IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gomel v. Live Nation Entertainment, Inc.,* 2021 BCSC 699

Date: 20210415
Docket: S1811318
Registry: Vancouver

Between:

David Gomel

Plaintiff

And

Live Nation Entertainment, Inc., Live Nation Worldwide, Inc. Ticketmaster LLC, Ticketmaster Canada Holdings ULC, and Ticketmaster Canada LP

Defendants

Before: The Honourable Mr. Justice Tammen

Reasons for Judgment – Certification Hearing

Counsel for the Plaintiff:	D. Jones J. Fung M. Hogan
Counsel for the Defendants:	C. Richter J. Gotowiec A. Oake
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Place and Date of Hearing:	Vancouver, B.C. November 16-20, 2020
Place and Date of Judgment:	Vancouver, B.C. April 15, 2021

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Introduction and Overview

[1] In July, 2018, at a convention in Las Vegas, Nevada, reporters for the Toronto Star and CBC ("Star/CBC") went undercover, posing as professional ticket resellers, and attended a closed door session hosted by the secondary sales division of the defendant Ticketmaster. At that session, several representatives of Ticketmaster, in an effort to secure business for their secondary ticket sales platform, espoused the benefits of their inventory software, Tradedesk. Those representatives also assured the undercover reporters that the secondary sales division of Ticketmaster did not share information about resellers' accounts with the primary sales division. In particular, Ticketmaster employees were reported to have said that they were unconcerned with breaches of the Terms of Use that applied to the primary market, prohibiting use of ticket "bots" and creation of multiple accounts. Ticketmaster staff acknowledged that no professional reseller could make a living with only one primary market account, given the normal ticket limit of six or eight tickets per event.

[2] In September, 2018, both the Star and CBC published articles detailing the undercover operation, along with commentary from various industry observers. One of those, a business school professor, described Ticketmaster's alleged behaviour as "misleading" and "unethical." He was also quoted as saying: "Helping to create a secondary market where purchasers are duped into paying higher prices, and securing themselves a second commission, should be illegal." The class action bar of Canada obviously agreed. The Star/CBC expose led directly to the commencement of five actions in four Canadian provinces in the fall of 2018.

[3] There is no consensus among the bar concerning cause of action, nor theory of damages.

[4] In Saskatchewan, the action was "piggy-backed" onto a previously filed claim related to hidden service charges, or "drip pricing." The amended claim, adding the secondary sales market complaint, is based on civil conspiracy. There is no proposed representative plaintiff who purchased tickets in the secondary market. The theory of damages is based on the general inflationary effect of the

conspiratorial acts and the use of Tradedesk in the secondary market. A certification motion was heard in November, 2020, with judgment reserved.

[5] The same law firm filed an identical action in Quebec, which has been stayed in favour of the Saskatchewan action.

[6] In Ontario, two actions were filed, which have since been joined under one style of cause. The proposed representative plaintiffs purchased tickets from Ticketmaster's secondary sales platform, and paid prices in excess of face price. Those claims are based on breach of contract. The damages theory seems to be hinged to the "double-dip" commissions charged by Ticketmaster when it permits the same ticket to be sold in both primary and secondary markets on its website. It appears that the claim will also be based in part on the general inflationary effect occasioned by use of ticket "bots" in the primary market. The certification motion was scheduled for early December, 2020, but has since been adjourned.

[7] The present action, in British Columbia, is premised on misrepresentation, specifically a series of individual misrepresentations contained in Ticketmaster's Terms of Use for purchasers in the primary market, said to collectively amount to a general misrepresentation that all users will be afforded a fair opportunity to purchase tickets in the primary market for face price. The proposed representative plaintiff purchased tickets for a concert on Stubhub, a competitor of Ticketmaster in the secondary market. The theory of damages is that all purchasers should have been able to obtain tickets at face price, so damages for each are calculated by simply determining the difference between what they paid on the secondary market and face price. An alternative proposed theory is that the representations (presumably in conjunction with use of ticket bots in the primary market) cause a general inflationary effect in the secondary market. The proposed class includes all those who purchased tickets on the secondary market from any secondary seller, where the tickets were originally sold by the defendant Ticketmaster. The proposed class period is from January, 2010 to date of certification.

[8] All the actions also plead contraventions of the *Competition Act*, R.S.C., 1985, c. C-34 [*Competition Act*] and each relies on provincial consumer protection legislation. Importantly, the B.C. action makes claims pursuant to the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*], a provincial statute aimed at offering consumers in this province robust protection against unconscionable or misleading business practices. The B.C. action also pleads the common law tort of negligent misrepresentation and the claim in equity of unjust enrichment.

[9] For the reasons I will hereafter set out, I am persuaded that certification of this action is appropriate in respect of claims made pursuant to the *BPCPA*.

[10] I decline to certify the claim made under the *Competition Act*. Likewise, I decline to certify the claims of negligent misrepresentation and unjust enrichment. In my view, all claims apart from those under the *BPCPA* are doomed to fail because the pleadings do not disclose a cause of action.

The Facts

The Parties

The Plaintiff

[11] Mr. Gomel is a lawyer, practising in Vancouver. He is the sole representative plaintiff proposed in this action.

The Defendants

[12] The Defendants are five corporate entities which are involved in the entertainment business, specifically the promotion of music and sporting events at many venues, large and small, throughout North America, and the sale of tickets for those events.

[13] In early 2010, Live Nation, an extremely successful event promotion company, said to be the world's largest, merged with Ticketmaster, almost certainly the largest ticket sales agent in North America. Although corporate stock is now

traded under the Live Nation banner and name, and Ticketmaster Canada is a wholly owned subsidiary of Live Nation Entertainment Inc., I will refer to the Defendants in this judgment as “Ticketmaster” for shorthand purposes.

[14] Ticketmaster Canada acts as a sales agent for its clients, described as “venues, sport teams, artists, promoters and others”, who offer for sale to the public tickets to live events in Canada.

[15] Ticketmaster does not own the tickets, but merely acts as an intermediary for the sale of the tickets. For that service, Ticketmaster receives a transaction fee, which is added to the face price of the ticket.

[16] Ticketmaster operates in both the primary and secondary ticket sales markets.

Ticket Sales Markets

The Primary Market

[17] The primary ticket sales market refers to the initial sale of a ticket for a given event. The owner of the ticket, often the sports franchise or performing artist, sets the price for all such tickets. The majority of Ticketmaster’s clients in the primary market are venues, with whom Ticketmaster negotiates agreements to act as sole ticket agent for all events held at the venue. The client sets all sales criteria, including size of ticket inventory, individual pricing and limits on number of tickets permitted to be purchased by an individual.

[18] Ticketmaster sets the transaction fee per ticket, which is paid by the purchaser.

The Secondary Market

[19] The secondary ticket sales market refers to the resale of tickets for events, often at a price that differs from the face price. The resale price is set by the owner of the ticket. Ticket owners will thus be a disparate group, including fans who can no longer attend an event, season ticket holders of sports teams who do not attend

every game, and professional ticket resellers, pejoratively referred to as “scalpers.” Those are individuals who seek to either support themselves or supplement their incomes by acquiring large numbers of tickets for events at face price, then reselling them at a profit.

[20] For many years, there has been a large secondary market for event tickets in Canada. Two of the largest websites devoted to this market are Stubhub and Vivid Seats, both of whom Ticketmaster describes as competitors.

[21] Ticketmaster has been directly participating in the secondary market since 2015. Since then, Ticketmaster has developed what it calls an integrated market for tickets, where tickets are sold on its website by both initial owners and resellers. Ticketmaster only provides resale tickets to events for which it is the primary market ticketing agent. For many, but not all, of those tickets, Ticketmaster will receive three separate transaction fees: the initial purchase fee, a “seller fee” calculated based on resale price, and a “buyer fee”, also calculated as a percentage of the resale price set by the reseller.

[22] Ticketmaster may also earn fees from ticket brokers selling tickets on other secondary market platforms, if the broker opts to use Ticketmaster’s automated tools for transferring the ticket.

[23] Since 2015, sales by professional resellers have accounted for 37 percent of the annual gross transaction value of Ticketmaster’s resale figures.

Tradedesk and Tradedesk POS

[24] Both Tradedesk and Tradedesk POS are proprietary software programs that provide tools to resellers on Ticketmaster’s site. Neither has any application to the acquisition of tickets on the primary market.

[25] The primary use of Tradedesk is as an inventory management tool for those wishing to resell large numbers of tickets on Ticketmaster’s website. Using

Tradedesk, a professional reseller can simultaneously validate multiple tickets and have new barcodes issued for them, a requirement for resale on Ticketmaster's site.

[26] Tradedesk also permits a ticket reseller to hold tickets acquired from multiple sources in a single account, and to offer them for resale on Ticketmaster's website.

[27] Tradedesk POS is a web-based point of sales system designed to support the business operations of professional resellers. According to Ticketmaster, it has an insignificant user base, and ticket sales in B.C. using Tradedesk POS numbered fewer than 1,000 in 2019.

[28] Tradedesk POS is the program that permits professional reseller to synchronize inventory and offer tickets for resale on multiple sites, as reported by the Toronto Star in 2018. Tradedesk POS has been available since May 2017.

Ticket Bots

[29] Ticket "bots" are computer programs that automate the process of online ticket buying. Ticketmaster's primary affidavit filed in these proceedings acknowledges that ticket bots "allow some professional resellers to rapidly search for, hold, and purchase multiple primary tickets faster than any human, to the detriment of fans."

[30] Ticketmaster says that it has been combatting bots on multiple fronts for many years, and continues to do so.

[31] Ticketmaster's Terms of Use for its primary sales site require that the purchaser agrees not to use automated software to search for, reserve and purchase tickets. The Terms of Use preserve Ticketmaster's right to investigate any breach by a user, and to take action, including cancellation of a user account.

[32] There is no evidence of any such action being undertaken by Ticketmaster, nor any evidence of any concerted effort anywhere in Canada by Ticketmaster to actively combat the use of ticket bots.

The Representative Plaintiff's Claim

[33] Mr. Gomel purchased two tickets for a Bruno Mars concert at Rogers Arena for $437.86 USD. The date of the concert was July 26, 2017.

[34] Mr. Gomel made his purchase on Stubhub on November 18, 2016.

[35] Mr. Gomel does not know the face price of the tickets, but believes it was less than what he paid. He did not attend the concert, but rather gifted the tickets to staff at his office.

[36] The foregoing is the sum total of the plaintiff's evidence concerning this transaction. Of note, Mr. Gomel does not state why he chose to purchase on Stubhub or if he attempted to secure tickets through the primary sales market. Appended to a different affidavit filed by a paralegal from plaintiff's counsel's firm is a page from the Rogers Arena website advertising the Bruno Mars concerts in July, 2017. The plaintiff relies on the advertisement as evidence that the show was produced by Live Nation, and thus an inference can be drawn that Ticketmaster was the original agent for primary ticket sales. Perhaps of some note, if that advertisement is factually correct, ticket sales to the general public did not commence until November 21, 2016. Early access to tickets was apparently to be afforded to fans who pre-ordered the forthcoming Bruno Mars album, slated for release on November 18, 2016, the date of Mr. Gomel's purchase.

[37] It thus appears that Mr. Gomel was able to purchase tickets from a reseller on Stubhub prior to tickets going on sale through Ticketmaster's primary ticket site.

The Nature and Purpose of Class Proceedings

[38] In *Western Canada Shopping Centres Inc. v. Dutton*, 2001 SCC 46, at paras. 27–29, Chief Justice McLachlin set out the three overarching advantages to class actions versus a "multiplicity of individual suits":

1. Judicial economy — by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis.
2. Access to justice — by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own.
3. Behaviour modification — class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public

(Also see *Hollick v. Metropolitan Toronto (Municipality),* 2001 SCC 68 at para. 15).

[39] Class proceedings, particularly brought pursuant to statutes such as the federal *Competition Act* or provincial consumer protection legislation, have often been effective in holding large corporate bodies accountable for widespread wrongs or unfair business practices.

[40] However, as cases such as this demonstrate, the availability of class actions can lead to a multiplicity of complex proceedings, as lawyers in different parts of the country attempt to categorize in legal terms what civil wrong has been committed by the defendant corporation and then, after identifying a representative plaintiff, seek to cast the liability net as widely as possible.

The Test For Certification

[41] Section 4(1) of the *Class Proceedings Act,* R.S.B.C. 1996, c.50 [*CPA*] contains the five requirements for certification:

> **4** (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;

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

[42] The certification requirements are to be interpreted generously, keeping in mind the three advantages of class action legislation, namely, judicial economy, access to justice and behaviour modification: *Hollick* at paras. 15–16.

[43] The certification stage is not meant to be a test of the merits of the action, rather, it is concerned with form and with whether the action can properly proceed as a class action: *Hollick* at para. 16; *Pro-Sys Consultants Ltd. v*. *Microsoft*, 2013 SCC 57 at para. 99.

[44] Subsection 4(1)(a) is assessed on the same standard as on a motion to strike pleadings under Rule 9-5(1)(a). The plaintiff satisfies this requirement unless it is plain and obvious that the plaintiff's claim cannot succeed: *Hollick* at para. 25, *Microsoft* at para. 63. For this analysis, the Court must assume that all the pleaded facts are true unless they are patently unreasonable or incapable of proof: *Watson v. Bank of America Corp.,* 2014 BCSC 532. A claim must not be struck merely because it is novel or complex: *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959 at 980.

[45] Subsections 4(1)(b)–(e) require the plaintiff to show “some basis in fact” for each requirement: *Hollick* at para. 25. The "some basis in fact" standard does not require that the court resolve conflicting facts and evidence; at certification, the court

is ill-equipped to resolve conflicts in the evidence or assess evidentiary weight: *Microsoft* at para. 102.

Certification of *BPCPA* Claims

[46] The *BPCPA* is, as noted, provincial consumer protection legislation. Because it is a statute whose purpose is "all about consumer protection…its terms should be interpreted generously in favour of consumers": *Seidel v. Telus Communications Inc*., 2011 SCC 15 at para. 37.

[47] In *Koubi v. Mazda Canada Inc*., 2012 BCCA 310, the Court of Appeal held that in enacting the *BPCPA*, the legislature intended to create "an exhaustive code regulating consumer transactions, directed to both protection of consumers and fairness and consistency for all parties in the consumer marketplace" (para. 63).

[48] With those overarching considerations in mind, I turn to the criteria for certification.

Do the pleadings disclose a cause of action?

[49] For ease of reference, I reproduce below the portion of the plaintiffs' written submissions that addresses the *BPCPA* claim, paras. 74–84.

> ***Contravention of the BPCPA***
>
> 74. S. 1 of the *BPCPA* contains the following definitions:
>
> > . . .
> >
> > **"consumer"** means an individual, whether in British Columbia or not, who participates in a consumer transaction, but does not include a guarantor;
> >
> > . . .
> >
> > **"consumer transaction"** means
> >
> > > (a) a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household, or
> > >
> > > (b) a solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to in paragraph (a), and, except in Parts 4 and 5, includes a solicitation of a consumer by a supplier for a

> contribution of money or other property by the consumer;
>
> . . .
>
> **"supplier"** means a person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by
>
> (a) supplying goods or services or real property to a consumer, or
>
> (b) soliciting, offering, advertising or promoting with respect to a transaction referred to in paragraph
>
> of the definition of "consumer transaction", whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of that person and, except in Parts 3 to 5 *[Rights of Assignees and Guarantors Respecting Consumer Credit; Consumer Contracts; Disclosure of the Cost of Consumer Credit]*, includes a person who solicits a consumer for a contribution of money or other property by the consumer;

75. Ticketmaster is a supplier of under the *BPCPA*. The class members are consumers under the *BPCPA*.

76. S. 4(1) of the *BPCPA* provides that a “deceptive act or practice” includes a representation that has the capability, tendency, or effect of deceiving or misleading a consumer. A “representation” includes any term or form of a contract, notice, or other document used or relied on by a supplier in connection with a consumer transaction.

77. S. 4(3) of the *BPCPA* provides as follows:

> 4(3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:
>
> (a) a representation by a supplier that goods or services
>
> . .
>
> (iv) are available for a reason that differs from the fact,
>
> (v) are available if they are not available as represented,
>
> (vi) were available in accordance with a previous representation if they were not,
>
> (vii) are available in quantities greater than is the fact, or
>
> (viii) will be supplied within a stated period if the supplier knows or ought to know that they will not;

78. Each of these subparagraphs of s. 4 *BPCPA* can clearly be argued to prohibit Ticketmaster’s alleged practice of diverting a large portion of event tickets from Primary Sales at the face value to Secondary Sales at inflated values. Members of the Proposed Class are deceived by the representation

that they can acquire event tickets at face value when in fact that is extremely difficult as a result of Ticketmaster's conduct.

79. Furthermore, s. 5(2) of the *BPCPA* puts the burden of proof on the supplier to show that a deceptive act or practice was not committed.

80. S. 8 and s. 9 of the *BPCPA* prohibits "unconscionable acts or practices", and puts the burden of proof on the supplier to show that an unconscionable act or practice was not committed.

81. S. 8(3) of the *BPCPA* provides a non-limiting list of circumstances that the court must consider in determining whether a supplier engaged in an unconscionable act or practice. However, s. 8(2) of the *BPCPA* mandates that "all of the surrounding circumstances of which the supplier knew or ought to have known" needs to be considered.

82. S. 171 and s. 172 of the *BPCPA* create statutory causes of action for consumers to recover pecuniary loss caused by a supplier:

> 171(1) Subject to subsection (2), if a person, other than a person referred to in paragraphs (a) to (e), has suffered damage or loss due to a contravention of this Act or the regulations, the person who suffered damage or loss may bring an action against a
>
> > (a) supplier,
> >
> > . . .
>
> who engaged in or acquiesced in the contravention that caused the damage or loss.
>
> . . .
>
> 172(1) The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court for one or both of the following:
>
> > (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
> >
> > (b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.
>
> . . .
>
> (3) If the court grants relief under subsection (1), the court may order one or more of the following:
>
> > (a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;
> >
> > . . .

> (c) that the supplier advertise to the public in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions that the court considers reasonable, particulars of any judgment, declaration, order or injunction granted against the supplier under this section.
>
> 83. The Representations are pleaded at para. 39 of the Amended Notice of Civil Claim. Particulars of how they were deceiving or misleading to a consumer are at para. 40 of the Amended Notice of Civil Claim, and particulars of how they were unconscionable at para. 41 of the Amended Notice of Civil Claim.
>
> 84. With respect to deceptive acts or practices, Ticketmaster's conduct resulted in an unfair and severe restriction on the supply of event tickets, despite representations to the contrary. With respect to unconscionable acts or practices, purchasers have no other options when trying to purchase event tickets in the Primary Sales market. Knowing it has a monopoly on tickets for particular events, Ticketmaster engaged in conduct that encouraged the use of ticket bots, which allowed Ticketmaster to profit from the resale (at grossly excessive prices) of event tickets.

[50] Thus, the plaintiffs allege contraventions of ss. 4 and 5 of the *BPCPA*, which proscribe deceptive acts or practices, including through misleading representations, and ss. 8 and 9 of the *BPCPA*, which proscribe unconscionable acts or practices. Subsections 5(2) and 9(2) create a reverse onus, shifting the persuasive burden to the defendant supplier when a deceptive or unconscionable act or practice is alleged.

[51] The Amended Notice of Civil Claim dated March 12, 2020 (the "NoCC"), at para. 24, sets out the plaintiffs' summary of the relevant portions of the "Terms of Use" on Ticketmaster's website. Paragraph 39 alleges that those statements were representations by Ticketmaster under seven discrete headings, (a) through (g). Para. 40 pleads that the representations were "false, misleading or deceptive under s. 4 of the *BPCPA*", and provides some particularization. Paragraph 41 pleads that the representations were "unconscionable under s. 8 of the *BPCPA*".

[52] First, I will address the claim made pursuant to ss. 4 and 5 of the *BPCPA.* I find that there is nothing that should be pled which is missing from the claim made as it relates these sections. I find that the plaintiffs have pleaded that Ticketmaster has committed a deceptive act or practice.

[53] All of the arguments advanced by the defendants under this heading address the merits of the claim.

[54] First, Ticketmaster argues that the "Terms of Use" and "Purchase Policy" do not contain any representations at all, and certainly not the sort pleaded by the plaintiffs. Ticketmaster has placed before the Court a complete copy of those two important documents. I agree with the defendants' submission that, although at this stage of analysis, I am confined to a consideration of the pleadings and must not weigh the evidence, I may nonetheless consider these documents. The analogy to a breach of contract case is apt. The actual "Terms of Use" in particular are incorporated by reference into the pleadings: See *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49 at paras. 22 and 38.

[55] Nonetheless, I cannot agree that it is "plain and obvious" that there are no representations contained in the "Terms of Use." In order to make such a finding, I would need to analyze and interpret the "Terms of Use", an impermissible exercise at this juncture. The issue of whether or not the "Terms of Use" contain representations as alleged by the plaintiffs is very much an issue for trial.

[56] Next, the defendants submit that it is plain and obvious that the plaintiff is not a "consumer" within the meaning of the *BPCPA*, and that Ticketmaster is not a "supplier." If that is all so, then the transaction is not a "consumer transaction" as defined by the *BPCPA*. Ticketmaster asserts that Mr. Gomel, or any similarly situated class member, would not have a cause of action because they did not purchase anything from Ticketmaster. Mr. Gomel did not engage in a "consumer transaction" with Ticketmaster, inasmuch as he purchased his tickets from Stubhub.

[57] Again, in my view, these are matters that must be left to trial. Indeed, those are among the common issues proposed for certification by the plaintiffs.

[58] I find that it is not plain and obvious that class members who did not purchase from Ticketmaster have no claim. The reasoning of Madam Justice Harris in *Cantlie v. Canadian Heating Products Inc*., 2017 BCSC 286 is persuasive. Justice Harris

found that the provisions of the *BPCPA* supported an expanded application of a "consumer transaction". At para. 231, she noted that the "definition of "consumer transaction," "consumer," and "supplier" are broadly framed. Although there is reference to the consumer having participated in a consumer transaction, as there is no requirement for privity of contract, the apparent intention is to focus on the goods supplied rather than on the transaction in which the good were acquired."

[59] Further, at paras. 237–238, Harris J. commented that the remedies under the *BPCPA* do not appear to require a party to have participated in an impugned consumer transaction. Section 171 states that any "person" who is injured due to a contravention of the *BPCPA* may bring a claim for harm suffered from that contravention.

[60] In my view, in this case, as in that one, to the extent some of the plaintiffs may be indirect purchasers, the question of the applicability of the *BPCPA* can be a common issue, to be decided after certification. Of necessity, deciding this issue would involve detailed argument and analysis of the relevant provisions of the *BPCPA*, with reference to common law principles and the facts of this particular case.

[61] I also note there are decisions from this Court deciding that it is not necessary to plead reliance by the plaintiff on the representation where a breach of ss. 4 and 5 of the *BPCPA* is alleged: *Seidel v. Telus Communications Inc*., 2016 BCSC 114, para. 97*; Cantlie*, para. 243. At this stage of the analysis, that is a potentially important difference between claims under the *BPCPA* and a common law claim of misrepresentation.

[62] Finally, I will address the assertion of the defendants that there must be some immediacy between a supplier and a consumer for the *BPCPA* to apply, relying on the decision of *Tracy v. Instaloans Financial Solution Centres (B.C.) Ltd*., 2008 BCSC 669 (para. 107, Defendants' Written Submissions). In that case, Madam Justice Brown held that some of the defendants in a payday loans case did not fall within the definition of "supplier" in the *BPCPA*. However, that finding was

made in the context of a summary trial (then Rule 18A), post-certification, at which Brown J. was making final determinations of the previously certified common issues.

[63] The same result may obtain in the common issues trial in the instant case. For purposes of certification, I cannot make that determination.

[64] I will next consider the pleadings in respect of unconscionable acts and practices under ss. 8 and 9 of the *BPCPA*. I find that the plaintiffs have pleaded that Ticketmaster has committed an unconscionable act or practice.

[65] Ticketmaster argues that the NoCC does not properly plead unconscionability. It notes that in *Loychuk v. Cougar Mountain Adventures Ltd*., 2012 BCCA 122, at para. 54, the Court of Appeal held that the essential elements are the same whether at common law or pursuant to the *BPCPA*. The essential elements are inequality of bargaining power and an improvident bargain. Ticketmaster submits that the NoCC does not adequately plead those two elements.

[66] I first note that the pleading here is not a "bare bones" pleading, such as those found to be insufficient in both *Cantlie* and in *Sandhu v. HSBC Finance Mortgages Inc*., 2016 BCCA 301 at para. 91 (referred to at para. 249 of *Cantlie*).

[67] The particulars of unconscionability are contained in para. 41 of the NoCC, which reads:

> 41. These representations were unconscionable under s. 8 of the BPCPA in that:
>
> (a) the Plaintiff and Class relied on the Ticketmaster's knowledge and expertise, to their detriment;
>
> (b) Ticketmaster virtually monopolizes the event ticket sale industry, which leave consumers with few options other than purchasing event tickets from www.ticketmaster.ca;
>
> (c) the price of event tickets marketed and sold on www.ticketmaster.ca as Secondary Sales grossly exceeded the price at which similar goods were readily available; and
>
> (d) such other ways as will be proven at trial.

[68] Ticketmaster cites *Uber Technologies Inc. v. Heller*, 2020 SCC 16, at para. 74 which provides:

> [74] A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable (see McCamus, at pp. 426-27; Chen-Wishart (1989), at p. 51; Benson, at p. 187; see also Waddams (2017), at p. 303; Stephen Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (2011), at pp. 87 and 121-22). Improvidence is measured at the time the contract is formed; unconscionability does not assist parties trying to "escape from a contract when their circumstances are such that the agreement *now* works a hardship upon them" (John-Paul F. Bogden, "On the 'Agreement Most Foul': A Reconsideration of the Doctrine of Unconscionability" (1997), 25 *Man. L.J.* 187, at p. 202 (emphasis in original)).

[69] I note that in the next paragraph, the Court added the following concerning the concept of improvident bargains:

> [75] Improvidence must be assessed contextually (McInnes, at p. 528). In essence, the question is whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized. An undue advantage may only be evident when the terms are read in light of the surrounding circumstances at the time of contract formation, such as market price, the commercial setting or the positions of the parties (see Chen-Wishart (1989), at pp. 51-56; McInnes, at pp. 528-29; Reiter, at pp. 417-18).

[70] Ticketmaster submits that the plaintiffs have not pleaded that any class member entered into an improvident bargain. Ticketmaster also says that it is unclear how Mr. Gomel could have entered an improvident bargain as he did not enter into a bargain or transaction with Ticketmaster.

[71] As explained above, I find the reasoning of Harris J. in *Cantlie* at 237–238 persuasive. The remedies under the *BPCPA* do not appear to require a party to have participated in an impugned consumer transaction. Therefore, it may not be necessary for a class member to have entered into a bargain with Ticketmaster directly. Further, there are some differences between common law unconscionability and unconscionability as described under the *BPCPA.* For example, under the common law, improvidence is measured at the time the contract is formed: *Uber* at para. 74. However, s. 8(1) of the *BPCPA* provides that "an unconscionable act or practice by a supplier may occur before, during or after the

consumer transaction". This indicates that unconscionability under the *BPCPA* may have a wider application than under the common law. Determination of the scope of unconscionability under the *BPCPA* is best suited for trial.

[72] I agree with Ticketmaster that the link between the alleged representations and the claim of unconscionability appears tenuous. However, I cannot say it is non-existent. The particulars at para. 41 of the NoCC are adequate to support that the claim of unconscionable acts under the *BPCPA* is not doomed to fail, given the low bar the plaintiffs must clear at this stage.

[73] I also note the commentary on the potential expansion of unconscionability to systemic conduct, contained in the two Court of Appeal decisions of *Sherry v. CIBC Mortgage Inc*., reported at 2016 BCCA 240 ("*Sherry* Appeal #1") and 2020 BCCA 139 ("*Sherry* Appeal #2"). At para. 42 of *Sherry CA #2*, Dickson J.A. for the Court stated:

> [42] As I noted at the outset, in *Sherry* Appeal #1 this Court did not disturb the chambers judge's finding that the unconscionability claim could be determined as a common issue. Citing recent authorities in which unconscionability claims based on consumer protection legislation were certified in class proceedings, Justice Newbury commented that, in the context of the *Business Practices and Consumer Protection Act*, the concept of unconscionability may be expanding to conduct that is systemic in nature:
>
> > [88] It may be that particularly in the context of the BPCPA, the concept of unconscionability is in the process of expanding beyond the individual circumstances of a particular consumer or transaction, to conduct that is more "systemic". Given the purposes and objectives of the BPCPA and the fact that the novelty of a claim should not necessarily be fatal, I would defer to the chambers judge on this point.

[74] I thus would not at this juncture stop the plaintiffs in their tracks, and decline to permit them to move this litigation forward. It may be that this is one part of the pleadings which will be subject to an application to further amend, for instance to add particulars as envisaged in the NoCC at para. 41(d). However, the pleading as drafted, referencing the virtual monopoly of Ticketmaster in segments of the marketplace and the inflated prices in the secondary market, is sufficient to clear the "no cause of action" bar.

BPCPA Damages, Section 171

[75] I wish next to address what was for much of this certification hearing the largest elephant in the room, namely the plaintiffs' theory of damages. I want to be clear that I make no findings on the merits of the plaintiffs' claims to damages, and the various methods proposed for calculation. I am here discussing whether the pleadings disclose a cause of action, and not weighing any evidence.

[76] However, given the manner in which argument proceeded, this is an appropriate juncture to make some brief comment. One method proposed by the plaintiffs is that damages for every member of the class should be measured by calculating the difference between the price paid for their ticket in the secondary market and the original face price. That method is based on the proposition that "but for" the misrepresentations made by Ticketmaster, every purchaser for every event would have been able to purchase a ticket at face price. Ticketmaster points out the obvious problems with that premise, given that demand for tickets frequently exceeds supply, based simply on finite seating capacity. Moreover, even on the theory of the case posited by the plaintiffs, it is the use of automated ticket bots that most directly causes the inability of purchasers to secure tickets in the primary market, not the representations themselves.

[77] A second theory of damages advanced by the plaintiffs is that the representations (presumably in conjunction with use of ticket bots in the primary market) cause a general inflationary effect in the secondary market. This is pleaded at para. 36 of the NoCC, in relation to claims under the *Competition Act*.

[78] I see no reason in principle that the inflationary effect claim must be restricted to the *Competition Act*. If the representations caused a general inflationary effect in the secondary market, that would apply equally to claims made under the *BPCPA*.

[79] However, at the certification stage, I see a significant difference between the claims for damages made pursuant to ss. 36 and 52 of the *Competition Act* and those made pursuant to ss. 5 or 9 and 171 of the *BPCPA*.

[80] Ticketmaster submits that in order to prove damages at common law for misrepresentation, or pursuant to s. 36 of the *Competition Act* or s. 171 of the *BPCPA*, the plaintiffs must plead and prove reliance on the representation. I cannot agree insofar as the *BPCPA* is concerned.

[81] In my view, the controlling authorities on this score, binding on me, are *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc*., 2014 BCCA 36 and *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361.

[82] In *Wakelam*, the failure to plead any material facts in support of a causal connection between a breach of s. 52 of the *Competition Act* and the loss or damage was fatal to the claim. At para. 91, the court expressly agreed with a finding in *Singer v. Schering-Plough Canada Inc.,* 2010 ONSC 42, that in the context of misrepresentation claims, the plaintiff must plead that the representation caused him to do something, "i.e. that he relied on it to his detriment."

[83] In *Finkel,* the Court considered that same passage from *Singer* cited in *Wakelam* and then said this about the *BPCPA*, at paras. 83 and 84:

> [83] In my view, the causal link required between a breach of s. 5 of the *BPCPA* and damages for the cause of action created by s. 171 is not equally well-settled. Nor is it equally apparent that reliance will always be necessary for causation purposes given the differing nature of the statutory breach and the potential loss. As this Court noted in *Collette v. Great Pacific Management Co. Ltd*., 2004 BCCA 110 at para. 34 in the context of a tort claim, reliance may not be required to establish a causal link between a breach of duty and a loss in all misrepresentation cases. The reason for insistence on reliance is to prove causation. They are not independent requirements. Accordingly, if a breach of duty can be adequately linked to a loss by alternate means, individual reliance need not be shown.
>
> [84] Without reliance, a misleading representation made to the public in breach of s. 52 of the *Competition Act* cannot be linked to a loss suffered by a particular individual. However, given the broad definition of a "consumer transaction" and a "deceptive act or practice", the same is not necessarily true of a breach of s. 5 of the *BPCPA* and an individual loss. Where, as here, a s. 5 breach is allegedly committed in the context of a direct contractual relationship and involves a breach of a contractual term and related loss, in my view it is arguable that, as the judge held, the fact of the contractual breach sufficiently links the statutory breach to the loss for purposes of causation under s. 171 of the *BPCPA*. Interpreted thus, s. 171 would enable a consumer to recover the loss suffered within the comprehensive scheme of

> the *BPCPA*, which scheme expressly prohibits deceptive representations in contracts.

[84] At para. 87, the Court concluded:

> [87] In sum, the absence of jurisprudence fully settling the statutory interpretation issue raised by the s. 171 claim and the plausible arguments advanced for its broad application in this factual context meant restraint in declining to strike the claim at the pleadings stage was appropriate. In my view, given the nature of the alleged statutory contravention and despite the lack of a proper reliance plea, as the judge concluded, it is not plain and obvious that the claim is bound to fail. I would not accede to this ground of appeal.

[85] I recognize that the claim being advanced here for a broad application of s. 171, an award of damages "due to" a contravention of the *BPCPA,* may be even more novel than that posited in *Finkel.* However, given the comments of the Court of Appeal in that case, I proceed with restraint at this stage of proceedings. I find that the plaintiffs have pleaded damage or loss due to a contravention of the *BPCPA*.

***BPCPA* Restoration, Section 172(3)**

[86] One aspect of the claim made pursuant to the *BPCPA* which I would decline to certify, and thus strike from the NoCC is para. 43, the claim for restoration premised on s. 172(3)(a).

[87] I agree with Ticketmaster that there are no pleadings sufficient to support such a claim, and that it is plain and obvious that it cannot succeed.

[88] The subsection does not create a cause of action or give rise to a free-standing right to damages. Rather, damages are ancillary to the granting of injunctive relief, in the context of public remedies for corporate malfeasance. In *Ileman v Rogers Communications Inc*., 2015 BCCA 260 the Court of Appeal discussed the requirements of 172(3), citing *Wakelam v. Johnson & Johnson*, 2014 BCCA 36. At para. 53, the court in *Ileman* set out the four prerequisites for granting a restoration order:

> a) The court must make a declaratory or injunctive order under s. 172(1) before it can make an order under s. 172(3) — this requirement is set out in the opening words of s. 172(3);

> b) The supplier must have acquired something ("money or other property or thing") because of a contravention of the legislation - this requirement is explicit in s. 172(3)(a);
>
> c) The beneficiary of an order under s. 172(3) must have been the source of money or some other thing acquired by the supplier — this requirement is a necessary implication of the use of the word "restore"; and
>
> d) The beneficiary must have "an interest" in the thing to be restored — this requirement is explicit in s. 172(3)(a).

[89] Further, the court stated:

> [59] In my view, the proper interpretation of s. 172(3)(a) begins with the understanding that a restoration order is merely ancillary to a declaration or injunction. The purpose of s. 172(3)(a) is not to create a new legal right, but rather to allow existing private rights to be recognized within the context of public interest litigation.
>
> [60] While "an interest" need not be a proprietary interest in specific property, then, it must be an interest recognized by law outside of s. 172(3)(a). A right to recover damages under s. 171, for instance, would be a sufficient interest to allow recovery under s. 172(3)(a).

[90] The plaintiffs' claim fails to plead any facts that satisfy the criteria noted above. The pleadings do not suggest that "an interest" in the thing to be restored arises in this case. While "an interest" could be a right to recover damages under s. 171, as contemplated at para. 60 of *Ileman*, it cannot be said that Ticketmaster acquired money from the class members as a result of the alleged contraventions of the *BPCPA*. The plaintiffs' theory of damages is premised on either the difference between the secondary market price of a ticket and its face value or an inflationary effect in the secondary market. Any excess value paid by class members for the resold ticket went to resellers — not Ticketmaster. While Ticketmaster may have received additional fees from class members who purchased through Ticketmaster's own Secondary Sales platforms, these fees are not the damages alleged by the plaintiffs.

[91] As such, the claim made pursuant to s. 172(3)(a) is bound to fail and should not be certified.

[92] I note as well that the claim at para. 43 is framed as an alternative to that pleaded at para. 42, damages pursuant to s. 171 of the *BPCPA*. If the plaintiffs can

prove a claim for such damages, any claim pursuant to s. 172(3)(a) would be unnecessary and redundant.

[93] In sum, I find the pleadings under the *BPCPA* disclose a cause of action save for the claim for restoration premised on s. 172(3)(a).

[94] Before addressing the remaining criteria for certification, I will address the other causes of action proposed to be certified.

Competition Act Claims

[95] The claims pursuant to the *Competition Act* cannot be certified. As stated above, the Court of Appeal in *Wakelam* approved the following passages in *Singer* concerning what is required to plead a claim under ss. 36 and 52 of the *Competition Act*:

> [91] In terms of the *Competition Act*, this leaves Ms. Wakelam's claim for "damages" suffered "as a result of" the defendants' breach of Part VI (founded on s. 36) as well as for her costs of investigation under s. 36(1). In this regard, I return to and respectfully agree with the Court's statement in *Singer*, which I reproduce again for convenience:
>
> > … [Section] 52(1) does not create a cause of action. The cause of action, or right of action, is created by s. 36. The plain language of that section makes it clear, as the defendants assert, that the plaintiff must show *both* a breach of s. 52 *and* loss or damage suffered by him or her as a result of that breach. That can only be done if there is a causal connection between the breach (the materially false or misleading representation to the public) and the damages suffered by the plaintiff. A consumer of sunscreen products cannot recover damages, in the abstract, simply by proving that the manufacturer made a false and misleading representation to the public. The failure of the plaintiff to plead a causal link is fatal to this claim.
> >
> > Section 52(1.1) only removes the requirement of proving reliance for the purpose of establishing the contravention of s. 52(1). The separate cause of action, created by s. 36 in Part IV of the *Competition Act*, contains its own requirement that the plaintiff must have suffered loss or damage "*as a result*" of the defendant's conduct contrary to Part VI. It is not enough to plead the conclusory statement that the plaintiff suffered damages as a result of the defendant's conduct. The plaintiff must plead a causal connection between the breach of the statute and his damages. In my view, this can only be done by pleading that the misrepresentation caused him to do something - i.e., that he relied on it to his detriment. [At paras. 107-8; emphasis added.]

> This reasoning seems consistent with a comment made by the Court at para. 65 of *Pro-Sys v. Microsoft* that s. 36 of the *Competition Act* allows anyone who has suffered loss or damage "as a result of conduct engaged in by any person contrary to Part VI" to "sue for and recover <u>that</u> loss or damage." (My emphasis.)

[96] In this case, the pleadings disclose no cause of action since there are no material facts pleaded in support of any reliance on the representations. The sole pleading in this regard is at para. 36 of the NoCC. Immediately after the market distortion theory is posited, there is a bald, conclusory statement, framed in the alternative, stating that "the Plaintiff and Class relied upon the representations."

[97] In my view, that pleading is woefully insufficient to support the claim for damages pursuant to ss. 36 and 52 of the *Competition Act*. I infer, as did the Court of Appeal in *Wakelam*, that the failure to plead facts in support of the causal connection is indicative of an inability to do so (para. 92).

[98] The pleadings in relation to the *Competition Act* must be struck, with the exception of the first sentence of para. 36, which may remain, but in relation to the *BPCPA* claims.

<u>Negligent Misrepresentation</u>

[99] The claim of misrepresentation must also be struck. The pleadings in that regard do not disclose a cause of action.

[100] The essential elements for a successful claim of negligent representation are well settled, namely:

- Existence of a duty of care, based on a "special relationship" between the parties;
- The representation must be untrue, inaccurate or misleading;
- Negligence by the defendant in making the representation;

- Reliance by the plaintiff on the representation, which reliance must be reasonable;

- The reliance must have been detrimental to the plaintiff, in the sense that damages resulted.

The Queen v. Cognos Inc., [1993] 1 S.C.R. 87 at 110.

[101] Pleadings alleging negligent misrepresentation must allege some facts capable of supporting each of the five constituent elements.

[102] Here, there are virtually no facts pleaded capable of supporting the "special relationship" requirement, and none at all capable of supporting detrimental reliance.

[103] The only possible facts in support of a special relationship between the parties are the assertions concerning Ticketmaster's virtual monopoly in certain market segments. It might be possible to knit together parts of the NoCC to find adequate statements in this regard, but only barely.

[104] Of far greater import, there are no facts pleaded which support the fourth and fifth elements, which combined, amount to detrimental reliance. Paragraph 46 of the NoCC contains a single conclusory statement in this regard: "The Plaintiff and Class relied, in a reasonable manner, on the representations to their detriment." That pleading is part of the "Legal Basis" for the claim. The "Statement of Facts" is silent on that score.

[105] The plaintiffs do not seek to certify common issues relating to detrimental reliance. They submit that such issues can be addressed at the individual stage, and that such a procedure is not fatal to certification. In support of this approach, they cite *N&C Transportation Ltd. v. Navistar International Corporation*, 2018 BCCA 312, para. 146, which reads:

> [146] In common law misrepresentation claims, individual issues of reliance, causation and damages can sometimes overwhelm common issues and render a class proceeding unmanageable and inefficient: see, for example, *Bayens v. Kinross Gold Corporation*, 2014 ONCA 901. By contrast, in *Fantl v. Transamerica Life Canada*, 2016 ONCA 633, leave to appeal ref'd

> [2016] S.C.C.A. No. 448, the Court found that common issues relating to a negligent misrepresentation claim satisfied the preferability requirement. Although individual trials were necessary on the issues of reliance, causation and damages, every class member acknowledged receiving a single representation. In addition, common issues relating to a claim for breach of contract had already been certified. Those issues could share "some of the necessary heavy lifting on the misrepresentation common issues": para. 39. Accordingly, the Court concluded that certification would promote judicial economy and prevent a multiplicity of proceedings.

[106] It is important that the discussion there was in relation to preferability, whether issues of individual reliance would overwhelm the proceedings. On the issue of cause of action disclosed by the pleadings, the certification judge found that there were facts sufficient to support the claims disclosed in the pleadings. Specifically, in that case, the plaintiffs "alleged that they purchased the trucks in reliance on the Representation and suffered loss and damage as a result" (para. 20).

[107] In this case, there is no such factual pleading. Nowhere do the plaintiffs state what they did in reliance on the representations, nor how they suffered damages as a consequence. That, in my view, is fatal to a claim of negligent misrepresentation.

Unjust Enrichment

[108] Finally, the claim for unjust enrichment must be struck. The pleadings do not disclose a cause of action.

[109] In order to make out a claim for unjust enrichment, a plaintiff must plead and prove the following three elements:

- That the defendant was enriched;
- A corresponding deprivation to the plaintiff;
- Absence of a juristic reason for the enrichment.

Garland v. Consumers' Gas Co., 2004 SCC 25 at para. 30.

[110] In *Moore v. Sweet*, 2018 SCC 52 at para. 41, Justice Côté, writing for the majority, discussed the necessity that enrichment and deprivation be "two sides of the same coin":

> [41] The first two elements of the cause of action in unjust enrichment require an enrichment of the defendant and a corresponding deprivation of the plaintiff. These two elements are closely related; a straightforward economic approach is taken to both of them, with moral and policy considerations instead coming into play at the juristic reason stage of the analysis (*Kerr*, at para. 37; *Garland*, at para. 31). To establish that the defendant was enriched and the plaintiff correspondingly deprived, it must be shown that something of value — a "tangible benefit" — passed from the latter to the former (*Kerr*, at para. 38; *Garland*, at para. 31; *Peel*, at p. 790; *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575, at para. 15). This Court has described the enrichment and detriment elements as being "the same thing from different perspectives" (*Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660 ("*PIPSC*"), at para. 151) and thus as being "essentially two sides of the same coin" (*Peter*, at p. 1012).

[111] There are no facts pled in the NoCC in support of the first two elements. The pleading in support of this claim under the "Legal Basis" heading is confusing and disjointed. Paragraph 48 pleads:

> 48. Ticketmaster has been unjustly enriched by allowing and encouraging professional ticket brokers to violate its Terms of Use and Purchase Policy so that Ticketmaster could collect additional fees through Secondary Sales on Ticketmaster Resale. The Plaintiff and Class have suffered corresponding deprivation by paying more for the event ticket by purchasing through Secondary Sales.

Thus, it appears that the alleged enrichment is the collection of multiple fees for the sale and resale of the same ticket.

[112] However, it cannot be said that any deprivation "corresponds" with the alleged enrichment to the defendants. The deprivation seems to be the inflated prices paid by the plaintiffs for tickets in the resale market. Again, the excess price paid for the ticket over the face price went to resellers — not Ticketmaster.

[113] There is no suggestion that any plaintiff paid multiple service fees for a ticket. In this case, the additional service fees did not pass from the plaintiffs to the defendants. Thus, if the collection of multiple fees for sale of the same ticket is

actionable, it could only be pursuant to statute. This claim, if it can be made out at all, fits much more comfortably within the *BPCPA* claim than at common law.

[114] I also note that the pleading is contained under a broader heading which includes waiver of tort, a claim the plaintiffs now concede cannot be certified.

[115] In my view, the claim of unjust enrichment is "doomed to fail", and thus must be struck in its entirety.

The Other Certification Criteria

Identifiable class of two or more persons - *CPA*, s. 4(1)(b)

[116] The three purposes served by this criterion are: (1) identifying those persons who have a potential claim against the defendants; (2) defining the parameters of the lawsuit so as to identify those persons who are bound by its result; (3) describing who is entitled to notice of the action: *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 57.

[117] Membership in the proposed class must be defined by objective criteria. There must be some ability of class members to self-identify: *Sun-Rype* at para. 58.

[118] The proposed class must not be unnecessarily broad, in the sense that it could be more narrowly defined without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be more narrowly defined, the court should either decline to certify or certify on condition that the definition of the class be amended: *Hollick* at para. 21.

[119] Although there is no determination of the merits at the certification stage, there must be an evidentiary basis to support the assertion that there is an identifiable class: *Chartrand v General Motors Corp*., 2008 BCSC 1781 at para. 52 citing *Hollick* at para. 25. Also see *Lee v. Georgia Properties Partnership,* 2012 BCSC 1484 at para. 38.

[120] Ticketmaster advances two bases on which to deny certification based on this criterion. First, it argues that the class period is overbroad, because it commences

in 2010, a time prior to any involvement by Ticketmaster in the secondary market. Secondly, and more fundamentally, Ticketmaster submits that there is no ability to self-identify based on ascertainable objective criteria. Thus, this claim suffers from the same overarching problem as that identified in *Sun-Rype* at paras. 61–69.

[121] I agree with Ticketmaster's submission on the first branch of this argument. The class period is overbroad. However, that can be remedied by narrowing the timeframe, as opposed to declining to certify.

[122] The plaintiffs offered no basis for the chosen commencement of the actionable class period. It appears the plaintiffs selected the year in which Ticketmaster merged with Live Nation. The legal or logical reason for that is unclear. I accept the defendants' submissions that there is no evidence related to any alleged misrepresentations from any time before TradeDesk was made available in Canada. Further, the claims of the plaintiffs are largely centred on the advent of Tradedesk and Ticketmaster's participation in the secondary market. Thus, the logical date from which the class period should run is 2015. Tradedesk was developed circa 2015. More importantly, around that time Ticketmaster commenced listing resale tickets for events in British Columbia on its integrated seat map. That integrated platform came online in July, 2015 on Ticketmaster's website.

[123] Thus, in my view, the class period must be amended to commence on June 30, 2015. Although the NoCC seeks to have the period run to September 2018, in submissions, the plaintiffs sought to extend it to the date of certification. I would do so.

[124] I do not agree with Ticketmaster's submission that the issue concerning the ability of class members to self-identify is a bar to certification. I see significant differences between this case and *Sun-Rype* in that regard.

[125] In *Sun-Rype*, the issue was a complete absence of evidence that two or more persons could prove that they purchased a product containing high fructose corn syrup during the class period.

[126] In this case, Ticketmaster argues that there are several hurdles to establishing objective criteria for self-identification, including:

- A purchaser in the secondary market has no way of knowing it the ticket was originally "sold by" Ticketmaster, no matter how one determines that phrase;

- No tickets are in fact "sold by" Ticketmaster in any event, since Ticketmaster is merely a sales agent, not an owner of any tickets;

- If one interprets "sold by" as meaning all tickets for which Ticketmaster actually acted as the agent in first instance (and thereby collected fees), there is no way for the secondary purchaser to know if such is the case if the purchaser used any website other than Ticketmaster.ca. Any tickets purchased on Stubhub or other competitor sites may have been listed by season ticket holders or those who acquired tickets via other direct means, such as band fan clubs;

- If one interprets "sold by" as meaning that Ticketmaster was the exclusive agent for the event, there are additional problems. A purchaser may not know if Ticketmaster was the exclusive agent for a particular event. Also, Ticketmaster collects no fees for the tickets for those events that are sold at first instance directly by the sports team or musical performer. Those tickets are never available on the primary market.

[127] I agree that the issue of self-identification for all potential class members is problematic, and may be impossible for some class members. However, there is an identifiable class of two or more persons who can be identified by objective criteria. The named plaintiff is likely not among those who are most readily identified. However, that is not a bar to certification. Mr. Plawsky's affidavit states that "Ticketmaster.ca only provides resale tickets to events for which Ticketmaster Canada is the primary market ticketing agent" (para. 25). Thus, anybody who

purchased a resale ticket on Ticketmaster's website will know that Ticketmaster was the exclusive agent for the event.

[128] If those tickets which were originally season tickets or part of a direct distribution by the musical artist are excluded, such will not be known by the purchaser, but may be ascertainable by Ticketmaster by reference to the unique bar code.

[129] The bar code data held by Ticketmaster may reveal sufficient information to readily determine if purchasers from other resellers, such as Stubhub, are also part of the class. At this stage of proceedings, it is simply too early to determine. The normal process of discovery should assist in that regard. The class may need to be amended at some point, but again, I would not refuse certification on this basis. There is some basis in fact to conclude that there are two or more persons who can be identified by objective criteria.

Common Issues - *CPA*, s. 4(1)(c)

[130] Section 1 of the *CPA* defines "common issues" as:

> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[131] In *Microsoft* at para. 108, the Court set out the approach mandated by its earlier judgment of *Dutton* including that the "the underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis". The Court distilled the remaining principles as follows:

> (1) The commonality question should be approached purposively.
>
> (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
>
> (4) It 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. The court will examine the significance of the common issues in relation to individual issues.

> (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[132] The burden on the plaintiffs is to show "some basis in fact" for the existence of the common issues. The common issue criterion is not a high legal hurdle, and the fact that many individual issues may remain to be decided after resolution of a proposed common issue is no bar to it being a common issue. A common issue need not dispose of the litigation. It is sufficient if its resolution will advance the litigation for or against the class: *Singer*, at para. 140, *Finkel* at para. 23.

[133] In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members: *Microsoft* at para. 110.

[134] The proposed common issues are set out at Schedule A of the plaintiffs' written submissions on certification, and I reproduce them as Appendix A to this judgment. In light of my earlier conclusions, I need only consider the questions related to contraventions of the *BPCPA* and damages. Those are questions (f) through (l) and (y) through (dd).

[135] I am satisfied that there is some basis in fact disclosed by the pleadings to certify all the questions related to alleged contraventions of the *BPCPA*. Ticketmaster challenges proposed questions (g), (i), (k) and (l)(iii) only. I will examine those in turn.

[136] Question (g) is this:

> g. Did the defendants discharge their burden of proving that they did not make a representation or engage in conduct that had the capability, tendency, or effect of deceiving or misleading the Class Members (a "deceptive act or practice") contrary to s. 5(1) of the *BPCPA*?

[137] The objection to question (g) is that the plaintiffs have failed to plead and demonstrate some basis in fact that they relied on the alleged misrepresentations. In this regard, the defendants rely on para. 60 of *Loychuk*:

> [60] Deceptive statements cannot be pleaded in the abstract. A consumer cannot allege that a statement was deceptive—either in support of an assertion that a transaction was unconscionable or as an independent basis for damages—without establishing that he or she relied on that statement in entering into the transaction in issue. Absent such a nexus a statement would not be a "representation", as it would not have been "used or relied upon by a supplier in connection with a consumer transaction."

[138] Ticketmaster fairly acknowledges that other decisions of the Court of Appeal seem to go in a slightly different direction, and suggest that detrimental reliance may not be a necessary element of a successful claim under s. 5(1) of the *BPCPA*. The plaintiffs argue that there is little decided law on the appropriate scope of the *BPCPA* as robust consumer protection legislation, and that this case may provide an opportunity to settle this question. Essentially for the reasons previously stated at para. 85 of this judgment, I would not decline to certify this question. The Court may be required to answer an additional question, namely whether detrimental reliance must be proved in a claim under s. 5(1) of the *BPCPA*, but that further inquiry should not be a bar to certification.

[139] Questions (i) and (k) are more problematic. They are:

> i. Have the Class Members suffered damage or loss due to a contravention of the *BPCPA*?
>
> k. What amounts, if any, should the defendants, or any of them, pay Class Members as a result of the defendants' contravention(s) of the *BPCPA*?

[140] Ticketmaster submits that both questions involve a consideration of individual damages, and as such cannot be certified as common issues. To the extent there may be a way of calculating damages on a class-wide basis, Ticketmaster further submits that the plaintiffs have not put forward any methodology to address damages on a class wide basis. Ticketmaster says this is also fatal to certification.

[141] In *Microsoft*, at para. 118, the Supreme Court of Canada discussed the standard for assessing expert methodology in indirect purchaser actions involving common questions of loss:

> [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.

[142] Indirect purchaser actions are notoriously complex and may involve more onerous methodology requirements than in other cases. It is often difficult to assess liability and apportion damages where the wrongdoer and the harmed parties are separated by a long and complex chain of distribution: *Microsoft* at para. 1 and *Miller v. Merck Frosst Canada Ltd*., 2015 BCCA 353 at para. 31.

[143] Nevertheless, the jurisprudence indicates that even in cases not dealing with indirect purchasers, it is necessary to demonstrate a "methodology" through which damages can plausibly be proven at trial in order to certify damages or causation as a common issue: *Miller* at 27, *Charlton v. Abbott Laboratories Ltd.,* 2015 BCCA 26 at paras 84-92, *Andriuk v. Merrill Lynch Canada Inc*., 2014 ABCA 177.

[144] While a plausible "methodology" is required, the standard required of that "methodology" will differ from case to case depending on complexity. Justice Savage, writing for the Court of Appeal in *Miller* noted:

> [33] In my opinion, however, "methodology" in this context is not, and should not be, confused with a prescribed scientific or economic methodology. Instead, it refers to whether there is *any* plausible way in which the plaintiff can legally establish the general causation issue embedded in his or her claim. As noted in *Andriuk*, not every case will require expert evidence (para. 11).
>
> […]
>
> [38] Although a methodology may include a prescribed scientific or economic methodology, the methodology requirement as contemplated in

> *Microsoft* encompasses a broader category of methods: "the critical element that the methodology must establish is the ability to prove 'common impact'" (para. 115). In other words, to overcome the certification hurdle, plaintiffs are required to show how their common issue could be established at a common issues trial, remembering that the threshold, at this stage, is not an onerous one.

[145] Ticketmaster submits this case is very similar to *Clark v. Energy Brands Inc*., 2014 BCSC 1891, and thus the same result should obtain, namely refusal to certify based on an absence of a viable theory as to damages. I see several parallels between the two cases, but also some significant differences.

[146] In *Energy Brands*, the plaintiffs' claim was based on a "premium price" theory, that the defendant was able to command a higher price than would be charged for sugary soft drinks, by failing to disclose in the packaging materials that Vitaminwater was such a product. By its name, and the absence of clear sugar content information, all purchasers were misled into thinking Vitaminwater was a healthy alternative to sugary soft drinks.

[147] However, that claim broke down on multiple levels when even cursorily scrutinized. The evidence at certification tended to show that plaintiffs did purchase Vitaminwater believing it was a healthy alternative to soft drinks, but that when they discovered the sugar content, they simply ceased purchasing it. They did not state that they paid more for the product because it was a healthy alternative.

[148] In addition, there was no evidence capable of supporting any meaningful comparison among beverage alternatives, so there was no baseline comparison for the "premium price" theory at all.

[149] In this case, although Mr. Gomel's affidavit is sparse, it does state that he paid more than face price for his tickets. There is some, albeit limited, evidence to support the fundamental premise that for popular events, cost of tickets in the secondary market exceeds that in the primary market. There is some evidence from which one can readily infer that the use of ticket bots when tickets for such events

first go on sale leads to impeded access to such tickets by individual consumers, who are then forced to purchase in the secondary market.

[150] Thus, there is some evidence to support the "general inflationary effect" theory advanced by the plaintiffs. As I have noted, how the damages can be traced to Ticketmaster's representations, as distinct from the use of ticket bots, remains a very problematic issue of proof for the plaintiffs. However, at this stage, I must not weigh the evidence or seek to resolve issues on their merits.

[151] I find that expert evidence supporting a methodology is not required at this stage. This case does not rise to the level of complexity of *Microsoft*. *Microsoft* involved different types of software products installed on many different brands of hardware and sold through many different retailers and intermediaries over years. The present case is much simpler in terms of addressing loss or damages as a common issue. Although it may be argued that there are different market conditions for different events, at base, the claim involves a customer purchasing a ticket to an event from a reseller. It also currently involves only a few different resale platforms.

[152] I must therefore only answer whether there is "*any* plausible way" in which the plaintiffs can legally establish "common impact". Although proving a "general inflationary effect" will likely require expert evidence at trial, I find that the plaintiffs have shown that proving a "general inflationary effect" is at least a plausible method of establishing damages on a class-wide basis. This theory will likely need to be developed as the proceedings move forward and more evidence comes to light.

[153] As to the plaintiffs' theory that damages can be calculated by subtracting the price paid from the price of the resold ticket, I find that methodology implausible. There is no evidence to support the plaintiffs' assertion that the full difference between the price of a ticket on the primary and secondary market is due to the alleged representations. I agree with Ticketmaster that one cannot assume a class member would have acquired a ticket for a particular event on the primary market absent the representations. The plaintiffs have provided no evidence to show that this method could decide the issue of damages on a class-wide basis. Even

assuming that Ticketmaster's representations influenced the price of tickets, on the plaintiffs' own theory, the use of automated ticket bots more directly causes the inability of purchasers to secure tickets in the primary market, not the representations themselves.

[154] The balance of the defendants' arguments related to the individual nature of the inquiries that would be necessitated on damages. They correctly point out that the variables at play are vast, including those that exist among different events, types of event, venues, and importantly circumstances and motivation of individual purchasers, who may have many different reasons for choosing to purchase tickets in the secondary market.

[155] There is much merit to these arguments. However, I do not agree that it is inevitable that a common issues trial would devolve into an assessment of individual damages claims. This may be a case for aggregate damages, or damages spread across the class. Alternatively, counsel and the Court may need to fashion a methodology for assessing individual claims, once certain basic criteria for entitlement are identified. Those are tools and methods available pursuant to the *CPA*.

[156] Again, I reiterate, this is a preliminary motion, meant to determine if the case should be permitted to proceed at all. There may be no damages awarded to the plaintiffs, even if they succeed in proving their claims. It is within the realm of reasonable possibility that the plaintiffs' relief will be restricted to the declaratory and injunctive items set out at question (l)(i)(ii) and (iv).

[157] I find that certification of Questions (i) and (k) will advance the litigation and avoid a duplication of fact-finding and legal analysis and would certify them as common issues.

[158] The one question I would decline to certify is that at l(iii), restoration pursuant to s. 172(3)(a) of the *BPCPA*. I agree with the defendants' argument on this issue, and for the reasons previously set out, I decline to certify this part of the claim.

[159] I next move to questions (y) and (z):

> y. Do the acts and omissions of the defendants, or any of them, warrant an award of punitive or aggravated damages?
>
> z. If so, what monetary amount is payable by the defendants, or any of them, to the Class Members?

[160] For these questions, I will separately address punitive and aggravated damages. The distinction between these heads of damages was discussed in detail in *Whiten v. Pilot Insurance Co*., 2002 SCC 18.

[161] Aggravated damages are compensatory and take into account the additional harm caused to the plaintiff's feelings or emotional stress by reprehensible or outrageous conduct on the part of the defendant: *Whiten* at para. 116.

[162] Punitive damages, on the other hand, are not compensatory in nature. They are imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. They are awarded to achieve objectives of retribution, deterrence and denunciation where other penalties are inadequate. A punitive damage award will take into consideration the level of compensatory damages that have been awarded: *Whiten* at para. 94.

[163] Questions related to punitive damages are amenable to certification as common issues: *Rumley v. British Columbia*, 2001 SCC 69 at para. 34. Punitive damages may be able to address systemic conduct that relates to the class instead of conduct that relates to one specific member. In discussing the expansion of the concept of unconscionability under the *BPCPA* to address conduct that is systemic in nature, Justice Newbury commented that the “same type of ‘evolution’ may be occurring with respect to punitive damages”: *Sherry* Appeal #1 at para. 89.

[164] I find that there is “some basis in fact” in this case that an award of punitive damages could be made to address “systemic” conduct. Ticketmaster has a virtual monopoly on ticket distribution for large segments of the primary market. Commencing in 2015, the defendants have been participating in the secondary ticket

sales market, attempting to compete with sites such as Stubhub and Vivid Seats. There is evidence that Ticketmaster has turned a blind eye to professional resellers using bots to purchase large quantities of tickets on the primary market, and encouraged those resellers to list tickets for resale on its secondary market platform, using its inventory software, Tradedesk. Both Ticketmaster and the professional resellers profit from this activity, while the end user consumer pays an amount for the ticket greater than face price.

[165] I would therefore certify these questions as they relate to punitive damages with some modification.

[166] Because punitive damages are only available if other penalties are inadequate, the quantum of punitive damages cannot be assessed until compensatory damages are assessed. As will be discussed below, I decline to certify the issue of aggregate damages at this stage — as such, the quantum of compensatory damages may not be determined at the common issues trial. Therefore, I adopt and follow the approach of Justice Masuhara in *Finkel v. Coast Capital Savings Credit Union*, 2016 BCSC 561, at paras. 106-108:

> [106] As such, I would adopt the bifurcated approach to punitive damages outlined in *Chalmers v. AMO Canada Company*, 2010 BCCA 560 at para. 31:
>
> > 31. Although the ultimate determination of the entitlement and quantification of punitive damages must be deferred until the conclusion of the individual trials, it does not follow, in my opinion, that no aspect of the claim of punitive damages should be certified as a common issue. It is my view that the question of whether the defendants' conduct was sufficiently reprehensible or high-handed to warrant punishment is capable of being determined as a common issue at the trial in this proceeding where the other common issues will be determined. The focus will be on the defendants' conduct, and there is nothing in this case that will require consideration of the individual circumstances of the class members in order to determine whether the defendants' conduct is deserving of punishment. The ultimate decision of whether punitive damages should be awarded, and the quantification of them, can be tried as a common issue following the completion of the individual trials.
>
> [107] Accordingly, the following issue will be determined at the common issues trial:
>
> > Do the acts and omissions of Coast Capital warrant an award of punitive damages?

> [108] The Class' entitlement to punitive damages, and the quantum of any award, will be determined on a class-wide basis once the amount of any compensatory damages is determined (either at the common issues trial or following individual trials). The question at this stage will be:
>
> > If the acts and omissions of Coast Capital warrant an award of punitive damages, should an award of punitive damages be made against Coast Capital and, if so, in what amount?

[167] I adopt the bifurcated approach to punitive damages. Thus, questions (y) and (z) are both certified. However, the entitlement of the class to punitive damages and quantum of same will be determined on a class-wide basis once the amount of any compensatory damages is determined.

[168] As to aggravated damages, the plaintiffs have not pleaded any material facts supporting such an award. Further, aggravated damages are generally unsuitable for determination as a common issue. By their very nature, they require an individual inquiry into the additional harm caused to the plaintiff's feelings or emotional stress by reprehensible or outrageous conduct on the part of the defendant: *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Gen. Div.) at para. 83; *Kotai v. "Queen of the North"*, 2007 BCSC 1056 at paras. 40-42; *Ladas v. Apple Inc.,* 2014 BCSC 1821 at para. 187.

[169] I would decline to certify these questions as they relate to "aggravated damages" — any reference to such should be struck.

[170] Question (aa), related to interest, is certified, to be determined following the common and individual issues trials, after the issue of compensatory damages is determined.

[171] I decline to certify, at this juncture, the issue of aggregate damages in questions (bb), (cc) and (dd), but will revisit that issue at the conclusion of the common issues trial: See *Pioneer Corp. v. Godfrey,* 2019 SCC 42 at para. 113.

Preferability – *CPA*, s. 4(1)(d)

[172] Section 4(1)(d) mandates a consideration of whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common

issues. Section 4(2) requires the court to consider all relevant matters, including the following:

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

[173] In conducting the preferability analysis, a judge must keep in mind the three principal advantages of class actions — judicial economy, access to justice, and behavior modification: *Hollick* at para. 27.

[174] I have concluded that a class proceeding is the preferable procedure. The primary focus of this claim is broad consumer protection and the business practices of Ticketmaster in a market where it enjoys disproportionately large market share, indeed a monopoly in some segments. Thus, behaviour modification is at the forefront.

[175] As to s. 4(2)(a), I find that common issues predominate over questions affecting only individual members. It is true that at some point, a procedure may need to be crafted for determining individual damages claims. However, the common issues trial will determine the central issues of importance to the parties. Questions (g), (h), (j), (k) and (l) are all concerned with the defendants' behaviour and its broad impact on the class as a whole. There are multiple "off-ramps" built into those questions, which if answered in favour of Ticketmaster, would amount to full success, and make any consideration of damages unnecessary.

[176] I also rely on the comments of the Court of Appeal in a series of comparatively recent cases, concerning the post-certification tools available to the

judge and parties under the *CPA*. Most recently, in *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187, Justice Hunter put it this way:

> [119] Furthermore, in assessing the relationship between the resolution of common issues and the management of individual interests, it is important not to lose sight of the broad post-certification powers of the judge managing the case. These powers were referred to indirectly in *Infineon*, where the *CPA* was described as a "powerful procedural statute":
>
> > [76] I do not minimize the potential difficulties of proof arising out of the complexities involved in the marketing and distribution of DRAM. However, the *CPA* is a powerful procedural statute. It gives the case management judge flexible tools to deal with such complexities and if, despite this flexibility, it should turn out that a common issues trial is unmanageable, it gives the judge the power to decertify the action.
>
> [120] More specific reference to these powers was made in *Jiang*, where (at para. 112) Bauman C.J.B.C. referred to ss. 12, 27 and 28 of the *CPA* as providing:
>
> > … a wealth of judicial tools to address individual issues in a timely and practical manner and, importantly, in ways that promote the objectives of access to justice, judicial economy and behaviour modification that, at bottom, are what the CPA is all about encouraging …
>
> [121] This Court in *Jiang* concluded (at para. 120) that in conducting the preferability analysis in a case where individual interests are likely to exist apart from the common issues, the preferability question should be considered "with a keen eye to the broad power under the *CPA* to effectively manage these [individual] issues".

[177] It may be, for instance, that certain discrete issues can be decided early on, and that those may result in some form of resolution. Alternatively, if the case proves to be unwieldy, it can be decertified. There is, in short, no reason to view certification as anything more than the first, albeit important, step in this litigation.

[178] As to s. 4(2)(b), I find that any individual claims for damages in this action would be extremely small, and would not warrant trials, even in the Small Claims Court. There is nothing to suggest that a significant number, or any, class members would have a valid interest in pursuing separate actions. Allowing this action to move forward as a class proceeding will promote access to justice by allowing class members to pursue their claims where it would otherwise be uneconomical to do so.

[179] As to s. 4(2)(d), there are no other means of resolving these claims. The Competition Bureau has apparently declined to act. The defendants' conduct will be unchecked, indeed free of scrutiny, if this claim does not proceed.

[180] In consideration of s. 4(2)(e), I reiterate that, in these circumstances, pursuit of individual claims is impractical because of the amounts involved in relation to the inherent complexity of the issues and the difficulties and expense of bringing separate actions.

[181] The final issue I must decide concerning preferability, under s. 4(2)(c), relates to the other actions in Ontario and Saskatchewan. Counsel for the Ontario plaintiffs did not participate in this hearing. Counsel for Ms. Watch did. Her counsel's submission was that I should either certify the claim and then stay the action, pending resolution of the claim in Saskatchewan, or should defer my decision until after the certification decision was made in that action.

[182] I decline to follow either of those proposed courses of action.

[183] In reaching my decision, I see no need to assess the merits of proposed class counsel, and in particular, the question of Mr. Merchant's suitability as senior plaintiffs' counsel.

[184] I base my decision on a much narrower basis, namely the best interests of the British Columbia class. I repeat what I said in my earlier ruling, that there is no specific pleading in the Watch action related to the *BPCPA* and the secondary market. I take no comfort in the blanket pleading which invokes all provincial consumer protection legislation. The Watch action, although a proposed multi-jurisdictional class proceeding, is very much Saskatchewan-focussed. Moreover, its primary focus is the drip-pricing claim, the basis on which the action was initially brought. I have no doubt that B.C. residents are better served by having their very specific claims, made pursuant to provincial consumer protection legislation, heard in British Columbia.

[185] Certainly, a judge in Saskatchewan would be able to decide such claims. Nonetheless, the preferable procedure is to have them decided by a judge in British Columbia. There is no need to burden the Saskatchewan court with these claims.

[186] As for any prejudice to the defendants in having to defend proceedings in multiple provinces, I see very little. Ticketmaster is a multinational company, conducting business in most or all of North America. It certainly conducts business in all the provinces of Canada, each of which has its own consumer protection legislation. It cannot complain about being sued for alleged non-compliance with a provincial statute solely in the province at issue.

[187] I also note that I have been told very little about Ticketmaster's intentions in relation to the Ontario proceedings. At the time of the stay application in this matter, Ticketmaster advised that no similar application had been brought, nor was contemplated, in Ontario. It thus appears that Ticketmaster was content to defend litigation in both Saskatchewan and Ontario, although it has resisted certification in all three provinces.

[188] As far as I am aware, certification decisions have yet to be rendered in either Saskatchewan or Ontario.

[189] If actions are certified in either or both those provinces, it will be unnecessary to determine the applicability of the *BPCPA* in those actions, since that will be the sole focus of the common issues trial in British Columbia. I thus see very little risk of inconsistent findings among different courts.

Suitable representative plaintiff – *CPA*, s. 4(1)(e)

[190] I am satisfied that Mr. Gomel meets the criteria of s. 4(1)(e). He has deposed, and I accept, that he will represent the interests of the class. He has produced a litigation plan which will permit the litigation to move forward, subject to modification as needed. He has no conflict of interest with other class members on the common issues.

[191] Mr. Gomel is a member of the class, as presently proposed and defined.

[192] However, I am persuaded by the submissions of the defendants that I should hear further submissions on class definition and composition, which may necessitate either resort to s. 2(4) of the *CPA*, or that the plaintiffs identify a further representative plaintiff. For now, Mr. Gomel may remain as the sole representative plaintiffs.

[193] I will consider an application, if one is proposed by Ticketmaster, to confine the class to those who purchased tickets on Ticketmaster.ca only, as distinct from other resale platforms such as Stubhub. Depending on the outcome of that potential application, Mr. Gomel may cease to be a member of the class.

Conclusion

[194] I find that the plaintiffs have satisfied each of the requirements of s. 4(1) of the *CPA.* This action shall be certified as set out in these reasons.

[195] In summary:

- The plaintiffs' *BPCPA* claims are certified except the claim for restoration under s. 172(3).
- I decline to certify the claims for contraventions of the *Competition Act* and the common law claims in negligent misrepresentation and unjust enrichment. These pleadings must be struck, with the exception of the first sentence of para. 36 of the NoCC, which may remain, but in relation to the *BPCPA* claims.
- Those questions related to the *BPCPA* — questions (f)–(k), (l)(i) and (l)(ii) — are certified as common issues. For clarity, question (l)(iii), related to restoration under the *BPCPA,* is not certified.

- Questions (y) and (z) as they relate to punitive damages are certified as common issues; the reference to aggravated damages in question (y) is struck.

- Question (aa) is certified.

- I decline to certify the issue of aggregate damages in questions (bb), (cc) and (dd) at this stage. I will revisit that issue at the conclusion of the common issues trial.

- The class period must be amended to commence on June 30, 2015. The class period will end on the date of certification.

- Mr. Gomel is appointed as the representative plaintiff.

[196] Pursuant to s. 37 of the *CPA*, I make no award of costs.

[197] I direct that there be a further case management conference scheduled within 90 days of the release of this judgment to consider next steps.

"Tammen J."

Appendix "A"

SCHEDULE "A"

Amended Proposed Common Issues

Contraventions of the Competition Act

a. Did the defendants, or any of them, knowingly or recklessly make, send, or cause to be sent, representations to the public were was false or misleading in a material respect such that they contravened s. 52 of the *Competition Act*, RSC 1985, c 34 (the "*Competition Act*")?

b. As a result of the representations, was the market for event tickets originating from the defendants distorted such that it led to higher prices for event tickets in the Secondary Sales market. ("Secondary Sales" means the resale of event tickets by or on behalf of an event ticketholder)?

c. Further, or in the alternative, did the Class Members rely on the representations in purchasing tickets from Secondary Sales? Can reliance be inferred based on the representations?

d. What loss or damage, if any, are Class Members entitled to recover from the defendants, or any of them, pursuant to section 36 of the *Competition Act*?

e. What amounts, if any, should the defendants, or any of them, pay Class Members for the costs of any investigation in connection with this matter and for the costs of these proceedings pursuant to section 36 of the *Competition Act*?

Contraventions of the Business Practices and Consumer Protection Act

f. In purchasing events tickets from Secondary Sales for personal use and not for resale, where the original tickets were sold by the defendants:

   (i) were the Class Members "consumers" as defined by the *BPCPA*?

   (ii) were the defendants "suppliers" as defined by the *BPCPA*?

(iii) was this a "consumer transaction" as defined by the *BPCPA*?

g. Did the defendants discharge their burden of proving that they did not make a representation or engage in conduct that had the capability, tendency, or effect of deceiving or misleading the Class Members (a "deceptive act or practice") contrary to s. 5(1) of the *BPCPA*?

h. Further, or in the alternative, did the defendants discharge their burden of proving that they did not commit or engage in an unconscionable act or practice contrary to s. 9(1) of the *BPCPA*?

i. Have the Class Members suffered damage or loss due to a contravention of the *BPCPA*?

j. Are the Class Members' claims limited, waived, or released by the Limitation of Liability clause in the Terms of Use on www.ticketmaster.ca?

k. What amounts, if any, should the defendants, or any of them, pay Class Members as a result of the defendants' contravention(s) of the *BPCPA*?

l. If the Court finds that the defendants engaged in deceptive acts or practices, or unconscionable acts or practices, contrary to the *BPCPA*:

(i) pursuant to s. 172(1)(a), should a declaration be granted that these acts or practices engaged in by the defendants in respect of consumer transaction contravene the *BPCPA*?

(ii) pursuant to s. 172(1)(b), should an injunction be granted restraining the defendants from engaging or attempting to engage in those acts or practices?

(iii) pursuant to s. 172(3)(a), should the defendants be ordered to restore to Class Members any money that may have been acquired because of contraventions to the *BPCPA*?

(iv) pursuant to s. 172(3)(c), should the defendants be required to advertise the Court's judgment, declaration, order or injunction and, if so, on what terms or conditions?

Negligent Misrepresentation

m. Did the defendants, or any of them, owe a duty of care to the Class Members?

n. Did the defendants, or any of them, make representations that were untrue, inaccurate, or misleading?

o. Did the defendants, or any of them, act negligently in making such representations?

Unjust Enrichment

p. Were the defendants, or any of them, enriched by receipt of fees on event tickets sold through Secondary Sales?

q. Did Class Members suffer a corresponding deprivation as a consequence of fees on event tickets sold through Secondary Sales?

r. Is there a juridical reason why the defendants, or any of them, should be entitled to retain the fees, or any of the fees, given the defendants' wrongful and unlawful acts, including negligent misrepresentation and contraventions of the *Competition Act*?

s. What restitution, if any, is payable by the defendants, or any of them, to Class Members?

~~**Waiver of Tort**~~

~~t. Was the conduct of the defendants, or any of them, unlawful, wrongful or anti-competitive?~~

~~u. If so, did the defendants, or any of them, profit from their unlawful, wrongful or anti-competitive conduct?~~

~~v. Alternatively, if the elements of any tort claim in this action are satisfied, can the Class Members waive the tort and damages, and elect to receive restitution.~~

~~w. Are the defendants, or any of them, required to disgorge or account for their profits?~~

~~x. What restitution is payable by the defendants, or any of them, to Class Members for waiver of tort?~~

Aggravated and Punitive Damages

y. Do the acts and omissions of the defendants, or any of them, warrant an award of punitive or aggravated damages?

z. If so, what monetary amount is payable by the defendants, or any of them, to the Class Members?

Interest

aa. What is the liability, if any, of the defendants, or any of them, for court ordered interest?

Damages and Distribution

bb. Can damages for the Class Members be measured on an aggregate basis and, if so, what are the aggregate damages?

cc. What is the appropriate distribution of damages and/or restitution, including interest, to Class Members?

dd. Who should pay the cost of that distribution?