COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Airbnb, Inc. v. Ware,*
2026 BCCA 110

Date: 20260319
Docket: CA50368

Between:

Airbnb, Inc., Airbnb Canada Inc., Airbnb Travel, LLC, Airbnb Stays Inc., Airbnb Ireland Unlimited Company, and Airbnb Payments UK Ltd.

Appellants
(Defendants)

And

Margot Ware

Respondent
(Plaintiff)

Before: The Honourable Madam Justice Horsman
The Honourable Justice Iyer
The Honourable Justice Edelmann

On appeal from: An order of the Supreme Court of British Columbia, dated December 11, 2024 (*Ware v. Airbnb, Inc.*, 2024 BCSC 2240, Vancouver Docket S223172).

Counsel for the Appellants:	G.B. Dingle A. Bogach
Counsel for the Respondent:	K.J. McLaren S. Lin A.S. Majidi S. Cheong
Place and Date of Hearing:	Vancouver, British Columbia October 31, 2025
Place and Date of Judgment:	Vancouver, British Columbia March 19, 2026

Written Reasons by:
The Honourable Madam Justice Horsman

Concurred in by:
The Honourable Justice Iyer
The Honourable Justice Edelmann

Summary:

The appellants appeal the orders of the chambers judge certifying this proceeding as a class proceeding and dismissing objections by two of the appellants that the Court did not have territorial jurisdiction over them. The respondent alleges that the appellants have operated as real estate agents, travel agents, and/or money services businesses without having obtained the licence or registration required by the statutes regulating these activities. She pleads causes of action in unjust enrichment, breach of provincial consumer protection statutes, and breach of contract, all grounded in the alleged contravention of the statutes. On appeal, the appellants say that: (1) the chambers judge erred in finding there was a real and substantial connection between British Columbia and the facts of the pleaded claims against Airbnb, Inc. and Airbnb Canada Inc., or in refusing to decline jurisdiction over Airbnb, Inc.; and (2) the chambers judge erred in finding the respondent had established the requirements in s. 4(1)(a)-(d) of the Class Proceedings Act.

Held: Appeal allowed in part. Airbnb, Inc's appeal from the order dismissing its jurisdictional objection is dismissed. Airbnb Canada's appeal is allowed and the claim against it is dismissed. The appeal from the certification order is allowed, the certification order is set aside, and the matter is remitted to the chambers judge.

(1) On the appeal from the dismissal of the jurisdictional challenge, the chambers judge did not err in dismissing Airbnb, Inc.'s jurisdictional objection, or in refusing to decline jurisdiction on the basis that California was the more appropriate forum. The court has territorial jurisdiction over Airbnb, Inc. based on the company's undisputed role as a contracting party in relation to some of the claims. The chambers judge did not err in refusing to decline jurisdiction in favour of California. However, the chambers erred in finding the Court had territorial competence over Airbnb Canada. There are no pleaded facts to establish territorial jurisdiction. Airbnb Canada's role, as pleaded and shown on the evidence, was limited to providing advertising and marketing services to other Airbnb entities.(2) On the appeal from the certification order, the chambers judge did not err in finding that the pleadings disclosed a cause of action and that there was an identifiable class of two or more persons. However, she erred in her analysis of the preferable procedure requirement. Further, she conducted her preferability analysis on the basis of a fundamentally flawed set of proposed common issues that did not allow a proper assessment of whether the claim should be certified as a class proceeding. The certification order is set aside and the matter is remitted to the chambers judge to consider whether the requirements of ss. 4(1)(c) and (d) of the Class Proceedings Act are met in light of the Court of Appeal's reasons.

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Overview

[1] The appellants appeal two orders by the chambers judge: (1) her order certifying this proceeding as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1995, c. 50 [*CPA*]; and (2) her order dismissing a jurisdictional objection raised by two of the appellants.

[2] The appellants, along with other affiliates, are part of the Airbnb group of companies. The companies operate a platform (the "Airbnb Platform") that allows travellers ("Guests") to connect with individuals who have accommodations to offer for rent ("Owners"). Owners and Guests contract with an Airbnb entity for use of the Airbnb Platform pursuant to Airbnb's terms of service (the "Terms of Service") and with a separate Airbnb entity to facilitate payment for that use pursuant to Airbnb's payment terms (the "Payment Terms").

[3] I will use the generic term "Airbnb" to refer to this group of companies and the accommodation services they provide. I will use the generic terms "Terms of Service" and "Payment Terms" to refer to the contractual arrangements between Airbnb and class members. The appellants do not contend that there are material differences in the various contracts in effect over the class period.

[4] Airbnb charges a fee to Guests who reserve an accommodation through the Airbnb Platform (the "Travellers Service Fees"). While Airbnb also charges a fee to Owners for each reservation, it is the Travellers Service Fees that are in issue in this action. Specifically, the respondent seeks to recover, on behalf of herself and the class, the Travellers Service Fees that have been paid to Airbnb during the class period, as well as interest Airbnb is alleged to earn on monies it receives from Guests until such time as the monies are remitted to the Owner or the relevant tax authority (the "Accrued Interest").

[5] The respondent, Margot Ware, deposes that she has used the Airbnb Platform to reserve accommodations for many years, including to rent a property in

Penticton, B.C. in August 2021. The core of her claim in this proceeding is that the appellants have operated as real estate agents, travel agents, and/or money services businesses without having obtained the licence or registration required by the statutes regulating these activities. She pleads causes of action in unjust enrichment, breach of provincial consumer protection statutes, and breach of contract, all of which are grounded in the alleged contravention of these statutes.

[6] The respondent's application to certify the action as a class proceeding was heard at the same time as the application of two of the appellants—Airbnb, Inc. and Airbnb Canada Inc. ("Airbnb Canada")—to dismiss the claim against them on jurisdictional grounds. Airbnb, Inc. objected to the court's assumption of jurisdiction over it after June 30, 2014, while acknowledging that it did contract with class members before that date. Airbnb Canada maintained that there was no pleading or evidence that established a real and substantial connection at any time between British Columbia and the facts on which the proceeding against it were based.

[7] The appellants also unsuccessfully sought to have the claims dismissed based on abuse of process. However, that issue is not before us on appeal.

[8] The chambers judge dismissed the jurisdictional applications. She concluded that the respondent had established a good arguable case that the Court had jurisdiction over Airbnb, Inc. and Airbnb Canada, which the applicants had not rebutted. The chambers judge certified the action as a class proceeding. She found that the claim raised common issues that would advance the claims of class members and avoid duplication of fact-finding and legal analysis. The chambers judge rejected the appellants' argument that the regulatory process was a preferable procedure for resolving the common issues given the centrality of the issue of statutory illegality.

[9] The appellants appeal both the dismissal of the jurisdictional challenges and the certification of the action as a class proceeding.

Background

[10] I will address the activities of the Airbnb entities that are appellants in this proceeding in more detail later in this judgment. For the purpose of understanding the pleaded claims, it is important to note that since June 30, 2014, the appellant Airbnb Ireland Unlimited Company ("Airbnb Ireland") has been the primary company that contracts with Canadian Guests in relation to the Terms of Service, while Airbnb Payments UK Ltd. ("Airbnb UK") contracts with Canadian Guests in relation to the Payment Terms. The appellant Airbnb, Inc. formerly contracted with Canadian Guests, but has not done so since June 30, 2014. Airbnb Canada provides marketing services to other Airbnb entities under a service agreement with Airbnb Ireland.

The Amended Notice of Civil Claim

[11] The respondent filed her original notice of civil claim on April 14, 2022, and an amended notice of civil claim on July 17, 2023, (the "ANOCC").

The pleaded causes of action

[12] In the ANOCC, the respondent pleads that the appellants collectively provide and operate a global online marketplace for renting accommodations (defined as the "Accommodation Rental Services"), which are accessible via websites and through mobile applications. It is alleged that the Accommodation Rental Services bear the hallmarks of services provided by a real estate agent or a travel agent, including by:

a) recommending the price for the Owner to list the accommodation for rent;

b) facilitating or enabling correspondence between a potential Guest and the Owner;

c) compiling and standardizing the listings for the accommodations;

d) accepting bookings on behalf of the Owner or presenting an offer to book to the Owner;

e) charging security deposits and collecting monies for renting of the accommodation and remitting the monies to the Owner or tax authorities;

f) holding monies already paid by the Guest pending their arrival at the accommodation, and earning interest for the appellants' own benefit;

g) collecting, moderating, and publishing reviews;

h) verifying the authenticity of accounts;

i) providing the Guest and the Owner with various policies, guarantees, or insurance-like protections; and

j) providing 24/7 support to Owners and Guests.

[13] The ANOCC pleads that individuals wishing to offer such services in British Columbia must be licensed as a real estate agent and a travel agent under, respectively, the *Real Estate Services Act*, S.B.C. 2004, c. 42, and the *Travel Industry Regulation*, B.C. Reg. 296/2004. It is alleged that all of the Canadian provinces and territories, except Quebec, similarly prohibit unlicensed persons from providing real estate services, and that Ontario and Quebec similarly prohibit unlicensed persons from providing travel agent services. The ANOCC defines these legislative prohibitions as the "Real Estate Services Prohibition" and the "Travel Agent Services Prohibition".

[14] The ANOCC further alleges that Airbnb's facilitation of money transfers between Guests and Owners constitutes a money service business. Under the federal *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, foreign entities engaged in a money service business must register with the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). In Quebec, a foreign entity engaged in a money services business must be registered under the *Money Services Businesses Act*, CQLR, c. E-12.000001, ss. 3–4. It is alleged that the appellant Airbnb UK, as a foreign entity engaged in a money service

business, has failed to comply with these legislative requirements. This is defined as the “MSB Prohibition”.

[15] I will collectively refer to the Real Estate Services Prohibition, the Travel Agent Services Prohibition and the MSB Prohibition as the “Prohibitions”. The various cross-country statutes relevant to the Real Estate Prohibition are set out in Schedule A to the ANOCC while statutes relevant to the Travel Agent Services Prohibition are set out in Schedule B. The statutes relevant to the MSB Prohibition are identified in the body of the ANOCC.

[16] The ANOCC pleads three causes of action: unjust enrichment, breach of consumer protection statutes, and breach of contract.

[17] In relation to the claim of unjust enrichment, the ANOCC alleges that: (1) Airbnb has been enriched by collecting the Travellers Service Fees and earning the Accrued Interest; (2) class members have been deprived by the payment of Travellers Service Fees and loss of interest on their monies in an amount equivalent to the Accrued Interest; and (3) there is no juristic reason for Airbnb to retain these benefits. There is said to be no juristic reason because Airbnb’s contravention of the regulatory Prohibitions voids or renders voidable any contractual basis for the Travellers Service Fees, and renders illegal Airbnb’s conduct in retaining the Accrued Interest. The ANOCC seeks the remedies of restitution or disgorgement.

[18] In relation to the claim of breach of consumer protection laws, the ANOCC alleges that Airbnb engaged in “deceptive” or “unconscionable” acts and practices contrary to the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*], and analogous legislation in other jurisdictions. The alleged deceptive or unconscionable acts consist of Airbnb offering the Accommodation Rental Services when such conduct is contrary to the Prohibitions. It is further alleged that, by virtue of the illegal conduct, Airbnb has subjected class members to terms and conditions that were so harsh or adverse as to be “inequitable” within the meaning of s. 8(3)(e) of the *BPCPA*. The ANOCC seeks various remedies under the *BPCPA*, and the

analogous legislation in other jurisdictions, including damages, a declaration and injunction, and a restoration order.

[19] The claim in contract is pleaded in the alternative and only against the appellants Airbnb Ireland and/or Airbnb UK. It is alleged that the contracts between these entities and class members contain an express or implied term that Airbnb will comply with applicable laws, including the Prohibitions. It is alleged that the Airbnb entities breached this term.

The jurisdictional facts

[20] The ANOCC pleads facts to establish a jurisdictional basis for the claims against each of the appellants. On this appeal, it is only necessary to review the pleaded facts relating to the claim against Airbnb, Inc. and Airbnb Canada.

[21] The jurisdictional facts pleaded for the claim against Airbnb, Inc. are:

a) between July 10, 2009, to around June 30, 2014, Airbnb, Inc. contracted with British Columbia residents for their reservation of accommodations via the Accommodation Rental Services;

b) in the same period, Airbnb, Inc. contracted with non-British Columbia residents for their reservation of accommodations physically situated in B.C. via the Accommodation Rental Services;

c) Airbnb, Inc. performs advertising that is directed to the Canadian market including but not limited to: (1) the Airbnb.ca website, which targets Canadian users; and/or (2) the distribution of its mobile applications on the Canadian-specific Apple App Store or Google Play Store;

d) Airbnb, Inc. developed, operated, managed, and/or directed the operations of the global platform where the Accommodation Rental Services are offered; and

e) the accommodations that are reserved through the Accommodation Rental Services are physically situated in British Columbia.

[22] The pleaded jurisdictional fact for the claim against Airbnb Canada is that in Canada, Airbnb Canada acts on behalf of, represents, and markets the services of the other Airbnb defendants.

The parties' applications

[23] Aside from the abuse of process application that is not in issue on appeal, the chambers judgment addresses two applications: (1) the respondent's application to certify the action as a class proceeding; (2) the application of two of the appellants to strike the claims against them on jurisdictional grounds.

The certification application

The respondent's application material

[24] In her certification application, the respondent defined the proposed class as all individuals who, during the class period, made a reservation using the Accommodation Rental Services and paid Travellers Service Fees to Airbnb and either: (1) reside in Canada; or (2) reside outside of Canada and the reserved accommodation is located in British Columbia, Alberta, Saskatchewan, Ontario or Quebec. The proposed class definition excluded reservations made for work as well as reservations made between October 31, 2015–June 25, 2019, by individuals who submitted a claim for the Federal Court settlement in *Lin v. Airbnb, Inc., et al.* (T-166317).

[25] The proposed class period for Quebec residents was defined as June 27, 2019, to the date of final judgment in the action. For the remaining class members, it was defined as July 10, 2009, to the date of final judgment (the "Class Period").

[26] The respondent's proposed common issues were divided into "factual questions", "legal questions" and "remedies questions". The factual questions included: did Airbnb provide the Accommodation Rental Services to class members; did Airbnb charge class members the Travellers Service Fees and retain Accrued Interest; and were any of the Airbnb entities licenced real estate agents or travel agents, or licensed or registered to engage in a money service business in Canada?

[27] The legal questions asked whether any of the Airbnb entities complied with the Prohibitions—as set out in Schedules A and B to the ANOCC for the Real Estate Services and Travel Agent Services Prohibitions and in the body of the ANOCC for the MSB Prohibition—during the Class Period, and, if not, whether this constituted a breach of the contractual requirement that Airbnb comply with applicable laws.

[28] The remedies questions include whether the Airbnb entities should be ordered to pay "restitution, disgorgement, and/or accounting of profits" in relation to the Travellers Service Fees and the Accrued Interest, nominal damages for breach of contract, and punitive damages. The remedies questions also asked whether, if damages were awarded, the court should make an aggregate award of damages and whether a permanent injunction should be issued.

[29] Notably, the proposed legal and remedies questions did not include common issues specific to the elements of any of the pleaded of causes of action other than breach of contract. I will return to this point when I address the common issues requirement later in the judgment.

[30] The respondent relied on two affidavits in support of her certification application: her own affidavit and the affidavit of Owen Cotterill, a legal administrative assistant employed at the law firm representing the respondent. The respondent's affidavit summarizes her experience using Airbnb to reserve accommodations, describes her understanding of the proposed class action, and attaches a litigation plan. Mr. Cotterill's affidavit exhibits various documents setting out Airbnb's corporate structure and financing and describing the Rental Accommodation Services that Airbnb provides. The exhibits to Mr. Cotterill's affidavit also include letters sent by counsel for the respondents to regulators across the country advising them of the existence of the action and summarizing the relevant allegations. Mr. Cotterill deposes that to date counsel has received no substantive responses to these letters.

The appellants' response material

[31] The appellants opposed the certification of the action as a class proceeding, contending the respondent had not established any of the criteria in s. 4 of the *CPA*. Specifically, the appellants argued it was plain and obvious that none of the pleaded claims could succeed (s. 4(1)(a)), and in any event they did not raise common issues (s. 4(1)(c)). They argued that the requirement of s. 4(1)(b) of the *CPA* (identifiable class of two or more persons) was not satisfied because the class included individuals who should be excluded. The appellants' arguments on preferability (s. 4(1)(d)) included that it was for the relevant regulatory authorities to enforce the Prohibitions that grounded the respondent's claims.

[32] In support of their opposition to certification, the appellants relied on the affidavit of Stephen Scott, Manager, Advanced Analytics at Airbnb Ireland. Mr. Scott's affidavit describes the operation of the Airbnb Platform. Mr. Scott estimates that, based on the class definition, there are over eight million Guests who may fall within the class definition. Mr. Scott's affidavit exhibits documents relating to FINTRAC's regulation of money service businesses as well as a travel agent policy guideline published by the Travel Industry Council of Ontario. The documents include correspondence from FINTRAC advising that Airbnb UK did not appear to be a money service business and, therefore, it could not register with FINTRAC.

The application challenging jurisdiction

[33] The appellants Airbnb, Inc. and Airbnb Canada (collectively the "applicants") filed an application seeking to strike the claims against them on the basis that the Court lacked territorial competence over them. The notice of application alleged that:

a) Airbnb Canada did not contract with or collect fees from Guests or Owners; rather, its role in Canada was limited to providing sales and marketing and business support services under a services agreement with Airbnb Ireland.

b) Airbnb, Inc. had not contracted with Canadian residents since June 30, 2014, and it had no presence or employees in Canada. Instead, Airbnb,

> Inc. acted as the operating company for United States users of the Airbnb Platform and contracted with United States resident Guests and Owners under separate Terms of Services. It was further alleged that these separate Terms of Services contained arbitration and forum selection clauses.

[34] The applicants sought orders dismissing the claims against them for want of jurisdiction. To the extent that the court had jurisdiction over Airbnb, Inc. in the pre-June 2014 period, it argued the court should decline jurisdiction.

[35] In support of their jurisdictional objection, Airbnb, Inc. and Airbnb Canada relied on the affidavit of Killian Pattwell, the Director of EMEA Tax at Airbnb Ireland. Mr. Pattwell deposes that there are four Airbnb entities that currently contract with Canadian residents in relation to the Terms of Service or the Payment Terms:

a) Airbnb Ireland contracts with Canadian resident Guests booking on the Airbnb Platform and Canadian resident Owners that publish and offer services on the Airbnb Platform, unless another entity is identified in the checkout or listing process.

b) Airbnb UK contracts with Canadian Guests and Owners in relation to Airbnb's Payment Terms.

c) Airbnb Travel, LLC contracts with Canadian Guests and Owners for accommodations at certain hotel properties listed on the Airbnb Platform.

d) Airbnb Stays, Inc. contracts with Canadian resident Guests and Owners for long term stays (over 28 days) in the United States.

[36] Mr. Pattwell's evidence concerning the two applicants is as follows:

a) Airbnb, Inc. was incorporated under the laws of Delaware and is the parent company of the Airbnb group. Airbnb, Inc. had not contracted with Canadian residents in over eight years, since June 30, 2014, and it has no presence or employees in Canada.

b) Airbnb Canada—a company incorporated in New Brunswick with a head office in St. John— is a wholly-owned subsidiary of Airbnb Ireland. It provides sales and marketing and business support services to Airbnb Ireland under a service agreement between the two companies. Airbnb Canada does not contract with Guests or Owners in Canada, and does not operate the Airbnb Platform in Canada.

[37] The respondent relied on the second affidavit of Mr. Cotterill, which attaches various documents taken from the Airbnb website, documents created or disclosed in the prior Federal Court proceeding, and documents relating to Airbnb's trademarks, advertising, and investors.

[38] In her response to the jurisdictional application, the respondent agreed that the claims of United States residents were subject to an arbitration clause. She conceded that these claims should be stayed other than for accommodations located in provinces that have statutory prohibitions on arbitration clauses, such as ss. 172 of the *BPCPA*: see *Seidel v. TELUS Communications Inc.*, 2011 SCC 15. The respondent consented to an order staying claims relating to accommodations physically located in British Columbia made by consumers residing in the United States for causes of action outside the *BPCPA*.

[39] It should be noted that none of the appellants have brought an application to stay any or all of this proceeding under s. 7 of the *Arbitration Act*, S.B.C. 2020, c. 2.

The Intervenor Application

[40] The British Columbia Financial Services Authority (the "Authority") applied to intervene on the certification application. This application is relevant to some of the arguments the appellants advance on appeal, particularly in relation to the preferability requirement in s. 4(1)(d) of the *CPA*.

[41] In its notice of application, the Authority submitted that the Superintendent of Real Estate (the "Superintendent")—appointed by the Authority under s. 2.1 of the *Real Estate Services Act*—has jurisdiction in respect of the regulation, supervision,

and discipline of persons engaged in activity contrary to the Act. The Authority contended that the relief sought by the respondent fell exclusively within the Superintendent's regulatory jurisdiction. The Authority outlined its position that a person engaged in the management of short-term accommodation rentals does not require a licence under the *Real Estate Services Act*. It explained the process of statutory interpretation that informed this position. The Authority advised it has not commenced any investigation, hearing, or injunctive proceeding involving Airbnb's activities. It also has received no complaints about Airbnb's activities, including from the respondent.

[42] The Authority argued it had a direct interest in the proceeding and the certification hearing because the Court will determine whether persons other than the Superintendent can seek injunctive relief under the *Real Estate Services Act* and whether a class action is preferable to the Authority's regulatory processes. The Authority contended that this would directly affect its regulatory role. Alternatively, the Authority argued that even if it did not have a direct interest, it could offer a different and useful perspective on the issues.

[43] The chambers judge dismissed the Authority's intervenor application: 2023 BCSC 2144. The chambers judge concluded that the Authority had not established it had a direct interest in the proceeding at the certification application stage, or that it would offer a unique perspective that would assist the Court in determining whether the action should be certified.

[44] The Authority did not appeal this decision.

The Chambers Judgment

[45] The parties' applications were heard by the chambers judge over six days. On December 11, 2024, she issued reasons for decision granting the application for certification and dismissing the appellants' applications including the jurisdictional challenge: 2024 BCSC 2240 ("RFJ").

The jurisdictional application of Airbnb, Inc. and Airbnb Canada

[46] In addressing the jurisdictional challenge, the chambers judge first referred to s. 3(e) of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*]. This provision states that a court has territorial competence in a proceeding brought against a person if there is "a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based". The chambers judge referred to s. 10 of the *CJPTA*, which sets out a non-exhaustive list of circumstances—or "connecting factors"—that presumptively establish a real and substantial connection.

[47] The chambers judge cited the two-stage analytical framework set out in *Ewert v. Höegh Autoliners*, 2020 BCCA 181 at paras. 16–17. At the first stage, the plaintiff must show that one of the connecting factors listed in s. 10 exists based on undisputed pleaded facts or on disputed pleadings where the evidence shows a "good arguable case": *Ewert* at para. 16. If the plaintiff succeeds at this first stage, there is a mandatory presumption of a real and substantial connection. At the second stage, the defendant may attempt to rebut the presumption by establishing "facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them": *Ewert* at para. 17, quoting *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 95 [*Van Breda*]. *Ewert* describes the burden on the defendant to rebut the presumption of a real and substantial connection as "heavy": *Ewert* at para. 17.

[48] I pause to note that after the RFJ were released in this case, the Supreme Court of Canada rendered judgment in *Sinclair v. Venezia*, 2025 SCC 27. The Court in *Sinclair* expressed disagreement with the analysis in *Ewert* to the extent it suggests that the rebuttal stage imposes a "heavy" burden on the defendant. The parties disagree as to the significance, if any, of the judgment in *Sinclair*. I will return to this question later in the judgment.

[49] The chambers judge was satisfied that the respondent had established at least an arguable case for a real and substantial connection between British Columbia and the applicants under six subsections of s. 10 of the *CJPTA*:

a) Section 10(c) – the claim concerns the interpretation of a contract relating to property in British Columbia.

b) Section 10(e)(i) – the contractual obligations were, to a substantial extent, to be performed in British Columbia.

c) Section 10(e)(iii) – class members purchased services under their contracts primarily for personal, family or household reasons after Airbnb, Inc. solicited their business.

d) Section 10(f) – the claim concerns restitutionary obligations substantially arising in British Columbia.

e) Section 10(g) – the claim concerns a tort committed in British Columbia because the alleged breach of consumer protection legislation constitutes a tort in British Columbia.

f) Section 10(i) – the remedies sought include a claim for an injunction restraining each of the appellants from operating the Airbnb Platform contrary to the Prohibitions.

[50] The chambers judge concluded that the applicants had failed to rebut the presumptive existence of a real and substantial connection on any of these grounds.

[51] The chambers judge rejected the applicants' arguments that even though Airbnb, Inc. had contracted with Canadian Guests before June 30, 2014—thus establishing territorial jurisdiction in that time period—California was the appropriate forum for the pre-June 2014 claims. The chambers judge noted that Airbnb, Inc. had offered limited evidence to demonstrate that California was clearly the appropriate forum, and there was no evidence of duplicative proceedings in California.

Certification application

[52] The chambers judge next turned to the respondent's certification application. She set out the statutory requirements in s. 4(1) of the *CPA*. The chambers judge acknowledged that while a certification application is not a hearing on the merits, the court does play a gatekeeping function that requires more than "symbolic scrutiny" of the claim: RFJ at para. 126, citing *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 15.

Section 4(1)(a): do the pleadings disclose a cause of action?

[53] The chambers judge addressed what she understood to be four causes of action advanced by the respondent: breach of provincial consumer protection laws, "statutory illegality", unjust enrichment and breach of contract.

Breach of consumer protection legislation

[54] The claim for breach of provincial consumer protection laws rested primarily on the allegation that the appellants had engaged in "deceptive acts or practices" or "unconscionable acts or practices" by offering the Accommodation Rental Services contrary to the Prohibitions. The chambers judge rejected the appellants' argument that this claim was bound to fail because the Terms of Service expressly stated that Airbnb was not a travel agent or real estate broker. She reasoned that the appellants may have a valid defence arising from the Terms of Service, but this was not an issue to be resolved at the certification stage. The chambers judge concluded the ANOCC disclosed a reasonable claim for breach of the *BPCPA*.

[55] The chambers judge reached a different conclusion in relation to consumer protection statutes in other jurisdictions. She found it was insufficient for the respondent to have simply listed the other statutes, particularly given that the appellants had pointed to important differences in the statutory causes of action. The chambers judge gave the respondent leave to further amend her claim to plead the material facts necessary to disclose causes of action under consumer protection statutes outside British Columbia.

Statutory illegality

[56] As noted, the chambers judge understood the respondent to plead statutory illegality—the appellants' alleged contravention of the Prohibitions—as a stand-alone cause of action. On appeal, the respondent clarified that she did not intend to advance such a cause of action. This was a sensible acknowledgment given that breach of a statute is not a cause of action in Canadian law: *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1993] 1 S.C.R. 205, 1983 CanLII 21. The respondent's late clarification that her claim was not grounded in a bare breach of statute may have created complications for the certified common issues. I will return to this issue in addressing the common issues later in this judgment.

[57] The chambers judge's analysis of statutory illegality is nevertheless relevant to the question of whether the claim for unjust enrichment discloses a cause of action. The appellants argued it was plain and obvious that its activities did not contravene any of the Prohibitions. This argument invited the chambers judge to engage in a process of statutory interpretation in relation to the various Prohibitions. The chambers judge concluded that the interpretative exercise was not so straightforward that the answer was plain and obvious. She cited *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22, for the proposition that if a question of statutory interpretation is arguable, it should not be resolved on the pleadings test under s. 4(1)(a) of the *CPA*. Therefore, the chambers judge concluded the claim for statutory illegality was not bound to fail.

Unjust enrichment

[58] The chambers judge adopted her analysis of statutory illegality to assess the sufficiency of the pleading of unjust enrichment. She rejected the appellants' argument that the respondent had not pleaded material facts to establish a deprivation because she had received the accommodation she bargained for. The chambers judge noted that the claim did not seek to recover any monies paid by class members other than the Travellers Service Fees and the Accrued Interest. She also rejected the appellants' argument that public policy and the reasonable expectations of the party plainly and obviously provided a juristic reason for them to

retain the benefit because short-term accommodations were not subject to the Prohibitions.

[59] The chambers judge concluded that the ANOCC set out material facts capable of supporting the claim that the appellants were unjustly enriched.

Breach of contract

[60] The chambers judge rejected the appellants' argument that it was plain and obvious from the Terms of Service that they did not promise to comply with the Prohibitions. She found the resolution of this argument would require an assessment on the merits going beyond the scope of the task for her on the certification hearing. The chambers judge thus concluded that it was not plain and obvious on the pleaded facts that the claim for breach of contract was doomed to fail.

Section 4(1)(b): is there an identifiable class of 2 or more persons?

[61] The appellants made a variety of objections to the respondent's proposed class definition; some were rejected by the chambers judge while others led her to direct revisions to the class definition.

[62] The chambers judge rejected the argument that non-Canadian Guests should be excluded from the class definition due to statutory and constitutional limits on provincial laws. She found that this was an argument that went to the merits and required an evidentiary basis to resolve. The chambers judge further noted that the appellants had not provided notice to the Attorneys General of British Columbia and Canada under the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, that they were challenging the constitutional applicability of provincial legislation.

[63] However, the chambers judge reasoned that her refusal, for now, to certify claims based on consumer protection legislation in other provinces required the class definition to be limited in the meantime to the rental of accommodation physically located in British Columbia. It is not clear to me why the class definition should have been so limited when the chambers judge did certify common issues relating to allegations of breach of contract and unjust enrichment that were not

limited to the rental of accommodation in British Columbia. In any event, no one has taken issue with this aspect of the chambers judgment on appeal.

[64] For ease of reference, the class definition, as ordered by the chambers judge, is set out in Schedule A to my reasons.

Section 4(1)(c): do the claims of class members raise common issues?

[65] With limited exception, the chambers judge found there was some basis in fact for concluding that the resolution of the proposed common questions was necessary to resolve the claims of each class member and therefore were common questions. She directed that revisions be made to some of the common factual questions to limit them, for now, to accommodations physically located in British Columbia. This was to account for her conclusion that the ANOCC did not currently disclose a claim for breach of consumer protection statutes outside of British Columbia. The chambers judge declined to certify the proposed common question relating to aggregate damages because the respondent had offered no workable methodology for determining aggregate damages.

[66] Otherwise, the chambers judge found that the proposed common questions would avoid duplication of fact-finding and legal analysis on questions relevant to the resolution of the claims.

[67] The common issues certified by the chambers judge are also listed in Schedule A to my reasons.

Section 4(1)(d): is a class proceeding the preferable procedure?

[68] The chambers judge's reasons on the preferable procedure requirement are brief. She quoted s. 4(2) of the *CPA*, which sets out the factors to be considered by a court in deciding whether a class proceeding is the preferable procedure. The chambers judge noted that the court must be guided by the goals of class proceedings: access to justice, judicial economy and behaviour modification: RFJ at para. 213, citing *Lewis v. WestJet Airlines Ltd.*, 2022 BCCA 145 at para. 36.

[69] The chambers judge stated that she would specifically focus on the factors in s. 4(2) of the *CPA* that the appellants relied on in support of their arguments on preferability. Her analysis is contained in the following two paragraphs:

> [215] The defendants submit that the regulatory process is the preferable procedure. They point out that it is noteworthy that no regulator has taken action against Airbnb despite class counsel writing to inform them of the Claim. The defendants also submit that the Claim is potentially dense and complicated as a result of at least 26 unique statutory schemes. However, given the material facts pleaded in the present Claim, and while the Claim is subject to further amendment, there are now far fewer statutory and regulatory schemes at issue.
>
> [216] As the regulator in BC has confirmed that Airbnb is not subject to the applicable regime, I do not accept that the regulatory process is a viable avenue for recovery.

[70] Without further substantive analysis, the chambers judge concluded that on balance the factors in s. 4(2) militated in favour of a class proceeding as the preferable procedure.

Section 4(1)(e): is there an appropriate representative plaintiff?

[71] Finally, the chambers judge concluded that the respondent met the statutory requirements in s. 4(1)(e) of the *CPA* for representing the class.

On appeal

[72] In relation to the dismissal of the jurisdictional application, the applicants argue that the chambers judge erred in:

a) concluding that the factors under s. 10 of the *CJPTA* created a real and substantial connection between the applicants and this dispute; and

b) concluding that the court should take jurisdiction over Airbnb, Inc. in the pre-June 10, 2014, period when British Columbia is not the proper forum.

[73] In relation to the certification order, the appellants argue that the chambers judge erred in:

a) concluding it was not plain and obvious that all pleaded causes of action were bound to fail;

b) certifying a class definition that: (i) improperly includes foreign Guests; (ii) does not limit the Guest's inclusion based on their place of residence; and (iii) includes claims barred by an arbitration and class action waiver clause;

c) concluding that common issues existed with respect to the existence of a breach of statute, nominal damages, and punitive damages; and

d) concluding that a class action, as opposed to regulatory proceedings, was the preferable procedure to resolve the claims of class members when there was no pleading that any class member has suffered any loss.

Standard of review

[74] The standard of review differs as between the various issues raised on appeal.

[75] The question of whether a provincial superior court has territorial jurisdiction over a matter is generally a question of law reviewable on a standard of correctness: *Ewert* at paras. 42–44. However, where an application judge is required to resolve factual questions based on disputed evidence to decide the jurisdictional question, such findings are treated as factual findings and appellate intervention is justified only on the ground of palpable and overriding error: *Altria Group, Inc. v. Stephens*, 2024 BCCA 99 at para. 39. A decision on whether to decline jurisdiction under s. 11 of the *CJTPA* is discretionary and will not be interfered with unless the discretion was exercised on a wrong principle or was clearly wrong: *Lerner v. Lerner (Estate)*, 2017 BCCA 408 at para. 18.

[76] On the certification issues, the question of whether the pleadings disclose a cause of action is a question of law reviewable for correctness: *Situmorang v. Google LLC*, 2024 BCCA 9 at para. 52. The standard of review that applies to a chambers judge's conclusions on the remaining criteria under s. 4(1) of the *CPA*

depends on the nature of the issue for appellate consideration. If the appeal challenges an exercise of discretion by the chambers judge or a finding of fact or mixed fact and law, deference will be owed: *Finkel* at para. 55. In particular, a decision on preferable procedure is discretionary and appellate interference will only be justified where there are errors in principle that are directly relevant to the conclusion reached: *Lewis* at para. 145.

Analysis

The appeal from the dismissal of the jurisdictional challenge

[77] The applicants argue that the judge erred in finding that the Court had territorial jurisdiction over them in this proceeding. They maintain that, properly understood, none of the connecting factors in s. 10 of the *CJPTA* are present. The applicants say the respondent did not show a good arguable case for jurisdiction, or, in the alternative, their evidence rebutted any presumptive jurisdiction by demonstrating there is only a weak relationship between the subject matter of the litigation and British Columbia. The applicants contend that in light of *Sinclair*, the chambers judge erred in characterizing their burden at the second stage of the analysis as “heavy”. In the alternative, they say the chambers judge should have declined jurisdiction in favour of California.

[78] In my view, the analysis of the jurisdictional issues differs as between Airbnb, Inc. and Airbnb Canada, therefore I will address these entities separately.

Territorial jurisdiction over Airbnb, Inc.

[79] The question of the Court’s territorial jurisdiction over Airbnb, Inc. is easily answered. Airbnb, Inc. concedes that prior to June 30, 2014, it contracted with Canadian Guests in relation to the provision of the Accommodation Rental Services. The Class Period in this case starts in 2009. The respondent herself deposed in her affidavit sworn July 16, 2023, that she has used Airbnb to reserve accommodations “since approximately twelve years ago”. As such, the respondent’s personal claims cover a period of time where Airbnb, Inc. was the contracting party.

[80] Airbnb, Inc. accepts that "B.C. courts had territorial jurisdiction over certain claims before June 30, 2014, because Airbnb, Inc. contracted with Canadian Guests prior to this date": Appellants' Factum at para. 39. However, Airbnb, Inc. argues that these claims are likely statute-barred due to the lapse of time, and in any event the relevant contracts contained arbitration and class action waiver clauses.

[81] The issue of territorial jurisdiction as it relates to Airbnb, Inc. has been unnecessarily complicated by Airbnb, Inc.'s assumption that an action can be divided up into time periods for the purpose of determining the court's territorial jurisdiction over discrete aspects of a proceeding. This assumption appears to have been accepted by the chambers judge and the respondent.

[82] No authority is offered in support of such an approach. Section 3(e) of the *CJPTA* provides that a court "has territorial competence in a proceeding that is brought against a person" if there is a real and substantial connection "between British Columbia and the facts on which the proceeding against that person is based". In this case, the proceeding is based, at least in part, on facts that took place when Airbnb, Inc. was contracting with Canadian Guests. Airbnb, Inc. concedes that the court had territorial competence in relation to these claims against Airbnb, Inc. That concession should have ended the jurisdictional analysis.

[83] Airbnb, Inc.'s various arguments as to why California is the more appropriate forum for the pre-June 30, 2014, claims may be relevant to other issues—such as *forum non conveniens* and the class definition—but they are not relevant to the court's territorial jurisdiction over Airbnb, Inc. in this proceeding.

[84] On this basis, I reject Airbnb, Inc.'s appeal from the chambers judge's determination that the Court had territorial competence in relation to the claims against Airbnb, Inc. I will separately address Airbnb, Inc.'s argument on *forum non conveniens* after addressing the jurisdictional challenge relating to Airbnb Canada.

Territorial jurisdiction over Airbnb Canada

[85] Airbnb Canada stands in a different position from Airbnb, Inc. The ANOCC does not allege that Airbnb Canada has ever contracted with Canadian Guests. The only jurisdictional fact pleaded against Airbnb Canada is that it "acts on behalf of, represents, and markets the services of, the other Airbnb defendants".

[86] The analysis of the chambers judge does not make clear the basis upon which she found a real and substantial connection in relation to Airbnb Canada. She largely did not distinguish between Airbnb, Inc. and Airbnb Canada but rather dealt with the two companies together as if they were a single entity. However, as emphasized in *Sinclair*, in cases where there are multiple defendants, jurisdiction must be "examined from the perspective of each defendant rather than in light of the factual and legal situation writ large": *Sinclair* at para. 63. This avoids the "judicial overreach" that would result from an assumption of jurisdiction over a defendant—which brings a corresponding power to make coercive orders against them—without the requisite connection: *Sinclair* at para. 63. There must be a presumptive connecting factor that applies to each defendant.

[87] As the chambers judge erred in her approach to the jurisdictional challenge by Airbnb Canada, it is necessary to conduct a fresh analysis.

[88] The precise parameters of the allegation in the ANOCC that Airbnb Canada acts "on behalf of" and "represents" the other defendants are not entirely clear. Mr. Pattwell's evidence is that Airbnb Canada provides sales, marketing and business support services to Airbnb Ireland. His affidavit appends the services agreement between these two companies. The respondent has not pointed to anything in the agreement that connects Airbnb Canada to the claims in issue in this proceeding.

[89] On appeal, the respondent emphasizes that Airbnb Canada has acknowledged that it engages in marketing in British Columbia. However, there is no evidence (or pleading) that Airbnb Canada's marketing activity amounts to solicitation within the meaning of s. 10(e)(iii) of the *CJPTA*. The chambers judge

made no finding that the respondent had made a good arguable case that the presumptive real and substantial connection in s. 10(e)(iii) applied to Airbnb Canada because the contracts in issue resulted from its solicitation of business in British Columbia. Her review of the pleadings and evidence in relation to s. 10(e)(iii) related entirely to the allegations and evidence against Airbnb, Inc.

[90] In my view, the chambers judge erred in failing to carry out the necessary analysis of whether there was a presumptive connecting factor that applied to Airbnb Canada as distinct from Airbnb, Inc. Airbnb Canada was not a party to any of the contracts in issue. There is no allegation that Airbnb Canada was carrying on business in British Columbia. There is no pleading or evidence that Airbnb Canada carried out any activity in British Columbia that is relevant to the claims in this proceeding beyond providing marketing services under its agreement with Airbnb Ireland.

[91] I conclude that the respondent did not establish a good arguable case that any of the connecting factors listed in s. 10 of the *CJPTA* applied. It is therefore unnecessary to address whether Airbnb Canada's evidence rebutted the presumption. I also do not need to consider whether the chambers judge also erred, in light of *Sinclair*, in applying a "heavy" onus to the appellants at the rebuttal stage of the analysis.

[92] I would allow Airbnb Canada's appeal and dismiss the claim against it.

Forum non conveniens and Airbnb, Inc.

[93] I now return to Airbnb, Inc.'s argument that even if the chambers judge was correct to conclude that the court had territorial jurisdiction over it in this action, she erred in refusing to decline jurisdiction in favour of California. This argument relates to the common law doctrine of *forum non conveniens*, which is codified in British Columbia in s. 11 of the *CJPTA*. The circumstances to be considered by a court in determining whether "it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding" (emphasis added), are set out in s. 11(2). The burden is on Airbnb, Inc. at this stage to show that the proposed alternate forum is

clearly more appropriate: *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39 at para. 54, citing *Van Breda* at para. 109.

[94] Airbnb, Inc.'s argument again assumes that a court may decline jurisdiction over discrete claims within a proceeding rather than the entire proceeding. It is not clear to me that this is consistent with s. 11 of the *CJPTA*, which refers to the most appropriate forum in which "to hear a proceeding". Airbnb, Inc. cites no cases in support of its argument that s. 11 permits a court to decline jurisdiction over discrete claims within a proceeding.

[95] In any event, it is not necessary for me to resolve this question because Airbnb, Inc.'s arguments fail for other reasons. For the purpose of my analysis, I will simply assume that the court may decline jurisdiction over discrete claims; in this case, the pre-June 30, 2014, claims.

[96] Airbnb, Inc. makes several arguments as to why California is the more appropriate forum to adjudicate the pre-June 30, 2014, claims, most of which have nothing to do with the doctrine of *forum non conveniens* and the factors listed in s. 11(2) of the *CJPTA*.

[97] Airbnb, Inc. first argues that the Terms of Service in the pre-June 30, 2014, period contained mandatory arbitration and class action waiver clauses. However, Airbnb, Inc. does not rely on such clauses as pointing to California as the more appropriate forum for adjudication of the claims. Airbnb, Inc. instead says that given those clauses, the claims cannot be heard in a court at all.

[98] A mandatory arbitration clause is simply a contractual agreement by the parties to follow a certain method of dispute resolution. As with any contractual term, the parties can agree to waive an arbitration clause and proceed to court. If the parties disagree as to whether the dispute must be arbitrated, the party wishing to enforce the clause has the remedy—before submitting its first substantive response in the proceeding—of applying for a stay of the court action under the *Arbitration Act*. No such application has been brought to date in this case. As the class action waiver

is tied to the arbitration clause in the Terms of Service, neither provided a basis for the court to decline jurisdiction at the certification hearing: *Seidel* at paras. 44–46.

[99] Airbnb, Inc. next argues that it would be unfair and inefficient to "drag Airbnb, Inc. back to Canada" to have a small set of "likely time-barred claims adjudicated": Appellants' Factum at para. 40. This argument appears to amount to the indirect assertion of a limitation defence as a ground for effectively dismissing the claims. Again, this has nothing to do with California as a more appropriate forum. None of the appellants have yet filed a response to civil claim in this proceeding so there is not even presently a pleaded limitation defence. If such a defence is pleaded, then the chambers judge will have to determine how it is to be adjudicated—that is, as a common or individual issue. The existence of a potential limitation defence does not militate in favour of California as the more appropriate forum.

[100] Finally, Airbnb, Inc. argues that under the Terms of Service, California law would apply to the pre-June 30, 2014, claims. The "law to be applied to issues in the proceeding" is a relevant factor under s. 11(2)(b) of the *CJTPA*. However, the Terms of Service do not provide that all disputes between the parties will be governed by California law. Instead, the Terms of Service state that "[t]hese Terms will be interpreted in accordance with the laws of the State of California and the United States of America". Airbnb, Inc. made no submissions to the chambers judge, or to this Court, as to the scope of this provision or its impact on the substantive issues in dispute. Airbnb, Inc. has also not pointed to any material differences between the relevant laws of California and British Columbia.

[101] In these circumstances, I am not persuaded that the chambers judge made any error in refusing to decline jurisdiction over the pre-June 30, 2014, claims. To the extent there are material differences between the claims in the two periods—which have not been identified to date—this is a matter that may affect the formulation of common issues or the identification of subclasses. However, this is a matter of class action procedure and management rather than jurisdiction.

The appeal from the certification order

Issue 1: Did the chambers judge err in finding the pleaded causes of action were not bound to fail?

[102] The test for determining whether the pleading discloses a cause of action under s. 4(1)(a) of the *CPA* is the same as the test that applies on an application to strike pleadings under R. 9-5(1)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009: assuming the pleaded facts to be true, is it plain and obvious that the claim has no reasonable prospect of success?: *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198 at para. 56.

[103] The appellant alleges that the chambers judge erred in the following respects in finding that the ANOCC disclosed a cause of action:

a) She should have found it was plain and obvious that the Prohibitions do not apply to Airbnb's activities in facilitating the rental of short-term accommodation;

b) Even if Airbnb contravened the Prohibitions, the chambers judge should have found it plain and obvious that there was no arguable claim for unjust enrichment because: (a) class members did not suffer a deprivation; (b) any deprivation did not correspond to Airbnb's enrichment in relation to Accrued Interest; and (c) there is a juristic reason for Airbnb's enrichment and class members' corresponding deprivation;

c) She should have found it plain and obvious that there was no claim for deceptive or unconscionable practices under the *BPCPA* because Airbnb's Terms of Service clearly state that they are not a licensed travel agent or real estate agent; and

d) She should have found it plain and obvious that there was no breach of contract because the Terms of Service contain no commitment on the part of Airbnb to "comply with applicable laws".

[104] I will address each alleged error in turn.

Is it plain and obvious that the Prohibitions do not apply to Airbnb?

[105] On appeal, the appellants repeated the lengthy submission they made to the chambers judge about the proper interpretation and application of the British Columbia legislation that contains the Real Estate Agent Prohibition and the Travel Agent Services Prohibition, and the legislation containing the MSB Prohibition. The disputed issues between the parties include, but are not limited to: whether the short-term rentals arranged through the Airbnb Platform constitute an interest in land, thus triggering the requirement for Airbnb to hold a real estate licence under the *Real Estate Services Act*; whether Airbnb falls within the legislative definition of a "travel agent" if—as the appellants allege—it is the Owners that offer the accommodation; whether the existence of other statutes that directly govern short-term accommodations reflect a legislative intent to exempt the type of activities Airbnb engages from the scope of the Prohibitions; and whether Airbnb's activities fall within scope of a FINTRAC policy defining activities that do not constitute a money service business.

[106] In support of their argument that it is plain and obvious that the Prohibitions do not apply, the appellants rely on various provisions of the Terms of Service, as well as policy statements from the Ontario regulator of travel agents and FINTRAC. The policy statements—to start with an obvious difficulty with the appellants' argument—are evidence that is not even referenced in the pleading and cannot properly be considered under s. 4(1)(a) of the *CPA*.

[107] I am not persuaded that the resolution of the respondent's pleading that Airbnb contravened the Prohibitions involves a straightforward process of statutory interpretation. The various regulatory schemes are complex. Furthermore, the appellants' submission requires not only the interpretation of the legislation but also its application to Airbnb based on the appellants' proposed interpretation of the Terms of Service. In my view, the chambers judge was correct to conclude that the issues of statutory interpretation and application raised by the appellants could not properly be resolved under s. 4(1)(a) of the *CPA*: *Trotman* at para. 26; *WestJet v. Gauthier*, 2025 BCCA 134 at para. 64. She was also correct to decline the

appellants' invitation to embark on an interpretation of the provisions of the Terms of Service at this stage: *Situmorang* at para. 70.

[108] For these reasons, I conclude that the chambers judge did not err in finding it was not plain and obvious that the respondent's claims were bound to fail to the extent they relied on the allegation that the appellants had contravened the Prohibitions. I do have concern as to whether the issue of the alleged contravention of the Prohibitions is properly litigated through the vehicle of a class proceeding in this case. I will return to that concern in addressing the ground of appeal relating to the preferable procedure requirement.

Is it plain and obvious there is no reasonable claim for unjust enrichment?

[109] A summary of the general principles that govern an action for unjust enrichment will assist in grounding the appellants' allegations of error by the chambers judge.

The cause of action for unjust enrichment

[110] Broadly speaking, the doctrine of unjust enrichment applies where a defendant receives a benefit from the plaintiff in circumstances where it would be unjust to allow the benefit to be retained. In such circumstances, the defendant will be obligated to restore the benefit: *Moore v. Sweet*, 2018 SCC 52 at para. 35, citing *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 at 788, 1992 CanLII 21.

[111] Historically, restitution for unjust enrichment was available if a plaintiff's claim fit within an established category. The Supreme Court of Canada has more recently developed a principled framework that does not depend on the existence of an established category. As summarized in *Moore* at para. 37, under the principled framework a plaintiff will succeed on the cause of action for unjust enrichment if they can show:

a) the defendant was enriched;

b) the plaintiff suffered a corresponding deprivation; and

c) there is no juristic reason for the defendant's enrichment and the plaintiff's deprivation.

[112] The first two elements of the cause of action are closely related. The Supreme Court of Canada has adopted a "straightforward economic approach" to these elements, with moral and policy considerations deferred to the juristic reason stage of the analysis: *Peter v. Beblow*, [1993] 1 S.C.R. 980 at 990, 1993 CanLII 126; *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 31; *Kerr v. Baranow*, 2011 SCC 10 at para. 37; *Moore* at para. 41. To establish the first element, the plaintiff must show that they gave something to the defendant that the defendant received and retained. The second element obligates the plaintiff to also show not only that the defendant received a benefit, but that that the defendant's enrichment corresponds to a deprivation that the plaintiff has suffered: *Kerr* at para. 39.

[113] The second element of the cause of action for unjust enrichment serves the purpose of identifying the plaintiff as the party with standing to seek restitution against an unjustly enriched defendant: *Moore* at para. 43, citing M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham, Ont: LexisNexis Canada) 2014 at 149. A plaintiff must demonstrate that the loss they have incurred corresponds to the defendant's gain in the sense there is a causal connection between the two: *Moore* at para. 43. The corresponding deprivation element does not limit the plaintiff to their out-of-pocket expenditures or require that the disputed benefit be conferred directly by the plaintiff. As explained in *Moore*:

> [44] The authorities on this point make clear that the measure of the plaintiff's deprivation is not limited to the plaintiff's out-of-pocket expenditures or to the benefit taken directly from him or her. Rather, the concept of "loss" also captures a benefit that was never in the plaintiff's possession but that the court finds *would* have accrued for his or her benefit had it not been received by the defendant instead (*Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, at para. 30). This makes sense because in either case, the result is the same: the defendant becomes richer in circumstances where the plaintiff becomes poorer. […]

[114] The third element of a claim for unjust enrichment requires the plaintiff to show that the defendant's enrichment and the plaintiff's corresponding deprivation has occurred without juristic reason. At this stage of the inquiry, the court must

"consider whether the enrichment and detriment, morally neutral in themselves, are 'unjust'": *Peter* at 990. In *Garland*, the Supreme Court of Canada established the modern two-stage approach to juristic reason:

> (1) At the first stage, the plaintiff must show that no established category of juristic reason exists to deny recovery. The established categories include a contract, a disposition of law, donative intent, and other valid common law, equitable or statutory obligations. If the plaintiff demonstrates that none of the established categories apply, they will have made out a *prima facie* case: *Garland* at para. 44.
>
> (2) At the second stage, the *de facto* burden of proof falls on the defendant to rebut the *prima facie* case by looking "to all of the circumstances of the transaction" to determine if there is some residual reason to deny recovery: *Garland* at para. 45. In considering whether the defendant has successfully rebutted the *prima facie* case, the court should have regard to two factors: the parties' reasonable expectations and public policy: *Garland* at para. 46.

[115] In some cases, the analysis may be complicated by the fact that there has been a mutual conferral of benefits between the parties. A plaintiff cannot "expect both to get back something given to the defendant and retain something received by him or her": *Kerr* at para. 101. The question of how the unjust enrichment analysis should account for this "common sense proposition" was answered by the Supreme Court of Canada in *Kerr*.

[116] In *Kerr*, the Court concluded that mutual benefits should not be taken into account under the first two elements of the cause of action for unjust enrichment: the defendant's enrichment and the plaintiff's corresponding deprivation. Doing so would undermine the straightforward economic approach to the benefit/detriment analysis that the Court had consistently followed: *Kerr* at paras. 110–113. Instead, *Kerr* instructs that mutual benefits may have a limited role to play at the juristic reason stage of the analysis to the extent that the provision of reciprocal benefits provides

relevant evidence of the parties' reasonable expectations. Otherwise, mutual benefit conferrals are to be considered only at the defence and remedy stage of the analysis: *Kerr* at paras. 114–116.

[117] The remedy for unjust enrichment is restitutionary in nature and can take the form of a personal or proprietary remedy. A personal remedy consists of an order that the defendant pay money to the plaintiff, which in most cases will be sufficient to achieve restitution. In some cases, a plaintiff may be awarded a proprietary remedy in the form of a constructive trust against certain property: *Moore* at paras. 89–90; *Kerr* at paras. 46–53.

[118] In *Atlantic Lottery Corp. Ltd. v. Babstock*, 2020 SCC 19 [*Atlantic Lottery*], the Supreme Court of Canada clarified that restitution for unjust enrichment and disgorgement for certain types of wrongdoing are two distinct types of gain-based remedies. Disgorgement requires only that the defendant gained a benefit; there is no requirement that the plaintiff prove deprivation. Disgorgement is not an independent cause of action, but rather a remedy for certain forms of misconduct where the plaintiff has established all the elements of the cause of action: *Atlantic Lottery* at paras. 25, 32. Restitution for unjust enrichment is a cause of action. Restitution may be awarded for unjust enrichment where there is correspondence between the defendant's gain and the plaintiff's deprivation, and no juristic reason to allow the defendant to keep the gain: *Atlantic Lottery* at para. 24.

[119] The question is whether the ANOCC, assessed in light of this legal framework, discloses a cause of action for unjust enrichment.

The first argument: it is plain and obvious that class members did not suffer a deprivation

[120] The appellants argue it is plain and obvious that class members suffered no "loss" because they received the services they contracted for, and therefore there has been no deprivation. This argument is based on a misconception of the law of unjust enrichment.

[121] The Supreme Court of Canada jurisprudence I have reviewed makes it clear that the notion at the heart of the doctrine of unjust enrichment is that the defendant has received a benefit that the law does not permit them to retain: *Peel* at 788. Where money is transferred directly from the plaintiff to the defendant—that is, something of value has passed from the former to the latter—then the defendant has been enriched and the plaintiff has been deprived: *Moore* at para. 41. This is a straightforward economic analysis; consideration of whether the defendant's retention of the benefit is just is deferred to the juristic reason stage of the analysis. If there was a valid contract between the parties, that is an established category of juristic reason. The difficulty for the appellants in the present case is that the respondent alleges that the contracts were rendered void due to statutory illegality.

[122] At this stage of the proceeding, it is arguable that a deprivation has occurred. It will be open to the appellants to argue on the merits that: (1) the contracts are not void; or (2) even if they are, there is a juristic reason why they should be permitted to keep the Travellers Service Fees and Accrued interest. However, those arguments are not relevant to the question of whether there has been a deprivation.

The second argument: it is plain and obvious that any deprivation did not correspond to Airbnb's enrichment in relation to the Accrued Interest

[123] The appellants next argue it is plain and obvious that the claim for unjust enrichment does not entitle the respondent to recover the Accrued Interest because there is no correspondence between her deprivation and the appellants' enrichment. This is not an argument that goes to the existence of the cause of action, but rather the scope of the remedy.

[124] In any event, the respondent's claim for recovery of the Accrued Interest is at least arguably supported by *Moore*, which clarified that unjust enrichment may capture an enrichment that "*would* have accrued" for the plaintiff had it not been received by the defendant: *Moore* at para. 44. Here, it is arguable that the appellants were enriched by the receipt of the Travellers Service Fees to the extent it allowed

them to earn interest that the respondent and class members would otherwise have received on the monies they paid.

The third argument: it is plain and obvious that there is a juristic reason for the deprivation

[125] The appellants advance two arguments in relation to the existence of a juristic reason for the deprivation: (1) any breach of statute would not void the contracts and therefore the Terms of Service remain a juristic reason for Airbnb's enrichment; and (2) alternatively, there is a juristic reason in the mutual conferral of benefits—in return for the payment of the Travellers Service Fees to Airbnb, class members received the benefit of the Accommodation Rental Services Airbnb provided.

[126] There is no doubt that these are arguments Airbnb can advance on the merits, however the only issue at this stage is whether the pleadings disclose a cause of action.

[127] The question of whether a contract is rendered void and unenforceable by reason of statutory illegality is not straightforward. The appellants rely on *Wang v. Jiang*, 2021 BCCA 132 at para. 50, for the proposition that the effect of statutory illegality on the enforceability of a contract requires the assessment of established factors and considerations relevant to the integrity of the judicial process. They say this assessment can be done on the pleadings in this case. It appears to me that the factors and considerations the appellants cite would require a factual assessment of the relevant circumstances that go beyond the limited task for the chambers judge under s. 4(1)(a) of the *CPA* to determine if the pleaded facts disclose a cause of action for unjust enrichment.

[128] Furthermore, there are cases in which contracts are *per se* illegal and unenforceable because they violate a statutory or common law prohibition: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Inc.*, 2020 BCCA 130 at para. 47. The statute itself may direct the consequences of a breach of statute on a contract, and this statutory direction will govern. For example, s. 4 of the British Columbia *Real Estate Services Act* provides that no action may be brought to

recover compensation for the provision of real estate services unless the person claiming the remuneration was licensed. Where the statute giving rise to the illegality specifies the consequences for the contract, a court may be obliged to carry out the statutory objective: *Lindsay v. Ambrosi*, 2019 BCCA 442.

[129] These are not issues easily amenable to resolution under s. 4(1)(a) of the *CPA* where the only question is the sufficiency of the plaintiff's pleadings.

[130] The same can be said of the appellants' alternative argument that the provision of mutual benefits constitutes a juristic reason for the enrichment. It will be open to the appellants to argue when the merits of these claims are adjudicated that the existence of mutual benefits is, in this case, relevant to the existence of a juristic reason. The strength of this argument, and its impact if successful on the pleaded claims, are not matters that can be assessed at this stage.

Conclusion on unjust enrichment

[131] The chambers judge did not err in finding that the ANOCC disclosed a cause of action for unjust enrichment. While the appellants clearly have arguments and defences to advance as to why the claim for unjust enrichment should not succeed, such arguments and defences raise complex issues of statutory interpretation and/or contested factual questions that cannot be resolved under s. 4(1)(a) of the *CPA*.

[132] Before moving on from the discussion of the pleaded claim for unjust enrichment, I wish to make two observations.

[133] First, the appellants did not argue that the claim for unjust enrichment premised on their alleged breach of s. 143 of the *BPCPA* cannot be maintained because that statute creates a comprehensive code for the enforcement of its provisions. I presume the appellants acknowledge that it is not plain and obvious that the respondent is limited to her statutory remedies in this context: *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36; *Sherry v. CIBC Mortgage Inc.*, 2020 BCCA 139 at paras. 109–121.

[134] Second, the ANOCC is unnecessarily confusing to the extent that it pleads the remedies of restitution and disgorgement in relation to the claim for unjust enrichment, apparently interchangeably. The basis for the claim for disgorgement is unclear given the legal principles I have reviewed. Disgorgement is not a remedy for unjust enrichment; it is a distinct remedy that may be available for certain other causes of action—such as breach of fiduciary duty—where it cannot be shown that the plaintiff suffered a deprivation. The respondent does not plead the remedy of disgorgement in relation to the other causes of action she advances—breach of contract and breaches of ss. 4–5 and 8–9 of the *BPCPA*.

[135] I will return to the issue of disgorgement in addressing the appellants' arguments relating to the common issues.

Is it plain and obvious that there is no reasonable claim for deceptive or unconscionable practices under BPCPA

[136] The appellants make two arguments: (1) it is plain and obvious that their conduct was neither "deceptive" nor "unconscionable" because the Terms of Service state they are not a travel agent or real estate broker; and (2) in any event the remedies sought under ss. 171 and 172(3)(a) of the *BPCPA* are not available because the respondent has not pleaded any plausible theory of causation.

[137] On the first issue, I see no error in the chambers judge's conclusion that the appellants' argument invited her to venture into the merits of the case and interpret the Terms of Service to invalidate the claim. As the respondent argues, the statement in the Terms of Service that Airbnb is not a travel agent or real estate broker does not answer the allegation that the statement is capable of misleading consumers in two ways. First, it might be read by a consumer as a representation that Airbnb does not require a licence to carry out its activities. Second it may be capable of deceiving a consumer if, in fact, the appellants are performing the services of a travel agent and real estate broker but asserting otherwise.

[138] On the second issue, the appellants acknowledge that a pleading of reliance is not necessary in every case. However, they maintain the language of ss. 171 and

172(3)(a) of the *BPCPA* requires some plausible theory of causation to be pleaded. Under s. 171(1), the claimed loss or damages must have been suffered "due to a contravention of this Act or the regulations", while under s. 172(3)(a) a restoration order may be made where a supplier has acquired something "because of a contravention of this Act or the regulations".

[139] The appellants' argument that there is no sufficient pleading of causation is answered by the judgment of this Court in *Finkel*, holding that reliance is not a requirement to establish causation under s. 171 of the *BPCPA*. The Court in *Finkel* held that where the alleged contravention of the *BPCPA* also constitutes a breach of contract, the contractual breach linked the statutory breach to the loss for the purpose of the causation requirement under s. 171 of the *BPCPA*: *Finkel* at para. 84.

[140] It is not plain and obvious on the pleadings that the remedies in ss. 171 and 172 of the *BPCPA* are unavailable. There may be an issue as to whether the "loss" claimed by the respondent and class members in the context of the present case—which is essentially a claim for the recovery of the monies paid with interest—amounts to "damage or loss" within the meaning of s. 171. However, that goes to the merits of the claim.

[141] It is not apparent from the certified common issues how the disputed issue of the respondent's entitlement to remedies under ss. 171 and 172 of the *BPCPA* will be resolved at trial. Once again, I will return to this question in addressing the appellants' arguments related to the common issues requirement.

[142] The chambers judge was correct to conclude that the ANOCC disclosed a reasonable claim for breach of the *BPCPA*.

Is it plain and obvious that there is no cause of action for breach of contract?

[143] The appellants say it is plain and obvious from the Terms of Service that they made no contractual commitment to comply with all applicable laws, including the Prohibitions. The appellants cite the Terms of Service as stating that "Airbnb has 'the right, but does not have any obligation' to take certain actions to comply with

applicable laws". The appellants contend that no exercise of contractual interpretation is required to determine the meaning of the words "does not have any obligation", and therefore the chambers judge erred in concluding this was an issue that went to the merits rather than an issue of the sufficiency of the pleading.

[144] The appellants' quotation from the Terms of Service is incomplete. The language the appellants rely on is contained within this clause:

> **16. Airbnb's Role.**
>
> We offer you the right to use a platform that enables Members to publish, offer, search for, and book Host Services. While we work hard to ensure our Members have great experiences using Airbnb, we do not and cannot control the conduct of Guests and Hosts. You acknowledge that Airbnb has the right, but does not have any obligation, to monitor the use of the Airbnb Platform and verify information provided by our Members. For example, we may review, disable access to, remove, or edit Content to: (i) operate, secure and improve the Airbnb Platform (including for fraud prevention, risk assessment, investigation, and customer support purposes); (ii) ensure Members' compliance with these Terms; (iii) comply with applicable law or the order or requirement of a court, law enforcement, or other administrative agency or governmental body; (iv) address Content that we determine is harmful or objectionable; (v) take actions set out in these Terms; and (vi) maintain and enforce any quality or eligibility criteria, including by removing Listings that don't meet quality and eligibility criteria. […]
>
> [Emphasis added.]

[145] Without intending to offer any definitive interpretation of Clause 16, it appears to me that the language the appellants rely on is arguably restricted to Airbnb's role in relation to monitoring the use of the Airbnb platform and the verification of information provided by Members. The provision does not, at least on its face, appear intended to generally absolve Airbnb from the requirement that it comply with applicable laws, including laws requiring it to obtain regulatory licences or registrations to engage in its activities.

[146] The fact that the Terms of Service give rise to such interpretive issues reinforces the chambers judge's conclusions that the claims in contract were a matter for trial. She did not err in finding that the ANOCC disclosed a reasonable claim for breach of contract.

[147] It should be noted that the claim in contract in the ANOCC is pleaded only against Airbnb Ireland and Airbnb UK. This raises yet another issue with the certified common issues that I will address later in these reasons.

Issue 2: Did the chambers judge err in certifying the class definition?

[148] The appellants allege that the chambers judge erred in three ways in certifying an overinclusive class: (a) "Foreign Guests" must be excluded because the pleaded Prohibitions cannot regulate transactions between two foreign persons; (b) the class definition must be refined such that a Guest's inclusion is based on place of residence and not location of the accommodation; and (c) the Class Period cannot begin earlier than June 30, 2014.

The first two alleged errors: "Foreign Guests"

[149] The first two of the appellants' objections to the class definition relate to the issue of constitutional applicability that the chambers judge declined to engage in at the certification stage, particularly in the absence of notice to the Attorneys General. The appellants' argument is difficult to follow. As I understand it, the argument is premised on the assertion that the Prohibitions regulate transactions between parties in other jurisdictions without any connection to the home jurisdiction. However, that is not correct. What the Prohibitions do is require entities engaged in certain activities—such as real estate services—within a province to obtain a licence. The fact that the Guest might reside outside of the country is immaterial if the real estate activities are occurring in a province in relation to property that is physically located in the province. This is no different than if a real estate agent in British Columbia brokered a contract for the sale of property in British Columbia between a foreign buyer and a foreign seller. No one would suggest that the *Real Estate Services Act* could not constitutionally apply to the agent simply because the contracting parties were not Canadian residents.

[150] In any event, to the extent I have misunderstood the argument the appellants are advancing, this simply highlights the importance of the requirement for notice under the *Constitutional Question Act*, which requires the appellants to provide

particulars of the claim. I agree with the chambers judge that the appellants' arguments challenge the territorial limits on the scope of provincial regulatory power in relation to the Airbnb entities and/or foreign Guests, which raises a question of constitutional applicability: *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40. Pursuant to s. 8 of the *Constitutional Question Act*, notice must be given to the Attorney General of Canada and the Attorney General of British Columbia any time the validity or applicability of any law is challenged in a proceeding. The chambers judge has left it open to the appellants to pursue the challenge after proper notice has been provided to the relevant Attorneys General.

[151] I see no grounds for the exclusion from the class definition that is proposed by the appellants at this stage of the proceeding.

The third alleged error: the start of the Class Period

[152] The appellants' third alleged error repeats the arguments they made in relation to the chambers judge's refusal to decline jurisdiction over the pre-June 30, 2014, claims: the arbitration and class action waiver claims apply in this period and British Columbia is not the proper forum. For the reasons I have already stated in addressing the jurisdictional arguments, I am not persuaded that the pre-June 30, 2014, claims should be excluded.

Issue 3: Did the chambers judge err in her analysis of the common issues requirement?

[153] To satisfy the requirement in s. 4(1)(c) of the *CPA*, a plaintiff must show some basis in fact that "the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members". 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".

[154] The resolution of common issues is at the heart of a class proceeding: *Thorburn v. British Columbia*, 2013 BCCA 480 at para. 35. The commonality question is to be approached purposively: "The underlying question is whether

allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis": *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 39. Thus, the critical factors are that: (i) the resolution of the common issues will avoid duplication of fact-finding or legal analysis; and (ii) the common issue is a "substantial ingredient" of each class member's claim and its resolution is necessary to the resolution of that claim: *Thorburn* at para. 37. Certification of a common issue will not move the litigation forward if it is framed in overly broad terms: *Thorburn* at para. 39, citing *Rumley v. British Columbia*, 2001 SCC 69 at para. 29.

[155] The appellants contend that the chambers judge made three errors in her analysis: (1) she certified common issues despite the absence of "some basis in fact" to establish the appellants actually breached the Prohibitions; (2) she certified a common issue relating to punitive damages when there was no basis in fact for the claim; and (3) she certified a common issue relating to nominal damages without analysis.

[156] In relation to the first alleged error, the appellants' repeat their argument that it is plain and obvious that they did not breach the Prohibitions. For the reasons I have already stated, I am not persuaded by this argument. The merits of the pleaded claims are not the subject of the certification application. The other two alleged errors relating to punitive and nominal damages require more detailed attention.

Punitive damages

[157] The relevant certified common issue—Question 10 in Schedule A—asks whether punitive damages should be awarded against some or all of the appellants.

[158] Punitive damages are awarded in "exceptional cases for 'malicious, oppressive and high-handed misconduct' that 'offends the court's sense of decency'": *Whiten v. Pilot Insurance Co*., 2002 SCC 18 at para. 36, quoting *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 196, 1995 CanLII 59. The objective of punitive damages is to punish the defendant rather than compensate the plaintiff. In the class action context, a plaintiff must plead

material facts that would support a claim for punitive damages and there must be some basis in fact to support an award of punitive damages before this can be certified as a common issue: *MacKinnon v. Pfizer Canada Inc.,* 2022 BCCA 151 at paras. 5–7.

[159] The ANOCC pleads as follows in relation to the claim for punitive damages:

> 24. Airbnb's conduct of offering the Accommodation Rental Services when it was prohibited from doing so by statute shows ignorance, carelessness, flagrant disregard and/or gross negligence with respect to its obligations and the rights of consumers and would justify the award of punitive damages.
>
> 25. Airbnb and/or their directors or officers knew, or ought to have known, that providing real estate services, travel agency services, and/or money transferring services is subject to regulation and licensure in the applicable jurisdictions.

[160] While sparse in material facts, I accept that the respondent's pleading that the appellants have engaged in a knowing pattern of misconduct in contravening regulatory statutes could arguably ground a claim for punitive damages.

[161] This Court has held that beyond the pleadings, there must be some basis in fact to support an award of punitive damages before this can be certified as a common issue: *Pfizer* at para. 5, citing *Sharp v. Royal Mutual Funds Inc*., 2021 BCCA 307 at para. 173. The respondent says there is some basis in fact in the record to support the claim for punitive damages, while the appellants dispute that the evidence supports the certification of punitive damages as a common issue.

[162] The chambers judge did not explain in her reasons why she found the "some basis in fact" standard was met in relation to punitive damages. She simply stated that the commonality requirement was established for all of the proposed common remedies issues—other than aggregate damages—and that answering the questions "will avoid duplication of fact-finding or legal analysis": RFJ at para. 211. Given that I propose to allow the appeal on other grounds, and set the certification order aside, this issue may be reconsidered by the chambers judge on the remittal. For reasons I will expand upon, I consider the common issues as currently certified to be deficient in many respects. On the remittal, the parties can make further

submissions to the chambers judge on the issue of punitive damages, and the chambers judge can make the necessary findings as to whether the record establishes some basis in fact for punitive damages.

Nominal damages

[163] The chambers judge did not analyze the common issue of nominal damages beyond her general conclusion that all of the proposed common issues on remedies would avoid duplication of fact finding and legal analysis: RFJ at para. 211. The issue of nominal damages brings into focus some of the difficulties I have alluded to in relation to the common issues generally and the causes of action they are meant to connect to. The problems which emerge inform, in part, my conclusion that the requirements of commonality and preferability must be reconsidered by the chambers judge.

[164] Nominal damages are justified where a party "has established a cause of action and *bona fide* sought compensation but failed to prove a loss": *Sharp* at para. 164. In these circumstances, nominal damages serve a symbolic rather than compensatory purpose and may serve to vindicate the party's rights: *Hoy v. Expedia Group, Inc.*, 2024 ONSC 1462 at para. 75 [*Hoy Div. Ct*.]. Nominal damages may be awarded for breach of contract because proof of loss is not an element of the cause of action: *Atlantic Lottery* at para. 49. If the only remedy sought in a class proceeding is nominal damages, a certification judge would have to consider whether a class action is a proportionate procedure for adjudication of such a claim and whether it would achieve the goals of a class action: *Atlantic Lottery* at paras. 67–68.

[165] The respondent says that there is no proportionality concern in this case because she has claimed damages in respect of other causes of action (common Question 8) and limited her claim in relation to breach of contract to nominal damages. The respondent contends that her election to seek nominal damages only for the breach of contract is permissible and supported by case authority.

[166] To address the respondent's argument on nominal damages, I must outline my concerns with respect to the common issues generally. This requires, as a

starting point, an understanding of the respondent's pleaded causes of action and the legal and factual issues they give rise to.

[167] Before turning to this analysis, I must note that the difficulties I perceive with the current formulation of the common issues are not difficulties that were raised by the appellants in any focussed way in their submissions on appeal. Nevertheless, they are difficulties that in my view must be addressed.

[168] For the reasons I will set out in addressing preferability, I am persuaded that the chambers judge erred in her analysis of the preferable procedure requirement, and the case should be remitted to her to carry out the proper analysis. The preferability analysis goes hand in hand with the common issues. There is no purpose in requiring the chambers judge to conduct a new preferability analysis on the basis of a flawed set of common questions that provide no effective road map for the adjudication of common issues, or even permit the chambers judge to assess whether there are common issues that would advance the claims of class members.

The issues to be determined under the pleaded causes of action

[169] The common issues as certified are disconnected from the elements of the causes of action that the respondent has pleaded. I will explain what I consider to be missing in relation to the pleaded causes of action.

[170] This portion of my reasons is intended to assist the chambers judge when this matter is remitted to her. My reasons should not be taken to indicate that I consider this action should be certified as a class proceeding, or that the common issues should consist precisely of the questions I set out below. My purpose in listing the questions is simply to illustrate the problem and not to dictate the solution. The parties should provide the chambers judge with appropriate assistance that permits her to conduct a reasoned analysis of whether this action should be certified as a class proceeding. Any proposed list of common issues should assist the chambers judge in conducting an analysis of whether the issues are in fact common, and whether their resolution would meaningfully advance this litigation.

[171] The respondent's pleaded theory for the claim of unjust enrichment is that the appellants' contracts with class members are void due to statutory illegality. Without a valid contract, there is no juristic reason to permit the appellants to retain the Travellers Service Fees and Accrued Interest. The respondent's claim in unjust enrichment, if successful, would result in an order for restitution. It is apparent from the arguments advanced on this appeal that the adjudication of the claim for unjust enrichment will require the court to determine such issues as:

(1) Was there an enrichment of the appellants and corresponding deprivation of the respondent and class members?

(2) Do the contracts between the appellants and class members provide a juristic reason for the enrichment because either: (i) the appellants did not contravene the Prohibitions, or (ii) if they did, the statutory illegality did not render the contracts void?

(3) If the contracts are void, does the exchange of mutual benefits between the parties provide a juristic reason for the enrichment?

(4) If the exchange of mutual benefits is not relevant to the juristic reason for the enrichment, is the exchange nevertheless relevant to remedy or any defences?

(5) Are class members entitled to restitution from the appellants?

[172] As I have explained, I see no basis in the pleadings for the remedy of disgorgement. Disgorgement and restitution for unjust enrichment are separate remedies. While disgorgement might theoretically be available for breach of contract in an exceptional case, in this case the respondent has confirmed that the only remedy for breach of contract she seeks is nominal damages. The claims under the *BPCPA* are governed by the statutory remedies under ss. 171 and 172.

[173] The claims under the *BPCPA*, like the claim for unjust enrichment, depend on a finding that the appellants have contravened the Prohibitions. If such a finding is made, the following questions would have to be answered to resolve the claims:

(1) Are any of the appellants a “supplier” or “merchant” within the meaning of the *BPCPA*?

(2) If so, does the conduct of these appellants in offering the Accommodation Rental Services in breach of the Prohibitions amount to deceptive acts or practices contrary to ss. 4–5 of the *BPCPA*?

(3) Does the conduct constitute unconscionable acts or practices contrary to ss. 8–9 of the *BPCPA*?

(4) In imposing the Travellers Service Fees, have the appellants subjected class members to terms and conditions that were so harsh or adverse as to be inequitable?

(5) If the appellants contravened the *BPCPA*, can class members recover damages under s. 171?

(6) In particular, have the class members suffered loss or damage due to a contravention of the *BPCPA* or the regulations within the meaning of s. 171(1)?

(7) If the appellants contravened the *BPCPA*, are class members entitled to remedies under s. 172, including a restoration order and an injunction?

(8) In particular, in relation to a restoration under s. 172(3)(a), have the appellants acquired something that class members have an interest in because of a contravention of the *BPCPA* or regulations?

[174] There may be other issues arising in relation to the claims based on consumer protection legislation depending on whether the chambers judge ultimately certifies the claims from jurisdictions outside British Columbia.

[175] Finally, there is the claim for breach of contract, which I note is pleaded in the alternative and only against Airbnb Ireland and Airbnb UK. This claim must necessarily be pleaded in the alternative because the respondent's primary theory is that the statutory illegality has rendered the contracts void. The cause of action for nominal damages for breach of contract would only have to be determined if the judge first concludes that: (1) the appellants contravened the Prohibitions; (2) the statutory illegality did not affect the enforceability of the contracts, thus defeating the claim for restitution for unjust enrichment because the contracts remain a juristic reason for the appellants' enrichment; and (3) no remedies are available to class members under the *BPCPA*.

The problems with the common issues

[176] With the background of the elements of the respondent's pleaded claims, I turn to the difficulties I see with the common issues as currently formulated. Some of the difficulties are relatively small and remediable through minor re-drafting. Others are more substantive.

[177] The only common questions relevant to the appellants' liability are Questions 6 and 7:

> 6. During the Class Period, did the Defendants, or some of them, comply with:
>
> a. the Real Estate Services Prohibition (listed in Schedule A of the Amended Notice of Civil Claim) in every Canadian jurisdiction except Quebec?
>
> b. the Travel Agent Services Prohibition (listed in Schedule B of the Amended Notice of Civil Claim) in British Columbia, Ontario and/or Quebec?
>
> c. the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, [citation omitted] and/or the *Money-services Businesses Act*, [citation omitted] to obtain a licence or registration?
>
> (collectively the "**Applicable Laws**")

> 7. If Question 6 is YES, did any of the Defendants breach their contracts with Class Members in failing to comply with the Applicable Laws?

[178] The question of whether the appellants contravened the Prohibitions is central to this proceeding. In my view, Question 6 is more properly framed as "did the appellants breach" rather than "did the appellants comply", although I appreciate this is a minor drafting objection. There appears to be a drafting error in the opening words of question 7 because it should read "If the answer to Question 6 is NO". If the appellants did comply with the Prohibitions (thus the answer to Question 6 is "YES") then the case is over and there can be no breach of contract. I also note that Question 7 asks whether "any of the Defendants" breached their contracts with class members, when the breach of contract claim is only pleaded against Airbnb Ireland and Airbnb UK.

[179] More importantly, the common issues do not address any of the elements of the causes of action for unjust enrichment and breaches of the *BPCPA*. The common issues as certified would effectively require the judge to leap from a finding that the appellants breached the Prohibitions to consideration of damages without any intervening steps. Absent are the necessary stepping stones that would allow the judge to determine if the causes of action have been made out. I have already highlighted some of the questions that appear to me to require determination before any remedies could be considered. These stepping stones might, arguably, involve individual issues. Whether that is so has simply not been assessed.

[180] The chambers judge may have been led to believe that the assessment of damages would flow automatically from a finding that the appellants breached the Prohibitions under the cause of action of "statutory illegality". However, as I have reviewed, the respondent clarified at the hearing on appeal that she did not intend to advance statutory illegality as a stand-alone cause of action. The potential entitlement of class members to remedies, other than nominal damages for breach of contract, only arises if they establish at least one of the two remaining causes of action. Yet the common questions as certified do not allow for any determination of whether the causes of action are made out.

[181] Question 8, on remedies, is also problematic. It states:

> 8. Should the Defendants be ordered to pay, as damages, restitution, disgorgement and/or accounting of profits, for either or both of the following monies:
>
> a. Accrued Interest?
>
> b. Travellers Service Fees?

[182] As I have explained, disgorgement does not appear to be a viable remedy in this case. Question 8 otherwise lumps together damages, restitution, and accounting of profits without any differentiation of the source of the remedy. This is not a minor quibble. The basis upon which class members might be entitled to restitution for unjust enrichment is not the same as the basis on which they might be entitled to remedies under ss. 171 and 172 of the *BPCPA*. I cannot see how a court could answer the question of whether the appellants should be ordered to pay damages or restitution without understanding the basis upon which such payment is to be ordered. Among other uncertainties, the language of the certified common issues does not allow for resolution of the appellants' arguments about the remedial scope of ss. 171 and 172 of the *BPCPA*.

[183] These difficulties with the common issues as presently certified make it impossible to assess whether nominal damages should have been certified as a common issue, or whether it offends the principle of proportionality as the appellants argue. Since I conclude that the appeal of the certification order should be allowed in any event and the order should be set aside, I would leave this question for the chambers judge to address on the remittal.

Issue 4: Did the chambers judge err in her analysis of the preferable procedure requirement?

[184] Section 4(1)(d) of the *CPA* requires that a class proceeding must be "the preferable procedure for the fair and efficient resolution of the common issues". As the chambers judge noted, the preferability analysis is generally viewed through the lens of the objectives of a class proceeding: access to justice, judicial economy, and behaviour modification. Section 4(2) of the *CPA* sets out a list of specific matters that

are relevant to the court's consideration of whether a class proceeding would be the preferable procedure:

> (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.

[185] In *Finkel*, this Court described the preferability analysis in these terms:

> [25] Two questions predominate in a preferability analysis: (a) whether a class proceeding would be a fair, efficient and manageable method of advancing the claims and (b) whether a class proceeding would be preferable compared with other realistically available means for their resolution, which may include court processes or non-judicial alternatives. As to the first question, the common issues must be considered in the context of the action as a whole and their relative importance taken into account when preferability is determined. As to the second, the impact of a class proceeding on class members, the defendants and the court must be considered and a practical cost-benefit approach applied: *AIC* at paras. 21, 23; *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050 at para. 230; affirmed 2015 BCCA 252; leave to appeal dismissed [2015] S.C.C.A. No. 326 (S.C.C.).

[186] The preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, and not just the possibility of individual actions. For example, it may be relevant to consider the existence of legislative avenues that may address concerns about behaviour modification: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 35. It is also relevant to consider the extent to which the common issues contemplate that the court will make decisions that the legislature has assigned to an administrative tribunal: *Lockyer-Kash v. Workers' Compensation Board of British Columbia*, 2015 BCCA 70 at paras. 28, 30.

The complexity of the issue of statutory illegality

[187] The appellants' arguments on preferability before the chambers judge, and on appeal, focussed on the question of whether the regulatory process is the preferable procedure for resolving the claims of class members, which are wholly grounded in the allegation of statutory illegality. This argument raises difficult issues about whether the class proceeding as presently conceived is manageable or is so unwieldy that it may collapse under its own weight, as the appellants argue. To understand the issues, it is necessary to understand the complexities inherent in the claim of statutory illegality.

[188] To frame the issues, I will begin with a brief—and decidedly non-comprehensive—review of the statutory context for Real Estate Services and Travel Agent Services Prohibitions in British Columbia, and the federal MSB Prohibition.

The British Columbia Real Estate Services Act

[189] Section 3 of the *Real Estate Services Act* provides that a person must not provide real estate services, as defined in the Act, while s. 4 provides that no action can be brought for remuneration in relation to real estate services unless the claimant was licensed. These are the provisions the respondent relies on in British Columbia to establish the Real Estate Services Prohibition.

[190] Section 2.1 of the *Real Estate Services Act* provides that the Authority's board of directors must appoint a Superintendent to exercise powers and duties under the Act. Division 3 of Part 2, which generally covers licensing, sets out the Superintendent's powers in relation to the investigation of unlicensed activity. Pursuant to s. 48(1), the Superintendent may conduct an investigation to determine whether an unlicensed person has engaged in activity for which a licence is required. The Superintendent's investigatory powers under s. 48(3) include the power to inspect records, require a person to be interviewed, and apply for an order authorizing the seizure of records or other evidence.

[191] Following an investigation under s. 48(1), the Superintendent may issue a notice of hearing and conduct a hearing. Pursuant to s. 48(2), the notice must be

delivered at least 21 days before the date of the hearing, and it must describe the nature of the complaint and set out the time and place of the hearing. If, after the hearing, the Superintendent determines that the person was engaged in unlicensed activity, he may make one or more of the orders set out in s. 49 of the Act. This includes orders under s. 49(2)(a) requiring the person to cease the unlicensed activity, carry out remedial actions, and/or to pay a penalty. Section 51 empowers the Superintendent to make such orders without a hearing in urgent circumstances.

[192] Pursuant to s. 54(1)(e) of the Act, the person who is the subject of an order of the Superintendent under Division 3 of Part 2 of the Act may appeal the order to the Financial Services Tribunal (the "Tribunal") continued under s. 242.1 of the *Financial Institutions Act,* R.S.B.C. 1996, c. 141. On judicial review, decisions of the Tribunal are subject to the highly deferential standard of patent unreasonableness on judicial review due to the combined effect of two provisions in the *Financial Institutions Act*: s. 242.3 (a privative clause) and s. 242.1(7)(k) (adopting the standard of review in s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, where there is a privative clause).

The British Columbia Travel Industry Regulation and the BPCPA

[193] Section 143(1) of the *BPCPA* provides that a person may not engage in a "designated activity" without a licence. Pursuant to s. 1.1 of the *Travel Industry Regulation*, enacted under the *BPCPA*, a licence is required for a person engaged in the business and occupation of a "travel agent", as defined in the *Regulation*. These are the provisions the respondent relies on in British Columbia to establish the Travel Agent Services Prohibition.

[194] The *BPCPA* provides different avenues for addressing a contravention of the Act and Regulations. As we have seen, ss. 171 and 172 provide a direct avenue for civil recovery in court. Pursuant to s. 171, a person who has suffered loss or damage due to a contravention of the legislation may bring an action in court. Pursuant to s. 172 a court may grant remedies that include an interim or permanent injunction (s. 172(1)(b)) and a restoration order (s. 172(3)(a)).

[195] The *BPCPA* also provides inspection and enforcement powers to the director and inspectors appointed under the Act. Section 155(1) provides that an inspector may, after giving a person an opportunity to be heard, order the person to comply with the Act and the regulations. Pursuant to s. 155(4), a compliance order may include an order that a person reimburse any money or return any other property to a consumer or a class of consumers.

[196] It should be noted that the statutes containing the Travel Agent Services Prohibition in the other jurisdictions do not necessarily provide a civil right of action for unlicensed activity. For example, under Ontario's *Travel Industry Act*, 2002, S.O. 2002, c. 30, the Travel Industry Council of Ontario ("TICO") is the regulatory authority. TICO may enforce the prohibition on unlicensed activity through two routes: (1) an application to court under s. 30(1) for an injunction restraining the activity; or (2) initiation of a criminal prosecution. The *Travel Industry Act* does not include rights of civil action equivalent to ss. 171 and 172 of the *BPCPA* for contraventions of the statute.

The Proceeds of Crime (Money Laundering) and Terrorist Financing Act (the "Proceeds of Crime Act")

[197] Sections 5(h) and 11.1 of the *Proceeds of Crime Act* together provide that foreign entities engaging in a money service business in Canada must register with FINTRAC. Along with an analogous Quebec statute, this comprises the MSB Prohibition. The appellants allege that Airbnb UK, as a foreign entity, is required to register with FINTRAC.

[198] The *Proceeds of Crime Act* and its associated regulations are complex and detailed federal legislation. The objects of the Act, as set out in s. 3, include assisting in fulfilling Canada's international commitments to participate in the fight against transnational crime and terrorist activity, and facilitating Canada's efforts to mitigate the risk that its financial system could be a vehicle for money laundering and financing terrorist activities.

[199] A detailed review of the legislation would be time consuming and ultimately not of assistance in resolving the issues on this appeal. A useful review of the Act, and the role of FINTRAC, is set out by the Federal Court of Appeal in *Violator No. 10 v. Canada (Attorney General)*, 2018 FCA 150 at paras. 3–6. It is sufficient to note that FINTRAC, a specialized financial intelligence unit, is established pursuant to s. 41 of the Act as the agency responsible for ensuring compliance with the Act. The Act gives FINTRAC extensive investigatory powers for that purpose.

[200] If FINTRAC has reasonable grounds to believe there has not been compliance with the *Proceeds of Crime Act*, it may issue a notice of violation under s. 73.15 of the Act setting out the penalty it proposes to impose. The person receiving the notice may either accept the penalty or ask for an opportunity to make representations to the Director of FINTRAC. The Director must, after receiving the person's submissions, decide whether the person committed the violation. Pursuant to s. 73.21 of the Act, such a decision may be appealed to the Federal Court.

Statutory illegality and the certified common issues

[201] I will highlight some of the complexities that emerge in this case in deciding the issues of statutory illegality, as illustrated by even a brief review of a limited subset of the relevant legislation.

[202] It may be the case that the answer to the question of whether the appellants contravened the Prohibitions can be answered in common on a jurisdiction-by-jurisdiction basis. However, broad framing of Question 6 should not mask the magnitude of the task to be undertaken by the judge at the common issues trial. A decision that the appellants contravened s. 3 of British Columbia's *Real Estate Services Act* will not determine the question of whether there has been a breach of any of the other 13 statutes that comprise the Real Estate Services Prohibitions. The same may be said of the Travel Agent Services Prohibitions.

[203] To resolve common Question 6, the judge will have to conduct a detailed analysis of the provisions of 20 statutes and regulations—only three of which are enacted in British Columbia—and their application to the appellants' activities. The

statutes are largely regulatory in nature. Many assign investigation and enforcement powers to specialized statutory decision makers, whose decisions, in turn, are subject to statutory rights of appeal to other specialized tribunals. In the case of the *Proceeds of Crime Act*, the specialized decision maker is a federal agency (FINTRAC) with the specific legislative mandate of facilitating Canada's efforts to combat transnational crime and terrorist activities. Under the express provisions of the *Proceeds of Crime Act*, decisions by FINTRAC are only reviewable through a statutory right of appeal to the Federal Court.

[204] A related consideration—unaddressed by the chambers judge—is how this exercise is further complicated by the fact that many of the statutes that comprise the Prohibitions contain enforcement mechanisms such as administrative penalties, injunctions, and the possibility of criminal prosecutions. These mechanisms arguably undercut the need for a class proceeding to achieve the goal of behaviour modification.

[205] Accordingly, the class proceeding as proposed by the respondent, and largely adopted by the chambers judge, would require the trial judge to determine whether the appellants are required to be licensed or registered under statutes that are governed by a diverse array of regulators in jurisdictions across Canada, such as FINTRAC, the Travel Industry Council of Ontario, the Nova Scotia Real Estate Commission, the Nunavut Superintendent of Real Estate, and the Saskatchewan Real Estate Commission, to name only a few. Since the chambers judge would be asked to decide the question of licensing and registration in the first instance, the deference often owed to the decisions of such bodies on an application for judicial review would be wholly absent.

[206] Such concerns may be of less force in relation to certain statutes. For example, the *BPCPA* provides a civil right of action for an individual claiming remedies for legislative breaches, which may include providing travel agent services without a licence when one is required. However, this example simply highlights the distinct nature of each piece of legislation covered by common Question 6. The *Proceeds of Crime Act*, by contrast, does not contain a civil right of action, and its

provisions are enforced by a specialized federal agency (FINTRAC). A focussed class proceeding grounded only on alleged breaches of the *BPCPA* may raise fewer concerns than a national class action that implicates regulatory processes across the country.

[207] There is also the potential—as is evident in the record in this case and the Superintendent's intervenor application—that one or more of the affected regulators may disagree with a decision made in this proceeding that the appellants must be licensed or registered as a real estate agent, travel agent, or money service business in their jurisdictions. The appellants may in that event end up bound by a permanent injunction that requires them to obtain a licence or registration when compliance is impossible because the regulator responsible for administering the statute will not give them one.

[208] To be clear, I do not suggest that a regulatory process is invariably the preferable procedure to resolve claims that fall within the jurisdiction of a regulator. Such a broad proposition is inconsistent with the case law and with the contextual and discretionary nature of the preferability analysis. See for example: *AIC Limited v. Fischer*, 2013 SCC 69 and *Brewers Retail Inc. v. Campbell*, 2023 ONCA 534 at paras. 94–96.

[209] My point is simply that the preferability analysis must account for the complexities presented by this case, particularly its breadth and the fact that no regulatory action has been taken against the appellants in any jurisdiction to date. The case, as certified, would require the trial judge to make first-instance decisions regarding the licensing and registration requirements of at least 20 different statutes, enacted in jurisdictions across Canada, as applied to the appellants' activities. The application for certification required the judge to engage with these complexities in deciding whether a class proceeding was the preferable procedure for resolving the common issues in this context.

The chambers judge's analysis of preferable procedure

[210] The appellants submitted to the chambers judge that the regulatory process was the preferable procedure for resolving the claims of class members given that they were fundamentally premised on the allegation of statutory illegality. The appellants argued that a class proceeding would be "potentially dense and complicated" as it involved "26 unique statutory schemes": RFJ at para. 215. The chambers judge rejected these arguments for two reasons.

[211] First, she stated that "given the material facts pleaded in the present Claim, and while the Claim is subject to further amendment, there are now far fewer statutory and regulatory schemes in issue": RFJ at para. 215. I presume this observation relates to the chambers judge's refusal, at least for now, to certify claims for breach of consumer protection statutes in other provinces.

[212] In my view, the chambers judge erred in dismissing the appellants' concerns about the complexity without proper analysis. The fact that there may currently only be 20 unique statutory schemes in issue as opposed to 26 does not answer the question of whether a class proceeding is a fair, efficient, and manageable method of advancing the claims, and whether a class proceeding would be preferable to the regulatory processes. The chambers judge did not meaningfully grapple with the complexities of a class proceeding in a case of this scope and nature, or with the implications of litigating regulatory licensing and registration issues in a national class action on such a broad scale.

[213] Second, the chambers judge stated that because the British Columbia Superintendent of Real Estate has taken the position in their intervenor application that the Airbnb's activities are not covered by the *Real Estate Services Act*, she did not accept that "the regulatory process is a viable avenue for recovery": RFJ at para. 216.

[214] This analysis reflects further error. The appellants argued that the respondent's claims were fundamentally premised on regulatory powers that had not yet been exercised. They contended that the regulators were better positioned than

the Court to determine whether licensing and registration was required, and could do so efficiently and in a manner consistent with the legislative intent underlying the various schemes. The cogency of the appellants' arguments did not depend on what licensing decision a regulator ultimately made. Put another way, it cannot be the case that a regulatory proceeding is a preferable procedure for resolving common issues only if the issues are resolved in the plaintiff's favour.

[215] Arguably, the fact that there was evidence in the record that some of the regulators—the Superintendent and FINTRAC—are of the view that Airbnb does not require licensing or registration weighed against a class proceeding as the preferable procedure. The chambers judge did not address the question of what the appellants are to do if she concludes at the common issues trial that they should be licensed, and the regulators do not agree. As noted, this conundrum may have implications for the goal of behaviour modification.

[216] In my view, the certification order cannot stand in light of the chambers judge's errors in her analysis of the preferable procedure requirement. Given the difficulties I have already identified in the certified common issues, this is not a case in which this Court is able to conduct a fresh analysis. I have doubts as to whether the action, as currently formulated, can efficiently be litigated through a class proceeding. There may, however, be ways to remedy some of the difficulties through re-drafted common issues or a more focussed claim. The chambers judge conducted her preferability analysis on the basis of a flawed set of common issues, which has compounded the errors she made in her analysis of preferability. I propose to remit the matter back to the chambers judge to reconsider, with the parties' assistance, the common issues and preferable procedure requirements in ss. 4(1)(c) and (d) of the *CPA*.

The "no loss, no preferability" principle

[217] Before concluding, I will address a persistent theme of the appellants' arguments on appeal that this proceeding cannot be certified as a class proceeding because it offends what is referred to as a "no loss, no preferability" principle. The principle is said to be that a court will not certify a class proceeding in the absence of

evidence of compensable harm. The appellants cite several cases in support of the existence of this principle, including: *Tress v. FCA US LLC*, 2024 SKCA 31 at paras. 19–28 (Chambers); *Hoy v. Expedia Group Inc.*, 2022 ONSC 6650 at paras. 280–281 [*Hoy SCJ*], aff'd *Hoy Div. Ct.*; *Maginnis and Magnaye v. FCA Canada et* al, 2020 ONSC 5462 at para. 26, aff'd 2021 ONSC 3897 (Div. Ct.); *Setoguchi v. Uber BV*, 2023 ABCA 45; and *Larsen v. ZF TRW Automotive Holdings Corp*., 2023 BCSC 1471 at para. 99.

[218] It does not appear to me that a consistent principle emerges from these cases. In *Setoguchi*, for example, the Alberta Court of Appeal held that the judge below had correctly refused to certify a class action seeking only nominal damages for breach of contract. The Court found that in this context, a certification judge "can properly ask what purpose the action serves in the context of the objectives of class proceedings": *Setoguchi* at para. 73. This is consistent with the conclusion of the Supreme Court of Canada in *Atlantic Lottery* that a class action may not be the preferable procedure for litigating a claim for only nominal damages for breach of contract: *Atlantic Lottery* at paras. 67–68.

[219] If the principle that the appellants rely on is that a class proceeding may not be preferable if class members seek only a symbolic remedy in the form of nominal damages, the principle appears sound and well-grounded in the governing case law. However, the principle has no application in this case because class members do seek substantive monetary remedies, including restitution for unjust enrichment.

[220] In some of the other cases cited by the appellants, the stated principle is that a class proceeding is not the preferable procedure unless there is some basis in fact that class members suffered "compensable harm": *Tress* at para. 25; *Hoy SCJ* at para. 281; *Larsen* at para. 99; *Maginnis and Magnaye* at paras. 38–39. However, I do not read these cases as suggesting that a class action can only be certified where class members seek compensatory remedies (such as damages) as opposed to gain-based remedies such as disgorgement or restitution. A principle that would effectively exempt certain categories of claims from the scope of the *CPA* is not supported by the wording of the statute or the jurisprudence of the Supreme Court of

Canada, including *Garland* (a class action to recover restitution for unjust enrichment) and *Atlantic Lottery*.

[221] In *Atlantic Lottery*, the Court abandoned the concept of "waiver of tort"; clarified that disgorgement is not an independent cause of action; and reviewed the limited circumstances in which the remedy of disgorgement might be available. Notably, the circumstances include as a remedy for breach of fiduciary duty, which does not require proof of damage: *Atlantic Lottery* at para. 32. The other gain-based remedy discussed in *Atlantic Lottery* was restitution for unjust enrichment. This was one of the causes of action pleaded by the plaintiff in that case. The Court did not say that a class proceeding was not the preferable procedure for resolving the unjust enrichment claim. Rather, the Court found the claim stood no chance of success because the contract between the parties—which was referenced in the pleading—provided a juristic reason for any enrichment. Further, "[n]othing in the pleadings…could serve to vitiate the alleged contract": *Atlantic Lottery* at para. 71.

[222] In the present case, the appellants say that the respondent has not provided any evidence of harm or loss because she, and other class members, received the Rental Accommodation Services through the Airbnb Platform in return for the Travellers Service Fees. This simply repeats the argument I have already rejected that the exchange of mutual benefits plainly and obviously defeats the claim for unjust enrichment. In this case, unlike in *Atlantic Lottery*, the respondent does plead facts that might arguably vitiate the contracts, and she seeks a gain-based remedy for unjust enrichment. While the respondent may ultimately be unsuccessful on the merits, I cannot see how her choice to attempt to litigate the issues through a class proceeding could be defeated simply because she seeks the remedy of restitution rather than compensatory damages.

Disposition

[223] For the foregoing reasons, I would make the following orders:

a) Airbnb, Inc.'s appeal from the order dismissing its jurisdictional objection is dismissed;

b) Airbnb Canada's appeal from the order dismissing its jurisdictional objection is allowed and the claim against Airbnb Canada is dismissed;

c) The appellants' appeal from the certification order is allowed and the order is set aside;

d) The matter is remitted to the chambers judge to consider whether the requirements of ss. 4(1)(c) and (d) of the *CPA* are met in light of these reasons.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Justice Iyer"

I AGREE:

"The Honourable Justice Edelmann"

Schedule A

THE CLASS DEFINITION:

The class is comprised of:

All individuals that made a reservation using the Defendants' Accommodation Rental Services and paid a Travellers Service Fee to the Defendants during the Class Period and either:

(1) reside in Canada (the "**Canadian Resident Subclass**"), or

(2) reside outside of Canada, except for residents of the United States of America, and the reserved accommodation is physically situated in the province of British Columbia (the "**Non-Canadian Resident Subclass**").

Excluding:

(a) reservations made via "Airbnb for Work";

(b) reservations marked as a business trip; or

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

THE CERTIFIED COMMON ISSUES:

Factual Questions

1. During the Class Period did the Defendants, or some of them provide or offered (*sic*) to provide all or some of the Accommodation Rental Services (including the features listed in paragraph 8 of the Amended Notice of Civil Claim)?

    a. If so, were those services provided to class members situated in Canada or otherwise in relation to accommodations physically situated in British Columbia?

2. During the Class Period,

    a. For the Canadian Resident Subclass, were the Defendants:

        i. licensed real estate agents in any Canadian jurisdiction, except Quebec?

ii. licensed travel agents in British Columbia, Ontario, or Quebec?

iii. licensed or registered to engage in a money service business in Canada or Quebec?

b. For the Non-Canadian Resident Subclass, were the defendants:

i. licensed real estate agents in British Columbia?

ii. licensed travel agents in British Columbia?

iii. licensed or registered to engage in a money service business in Canada?

3. Did the Defendants, or some of them, charge the Class Members the Travellers Service Fees (defined in paragraph 12 of the Amended Notice of Civil Claim)?

4. Did the Defendants, or some of them, earn the Accrued Interest (defined in paragraph 10 of the Amended Notice of Civil Claim) for monies received from the Class Members that were intended to be paid to Owners (defined in paragraph 8 of the Amended Notice of Civil Claim?

5. If Question 3 or 4 is YES, how much was received by each Defendant?

Legal Questions

6. During the Class Period, did the Defendants, or some of them, comply with:

a. the Real Estate Services Prohibition (listed in Schedule A of the Amended Notice of Civil Claim) in every Canadian jurisdiction, except Quebec?

b. the Travel Agent Services Prohibition (listed in Schedule B of the Amended Notice of Civil Claim) in British Columbia, Ontario and/or Quebec?

c. the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 and/or the *Money-services Businesses Act*, CQLR c. E-12.000001 to obtain a licence or registration?

(collectively the "**Applicable Laws**")

7. If Question 6 is YES, did any of the Defendants breach their contracts with the Class Members in failing to comply with the Applicable Laws?

Remedies Questions

8. Should the Defendants be ordered to pay, as damages, restitution, disgorgement, and/or accounting of profits, for either or both of the following monies:

    a. Accrued Interest?

    b. Travellers Service Fees?

9. If Question 7 is YES, should the Defendants be ordered to pay nominal damages for breach of contract?

10. Should punitive damages be awarded against some or all of the Defendants?

11. Should a permanent injunction be issued that the Defendants cease providing the Accommodation Rental Services to Class Members in Canada, or otherwise in relation to accommodations physically situated in Canada, until the Defendants comply with the Applicable Laws?