COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Live Nation Entertainment, Inc. v. Gomel,* 2023 BCCA 274

Date: 20230707
Docket: CA47479

Between:

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

Appellants/Respondents on Cross Appeal
(Defendants)

And

David Gomel

Respondent/Appellant on Cross Appeal
(Plaintiff)

Before: The Honourable Justice Dickson
The Honourable Justice Marchand
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated April 15, 2021 (*Gomel v. Live Nation Entertainment, Inc.*, 2021 BCSC 699, Vancouver Docket S1811318).

Counsel for the Appellants:	C.L. Richter J.A. Gotowiec A. Oake
Counsel for the Respondent:	D.G.A. Jones J.E. Fung
Place and Date of Hearing:	Vancouver, British Columbia February 3, 2023
Place and Date of Judgment:	Vancouver, British Columbia July 7, 2023

Written Reasons by:
The Honourable Justice Marchand

Concurred in by:
The Honourable Justice Dickson
The Honourable Madam Justice Horsman

2023 BCCA 274 (CanLII)

2023 BCCA 274 (CanLII)

Summary:

In class proceedings, the plaintiff broadly alleges the appellants' ("Ticketmaster") Terms of Use and Purchase Policy contain misrepresentations that have "distorted" and caused a "general inflationary effect" in the secondary market for event tickets, causing widespread loss to secondary market ticket purchasers and significant financial gain to Ticketmaster. The certification judge certified the plaintiff's deceptive practices and unconscionable practices claims under ss. 5 and 9 of the Business Practices and Consumer Protection Act [BPCPA]. He also certified common issues related to damages. He did not certify the plaintiff's restoration claim under the BPCPA or his claims under the Competition Act, the common law of negligent misrepresentation or unjust enrichment.

Ticketmaster appeals the judge's certification order alleging the judge erred by (1) accepting the plaintiff's "bare pleading" that the representations amounted to "deceptive" and/or "unconscionable" conduct; (2) certifying the claims under the BPCPA in the absence of a pleading explaining how the alleged conduct caused any loss to class members; (3) interpreting the definition of "Consumer" and "Supplier" under the BPCPA too broadly; and (4) certifying common issues related to damages in the absence of any evidence supporting the existence of a plausible methodology to determine damages on a class-wide basis. The plaintiff cross-appeals alleging the judge erred by declining to certify the plaintiff's restoration, Competition Act, negligent misrepresentation and unjust enrichment claims. In addition, in oral submissions, the plaintiff suggested that his pleadings were broad enough to support the equitable remedy of disgorgement. He submitted this Court should certify the issue of disgorgement or remit it to the certification judge.

Held: Appeal allowed in part; cross-appeal allowed in part. The judge erred by certifying common issues related to damages in the absence of any evidence supporting the existence of a plausible methodology to determine damages on a class-wide basis. This ground of appeal is allowed and the judge's certification is set aside with respect to the following issues: (1) have the Class Members suffered damage or loss due to a contravention of the BPCPA; and (2) what amounts, if any, should the defendants, or any of them, pay Class Members as a result of the defendants' contravention(s) of the BPCPA? These issues are remitted to the certification judge for reconsideration. Ticketmaster's other grounds of appeal are dismissed. The plaintiff's cross-appeal with respect to the restoration, Competition Act and unjust enrichment claims are allowed. The plaintiff's proposed common issue I (iii) regarding restoration is certified. The plaintiff's proposed common issues regarding his Competition Act and unjust enrichment claims are remitted to the certification judge for reconsideration. The plaintiff's cross-appeal with respect to the negligent misrepresentation claim is dismissed. Issues related to disgorgement are for the certification judge to address with the parties during his reconsideration of the plaintiff's Competition Act claim.

Table of Contents

2023 BCCA 274 (CanLII)

Reasons for Judgment of the Honourable Justice Marchand:

Introduction

[1] The appellants, who I will refer to collectively in the singular as "Ticketmaster", are said to be the largest promoter, distributor and seller of event tickets in North America. Ticketmaster is involved in both the initial sale of event tickets (the "primary market") and in the resale of event tickets (the "secondary market").

[2] In these class proceedings, the plaintiff (respondent and cross-appellant on appeal) broadly alleges that Ticketmaster's Terms of Use and Purchase Policy contain misrepresentations that have "distorted" and caused a "general inflationary effect" in the secondary market, causing widespread loss to secondary market ticket purchasers (including those who purchase tickets from Ticketmaster's competitors) and significant financial gain to Ticketmaster. Essentially, the plaintiff says that Ticketmaster misrepresents that it enforces ticket purchasing limits and "ticket bot" prohibitions against professional ticket resellers (sometimes pejoratively referred to as "scalpers"). As a consequence, the plaintiff says that professional ticket resellers are able to resell massive amounts of unfairly obtained tickets at a substantial premium.

[3] In reasons for judgment indexed at 2021 BCSC 699, the certification judge certified the plaintiff's deceptive practices and unconscionable practices claims under ss. 5 and 9 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*]. He also certified common issues related to damages. He did not certify the plaintiff's restoration claim under the *BPCPA* or his claims under the *Competition Act*, R.S.C. 1985, c. C-34, the common law of negligent misrepresentation or unjust enrichment.

2023 BCCA 274 (CanLII)

[4] Ticketmaster appeals the judge's certification order. It says the judge erred by:

1. accepting the plaintiff's "bare pleading" that the representations amounted to "deceptive" and/or "unconscionable" conduct, without considering whether the text of the provisions (which had been incorporated by reference into the amended notice of civil claim) were capable of being interpreted as alleged;

2. certifying the claims under the *BPCPA* in the absence of a pleading explaining how the alleged conduct caused any loss to class members;

3. interpreting the definition of "consumer" and "supplier" under the *BPCPA* too broadly, capturing alleged conduct that was not intended to be captured by the legislation; and

4. certifying common issues related to damages in the absence of any evidence supporting the existence of a plausible methodology to determine loss or damage on a class-wide basis.

[5] The plaintiff maintains the judge did not err in certifying his claims in respect of deceptive or unconscionable acts or practices under the *BPCPA*. He says the judge properly refrained from weighing evidence and making merits determinations. He also says the judge correctly held there was a plausible way to establish a common impact.

[6] The plaintiff cross appeals the judge's refusal to certify his restoration, *Competition Act*, negligent misrepresentation and unjust enrichment claims. He says the judge erred by:

1. finding that no class member would be entitled to a restoration order under s. 172(3)(a) of the *BPCPA*;

2. holding it was necessary to specifically plead detrimental reliance to sustain the plaintiff's claims under ss. 36 and 52 of the *Competition Act*;

2023 BCCA 274 (CanLII)

3. failing to find the plaintiff had adequately pleaded detrimental reliance with respect to his *Competition Act* and negligent misrepresentation claims; and

4. failing to find the plaintiff had adequately pleaded his claim in unjust enrichment when the amended notice of civil claim alleged Ticketmaster had engaged in "unlawful conduct" that had enriched Ticketmaster while causing class members a corresponding deprivation.

[7] Further, in oral submissions, the plaintiff submits this Court ought to certify his pleaded (but not adjudicated) remedial claim for disgorgement or remit it to the certification judge.

[8] Ticketmaster maintains the judge did not err as alleged by the plaintiff and that the plaintiff's restoration, *Competition Act*, negligent misrepresentation and unjust enrichment claims were bound to fail on reliance, causation and damage assessment issues. Ticketmaster further maintains that the plaintiff did not plead disgorgement and that it is now too late to raise the issue.

Background

[9] Ticketmaster operates a technology platform accessible through its website, www.ticketmaster.ca, that allows for the purchase of event tickets on both the primary and secondary markets.

[10] In the primary market, Ticketmaster is generally the exclusive sales agent for its clients, predominantly venues, sports teams, artists and promoters. It does not own the tickets it sells and its clients set all sales criteria, including ticket inventory, ticket purchase limits and pricing. Ticketmaster sets a transaction fee per ticket that is added to the face price of the ticket and is paid to it by the purchaser.

[11] Demand for tickets in the secondary market arises when demand outstrips supply for tickets in the primary market. At times, demand on the secondary market can be substantial. Websites operated by various entities offer resale tickets to

2023 BCCA 274 (CanLII)

interested purchasers. In Ticketmaster's case, its platform is available for the resale of "verified" event tickets for which it was the primary market sales agent.

[12] Since July 2015, Ticketmaster lists both primary and resale tickets on an integrated seat map. Resale tickets are sold by the owners of the tickets, be they fans, season ticket holders or professional ticket resellers. Ticket owners set the resale price. Ticketmaster collects resale, buyer and sometimes delivery fees for tickets resold through its website. It also collects a fee if its automated tools are used to facilitate the transfer of a resale ticket through a non-Ticketmaster platform.

[13] Around the same time as Ticketmaster introduced its integrated seat map, it also released a proprietary inventory software tool called "TradeDesk". TradeDesk is used mainly by professional ticket resellers to validate and manage the tickets they have for sale on Ticketmaster's website.

[14] On November 18, 2016, the plaintiff purchased two tickets to Bruno Mars' July 26, 2017 concert in Vancouver on StubHub, a competitor of Ticketmaster in the secondary market, for 437.86 USD. He believes that the face price of the tickets was less than what he paid. An advertisement for the concert indicates that the concert was produced by one of the appellants, which suggests that Ticketmaster was the original agent for primary ticket sales. However, the advertisement also indicates that tickets were offered for sale to the general public on November 21, 2016, which suggests that the plaintiff purchased his tickets from StubHub before tickets were offered for sale through Ticketmaster on the primary market.

[15] In any event, in the fall of 2018, the Toronto Star and the Canadian Broadcasting Corporation published a series of investigative articles ("Star/CBC reports") that suggested Ticketmaster was promoting TradeDesk with professional ticket resellers to "[facilitate] the mass scalping of tickets" in direct violation of the Terms of Use on Ticketmaster's website. The Star/CBC reports led to the filing of class actions in Quebec, Ontario, Saskatchewan and this one in British Columbia. The Quebec action has been stayed in favour of the Saskatchewan action.

2023 BCCA 274 (CanLII)

[16] The proposed representative plaintiff in the Saskatchewan action purchased event tickets from Ticketmaster in the primary market and paid more than the face price. She advanced two discrete claims, the "Representation or Primary Market Claim" and the "TradeDesk or Secondary Market Claim".

[17] The "Representation or Primary Market Claim" alleged, among other things, that Ticketmaster breached various provisions of the *Competition Act* by not disclosing fees associated with a ticket purchase until towards the end of the purchase transaction, rather than the beginning.

[18] The "TradeDesk or Secondary Market Claim" alleged various causes of action but relied principally on the allegation that Ticketmaster had conspired with persons, including "scalpers and ticket brokers" (1) to harm the "resale class" by requiring them to pay artificially high prices for resale event tickets, and (2) to illegally increase their profits on the sale of resale event tickets.

[19] On November 25, 2022, in reasons indexed at 2022 SKKB 259, the certification judge certified the "Representation or Primary Market Claim" but declined to certify the "TradeDesk or Secondary Market Claim." The proposed representative plaintiff and Ticketmaster have both applied for leave to appeal this decision. Their leave applications were heard in March 2023, but no decision has been issued yet.

[20] Two actions were filed in Ontario. They have since been joined under one style of cause: *Thompson-Marcial v. Ticketmaster LLC* (CV-18-00605906-00CP). The proposed representative plaintiff purchased tickets from Ticketmaster's secondary sales platform and paid more than the face price. The theory of damages appears to be connected to "double-dip" commissions Ticketmaster allegedly charged when it permitted the same ticket to be sold in both primary and secondary markets on its website. The claim is also based on the general inflationary effect caused by the use of ticket bots in the primary market. The certification application is scheduled for a four-day hearing in December 2023.

2023 BCCA 274 (CanLII)

[21] In this case, the plaintiff generally alleges that Ticketmaster's Terms of Use and Purchase Policy misrepresent that Ticketmaster would provide consumers a fair opportunity to purchase event tickets from it on the primary market. In reality, the plaintiff alleges, Ticketmaster facilitated the acquisition of event tickets by professional ticket resellers faster and in larger quantities than possible for an individual consumer. The plaintiff says Ticketmaster did so by failing to prohibit professional ticket resellers from using software known as "ticket bots" that automate the purchase of event tickets, including by enabling professional ticket resellers to complete numerous ticket purchase transactions simultaneously using multiple accounts.

2023 BCCA 274 (CanLII)

Ticketmaster's Terms of Use and Purchase Policy

[22] To purchase an event ticket on the Ticketmaster website, users have to agree to Ticketmaster's Terms of Use. The full Terms of Use are available on the website by clicking a link on the homepage. The copy of the Terms of Use filed by Ticketmaster on the certification application comprises eight pages of fine print covering a variety of topics, including: the requirement to register an account to use the website to purchase a ticket; a Code of Conduct for users; the ownership of site content; parental controls; the applicability of Ticketmaster's Purchase Policy to purchases made on the website; and disclaimers, limitations of liability and indemnities in favour of Ticketmaster. The terms are not negotiable. If a user wants to purchase a ticket, they must accept them.

[23] Ticketmaster's Terms of Use include the following provisions:

> …
>
> You agree that you will comply with all applicable laws, rules and regulations, and that you will not:
>
> - …
> - Order a number of tickets for an event that exceeds the stated limit for that event;
> - …
> - Use any area of the Site for commercial purposes, such as to conduct sales of tickets, products or services.

> …
>
> We grant you a limited, conditional, no-cost, non-exclusive, non-transferable, non-sublicensable license to view this Site and its Content as permitted by these Terms for non-commercial purposes only if, as a condition precedent, you agree that you will not:
>
> - …
> - Use any automated software or computer system to search for, reserve, buy or otherwise obtain tickets…;
> - …
>
> …
>
> … You may not attempt to conceal your identity by using multiple Internet Protocol addresses or email addresses to conduct transactions on the Site…
>
> …
>
> We may Investigate any violation of these Terms, including unauthorized use of the Site. We may provide law enforcement with information you provide to us related to your transactions to assist in any investigation or prosecution of you. We may take legal action that we feel is appropriate…

[24] The full Purchase Policy is also available on Ticketmaster's website by clicking a link accessible in various locations on the website, including within the Terms of Use. The copy of the Purchase Policy filed by Ticketmaster on the certification application comprises three pages of fine print covering information on a variety of topics, including: payment methods; who purchasers are buying tickets from; pricing and availability of tickets; service and other fees; ticket limits; refunds; delivery methods; and a limitation of liability in favour of Ticketmaster.

[25] Under the heading "Number of Tickets or 'Ticket Limits'", the Purchase Policy provides:

> When purchasing tickets on our Site, you are limited to a specified number of tickets for each event (also known as a "ticket limit"). This ticket limit ls posted during the purchase process and is verified with every transaction. This policy is in effect to discourage unfair ticket buying practices. Each Ticketmaster account must be linked to a unique individual and contain valid, and verifiable, information. Multiple accounts may not be used to circumvent or exceed published ticket limits. We reserve the right to cancel any or all orders and tickets, in addition to prohibiting your ticket purchase abilities, without notice to you, if you exceed or attempt to exceed, the posted ticket limits. Any tickets, cancelled due to violating the posted ticket limit, will be refunded at face value (excluding fees). This includes orders associated with the same

2023 BCCA 274 (CanLII)

> name, e-mail address, billing address, credit card number or other information.

The Amended Notice of Civil Claim

[26] In the amended notice of civil claim, the plaintiff broadly asserts that Ticketmaster "gain[s] substantial profits" from "foster[ing] an artificial secondary market for event ticket sales wherein professional ticket brokers use automated purchasing software to obtain event tickets *en masse* from Ticketmaster and subsequently resell these tickets to consumers at significant markups from their original face value."

[27] The amended notice of civil claim then pleads some noncontroversial details about Ticketmaster's involvement in the primary and secondary markets, the fees it collects and its Terms of Use and Purchase Policy. The controversy arises principally from its pleadings that:

> 21. Ticketmaster has been aware at all material times, and in particular during the Class Period, that professional ticket brokers circumvent… the ticket purchasing limits by using ticket "bots" to acquire numerous event tickets at once through multiple online accounts.
>
> …
>
> 27. Through the Terms of Use and the Purchase Policy, Ticketmaster represented that it enforced fair ticket buying practices and it enforced a prohibition on the use of ticket bots.
>
> …
>
> 30. Notwithstanding Ticketmaster's representations that it enforced fair ticket buying practices and enforced a prohibition on the use of ticket bots, Ticketmaster developed and promoted TradeDesk, a platform that Ticketmaster knew facilitated and encouraged the use of ticket bots on www.ticketmaster.ca. Alternatively, Ticketmaster was willfully blind to the use of ticket bots on www.ticketmaster.ca and the circumvention of event ticket purchasing limits by professional ticket brokers using TradeDesk. Ticketmaster's conduct, whether witting or unwitting, permitted and encouraged professional ticket brokers to use ticket bots to acquire large quantities of event tickets from Ticketmaster directly, and then resell those event tickets at a substantial mark up from their original face value.
>
> 31. While Ticketmaster represents that violation of the Terms of Use may result in penalties and legal action, Ticketmaster has not, at any material time, attempted to curtail the activities of professional ticket brokers that were in violation of the Terms of Use.

2023 BCCA 274 (CanLII)

> 32. Ticketmaster earns substantial profits from all event ticket sales conducted through www.ticketmaster.ca... When professional ticket brokers use ticket bots to purchase event tickets *en masse*, Ticketmaster collects fees on each transaction. Additionally, if that event ticket is resold through Ticketmaster Resale, Ticketmaster collects a fee on that transaction as well. In this way, each time there is Secondary Sales of an event ticket through Ticketmaster Resale, Ticketmaster collects an additional fee.
>
> …
>
> 34. Ticketmaster knowingly or recklessly made, and continues to knowingly or recklessly make, representations in its Terms of Use and Purchase Policy, through press releases in response to the recent undercover investigation and through the Internet, including through its website, www.ticketmaster.ca. This includes representations that Ticketmaster:
>
> (a) provides consumers with a fair opportunity to acquire event tickets;
>
> (b) prohibits the use of ticket bots or other automated software for purchasing tickets through www.ticketmaster.ca;
>
> (c) enforces ticket purchasing limits;
>
> (d) prohibits users of www.ticketmaster.ca from concealing their identities through multiple Internet Protocol addresses or email addresses to conduct multiple transactions;
>
> (e) investigates any misuse of www.ticketmaster.ca;
>
> (f) assists law enforcement officials with the prosecution of any individual found to be in violation of Ticketmaster's Terms of Use; and
>
> (g) discourages misuse of www.ticketmaster.ca, including any activity designed to circumvent ticket purchase limits per transaction.
>
> …
>
> 36. As a result of these representations, the market for event tickets that originated from Ticketmaster was distorted, leading to higher prices for event tickets. Further, and in the alternative, the Plaintiff and Class relied upon the representations. As a result, the Plaintiff and Class have suffered loss, damage and expense as described herein…
>
> [Emphasis added.]

[28] Based on this background, the plaintiff pleads various causes of action under the *BPCPA*, the *Competition Action*, the common law of negligent misrepresentation and unjust enrichment.

[29] Under the *BPCPA*, the plaintiff pleads that he and class members are “consumers”, Ticketmaster is a “supplier” and Ticketmaster's marketing, promotion, labelling and sale of event tickets resold on www.ticketmaster.ca constitute a

2023 BCCA 274 (CanLII)

"consumer transaction", all as defined in the legislation. He also pleads that Ticketmaster's representations were "false, misleading or deceptive" under s. 4 and "unconscionable" under s. 8. As such, he maintains that Ticketmaster breached ss. 5 and 9 and that class members are therefore entitled to recover damages from Ticketmaster under s. 171 or, alternatively, to have Ticketmaster "restore" money to them under s. 172(3)(a).

[30] Under the *Competition Act*, the plaintiff pleads that Ticketmaster's representations contravened s. 52 because they were knowingly or recklessly made and were "false or misleading in a material respect." He also pleads that he and class members have suffered loss, damage and expense "as a result" of the representations because "the market for event tickets that originated from Ticketmaster was distorted, leading to higher prices for event tickets." Further, and in the alternative, the plaintiff pleads that he and class members "relied upon the representations." Accordingly, the plaintiff pleads they are entitled to recover damages from Ticketmaster under s. 36.

[31] Under the common law of negligent misrepresentation, the plaintiff pleads that Ticketmaster's representations were "untrue, inaccurate, or misleading", that Ticketmaster acted negligently in making the representations and that he and class members reasonably relied on the representations to their detriment.

[32] Finally, the plaintiff advances a claim in unjust enrichment. He pleads that:

- Ticketmaster has been enriched by allowing and encouraging professional ticket brokers to violate its Terms of Use and Purchase Policy so that it could collect additional fees through secondary sales;

- He and class members have suffered corresponding deprivation by paying more for event tickets by purchasing through secondary sales; and

- "Since the additional fees received by Ticketmaster from the Plaintiff and Class resulted from Ticketmaster's wrongful and unlawful acts, which include negligent misrepresentation and contraventions of the *Competition Act* and

2023 BCCA 274 (CanLII)

> the *BPCPA*, there is and can be no juridical reason justifying Ticketmaster retaining any part of it."

[33] There is a dispute between the parties as to whether the amended notice of civil claim advances a remedial claim for disgorgement.

Reasons for Judgment

[34] After outlining the factual background and providing an overview of the plaintiff's claim, the certification judge noted the three advantages that class actions offer over a "multiplicity of individual suits", namely judicial economy, access to justice and behaviour modification: *Western Canada Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 27–29. He then set out the five requirements for certifying class proceedings under s. 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*]:

> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[35] The judge summarized a number of well-accepted principles concerning certification:

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

2023 BCCA 274 (CanLII)

> [43] The certification stage is not meant to be a test of the merits of the action, rather, it is concerned with form and with whether the action can properly proceed as a class action: *Hollick* at para. 16; *Pro-Sys Consultants Ltd. v. Microsoft*, 2013 SCC 57 at para. 99.
>
> [44] Subsection 4(1)(a) is assessed on the same standard as on a motion to strike pleadings under Rule 9-5(1)(a). The plaintiff satisfies this requirement unless it is plain and obvious that the plaintiff's claim cannot succeed: *Hollick* at para. 25, *Microsoft* at para. 63. For this analysis, the Court must assume that all the pleaded facts are true unless they are patently unreasonable or incapable of proof: *Watson v. Bank of America Corp.*, 2014 BCSC 532. A claim must not be struck merely because it is novel or complex: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980.
>
> [45] Subsections 4(1)(b)–(e) require the plaintiff to show "some basis in fact" for each requirement: *Hollick* at para. 25. The "some basis in fact" standard does not require that the court resolve conflicting facts and evidence; at certification, the court is ill-equipped to resolve conflicts in the evidence or assess evidentiary weight: *Microsoft* at para. 102.

[36] The judge then addressed whether the pleadings disclosed a cause of action.

[37] First, the judge found that the plaintiff had properly pleaded that Ticketmaster had committed deceptive acts or practices contrary to ss. 4 and 5 and unconscionable acts or practices contrary to ss. 8 and 9 of the *BPCPA*. In doing so, he rejected various arguments made by Ticketmaster. Of relevance to the appeal, he held:

1. It was not plain and obvious that no representations were made in the "Terms of Use". Although the judge agreed with Ticketmaster that he could consider the Terms of Use and Purchase Policy (and not just the pleadings about them), he did not analyze and interpret them. He considered such an exercise to be "impermissible" at the certification stage and the issue of whether the "Terms of Use" contain representations to be "very much an issue for trial."

2. It was not plain and obvious that the plaintiff was not a "consumer", Ticketmaster was not a "supplier" and the transactions at issue were not "consumer transactions" as defined in the *BPCPA*. The judge noted that *Cantlie v. Canadian Heating Products Inc.,* 2017 BCSC 286 "supported an expanded application of 'consumer transaction'" and that there is no requirement for privity of contract under the legislation. Accordingly, he found

2023 BCCA 274 (CanLII)

that the applicability of the *BPCPA* to indirect purchasers like the plaintiff, who did not purchase from Ticketmaster, "must be left to trial."

3. Although the certification judge agreed with Ticketmaster that "the link between the alleged representations and the claim of unconscionability appears tenuous," he could not say it was non-existent. In support of this finding, he noted the judicial commentary in *Sherry v. CIBC Mortgage Inc.*, 2016 BCCA 240 and 2020 BCCA 139 regarding "the potential expansion of unconscionability [under the *BPCPA*] to systemic conduct."

4. Relying on *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 ["*Finkel BCCA*"] at paras. 83 and 84, it was arguable that the plaintiff was not required to plead and prove reliance on Ticketmaster's representations in order to recover damages under s. 171 of the *BPCPA*.

[38] The certification judge ultimately concluded that these aspects of the plaintiff's pleading under the *BPCPA* "referencing the virtual monopoly of Ticketmaster in segments of the marketplace and the inflated prices in the secondary market, [was] sufficient to clear the 'no cause of action' bar."

[39] The judge reached the opposite conclusion with respect to the plaintiff's other claims. He found the remaining claims did not meet the certification requirement in s. 4(1)(a) of the *CPA* that the pleadings must disclose a cause of action.

[40] First, the judge declined to certify the plaintiff's "restoration" claim under s. 172(3) of the *BPCPA*. Relying on *Ileman v. Rogers Communications Inc*., 2015 BCCA 260 at paras. 53, 59–60, he held that that subsection "does not create a cause of action or give rise to a free-standing right to damages. Rather, damages are ancillary to the granting of injunctive relief, in the context of public remedies for corporate malfeasance."

[41] In his view, there were no pleadings to support the plaintiff's restoration claim. In particular, there was no pleading that Ticketmaster acquired money from the class members as a result of its alleged contraventions of the *BPCPA*, so there was "no

2023 BCCA 274 (CanLII)

interest" in anything acquired by Ticketmaster to restore to the class members. On the plaintiff's theory of damages, Ticketmaster may have received additional fees from class members but any excess value paid by class members for resold tickets was paid to ticket resellers, not Ticketmaster.

[42] Second, the certification judge declined to certify the plaintiff's claims under the *Competition Act*. Relying on *Wakelam v. Johnson & Johnson*, 2014 BCCA 36 and *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, he concluded that in order to make a claim under s. 36 a plaintiff must establish both a breach of s. 52 and loss or damage suffered as a result of detrimental reliance on that breach. In his view, there was nothing more than a bald pleading that the plaintiff and class members relied on Ticketmaster's representations, which was "woefully inadequate" to support the plaintiff's claims. In short, he concluded that the pleadings disclosed no cause of action since the plaintiff failed to plead any material facts in support of the necessary reliance on Ticketmaster's representations.

[43] Third, after listing the five well-known elements for a successful claim in negligent misrepresentation, the certification judge held that the plaintiff pleaded "virtually no facts" to support the "special relationship" requirement (the first element), and "none at all" to support detrimental reliance (the fourth and fifth elements). He therefore declined to certify the plaintiff's negligent misrepresentation claim.

[44] Finally, after listing the three well-known elements for a successful claim for unjust enrichment, the certification judge held that the plaintiff pleaded no facts to support the first two elements, namely that Ticketmaster had been enriched and the plaintiff and class members correspondingly deprived. While the judge acknowledged that the alleged enrichment was Ticketmaster's "collection of multiple fees for the sale and resale of the same ticket," there was no corresponding deprivation to the plaintiff and class members. In the judge's view, the plaintiff's claimed loss related to the payment of inflated prices in the secondary market (which went to ticket resellers), not fees (which went to Ticketmaster). Further, he held that

2023 BCCA 274 (CanLII)

(1) “[t]here [was] no suggestion that any plaintiff paid multiple service fees for a ticket”; (2) any additional service fees “did not pass from the plaintiffs to the defendants”; and (3) any collection of multiple fees for the same ticket could only be actionable (if actionable at all) “pursuant to statute”. He therefore declined to certify the plaintiff’s unjust enrichment claim.

[45] The certification judge then turned to the four remaining requirements for certification under s. 4(1)(b)-(e) of the *CPA*. His summaries of the legal principles and his findings under ss. 4(1)(b), (d) and (e)—that there was (1) an identifiable class of two or more persons, (2) class proceedings would be the preferable procedure for the fair and efficient resolution of the common issues and (3) the suitability of the plaintiff to act as the representative plaintiff—are not at issue on appeal.

[46] The issue under s. 4(1)(c) is whether the judge erred by certifying common issues relating to loss or damage in the absence of evidence of a plausible methodology for establishing loss on a class-wide basis. The judge’s key findings were that expert evidence regarding methodology was not required at the certification stage and that proving the pleaded “general inflationary effect” was a plausible method of establishing loss or damage on a class-wide basis.

[47] The certification judge rejected the plaintiff’s theory that damages could be calculated by subtracting the original price of the tickets at issue from the price paid when they were resold. This finding is not at issue on appeal.

[48] The judge did not agree that a common issues trial would inevitably devolve into an assessment of individual damages claims. He specifically contemplated that the plaintiff’s case may be suitable for the assessment of aggregate damages, meaning damages spread across the class. In the alternative, he contemplated that “counsel and the Court may need to fashion a methodology for assessing individual claims, once certain basic criteria for entitlement are identified.”

2023 BCCA 274 (CanLII)

[49] The judge next held that there was "some basis in fact" to support an award of punitive damages to address Ticketmaster's alleged systemic misconduct:

> [164] … Ticketmaster has a virtual monopoly on ticket distribution for large segments of the primary market. Commencing in 2015, the defendants have been participating in the secondary ticket sales market, attempting to compete with sites such as Stubhub and Vivid Seats. There is evidence that Ticketmaster has turned a blind eye to professional resellers using bots to purchase large quantities of tickets on the primary market, and encouraged those resellers to list tickets for resale on its secondary market platform, using its inventory software, Tradedesk. Both Ticketmaster and the professional resellers profit from this activity, while the end user consumer pays an amount for the ticket greater than face price.

[50] The judge therefore certified the plaintiff's proposed questions regarding punitive damages, with some modification.

[51] Relying on *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 94, the judge noted that punitive damages are only awarded if "there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour". He also held that they are awarded "to achieve objectives of retribution, deterrence and denunciation where other penalties are inadequate".

[52] Relying on *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 113, the judge declined to certify questions related to aggregate damages "at this juncture". In his view, the plaintiff had not pleaded any material facts to support such an award. Instead, the judge determined that he would revisit the issue at the conclusion of the common issues trial. This determination is not at issue on appeal.

[53] Given that the quantum of compensatory damages would not be known until after the common issues trial, the judge adopted the "bifurcated approach" to assessing punitive damages taken in *Finkel v. Coast Capital Savings Credit Union*, 2016 BCSC 561 at paras. 106–108. That is, the judge determined that he would first decide whether the acts and omissions of Ticketmaster would warrant an award of punitive damages at the common issues trial. If so, then, after determining

2023 BCCA 274 (CanLII)

compensatory damages on a class-wide basis, he would decide whether to award punitive damages and in what amount.

[54] The judge certified a question related to interest, to be determined "following the common and individual issues trials, after the issue of compensatory damages is determined." This finding is also not at issue on appeal.

[55] In the result, the judge certified the following issues:

> ***Contraventions of the Business Practices and Consumer Protection Act***
>
> (f) In purchasing events tickets from Secondary Sales for personal use and not for resale, where the original tickets were sold by the defendants:
>
> (i) were the Class Members "consumers" as defined by the BPCPA?
>
> (ii) were the defendants "suppliers" as defined by the BPCPA?
>
> (iii) was this a "consumer transaction" as defined by the BPCPA?
>
> (g) Did the defendants discharge their burden of proving that they did not make a representation or engage in conduct that had the capability, tendency, or effect of deceiving or misleading the Class Members (a "deceptive act or practice") contrary to s. 5(1) of the BPCPA?
>
> (h) Further, or in the alternative, did the defendants discharge their burden of proving that they did not commit or engage in an unconscionable act or practice contrary to s. 9(1) of the BPCPA?
>
> (i) Have the Class Members suffered damage or loss due to a contravention of the BPCPA?
>
> (j) Are the Class Members' claims limited, waived, or released by the Limitation of Liability clause in the Terms of Use on www.ticketmaster.ca?
>
> (k) What amounts, if any, should the defendants, or any of them, pay Class Members as a result of the defendants' contravention(s) of the BPCPA?
>
> (l) If the Court finds that the defendants engaged in deceptive acts or practices, or unconscionable acts or practices, contrary to the BPCPA:
>
> (i) pursuant to s. 172(1)(a), should a declaration be granted that these acts or practices engaged in by the defendants in respect of consumer transaction contravene the BPCPA?
>
> (ii) pursuant to s. 172(1)(b), should an injunction be granted restraining the defendants from engaging or attempting to engage in those acts or practices?
>
> …
>
> ***Aggravated and Punitive Damages***

2023 BCCA 274 (CanLII)

> (y) Do the acts and omissions of the defendants, or any of them, warrant an award of punitive damages?
>
> (z) If so, what monetary amount is payable by the defendants, or any of them, to the Class members?
>
> ***Interest***
>
> (aa) What is the liability, if any, of the defendants, or any of them, for court ordered interest?

[56] The judge also amended the class period to commence on June 30, 2015 and to end on the date of certification.

Standard of Review

[57] In *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85, this Court succinctly summarized the standard of review for certification decisions as follows:

> [30] A certification decision, including whether the statutory requirements of the *CPA* are met, is "entitled to substantial deference": *Wilson v. DePuy International Ltd.*, 2019 BCCA 440 at para. 37; see also *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at paras. 55–56. This Court will only interfere in issues of fact and questions of mixed fact and law if the chambers judge made a palpable and overriding error or was clearly wrong: *Service v. University of Victoria*, 2019 BCCA 474 at para. 50. Deference is also accorded to the chambers judge's assessment of the evidence. Accordingly, this Court will not interfere with that assessment by reweighing or substituting "its view of the weight of the evidence", absent "an error in principle or unless he was clearly wrong": *Jones v. Zimmer GMBH*, 2013 BCCA 21 at para. 51. Finally, extricable questions of law are reviewed on a standard of correctness: *Service* at para. 50; *Sherry v. CIBC Mortgage Inc.*, 2020 BCCA 139 at para. 56. The question of whether the pleadings of a plaintiff disclose a cause of action is generally a pure issue of law and does not attract appellate deference: *Scott v. Canada (Attorney General)*, 2017 BCCA 422 at para. 44; *Sherry* at para. 56.

Certification of Class Proceedings

[58] A class action is a procedural tool that allows an individual member of a class to prosecute a suit on behalf of other class members. As noted by the certification judge, the procedure has three main advantages over individual suits: judicial economy, access to justice and behaviour modification: *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 13, 27; *Finkel BCCA* at para. 13.

2023 BCCA 274 (CanLII)

[59] In *676083 B.C. Ltd.*, this Court provided a helpful overview of the certification of class proceedings under s. 4(1) of the *CPA*:

> [31] Section 4(1) of the *CPA* establishes the statutory requirements for certification of a class action. When these requirements are met, the proceeding must be certified. The merits of a claim are not determined on a certification application and the threshold for certification is low. Nevertheless, certification serves as a "meaningful screening device", and the court performs "an important gatekeeping role by screening out those claims destined to founder at the merits stage of the proceeding": *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 103−04 [*Pro-Sys Consultants*]; *Sherry* at para. 22. Thus, the standard for assessing evidence at certification requires more than a "superficial level of analysis into the sufficiency of the evidence" and more than "symbolic scrutiny": *Pro-Sys Consultants* at para. 103.

2023 BCCA 274 (CanLII)

The Adequacy of the Pleadings

[60] The appeal and cross-appeal turn largely on the requirement in s. 4(1)(a) of the *CPA* that the pleadings disclose a cause of action.

[61] As noted by the certification judge, the adequacy of the pleadings is assessed on the same standard as on a motion to strike pleadings under Rule 9-5(1)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. A plaintiff satisfies this requirement unless it is plain and obvious that their claim cannot succeed: *Finkel BCCA* at para. 16; *Pro-Sys Consultants Inc. v. Microsoft Corporation*, 2013 SCC 57 at para. 63.

[62] A plaintiff must plead the material facts necessary to support each element of the cause of action they seek to certify. The court must assume that all pleaded facts are true. However, the court is not required to take allegations that are "manifestly incapable of being proven" or are based on assumptions or speculation as true: *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2021 BCCA 142 at para. 54, citing *Operation Dismantle Inc. v. R.*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441 at 455 and *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 22. Furthermore, bare allegations and conclusory statements are not enough: *Wakelam* at paras. 91–92.

[63] On the other hand, "[i]n deciding whether pleadings disclose a cause of action, the judge should read them generously, with a view to accommodating inadequacies in form attributable to deficient drafting": *Finkel BCCA* at para. 17. Further, a claim will not be struck merely because it is novel or complex: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980. In fact, "the absence of jurisprudence fully settling an issue may be good reason to exercise restraint in striking a claim at the pleadings stage": *Finkel BCCA* at para. 17, citing *Trillium Motor World Inc. v. General Motors of Canada Limited*, 2011 ONSC 1300, aff'd 2012 ONSC 463 at paras. 61, 74.

2023 BCCA 274 (CanLII)

Analysis

Did the judge err by accepting the plaintiff's "bare pleading" that the representations amounted to "deceptive" and/or "unconscionable" conduct?

[64] Ticketmaster submits that the plaintiff's claims under the *BPCPA* are doomed to fail and should not have been certified because the certification judge failed to consider whether its Terms of Use and Purchase Policy could reasonably be interpreted as the plaintiff alleged. Ticketmaster says, when viewed objectively, the Terms of Use and Purchase Policy could not have misled consumers in the secondary market to believe that Ticketmaster made any of the representations alleged by the plaintiff. In particular, Ticketmaster says:

- The Terms of Use state that it is an agreement between Ticketmaster and a user of its website. The Terms of Use "are not announcements to the public or to purchasers in the secondary market writ large."
- By agreeing to the Terms of Use, users agree to refrain from certain conduct.
- The Terms of Use advise users of the remedies Ticketmaster may exercise if a user does not comply.
- The Terms of Use do not represent that Ticketmaster will enforce the provisions against others. In fact, by indicating that Ticketmaster has no

liability for any failure of another user to conform to the Code of Conduct, the Terms of Use say the opposite.

[65] Ticketmaster maintains that the plaintiff did no more than baldly assert it made certain representations that amounted to deceptive and/or unconscionable conduct. It says the plaintiff failed to plead a factual basis to explain how the words in the Terms of Use and Purchase Policy were capable of conveying the deceptive meaning or amounted to the unconscionable conduct alleged.

[66] I agree that if the Terms of Use and Purchase Policy were patently incapable of amounting to deceptive or unconscionable conduct as defined, then the pleadings would disclose no cause of action and the plaintiff's claims under the *BPCPA* should not have been certified. Indeed, that was the result in *Ileman* where this Court upheld the chambers judge's refusal to certify a class action on the basis that the term "system access fee" (which was a fee charged by telecommunications companies to cell phone users) could not have misled consumers into believing that the fee was a government levy. However, in my view, it is not "plain and obvious" that (1) the Terms of Use and Purchase Policy could not reasonably be taken to have made the representations alleged by the plaintiff or (2) the representations could not reasonably have constituted deceptive and/or unconscionable conduct, as defined.

[67] The relevant provisions of the *BPCPA* provide as follows:

> **Deceptive acts or practices**
>
> 4 (1) In this Division:
>
> **"deceptive act or practice"** means, in relation to a consumer transaction,
>
> (a) an oral, written, visual, descriptive or other representation by a supplier, or
>
> (b) any conduct by a supplier
>
> that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;
>
> **"representation"** includes any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction.

2023 BCCA 274 (CanLII)

(2) A deceptive act or practice by a supplier may occur before, during or after the consumer transaction.

(3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:

(a) a representation by a supplier that goods or services

…

(iv) are available for a reason that differs from the fact,

(v) are available if they are not available as represented,

(vi) were available in accordance with a previous representation if they were not,

(vii) are available in quantities greater than is the fact, or

…

…

Prohibition and burden of proof

5 (1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.

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

…

Unconscionable acts or practices

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

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

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

(a) that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;

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

(c) that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;

2023 BCCA 274 (CanLII)

> (d) that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;
>
> (e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;
>
> (f) a prescribed circumstance.
>
> **Prohibition and burden of proof**
>
> 9 (1) A supplier must not commit or engage in an unconscionable act or practice in respect of a consumer transaction.
>
> (2) If it is alleged that a supplier committed or engaged in an unconscionable act or practice, the burden of proof that the unconscionable act or practice was not committed or engaged in is on the supplier.
>
> [Emphasis by underlining added.]

2023 BCCA 274 (CanLII)

[68] As will be seen, in my view it is arguable that Ticketmaster is a "supplier", the plaintiff and class members are "consumers" and the transactions at issue are "consumer transactions". As such, the Terms of Use and Purchase Policy are capable of constituting "representations". They are the terms of contract relied on by Ticketmaster in connection with consumer transactions.

[69] Although the Terms of Use and Purchase Policy establish the terms of an agreement between Ticketmaster and a user of its website, both documents are publicly available. In my view, it is arguable that:

- When the Purchase Policy says that ticket limits are in effect "to discourage unfair ticket buying practices," the public might reasonably understand Ticketmaster to be saying that it would not work with professional ticket resellers to circumvent such limits.

- When the Purchase Policy says that "[m]ultiple accounts may not be used to circumvent or exceed published ticket limits," the public might reasonably understand Ticketmaster to be saying that it would not facilitate or turn a blind eye to professional ticket resellers doing that very thing.

- When the Terms of Use prohibit the use of the Ticketmaster website for commercial purposes, the public might reasonably understand Ticketmaster

to be saying that it would not actively work with professional ticket resellers to advance their commercial interests or turn a blind eye to such conduct.

- When the Terms of Use and Purchase Policy contain various remedies for any breaches of them, the public might reasonably understand Ticketmaster to be saying that it would fight rather than facilitate such breaches.

[70] Given the plaintiff's pleadings that Ticketmaster knowingly contravened or turned a blind eye to the representations that arguably flow from the Terms of Use and Purchase Policy, the representations may be found to have had "the capability, tendency or effect of deceiving or misleading a consumer." In other words, they may be found to have amounted to a "deceptive act or practice" under s. 4(1) of the *BPCPA*.

[71] With respect to unconscionability, the certification judge correctly noted that the essential elements are inequality of bargaining power and an improvident bargain: *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at paras. 61–65; *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122 at paras. 29–31, 54. He also correctly noted that claims of unconscionability may be "expanding beyond" the circumstances of individual transactions and into systemic conduct: *Sherry v. CIBC Mortgage Inc.*, 2020 BCCA 139 at para. 42.

[72] In the present case, the plaintiff has alleged wrongdoing that could fairly be characterized as systemic in nature. In that context, the plaintiff's allegations that (1) Ticketmaster held a dominant position in the primary market and that (2) the price of event tickets sold in the secondary market by Ticketmaster "grossly exceeded the price at which similar goods were readily available," may (3) lead to a finding that Ticketmaster's conduct amounted to an "unconscionable act or practice" under s. 8 of the *BPCPA*.

[73] While Ticketmaster vehemently denies that it has engaged in the conduct alleged by the plaintiff, an application for certification is not a determination of the merits. In certifying the plaintiff's claim under the *BPCPA*, the judge made no

2023 BCCA 274 (CanLII)

findings of wrongdoing by Ticketmaster. Rather, based on his review of the pleadings, the certification judge correctly concluded that the plaintiff's claims under the *BPCPA* were not doomed to fail on the basis that the Terms of Use and Purchase Policy were incapable of supporting the plaintiff's claims of deceptive or unconscionable conduct.

[74] Although the certification judge did not engage in a detailed analysis and interpretation of the Terms of Use and Purchase Policy, Ticketmaster's submission that he did not consider them is unfair. Given that they had been incorporated into the pleadings, he expressly indicated that it was open to him to do so. It is evident from reading his reasons as a whole that, after reviewing the Terms of Use and Purchase Policy, he rejected Ticketmaster's submission that it was plain and obvious that they did not contain the representations alleged by the plaintiff. In my view, he was correct to leave the issues of deceptive and/or unconscionable conduct for trial.

[75] I would not accede to this ground of appeal.

Did the judge err by certifying the claims under the *BPCPA* in the absence of a pleading explaining how the alleged conduct caused any loss to class members?

[76] Ticketmaster submits that the plaintiff's claims under the *BPCPA* are doomed to fail and should not have been certified because there was no pleading explaining how the alleged deceptive and/or unconscionable conduct caused any loss to class members. While the certification judge accepted that the plaintiff's "general inflationary effect" theory of damages applied to the plaintiff's claims under the *BPCPA*, Ticketmaster says the plaintiff was nevertheless required to plead some facts to establish how its impugned conduct created that effect.

[77] Ticketmaster argues that the plaintiff's pleading is fatally flawed for a variety of reasons.

[78] First, Ticketmaster notes that the plaintiff's market distortion allegation appears within his *Competition Act* pleading, not his *BPCPA* pleading. Ticketmaster

2023 BCCA 274 (CanLII)

says the certification judge erroneously rested his analysis on a damage theory that was not advanced by the plaintiff as part of his *BPCPA* claim.

[79] Second, Ticketmaster recognizes that *Finkel BCCA* holds that reliance is not always necessary to demonstrate the required causal link. However, Ticketmaster points out that is so only "if a breach of duty can be adequately linked to a loss by alternate means": *Finkel BCCA* at para. 83. Here, Ticketmaster argues that the certification judge failed to identify "why this was a case where reliance was unnecessary, and failed to identify how the alleged misrepresentations could have caused any of the alleged losses in the absence of the plaintiff and the class relying on them."

[80] Third, Ticketmaster says the plaintiff "has not pleaded any theory as to how the representations caused class members who purchased a secondary market ticket to pay a higher price than they would have in the absence of the representations." According to Ticketmaster, the plaintiff was obliged to plead, at a minimum, what the alleged representations caused him and class members to do, material facts to support their reliance on the alleged representations, and how the alleged representations had the alleged effect on the market.

[81] I agree with Ticketmaster that the plaintiff must plead and prove a causal link between Ticketmaster's alleged deceptive and/or unconscionable conduct and a pecuniary loss suffered by him and class members. That is because s. 171(1) of the *BPCPA* provides that "if a person… has suffered damage or loss due to a contravention of this Act or the regulations, the person… may bring an action" against a supplier or other listed people/entities (emphasis added). But, I do not agree with the balance of Ticketmaster's arguments.

[82] First, Ticketmaster's objection to the location of the plaintiff's market distortion pleading within the amended notice of civil claim is flawed. Contrary to the authorities, Ticketmaster's objection puts form over substance and promotes a narrow rather than generous approach to the pleadings: *Hollick* at paras. 15–16; *Finkel BCCA* at para. 17.

2023 BCCA 274 (CanLII)

[83] At all times, Ticketmaster was aware of the plaintiff's theory of a general inflationary effect. As a result, Ticketmaster cannot complain of prejudice and it was completely appropriate for the certification judge to broadly consider the plaintiff's formulation of his claim at the certification hearing, even if this varied somewhat from a narrow reading of the amended notice of civil claim. There must be procedural flexibility in order to achieve the goals of class proceedings: *Halvorson v. British Columbia (Medical Services Commission)*, 2010 BCCA 267 at paras. 23–25.

[84] Second, I recognize (as did the certification judge) that causation will be a significant hurdle for the plaintiff to overcome at trial. In particular, Ticketmaster makes a forceful argument that nothing would have been different in the absence of Ticketmaster's alleged representations. Nevertheless, in my view, the plaintiff has adequately pleaded how he may ultimately succeed with his claims under the *BPCPA*.

[85] Though not detailed in precisely these words, I take the plaintiff's pleaded general inflationary theory to be as follows:

- Through its Terms of Use and Purchase Policy, Ticketmaster represented that it provided consumers with a fair opportunity to purchase event tickets in the primary market by prohibiting ticket bots and enforcing ticket limits.

- As a result, consumers trusted Ticketmaster, had confidence in the secondary market and purchased tickets on the secondary market. The demand for tickets on the secondary market drove prices up.

- Contrary to its representations, in order to earn substantial additional fees, Ticketmaster fostered an artificial secondary market by facilitating or turning a blind eye to professional ticket resellers using ticket bots in the primary market to exceed ticket limits.

- If consumers were aware of the true state of affairs, they would have lost trust in Ticketmaster, concluded that the secondary market was unfair and declined to participate in the secondary market.

2023 BCCA 274 (CanLII)

- Further or alternatively, in the absence of the representations, consumers may have been wary of the activity of professional ticket resellers on the Ticketmaster website, concluded that the secondary market was unfair and declined to participate in the secondary market.

- As a result, demand on the secondary market would have decreased, resulting in lower prices.

[86] In this way, the secondary market may have been distorted "due to" Ticketmaster's representations, potentially causing loss to consumers through the payment of higher ticket prices. This potential loss would not turn on individual class members establishing that they specifically relied on Ticketmaster's representations in deciding to purchase a particular event ticket.

[87] Certification has an important role to play in weeding out claims that are doomed to fail, not those that are novel or that may be difficult to prove. I would put the causation aspect of the plaintiff's claim in the latter categories, not the former. Accordingly, I would not accede to this ground of appeal.

Did the judge err by interpreting the definition of "Consumer" and "Supplier" under the *BPCPA* too broadly?

[88] Ticketmaster submits that the plaintiff's claims under the *BPCPA* are doomed to fail and should not have been certified because the plaintiff and similarly situated ticket buyers did not purchase anything from Ticketmaster. Accordingly, Ticketmaster says that the judge erred in concluding that the plaintiff had entered a "consumer transaction" with Ticketmaster.

[89] As noted above, ss. 5 and 9 of the *BPCPA* prohibit a "supplier" from engaging in deceptive and/or unconscionable conduct in respect of a "consumer transaction". To succeed with his claims under the *BPCPA*, the plaintiff must establish that he, as a "consumer", entered a "consumer transaction" with Ticketmaster, as a "supplier". These terms are defined by the legislation as follows:

2023 BCCA 274 (CanLII)

> **"consumer"** means an individual, whether in British Columbia or not, who participates in a consumer transaction, but does not include a guarantor;
>
> …
>
> **"consumer transaction"** means
>
> (a) a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household, or
>
> (b) a solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to in paragraph (a),
>
> and, except in Parts 4 and 5, includes a solicitation of a consumer by a supplier for a contribution of money or other property by the consumer;
>
> …
>
> **"supplier"** means a person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by
>
> (a) supplying goods or services or real property to a consumer, or
>
> (b) soliciting, offering, advertising or promoting with respect to a transaction referred to in paragraph (a) of the definition of "consumer transaction",
>
> whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of that person and, except in Parts 3 to 5 [Rights of Assignees and Guarantors Respecting Consumer Credit; Consumer Contracts; Disclosure of the Cost of Consumer Credit], includes a person who solicits a consumer for a contribution of money or other property by the consumer;

[90] Although the amended notice of civil claim attaches the correct statutory labels to the plaintiff, Ticketmaster and the transactions at issue, the question is whether it is plain and obvious that the labels do not fit the pleaded facts.

[91] The certification judge addressed Ticketmaster's arguments as follows:

> [56] Next, the defendants submit that it is plain and obvious that the plaintiff is not a "consumer" within the meaning of the *BPCPA*, and that Ticketmaster is not a "supplier." If that is all so, then the transaction is not a "consumer transaction" as defined by the *BPCPA*. Ticketmaster asserts that Mr. Gomel, or any similarly situated class member, would not have a cause of action because they did not purchase anything from Ticketmaster. Mr. Gomel did not engage in a "consumer transaction" with Ticketmaster, inasmuch as he purchased his tickets from Stubhub.
>
> [57] Again, in my view, these are matters that must be left to trial. Indeed, those are among the common issues proposed for certification by the plaintiffs.

2023 BCCA 274 (CanLII)

> [58] I find that it is not plain and obvious that class members who did not purchase from Ticketmaster have no claim. The reasoning of Madam Justice Harris in *Cantlie v. Canadian Heating Products Inc.*, 2017 BCSC 286 is persuasive. Justice Harris found that the provisions of the *BPCPA* supported an expanded application of a "consumer transaction". At para. 231, she noted that the "definition of "consumer transaction," "consumer," and "supplier" are broadly framed. Although there is reference to the consumer having participated in a consumer transaction, as there is no requirement for privity of contract, the apparent intention is to focus on the goods supplied rather than on the transaction in which the good were acquired."
>
> [59] Further, at paras. 237–238, Harris J. commented that the remedies under the *BPCPA* do not appear to require a party to have participated in an impugned consumer transaction. Section 171 states that any "person" who is injured due to a contravention of the *BPCPA* may bring a claim for harm suffered from that contravention.
>
> [60] In my view, in this case, as in that one, to the extent some of the plaintiffs may be indirect purchasers, the question of the applicability of the *BPCPA* can be a common issue, to be decided after certification. Of necessity, deciding this issue would involve detailed argument and analysis of the relevant provisions of the *BPCPA*, with reference to common law principles and the facts of this particular case.

[92] Ticketmaster asserts that the certification judge's reliance on *Cantlie v. Canadian Heating Products Inc.*, 2017 BCSC 286 was misplaced. Ticketmaster points out that *Cantlie* was a product liability case involving the certification of class proceedings against the manufacturer of fireplace inserts. The court in that case held that the definitions under the *BPCPA* were broad enough to capture individuals who had purchased homes with fireplace inserts installed by previous owners. As noted by the certification judge, the court in *Cantlie* held that "there [was] no requirement for privity of contract" and that the apparent intention of the legislation was "to focus on the goods supplied rather than on the transaction in which the goods were acquired": *Cantlie* at para. 231.

[93] Here, Ticketmaster says the circumstances are quite different. The plaintiff and similarly situated ticket purchasers got the tickets they wanted at the prices they agreed to pay. They neither purchased anything directly from Ticketmaster nor "inherited" a defective product.

2023 BCCA 274 (CanLII)

[94] Respectfully, Ticketmaster mischaracterizes the way in which the certification judge relied on *Cantlie*. The judge did not rely on *Cantlie* as a direct comparator to the plaintiff's claim. Clearly, the plaintiff's claim does not involve defective products.

[95] What the certification judge drew from *Cantlie*, correctly in my view, was that (1) as consumer legislation, the *BPCPA* is to be interpreted generously in favour of consumers, (2) privity of contract is not required for the legislated protections to apply and (3) the legislation appears to focus on the good supplied rather than on the transaction in which the good was acquired. The first point is well-established in the jurisprudence: see, for example, *Seidel v. Telus Communications Inc.*, 2011 SCC 15 at para. 37. The second point is express in the statutory definition of "supplier". The third point naturally flows from the second.

[96] Seen in the proper light, the judge's reliance on *Cantlie* was well-placed. He did not rely on it to determine that, in the pleaded circumstances, the plaintiff and class members were "consumers", Ticketmaster was a "supplier" and purchases on the secondary market were "consumer transactions". Rather, he determined that it was not plain and obvious that they were not and certified the questions for determination on the merits.

[97] It is self-evident that purchasers of event tickets on the secondary market were "consumers" who participated in a "consumer transaction". The open question is whether Ticketmaster was a "supplier" in the context of these transactions. Even though Ticketmaster did not own the event tickets being offered for resale and was therefore not a party to particular sales transactions on the secondary market, given *Cantlie* and *Seidel* it is at least arguable that Ticketmaster was a "supplier" to these "consumer transactions" in various ways contemplated by the *BPCPA*.

[98] In respect of event tickets resold on the Ticketmaster website, Ticketmaster would appear to have directly "participated" in the transactions by "soliciting, offering, advertising and promoting" the transaction. In respect of event tickets resold on websites operated by Ticketmaster's competitors, it is possible that Ticketmaster might be found to have indirectly "participated" in the transactions through its

2023 BCCA 274 (CanLII)

allegedly central role in the chain of transactions leading to the eventual sale to the "consumer".

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

Did the judge err by declining to certify the plaintiff's restoration claim?

[100] The plaintiff submits that the certification judge erred by declining to certify his restoration claim under s. 172(3)(a) of the *BPCPA*.

[101] The relevant statutory provisions provide:

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

[102] Although the judge certified the issues of whether a declaration or injunction should be granted under ss. 172(1)(a) and (b) of the *BPCPA*, he declined to certify the plaintiff's claim for restoration under s. 172(3)(a). The judge reasoned:

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

2023 BCCA 274 (CanLII)

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

b) The supplier must have acquired something ("money or other property or thing") because of a contravention of the legislation - this requirement is explicit in s. 172(3)(a);

c) The beneficiary of an order under s. 172(3) must have been the source of money or some other thing acquired by the supplier — this requirement is a necessary implication of the use of the word "restore"; and

d) The beneficiary must have "an interest" in the thing to be restored — this requirement is explicit in s. 172(3)(a).

[89] Further, the court stated:

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

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

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

[92] I note as well that the claim at para. 43 is framed as an alternative to that pleaded at para. 42, damages pursuant to s. 171 of the *BPCPA*. If the plaintiffs can prove a claim for such damages, any claim pursuant to s. 172(3)(a) would be unnecessary and redundant.

[103] While the certification judge accurately summarized the law respecting restoration orders, I respectfully disagree with his conclusion that the plaintiff did not plead any facts to satisfy the necessary criteria. To be fair to the judge, my finding

2023 BCCA 274 (CanLII)

that he erred is based on arguments that were not clearly presented to him at the certification hearing.

[104] At para. 43 of the amended notice of civil claim, the plaintiff claimed that he and class members were entitled to an order under s. 172(3)(a) "requiring Ticketmaster restore to them money acquired as a result of a contravention of the *BPCPA*." Earlier, at para. 32, the plaintiff pleaded that Ticketmaster collected fees on event tickets resold on the Ticketmaster website. Later, at para. 49, the plaintiff pleaded that Ticketmaster received "additional fees" from the plaintiff and class members as a result of Ticketmaster's "wrongful and unlawful acts", including its contraventions of the *BPCPA*.[1] Further, according to the evidence adduced by Ticketmaster on the certification hearing, the fees it charges for resales of event tickets on its website vary with the price charged—in other words, the higher the price of the resold ticket, the higher the fee paid by a ticket purchaser to Ticketmaster.

[105] Therefore, if (1) the court declares that Ticketmaster breached the *BPCPA* and/or enjoins Ticketmaster from breaching the legislation and (2) the plaintiff establishes his general inflationary effect theory at trial, then (3) Ticketmaster may be found to have acquired somewhat higher fees directly from class members who purchased tickets resold on the Ticketmaster website than would have been the case in the absence of Ticketmaster's breaches.

[106] In addition, the plaintiff's restoration claim is not framed only as an alternative claim. It is also framed as a "further" claim. As I see it, the claim is not redundant.

[107] If the plaintiff succeeds with his deceptive and/or unconscionable conduct claims with damages measured by his general inflationary effect theory, class members will recover damages from Ticketmaster based on the increased prices paid by class members to ticket vendors that can be attributed to Ticketmaster's

[1] I recognize that the pleading at para. 49 of the amended notice of civil claim falls under the heading "Unjust Enrichment and Waiver of Tort" not "Statutory Causes of Action". However, that is a matter of form, not substance. See para. 82 above.

2023 BCCA 274 (CanLII)

representations. On the other hand, if successful, the plaintiff's restoration claim would result in Ticketmaster returning the increased portion of the fees paid by certain class members to Ticketmaster that flow from the general inflationary effect caused by Ticketmaster's representations. As can be seen, certain class members may recover two different things: damages associated with inflated prices paid to ticket vendors and restoration of increased fees paid to Ticketmaster.

[108] As will be seen, in my view, the judge erred by certifying common issues related to damages in the absence of any evidence supporting the existence of a plausible methodology to determine loss or damage on a class-wide basis. Even though the plaintiff's restoration claim turns, in part, on his ability to prove his general inflationary effect theory, I would nevertheless certify his restoration claim rather than return it to the certification judge for reconsideration. I have reached this conclusion because some of the plaintiff's other *BPCPA* claims that depend on the general inflationary effect have already been certified and are likewise not being returned for reconsideration. I note, however, that if the plaintiff is unable to establish a plausible methodology to establish the general inflationary effect, the certification judge can consider whether to de-certify any claims under the *BPCPA* that depend on the plaintiff establishing that effect.

[109] For these reasons, I would allow the plaintiff's cross-appeal on this issue and certify the plaintiff's proposed common issue I (iii): "pursuant to s. 172(3)(a), should the defendants be ordered to restore to Class Members any money that may have been acquired because of contraventions to the BPCPA?".

Did the judge err by declining to certify the plaintiff's claims under the *Competition Act*?

[110] The plaintiff submits that the certification judge erred by declining to certify his claims under the *Competition Act*. More specifically, he submits the judge erred by holding it was necessary to specifically plead detrimental reliance to sustain the plaintiff's claims under the *Competition Act* or, in the alternative, by holding that the plaintiff failed to adequately plead detrimental reliance. Based on post-certification

2023 BCCA 274 (CanLII)

developments in the jurisprudence, I do not agree that the plaintiff was obliged to plead detrimental reliance.

[111] Under s. 36 of the *Competition Act*, a person can recover for loss or damage suffered "as a result of" conduct contrary to Part IV, such as false or misleading representations contrary to s. 52. The relevant provisions provide:

> **Recovery of damages**
>
> **36 (1)** Any person who has suffered loss or damage as a result of
>
> **(a)** conduct that is contrary to any provision of Part VI, or
>
> **(b)** the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.
>
> …
>
> **False or misleading representations**
>
> **52 (1)** No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.
>
> **(1.1)** For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that
>
> **(a)** any person was deceived or misled;
>
> **(b)** any member of the public to whom the representation was made was within Canada; or
>
> **(c)** the representation was made in a place to which the public had access.
>
> …
>
> [Emphasis by underlining added.]

[112] As noted above, relying on this Court's decision in *Wakelam* and the Ontario Superior Court of Justice decision in *Singer*, the certification judge concluded that a plaintiff must establish both a breach of s. 52 and loss or damage suffered as a result of detrimental reliance on that breach in order to make out a claim under s. 36.

2023 BCCA 274 (CanLII)

In his view, the plaintiff's bald pleading that the plaintiff and class members relied on Ticketmaster's representations was "woefully inadequate" to support the plaintiff's claims.

[113] In the recent decision of *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366, this Court comprehensively addressed the first issue raised by the plaintiff, namely whether a plaintiff is always required to plead and prove detrimental reliance in order to succeed in a claim for damages under ss. 36 and 52 of the *Competition Act*.

[114] The decision in *Valeant* arose out of applications to strike pleadings, including *Competition Act* pleadings, in class proceedings brought by the Province of British Columbia (the "Province") to recover damages and public health care costs from drug manufacturers arising from the opioid epidemic. Like Ticketmaster, the drug manufacturers argued that *Wakelam* and *Finkel BCCA* provide binding authority for the proposition that detrimental reliance by a person suing under s. 36 of the *Competition Act* is always necessary.

[115] *Wakelam* involved class proceedings brought by a parent against manufacturers of children's cold medications. This Court allowed an appeal of a certification order under s. 36 of the *Competition Act* on the basis that the plaintiff failed to plead the required causal connection between a breach of s. 52(1) and the plaintiff's claimed damages.

[116] *Finkel BCCA* involved class proceedings against a credit union in relation to allegedly undisclosed surcharges imposed on members who withdrew foreign currency from their personal accounts through ATMs. This Court dismissed an appeal of a certification order, including because it was not plain and obvious that the plaintiff's breach of contract and *BPCPA* claims were bound to fail. Although the proceedings did not involve a claim for damages under s. 36 of the *Competition Act*, the Court distinguished between such claims (which in the Court's view required detrimental reliance) and claims under the *BPCPA* (which in the Court's view did not).

2023 BCCA 274 (CanLII)

[117] In *Valeant*, Justice Harris, for the Court, began his analysis by noting that *Wakelam* and *Finkel BCCA* both relied on the following passage from *Singer*:

> [107] ... [Section] 52(1) does not create a cause of action. The cause of action, or right of action, is created by s. 36. The plain language of that section makes it clear, as the defendants assert, that the plaintiff must show *both* a breach of s. 52 *and* loss or damage suffered by him or her as a result of that breach. That can only be done if there is a causal connection between the breach (the materially false or misleading representation to the public) and the damages suffered by the plaintiff. A consumer of sunscreen products cannot recover damages, in the abstract, simply by proving that the manufacturer made a false and misleading representation to the public. The failure of the plaintiff to plead a causal link is fatal to this claim.
>
> [108] Section 52(1.1) only removes the requirement of proving reliance for the purpose of establishing the contravention of s. 52(1). The separate cause of action, created by s. 36 in Part IV of the *Competition Act*, contains its own requirement that the plaintiff must have suffered loss or damage "*as a result*" of the defendant's conduct contrary to Part VI. It is not enough to plead the conclusory statement that the plaintiff suffered damages as a result of the defendant's conduct. The plaintiff must plead a causal connection between the breach of the statute and his damages. In my view, this can only be done by pleading that the misrepresentation caused him to do something – i.e., that he relied on it to his detriment.
>
> [Underlining added by Harris J.A.]

[118] While not taking issue with the results in *Wakelam* and *Finkel BCCA*, Harris J.A. held that neither was binding in the context of the claims before the Court. *Wakelam* involved alleged misrepresentations to members of the proposed class. By contrast, in *Valeant*, the Province contended that it had suffered damages as a result of misrepresentations made not to it, but to others, namely the public and drug prescribers. *Finkel BCCA*, as noted, did not involve claims under the *Competition Act*, so the Court's comments in relation to the *Competition Act* were "clearly *obiter*": *Valeant* at paras. 228–230.

[119] Justice Harris noted that s. 36 "requires causation, but does not stipulate how that may be proven. It does not expressly require reliance": *Valeant* at para. 232. He then cited *Rebuck v. Ford Motor Company*, 2018 ONSC 7405, *Go Travel Direct Inc. v. Maritime Travel Inc*., 2009 NSCA 42 and *Pro-Sys* as examples of *Competition Act* claims that did not require detrimental reliance.

2023 BCCA 274 (CanLII)

[120] *Rebuck* involved class proceedings against a car manufacturer for alleged misrepresentations regarding fuel economy. The court in that case held that the plaintiff was not required to plead that the alleged misrepresentations had induced him to buy his car. Rather, it was sufficient to plead that the alleged misrepresentations caused him to acquire less value than he expected to acquire, in the sense of causing him to "spend more on gas than he thought he would spend when he purchased the Vehicle": *Rebuck* at para. 35.

[121] *Go Travel* involved one travel business suing a competitor in relation to alleged misrepresentations made by its competitor, not to it, but to the public. The Court in that case held that if the plaintiff could prove it had suffered a loss caused by the alleged misrepresentation, it was not additionally required to prove a consumer relied on and was misled by the misrepresentation: *Go Travel* at para. 64.

[122] Finally, in *Pro-Sys*, the plaintiffs brought class proceedings alleging that Microsoft had unlawfully overcharged for its Intel-compatible PC operating systems and applications software. The proposed class members were the ultimate consumers of these products. In some cases, the proposed class members were separated from Microsoft "by a long and complex chain of distribution, involving many parties, purchasers, resellers and intermediaries": *Pro-Sys* at paras. 1, 5.

[123] The Supreme Court of Canada restored an order certifying claims under s. 36 of the *Competition Act* in the absence of any claim of detrimental reliance. As noted by Harris J.A., the class members in *Pro-Sys* could not have relied on Microsoft's alleged misrepresentations. "The theory of causation there was that Microsoft made false claims about the nature and timing of the release of one of its products in order to deprive a competitor of the advantage of being the first in the market, thereby allegedly allowing Microsoft to sell its products at a higher price to intermediate corporate resellers": *Valeant* at para. 235.

[124] Given these authorities, Harris J.A. was "not persuaded that it is plain and obvious the Province must plead that it detrimentally relied on the alleged

2023 BCCA 274 (CanLII)

misrepresentations to ground an independent claim under the *Competition Act*": *Valeant* at para. 236.

[125] Ticketmaster submits that each of *Rebuck*, *Go Travel*, *Pro-Sys* and *Valeant* is distinguishable and that the plaintiff was required to plead and prove detrimental reliance in the circumstances of this case. While I agree that there are distinctions between this case and those cases, I cannot agree that the distinctions are material. The point of principle is that, if there is an alternative means of establishing the causal link required to make out a claim under s. 36 of the *Competition Act*, a plaintiff need not plead and prove detrimental reliance. The outcome will depend on the circumstances and the nature of the claim.

[126] In this case, I have already found that the plaintiff's general inflationary effect theory is not doomed to fail. As this theory does not depend on detrimental reliance, in my view, the plaintiff need not plead it and the certification judge erred in declining to certify the plaintiff's *Competition Act* claim.

[127] I would therefore allow this aspect of the plaintiff's cross-appeal and remit the plaintiff's proposed common issues under the *Competition Act* to the certification judge for reconsideration. For clarity's sake, this will necessarily include reconsideration of the plaintiff's proposed common issue d: "[w]hat loss or damage, if any, are Class Members entitled to recover from the defendants, or any of them, pursuant to section 36 of the *Competition Act*?" Because of the judge's erroneous conclusion regarding reliance, he did not set his mind to this proposed common issue. In considering it for the first time, it will necessarily be open to him to permit the plaintiff to adduce evidence and advance arguments on any theory of common loss or damage, including the general inflationary effect and disgorgement (which are topics that I will return to below).

Did the judge err by declining to certify the plaintiff's claim under the common law of negligent misrepresentation?

[128] The plaintiff submits that the certification judge erred by declining to certify his claim under the common law of negligent misrepresentation.

2023 BCCA 274 (CanLII)

[129] Relying on *Queen v. Cognos Inc*., [1993] 1 S.C.R. 87, 1993 CanLII 146 at 110, the judge correctly identified the elements for a successful claim in negligent misrepresentation, namely:

- Existence of a duty of care, based on a "special relationship" between the parties;
- The representation must be untrue, inaccurate or misleading;
- Negligence by the defendant in making the representation;
- Reliance by the plaintiff on the representation, which reliance must be reasonable;
- The reliance must have been detrimental to the plaintiff, in the sense that damages resulted.

[130] The plaintiff's cross-appeal focuses on the following passage in the judge's reasons:

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

[131] The plaintiff submits the certification judge appears to have improperly focussed on the form of the pleading rather than its substance and failed to read the pleadings generously with a view to curing any inadequacies by way of amendment. I do not agree.

[132] The certification judge did not decline to certify the plaintiff's negligent misrepresentation claim because his assertion of detrimental reliance appeared in the "Legal Basis" part of the amended notice of civil claim rather than in the "Statement of Facts". He declined to certify the plaintiff's negligent misrepresentation claim because the plaintiff failed to plead any facts whatsoever to support detrimental alliance. More specifically, the certification judge held:

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

2023 BCCA 274 (CanLII)

> [102] Here, there are virtually no facts pleaded capable of supporting the "special relationship" requirement, and none at all capable of supporting detrimental reliance.
>
> …
>
> [107] … Nowhere do the plaintiffs state what they did in reliance on the representations, nor how they suffered damages as a consequence. That, in my view, is fatal to a claim of negligent misrepresentation.

[133] As noted by the certification judge, the plaintiff's only pleading of detrimental reliance is "a single conclusory statement." As set out earlier in these reasons, bare allegations and conclusory statements do not amount to a pleading of material fact: *Wakelam* at paras. 91–92.

[134] The plaintiff correctly notes that the amended notice of civil claim was "capable of amendment or further particularization": *Watson v. Bank of America Corporation*, 2015 BCCA 362 at para. 87. But, the plaintiff did not propose a specific amendment to address the obvious shortcoming in his negligent misrepresentation pleading to either the certification judge or this Court. That is likely an indication that no such amendment is available. After all, the plaintiff's claim is based on his "general inflationary effect" theory, not detrimental reliance.

[135] I would not accede to this aspect of the plaintiff's cross-appeal.

Did the judge err by declining to certify the plaintiff's claim in unjust enrichment?

[136] The plaintiff submits that the certification judge erred by declining to certify his claim in unjust enrichment.

[137] In the amended notice of civil claim, the plaintiff seeks a declaration that Ticketmaster has been unjustly enriched at the expense of the plaintiff and class members and a declaration that Ticketmaster account for and make restitution to class members "in an amount equal to the excess profits derived." Under "Legal Basis", he frames his unjust enrichment claim as follows:

> 48. Ticketmaster has been unjustly enriched by allowing and encouraging professional ticket brokers to violate its Terms of Use and Purchase Policy so that Ticketmaster could collect additional fees through secondary sales on

2023 BCCA 274 (CanLII)

> Ticketmaster Resale. The plaintiff and class have suffered corresponding deprivation by paying more for the event ticket by purchasing through Secondary Sales.
>
> 49. Since the additional fees received by Ticketmaster from the Plaintiff and Class resulted from Ticketmaster's wrongful and unlawful acts, which include negligent misrepresentation and contraventions of the *Competition Act* and the *BPCPA*, there is and can be no juridical reason justifying Ticketmaster retaining any part of it.

[138] Relying on *Garland v. Consumers' Gas Co*., 2004 SCC 25 at para. 30, the certification judge correctly identified the three elements for a successful claim in unjust enrichment, namely: (1) an enrichment of the defendant; (2) a corresponding deprivation to the plaintiff; and (3) the absence of a juristic reason for the enrichment.

[139] As noted above, the certification judge declined to certify the plaintiff's unjust enrichment claim because, in his view, the plaintiff had pleaded no facts to support the first two elements, namely that Ticketmaster had been enriched and the plaintiff and class members correspondingly deprived. While acknowledging that the alleged enrichment was Ticketmaster's "collection of multiple fees for the sale and resale of the same ticket", the judge held there was no corresponding deprivation to the plaintiff and class members. He held that the plaintiff's claimed loss related to the payment of inflated prices in the secondary market (which went to ticket resellers), not fees (which went to Ticketmaster).

[140] Respectfully, the plaintiff's unjust enrichment pleading put the judge in a difficult position. That is because the basis of the plaintiff's unjust enrichment claim is not entirely clear from the amended notice of civil claim. As noted by the judge, the plaintiff clearly alleges that Ticketmaster has been enriched through the collection of additional fees on secondary sales. But, the basis of the corresponding deprivation is not equally clear.

[141] At para. 48 of the amended notice of civil claim, the "corresponding deprivation" is identified as the plaintiff and class "paying more for the event ticket by purchasing through Secondary Sales." ("Secondary Sales" are defined earlier in the amended notice of civil claim to refer to all resales of event tickets, whether via

2023 BCCA 274 (CanLII)

Ticketmaster or one of its competitors). On the other hand, para. 49 identifies "the additional fees received by Ticketmaster from the Plaintiff" as the alleged enrichment. On Ticketmaster's evidence, these additional fees included fees charged by Ticketmaster for resales completed on its website and fees charged when its automated tools were used to facilitate the transfer of a resale ticket through a non-Ticketmaster platform.

[142] I agree with the certification judge that the plaintiff's pleading at para. 48 of the amended notice of civil claim does not disclose a cause of action for the reasons the judge stated. There is no correspondence between the additional fees received by Ticketmaster and the increased ticket prices paid by purchasers "for the event ticket" on the secondary sales market. The increased prices for event tickets were paid to the ticket resellers, not Ticketmaster.

[143] However, at para. 49 of the amended notice of civil claim, the plaintiff references the "additional fees received by Ticketmaster from the Plaintiff and Class". Reading the plaintiff's pleading generously, I am satisfied that he has adequately pleaded his claim in unjust enrichment. If the plaintiff succeeds in (1) establishing that Ticketmaster breached the *BPCPA* or *Competition Act* and (2) his general inflationary effect theory, then (3) at a minimum, any associated increase in the fees paid to Ticketmaster would necessarily represent a deprivation to the fee-paying class member and (4) there would be no juristic reason due to the statutory breach(es).

[144] I would therefore allow this aspect of the plaintiff's cross-appeal and remit the plaintiff's proposed common issues under unjust enrichment to the certification judge for reconsideration.

2023 BCCA 274 (CanLII)

Did the judge err by certifying common issues related to damages in the absence of any evidence supporting the existence of a plausible methodology to determine damages on a class-wide basis?

[145] Since the judge dismissed the plaintiff's *Competition Act*, negligent misrepresentation and unjust enrichment claims, the only damages issues he certified related to the plaintiff's claims under the *BPCPA*.

[146] As noted, the judge rejected the plaintiff's theory that individual class members could be awarded damages based on the difference between the price they paid for a ticket in the secondary market and the face value of the original ticket. Instead, the judge certified common issues related to loss and damage (common issues (i) and (k)) based on the plaintiff's "general inflationary effect" theory.

[147] It is common ground that, in order for the judge to certify common issues (i) and (k), the judge had to be satisfied of the existence of a plausible methodology to determine loss or damage on a class-wide basis. Ticketmaster submits that the certification judge erred by concluding the plaintiff had established one.

[148] One of many issues resolved by the Supreme Court of Canada in *Pro-Sys* was the standard for determining whether loss to indirect purchasers could be established on a class-wide basis. The Court noted that plaintiffs typically rely on expert evidence to satisfy the "some basis in fact" standard for loss-related issues. The role of expert methodology at the certification stage is not to quantify damages. Rather, it is to "establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole": *Pro-Sys* at paras. 114–115. As noted by the certification judge, the Court described the required standard as follows:

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

2023 BCCA 274 (CanLII)

> must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.

[149] This Court has also addressed the required standard, noting that it will differ depending on the complexity of the case. Expert evidence will not be required in every case. The standard will be met if there is "*any* plausible way" for the plaintiff to prove a common impact: *Miller v. Merck Frosst Canada Ltd*., 2015 BCCA 353 at paras. 31–38 (emphasis in original).

[150] After correctly stating the applicable legal principles, the certification judge held:

> [149] In this case, although Mr. Gomel's affidavit is sparse, it does state that he paid more than face price for his tickets. There is some, albeit limited, evidence to support the fundamental premise that for popular events, [the] cost of tickets in the secondary market exceeds that in the primary market. There is some evidence from which one can readily infer that the use of ticket bots when tickets for such events first go on sale leads to impeded access to such tickets by individual consumers, who are then forced to purchase in the secondary market.
>
> [150] Thus, there is some evidence to support the "general inflationary effect" theory advanced by the plaintiffs. As I have noted, how the damages can be traced to Ticketmaster's representations, as distinct from the use of ticket bots, remains a very problematic issue of proof for the plaintiffs. However, at this stage, I must not weigh the evidence or seek to resolve issues on their merits.
>
> [151] I find that expert evidence supporting a methodology is not required at this stage. This case does not rise to the level of complexity of [*Pro-Sys*]. [*Pro-Sys*] involved different types of software products installed on many different brands of hardware and sold through many different retailers and intermediaries over years. The present case is much simpler in terms of addressing loss or damages as a common issue. Although it may be argued that there are different market conditions for different events, at base, the claim involves a customer purchasing a ticket to an event from a reseller. It also currently involves only a few different resale platforms.
>
> [152] I must therefore only answer whether there is "any plausible way" in which the plaintiffs can legally establish "common impact". Although proving a "general inflationary effect" will likely require expert evidence at trial, I find that the plaintiffs have shown that proving a "general inflationary effect" is at least a plausible method of establishing damages on a class-wide basis. This theory will likely need to be developed as the proceedings move forward and more evidence comes to light.
>
> [Emphasis added.]

2023 BCCA 274 (CanLII)

[151] Respectfully, I do not agree with this aspect of the certification judge's analysis. As can be seen, the judge used the terms "theory" and "method" interchangeably, when they are not interchangeable. According to the *Oxford English Dictionary*, a "theory" is "a supposition… intended to explain something" whereas a "method" is "a particular procedure for accomplishing or approaching something": C. Soanes & A. Stevenson, *Concise Oxford English Dictionary*, 11th ed (Oxford: Oxford University Press, 2008). In the context of certifying a class action, a "theory" of damages explains what the damages are posited to be while a "method" of determining damages sets out how the posited damages will actually be measured.

[152] In my view, the plaintiff has advanced only a theory of damages, not a methodology. Although the determination of damages in this case may not be as complex as *Pro-Sys*, there is nothing obvious or intuitive about how the issue should be approached. As the certification judge put it, the claim covers "different market conditions for different events." Further, it will likely be difficult to disentangle the impact of Ticketmaster's representations on ticket prices in the secondary market (if any) from the impact of other factors, including the impact of ticket bots used by professional ticket resellers. There was no evidence before the judge to establish what data would be needed, whether that data would be available and how that data would be used to measure damages.

[153] For these reasons, on the basis of the materials before him, the certification judge erred by certifying common issues related to loss and damage under the *BPCPA*. I would, therefore, allow the appeal on this ground and set aside the judge's certification of the following issues: (i) Have the Class Members suffered damage or loss due to a contravention of the *BPCPA*? and (k) What amounts, if any, should the defendants, or any of them, pay Class Members as a result of the defendants' contravention(s) of the *BPCPA*?

[154] Although I would set aside the judge's certification of common issues (i) and (k), I am not saying that the plaintiff's general inflationary effect theory is no longer

2023 BCCA 274 (CanLII)

available or viable in relation to his claims under the *BPCPA*. The certification judge will be reconsidering damage and loss issues under the *Competition Act* and unjust enrichment in any event. In doing so, it will be open to him to permit the plaintiff to adduce evidence and advance arguments regarding a methodology to establish his general inflationary effect theory. In these circumstances, I see no serious prejudice to Ticketmaster in also remitting the plaintiff's proposed common issues (i) and (k) for reconsideration in light of any evidence permitted by the certification judge in relation to the plaintiff's *Competition Act* and unjust enrichment claims.

Has the plaintiff pleaded disgorgement and, if so, should that claim be certified and/or remitted to the certification judge?

[155] In oral submissions before this Court, the plaintiff argued that his pleadings are broad enough to support the equitable remedy of disgorgement. Specifically, he argued that if Ticketmaster is found to have breached the *Competition Act*, its "criminal conduct" would permit the class to recover all of Ticketmaster's ill-gotten gains, meaning the entirety of the fees it collected as a result of sales on the secondary market.

[156] The plaintiff says that disgorgement should either be certified as a common issue by this Court or remitted to the certification judge. Ticketmaster submits, however, that disgorgement is a new and unpleaded theory, which the plaintiff should not be able to raise at this stage in the proceedings.

[157] The plaintiff's disgorgement argument appeared to arise in response to questions from the division near the end of the hearing, was not well-developed and appeared to catch Ticketmaster by surprise. In these circumstances, in my view, it would not be appropriate to address the issue in the context of this appeal. However, as disgorgement may simply amount to an alternative measure of loss or damage under the *Competition Act*, it will be open to the certification judge to address disgorgement issues with the parties in the context of his reconsideration of the plaintiff's proposed common issues under the *Competition Act*.

2023 BCCA 274 (CanLII)

Conclusion and Disposition

[158] Contrary to Ticketmaster's allegations, the judge did not err by (1) accepting the plaintiff's "bare pleading" that its representations amounted to "deceptive" and/or "unconscionable" conduct; (2) certifying the claims under the *BPCPA* in the absence of a pleading explaining how the alleged conduct caused any loss to class members; or (3) interpreting the definition of "Consumer" and "Supplier" under the *BPCPA* too broadly. Accordingly, I would dismiss these grounds of appeal.

[159] However, the judge erred by certifying common issues related to damages in the absence of any evidence supporting the existence of a plausible methodology to determine loss or damage on a class-wide basis. Accordingly, I would allow the appeal on this ground and set aside the judge's certification of the following issues: (i) Have the Class Members suffered damage or loss due to a contravention of the *BPCPA*? and (k) What amounts, if any, should the defendants, or any of them, pay Class Members as a result of the defendants' contravention(s) of the *BPCPA*? I would remit these questions to the certification judge for reconsideration.

[160] I have also concluded that the judge erred by declining to certify the plaintiff's restoration, *Competition Act* and unjust enrichment claims. Accordingly, I would allow the plaintiff's cross-appeal with respect to these claims. I would certify the plaintiff's proposed common issue l (iii) regarding restoration. I would remit the plaintiff's proposed common issues regarding his *Competition Act* and unjust enrichment claims to the certification judge for reconsideration.

[161] I would leave issues related to disgorgement to the certification judge to address with the parties during his reconsideration of the plaintiff's *Competition Act* claim.

2023 BCCA 274 (CanLII)

[162] I would dismiss the plaintiff's cross-appeal with respect to the negligent misrepresentation claim. The judge did not err in declining to certify it.

[163] I thank counsel for their helpful submissions.

"The Honourable Justice Marchand"

I AGREE:

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Madam Justice Horsman"

2023 BCCA 274 (CanLII)