Federal Court Cour fédérale

**Date: 20191205**

**Docket: T-1663-17**

**Citation: 2019 FC 1563**



**Ottawa, Ontario, December 5, 2019**

**PRESENT: The Honourable Mr. Justice Gascon**

**PROPOSED CLASS PROCEEDING**

**BETWEEN:**

**ARTHUR LIN**

**Plaintiff**

**and**

**AIRBNB, INC., AIRBNB CANADA INC.,
AIRBNB IRELAND UNLIMITED COMPANY,
AIRBNB PAYMENTS UK LIMITED**

**Defendants**

# ORDER AND REASONS

## I. Overview

[1] In March 2016, Mr. Arthur Lin, a British Columbia resident, booked an accommodation in Japan using the Airbnb online platform [Airbnb Platform]. The Airbnb Platform is a digital

marketplace connecting individuals seeking accommodations [Guests] with other individuals offering accommodations [Hosts], and allowing them to transact. Mr. Lin claims he was ultimately charged a price higher than the price initially displayed to him for the accommodation booking services supplied on the Airbnb Platform. Many other individuals residing in Canada have reserved accommodations using the Airbnb Platform, also experiencing different prices displayed to them.



[2] Mr. Lin seeks an order certifying this action as a class proceeding under Rule 334.16(1) of the *Federal Courts Rules*, SOR/98-106 [Rules] and granting an order under Rule 334.17. As the proposed representative plaintiff, Mr. Lin seeks compensation from the defendants Airbnb, Inc., Airbnb Canada Inc. and Airbnb Ireland Unlimited Company, as well as Airbnb Payments UK Limited [collectively, Airbnb], on behalf of all individuals residing in Canada who, on or after October 31, 2015, reserved an accommodation anywhere in the world using Airbnb, excluding individuals reserving an accommodation primarily for business purposes.

[3] Mr. Lin alleges that Airbnb breached section 54 of the *Competition Act*, RSC 1985, c C-34 [*Competition Act*], a rarely used criminal offence known as “double ticketing”. Section 54 prohibits a person from supplying a product at a price that exceeds the lowest of two or more clearly expressed prices at the time the product is supplied. More specifically, Mr. Lin contests the fact that Airbnb adds “service fees” to the final price it charges for its accommodation booking services, although these fees are not included in the initial price per night displayed on the Airbnb Platform. In his proposed class proceeding, the main remedies sought by Mr. Lin are damages and the costs of investigation and prosecution, both pursuant to section 36 of the

*Competition Act*. Mr. Lin also had claims of permanent injunction and punitive damages but he abandoned them at the hearing before this Court.

[4] In addition to his motion for certification, Mr. Lin brought a motion to add Airbnb Payments UK Limited [Airbnb Payments] as a defendant, which was unopposed by the defendants.

[5] Mr. Lin maintains that all required legal elements for certification have been met, namely, (i) that there is a reasonable cause of action; (ii) that there is an identifiable class; (iii) that there are common questions of law and fact; (iv) that certification is the preferred procedure; and (v) that he is an appropriate representative of the class. Airbnb opposes certification of the class as it claims that Mr. Lin has failed to meet those five necessary preconditions.

[6] The only issue before the Court is whether Mr. Lin has met the requirements of Rule 334.16(1) to certify this action as a class proceeding and, if so, the details of the certification order that should be issued under Rule 334.17 as a result. At the center of the debate between the parties are the scope and interpretation of section 54 on "double ticketing" and its application to the circumstances of Mr. Lin and to Airbnb.

[7] For the reasons detailed below, and considering the generous approach that courts are required to take at the certification stage, I will grant Mr. Lin's motion for certification, conditional upon an amendment to be made to his proposed class definition. Even though the

scope of section 54 of the *Competition Act* and its application to this case are not free from doubt, I conclude that it is not plain and obvious that the pleadings disclose no reasonable cause of action. I further find that, conditional upon the amendment discussed below, (i) there is an identifiable class of two or more persons [Class]; (ii) there are common issues predominating over questions affecting only individual members, and their resolution will advance the claims of all Class members and help the Court avoid duplication of fact-finding and/or legal analysis; (iii) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law and fact, and will achieve all three principles underpinning class actions (i.e., judicial economy, behavioural modification and access to justice) more effectively than alternative procedures; and (iv) Mr. Lin is an appropriate representative plaintiff.



## II. Background

### A. *Factual context*

[8] Airbnb operates the Airbnb Platform. In Canada, the Airbnb Platform is available through the website www.airbnb.ca, as well as through various mobile applications. The Airbnb Platform allows Guests to book overnight stays from Hosts anywhere in the world.

[9] Airbnb operates what can be described as a two-sided transaction platform, providing services simultaneously to two different groups of customers (identified as Hosts and Guests) who depend on the platform to conclude a transaction. In other words, the Airbnb Platform brings together providers and consumers of a particular service, namely the booking of overnight stays in other people’s accommodations.

[10] In its Terms of Service, various versions of which are attached to the affidavit of Airbnb's deponent, Mr. Kyle Miller, Airbnb states that it provides an online platform connecting Hosts, who have accommodations to list and book, with Guests seeking to book such accommodations. In its Terms of Service, Airbnb itself defines these as its "Services" accessible on different websites. The Terms of Service also state that Airbnb makes available an online platform or marketplace with related technology for Guests and Hosts to meet online and arrange for bookings of accommodations, directly with each other.



[11] Various entities are involved in operating Airbnb in Canada. First, Airbnb Ireland Unlimited Company is the entity entering into contractual relationships with Canadian users. Second, Airbnb, Inc. (also referred to as "Airbnb US" by Airbnb) owns and operates the www.airbnb.com website. Airbnb, Inc. employs Mr. Miller, whose team is responsible for the localized versions of the Airbnb Platform, and its name is mentioned on the www.airbnb.ca website. The same contact address is used on the www.airbnb.ca and www.airbnb.com websites, and Airbnb, Inc. owns four registered Canadian trademarks displayed on the www.airbnb.ca website. Third, Airbnb Canada Inc. is involved in procuring and holding the domain www.airbnb.ca, although Airbnb claims it is only a marketing entity. Fourth, Airbnb Payments collects and distributes payments made on the Airbnb Platform.

[12] It is not disputed that Airbnb does not own accommodations nor manage accommodations on behalf of the Hosts. Hosts decide when they want to make their accommodations available on the Airbnb Platform, the price for their accommodations, and the booking requests they accept. With respect to price, Hosts can set different rates depending on

the dates and length of the contemplated stay, and they can decide to charge cleaning fees or fees for additional visitors.

[13] When Guests search for accommodations on the Airbnb Platform, they are typically directed to a search results page. This page lists the accommodations and displays the properties' price per night [First Price] based on the Guest's search parameters, with no indication that additional fees will be added. The First Price shown on the search results page includes: (i) the price per night as set by the Host; (ii) cleaning fees, if applicable, divided by the number of nights; and (iii) fees per night for additional visitors, if applicable. If the dates of the stay or the number of visitors are not specified by the Guest in the search parameters, the search results page will only display an average First Price. When Guests select the desired accommodation, they are redirected to another page known as the listing page. The listing page displays a second price [Second Price or Total Price] consisting of: (i) the First Price for the specific dates and number of visitors, multiplied by the number of nights; (ii) Airbnb's service fees [Service Fees]; and (iii) taxes. When they are on the listing page, Guests can modify the dates and number of visitors, in which case the Second Price is updated accordingly. In some cases (such as when they search an accommodation they already know or have already booked), Guests can also directly access the listing page of an accommodation without running a search, and therefore without actually being shown the First Price displayed on the search results page. The First Price and the Second Price are both displayed on the Guests' receipt.

[14] Airbnb charges a Service Fee to Guests (between 0% and 20% of the First Price according to Airbnb, or between 5% and 15% according to Mr. Lin), as well as a Service Fee to

Hosts (generally 3% of the First Price). Airbnb collects the Second Price from Guests and pays to Hosts the First Price, after having deducted the Hosts' Service Fee.

[15] Mr. Lin used the Airbnb Platform both as a Guest and as a Host. The event he describes in his Statement of Claim to illustrate how Airbnb allegedly engaged in "double ticketing" is a reservation he made as a Guest, on or about March 20, 2016, for a vacation to Japan. On the Airbnb Platform, Mr. Lin searched for the dates May 24, 2016 to May 31, 2016. A number of accommodations were displayed on a search results page, including the one he eventually booked; the First Price for that accommodation was displayed as being $109.00 per night for a stay of seven nights. When Mr. Lin selected this accommodation, he was redirected to a listing page displaying a Second Price of $855.00, or $122.14 per night. This Second Price was broken down as follows: $102.00 per night for seven nights, $48.00 for cleaning fees, and $91.00 for Airbnb's Services Fees. I add that, in other transactions he separately made on the Airbnb Platform as a Host, Mr. Lin also offered an accommodation which was booked six times in 2016.

[16] Guests and Hosts are bound by Airbnb's Terms of Service, for transactions made since October 2015, as well as by Airbnb's Payments Terms of Service for transactions made since March 2016 [collectively, the Terms]. Guests and Hosts have to accept the Terms during the account creation process prior to booking an accommodation. When the Terms are updated, Guests and Hosts further have to accept the updated version before transacting again on the Airbnb Platform. Both Airbnb's Terms of Service and Payments Terms of Service have been updated several times since October 2015 and March 2016, respectively. The Terms notably include provisions to the effect that:

- Canadian residents are deemed to be contracting with Airbnb Ireland Unlimited Company;

- Canadian residents are not subject to the arbitration agreement and class action waiver provisions;

- The agreement with Airbnb will be interpreted in accordance with the laws of Ireland without negating consumer protection laws applicable in Canada;

- Guests and Hosts enter into contractual relationships with each other when a booking is made, with Airbnb acting on behalf of Hosts only to facilitate payments; and

- Airbnb may charge Service Fees to Hosts and Guests for using the Airbnb Platform.



[17] In its Terms, Airbnb identifies the First Price described by Mr. Lin as “Listing Fee”, and the Service Fees it charges to Hosts and Guests as the “Host Fee” and “Guest Fee”, respectively. Airbnb calls the Second Price or Total Price described by Mr. Lin as the “Total Fees”. The damages sought by Mr. Lin are specifically defined in his Statement of Claim as being equivalent to the difference between the Second Price and the First Price, minus the taxes. In other words, the damages claimed are the Service Fees.

[18] Airbnb estimates that approximately 2.2 million Canadian-resident Guests reserved an accommodation using the Airbnb Platform between October 31, 2015 and August 2018.

**B.** ***Orders sought***

[19] In his motion for certification, Mr. Lin seeks the following orders from the Court:

1. This Action is certified as a class proceeding;

2. The Class is defined as:

> All individuals residing in Canada who, on or after October 31, 2015, reserved an accommodation for anywhere in the world using Airbnb, excluding individuals reserving an accommodation primarily for business purposes.

3. The Plaintiff is appointed as the representative plaintiff for the Class;

4. The Common Questions are stated to be those set out in Schedule "A" to the Notice of Motion;

5. The nature of the Class is stated to be violations of section 54 of the *Competition Act*;

6. The relief sought by the Class is stated to be:

> a. a declaration that the Defendants charged every Class member a price higher than the lowest of two or more prices clearly expressed by the Defendants to each Class Member, contrary to section 54 of the *Competition Act*;
>
> b. damages, pursuant to section 36 of the *Competition Act*, for the Defendants' conduct in contravention of section 54 of the *Competition Act*;
>
> c. an Order pursuant to Rules 334.28(1) and (2) for the aggregate assessment of monetary relief and its distribution to the Plaintiff and the Class members;
>
> d. costs of investigation and prosecution of this proceeding on a full-indemnity basis, pursuant to section 36 of the *Competition Act*;
>
> e. pre-judgment and post-judgment interest pursuant to sections 36 and 37 of the *Federal Courts Act*, RSC 1985, c. F-7;
>
> f. exemplary or punitive damages; and
>
> g. such further and other relief as this Honourable Court deems just.

7. The Litigation Plan attached as Schedule "B" to the Notice of Motion is approved as a workable method of advancing the litigation;

> 8. The Notice Plan included in the Litigation Plan is approved as a workable method of contacting the Class members;
>
> 9. The Defendants pay the costs of the Notice Plan;
>
> 10. The Defendants provide counsel for the Plaintiff with a list of Class members and those Class members' contact information following the expiry of the opt-out period in part 11 of the Order;
>
> 11. Class members who wish to opt-out of the Action must do so in writing within thirty days of the date of the Order;
>
> 12. Both the Plaintiff and Defendants bear their own costs for this certification motion, pursuant to Rule 334.39, without limiting the Plaintiff's right to seek the costs for prosecution of the whole proceeding at the conclusion of the trial, pursuant to section 36 of the *Competition Act*; and
>
> 13. Such further and other relief as this Honourable Court deems just.



## C. *Legislative framework*

[20] Part 5.1 of the Rules sets out the framework for establishing and managing class proceedings before this Court. Rules 334.16(1) and (2) and 334.18 are the main provisions governing the certification of class proceedings. They are reproduced in their entirety in Annex A of these Reasons.

[21] Rule 334.16(1) prescribes that a class action shall be certified if the following five conditions are met: (i) the pleadings disclose a reasonable cause of action; (ii) there is an identifiable class of two or more persons; (iii) the claims raise common questions of law or fact; (iv) a class proceeding is the preferable procedure for the just and efficient resolution of those common questions; and (v) there is an appropriate representative plaintiff. Rule 334.16(1) uses mandatory language, meaning that the Court shall grant certification where all five elements of

the test are satisfied (*Sivak v Canada*, 2012 FC 271 at para 5). Since the test is conjunctive, if a plaintiff fails to meet any of the five listed criteria, the certification motion must fail (*Buffalo v Samson First Nation*, 2008 FC 1308 [*Buffalo FC*] at para 35, aff'd 2010 FCA 165 at para 3).



[22] Conversely, Rule 334.18 describes factors which cannot by themselves, either singly or combined with the other factors listed, provide a sufficient basis to decline certification (*Kenney v Canada (Attorney General)*, 2016 FC 367 [*Kenney*] at para 17; *Buffalo FC* at para 37). These factors are: (i) the relief claimed includes a claim for damages that would require an individual assessment after a determination of the common questions of law or fact; (ii) the relief claimed relates to separate contracts involving different class members; (iii) different remedies are sought for different class members; (iv) the precise number of class members or the identity of each class member is not known; or (v) the class includes a subclass whose members have claims that raise common questions of law or fact not shared by all of the class members. Nevertheless, by using the word "solely", the provision suggests that these factors may be relevant considerations on a motion for certification, provided the overall conclusion underlying a potential refusal is based on other concerns as well (*Kenney* at para 17).

[23] It bears noting that the certification criteria established in Rule 334.16(1) are akin to those applied by the courts in Ontario and British Columbia (*Canada v John Doe*, 2016 FCA 191 [*John Doe FCA*] at para 22; *Buffalo v Samson Cree National*, 2010 FCA 165 [*Buffalo FCA*] at para 8). Indeed, much of the Supreme Court of Canada's [SCC] case law relating to class actions on which this Court and the Federal Court of Appeal [FCA] have relied arose in those provinces.

**D.** ***General principles for certification***

[24] Before analyzing the individual requirements prescribed by the Rules, some general and fundamental principles governing certification motions must be underscored.

[25] In *Hollick v Toronto (City)*, 2001 SCC 68 [*Hollick*], the SCC stated that the certification criteria should always be assessed while keeping in mind the overarching purposes of class proceedings. First, foremost consideration should be given to the fact that class actions serve judicial economy by avoiding unnecessary duplication of fact-finding and legal analysis. Second, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to bring forward on his or her own. Third, class actions serve efficiency and justice by ensuring that wrongdoers modify their behaviour by taking full account of the harm that they have caused or might cause. Therefore, it is "essential […] that courts [do] not take an overly restrictive approach to the legislation, but rather interpret [class action legislation] in a way that gives full effect to the benefits foreseen by the drafters" (*Hollick* at para 15; *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46 [*Dutton*] at paras 27-29; *Condon v Canada*, 2015 FCA 159 [*Condon*] at para 10). As the SCC noted in *Hollick*, "the certification stage focuses on the <u>form</u> of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action" (emphasis in original) (*Hollick* at para 16). In other words, the court plays a screening role and must view the application as a procedural means (*Infineon Technologies AG v Option consommateurs*, 2013 SCC 59 [*Infineon*] at para 65; *Vivendi Canada Inc. v Dell'Aniello*, 2014 SCC 1 [*Vivendi*] at para 37). The objective of certification is to determine if, from a

procedural standpoint, the action is best brought in the form of a class action (*Hollick* at para 16). Conversely, certification seeks to filter out manifestly unfounded and frivolous claims.

[26] The SCC recently firmly reiterated and reaffirmed these core principles in *Pioneer Corp. v Godfrey*, 2019 SCC 42 [*Godfrey*] and in *L'Oratoire Saint-Joseph du Mont-Royal v J.J.*, 2019 SCC 35.

[27] It is also well established that the onus on a party seeking certification is not an onerous one. The test to be applied on the first criterion for certification – that the pleadings disclose a reasonable cause of action – is similar to that applicable on a motion to strike or dismiss (*Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys*] at para 63; *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 [*Elder*] at para 20). The test is whether it is "plain and obvious" that the pleadings disclose no reasonable cause of action and that no claim exists (*Godfrey* at para 27; *R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 [*Imperial Tobacco*] at para 17; *Elder* at para 20; *Hollick* at para 25; *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 [*Hunt*] at p 980).

[28] This threshold is very low (*Rae v Canada (National Revenue)*, 2015 FC 707 [*Rae*] at para 54; *Buffalo FC* at para 43). It must be "used with care", bearing in mind that the "law is not static and unchanging", and that "[a]ctions that yesterday were deemed hopeless may tomorrow succeed" (*Imperial Tobacco* at para 21). Stated otherwise, a pleading should only be struck where the claim is so clearly futile that it has not the slightest chance of succeeding or is certain to fail (*Hunt* at para 33). Pursuant to that test, the claim must be so clearly improper as to be

"bereft of any possibility of success" (*LJP Sales Agency Inc. v Canada (National Revenue)*, 2007 FCA 114 at para 7; *Wenham v Canada (Attorney General)*, 2018 FCA 199 [*Wenham*] at paras 27-33). The test is best expressed in the negative, and the Court must be convinced that the contemplated action has no chance of success and is doomed to fail (*Wenham* at para 22).



[29] For this first criterion, the facts alleged in the pleadings are assumed to be true and no evidence may be considered by the Court (*John Doe FCA* at para 23; *Condon* at para 13). Even though the facts are assumed to be true, they must still be pleaded in support of each cause of action; bald assertions of conclusions are not allegations of material fact and cannot support a cause of action (*John Doe FCA* at para 23; *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 27; *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at para 34).

[30] For the remaining four certification criteria, the plaintiffs have the burden of adducing evidence to show "some basis in fact" that they have been met (*Hollick* at para 25; *Pro-Sys* at para 99). This threshold is also low, given the Court's limited scope of factual inquiry and its inability to "engage in the finely calibrated assessments of evidentiary weight" at the certification stage (*AIC Limited v Fischer*, 2013 SCC 69 [*Fischer*] at para 40; *Pro-Sys* at paras 102, 104). That said, the "some basis in fact" standard cannot be assessed in a vacuum, and each case must be decided on its own facts. The "some basis in fact" requirement means that, for all certification criteria except the cause of action, an evidentiary foundation is needed to support a certification award, and the use of the word "some" implies that the evidentiary record need not be exhaustive or be a record on which the merits will be argued (*Fischer* at para 41, citing

*McCracken v Canadian National Railway Co.*, 2012 ONCA 445 at paras 75-76). The Court must therefore refrain from assessing the sufficiency of the alleged facts on its merits, and is not tasked with resolving conflicts in the evidence. It is trite law that the "some basis in fact" standard falls below the standard of proof on a balance of probabilities (*Pro-Sys* at para 102; *John Doe FCA* at para 24).



[31] While the certification stage is not intended to determine the viability or strength of the contemplated class action, the analysis of the evidence, however, cannot "amount to nothing more than symbolic scrutiny" (*Pro-Sys* at para 103). Given that the Court does not engage in a robust analysis of the merits at the certification stage, the outcome of a motion for certification will not be predictive of the action's success at the common issues trial (*Pro-Sys* at para 105).

## III. Analysis

### A. *Rule 334.16(1)(a): Reasonable cause of action*

[32] The first certification requirement is that the pleadings disclose a reasonable cause of action. Mr. Lin's Statement of Claim invokes one single cause of action based on sections 36 and 54 of the *Competition Act*. Mr. Lin pleads that, in providing its accommodation booking services to him and other Class members, Airbnb displayed an initial First Price excluding Airbnb's Service Fees and a final, higher Second Price including such fees, and that Airbnb thus charged the Class members the higher of two displayed prices, in contravention of section 54 of the *Competition Act*. This breach of section 54, says Mr. Lin, renders Airbnb liable, under section 36 of the *Competition Act*, for damages equal to the Service Fees and for the costs of investigation.

[33] Airbnb responds that the pleadings (i.e., Mr. Lin's Statement of Claim) do not disclose a reasonable cause of action since: (i) section 54 of the *Competition Act* does not apply to the pleaded facts, described by Airbnb as a situation where there are two prices for two different products; (ii) the defence provided by section 60 of the *Competition Act* applies to Airbnb; and (iii) Mr. Lin does not plead any loss or damage as required by section 36 of the *Competition Act*, since he would have paid the same price if the Service Fees were included in the First Price on the search results page. Airbnb notably relies on the Terms to support its arguments.



[34] I do not agree with Airbnb. Further to my review of the pleadings, I find that Airbnb mischaracterizes the "product" effectively defined and described by Mr. Lin in his Statement of Claim. In addition, even though Airbnb raises numerous valid points regarding the interpretation of sections 36 and 54 of the *Competition Act* and their application to this case, I am unable to conclude that, when the alleged facts are accepted as true, the cause of action pleaded by Mr. Lin is "plain and obvious" to fail. The objections voiced by Airbnb are matters to be determined at the trial on the merits with the benefit of a full evidentiary record and full legal submissions.

(1) Section 54 of the *Competition Act*

[35] Mr. Lin's proposed class proceeding is based on section 54 of the *Competition Act*. This section creates the criminal offence of "double ticketing" and is part of the deceptive marketing practices offences contained in Part VI of the *Competition Act* entitled "Offences in Relation to Competition". Section 54 reads as follows.

| **Double ticketing** | **Double étiquetage** |
|---|---|
| **54** (1) No person shall supply a product at a price that exceeds the lowest of two or more prices clearly expressed by him or on his behalf, in respect of the product in the quantity in which it is so supplied and at the time at which it is so supplied, | **54** (1) Nul ne peut fournir un produit à un prix qui dépasse le plus bas de deux ou plusieurs prix clairement exprimés, par lui ou pour lui, pour ce produit, pour la quantité dans laquelle celui-ci est ainsi fourni et au moment où il l'est : |
| (a) on the product, its wrapper or container; | a) soit sur le produit ou sur son emballage; |
| (b) on anything attached to, inserted in or accompanying the product, its wrapper or container or anything on which the product is mounted for display or sale; or | b) soit sur quelque chose qui est fixé au produit, à son emballage ou à quelque chose qui sert de support au produit pour l'étalage ou la vente, ou sur quelque chose qui y est inséré ou joint; |
| (c) on an in-store or other point-of-purchase display or advertisement. | c) soit dans un étalage ou la réclame d'un magasin ou d'un autre point de vente. |

[36] This prohibition against "double ticketing" first came into effect in 1975, as section 36.2 of the *Combines Investigation Act*, SC 1974-1975-1976, c 76 [*Combines Act*]. The language of section 36.2 of the *Combines Act* was identical to the current wording of section 54 of the *Competition Act*. Pursuant to that provision, a person commits a "double ticketing" offence when that person: (i) supplies a product; (ii) at a price that exceeds the lowest of two or more prices; (iii) which are clearly expressed on the product, on anything attached to or accompanying the product, or on any point-of-purchase display or advertisement. There are no other requirements for the offence. The language of the provision clearly suggests that section 54 relates strictly to the supplier's conduct, and that it only applies to situations where different prices are expressed

in respect of the same product in terms of quantity and time of supply. Subsection 2(1) of the *Competition Act* defines "product" as including an "article" and a "service", so section 54 can apply to both. The word "supply" also has a broad meaning, being defined by subsection 2(1) as "in relation to a service, sell, rent or otherwise provide a service or offer so to provide a service".



[37] I pause to observe that the "double ticketing" offence came into force at the same time as the "sale above advertised price" criminal offence, which was previously contained in former section 37.1 of the *Combines Act* and prohibited the supply of a product at a price higher than the price advertised. This criminal provision was repealed in 1999 and was replaced by the civilly reviewable conduct of "sale above advertised price" now contained at section 74.05 of the *Competition Act*. This reviewable conduct is sometimes referred to by the Competition Bureau as fragmented pricing or drip pricing (see for example: Competition Bureau, *The Deceptive Marketing Practices Digest*, June 2015).

[38] A brief review of the legislative history of section 54 suggests that this provision was meant to prevent the display of two price tags on a single product. The House of Commons and Senate debates indicate that, at the time of its adoption, the "double ticketing" prohibition stemmed from concerns about high food prices (*House of Commons Debates*, 29th Parl, 2nd Sess, vol 1 (13, 20, and 27 March 1974) at 489, 708 and 918; *House of Commons Debates*, 30th Parl, 1st Sess, vol 1 (22 October 1974) at 624-625 and 627; *House of Commons Debates*, 30th Parl, 1st Sess, vol 8 (21 October 1975) at 8419; *Senate Debates*, 30th Parl, 1st Sess, vol 2 (13 November 1974) at 1295). In essence, consumers were complaining about the food industry's practice of increasing the price of existing inventory in response to increased procurement costs,

and about how certain grocery stores would put new price stickers on their products beside the previous, lower price.

[39] Even though the "double ticketing" provision has now been part of the *Competition Act* and its predecessors for over 40 years, very limited jurisprudence on this provision is available. Airbnb referred to one case, *The Consumers' Association of Canada et al. v Coca-Cola Bottling Company et al.*, 2006 BCSC 863 [*Coca-Cola*], aff'd 2007 BCCA 356, where recycling fees for bottled drinks were excluded in the price displayed on the shelf for these products, but were added at the cashier and charged to the consumer in the final price. The court found that this did not constitute "double ticketing" and did not breach section 54 (*Coca-Cola* at paras 69, 93). In his submissions, Mr. Lin did not refer the Court to any precedent on that provision. The Court has identified two other cases mentioning section 54, namely *Apotex Inc. v Hoffman La-Roche Limited*, 195 DLR (4th) 244, 2000 CanLII 16984 (Ont CA) at para 20 and a small claims case from Quebec, *Massé c Sears Canada Inc.*, 2012 QCCQ 15181 at paras 5, 16. However, none of these cases discussed the interpretation of the "double ticketing" provision to any extent.

(2) Section 36 of the *Competition Act*

[40] For its part, section 36 of the *Competition Act* provides:

| **Recovery of damages** | **Recouvrement de dommages-intérêts** |
|---|---|
| **36** (1) Any person who has suffered loss or damage as a result of | **36** (1) Toute personne qui a subi une perte ou des dommages par suite : |
| (a) conduct that is contrary to any provision of Part VI, or | a) soit d'un comportement allant à l'encontre d'une |

| | |
|---|---|
| | disposition de la partie VI; |
| […] | […] |
| 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. | peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article. |



[41] To establish a claim under paragraph 36(1)(a), the plaintiff must plead that the defendants breached a provision of Part VI of the *Competition Act* on "Offences in Relation to Competition" and that he or she suffered loss or damage as a result of the impugned criminal conduct. The right to pursue an action in damages and to seek recovery of certain investigation costs is subject to some important limits, including a limit to pursuing compensatory damages (i.e., no punitive damages or injunctive relief).

[42] I agree with Airbnb that section 36 is the provision effectively creating Mr. Lin's cause of action, of which damages caused by the alleged violation of the *Competition Act* are an essential component (*Godfrey* at para 76; *Murphy v Compagnie Amway Canada*, 2015 FC 958 [*Murphy*] at paras 83-85; *Singer v Shering-Plough Canada Inc.*, 2010 ONSC 42 [*Singer*] at paras 107-108). The combined features of paragraph 36(1)(a) and section 54 of the *Competition Act* limit the availability of this cause of action to claimants who can demonstrate that the defendants' conduct

satisfies all elements of section 54, as well as a causal link between the loss or damage suffered and the "double ticketing" conduct.

(3) The "product" issue

[43] Airbnb first submits that it is plain and obvious that section 54 cannot apply to this case since there are two prices for two different products. Airbnb submits that Mr. Lin's Statement of Claim does not expressly define the "product" at issue, but that the pleadings imply that it is the accommodation reserved and booked by Mr. Lin. Airbnb also states that Mr. Lin's Memorandum of Fact and Law expressly identifies a "product", namely the use of the Airbnb Platform. Airbnb maintains that, when Mr. Lin's pleadings are taken as a whole, there are two products at issue in this case, supplied through the Airbnb Platform: (i) accommodations offered by Hosts to Guests; and (ii) the use of the platform offered by Airbnb to both Hosts and Guests. Airbnb contends that Mr. Lin conflated the two products and alleged that bundling the two products together in the Second Price amounted to a price increase for a single product.

[44] I am not persuaded by Airbnb's interpretation and do not find that this is an adequate reading of Mr. Lin's Statement of Claim.

[45] In his Statement of Claim, Mr. Lin notably alleges the following facts:

> 10. Airbnb is the operator of an online marketplace and hospitality service, enabling people anywhere in the world to lease or rent short-term lodging from any other person in the world who is offering accommodation for lease and/or rental.
>
> 11. At all materials [sic] times, Airbnb conducted its online marketplace and hospitality services primarily via various Internet platforms including websites (such as http://www.airbnb.com and

> http://www.airbnb.ca) and mobile applications on the Apple and Android operating systems (collectively the "Booking Platform(s)").
>
> […]
>
> 17. On or about March 20, 2016, the Plaintiff contracted with Airbnb for accommodations for his vacation to Japan, including an accommodation in Shibuya, Japan under the following terms (the "Reservation") […].
>
> […]
>
> 29. When a Class member completes any reservation for accommodations through Airbnb (including "Request to Book" and "Instant Book"), regardless of the Booking Platform used, Airbnb charges the Class member the Second Price, not the First Price.
>
> [Emphasis added.]



[46] I concede that the pleadings could have been drafted with much more clarity and details regarding the actual product involved in Mr. Lin's claim. Especially in a context where, in section 54 invoked by Mr. Lin to underlay his cause of action, the notion of "product" is a central element. However, at this certification stage, I must adopt a generous reading of the pleadings. The pleadings should be read as a whole and be given a liberal interpretation, with a view to accommodating any inadequacies in the allegations and without fastening onto matters of form (*Operation Dismantle v The Queen*, [1985] 1 SCR 441 at para 14; *Wenham* at para 34; *John Doe FCA* at para 51; *Shah v LG Chem Ltd.*, 2018 ONCA 819 [*Shah*] at paras 74, 76; *Finkel v Coast Capital Savings Credit Union*, 2017 BCCA 361 [*Finkel*] at para 17).

[47] In his Statement of Claim, Mr. Lin refers to Airbnb's online marketplace and hospitality service or services and to the fact that what Mr. Lin and the Class members contracted for and

purchased is a reservation for accommodation through Airbnb. I am satisfied that, when read in context, Mr. Lin's Statement of Claim identifies one "product" supplied by Airbnb, namely the accommodation booking services offered and supplied by Airbnb through its platform. Put differently, I do not find it plain and obvious that, as argued by Airbnb, the pleadings relate to two prices for two different products.

[48] Though I acknowledge that this is not part of the pleadings, I pause to note that, in his Memorandum of Fact and Law, Mr. Lin repeatedly and expressly refers to Airbnb's "accommodation booking service" or "accommodation booking services" when he describes the product being supplied by Airbnb, and for which he claims Airbnb violated the "double ticketing" provision. These accommodation booking services relate to the use of the Airbnb Platform to find and book accommodations.

[49] My understanding of Mr. Lin's allegations is that the product effectively offered and supplied by Airbnb is a specific service: the access to and use of the Airbnb Platform in order to find a pool of accommodations and to eventually book one. Mr. Lin acknowledges that Airbnb does not own the accommodations offered by the Host, but the fact that Airbnb does not own the accommodations displayed through its service does not mean that Airbnb is not supplying a service for the booking of such accommodations.

[50] According to Mr. Lin's pleadings, the product supplied by Airbnb (i.e., its booking service) does not change between the search results phase, where the First Price is expressed, and the booking phase, where the Second Price is expressed. The product is always the access to and

use of the Airbnb Platform in order to find and book accommodations on Airbnb's digital marketplace. In my view, the pleadings made by Mr. Lin do not suggest that a new service element is "added" by Airbnb at the booking stage, or that Airbnb performs an additional service at the booking stage, as opposed to the search results stage. The service of providing a booking platform, where Hosts and Guests can transact, is the "product" supplied by Airbnb as soon as a person enters the Airbnb Platform (where the Guests and Hosts have access to the relevant information and presentation of that information). According to Mr. Lin, what does change between the search results and booking phases is the price at which Airbnb's accommodation booking service is supplied.

[51] Again, I am mindful of the fact that Mr. Lin's pleadings are not a model of clarity on this point, far from it. But, at the certification stage, the approach has to be generous and the pleadings can be sufficient, even if the product is not described with perfect precision, as long as they are sufficiently precise to allow the reader to identify the product being the subject of the claim (*Watson v Bank of America Corporation*, 2015 BCCA 362 [*Watson CA*] at paras 85-87). Here, I am of the view that the pleadings are sufficiently detailed to understand that Mr. Lin refers to one product, namely Airbnb's accommodation booking services. His written submissions clearly confirm this.

[52] I observe that, in its submissions, Airbnb itself states that the Airbnb Platform connects Guests seeking accommodations with Hosts offering accommodations, and allows them to transact. Furthermore, Airbnb's own Terms of Service describe its "Services" in a similar

manner. These statements echo the “accommodation booking services” referred to by Mr. Lin in his materials, and which he claims are supplied by Airbnb.

[53] I do not dispute that, in its submissions, Airbnb raises a valid and very relevant point regarding the nature and identity of the product or products effectively supplied by Airbnb through the Airbnb Platform. It is certainly open to Airbnb to submit and argue that section 54 of the *Competition Act* does not apply in this case because what is effectively supplied through the Airbnb Platform are two different products by two different persons at two different prices. However, I cannot accept these arguments at the certification stage. What I have to determine is whether, based on Mr. Lin’s Statement of Claim (which is the only pleading), it is plain and obvious that section 54 cannot apply. I cannot conclude that it is the case, in light of Mr. Lin’s alleged facts regarding the accommodation booking services provided through the Airbnb Platform.

[54] The arguments advanced by Airbnb on the presence of two products, on whether what is supplied by Airbnb could be characterized as a bundle of different articles and services, and on whether the product at issue is the bundle or its components, as opposed to the accommodation booking services put forward by Mr. Lin, require factual assessments to be determined at the trial on the merits, with the benefit of a complete evidentiary record. In other words, it is not plain and obvious that the First Price (or Listing Fee) and the Second Price (or Total Fees) alleged by Mr. Lin relate to separate products for, respectively, the accommodation and the use of the Airbnb Platform.

(4) The elements of section 54

[55] As stated above, the required elements of the section 54 offence are: (i) the supply of a product by a person; (ii) at a price that exceeds the lowest of two or more prices; (iii) which are clearly expressed on the product, on anything attached to or accompanying the product, or on any point-of-purchase display or advertisement. Here, I am satisfied that Mr. Lin pleaded all the elements of the section 54 offence, namely the supply of accommodation booking services by Airbnb, the existence of a First Price and a Second Price and the fact that the service was supplied at the higher price, and the fact that the prices were clearly expressed at the point-of-purchase display on Airbnb Platform. I note that Mr. Lin has not expressly pleaded the *mens rea* element of this criminal offence. However, some required elements of a cause of action, such as *mens rea*, may be implied from the alleged facts by common sense and do not always need to be specifically pleaded (*Watson CA* at para 101). In my view, the required mental element of Airbnb's conduct is implied in Mr. Lin's pleadings, and Airbnb has indeed not raised any objection on this point (*Watson v Bank of America Corporation*, 2014 BCSC 532 [*Watson SC*] at paras 101-102).

[56] I recognize that, in light of the paucity of "double ticketing" cases, Mr. Lin certainly appears to be stretching the potential interpretation and application of section 54 of the *Competition Act*, and that he is extending it into unchartered territory. In fact, Airbnb argues that his claim will ultimately fail. However, at the certification stage, this is not enough to conclude to an absence of a reasonable cause of action. On the contrary, when a case raises novel or difficult questions of statutory interpretation, such questions should not be decided at the

certification stage (*John Doe FCA* at para 53; *Jiang v Peoples Trust Company*, 2017 BCCA 119 [*Jiang*] at para 64; *Finkel* at para 17). Doing so would eliminate common issues based on these questions, and could prevent the judge on the merits from considering these questions with the benefit of a complete evidentiary record (*Jiang* at paras 64, 67). As the SCC reminded, "where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed" (*Hunt* at p 990; *Arsenault v Canada*, 2008 FC 299 [*Arsenault*] at paras 25-26). As such, the reasonable cause of action criterion can be met despite the length and complexity of the issues, the novelty of the cause of action, or the potential for the defendant to present a strong defence (*Murphy* at para 38). It is not determinative that the law has not yet recognized a particular claim (*Imperial Tobacco* at para 21). The Court must rather ask whether, assuming the facts pleaded are true, the claim is doomed to fail. The approach must be a generous one and err on the side of permitting a novel but arguable claim to proceed to trial.

[57] To further underscore the need for a liberal approach, I would add that the purpose clause of the *Competition Act* (section 1.1) expressly provides that the protection of consumers is one of its underlying purposes, and this legislation has been recognized as a consumer protection legislation (*Finkel* at para 61). This is notably true for the *Competition Act*'s criminal and civil provisions dealing with marketing practices (to which the "double ticketing" provision belongs), which often mirror comparable provisions contained in provincial consumer protection laws. As pointed out by Mr. Lin, the SCC stated that consumer protection laws are to be interpreted generously in favour of the consumers (*Seidel v TELUS Communications Inc.*, 2011 SCC 15 at para 37).

[58] I also agree with Mr. Lin that the law is always speaking and must be interpreted to apply to today's circumstances, even though a provision may have been adopted a long time ago (*Interpretation Act*, RSC 1985, c I-21, s 10*; R. v 974649 Ontario Inc.*, 2001 SCC 81 at para 38). While section 54 on "double ticketing" was created before the digital economy and the emergence of online commerce, the provision can extend and apply to current technologies and commercial practices. Digital marketplaces and online platforms offering digital commerce transactions, allowing sellers and buyers to connect and exchange, and charging for such service are now frequent in the digital economy. Airbnb is an example in accommodation booking services, but other examples exist in transportation booking services (such as Uber) or in ticket booking services (see *Nicolas c Vivid Seats*, 2018 QCCS 3938). The issue of the interpretation of section 54 of the *Competition Act*, and whether the provision effectively applies to a platform like Airbnb, goes to the merits of the claim.

[59] Lastly, as mentioned above, there is very limited jurisprudence on section 54 and none of the cases I am aware of is binding on this Court. In addition, those decisions do not contain any meaningful analysis of the provision and how it should be interpreted. In its submissions, Airbnb pointed to the *Coca-Cola* case, where the Supreme Court of British Columbia found that charging recycling fees for bottled drinks in the final price to consumers, although the fees were not included in the price displayed on the shelf, was not in breach of the "double ticketing" provision (*Coca-Cola* at paras 69, 93). However, I observe that this case occurred in a different jurisdiction, and that the discussion of section 54 was very succinct. The case focused on how the deposits were held and whether recycling fees were an illegal levy. The section 54 claim was analysed and dismissed by the court in a single paragraph (*Coca-Cola* at para 93). In these

circumstances, I do not consider it a very compelling authority to support rejecting Mr. Lin's claim at this early stage. In order to find that it is "plain and obvious" that no claim exists, there must be "a decided case directly on point, from the same jurisdiction, demonstrating that the very issue has been squarely dealt with and rejected" (*Arsenault* at para 27, citing *Dalex Co. v Schwartz Levitsky Feldman* (1994), 19 OR (3d) 463, 1994 CanLII 7290 (SC); see also *Finkel* at para 17). This is not the situation here.



[60] Mr. Lin may ultimately fail on the merits of his proposed interpretation of section 54 and its application to Airbnb. I acknowledge that, depending on the factual evidence to be presented at the common issues trial, the judge on the merits could for instance find that Guests concluded one transaction with Hosts for the accommodation, and a different one with Airbnb for the service of using its platform; or that Guests concluded two separate transactions with Airbnb for two different products, one for the accommodation and one for the use of the Airbnb Platform. However, this is not a sufficient basis, at this stage, to conclude that there is no reasonably viable cause of action. For all these reasons, I find that it is not plain and obvious that Airbnb did not engage in "double ticketing" and that section 54 of the *Competition Act* does not apply to Airbnb's conduct. It will be up to the judge on the merits, with a complete record and full legal submissions, to determine whether Airbnb's conduct is sufficient to satisfy the provision's requirements.

[61] If Airbnb can demonstrate, at the common issues trial, that what is effectively supplied through the Airbnb Platform are two products at two different prices, this would be sufficient to

conclude that section 54 on "double ticketing" does not apply, to terminate the litigation and to dismiss the claim for damages.

(5) Section 60 of the *Competition Act*



[62] Airbnb also submits that it is plain and obvious that section 60 of the *Competition Act* is fatal to Mr. Lin's claim. I disagree.

[63] The section 60 "defence" exempts from section 54, on certain conditions, "a person who prints or publishes or otherwise distributes a representation or an advertisement on behalf of another person". It reads as follows:

| **Defence** | **Moyen de défense** |
|---|---|
| **60** Section 54 does not apply to a person who prints or publishes or otherwise distributes a representation or an advertisement on behalf of another person in Canada if he or she establishes that he or she obtained and recorded the name and address of that other person and accepted the representation or advertisement in good faith for printing, publishing or other distribution in the ordinary course of his or her business. | **60** L'article 54 ne s'applique pas à la personne qui diffuse, notamment en les imprimant ou en les publiant, des indications ou de la publicité pour le compte d'une autre personne se trouvant au Canada, si elle établit qu'elle a obtenu et consigné le nom et l'adresse de cette autre personne et qu'elle a accepté de bonne foi d'imprimer, de publier ou de diffuser de quelque autre façon ces indications ou cette publicité dans le cadre habituel de son entreprise. |

[64] Airbnb has not cited any cases on the interpretation of section 60, and the Court is aware of none. However, the provision's wording makes it clear that it refers to the passive role of mere advertisers or publishers of advertisements who have conducted a minimum level of due

diligence. As pointed out by Mr. Lin, section 60 is similar to subsection 74.07(1) of the *Competition Act*, which has been described by the Competition Bureau as a publisher's defence available to those who do not have decision-making authority over the content of what is being displayed, published or represented (Competition Bureau, *Application of the Competition Act to Representations on the Internet*, February 2003, at 6). In other words, the provision intends to exempt publishers and advertisers (such as newspapers, media or other innocent bystanders) who are only displaying the prices of others, and not their own prices.



[65] In this case, the pleadings establish that Airbnb is providing comprehensive accommodation booking services and has a direct stake in the accommodation booking services it supplies on the Airbnb Platform, notably in the offering and display of the Second Price or Total Price, which includes its Service Fees. To the extent that the pleadings refer to two different prices being offered and displayed for Airbnb's accommodation booking services, it is therefore not plain and obvious that section 54 does not apply to Airbnb because of section 60. Airbnb indeed acknowledges in its Memorandum of Fact and Law that section 60 may not apply to Airbnb's operation of the Airbnb Platform. As stated above, a generous reading of the pleadings leads me to conclude that the product at issue in Mr. Lin's claim is Airbnb's accommodation booking services.

[66] Once again, the interpretation and application of this section 60 defence should not be weighted at the certification stage. Rather, this defence should be considered with the benefit of a complete evidentiary record, at the merits stage, considering the debate on whether Airbnb is

merely an advertiser of the Hosts' accommodations (as argued by Airbnb) or provides comprehensive accommodation booking services (as submitted by Mr. Lin).

(6) Section 36 of the *Competition Act*

[67] Airbnb finally submits that Mr. Lin has not properly pleaded loss or damage as required by section 36 of the *Competition Act*. More specifically, Airbnb maintains that Mr. Lin has failed to plead and prove causation, and to plead that he or anyone else was misled by Airbnb's display of prices. Airbnb argues that Mr. Lin had to plead (and ultimately prove) (i) that he and the proposed Class members believed they were paying only the First Price, and (ii) that they would not have booked accommodation on the Airbnb Platform had they realized that they had to pay the Second Price. Again, I do not agree with Airbnb.

[68] First, keeping in mind the generous interpretation that pleadings ought to receive, I am satisfied that Mr. Lin has pleaded the necessary elements to claim the relief he seeks under section 36. More specifically, paragraphs 30, 32 (b) and (c) and 33 of the Statement of Claim (which correspond to paragraphs 31, 34(b) and (c) and 35 of the Amended Statement of Claim) read as follows:

> 30. Airbnb charging the Plaintiff (and each of the Class members) the Second Price, instead of the First Price caused the Plaintiff (and each of the Class members) to suffer loss and/or damage.
>
> […]
>
> 32. The Plaintiff seeks, on his own behalf and on behalf of the Class, a declaration that:
>
> a. Airbnb supplied, or offered to supply, a product that exceeds the lowest of two clearly expressed prices at the time which the

> product is so supplied, in contravention of section 54 of the *Competition Act*;
>
> b. The Plaintiff and all Class members were entitled to pay to Airbnb only the First Price for each night of their respective reservation(s) through Airbnb in accordance with section 54 of the *Competition Act*; and
>
> c. The Plaintiff and all Class members, having paid the Second Price for each night of their respective reservation(s), suffered loss and/or damage equivalent to the monetary difference between the Second Price and First Price, less the Taxes.
>
> 33. The Plaintiff says that he, and the Class, have suffered damages as a result of the Defendants' breach of section 54 of the *Competition Act* and as a result seek damages pursuant to section 36 of the *Competition Act* […]
>
> [Emphasis added.]

[69] These paragraphs contain allegations of facts referring to all elements of section 36. To establish a claim under section 36, a plaintiff must demonstrate that he or she suffered a loss or damage as a result of the defendant's conduct. To have a reasonable cause of action under section 36, the plaintiff has to suffer a loss resulting from the violation of the impugned criminal provision, and must allege damages resulting from the violation (*Sun-Rype Products Ltd. v Archer Daniels Midland Company*, 2013 SCC 58 [*Sun‑Rype*] at paras 74-75; *Godfrey v Sony Corporation*, 2017 BCCA 302 [*Godfrey CA*] at para 231; *Murphy* at para 83; *Watson SC* at para 106; *Axiom Plastics Inc. v EI Dupont Canada Company*, 87 OR (3d) 352, 2007 CanLII 36817 (SC) [*Axiom*] at paras 25, 35). As such, the cause of action under section 36 requires the plaintiff to prove that he or she suffered loss or damage in the actual world as compared to the "but for" world, namely the world without the violation of the criminal provision (*Eli Lilly and Company v Apotex Inc.*, 2009 FC 991 at para 849).

[70] Here, the cause of action under section 36 has three components: a violation of section 54 by Airbnb, a loss or damage suffered by Mr. Lin, and a causal link between the two. The paragraphs referred to above expressly refer to the alleged violation by Airbnb, to the exact nature of the damages claimed and to the causation element of section 36. They specifically state that the loss and/or damage claimed is the monetary difference between the two prices displayed by Airbnb (which amounts to the Service Fees), and that these damages were suffered as a result of Airbnb's breach of section 54.



[71] In my view, this is not a situation like in *Sandhu v HSBC Finance Mortgages Inc.*, 2016 BCCA 301 [*Sandhu*], *Wakelam v Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 [*Wakelam*] or *Singer*, where the courts dealt with matters of misleading representation and notably found that the essentials of the cause of action were not adequately pleaded for claims under sections 36 and 52 of the *Competition Act*. The "double ticketing" pricing conduct cannot be simply assimilated to instances of misleading representations. The courts repeatedly affirmed that, when the impugned criminal conduct takes the form of a misleading representation under section 52, a claimant must demonstrate, in order to sustain a claim under section 36 for a breach of that provision, that he or she relied on the misrepresentation to his or her detriment (*Murphy* at paras 79-85; *Wakelam* at paras 74, 91; *Singer* at paras 107-108). Evidence that the claimant acted, to his or her detriment, on the strength of the alleged false representations and suffered loss or damage because of such reliance is one of the necessary ingredients for an action against the person who made the representations. In my view, the situation differs for a prohibited pricing conduct. I am aware of no precedent where an element of reliance to the

person's detriment was required to support a cause of action under section 36 for the breach of a pricing conduct such as "double ticketing".

[72] Section 36 must receive a broad application and a generous approach must be taken when assessing the adequacy of the pleadings of loss or damage at the certification stage (*Shah* at para 74). In previously certified proposed class actions dealing with price-related offences, it was found sufficient to describe damages in the pleadings as the price differential with the "but for" world, and to deal with causality by writing that damages resulted from the violation (*Shah* at para 75; *Pro-Sys* at para 69; *Axiom* at paras 25, 35; *Godfrey CA* at para 14). This is what Mr. Lin has done here, pleading that the damages amount to the difference between the two prices expressed by Airbnb, and that he suffered such damages by having to pay the higher price.

[73] Furthermore, I note that the words "loss" and "damage" in section 36 have been liberally interpreted at the pre-trial motion stage (*Apotex Inc. v Eli Lilly and Company*, 2005 FCA 361 [*Apotex*] at paras 58-59; *Bédard v Canada (Attorney General)*, 2007 FC 516 at paras 48-50, 52, 84). In *Apotex*, the plaintiff claimed that, for the purpose of section 36, the damages suffered were any amount it would have to pay to the defendant in an infringement action (*Apotex* at para 58). Even if this was found to be a "strange proposition in law", the motion for summary judgement was nevertheless dismissed since it was not clear that the claim could not succeed (*Apotex* at para 59).

[74] In *Godfrey*, in the context of a litigation involving a price-fixing conspiracy, the SCC recently observed that, over time, section 36 emerged as a powerful remedy for consumers and

an important deterrent of anti-competitive conduct, and that it deserves a broad interpretation, such that anyone who suffers a loss from prohibited anti-competitive behaviour could bring a private action (*Godfrey* at para 68). Section 1.1 of the *Competition Act* provides that the purpose of the legislation is to "maintain and encourage competition in Canada" with a view to providing consumers with "competitive prices and product choices" (*Godfrey* at para 65). Monetary sanctions for criminal anti-competitive conduct therefore further the *Competition Act*'s purpose. The courts have also recognized that deterrence of anti-competitive behaviour and compensation for the victims of such behaviour are two other objectives of the *Competition Act* of particular relevance (*Infineon* at para 111; *Sun-Rype* at paras 24-27; *Shah* at para 37).

[75] I further note that, as far as damages are concerned, Rule 182 provides that the statement of claim shall specify "the nature of any damages claimed". A general description of the nature of the damages claimed is sufficient (*Condon* at para 20; *John Doe FCA* at paras 50-51). Here, the Statement of Claim specifically describes the claimed damages as the price differential equal to the Service Fees.

[76] For all these reasons, I find that Mr. Lin's pleadings on loss or damage are sufficient at this stage.

[77] With regard to the allegation of loss or damage, Airbnb further submits that Mr. Lin had to plead (and eventually prove) that (i) he and the proposed Class members believed they were paying only the First Price and that (ii) they would not have booked an accommodation if they

had realized that they had to pay the Second Price. Since Mr. Lin omitted to do so, Airbnb argues that it is plain and obvious that this action will fail. Again, I do not agree.

[78] The statutory language of sections 36 and 54 of the *Competition Act* does not contain the requirements laid out by Airbnb and I am not persuaded that it is plain and obvious that loss or damage resulting from a "double ticketing" offence could not be established without such requirements.

[79] Airbnb points to no binding decision establishing that, in order to suffer loss or damage under section 36 for a breach of section 54, an element of deception or of being misled is a necessary ingredient. The same is true for the submission that no loss or damage could be sustained if the customer does not allege that he or she would not have purchased the product at the higher price.

[80] Section 54 creates a strict liability offence, pursuant to which charging a price higher than the lowest of two or more expressed prices is a violation of the *Competition Act*. This is an offence strictly based on the supplier's conduct, more specifically on what the supplier expressed and on the price at which the product is supplied. It simply states that, if the supplier expresses two prices for a product, the supplier cannot charge the higher price. It arguably implies that the purchaser is entitled to have the benefit of the lower price. In light of the statutory language, such a pricing provision is to be analyzed from the perspective of the supplier, like similar provisions on fragmented pricing (*Union des consommateurs c Air Canada*, 2014 QCCA 523 at paras 70-73). Whether section 54 was violated must therefore be addressed objectively, and there is an

arguable case that there is no requirement to assess whether the customers were misled or whether they would have purchased the product at the higher price or not.

[81] Section 54 prohibits a supplier to clearly express two different prices for a product, and then to charge the higher price. The prohibited conduct appears to give the purchasers of such product a legal entitlement to the lower price, and it is arguable that, as a result of such "double ticketing" conduct, the customer suffers loss or damage equal to the difference between the two prices. I pause to observe that, in *Murphy*, the Court contrasted section 36 claims based on misrepresentations with those based on pyramid selling, noting that the latter provision involved questions of "structure" that "require different treatment" (*Murphy* at paras 91, 93). In light of his other conclusions, the judge did not elaborate on this point in *Murphy*. But the same can arguably be said about the "double ticketing" provision, in contrast to the misleading representation offences.

[82] It is therefore not plain or obvious that, in order to prove loss or damage resulting from an alleged violation of the "double ticketing" provision, there is a requirement that the purchaser has been misled or that the purchaser's choice or decision to buy would have been affected by a difference in price. Stated differently, based on the provision's wording, it is not plain and obvious that, in order to support his claim of loss or damage, Mr. Lin needed to plead and allege that he believed he would pay only the First Price shown on Airbnb's search results page, and that he would not have paid the Second Price or would not have bought Airbnb's accommodation booking services at the Second Price.

[83] I agree that it may look as a strange proposition to plead and argue that loss or damage can be established by a customer, based simply on a price differential between the lower and the higher price of a product, when the customer knew about both prices and nevertheless decided to accept the higher price and to proceed with the transaction. I also acknowledge that demonstrating and proving the existence of an actual loss or damage in these circumstances may present additional challenges for Mr. Lin and the Class members. I further understand that, in this context, Airbnb may have strong reserves about Mr. Lin's ultimate ability to demonstrate a loss or damage automatically equal to the full price differential. However, in light of section 54's wording and the lack of jurisprudence interpreting the provision, I am not persuaded that Mr. Lin's cause of action based on sections 36 and 54 is doomed to fail in the absence of pleadings addressing the two alleged requirements identified by Airbnb.

[84] Again, it may well be that, further to a more comprehensive analysis of the provisions with a full evidentiary record and full legal submissions, the trial judge agrees with Airbnb and finds that establishing loss or damage under section 36 for a breach of section 54 requires demonstrating that the customer was misled or would not have proceeded to purchase the product at the higher price had it been shown to him or her in the first place, and that simply invoking the price differential does not suffice. However, this is a matter of interpretation and application of the two provisions to be debated on the merits. If Airbnb was able to demonstrate, at the common issues trial, that a loss or damage cannot be solely established by the price differential associated with a "double ticketing" conduct, this could be sufficient to conclude that no damages have been suffered by Mr. Lin and the Class members.

(7) Conclusion

[85] In conclusion on this first criterion, it will be up to Mr. Lin, at the merits stage, to prove that Airbnb conducted itself in a manner contrary to section 54 of the *Competition Act* and that he is entitled to damages equal to the Service Fees under section 36. But, for the time being, I am satisfied that it is not plain and obvious that, if the alleged facts are assumed to be true, Mr. Lin's action based on those provisions is certain to fail, and that the pleadings disclose no reasonable cause of action. In my opinion, Airbnb's arguments, as attractive as they may seem at first glance, require debate of the facts and law and a foray into the merits of the case. This case raises many novel issues regarding the interpretation and application of a rarely used pricing provision of the *Competition Act*, and on its interface with section 36, and it would be inappropriate to decide them at the certification stage. Certification serves to decide which form the action will take, and Rule 334.16(1)(a) is only meant as a screen to filter out actions that are bound to fail at the merits stage. I am not persuaded that this is the case here.

**B. *Rule 334.16(1)(b): Identifiable class of two or more persons***

[86] I now turn to the four other requirements to certify a class proceedings, for which Mr. Lin has the burden of adducing evidence to show "some basis in fact" that they have been met. Having an identifiable class of two or more persons is the first one.

[87] Mr. Lin asks the Court to certify the following Class: "All individuals residing in Canada who, on or after October 31, 2015, reserved an accommodation for anywhere in the world using Airbnb, excluding individuals reserving an accommodation primarily for business purposes". He

submits that this is an identifiable class, as the fact that a person made a booking with Airbnb is by itself an objective criterion that will allow Class members to self-identify. Mr. Lin also warns the Court to be careful in narrowing the Class and excluding Class members at this early stage, especially given the informational imbalance between Airbnb and him.



[88] I pause to underline that Mr. Lin's proposed Class definition covers all individuals having booked an accommodation with Airbnb, with no further distinction or exclusion (save for the reservations for business purposes). The definition is totally detached from the impugned pricing conduct at issue and contains no direct or indirect reference to a requirement that the Class members be individuals who paid a price higher than another price expressed by Airbnb, which is the essence of section 54 on "double ticketing" and the central thrust of Mr. Lin's claim for damages.

[89] Airbnb does not contest that the proposed Class is comprised of two or more persons: approximately 2.2 million Canadian residents booked an accommodation on the Airbnb Platform from October 31, 2015 to August 2018, according to the second affidavit of Mr. Miller. Airbnb however contends that the proposed Class definition is too broad and that it should be limited in two ways. First, it should only include Guests "who saw two prices" by booking an accommodation exactly matching the parameters of a previous search they ran on the search results page of the Airbnb Platform. Second, it should only cover Guests who (i) believed they would pay only the First Price shown on the search results page, and (ii) would not have made a booking had they been aware that they would be charged the Service Fees in the Second Price. However, Airbnb explains that such amendments to the proposed Class definition would be

inappropriate, since they would require relying on individuals' memories to determine who is part of the Class.

[90] For the following reasons, I partly agree with Airbnb and conclude that the proposed Class definition must be amended to be a properly defined and acceptable identifiable class. As defined by Mr. Lin, the proposed Class is not sufficiently narrow and is overly broad because the definition contains no reference to the need for individuals to have been exposed to two different prices for Airbnb's accommodation booking services. The evidence shows that some Guests can access Airbnb's accommodation booking services without going to the search results page on the Airbnb Platform, where Airbnb's First Price is displayed. Airbnb therefore does not express two prices to these individuals. The definition of the identifiable class will have to be amended to exclude those individuals.

[91] Three criteria must be met to find an identifiable class: (i) the class must be defined by objective criteria; (ii) the class must be defined without reference to the merits of the actions; and (iii) there must be a rational connection between the common issues and the proposed class definition (*Hollick* at para 17; *Dutton* at para 38; *Wenham* at para 69). Though the SCC instructed courts to generously interpret class action legislation, the burden lies on the proposed representative plaintiff to show that the defined class is sufficiently narrow, thereby meeting the criteria (*Hollick* at paras 14, 20). Still, the burden is not unduly onerous: the representative does not need to show that "everyone in the class shares the same interest in the resolution of the asserted common issue[s]", only that the class is not "unnecessarily broad" (emphasis added) (*Hollick* at para 21; *Paradis Honey Ltd. v Canada*, 2017 FC 199 [*Paradis Honey*] at para 24). As

such, over-inclusion and under-inclusion are not fatal to certification, as long as they are not illogical or arbitrary (*Rae* at para 56). If the class can be defined more narrowly without arbitrarily excluding people sharing the same interest in the resolution of the common issues, the Court can allow certification on condition that the class definition be amended (*Hollick* at para 21).



[92] In *Dutton*, the SCC explained the underlying rationales for proceeding with a clearly identifiable class at the outset of the litigation. The Court must be in a position to identify: (i) who is entitled to notice, (ii) who is entitled to relief, and (iii) who is bound by the judgment (*Dutton* at para 38; *Paradis Honey* at para 22). However, despite having to proceed with an identifiable class at the preliminary stages of the class action proceedings, the Court must remain flexible and open to amendments to the class definition during the post-certification stages "because of the complex and dynamic nature of class proceedings" which calls for active case management (*Buffalo FCA* at para 12; *Paradis Honey* at para 26).

[93] I first briefly deal with the second argument raised by Airbnb on the overbreadth of the Class proposed by Mr. Lin, regarding the Guests who were not misled. Airbnb submits that the Class definition should be limited to Guests who (i) believed they were paying only the First Price displayed on the search results page, and (ii) would not have made a booking had they known they would be charged the Service Fees in the Second Price. This essentially echoes what Airbnb submitted with respect to the requirement to establish loss or damage, discussed above in the section on the reasonable cause of action.

[94] For the reasons detailed above, I do not agree that this argument can be accepted at this stage and that the Class needs to be limited to those "Guests who were misled" to establish a rational connection with the common issues at stake. I am not persuaded at this stage that these are necessarily requirements to establish loss or damage under section 36 for a breach of the "double ticketing" provision; and it would be premature to import them in the definition of the identifiable class. It will be up to the common issues trial judge to decide whether a deception or misleading element is required to recover loss or damage under section 36, or whether proof that a purchaser would not have bought the product at the higher price is required. Mr. Lin argues that the existence of the price differential under section 54 is sufficient to establish loss or damage under section 36 in the circumstances, and this is how he has defined the actual damages suffered by the Class members in his common issues. If it was eventually determined that customers effectively do not need to have been misled or deceived to be entitled to damages, the individuals that Airbnb asks to exclude from the Class definition based on the two additional requirements described above would be left with no relief, and would have to start a new action. This would be contrary to the class actions objectives of access to justice and judicial economy.

[95] At the certification stage, one should exercise caution before limiting the dimension of the class as stated by a plaintiff. The consequences of excluding members of the class at this early stage can be serious, and an overly strict approach to the class definition would undermine the liberal approach that the SCC advised, in *Vivendi* and *Infineon,* for interpreting the requirements for class actions certification. While I cannot exclude the possibility that the class may need to be reconfigured later in these proceedings, agreeing to the second narrowing of the

Class submitted by Airbnb would arbitrarily exclude people who share the same interest in the resolution of the common issues.

[96] In my view, the situation is however quite different for Airbnb's first argument on the overbreadth of the Class definition proposed by Mr. Lin, regarding the Guests who did not "see" two prices.

[97] According to Mr. Lin's Statement of Claim and submissions, the First Price expressed by Airbnb is solely displayed on the search results page of the Airbnb Platform. The first and second affidavits of Mr. Miller provide evidence about at least two types of situations where Guests booking accommodations on the Airbnb Platform are not exposed to the First Price described by Mr. Lin. First, Guests may directly access the listing page of a specific accommodation on the Airbnb Platform without having to visit the search results page and running a search. This is notably the case when Guests book accommodations that they previously booked, and which they can access directly without a search. Second, when Guests change the search parameters of their booking (such as the dates of their stay or the party size) once they are on the listing page of a specific accommodation – thus modifying the parameters they initially used on the search results page –, new prices are displayed to them for that accommodation on the listing page. However, such Guests are not informed of the corresponding price of the accommodation on a search results page. In those circumstances, says Airbnb, the Guests do not visit the search results page for their revised booking, and there is no First Price for that particular transaction concluded by the Guests.

[98] This evidence submitted by Mr. Miller was not contradicted. Mr. Miller estimates in his second affidavit that these instances could reflect the situation of approximately 25% of the total bookings made by Canadian-resident Guests on the Airbnb Platform. This is not insignificant.

[99] Airbnb presents this argument in terms of Guests who did not "see" two prices and, notably, never saw the First Price described by Mr. Lin, which excludes the Service Fees. Mr. Lin responds that section 54 of the *Competition Act* does not require customers to "actually see" the price before the supplier violates the provision, as the "double ticketing" offence focuses on whether the supplier displays two different prices and charges the higher price.

[100] With respect, the overbreadth argument raised by Airbnb on the "two prices" issue should not be crafted in terms of whether the Guests "see" two prices or not. What matters is whether Airbnb expressed a price or not. A fundamental element required for the "double ticketing" offence is that the supplier clearly expresses two or more prices for the same product, and charges higher than the lowest expressed price. In the situations described by Mr. Miller, Airbnb does not express a First Price to the Guests; instead, for those transactions where the Guests did not go through or go back to the search results page, only a Second Price was expressed to the customer, at the booking phase of the transaction. More specifically, if a Guest books an accommodation without first going through the search results page, it implies that Airbnb does not express a First Price to the Guest, but only a Second Price at the booking phase. Similarly, if a Guest modifies his or her search parameters in the booking phase, a Second Price will be expressed by Airbnb for that particular transaction, for which no First Price will have been or will be expressed at the search results phase.

[101] According to the evidence, these are not situations where Guests are not "seeing" a First Price that might be displayed somewhere on the Airbnb Platform for the transaction, as the only place where a First Price can be displayed is on the search results page related to a particular booking. These are instead situations where a First Price is never expressed for the transaction, and simply does not exist. Clearly, if Airbnb only expresses a Second Price to a Guest for a transaction, and no First Price, there cannot be a violation of section 54 of the *Competition Act*, and Guests having booked accommodations in that context cannot logically and properly belong in the identifiable class. On the evidence before me, Airbnb expresses two prices for a transaction only when a Guest books an accommodation that matches the parameters of a previous search he or she made on the search results page of the Airbnb Platform. A Guest is not exposed to a First Price if he or she does not visit Airbnb's search results page for a booking transaction.

[102] Guests who book an accommodation by directly accessing the listing page without going through the search results page must therefore be excluded from the Class as no proposed common issues can be relevant or have any rational connection to them. The same is true for Guests who modify the parameters of their booking on the listing page after running a search, as they are not exposed to a First Price on the search results page. These are not potential Class members, and they are individuals who are clearly not entitled to notice or relief for a claim anchored to the "double ticketing" provision.

[103] A proposed class definition will be overly broad if it binds persons who ought not to be bound, and if there is no rational connection between some of the proposed class members and

the alleged impugned conduct to which the common issues relate (*Harrison v Alexa Life Sciences Inc.*, 2018 BCCA 165 [*Harrison*] at para 39). This is the case here. Section 54 can only apply where two prices are expressed for the same product supplied at the same time and in the same quantity. The current proposed Class definition includes individuals with no claims under section 54 because they were never exposed to a First Price. As defined, the proposed Class is insufficiently related to the impugned "double ticketing" conduct (i.e., the requirement of a supplier having expressed two prices) and to the specific claims advanced by Mr. Lin against Airbnb. The definition does not tailor the Class to individuals exposed to two prices, despite this being the central thrust of Mr. Lin's claim against Airbnb. In that sense, the Class definition proposed by Mr. Lin is unnecessarily broad as the Class could be narrowed without arbitrarily excluding people who share the same interest in the resolution of the common issues (*Hollick* at para 21).

[104] Without an amendment excluding the Guests who have not been exposed to a First Price by booking an accommodation through visiting Airbnb's search results page, the Class proposed by Mr. Lin captures individuals who do not share the same interest in the resolution of the common issues. Narrowing the class definition along those lines will not arbitrarily exclude individuals with potential valid claims. It will only exclude individuals without such claims.

[105] I therefore agree with Airbnb that the identifiable class can only include Guests who booked accommodations that matched the parameters of a previous search they ran on the search results page of the Airbnb Platform, as it is only in those situations that Airbnb will have expressed both a First Price and a Second Price for a booking transaction. There cannot be a

properly defined and acceptable identifiable class without such change. Mr. Lin therefore must appropriately reword the Class definition to only include individuals who reserved an accommodation that matched the parameters of a previous search made by the individual on the search results page of the Airbnb Platform and for which a First Price or Listing Fee was displayed. I pause to note that this is not a situation where the Court is resolving conflicts in the evidence to reach that conclusion. The evidence is simply insufficient to establish some basis in fact for the existence of an identifiable class which would include Guests to whom Airbnb has not expressed a First Price.



[106] That being said, I am not convinced, contrary to Airbnb's submissions, that an amendment to the Class definition could not solve the problem. Limiting the Class definition to exclude the situations described in Mr. Miller's affidavits is based on an objective criterion regarding the search parameters and the visit of Airbnb's search results page. It defines the Class without reference to the merits of the action, and ensures a rational connection between the common issues and the proposed class. My understanding of the evidence provided by Mr. Miller in his second affidavit is that Airbnb further has the ability to identify and determine the bookings made by Canadian-resident Guests on the Airbnb Platform which can be matched to a previous search ran by the Guests with the same parameters, even though this may require enormous time and resources, and even though Airbnb says it currently has no efficient way to do it.

[107] In my view, this situation differs from *Harrison*, referred to by Airbnb, where the class was found to be unnecessarily broad but could not be narrowed as it would have required relying

on individuals' memories of specific misrepresentations to determine whether they were part of the class or not. In *Harrison*, a case on misleading representation, the class was found overbroad because it was not tailored to those who relied on the misrepresentations to purchase the product. Instead, the class covered all purchasers of the product although they were not exposed to a common, uniform set of misrepresentations. In that case, the court found that the class definition could not be amended and tailored because the class members would likely be unable to recall the precise representations on the packaging to determine whether they belong to the class or not, and would have to rely on their memories regarding the nature of the misrepresentation.



[108] Here, the criterion relates to search parameters and the visit of the search results page on the Airbnb Platform for potential Class members who will claim having paid a price higher for their accommodation booking. I am not persuaded that individuals will be highly unlikely to recall having gone to a search results page where a First Price was expressed by Airbnb, or to have records that will allow them to determine it. To self-identify as potential class members, they will need to determine two elements: that they booked an accommodation with Airbnb after being exposed to two prices which included a First Price on the search results page, and that they ended up paying the higher price. The existence of a First Price or Listing Fee refers to a basic element of booking transactions made by the Guests on the Airbnb Platform. Potential class members will therefore have the ability to self-identify by applying an objective criterion regarding their own usage of Airbnb's accommodation booking services. Here, in my view, there exists a realistic possibility that a substantial number of potential Class members will be able to determine with a degree of certainty whether they fall within or outside of the amended Class

definition. The connection can be established objectively by referring to a visit on Airbnb's search results page.

[109] For many individuals, this determination will be straightforward, while for some it may be more complicated. The fact that there can be difficulties in objectively determining whether an individual booked an accommodation after visiting Airbnb's search results page does not mean it is impossible. Moreover, the evidence indicates that Airbnb has some ability to match bookings made by Guests to specific search parameters.

[110] It is sufficient that the class definition states objective criteria by which class members can later be identified (*Sun-Rype* at para 57). Justice Rothstein's reasons in *Sun-Rype* clarifies that the identifiable class requires evidence establishing some basis in fact that sufficient information is available to class members to permit them to determine whether they belong to the class. Whether a particular individual may, as a matter of fact, be found to be within the class definition may require further inquiry in the administration phase of this class proceeding. But, it can be managed and does not pose an insurmountable hurdle. In addition, Airbnb has records which can be of assistance. The fact that individual inquiries may be required does not take away from the fact that a class may be properly defined and identifiable.

[111] I am therefore satisfied that some basis in fact supports the conclusion that, as amended, the Class proposed by Mr. Lin meets the criteria to constitute a properly identifiable class of two or more persons. The amended Class will allow objective identification on the basis of whether or not the member made a booking on the Airbnb Platform after having been through the search

results page and being exposed to two prices. The amended Class is defined without reference to the merits of the claims asserted and, with the amendment, a rational connection exists between the common issues regarding liability and damages and the proposed Class. In addition, there is some basis in fact that a class of two or more people meeting the amended definition exists.



### C. *Rule 334.16(1)(c): Common question of law or fact*

[112] The next requirement is for Mr. Lin to demonstrate some basis in fact for the claims of the Class members raising common questions of law or fact, regardless of whether those common questions predominate over questions affecting only individual members. Mr. Lin argues that there are common questions of fact and law with respect to liability and remedies. The common questions proposed by Mr. Lin are as follows:

> "*Liability to the Class under the Competition Act*
>
> 1. Did the Defendants clearly display a "first price" in the search results to each of the Class Members in the search result screen?
>
> 2. Did the Defendants display a "second price" immediately prior to each Class Member confirming and/or submitting their accommodation reservation?
>
> 3. Is the "second price" higher than the "first price" for all Class Members?
>
> 4. Were the Defendants only entitled to charge the "first price" under section 54 of the *Competition Act*?
>
> 5. Were the Class members entitled to pay to Airbnb the "first price" under section 54 of the *Competition Act*?
>
> 6. Are the Class Members individuals acting primarily for non-business purposes?
>
> *Recovery for the Class under Section 36 of the Competition Act*

7. Have the Class Members suffered actual damages equivalent to the “second price” minus the “first price”, less any applicable taxes?

8. Are the Class Members entitled to claim the damages in question #7 pursuant to section 36 of the *Competition Act*?

9. Are the Defendants jointly and severally liable for their own conduct and that of each other?

10. Are the Class Members entitled to recovery of investigation costs and costs of this proceeding, including counsel fees and disbursements on a full indemnity basis?

*Miscellaneous*

11. Should the Court grant a permanent injunction enjoining the Defendants from:

a. charging a price higher than the lowest clearly displayed price or otherwise displaying two or more different prices; and

b. displaying two or more different prices for the same product/service of the same quantity?

12. Are the Defendants liable to pay punitive or exemplary damages having regard to the nature of their conduct? If so, what amount and to whom?

13. Are the Defendants liable to pay court-ordered interest?

14. Can an aggregate assessment of damages be made pursuant to Rule 334.28(1)?”

[113] As indicated above, at the hearing before this Court, Mr. Lin abandoned his claims for permanent injunction and punitive damages, so the proposed common issues 11 and 12 are no longer in play.

[114] Airbnb submits that none of the proposed issues are common. Airbnb's principal submission is that the proposed common issues cannot be answered without first making findings of fact with respect to each individual claimant.



[115] For the reasons that follow, I find that, with the amended definition of the identifiable Class, Mr. Lin meets the requirement to demonstrate some basis in fact that the claims of the Class members raise certain common issues on liability and recovery of damages. I am satisfied that these issues must be settled to resolve each Class member's claim. However, some of the proposed questions require clarification.

[116] The task of the Court at this stage is not to precisely determine the common issues, but rather to "assess whether the resolution of the issue is necessary to the resolution of each class member's claim" (*Wenham* at para 72). In assessing the commonality of issues, the emphasis is not on the differences between the class members but on the identical, similar or related issues of law or fact. The judge must simply assess whether common questions stemming from facts relevant to all class members exist. If the fact is significant enough to advance the resolution of every class member's claim, the condition is met.

[117] In *Pro-Sys*, Justice Rothstein summarized the SCC's instructions for ascertaining the commonality requirement previously stated in *Dutton*. Underpinning the commonality question, as well as the overarching class action framework, is an inquiry into "whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis" (*Pro-Sys* at para 108, citing *Dutton* at para 39). In light of these considerations, the Court must determine the

existence of a common question while applying the following principles: (i) the commonality question should be approached purposively; (ii) an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim; (iii) it is not essential that the class members be identically situated vis-à-vis the opposing party; (iv) it is not necessary that common questions predominate over non-common issues, though the class members' claims must share a substantial common ingredient to justify a class action, as the Court will examine the significance of the common issues in relation to individual issues; and (v) success for one class member must mean success for all, since all class members must benefit from the successful prosecution of the action, albeit not necessarily to the same extent (*Pro-Sys* at para 108; *Rae* at para 58; *Paradis Honey* at paras 68-69).

[118] In *Vivendi*, the SCC further underlined that the common success requirement should not be applied "inflexibly" (*Vivendi* at para 45). Thus, a common question can exist even if the answer may vary from one class member to another; success for one member does not necessarily entail success for all members, though success for one must not mean failure for another (*Vivendi* at para 45). In interpreting the principles laid down in *Dutton* and *Rumley v British Columbia*, 2001 SCC 69, the SCC reiterated that a question will be considered common if it can serve to advance the resolution of every class member's claim, which may require nuanced and varied answers based on the situation of individual members (*Vivendi* at para 46; *Paradis Honey* at para 77). In other words, the commonality requirement does not call for identical answers for all class members or even that each member must benefit to the same extent. Rather, it is "enough that the answer to the question does not give rise to conflicting interests among members" (*Vivendi* at para 46).

[119] Concerning the substantiality of the common issues, the FCA clarified that the commonality requirement can be met even if many issues, such as causation and damages, remain to be decided individually after the trial on common issues (*John Doe* at paras 62-63).

[120] Common issues are at the heart of the class action process because resolving common issues is what allows a class action to efficiently provide access to justice, resulting in economic use of judicial resources and behaviour modification. That said, the threshold to meet the commonality requirement is low: it suffices to establish a rational connection between the class and the proposed common issues, and the determination of each common issue must contribute to advance the litigation for (or against) the class. Conversely, an issue is not common if its resolution is dependent upon individual findings of fact that would have to be made for each class member.

[121] I am satisfied that, subject to the comments below and a few changes in the wording, the questions identified by Mr. Lin need to be established for all Class members, as defined in the amended Class definition. They are central to the litigation and do not require individualized evidence from Class members. The claims under sections 54 and 36 raise common issues that predominate over questions affecting individual members, such that the criterion in Rule 334.16(1) is satisfied. The proposed common issues focus on Airbnb's pricing conduct and I am satisfied that resolution of these issues will advance the action on behalf of all Class members. They will also avoid duplication of fact-finding or legal analysis. This is not to say that individual assessments may not be necessary – they probably will be. However, the legal and factual foundation of the claims will be common to all Class members.

[122] The first set of issues (proposed common questions 1 to 6) are questions relating to Airbnb's liability. The first three issues relate to Airbnb's pricing practices, and there is some basis in fact regarding Airbnb's uniform practice of charging the Service Fees and the Second Price at the booking stage and of expressing a First Price on the search results page of the Airbnb Platform. As to proposed issues 4 and 5, they are essentially legal questions directed at the interpretation of section 54 of the *Competition Act* and its application to Airbnb.

[123] With the Class redefined to ensure that it only covers the Guests to whom Airbnb expressed two prices, I am satisfied that the proposed common issues 1 to 5 can be resolved on a common basis and are suitable for collective adjudication. They constitute common questions of law or fact which fulfills the requirements of Rule 334.16(1)(c). Questions 1 and 2 will also allow the trial judge to assess and determine the "product" issue at the core of the debate between the parties, the applicability of section 54 to this case, as well as the availability of the section 60 defence. The trial judge's findings on these liability issues can be applied to each Class member.

[124] Airbnb objected to these questions as common issues, arguing that the proposed identifiable Class included Guests to whom a First Price might not have been expressed. This is no longer relevant with the amended Class definition being limited to Guests having booked an accommodation matching the parameters of a previous search made by the Guest on the search results page of the Airbnb Platform and for which a First Price was expressed on the search results page.

[125] When certifying an action, the Court has the discretion to redefine the common issues proposed by the representative plaintiff. Because of the key issue surrounding the "product" or "products" at stake in assessing Airbnb's pricing conduct, the wording of section 54 and the determinative role of the product notion in the "double ticketing" provision, proposed common questions 1 and 2 should be reformulated and clarified as follows:

> 1. Did the Defendants clearly express a "first price" for a product to each of the Class Members in the search results screen?
>
> 2. Did the Defendants clearly express a "second price" for the same product immediately prior to each Class Member confirming and/or submitting their accommodation reservation?

[126] With regard to proposed common question 6, I agree with Airbnb that it is redundant and not common. The Class definition already excludes an individual who booked an accommodation for business purposes, as the class is only composed of people who booked an accommodation for non-business purposes. There is no point in asking if these people acted for non-business purposes. Question 6 will therefore not be part of the certified common issues.

[127] The second group of proposed common questions (7 to 10) deals with remedies and recovery of monetary damages under section 36 of the *Competition Act*. Airbnb argues that they are not common if the Class is not limited to Guests who (i) believed they would pay only the price shown on the search results page, and (ii) would not have made a booking had they known they would be charged the Service Fees in the Second Price. This again goes back to Airbnb's arguments regarding the additional requirements allegedly needed to establish loss or damage under section 36 for a breach of section 54.

[128] As discussed above, whether these requirements are necessary under the provision underlying Mr. Lin's cause of action is open for debate and the proposed common questions 7 and 8 on damages will address that. They will serve to establish what is the loss or damage resulting from an alleged violation of section 54, and whether Mr. Lin's position, to the effect that it can boil down to the simple price differential between the First Price and the Second Price without more on deception or intent to make a booking, is sufficient. Proposed common question 7 refers to the Class members having suffered "actual damages equivalent to the "second price" minus the "first price"", and proposed common question 8 asks whether Class members are entitled to claim such damages under section 36. Mr. Lin contends that the Class members only need to show the price differential to meet the requirements of section 36 in cases of an alleged breach of the "double ticketing" provision, and the common issues trial judge will be tasked with determining whether Mr. Lin is right. The damages as they are defined by Mr. Lin in question 7 are expressly limited to the price differential. Determining whether the price differential can constitute "actual damages" without proof that the Class members (i) believed they would pay only the price shown on the search results page, and (ii) would not have made a booking had they been aware that they would also be charged the Service Fees – which Mr. Lin says he does not need to prove –, will advance the action on behalf of all Class members, and will also avoid duplication of fact-finding or legal analysis.

[129] These questions on remedies contested by Airbnb will therefore move the litigation forward for every Class member, even if the common issues trial judge eventually decides that section 36 also requires proof that individuals have been misled or that they had no intention of purchasing the product at the higher price.

[130] I agree that questions 7 and 8 should be combined and I would reformulate them as follows:

> 7. Have the Class Members suffered actual damages equivalent to the "second price" minus the "first price", less any applicable taxes, entitling them to claim such damages pursuant to section 36 of the *Competition Act*?

[131] Answering this common issue will move the litigation forward even though damages would vary between each Class member, as the price differential equal to the Service Fees would be different for each transaction. However, this is not a bar to certification pursuant to Rule 334.18(a). With the answer to proposed common questions 7 and 8, proposed questions 9 and 10 can be answered and can be certified.

[132] The last group of proposed common issues (questions 13 and 14) relates to other remedies. Regarding the proposed common issue 13 on whether Airbnb can be liable to pay court-ordered interest, the resolution of this issue will not advance the litigation. In addition, it falls within the inherent jurisdiction of the trial judge, whether certified or not. I am not satisfied that the question is appropriate for certification.

[133] Turning to common issue 14 on aggregate damages, a court can make an aggregate assessment of damages as part of the common issues trial, in the event the defendant is found at the said trial to have breached an applicable obligation or duty. Indeed, in *Pro-Sys* at paragraphs 132-134, while observing that aggregate damages are applicable only once liability has been established, Justice Rothstein held that the question of whether aggregate damages are an appropriate remedy can be certified as a common issue and be determined at the common issues

trial, once a finding of liability has been made. However, aggregate damages are not available unless liability and entitlement to damages can be determined on a class wide basis, with no questions of fact or law remaining. The availability of aggregate damages has been certified as a common issue if there is a reasonable likelihood of such remedy being granted (*Sankar v Bell Mobility Inc.*, 2013 ONSC 5916 at para 86).



[134] Here, a number of common issues must first be determined before concluding to Airbnb's liability under sections 36 and 54 of the *Competition Act*, and the issue of the availability of aggregate damages can only be dealt with after all these complex issues will be decided. There is some basis in fact that aggregate damages could be awarded after the common issues trial. Here, monetary relief is claimed and the common issues will be dispositive of liability and entitlement to damages for the Class. In addition, the aggregate liability of Airbnb can be determined by Airbnb's records of all Service Fees collected from the Class members. In these circumstances, I am satisfied that the proposed common issue on aggregate damages is appropriate for certification.

## D. *Rule 334.16(1)(d): The preferable procedure for the just and efficient resolution of the common questions of law or fact*

[135] The next criterion is the preferable procedure criterion, set out in Rule 314.16(1)(d). According to the test outlined by the SCC, in order to meet the preferable procedure criterion, the representative plaintiff must show (i) that a class proceeding would be a fair, efficient and manageable method of advancing the claim and determining the common issues which arise from the claims of multiple plaintiffs, and (ii) that it would be preferable to any other reasonably

available means of resolving the class members' claims (*Fischer* at para 48; *Hollick* at para 28; *Wenham* at para 77). Determining whether a class proceeding is preferable must be "conducted through the lens of the three principal goals of class action, namely judicial economy, behaviour modification and access to justice" (*Fischer* at para 22).



[136] A number of principles need to be considered when determining whether a class action is the preferable procedure (*Wenham* at paras 77-78; *John Doe FCA* at para 26). First, the preferable procedure requirement is broad enough to encompass all available means of resolving the class members' claims, including avenues of redress other than court actions (*Fischer* at paras 19-20; *Hollick* at para 31). Second, the common issues must be examined in their context, taking into account the importance of the common issues in relation to the claim as a whole (*Hollick* at paras 29-30). As such, when comparing possible alternatives with the proposed class proceeding, a practical, cost-benefit approach must be adopted to consider the impact of the class proceeding on the class members, defendants and courts (*Fischer* at para 21). Third, the preferable procedure analysis is concerned with the extent to which the proposed class action serves the overarching goals of class proceedings (*Hollick* at para 27). This involves a comparative exercise ultimately questioning whether other available means of resolving the common issues are preferable, not whether a class action would fully achieve those goals (*Fischer* at paras 22-23). Fourth, the preferable procedure requirement can be met even where substantial individual issues exist (*Hollick* at para 30).

[137] A plaintiff is expected to show some basis in fact for concluding that a class action would be preferable to any other litigation options. However, he or she cannot be expected to

address every single conceivable non-litigation option; in fact, "[w]here the defendant relies on a specific non-litigation alternative, he or she has an evidentiary burden to raise it" (*Fischer* at para 49). Yet, once some of the adduced evidence proves that such an alternative exists, the burden of satisfying the preferable procedure criterion remains on the plaintiff (*Fischer* at para 49).



[138] Moreover, Rule 334.16(2) provides a list of factors to be considered by the Court in the analysis, including: (i) the extent to which common questions predominate over individual questions; (ii) whether a significant number of class members have an interest in individually controlling the proceedings; (iii) whether the same claims have been the subject of other proceedings; (iv) whether other means of resolving the claims are less practical or efficient; and (v) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced, if relief were sought by other means.

[139] Mr. Lin submits that a class proceeding is the preferable procedure in this case, since it favors access to justice, judicial economy and behaviour modification. Furthermore, he maintains that he meets all the factors set out in Rule 334.16(2): common questions predominate over individual ones; there is no evidence of Class members having an interest in controlling individual actions; there are no individual proceedings, and only one class proceeding has been filed in a provincial court, on the basis of a different cause of action; there is no viable alternative to resolve the claims; and the class proceeding will not create greater difficulties than any other alternative.

[140] Airbnb responds that a class proceeding is not the preferable proceeding, as the difficulties in identifying Class members will overwhelm the resolution of the common issues. Airbnb's argument is once again anchored on its submissions that the Class should be limited to Guests who "saw two prices" and who "were misled". Those concerns were addressed earlier and, for the reasons discussed above and with the amended Class definition, I am not persuaded that this action will be dominated by individual issues which would be far more time-consuming that the common issues, thus rendering the action unmanageable. On the contrary, the numerous common questions to be resolved do predominate.

[141] I find little in Airbnb's submissions to convince me that Mr. Lin failed to demonstrate that a class proceeding is the preferable procedure for resolving the commons issues identified above, in the context where the Class definition is amended as discussed. After reviewing the jurisprudence on the principles relating to the preferable procedure analysis, I am satisfied that a class action is the preferable procedure in the circumstances.

[142] Because of the likely modest claims of each individual Class member, individual Class members have no interest to pursue their own separate claims and to bring separate proceedings against Airbnb. In this case, both access to justice and judicial economy make a class proceeding preferable over thousands of individual proceedings. Given the cost of individual proceedings in relation to the likely value of the claims, there does not appear to be any other means of resolving the claims of the Class members than by a class proceeding. Airbnb failed to identify any viable alternative remedy with better efficiency or providing equivalent relief. Mr. Lin mentions having approached the Competition Bureau, which possesses the power to take

enforcement action leading to possible criminal prosecution under section 54, but there is no indication that it will take any such action. Furthermore, an enforcement action under the criminal provision could not lead to recovery of damages for the Class members.



[143] In this case, a class proceeding is preferable to any other reasonably available means of resolving the Class members' claims, in light of the overarching goals of class proceedings. Compared to individual actions, a class proceeding favors access to justice because the pooling of financial resources makes the litigation possible for claims of relatively small amounts of money; the no-cost regime in this Court shield the parties from costs if they lose; and the notification requirements ensure that individuals know if they are entitled to a claim (*Wenham* at paras 86-89). Judicial economy is also favored here since a class proceeding will entail one single review of the numerous legal and factual issues raised by Mr. Lin's claim regarding the interpretation and application of the "double ticketing" provision and of section 36.

[144] I conclude that the preferable procedure criterion is satisfied in this case.

**E.** ***Rule 334.16(1)(e): Appropriateness of the representative plaintiff***

[145] The fifth and final criterion for certification as a class action concerns the ability of Mr. Lin to act as a representative plaintiff who would adequately represent the interests of the Class without conflict of interest.

[146] According to Rule 334.16(1)(e), the requirements for establishing that the proposed representative plaintiff is appropriate are that he or she: (i) would fairly and adequately represent

the interests of the class; (ii) has prepared 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 as to how the proceeding is progressing; (iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members; and (iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record. In *Dutton*, the SCC noted that the proposed representative need not be typical of the class or the best possible representative, but the court assessing this criterion should "be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class" (*Dutton* at para 41).



[147] Though a litigation plan "is not to be scrutinized in great detail" at the certification stage because it will "likely be amended during the course of the proceeding", the plan must nevertheless demonstrate that the plaintiff (and their counsel) have thought the process through, having considered the complexities of the case and procedures (*Buffalo FC* at para 148; *Rae* at paras 79, 80). There are no "fixed rules or requirements" for a litigation plan, and the appropriate content of a litigation plan will depend on the "nature, scope and complexity" of the particular litigation (*Buffalo FC* at para 150; *Rae* at para 80). As such, the jurisprudence established the following non-exhaustive list of topics to be addressed in a litigation plan: (i) the steps to be taken to identify and locate necessary witnesses and to gather their evidence; (ii) the collection of relevant documents from members of the class, as well as from others; (iii) the exchange and management of documents produced by all parties; (iv) ongoing reporting to the class; (v) mechanisms for responding to inquiries from class members; (vi) whether the discovery of individual class members is likely and, if so, the intended process for conducting those

discoveries; (vii) the need for experts and, if needed, how those experts are going to be identified and retained; (viii) if individual issues remain after the termination of the common issues, what plan is proposed for resolving those individual issues; and (ix) a plan to address how damages or any other forms of relief are to be assessed or determined after the common issues have been decided (*Buffalo FC* at para 151; *Rae* at para 79).

[148] Regarding conflicts of interest, a mere possibility of conflict is not enough to deny certification (*Infineon* at paras 150-151). Furthermore, a representative plaintiff should only be excluded if the conflict of interest "is such that the case could not possibly proceed fairly" (*Infineon* at para 149).

[149] Mr. Lin submits that he is an appropriate representative plaintiff. He claims that he is familiar with the substance of the issues, understands the role of a representative plaintiff, has proposed a detailed litigation plan taking into account the complexities of the case, has no conflict of interest, and has provided a summary of its retainer agreement with counsel. I am satisfied that there is some basis in fact in Mr. Lin's affidavits to support all of these elements. This evidence was not challenged or contradicted.

[150] Airbnb responds that Mr. Lin cannot be the representative plaintiff since no evidence shows that he meets the elements that, according to Airbnb, should allegedly be added to the Class definition. In the alternative, Airbnb pleads that a sub-class should be created for Guests like Mr. Lin who have also been Hosts, to avoid conflicts of interest. More specifically, Airbnb

submits that a conflict could develop, considering that some Guests may not have booked an accommodation if the Service Fees would have been displayed on the search results page.

[151] I am not persuaded by Airbnb's arguments on this last criterion for certification. First, Airbnb's submissions on the additional requirements for an appropriate class definition have been addressed above. Mr. Lin's claim is for Guests who made a booking on the Airbnb Platform, regardless of whether the individual would not have booked because of the additional Service Fees. It is Mr. Lin's position that the "double ticketing" offence entitles the Class members to the lower price, irrespective of their willingness to pay the higher price. Second, regarding conflicts of interest, the possibility of a conflict is not enough to prevent someone from being a representative plaintiff and to deny certification (*Infineon* at paras 150-151). A representative plaintiff should only be excluded if the conflict of interest "is such that the case could not possibly proceed fairly" (*Infineon* at para 149). Third, on the record before me, I find no factual support for Airbnb's submissions about a potential conflict of interest due to Mr. Lin being also a Host on the Airbnb Platform. Moreover, if needed, it will remain open to the common issues trial judge to create a subclass later in the proceedings, based upon the evidence at trial (*Daniells v McLellan*, 2017 ONSC 3466 at para 40).

[152] I see no serious challenge to Mr. Lin's ability to fairly and adequately represent the Class or to fulfill the role demanded of him in instructing counsel and pursuing the action diligently. He fits within the definition of the amended Class, appears to fully understand the issues and the responsibility he is taking on, and has retained experienced counsel to represent the Class. The litigation plan contained in the motion record proposes an efficient procedure for the balance of

the litigation. No evidence indicates or suggests that the case cannot proceed fairly with Mr. Lin as the representative plaintiff.

[153] In my opinion, Mr. Lin satisfies the fifth criterion for certification.

## IV. Conclusion

[154] In conclusion, I find that, on the condition that the Class definition be amended as discussed above, Mr. Lin successfully meets the legal requirements for the certification of this class action. Therefore, I will grant the motion to certify this action as a class proceeding, conditional on the amendment of the Class definition. The Order issued with these Reasons will address the points contemplated by Rule 334.17(1), in a manner consistent with the conclusions in these Reasons.

[155] I will also grant the motion to add Airbnb Payments as a defendant.

[156] Pursuant to Rule 334.39, no costs are typically awarded on a motion for certification. Neither party has sought costs, and there is no basis to depart from the principle established by Rule 334.39 and to award costs in the present motion.

**ORDER in T-1663-17**

**THIS COURT ORDERS that:**

1. This action is hereby certified as a class proceeding, conditional upon the amendment to be made to the definition of the Class, described below.

2. Arthur Lin is appointed as the representative Plaintiff.

3. The definition of the Class proposed by the Plaintiff, described as "All individuals residing in Canada who, on or after October 31, 2015, reserved an accommodation for anywhere in the world using Airbnb, excluding individuals reserving an accommodation primarily for business purposes", shall be amended by the Plaintiff to be limited to individuals who reserved an accommodation that matched the parameters of a previous search made by the individual on the search results page of the Airbnb Platform and for which a First Price or Listing Fee was displayed.

4. The nature of the claim made on behalf of the Class is as follows:

> The claim asserts a breach of section 54 of the *Competition Act*.

5. The relief claimed by the Class is as follows:

> The claim seeks damages and costs pursuant to section 36 of the *Competition Act*.

6. The questions to be certified as common issues are as follows:

*Liability to the Class under Section 54 of the Competition Act*

1. Did the Defendants clearly express a "first price" for a product to each of the Class Members in the search results screen?

2. Did the Defendants clearly express a “second price” for the same product immediately prior to each Class Member confirming and/or submitting their accommodation reservation?

3. Is the “second price” higher than the “first price” for all Class Members?

4. Were the Defendants only entitled to charge the “first price” under section 54 of the *Competition Act*?

5. Were the Class members entitled to pay to the Defendants the “first price” under section 54 of the *Competition Act*?

*Recovery for the Class under Section 36 of the Competition Act*

6. Have the Class Members suffered actual damages equivalent to the “second price” minus the “first price”, less any applicable taxes, entitling them to claim such damages pursuant to section 36 of the *Competition Act*?

7. Are the Defendants jointly and severally liable for their own conduct and that of each other?

8. Are the Class Members entitled to recovery of investigation costs and costs of this proceeding, including counsel fees and disbursements on a full indemnity basis?

9. Can an aggregate assessment of damages be made pursuant to Rule 334.28(1)?

7. The time and manner for Class members to opt out of the class proceeding are reserved to be addressed through the case management process.

8. The style of cause is modified to add Airbnb Payments UK Limited as a Defendant.

9. No costs are awarded.

"Denis Gascon"

Judge

## ANNEX A

Rules 334.16(1) and (2), and 334.18 read as follows:

| | |
|---|---|
| **Certification** | **Autorisation** |
| **Conditions** | **Conditions** |
| **334.16** (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if | **334.16** (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies : |
| (a) the pleadings disclose a reasonable cause of action; | a) les actes de procédure révèlent une cause d'action valable; |
| (b) there is an identifiable class of two or more persons; | b) il existe un groupe identifiable formé d'au moins deux personnes; |
| (c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members; | c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre; |
| (d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and | d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs; |
| (e) there is a representative plaintiff or applicant who | e) il existe un représentant demandeur qui : |
| (i) would fairly and adequately represent the interests of the class, | (i) représenterait de façon équitable et adéquate les intérêts du groupe, |
| (ii) has prepared a plan for the proceeding that sets out a workable method of advancing | (ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au |

the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,

nom du groupe et tenir les membres du groupe informés de son déroulement,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

**Matters to be considered**

**Facteurs pris en compte**

(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether

(2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :

(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;

a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;

(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;

c) le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l'objet d'autres instances;

(d) other means of resolving the claims are less practical or

d) l'aspect pratique ou l'efficacité moindres des autres

less efficient; and

(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[…]

**Grounds that may not be relied on**

**334.18** A judge shall not refuse to certify a proceeding as a class proceeding solely on one or more of the following grounds:

(a) the relief claimed includes a claim for damages that would require an individual assessment after a determination of the common questions of law or fact;

(b) the relief claimed relates to separate contracts involving different class members;

(c) different remedies are sought for different class members;

(d) the precise number of class members or the identity of each class member is not known; or

moyens de régler les réclamations;

e) les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

[…]

**Motifs ne pouvant être invoqués**

**334.18** Le juge ne peut invoquer uniquement un ou plusieurs des motifs ci-après pour refuser d'autoriser une instance comme recours collectif:

a) les réparations demandées comprennent une réclamation de dommages-intérêts qui exigerait, une fois les points de droit ou de fait communs tranchés, une évaluation individuelle;

b) les réparations demandées portent sur des contrats distincts concernant différents membres du groupe;

c) les réparations demandées ne sont pas les mêmes pour tous les membres du groupe;

d) le nombre exact de membres du groupe ou l'identité de chacun est inconnu;

(e) the class includes a subclass whose members have claims that raise common questions of law or fact not shared by all of the class members.

e) il existe au sein du groupe un sous-groupe dont les réclamations soulèvent des points de droit ou de fait communs que ne partagent pas tous les membres du groupe.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-1663-17 |
| **STYLE OF CAUSE:** | ARTHUR LIN v. AIRBNB, INC., AIRBNB CANADA INC., AIRBNB IRELAND UNLIMITED COMPANY, AIRBNB PAYMENTS UK LIMITED |
| **PLACE OF HEARING:** | VANCOUVER, BRITISH COLUMBIA |
| **DATE OF HEARING:** | DECEMBER 4-5, 2018 |
| **ORDER AND REASONS:** | GASCON J. |
| **DATED:** | DECEMBER 5, 2019 |

**APPEARANCES:**

| | |
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