendants directed the conspiracy towards the Plaintiff and other members of the Class. Further, the Defendants knew or ought to have known in the circumstances that injury to the Plaintiff and to the other Class Members was likely to, and in fact, did result.

[57] The Plaintiff contends that, in paras. 14, 15 and 18 of her Statement of Claim, she has successfully plead the elements to ground the statutory causes of action under s. 45 and 36 of the *Competition Act* and the two types of civil conspiracy torts.

[58] The Plaintiff contends that her pleading of a monetary benefit and corresponding deprivation passing through the chain of commerce adequately pleads the unjust enrichment cause of action.

[59] The Plaintiff urges me to find that her pleading is analogous to the statement of claim considered by Raikes J. on a certification motion in *Cygnus Electronics Corporation v. Panasonic Corporation*, 2023 ONSC 2559 *("Cygnus").* In that case, the plaintiffs alleged that the defendants had engaged in a conspiracy to fix, maintain or stabilize the prices of a product. The defendants challenged the sufficiency of the pleading, asserting that only bald allegations and/or conclusions of law had been plead, that specific allegations of conduct against each defendant had not been plead, and that there was a failure to plead specific acts of the alleged conspirators' conduct.

[60] The Plaintiff submits that the following observations of Raikes J. at para. 52 of *Cygnus* are applicable to her circumstances:

> [52] In a perfect world, the Plaintiffs would plead in greater detail who did what, when, and where. They would set out specifics of the dates of secret meetings and communications or reference inculpatory emails. They would differentiate which Defendants did what specific act. It is the nature of cartel activity, however, that such information is closely guarded in secrecy.

[61] The Plaintiff further highlights similar observations in *Thompson-Marcial v. Ticketmaster Canada LP*, 2024 ONSC 2305, at para. 287 ("*Ticketmaster")* and *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 1646, at paras. 166-173 ("*Mancinelli*").

[62] The Plaintiff submits that she is at a disadvantage on this motion. She emphasizes that there has been no discovery, the pleadings are not yet closed, and the alleged conduct occurred in secret. However, I note that such circumstances of secrecy are acknowledged in the cases that the Defendants rely on, which I will discuss below. Furthermore, the present case also relies on public statements; namely, the 2015 Comments.

[63] I note also that the Plaintiff points out that s. 5(3) of the *Class Proceedings Act* has not been complied with and contends that the reason for such non-compliance is to shield the Defendants from cross examination. However, I am unable to accept such a bald assertion. In any event, I fail to see how the requirement in s. 5(3) for each party to provide, by affidavit, the party's best information on the number of members in the class," would shed light on the certification issues.

[64] For the same reason, I cannot accept the Plaintiff's submission that I distinguish *Jensen* on the basis that the defendant in *Jensen* sought certification under the Federal Courts Rules, which have "nothing equivalent to s. 5(3)".

[65] The Plaintiff asserts that she has met the required threshold in relation to her pleadings, stating that she has plead that the Defendants and their respective executives, officers, employees, servants and agents have committed the following acts as described in para. 11 of her reply factum:

> 11. There is no doubt the pleadings in this case meet the required threshold. Specifically, the plaintiff pleads that the defendants and their respective executives, officers, employees, servants and agents:
>
> a. shared information about passenger-carrying capacity and profitability of routes;
>
> b. had communications about their plans or other airlines' plans for passenger carrying capacity;
>
> c. had communications about the undesirability of increases to passenger-carrying capacity;
>
> d. had communications about their plans for adding new flights, routes and extra seats;
>
> e. reached agreements to limit flying routes;
>
> f. reached agreements to limit increases to passenger-carrying capacity
>
> g. took advantage of business meetings, such as the June 2015 annual International Air Transport Association ("IATA") conference, to have discussions regarding the matters outlined at subparagraphs "a" through "f" above and to further the conspiracy;
>
> h. took steps to disguise meetings and communications in which they discussed the conspiracy, such as using the word "discipline" as a euphemism for limiting flights and seats, with the effect of higher prices and fatter profit margins for the defendants;
>
> i. instructed members of the conspiracy not to divulge its existence;

> j. engaged in monitoring activities to determine whether their co-conspirators were abiding by their agreements; and
>
> k. threatened to take retaliatory measures such as engaging in a "price war" with any airline which failed to abide by their agreements.

This outline is a recitation of para. 15 of the Statement of Claim.

[66] The Plaintiff contends that her Statement of Claim contains the same level of particularization as the pleadings in *Mancinelli* and *Godfrey.*

[67] I cannot accept the position of the Plaintiff in relation to the s. 5(1)(a) criterion.

[68] The circumstances here are quite different from those in *Cygnus.* It is significant that *Cygnus* involved what the Defendants described as a " classic secret price fixing" allegation, and it was not about "signaling" nor was there any allegation in relation to public statements. I agree with the Defendants' submission that the pleadings in *Cygnus* are quite different from the Plaintiff's pleadings. At paras. 40 and 41, 57 and 58 of *Cygnus*, Raikes J. described the pleading of various investigations, prosecutions, guilty pleas, fines and penalties imposed by foreign antitrust regulators on many of the named defendants for an alleged price fixing conspiracy; the plaintiffs made allegations regarding the industry, the structure and character of the market for the product in issue; the defendants together dominated the global market including the sale of the product in Canada; and, the alleged global conspiracy was one in which all the defendants at each level in the corporate hierarchy were aware and involved.

[69] Further, it is significant that *Cygnus* was decided prior to *Lilleyman v. Bumble Bee Foods LLC*, 2024 ONCA 606, 173 O.R. (3d) 682 ("*Lilleyman*), application for leave to appeal to the Supreme Court of Canada dismissed March 27, 2025, a case which fortifies the position of the Defendants, as I will discuss below.

[70] Before discussing *Lilleyman,* I note that the Defendants take the position that this Statement of Claim is analogous to that considered by the motions court in *Jensen.*

[71] The Plaintiff diminishes the persuasiveness of the reasoning in *Jensen* because it is a decision of the Federal Court "and is not the law in Ontario". The Plaintiff emphasizes Raikes J.'s reference to *Jensen* in *Cygnus* at para. 67:

> 67. To the extent that Justice Gascon's decision suggests that because the existence of the alleged conspiracy is disputed, the plaintiff must plead with greater particularity including details of how and when the conspiracy was formed, I respectfully disagree. Cartel arrangements are often conceived in secrecy. It places too great a burden on the plaintiff to know the origin story of the conspiracy from the outset of the litigation before any discovery.

[72] However, the Federal Court's pleadings rules and certification criteria are analogous to those of Ontario. Section 334.16(1) of the *Federal Courts Rules,* SOR/98-106 sets out the same certification criteria as s. 5 of the *Class Proceedings Act* (see *Jensen* at para. 50). Rule 174 contains the same requirement as Ontario's rule 25.06(1) that a pleading contain material facts (see *Jensen* at para. 72).

[73] I note also that *Jensen* was cited by the Ontario Court of Appeal in *Lilleyman* at paras. 72 and 76 on the common issue criterion.

[74] Furthermore, Raikes J. did not have the benefit of the Federal Court of Appeal's decision in *Jensen*, as *Cygnus* and the appeal decision in *Jensen* were released on the same date.

[75] In *Jensen,* like here, the pleading was a claim for damages under s. 36 of the *Competition Act* arising from a breach of s. 45. In *Jensen*, a global conspiracy to reduce capacity was alleged arising from public statements and private meetings. The Defendants note that in *Jensen*, specific documents and specific public statements were referenced and there were allegations of a drop in supply. Nevertheless, Gascon J. concluded in *Jensen* that:

- General allegations of entering into a conspiracy or having a coordinated agreement or arrangement to suppress supply and increase prices "are nothing more than bald assertions of conclusionary facts, with no allegations of material facts regarding the formation or existence of an agreement or any form of coordination"; "these conclusionary statements are wholly insufficient to disclose a reasonable cause of action in conspiracy, as they do not provide the minimally required level of detail related to the "how" and "what" could give rise to the defendants' liability. (see para. 123)

- These general statements contain no material facts or particulars supporting any allegations regarding an agreement to fix or increase the prices, nor any material facts or particulars supporting the formation or existence of an agreement to suppress supply; "They only contain conclusory legal statements that paraphrase the language in section 45 of the act and allege a cause of action as if it was a material fact, or provide speculations as if they were proven material facts". (see para. 124)

- "Conspiracy within the meaning of section 45 of the act requires a meeting of the minds". "To properly plead a conspiracy, a plaintiff must notably specify the agreement to conspire between the defendants, and its purpose or object, as well as any specific conduct, described with clarity and precision, that is alleged to have been adopted by each of the conspirators in furtherance of the conspiracy." (see para. 125)

- Allegations of direct private communications between the defendants were vague, brief, and conclusory and without any material facts plead that could be reflective of a meeting of the minds. (see para. 130)

- Bald assertions regarding statements made at trade association meetings were incapable of supporting an allegation of unlawful agreement to suppress supply or increase prices as they did not describe any particular suspected or actual interactions between the defendants at those trade association meetings, nor any interactions suggesting the establishment of an agreement to restrain the supply or to increase prices. (see para. 133)

- With respect to the allegations of public "signaling" done by the defendants in various statements made by their executives at earnings calls, investor calls and industry conferences the defendants' public communications did not support any allegations of illegal conspiracy. (see para. 141)

[76] At para. 104 of *Jensen,* Gascon J. provided a useful description of conscious parallelism*,* referencing *Godfrey,* and emphasized that such business conduct is not prohibited in Canada:

> [104] A word needs to be said about conscious parallelism. Contrary to what the plaintiffs appear to suggest in their written and oral submissions, Canadian law has long recognized that "conscious parallelism" falls short of conduct prohibited by section 45 of the Act. Conscious parallelism has been described as "a phenomenon which occurs when parties not involved in a price-fixing conspiracy deliberately *choose* to adjust their prices in order to match those of their competitors, in the absence of any actual collusion between them" (emphasis in original) (*Godfrey*, at paragraph 190, Justice Côté dissenting, but not on this point). Stated differently, it is the act of independently adopting a common course of conduct with an awareness of the likely response of competitors or in response to the conduct of competitors. Conscious parallelism refers to those situations where, in the absence of an agreement, competitors unilaterally adopt similar or identical business practices or pricing, as a result of rational and profit-maximizing strategies based on observations of market trends and activities of each other's past behaviour. Such parallel conduct is frequent in oligopoly markets where leading firms may closely monitor their rivals' reactions to changes in their behaviour, and each firm accounts for the reaction of others in deciding on prices, production and output.

[77] Gascon J. made a similar observation with respect to signaling at para. 142:

> "signalling is not in itself a form of agreement proscribed by section 45 of the act just as conscious parallelism is not an agreement either. Public signaling is nothing more than information being communicated unilaterally by a market participant and such unilateral conduct is not a recognized cause of action under section 45 in Canada".

[78] In finding that the pleading in *Jensen* was insufficient, Gascon J. further observed at para. 142 that "there are no allegations nor any material facts providing any indication of two-way communications, mutual understanding or meeting of the minds between the defendants".

[79] The decision of Gascon J. in *Jensen* was upheld by the Federal Court of Appeal. That Court reiterated the legality of conscious parallelism and signalling at para. 54:

> It is undisputed between the parties and well-established at law that the gravamen and basic threshold requirement of a criminal conspiracy is an agreement between the alleged conspirators: see, for example, *United States of America v. Dynar*, [1997] 2 S.C.R. 462, 1997 CanLII 359 at paras. 87 and 177; *R. v. Proulx,* 2016 QCCA 1425, [2016] Q.J. 11393 at para. 32. It is on that basis that the Supreme Court found, in *Atlantic Sugar Refineries Co. Ltd. et al. v. Attorney General of Canada*, [1980] 2 S.C.R. 644, 1980 CanLII 226 (at p. 657) [*Atlantic Sugar*], that deliberate parallel conduct ("conscious parallelism") does not amount to a tacit agreement and therefore is not illegal. As noted by the Motion Judge, conscious parallelism, which he defines as "the act of independently adopting a common course of conduct with an awareness of the likely response of competitors or in response to the conduct of competitors" (Reasons at para. 104), falls short of conduct prohibited by section 45 of the *Competition Act*. The same is true of "signalling", which can be described as the communication by competitors to one another through public statements, of their intent not to compete for market share.

[80] The Court of Appeal noted, at para. 57, the "valid concern" that details of conspiracy are "largely in the hands of the conspirators". The Court further observed at para. 58 that s. 45(3) of the *Competition Act* "addresses that issue," and importantly stated that,

> "even in a conspiracy case, there are specific requirements with respect to pleadings, and when there is no direct evidence of an agreement, the plaintiff must still plead material facts and full particulars of an agreement based on indirect or circumstantial evidence of some form of communication between the alleged conspirators such that an agreement can be inferred."

[81] In upholding the conclusions of the motions judge, the Court of Appeal in *Jensen* at para. 64 found that the pleadings were "insufficient to disclose a reasonable cause of action particularly with respect to very serious legal claims of an unlawful conspiracy".

[82] I agree with the Defendants that the Plaintiff's pleading is more insufficient than the pleading in *Jensen.* There is no reference to specific documents or "forms of communication" save and except for the 2015 Comments, which, as I will later address, do not resolve the insufficiencies in the Plaintiff's pleading.

[83] The Defendants also rely on *EnerWorks Inc. v. Glenbarra Energy Solutions Inc*., 2012 ONSC 414 ("*EnerWorks")*, and they say that Perell J.'s reasoning is consistent with the analysis and findings in *Jensen*, a proposition with which I agree.

[84] In *EnerWorks,* Perell J. considered the sufficiency of a pleading alleging a conspiracy where the defendants had argued that the plaintiff had failed to plead all the material facts necessary for the constituent elements of that cause of action. Perell J. observed the following at para. 36:

> [36] EnerWorks' argument is wrong. It is a fundamental principal of procedural justice that a litigant should have notice of the case against him or her. The *Rules of Civil Procedure* employ a system of fact pleading to give notice. The primary function of a system of fact pleading is to compel the parties to disclose the facts that they are relying on to support their claim or defence. The heart of the system of fact pleadings is that the parties plead the material facts that constitute their claim or defence.
> …

[85] Perell J. referenced guidance from the Court of Appeal in *Normart Management Ltd. v. West Hill Redevelopment Co*., (1998) 37 O.R. (3d) 97 ("*Normart*"), at para. 102, about a proper pleading of conspiracy:

> In *H.A. Imports of Canada Ltd. v. General Mills Inc.* (1983), 1983 CanLII 1722 (ON SC), 42 O.R. (2d) 645, 150 D.L.R. (3d) 574 (H.C.J.), O'Brien J., dealing with the civil action of conspiracy as pleaded, quoted from Bullen, Leake and Jacob's Precedents of Pleadings, 12th ed. (London: Sweet & Maxwell, 1975), as follows at pp. 646-47:
>
> > The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby.

[86] I note here parenthetically that this passage from *Normart* was cited and applied by the Ontario Court of Appeal in *Tran v. University of Western Ontario,* 2015 ONCA 295, at para. 21.

[87] Perell J. concluded in *EnerWorks* at para. 74 that the pleading must be struck, with leave to amend, because it did not set forth with clarity and precision the overt acts done by each of the alleged conspirators in furtherance of the conspiracy and did not adequately plead the unlawful acts of each individual defendant.

[88] He emphasized again at para. 76 that "each individual defendant is entitled to know the case they must meet and although conspiracy is a tort committed by a group the liability of each defendant arises because they individually participated as a member of the group".

[89] He acknowledged at para. 78 that a plaintiff "should be given some slack in how much detail he or she must provide in setting out the material facts of a conspiracy". He noted that the omission of conspiracy from the requirement of particulars in rule 25.06(8) may "reflect the practical reality that conspiracies by their nature are planned behind closed doors and may involve clandestine conduct". However, he concluded at para. 78 that "it is

not good enough to allege conspiracy and then use an action and its examinations for discovery to confirm one's suspicions or to find a cause of action".

[90] Although the Plaintiff submits that *EnerWorks* is distinguishable from this case because *EnerWorks* involved a conspiracy pleading in relation to a fraudulent conveyance and misrepresentation, in my view Perell J.'s comments are reinforced in *Lilleyman* and are applicable here.

[91] I agree with the Defendants that *Lilleyman* is an important case. *Lilleyman* considered a claim that included the same causes of action advanced by the Plaintiff in this action - a breach of part VI of the *Competition Act*, unlawful means conspiracy, predominant purpose to injure conspiracy and unjust enrichment. The motions judge, Perell J., noted in *Lilleyma*n that the alleged breaches of the *Competition Act* were "at the heart of" her proposed class action and her claim of unjust enrichment was "totally derivative of the three conspiracies". The same can be said in relation to the Plaintiff's claims in this action.

[92] With respect to the liability element relating to the breaches of the *Competition Act,* Perell J. stated the following in *Lilleyman* at para. 85:

> The critical liability element of the old s. 45 and the current s. 45 and all its predecessors is that the defendant entered into a bilateral or multilateral agreement. The critical element for liability is that by words or deeds, the conspirators came to a meeting of the minds and formed an agreement that has been criminalized by the *Competition Act*.[1] The agreement may be proven by an oral or written agreement or the agreement may be proven by the conduct of the parties showing that they communicated and came to a meeting of the minds as to how they would respectively conduct their affairs in the marketplace in a way that would increase the price of their goods and respectively increase their own profits.[2]

[93] He also confirmed the elements of a claim of civil conspiracy at paras. 95 and 96 as follows:

> [95] The elements of a claim of civil conspiracy are: (1) two or more defendants make an agreement to injure the plaintiff; (2) the defendants: (a) use some means (lawful or unlawful) for the predominant purpose of injuring the plaintiff, or (b) use unlawful means with knowledge that their acts were aimed at the plaintiff and knowing or constructively knowing that their acts would result in injury to the plaintiff; (3) the defendants act in furtherance of their agreement to injure; and, (4) the plaintiff suffers damages as a result of the defendants' conduct.[3]

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[1] *Jensen v. Samsung Elec. Co. Ltd*., 2021 FC 1185, aff'd 2023 FCA 89; *Proulx c. R*, 2016 QCCA 1425; *United States of America v. Dynar*, 1997 CanLII 359 (SCC), [1997] 2 S.C.R. 462; *Atlantic Sugar Refineries Co Ltd et al v. Attorney General of Canada*, 1980 CanLII 226 (SCC), [1980] 2 S.C.R. 644; *Regina v Canadian General Electric Company Ltd et al*, (1976) 1976 CanLII 756 (ON SC), 15 O.R. (2d) 360 (H.C.J.); *Regina v Armco Canada Ltd. et al.* (1976) 1976 CanLII 559 (ON CA), 13 O.R. (2d) 32 (C.A.), leave to appeal to the S.C.C. ref'd [1976] 1 S.C.R. vii.

[2] *Jensen v. Samsung Elec. Co. Ltd*., 2021 FC 1185, aff'd 2023 FCA 89; *Atlantic Sugar Refineries Co Ltd et al v Attorney General of Canada*, 1980 CanLII 226 (SCC), [1980] 2 S.C.R. 644.

[3] *Pro-Sys Consultants v. Microsoft,* 2013 SCC 57; *Gould v. Western Coal Corporation*, 2012 ONSC 5184; *EnerWorks Inc. v. Glenbarra Energy Solutions Inc.,* 2012 ONSC 414; *Normart Management Ltd. v. West Hill Redevelopment*

> [96] The second element of a civil conspiracy cause of action has come to identify two distinct types of civil conspiracy, i.e., (a) the illegal means conspiracy; and (b) the predominant purpose of injuring the plaintiff conspiracy.

[94] After citing *Normart* and the Court of Appeal's guidance on how to plead a claim in civil conspiracy that I referenced above, Perell J. reiterated the following at para. 102:

> [102] In pleading a conspiracy, material facts actions in furtherance of the conspiracy must be connected to the actors; in a conspiracy pleading, it is necessary to set out discretely the particular acts of each co-conspirator so that each defendant can know what he or she is alleged to have done as part of the conspiracy.[4] A recitation of a series of events coupled with an assertion that they were intended to injure is insufficient, and it is not appropriate to group some or all of the defendants together into a general allegation that they conspired to injure the plaintiff.[5]

[95] The Defendants on this motion assert that the Plaintiff's pleading can be described in the same manner - a recitation of a series of events coupled with an assertion that they were intended to injure, grouped into a general allegation against the Defendants.

[96] The Defendants say that Perell J.'s description of Ms. Lilleyman'*s* causes of action at para. 278 is an apt description of the Plaintiff's causes of action:

> [278] The quintessence of all of Ms. Lilleyman's causes of action is that there was a price-fixing conspiracy involving a group of conspirators (the Defendants) who had the market power to move the whole market for canned tuna in Canada and who did move the market thereby causing harm to direct purchasers, indirect purchasers, and umbrella purchasers. The alleged price-fixing conspiracy is the quintessence of the statutory claims, both types of common law civil conspiracy claims, and the basis for an unjust enrichment claim. If there is no properly pleaded conspiracy, then the cause of action criterion is not satisfied for any of the four causes of action.

Co. (1998), 1998 CanLII 2447 (ON CA), 37 O.R. (3d) 97 (C.A.); *Knoch Estate v. John Picken Ltd*. (1991), 1991 CanLII 7320 (ON CA), 4 O.R. (3d) 385 (C.A.); *Hunt v. T & N plc*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959; *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.,* 1983 CanLII 23 (SCC), [1983] 1 S.C.R. 452.

[4] *David v. Loblaw,* 2021 ONSC 7331; *Mancinelli v. Royal Bank of Canada,* 2020 ONSC 1646; *Hostmann-Steinberg Ltd. v. 2049669 Ontario Inc.,* 2010 ONSC 2441; *D.G. Jewelry Inc. v. Cyberdiam Canada Ltd.,* [2002] O.J. No. 1465 at para. 34 (S.C.J.); *J.G. Young & Sons Ltd. v. TEC Park Ltd.,* [1999] O.J. No. 4066 at paras. 9-10 (S.C.J.).

[5] *Jensen v. Samsung Elec. Co. Ltd.*, 2021 FC 1185, aff'd 2023 FCA 89; *David v. Loblaw,* 2021 ONSC 7331; *Mancinelli v. Royal Bank of Canada,* 2020 ONSC 1646; *Fairview Donut Inc. v. TDL Group Corp* 2012 ONSC 1252, aff'd 2012 ONCA 867, leave to appeal to the S.C.C. ref'd [2013] S.C.C.A. No. 47; *Gould v. Western Coal Corporation*, 2012 ONSC 5184; *Martin v. Astrazenca Pharmaceuticals PLC*, 2012 ONSC 2744; *EnerWorks Inc. v. Glenbarra Energy Solutions Inc.*, 2012 ONSC 414; *Pension Financial Services Canada Inc. v. Connacher*, 2010 ONSC 2843 at para. 15*; Hostmann-Steinberg Ltd. v. 2049669 Ontario Inc*., 2010 ONSC 2441, at para 20. *J.G. Young & Son Ltd. v. Tec Park Ltd.,* [1999] O.J. No. 4066 (S.C.J.); *Balanyk v. University of Toronto*, 1999 CanLII 14918 (ON SC), [1999] O.J. No. 2162 (S.C.J.); *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 1998 CanLII 2447 (ON CA), 37 O.R. (3d) 97 (C.A.).

The Defendants also assert that the Plaintiff's position in response mirrors Ms. Lilleyman's, as set out at para. 28:

> [281] Ms. Lilleyman's response is that her pleading is adequate and even more than adequate given the context of a certification motion. She submits that given that: (a) conspiracies are clandestine; (b) certification motions take place before the discovery phase of an action, where the truth can be revealed; (c) certification motions are not merits determinations; and (d) the cause of action criterion is measured by assuming the pleaded facts are true, she has more than satisfied the cause of action criterion. She adds that numerous price-fixing conspiracies like hers have been certified and that these precedents support her arguments that she has satisfied the cause of action criterion.

[97] Perell J. provided many reasons for his conclusion that Ms. Lilleyman had not met the cause of action requirement for certification and no purpose would be served by granting her leave to amend her already amended statement of claim, including this finding at para. 299:

> [299] … the material facts that are pleaded do not indicate how and when and to what purpose each alleged conspirator came to a meeting of the minds with regard to the commission of the alleged conspiracy and the material facts pleaded do not set out any particular overt acts undertaken by each defendant in furtherance of the alleged conspiracy. The pleaded material facts assume but do not demonstrate multilateral action that would constitute an illegal meeting of the minds and an illegal agreement to agree to fix prices as distinct from conscious parallelism, which is not illegal.

[98] The conclusions of Perell J. at para. 300 that "it was plain and obvious that Ms. Lilleyman had not plead a price fixing conspiracy that would animate her four causes of action including the unjust enrichment claim" were upheld on appeal.

[99] The Defendants submit that it is notable that the Court of Appeal in *Lilleyman* at para. 20 indicated that Perell J. had acknowledged the challenge in pleading a civil conspiracy claim, "given the clandestine nature of conspiracies". It is also notable that the Court stated at paras. 21 and 26:

> [21] The motion judge noted, however, that bare allegations and conclusory statements based on assumptions or speculation, or which are incapable of proof, are not material facts and are not assumed to be true for the purposes of a motion determining whether a legally viable cause of action is pleaded. He also observed that the requirement to plead material facts, including identifying the acts alleged against each defendant, is particularly important in pleading a civil conspiracy so that each can know what he or she is alleged to have done as part of the conspiracy.
>
> …

> [26] In short, the motion judge found that the Claim proceeded on the basis of bare allegations and conclusory statements, rather than material facts that could possibly support the conclusion that there was a conspiracy involving the defendants to unlawfully inflate the price of canned tuna in Canada.

[100] The Court of Appeal found no error in Perell J.' s conclusion in *Lilleyman*; specifically, that there was no link between the defendants that were involved in the proven U.S. conspiracy and those that sold tuna in Canada, and there were only bald allegations of domination and control which was insufficient to make out a claim for conspiracy in the Canadian market.

[101] The Plaintiff distinguishes *Lilleyman*, noting that there were 11 defendants in *Lilleyman* and only three participated in a conspiracy in the U.S. to fix the prices of canned tuna in the U.S. The Plaintiff asserts that in this action, all the Defendants are alleged conspirators in the U.S. and therefore the defendant groups are the same in both the U.S. litigation and in this action (a point I will discuss more fully below) and all sell the allegedly price-fixed product directly to Canadians. The Plaintiff also notes that the defendants in *Lilleyman* filed evidence regarding the market.

[102] On the other hand, the Defendants contend that the Plaintiff's circumstances are analogous to those in *Lilleyman*. They say the Plaintiff is seeking to transpose a different conspiracy involving a different product into the Canadian context.

[103] The Defendants reference the exercise undertaken by the court in *Jensen* and the resulting conclusions at paras. 145 and 146 that the extracts and documents relied on did not suggest any conspiracy, and the finding that the statement of claim "invents a fictitious scenario of intent, communications and coordination between the defendants that does not exist in or flow from the documents the plaintiffs claim to paraphrase". The Defendants submit that the situation in *Jensen* is the same "mischief" that the Plaintiff is doing here, in circumstances where no documents were presented for the Court's scrutiny.

[104] The Defendants further note that market context – meaning, the structure and character of the market –has not been plead by the Plaintiff, unlike in *Jensen* and *Lilleyman.* Paragraph 12 of the Statement of Claim simply states that "There are significant barriers to entry in the airline industry", which the Plaintiff describes in general terms.

[105] I agree with the Defendants' position that the Statement of Claim contains only bald unsupported pleadings of wrongdoing; there is insufficient particularity for the Defendants to understand what is alleged against them and the Plaintiff has simply enumerated the elements of the torts. As the Defendants note, the Plaintiff has made allegations against the Defendants en masse and "it is not appropriate to lump some or all of the Defendants together into a general allegation that they conspired to injure the plaintiff" (see *David v. Loblaw*, 2023 ONSC 7331 ("*Loblaw*"), at para. 33, citing *Mancinelli* at para. 142).

[106] Paragraph 14 of the Statement of Claim can accurately be described as "boilerplate" or "generic allegations" – it simply enumerates the elements of s. 45 of the *Competition Act.*

Paragraph 14(b) includes a reference to a pricing fixing scheme, although what is alleged is a supply suppression scheme.

[107] Paragraph 15 does not particularize who acted or what acts there were. There are no details as to who communicated and when communication occurred. The only exception is the reference to the 2015 Comments.

[108] With respect to the 2015 Comments, there are no allegations as to who attended the June 2015 meeting.

[109] As the Defendants submit, capacity discipline is exercised and expected and as a result the 2015 Comments were made in public. The 2015 Comments describe unilateral conduct and there is no unlawful agreement particularised. There is no pleading of the context of the 2015 Comments. Who entered into an agreement?

[110] Furthermore, as the Defendants note, the 2015 Comments are attributed to only three Defendants, there is no reference to the documents from which they are extracted, there is no reference to the transborder travel market, and there is no reference to an agreement.

[111] I agree with the Defendants' argument that the 2015 Comments can be taken as describing conscious parallelism.

[112] It is also significant that the 2015 Comments, made in the last month of the Class Period, are forward-looking statements and would be relevant outside the Class Period in any event.

[113] As a result of the foregoing conclusions, I cannot find there is a properly pleaded conspiracy, and, as a result, the s.5(1)(a) cause of action criterion is not met for all the Plaintiff's alleged causes of action.

[114] The Plaintiff did not request leave to amend her Statement of Claim. In any event, these are not circumstances where leave would be appropriate, particularly considering my conclusions in relation to the other certification criteria, which I will turn to next.

Issue 3 – is there an identifiable class?- the s.5(1)(b) requirement

[115] As noted, the Amended Statement of Claim included a broader definition of the class by extending the class to November 17, 2017. The Defendants, in their response to the certification motion, asserted that this proposed class definition fails the requirement that there be a rational relationship between the class and the common issues. The proposed class was improperly "unnecessarily broad or over inclusive" (see *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, 145 D.L.R. (3d) 385, at para. 23; see also *Harris v. GlaxoSmithKline Inc.*, 2010 ONCA 872, 106 O.R. (3d) 661, at paras. 41- 44).

[116] In addition, the proposed definition was inconsistent with the analysis of the Plaintiff's expert Dr. West, who had restricted his analysis to the period between January 1, 2010 to

July 1, 2015. Although in his reply report Dr. West endeavoured to address this issue, the Plaintiff opted to amend the Class Period.

[117] The delivery of the Statement of Claim during the certification hearing resolved the issues originally raised by the Defendants. In the Statement of Claim, the proposed class is:

> All Canadian resident persons who purchased a ticket from any of the defendants for air travel between Canada and the United States between January 1, 2010 and July 1, 2015 (excluding the defendants, their employees, and their respective parents, subsidiaries and affiliates).

[118] This proposed definition, by objective criteria, fulfills the purposes of a class definition by identifying those who have a potential claim, defining the parameters of the action to identify those bound by the result, and describing who is entitled to notice of certification (see *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 ("*Dutton*")). The s. 5(1)(b) requirement is met.

Issue 4 – does the Statement of Claim raise common issues?- the s. 5(1)(c) requirement

[119] The Plaintiff seeks to certify 12 common issues and emphasizes the low evidentiary standard– of 'some basis in fact', which does not require the resolution of conflicting facts and evidence or an evaluation of the strength of the Plaintiff's case (see *Microsoft).*

[120] Before addressing the common issue requirement, I will set out some information regarding the airline industry presented by Mr. Garvett.

Evidence of Mr. Garvett respecting the airline industry

[121] In his affidavit, Mr. Garvett explained that the Defendants are legacy carriers which he described as "typically full service network airlines", providing a wide range of preflight and onboard services, including different service classes and connecting flights.

[122] He also explained that legacy carriers operate a 'hub and spoke model' – meaning, all passengers except those whose origin or destination is the hub itself, transfer at the hub to another flight towards their final destination. This model offers greater connectivity to passengers, serving more city pairs at higher frequency and often at a lower cost.

[123] The airline's network planners will allocate its fleet among the routes operating from its various hubs to create flight schedules. Fleet allocations are influenced by factors such as hub performance; the possible routes across the airline's entire domestic and international network, given market conditions; aircraft availability and economics and operating capabilities; performance of feeder routes; the availability and capacity of landing and departure slots at airports; any constraints imposed by agreements between carriers and labour unions; and airport facilities.

[124] Mr. Garvett also explained that airlines categorize tickets by booking class to create and price tickets with different combinations of conditions. Examples of conditions include advanced purchase, minimum stay, checked baggage allowance, refundability, enhanced

seating, and passenger status. The airline determines how many seats to allocate to different booking classes or "fare buckets" and these allocations often change in the time leading up to the flight in a process known as yield management or revenue management.

[125] He further explained that yield management is typically very complicated. The management approach varies by airline and involves the analysis of large amounts of data using sophisticated algorithms and databases to predict passenger demand so seats can be allocated to fare buckets and the airline can maximize revenue for a particular flight or more broadly across its entire network.

[126] Overall, Mr. Garvett described fare setting, and seat allocation to fare buckets, as highly dynamic processes that often involve frequent short-term changes, sometimes as often as minute to minute. He also indicated that airlines compete for passengers on more dimensions than just ticket prices and ticket conditions, noting that passengers are influenced by departure and arrival times, flight frequency, loyalty programs, product/brand preferences, availability of direct flights and sometimes airports and airport locations.

[127] As the Plaintiff acknowledged, Dr. West did not have any concerns with the facts set out in Mr. Garvett's affidavit, which of course did not address the Plaintiff's allegations of a conspiracy.

The proposed liability common issues

[128] The Plaintiff describes proposed common issues 1, 3, 4, 5, and 6 as relating to the Defendants' conduct, and specifically the existence and scope of the alleged conspiracy. These proposed liability common issues are the following:

> 1. Did the defendants, or any of them, breach s. 45 of the *Competition Act* (which is contained in Part VI of the *Competition Act*) giving rise to liability pursuant to s.36 of the *Competition Act*?
>
> 3. Are the defendants, or any of them, liable in tort for conspiracy to fix the price or supply of tickets for air travel?
>
> > a. Did the defendants and/or any unnamed co-conspirators unlawfully conspire with each other to limit or lessen, unduly, the availability of tickets for air travel, or to enhance unreasonably the price of tickets for air travel?
> >
> > b. Did the defendants and/or any unnamed co-conspirators otherwise act in furtherance of the conspiracy?
> >
> > c. Did the defendants and/or unnamed co-conspirators intend that, as a result of the conspiracy, prices of tickets for air travel would be enhanced unreasonably?

d. Did the conspiracy involve unlawful conduct directed towards Class Members?

e. Did the defendants know, or ought to have known, in the circumstances that injury to Class members was likely to result?

f. Did Class Members suffer economic loss or injury as a result? And

g. Was the predominant purpose of the conspiracy acts to injure the plaintiff and other Class Members?

4. Over what period of time did the conspiracy take place?

5. Did the defendants, or any of them, take affirmative or fraudulent steps to conceal the conspiracy?

6. Did the defendants commit unlawful acts which were intended to cause the plaintiff and other Class Members economic loss or were a necessary means of enriching the defendants?

[129] As the Plaintiff notes, the Supreme Court of Canada in *Dutton* at para. 38 outlined the factors relevant to an assessment of commonality:

(i) the commonality question should be approached purposively

(ii) an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim

(iii) it is not essential that the class members be identically situated vis-a vis the opposing party

(iv) it is 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 and the court will examine the significance of the common issues in relation to individual issues

(v) success for one class member must mean success for all and all members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[130] These principles were confirmed in *Microsoft* at para. 108, as observed in *Godfrey* at para. 104.

[131] The Plaintiff in her factum references *Microsoft,* at paras. 99–104 and 110, where the court commented that to establish commonality, evidence that the alleged misconduct actually occurred is not required. Rather, the necessary evidence goes only to establishing whether the questions are common to all the class members. The Plaintiff also notes that courts

have consistently certified common issues relating to the existence and scope of a conspiracy, and the determination of these issues will be common to the proposed class members because the answer will depend on the defendant's conduct and that evidence will not vary for class members (see *Shah* and *Godfrey*)

[132] After the Plaintiff delivered her factum, the Court of Appeal's decision in *Lilleyman* was released. In relation to whether the Plaintiff's claim raises common issues, *Lilleyman* is a key case.

[133] The Defendants in their factum reference *Lilleyman* at paras. 67 to 77 to support their position that the Plaintiff must show some basis in fact that the proposed common issues exist and that the proposed issues can be answered in common across the entire class. The Defendants suggest that the Plaintiff misinterpreted *Microsoft* and that her interpretation was specifically rejected by the Ontario Court of Appeal in *Lilleyman.*

[134] The Defendants' factum referencing *Lilleyman* put the Plaintiff on notice that their position is that the Plaintiff must demonstrate some basis in fact to establish who the parties to the alleged conspiracy are, that those parties entered into an agreement, that they each committed acts in furtherance of that conspiracy, and that the conspiracy caused loss or harm.

[135] The Plaintiff suggests that the Defendants are setting the evidentiary standard too high, and the Plaintiff need only provide some basis in the evidence that an alleged conspiracy could or might have occurred. In support of that proposition, the Plaintiff references the Court of Appeal's observations in *Lilleyman* at para. 72*,* set out below:

> [72] The fact that a plaintiff on a certification motion must provide some basis in the evidence that an alleged conspiracy could or might have occurred is a minimal but necessary requirement. As a matter of logic and common sense, if there is no basis in fact to suppose that a conspiracy with attendant harm actually occurred, it necessarily follows that there is no basis to suppose that such a nonexistent conspiracy could have caused harm across members of the proposed class. Justice de Montigny made this point in *Jensen*, at para. 77: "I fail to see how it can seriously be argued that a judge could determine whether the claims of the class members raise common questions of fact or law without first deciding whether there is some basis in fact for the very existence of each common issue."

[136] It was a ground of appeal in *Lilleyman,* described in para. 67, that the motions judge "had erroneously applied a bifurcated "two-step" test in his analysis of the some-basis-in-fact criterion by requiring evidence both that: (i) the proposed common issues actually exist; and (ii) they can be answered in common across the entire class". This argument was dismissed by the Court of Appeal, and I am mindful of the Court's observations in doing so at paras. 73 and 74:

> [73] Whether the necessary analysis is described as involving one or two steps is beside the point. A key rationale and purpose of the certification process is to root out frivolous and unfounded claims. If a claim of conspiracy with no factual

> underpinning whatsoever could proceed as a class action merely by alleging that the purported conspiracy caused harm to a group of individuals, virtually any such conspiracy claim would have to be certified.
>
> [74] Requiring a plaintiff to satisfy this minimal evidentiary standard is entirely different from requiring proof of the claim, whether on a balance of probabilities or otherwise. The standard requires some basis in fact, not proof of fact. It does not involve weighing the merits of the claim or the resolution of conflicts in the evidence, but merely asks whether there is some minimal evidence in support of it. Certification of a claim that is unable to satisfy such a minimal evidentiary standard would undermine judicial economy, and in the process indirectly impair access to justice for other arguably meritorious claims.

[137] The Plaintiff submits that she has met the requisite evidentiary standard. The Plaintiff relies heavily on the court decisions in the U.S.

[138] The Plaintiff's position is that it is irrelevant that the U.S. litigation relates to domestic travel while her claim relates to transborder air travel. The Plaintiff says what is important is that both proceedings relate to the same product - airline travel.

[139] The Plaintiff's position is that the U.S. litigation provides some basis in fact that an alleged conspiracy over transborder air travel could or might have occurred. This evidence is detailed in para. 27 of the Plaintiff's reply factum, which I summarize as follows:

- The allegations in the 105 consolidated U.S. actions were that American Airlines, Inc., Delta Air Lines, Inc., Southwest Airlines Co. and United Airlines, Inc. fixed prices for domestic airline tickets by artificially suppressing capacity.

- The U.S. plaintiffs allege that other entities including Air Canada willingly conspired with these defendants to unlawfully restrain trade [the support for this statement is referenced as the Motion to Dismiss the plaintiffs' consolidated amended complaint, which I will discuss below]

- The plaintiffs in the U.S. litigation alleged that the defendants colluded to limit capacity on their respective airlines in a conspiracy to fix, raise, maintain and/or stabilize the prices for air passenger transportation services within the U.S.

- The defendants brought a motion to dismiss the plaintiffs' consolidated amended complaint. In responding to that motion ,the U.S. plaintiffs presented evidence regarding fares and referenced statements made by the executives of the defendants during earnings calls, industry summits, industry conferences and investment conference.

- The U.S. plaintiffs referenced a 2015 report of IATA relating to the consolidation of U.S. airlines in which it was noted that airlines "have been

very disciplined about capacity". Three of the four U.S. defendants participated in IATA.

- The U.S. plaintiffs also referred to statements by the executives of the U.S. defendants referencing the airline industry as a whole.

- There was a finding on the motion to dismiss by the U.S. court that there was at least "some evidence that supports the plaintiffs' claim that this trend [of price increases] was the result of the defendants' collusion to limit capacity growth".

- There have been 2 settlements in the U.S. - one with American Airlines, Inc. and the other with Southwest Airlines Co.

- Delta Air Lines, Inc. and United Airlines, Inc. brought a motion for summary judgment which required the U.S. plaintiffs to prove a "pattern of parallel behavior" as well as "the existence of one or more plus factors (defined as a factor that indicates the existence of a conspiracy by ruling out a legitimate non-collusive explanation for the parallel behavior, the factor suggests that an alleged conspirator's actions are inconsistent with independent pursuit of economic self-interest) that tend to exclude the possibility that the alleged conspirators acted independently."

- The U.S. plaintiffs were successful in opposing the summary judgment motion and the Memorandum Opinion of the U.S. District Court for the District of Columbia dated September 5th 2023 sets out numerous pieces of evidence which supported that court's finding. As the Plaintiff notes, the U.S. Court considered "a significant amount of evidence".

[140] The Plaintiff contends that the summaries of evidence and the conclusions in the U.S. litigation, as well as the fact that two settlements were made, provide a sufficient basis to show that the conspiracy alleged in the Statement of Claim could or might have occurred, and the Plaintiff has met the low burden required at this step of the certification test.

[141] The Plaintiff points out that in *Ticketmaster,* investigations by the media were found to be relevant and were relied on in a certification motion. I note, however, that in *Ticketmaster* the motions judge commented that what he described as a media investigation (an undercover investigation by two reporters who detailed questions posed and quoted answers received), as well as acknowledgements by Ticketmaster thereafter, were pleaded in detail in the statement of claim. The results of that investigation, and the detailed pleading, are much different from what the Plaintiff relies on here.

[142] The Plaintiff also suggests that the Ontario Court of Appeal in *Lilleyman* concluded that the U.S. market for tuna was entirely separate from the Canadian market which created the problem for the plaintiff's reliance in *Lilleyman* on the U.S. conspiracy for some basis in fact for the Canadian conspiracy.

[143] The Plaintiff submits that the markets here are not so distinct and the central allegation is that there was a conspiracy to lessen the supply of transborder services as described in para. 15 of the Statement of Claim.

[144] The Plaintiff acknowledges that the U.S. litigation relates to allegations that there was a conspiracy regarding domestic flights within the U.S., but the Plaintiff submits that there is a linkage between the U.S. domestic market and the Canadian market for transborder travel because airlines consider capacity across their entire fleet and entire systems.

[145] I cannot accept the Plaintiff's submissions on this point. The allegation, outlined in the summary judgment motion in the U.S. litigation, that the U.S. defendants "shifted capacity from domestic to international routes" in order to restrain capacity growth does not provide some basis in fact that the conspiracy alleged in the U.S. litigation is linked to the conspiracy alleged in this action.

[146] The same comment can be made in respect of the Plaintiff's reference to the further statement in the summary judgment motion that the U.S. plaintiffs alleged that there was a "data exchange" amongst the defendants that "enabled them to understand each other's capacity at a granular level". This statement in my view does not reveal some basis in fact to support the Plaintiff's allegation of data exchanges in this action.

[147] The Plaintiff contends that there is some basis in fact that capacity restriction allegations affect the entire fleet - domestic U.S. travel and transborder travel. The Plaintiff submits that the effect of capacity restrictions is not limited to one specific route referencing Mr. Garvett's affidavit at paras. 36 and 37.

> 36. Fleet composition planning is done with a view to the long term (e.g., twenty years) but is more refined with respect to the short and medium term (e.g., three to five years), with composition further broken down by year and month so the airline's network planners can allocate the fleet across the available routes over time.
>
> 37. Minor changes to an airline's fleet can be implemented in the short term by either changing the utilization (i.e., average hours flown per aircraft per day or other time period) of aircraft or by disposing of or grounding aircraft or acquiring one or more aircraft that might be available in the marketplace. However, an airline generally cannot materially scale its fleet up or down in quick response to changes in the market, such as fuel price or consumer demand. Generally, it takes years to acquire new aircraft from aircraft manufacturers or lessors.

[148] However, Mr. Garvett explained, as set out in para. 35 of his affidavit, that "an airline's capacity (i.e. how many ASMs [available seat miles] it flies in a year) is the product of many decisions made by an airline. It begins with decisions about the airline's fleet of aircraft". This statement related to the whole network of the airline.

[149] It is important to note also that Dr. West was clear in his report that "the product under consideration is airline passenger travel, direct or indirect, between Canada and the United

States" Dr. West explained that transborder air travel between Canada and the U.S. is governed by an 'open skies' agreement between Canada and the U.S. During the Class Period, while air carriers could serve transborder markets of their choice, their choices were subject to slot restrictions at a number of congested U.S. and Canadian airports.

[150] I am unable to find there is some basis in fact that a constraint in the U.S. domestic market impacts the market for transborder air travel between Canada and the U.S.

[151] The Defendants submit that there is no evidence of a conspiracy involving all four Defendants in which they constrained air travel between Canada and the U.S. between 2010 and 2015.

[152] The Defendants emphasize that the Plaintiff's pleading rests on the decisions of the U.S. court and there is no evidence to support a finding that the common issue criterion is met. The Defendants assert that because of the bereft record on this motion the review undertaken in *Jensen* cannot be undertaken here.

[153] Furthermore, the Defendants submit that the U.S. litigation is irrelevant. It involves different parties, a different geographic market, a different product, a different conspiracy and different (although overlapping) Class Periods. The Defendants emphasize that the claims in the U.S. litigation are framed as a domestic air travel class action.

[154] The Defendants note the observation of the Court of Appeal in *Lilleyman* at para. 30 that the fundamental problem was that the evidence relied upon by the plaintiff in *Lilleyman* had nothing to do with Canada and related to conduct that occurred only with respect to the U.S., which had an entirely separate market for tuna. The Defendants' position is that this comment is equally applicable here. The outline of evidence in the U.S. litigation concerns conduct that occurred only in relation to the U.S. domestic travel market and transborder air travel is an entirely different market.

[155] The Defendants submit that the U.S. litigation provides no basis to draw an inference of a conspiracy to reduce the capacity for transborder travel.

[156] Furthermore, there are no findings related to Air Canada in the U.S.

[157] As the Defendants note, the only reference to Air Canada in the materials from the U.S. litigation, filed on this motion, is one statement at para. 27 of the Memorandum of Opinion of the U.S. District Court dated October 28, 2016, denying a motion to dismiss the plaintiffs' consolidated amended complaint. This statement references the U.S. Complaint and I agree with the Defendants that it is unclear what that paragraph means or what has happened. It states only as follows:

> In addition, to the four named defendants, plaintiffs allege that U.S. Airways prior to its merger with American, Air Canada , and the International Air Transport Association ("IATA") willingly conspired with defendants to unlawfully restrain trade.

[158] The U.S. complaint has not been filed and I agree with the Defendants that the Plaintiff is essentially parroting an unsubstantiated allegation in relation to Air Canada.

[159] The Defendants also argue that, in any event, the decisions in the U.S. litigation are inadmissible as evidence of fact.

[160] The Plaintiff referenced s. 23 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5 and s. 38 of Ontario's *Evidence Act*, R.S.O. 1990, c. E.23, the latter of which is applicable here. That provision states that a judgment of any court of record in the U.S. "may be proved by the exemplification of the same under the seal of the court without any proof of the authenticity of the seal or other proof". This is the same process for proof of judgment from this Court.

[161] The judgments in the U.S. litigation, filed as exhibits to an affidavit, are not under seal, but that is not an issue for the Defendants who do not contest the authenticity of the documents.

[162] The reasons of the U.S. judges establish that a motion to dismiss (a pleadings motion) and a motion for summary judgment were denied. These documents cannot stand as the evidence to support a conclusion that there is some basis in fact that an alleged conspiracy could or might have occurred as alleged in the Plaintiff's Statement of Claim. On these procedural motions in the U.S. litigation, the U.S. courts did not make findings of fact. Rather, they recited evidence and assessed that evidence in accordance with the test applicable on the motion. The conclusion of the motion for summary judgment was that the plaintiffs had "presented enough evidence demonstrating a pattern of parallel behavior and the existence of one or more plus factors (that tend to exclude the possibility that defendants acted independently) to survive" the motion for summary judgment. There were no determinations made or conclusions reached with respect to the alleged conspiracy.

[163] These circumstances are different from those before the court in *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, [2011] 1 S.C.R. 657 ("*Malik")*. In *Malik,* the Supreme Court found at para. 8 that a judge considering an *Anton Piller* order "was entitled to have regard to" a prior judgment in a *Rowbotham* proceeding. The *Rowbotham* hearing resulted from Mr. Malik's motion. It was a contested hearing in which Mr. Malik and his family members gave evidence and examined witnesses.

[164] The Court in *Malik* stated at para. 7 that the judgment in a prior proceeding is admissible as evidence in a subsequent proceeding, "provided the parties are the same or were themselves participants in the prior proceedings on similar or related issues", noting that "the prejudiced party or parties will have an opportunity to lead evidence to contradict it or lessen its weight (unless precluded from doing so by the doctrine of *res judicata,* issue estoppel or abuse of process).

[165] It was critical to the Court's decision in *Malik* that both judicial proceedings involved the same or related parties, the proceedings involved the same or related issues and the court's "earlier decision was a judicial pronouncement after the contending parties had been heard" (para. 52). The Court was concerned about the inefficiency and potential mischief of duplicative findings. It is also worth noting that the applicable rule of procedure in British Columbia permitted the admission of hearsay evidence on an interlocutory application.

[166] The Plaintiff cannot resolve these distinctions by pointing out that the Defendants chose not to lead evidence on this motion and the Defendants will have an opportunity to "explain" the evidence in the U.S. litigation.

[167] It is also not enough for the Plaintiff to say that the decisions in the U.S. litigation show the kind of evidence that exists or might be available.

[168] Some basis in fact for the alleged conspiracy is key to all proposed liability common issues.

[169] I cannot conclude that there is some basis in fact to support a finding that the common issue criterion is met in relation to the proposed liability common issues.

The proposed loss-related common issues

[170] The Plaintiff describes common issues 2, 7, 8, 10 and 12 as loss-related common issues. These proposed common issues are as follows:

> 2. What damages, if any, are payable by the defendants, or any of them, to the Class Members pursuant to s. 36 of the *Competition Act*?
>
> 7. Have the defendants, or any of them, been unjustly enriched through their wrongful conduct? Have the Class Members suffered a corresponding deprivation? Is there a juristic reason why the defendants, or any of them, should be entitled to retain the unlawful revenues?
>
> 8. If the defendants, or any of them, have been unjustly enriched, are the Class Members entitled to restitution, an equitable accounting, disgorgement of unlawful revenue or other equitable relief?
>
> 9. Can damages or a restitutionary award for the Class be measured on an aggregate basis and, if so, what are the aggregate damages or amount of restitution for the Class?
>
> 10. Should the defendants, or any of them, be constituted as constructive trustees in favour of the Class Members for any damages?
>
> 11. Are the defendants, or any of them, liable to pay punitive or exemplary damages having regard to the nature of their conduct and, if so, in what amount? And
>
> 12. Should the full costs of investigation in connection with this matter, including the cost of the proceeding or part thereof, be fixed or assessed on a global basis pursuant to s. 36 of the *Competition Act* and if so, in what amount?

[171] The Plaintiff's position is that she has met the standard required for this Court to certify these loss-related questions as common issues in this proposed class action.

[172] Counsel agree that the required standard was described in *Microsoft* at para. 118:

> [118] In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.

[173] What is meant by loss on a class-wide basis was clarified in *Godfrey* at para. 107:

> [107] While there may be some room for debate arising from the references to "class-wide basis" in the above passages, in my view, the Court was employing the term "class-wide basis" synonymously with "indirect-purchaser level". *Microsoft*, therefore, directs that, for a court to certify loss-related questions as common issues in a price-fixing class proceeding, it must be satisfied that the plaintiff has shown a plausible methodology to establish that loss reached one or more purchasers — that is, claimants at the "purchaser *level*". For indirect purchasers, this would involve demonstrating that the direct purchasers passed on the overcharge.

[174] In this case, the Class Members are defined as direct purchasers.

[175] The Plaintiff notes that Dr. West is deeply engaged in thinking about airline economies and his evidence should be preferred over that of Dr. Levinsohn, who, it is acknowledged, is a capable economist but he has not had exposure to the Canadian airline market or the airline industry in general. However, the Defendants have also provided the affidavit of Mr. Garvett, who has extensive experience in the airline industry. In any event, as the Plaintiff points out, certification is not the time to resolve battles of the experts (see *Microsoft*, at para. 102). I note parenthetically that Dr. West and the Plaintiff criticize Dr. Levinsohn for developing his opinion based on a Class Period extending to 2017 despite being aware that Dr. West's opinion was based on a Class Period ending in 2015. That is an unfair criticism in these circumstances where the definition of the Class was amended during the hearing of this motion as I earlier described.

[176] In any event, the Plaintiff submits that the evidence provided by Dr. West in his two reports meets the *Microsoft* standard, noting that this case is simpler than an indirect purchaser case.

[177] As Dr. West explained, while the basis product he considered is airline passenger travel, direct or indirect, between Canada and the U.S. there may be different product markets: for example, different classes of service (business or leisure); nonstop and one stop or connecting passenger travel.

[178] Dr. West discussed other characteristics of transborder travel between Canada and the U.S. and concluded at para. 60 of his report appended to his initial affidavit:

> 60. Based on considerations of market definition, market shares, concentration, and entry barriers, it is my preliminary opinion that the Defendant carriers had the ability to exploit market power on transborder routes where they had a combined market share greater than 35%. Assuming the allegations in the Statement of Claim are correct, it is my preliminary opinion that it is likely that the Defendants' conspiracy during the Class Period would have increased the price of passenger services on those transborder routes where there are multiple Defendant carriers with a combined market share greater than 35%, and a four-firm concentration ratio around 65% or higher.53 The price of passenger service on other transborder routes might have risen as well depending on the breadth of the conspiracy. The method for assessing the amount of the overcharge needs to be examined further. Methods are available for this purpose that can be applied at a later date, once the required data are made available to me.

[179] Dr. West opined as follows in paras. 64, 66 and 67 of the same report:

> 64. A determination of the amount of injury suffered by Class members can be achieved through the estimation of the total fares that the Class members would have paid "but for," or in the absence of, the alleged misconduct, during the period of time in which the conspiracy was in effect. The difference between the observed prices, and those that would have obtained but for the conspiracy will be referred to as the overcharge. Once this overcharge is estimated, it can be combined with information on the volumes purchased by the Class to arrive at an estimate of the total injury to the Class. This will underestimate the amount of injury to Class members given that it does not estimate the magnitude of injury suffered because the higher prices caused Class members to reduce their purchases of airline tickets. One method that can be employed for the estimation of any overcharge resulting from the conspiracy on Class members is an analysis of the total fares before and after the start of the conspiracy. Such comparisons are a common method of estimating overcharges in price-fixing cases.
>
> …
>
> 66. In my opinion, a statistical analysis, based on the methods of multiple regression, that compares fares before and after the conspiracy is alleged to have started in city pair markets expected to be affected by the conspiracy, and that takes changes to other demand and cost factors into account, can be carried out to estimate the overcharge, subject to data availability.
>
> 67. Prices before and during the Class Period may have differed for reasons other than the conspiracy. This could be true for both cost and demand reasons. From the cost side, airline fuel costs and other variable costs would have changed over time. From a demand perspective, demand would be expected to vary over time because of exchange rate changes, general trends, and the impact of the Great Recession, among other factors. I am confident that data will be available, from either public sources or from the Defendants, which will allow the statistical analysis to be carried out.

[180] The Plaintiff contends that the methodology described by Dr. West has been accepted as "mainstream" in price fixing class actions (see *Godfrey*, at para. 97).

[181] The Plaintiff also takes the position that the Defendants have the necessary data to implement Dr. West's proposed methodology. Dr. West expressed confidence that the required data will be available from public sources or the Defendants. The Plaintiff also points out that Mr. Garvett acknowledged that there are vast amounts of data utilized in the airline industry to generate ticket prices.

[182] Dr. Levinsohn observed that he and Dr. West agree that defining the boundaries of airline markets requires market-by-market analyses.

[183] However, a point of disagreement between the two experts is whether a necessary condition for injury is that a constraint on supply caused a price increase.

[184] Dr. Levinsohn emphasized that both a reduction in market supply and an increase in price, as a result of the reduction in supply, are necessary for a class member to have been injured by the Defendants' alleged conduct.

[185] Dr. Levinsohn outlined in his report the necessary conditions for injury at paras. 19 – 21 and 24:

> 19. From an economic perspective, the question of injury in this matter is whether the alleged conspiracy caused any proposed class member to pay more for airline tickets. The increase in price the proposed class member is alleged to have paid is called an overcharge.
>
> 20. Two conditions would be necessary for the defendants' alleged conduct to have caused a proposed class member to pay an overcharge.
>
> 21. The first necessary condition is that the defendants' alleged conduct actually resulted in a reduction in supply to a market in which the proposed class member was traveling.
>
> 24. The second necessary condition for demonstrating injury from an economic perspective at trial is that a reduction in supply to a market caused the proposed class member to pay more for her ticket.

[186] Dr. Levinsohn found that the total number of available seat miles offered by the Defendants for transborder air travel increased in the aggregate during the Class Period and also increased on most individual transborder segments.

[187] However, in Dr. West's opinion, this metric is irrelevant in terms of evaluating the alleged conduct as it does not reference competition in specific markets. It is Dr. West's opinion that a reduction in supply is not a necessary condition for injury. According to Dr. West,

the issue is what would the market look like but for the conspiracy. As he stated at para. 8 and 10 of his reply report:

> The alleged conduct could have maintained capacity in markets that would otherwise, in the absence of the conspiracy, have had an increase in capacity due to higher demand. Throughout his report, Dr. Levinsohn refers to the alleged conduct having to result in a reduction in supply (see, for example, paragraph 23). This is not required for the conspiracy to be effective and to result in an increase in price above that which would have been charged in the market "but for" the existence of the conspiracy. Dr. Levinsohn does not acknowledge that in growing markets, a conspiracy can result in an increase in price with no observed reduction in supply.
>
> As the reduction in supply is not a necessary condition for demonstrating injury (given that maintaining supply in the face of increased demand can result in an increase in price), an increase in price due to a reduction in supply is also not a necessary condition for demonstrating injury. Injury will be demonstrated if one can show that price is higher than it would have been absent the conspiracy.

[188] Dr. Levinsohn highlights that the breadth of the proposed class requires the analysis of more than 1000 potentially relevant markets with different competitive conditions. In his opinion, Dr. West has not adequately addressed the many market-specific factors that must be considered to determine whether the Defendants' alleged conduct would have injured any class member in any individual market and he has relied on market share and concentration ratio guidelines utilized by competition authorities when screening proposed mergers. Dr. Levinsohn is also of the view that Dr. West's regression analysis will fail to isolate whether a price increase was caused by the Defendants' alleged conduct or whether it resulted from other market factors, notably what Dr. West and Dr. Levinsohn refer to as "the Great Recession" in 2008 to 2009.

[189] In his reply report, Dr. West also submits that Dr. Levinsohn misstated Dr. West's words in Dr. Levinsohn's critique of Dr. West's opinion. Dr. West submits that he stands by his opinion.

[190] The Defendants indicate that the thrust of their submissions is not to prefer Dr. Levinsohn's evidence to that of Dr. West's. Rather, the thrust of their submission is that Dr. West's evidence does not meet the *Microsoft* test.

[191] The Defendants submit that the requirement of a market-by-market approach, which both experts agree on, distinguishes this case from other certified price fixing cases and renders the methodology proposed by Dr. West insufficiently credible or plausible. The Defendants assert that Dr. West's methodology cannot apply on a class-wide basis.

[192] The Defendants submit that the concerns expressed by Branch J. in *Kett v. Mitsubishi Materials Corporation*, 2020 BCSC 1879, at para. 159 apply here:

> [159] A credible and plausible methodology must be capable of proving "common impact" that is "common to all the members of the class": *Pro-Sys* at

> para. 115. The methodology cannot be purely theoretical or hypothetical but must be grounded in the facts of the particular case in question: *Pro-Sys*, para. 118. Here, the facts are such that any analysis would have to be, at best, conducted on a shipment-by-shipment basis. Dr. Allen never truly wrestles with the implication of this reality, i.e. that the analysis for one shipment cannot be extrapolated to members of the class whose vehicles contain parts from other shipments.

[193] On the other hand, the Plaintiff contends that the Defendants' position requires a level of detail that is excessive, particularly when there has been no discovery and Dr. West has been unable to access data in the Defendants' possession. The Plaintiff also points out that several cases have been certified in which the class periods overlap with the Great Recession, such as *Shah*, *Mancinelli* and *Loblaw.*

[194] On his cross examination, Dr. West acknowledged that his proposed methodology would not account for several classes of purchasers (for example individuals who acquired their tickets using Air Miles or frequent flyer points or individuals who use flight passes or pre-paid credits).

[195] Dr. West was also cross examined on the statement in his opinion at para. 67 that demand would be expected to vary over time because of general trends, which would have to be taken into account. Dr. West indicated that he was thinking about factors which would be affecting markets more broadly so a general trend would be an economic trend. He agreed that changes or differences in the level of tourism activity, GDP growth, and unemployment rates could be a general trend. He also acknowledged that he had not yet done an analysis to know if inflation rate and consumer confidence need to be controlled for. Dr. West further acknowledged that it was fair to say he had not actually identified the specific general trends that are relevant to the methodology he proposed; it was possible some general trends may affect American and Canadian markets differently and it was conceivable that you would need different data sets for each of these economic variables for Canada and the United States. Ultimately, Dr. West stated that he had not determined what he needs to control for or how he is going to do it.

[196] The evidence from Dr. West and Dr. Levinsohn establishes, not surprisingly, that there is not one single market for air travel between Canada and the U.S. It is also clear that the number of markets to be analysed is large –Dr. Levinsohn estimates more than 1000, while Dr. West on cross examination did not know how many routes he would be applying his analysis to.

[197] My concern with respect to Dr. West's proposed methodology is that it does not address the complexities he will encounter in undertaking his analyses, as he acknowledged on his cross examination. Ultimately, I have to agree with the Defendants, as they stated at para. 106 of their factum, "the proposed methodology does not and cannot overcome the unique challenges posed by the complex and multi-faceted nature of defining and accounting for the thousands of separate markets for transborder air travel". I also agree with the Defendants at para. 111 that the fact that Dr. West has not proposed "a methodology that can account for and isolate non-conspiratorial explanatory variables such as macroeconomic conditions renders his analysis purely hypothetical".

[198] The Plaintiff also proposes a common issue relating to aggregate damages as follows:

> 9. Can damages or a restitutionary award for the Class be measured on an aggregate basis and, if so, what are the aggregate damages or amount of restitution for the Class?

[199] Section 24 of the *Class Proceedings Act* sets out the criteria for an award of aggregate damages as follows:

> 24 (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. 1992, c. 6, s. 24 (1).

[200] The Plaintiff's position is that the first two statutory criteria are met here. I would agree with the Plaintiff's position if I had made the findings requested by the Plaintiff in relation to the proposed liability common issues.

[201] With respect to the third statutory criteria for an award of aggregate damages, the Plaintiff relies on Dr. West's opinion in para 9(iii) of his affidavit, as follows:

> iii. I have determined that a common method can be used to calculate injury suffered by proposed class members based on common evidence, without individual inquiry.
>
> a. A determination of the amount of injury associated with higher fares suffered by Class members on the routes that I have identified can be achieved through the estimation of the total fares that the Class members would have paid "but for", or in the absence of, the alleged misconduct, during the period of time in which the conspiracy was in effect (the Class Period). The difference between the observed price, and the price that would have obtained but for the conspiracy will be referred to as the overcharge.
>
> b. Once an overcharge is estimated, it can be combined with information on the volumes purchased by Class members to arrive at an estimate of the total injury to the Class.

> c. One method that can be employed for the estimation of the injury suffered by Class members is an analysis of the total fares before and after the start of the conspiracy.
>
> d. A statistical analysis based on the methods of multiple regression, that compares the changes in fares before and after the conspiracy is alleged to have started, in markets expected to be affected by the conspiracy, and that takes changes to other demand and cost factors into account, can be carried out to estimate any overcharge resulting from the conspiracy.
>
> e. My experience is that the data required to implement a statistical analysis should be in the possession of the Defendant carriers.
>
> f. The effects of the conspiracy might also be identified by comparing the change in fares over time in city pair markets where the Defendants jointly have a large market share to change in fares in markets where the conspiracy is expected to have less effect. The analysis can also be extended to include routes not in the Class definition, such as domestic routes, as comparison markets, once the data are made available for these routes.

[202] My concerns with respect to Dr. West's proposed methodology, as outlined above, apply equally to this proposed common issue.

[203] In addition, the Plaintiff proposes a common issue relating to punitive or exemplary damages as follows:

> 11. Are the defendants, or any of them, liable to pay punitive or exemplary damages having regard to the nature of their conduct and, if so, in what amount?

[204] In relation to this issue, I need only state that I agree with the Defendants that there is no basis in fact for the Plaintiff's claim for punitive or exemplary damages.

[205] The common issue criterion is not met in relation to the proposed loss-related common issues.

Issue 5 – is a class proceeding the preferable procedure to resolve the common issues? – the s.5(1)(d) requirement

[206] Having found that there is no basis in fact for the proposed common issues, I conclude that there is no basis in fact to conclude that a class proceeding would be the preferable procedure for the resolution of the common issues.

[207] The Plaintiff fairly acknowledges that if the Court did not certify common issues relating to both conspiracy and injury, the Defendants are correct that a common issues trial will not advance the litigation.

[208] The s.5(1)(d) requirement is therefore not met.

Issue 6 – is there an adequate representative plaintiff? – the s. 5(1)(e) requirement

[209] There is no issue with respect to the Plaintiff's proposed litigation plan and no suggestion that she is incapable of appropriately prosecuting the interests of the Class. There is no suggestion that she has a conflict of interest with other class members.

[210] However, what is in issue is whether she falls within the definition of the Class.

[211] As explained in her affidavit sworn November 17, 2017 in support of this motion, the Plaintiff acquired a ticket to travel from London, ON to Toronto ON, to Philadelphia, U.S., departing on March 9, 2015 and returning from Philadelphia to London via Toronto on March 15, 2015.

[212] The Plaintiff did not purchase her ticket directly from one of the Defendants. She acquired her ticket using Air Miles. Specifically, she utilized 1800 Air Miles and paid $151.63 in taxes and fees. She deposed in para. 4 of her affidavit that she had been "advised by Air Miles that one of my Air Miles is the equivalent of $0.30".

[213] Through the affidavit of Plaintiff's Counsel's law clerk, the terms and conditions from the Air Miles web page as at March 2015 were produced after the clerk undertook an archival internet search.

[214] The Defendants submit that the Plaintiff has not "purchased" a ticket as described in the definition of the class and therefore she is not a class member and does not satisfy the requirements enunciated in *Stone v. Wellington (County) Board of Education*, 1999 CanLII 1886 (ON CA), at para. 10, that a "representative plaintiff be anchored in the proceeding, not simply a nominee with no stake in the potential outcome".

[215] Further, the Defendants submit that Dr. West has not provided a methodology to calculate the harm sustained by someone such as the Plaintiff, who indirectly acquired her ticket.

[216] At Questions 774 and 775 of his cross examination Dr. West indicated as follows:

> Q. All right. And this method wouldn't account for individuals who purchased or acquired their tickets using Air Miles or frequent-flyer points; is that right?
>
> A. Well, we don't have fare – well, at least I'm not sure exactly how they keep track of those in the date. Let me put it that way.
>
> Q. All right. You haven't addressed anywhere in your report how you'd deal with that issue.
>
> A. No.

[217] The Plaintiff counters the Defendants' argument by submitting, as set out in para. 49 of her reply factum that:

> Contrary to the defendants' incorrect assumptions, if an individual purchasers redeems their Air Miles points to purchase airfare, the resulting contract is between the individual purchaser and the airline directly. Air Miles' General Booking Terms and Conditions states that "if you purchase a flight through our website, we are acting as an agent for the Travel Provider and your contract for the flight is between you and the relevant Travel Provider."

[218] The Defendants observe that the document relied on by the Plaintiff only establishes a current agency relationship. They say that the Plaintiff has belatedly "coopered up" her status by asserting that the current terms and conditions applied to her purchase in 2015. They take the position that the materials attached to the law clerk's affidavit obtained through an archiving website are not admissible evidence and even if they are, there is not sufficient probative evidence to establish the nature of the Plaintiff's contractual relationship with Air Canada. The Defendants note also that the cost or price of the Plaintiff's ticket relies on hearsay evidence. These observations of the Defendants are correct.

[219] Had my earlier conclusions been favourable to the Plaintiff I might have considered the various solutions suggested by the Plaintiff – an adjournment of this motion for further evidence from the Plaintiff, an amendment to the definition of the Class to clarify that those who used loyalty points to buy tickets are members of the Class, or an adjournment to allow another representative plaintiff to be identified (see *Sondhi v. Deloitte,* 2017 ONSC 2122). However, considering my earlier conclusions, I am inclined to agree with the Defendants that such solutions are "out of time".

[220] I disagree with the additional approach suggested by the Plaintiff that the issues raised in relation to this certification criteria can be addressed post certification. I would not be inclined to certify the Class on the basis that a group can be decertified once the relationship between the Defendants and Air Miles is determined after discovery.

[221] On this record, I have to conclude that the s.5(1)(e) requirement is not met.

Conclusions

[222] For the foregoing reasons, the Plaintiff's motion is dismissed.

[223] Although the materials filed by the Plaintiff and the Defendants indicate that they will seek costs, as previously indicated, it was agreed that this action would be conducted on a "no costs" basis and no party would seek costs from another party in respect of this action.

L.C. Leitch J.

Released: June 4, 2025

CITATION: Gifford v. Air Canada, 2025 ONSC 3335
COURT FILE NO.: CV-15-2120
DATE: 20250604

ONTARIO

SUPERIOR COURT OF JUSTICE

JENNIFER GIFFORD

Plaintiff

-and-

AIR CANADA, DELTA AIR LINES, INC., AMERICAN AIRLINES, INC., and UNITED AIRLINES, INC.

Defendants

REASONS FOR JUDGMENT

L.C. Leitch, J.

Released: June 4, 2025