

COURT OF APPEAL FOR BRITISH COLUMBIA

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

Date: 20250429
Docket: CA49723

Between:

WestJet

Appellant
(Defendant)

And

Paul Gauthier and Christopher Reaume

Respondents
(Plaintiffs)

And

Attorney General of British Columbia

Respondent
(Pursuant to the *Constitutional Question Act*)

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

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

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Place and Date of Hearing: Vancouver, British Columbia
September 16–17, 2024

Place and Date of Judgment: Vancouver, British Columbia
April 29, 2025

Written Reasons by:

The Honourable Justice Dickson

Concurred in by:

The Honourable Madam Justice Fenlon

The Honourable Justice Winteringham

Summary:

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

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

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

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Reasons for Judgment of the Honourable Justice Dickson:**Introduction**

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

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

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

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

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

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

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

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

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

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

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

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

Legal Framework

Federal Legislation

Canada Transportation Act and Canadian Human Rights Act

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

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

...

(d) the transportation system is accessible without undue obstacle to the mobility of all persons;

(d.1) the transportation system is accessible without barriers to persons with disabilities; and ...

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

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

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

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

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

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

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

170(1) The Agency may, after consulting with the Minister, make regulations for the purpose of identifying or removing barriers or preventing new barriers ... in the transportation network under the legislative authority of Parliament to the mobility of persons with disabilities, including regulations respecting

...

(c) tariffs, rates, fares, charges and terms and conditions of carriage applicable in respect of the transportation of persons with disabilities or incidental services; ...

...

172(1) The Agency may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1), regardless of whether such a regulation has been made, in order to determine whether there is an undue barrier to the mobility of persons with disabilities.

(2) On determining that there is an undue barrier to the mobility of persons with disabilities, the Agency may do one or more of the following:

(a) require the taking of appropriate corrective measures;

(b) direct that compensation be paid for any expense incurred by a person with a disability arising out of the barrier, including for any costs of obtaining alternative goods, services or accommodation; ...

(3) If the Agency is satisfied that regulations made under subsection 170(1) that are applicable in relation to a matter have been complied with or have not been contravened, the Agency may determine that there is an undue barrier in relation to that matter but if it does so, it may only require the taking of appropriate corrective measures.

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

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

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

AT Regulation

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

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

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

31(1) Subject to subsection (2), it is prohibited for a carrier to impose a fare or any other charge for any service that the carrier is required by this Part to provide to any person.

(2) The prohibition in subsection (1) does not apply to a carrier in respect to any service that the carrier is required to provide under section 50, 51 or 52 if that service is provided by the carrier for the purpose of a transportation service between Canada and a foreign country.

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

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

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

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

Provincial Legislation

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

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

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

8(1) An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.

(2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.

(3) Without limiting subsection (2), the circumstances that the court must consider include the following:

...

(b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;

...

(e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable ...

9(1) A supplier must not commit or engage in an unconscionable act or practice in respect of a consumer transaction.

(2) If it is alleged that a supplier committed or engaged in an unconscionable act or practice, the burden of proof that the unconscionable act or practice was not committed or engaged in is on the supplier.

10(1) Subject to subsection (2), if an unconscionable act or practice occurred in respect of a consumer transaction, that consumer transaction is not binding on the consumer or guarantor.

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

Federal Paramountcy

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

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

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

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

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

Common Law and Equitable Claims

Claims for Breach of Statute

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

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

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

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

Doctrine of Unconscionability

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

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

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

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

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

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

trying to “escape from a contract when their circumstances are such that the agreement *now* works a hardship upon them” ...

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

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

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

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

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

Ouster of Common Law and Equitable Claims

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

[19] ... More often statutes modify the common law in particular ways, leaving it intact except to the extent that it has been displaced. As a general rule, then, the common law and a statutory regime will be allowed to co-exist where they do not conflict with one another.

[20] Of course, where a statute is in direct opposition to a common law principle, the two cannot co-exist. As statutes overlay the common law, the statute will prevail in cases of direct conflict.

[21] A statute may also specifically state that it is intended to displace the common law, and such a statement will be effective. For example, the *Criminal Code*, R.S.C. 1985, c. C-46 specifically sets out the rules for applying the common law in criminal cases in ss. 8 and 9.

[22] Finally, there are statutes that, while not in direct conflict with the common law, are drafted in such a way as to make it clear that they are intended to comprehensively govern an area, leaving no room for the application of the common law. Such statutes are often referred to as “comprehensive codes”. They are intended to supplant rather than supplement the common law.

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

[31] ... First, a court is to consider “the process for dispute resolution established by the legislation” and ask whether the language is “consistent with exclusive jurisdiction”. Courts should look at “the presence or absence of privative clauses and the relationship between the dispute resolution process and the overall legislative scheme”: *Pleau*, at para. 50 (emphasis in original).

[32] Second, a court should consider “the nature of the dispute and its relation to the rights and obligations created by the overall scheme of the legislation”. The court is to assess “the essential character” of the dispute and “the extent to which it is, in substance, regulated by the legislative ... scheme and the extent to which the court’s assumption of jurisdiction would be consistent or inconsistent with that scheme”: *Pleau*, at para. 51 (emphasis in original).

[33] The third consideration is “the capacity of the scheme to afford effective redress” by addressing the concern that “where there is a right, there ought to be a remedy”: *Pleau*, at para. 52 (emphasis in original).

[Emphasis added.]

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

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

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

[Canadian Human Rights Act] was never enacted. If Parliament intended the [Canadian Human Rights Act] to oust the court's jurisdiction over matters otherwise subject to its jurisdiction, I would expect it to do so expressly. It has not.

[46] Further, I am not persuaded that it is plain and obvious that the [Canadian Human Rights Act] ousts the jurisdiction of the courts by necessary implication. Recognizing that the legislation creates an administrative regime that is intended to be flexible, efficient, and expeditious, suggests that Parliament intended to create statutory rights capable of being vindicated by an administrative tribunal. Alone, this is not enough in my view to support an argument that by creating such a scheme Parliament intended to deprive plaintiffs of access to the courts they would otherwise enjoy.

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

Agency Decisions on Per-Seat Pricing

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

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

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

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

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

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

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

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

[67] In the absence of a proceeding that would provide the Agency with the breadth of perspective required to properly assess and evaluate this significant remedy, the Agency cannot discharge its responsibilities in a fair and informed way. The Agency is limited by the legislative mandate provided to it in the [*Canada Transportation Act*] which does not, at this time, include own motion powers to conduct broader, more systemic investigations.

[68] In light of the above, the Agency grants WestJet’s request that the Agency dismiss this aspect of Ms. Cheung’s application and will not consider expanding the application of the one-person, one-fare principle to transborder or international routes in the context of this application and at this time.

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

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

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

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

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

[59] Then the Agency said this:

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

[28] It should be noted that although the Agency now has own-motion powers to initiate the type of broad inquiry that was referred to in *Cheung v. WestJet*, these powers will not enable the Agency to overcome the challenges that exist based on the international scope of the requested remedy described above.

[29] Accordingly, in order for Canada to respect the commitments it has made to other states, the Agency finds that the application of [one-person, one-fare] to international carriage is best addressed through ongoing efforts to achieve international cooperation and coordination among governments. The Agency will continue its efforts to highlight the importance of a unified [one-person, one-fare] international carriage policy as part of its participation in transportation forums, including the International Civil Aviation Organization, and to proactively influence the international civil aviation environment with the objective of ensuring that it becomes more responsive to the needs of persons with disabilities.

[30] Noting that [one-person, one-fare] applied to international carriage is the only corrective measure requested in this application, the Agency exercises its discretion under section 37 of the [*Canada Transportation Act*] and declines to determine the application.

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

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

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

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence, as the case may be,

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

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

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

[17] In deciding whether pleadings disclose a cause of action, the judge should read them generously, with a view to accommodating inadequacies in form attributable to deficient drafting. Where such inadequacies exist, the plaintiff should propose amendments to cure the or, to the extent reasonable, the certification application should be adjourned to allow such a proposal to be made: *Sandhu v. HSC Financial Mortgages Inc.*, 2016 BCCA 301 at para. 44-46. Even if the plaintiff's argument is novel and may require an expansion of the law as it currently stands, this is not necessarily fatal: *Sherry* at para. 53. On the contrary, the absence of jurisprudence fully settling an issue may be a good reason to exercise restraint in striking a claim at the pleadings stage: *Trillium Motor World Inc. v. General Motors of Canada Limited*, 2011 ONSC 1300, aff'd 2012 ONSC 463 at paras. 61, 74. To satisfy the s. 4(1)(a) requirement, the plaintiff need only satisfy the judge that the action is not bound to fail.

[18] Nevertheless, the *Hunt* test will not be met in all cases. Difficult questions of law may arise on the pleadings and, insofar as reasonably possible, they should be addressed directly at the certification stage. This approach benefits the parties and the justice system by ensuring that only claims with a realistic prospect of success proceed and, therefore, that time and resources are only expended on moving such claims forward. As Justice Newbury observed in *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 at para. 64: "... scarce judicial resources may be squandered when difficult questions of law are continually side-stepped in the class action context".

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

Pleadings against WestJet

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

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

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

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

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

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

air. This impacts Class members' employment opportunities as well as their personal and family lives; causes economic distress; exacerbates the disadvantages faced by persons with Disabilities; and can be humiliating.

44. The contracts requiring Additional Fares are unenforceable on the basis that it would be contrary to public policy to enforce contracts that are blatantly discriminatory. As stated above, by requiring the Additional Fares, the Defendants charge persons with Disabilities a premium to travel by air, when compared to others who do not have the same disabilities.

...

47. The Plaintiffs and members of the Classes are entitled to claim and recover the Additional Fares paid based on equitable and restitutionary principles.

48. The Defendants caused the Plaintiffs and members of the Classes to pay more for air travel than other Canadian residents on the basis of their Disabilities.

49. The Defendants were enriched by the Additional Fares and the Plaintiffs and members of the Classes suffered a deprivation corresponding to the Defendants' enrichment.

50. The contracts requiring the Additional Fares are void and unenforceable therefore there is no juristic reason for the Defendants' enrichment and the Plaintiffs' and Class members' corresponding deprivation. The Plaintiffs and members of the Classes are entitled to restitution for the Defendants' unjust enrichment.

51. The Plaintiffs and members of the Classes plead and rely on [provincial consumer protection statutes].

52. The Defendants' contracts and policies for charging the Additional Fares constituted unfair, unconscionable and/or otherwise prohibited practices under the Consumer Protection statutes ...

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

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

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

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

Application to Dismiss Proposed Class Action

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

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

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

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

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

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

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

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

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

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

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

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

On Appeal

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

- a) Does the Supreme Court of British Columbia lack subject matter jurisdiction over the claim because it is plainly and obviously a claim for discrimination based on human rights legislation or its underlying public policy?
- b) Is it plain and obvious that the claim will fail because s. 31(2) of the *AT Regulation* permits WestJet to charge the impugned additional fares for international travel?
- c) Is it plain and obvious that s. 31(2) of the *AT Regulation* is incompatible with provincial consumer protection legislation?

Discussion

Standard of Review

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

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

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

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

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

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

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

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

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

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

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

[89] I am not persuaded by these submissions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[106] I do not accept these submissions.

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

31(1) Subject to subsection (2), it is prohibited for a carrier to impose a fare or any other charge for any service that the carrier is required by this Part to provide to any person.

(2) The prohibition in subsection (1) does not apply to a carrier in respect to any service that the carrier is required to provide under section 50, 51 or 52 [for additional seating] if that service is provided by the carrier for the purpose of a transportation service between Canada and a foreign country.

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

“The Honourable Justice Dickson”

I AGREE:

“The Honourable Madam Justice Fenlon”

I AGREE:

“The Honourable Justice Winteringham”