

CANADA / JUDGMENT

Gauthier v. Air Canada

2024 BCSC 231

COURT

Supreme Court of British Columbia

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2024 BCSC 231 Gauthier v. Air Canada

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gauthier v. Air Canada,

2024 BCSC 231

Date: 20240212

Docket: S217110

Registry: Vancouver

Between:

Paul Gauthier and Christopher Reaume

Plaintiffs

And

Air Canada and WestJet

Defendants

And:

The Attorney General of British Columbia

Pursuant to the Constitutional Question Act, R.S.B.C. 1996, c. 68

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

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Introduction

- [1] The plaintiffs are individuals with varying forms of disabilities, including severe cases of obesity, such that they cannot lower the armrest of an economy aircraft seat, and those who are not self-reliant and require care in their daily lives and when they travel by air, must do so with a personal attendant who can provide for their care during air travel, or with service animals.
- [2] The defendants, Air Canada and WestJet, each provide air travel services in Canada and abroad.
- [3] The plaintiffs claim that contracts applicable to their carriage are unconscionable and contrary to public policy. In respect of unconscionability, they claim both under the common law and under provincial consumer protection statutes.

The Proposed Claims

- [4] The plaintiffs' proposed claims seek damages and other relief on behalf of all residents of Canada, except residents in Quebec, in respect of fares paid or to be paid in the future for additional seating that they require to accommodate their disabilities, or for the fare of attendants with whom they must travel, and/or their service animals (the "Additional Fares"). Their claims against WestJet are limited to its international flight charges.
- [5] The plaintiffs asserted that by requiring the Additional Fares, the defendants charge persons with disabilities a premium to travel by air, when compared to others who do not have the same disabilities and plead that the contracts are unenforceable because it would be contrary to public policy to enforce contracts that are blatantly discriminatory.
- [6] The plaintiffs also claim under the consumer protection legislation of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Prince Edward Island, and Newfoundland and Labrador (the "consumer protection statutes"), and asserted that charging Additional Fares constituted unfair, unconscionable and/or otherwise prohibited practices, as the defendants knew, or ought to have known, that charging persons more for air travel because they have a disability is harsh, adverse, excessively one-sided and inequitable. Depending on the language of the legislation, they claim that charging Additional Fares is an "unconscionable" or "unfair" "act", "practice", or "representation", or imposed obligations on the class members "that are excessive, harsh or unconscionable".
- [7] It follows from these causes of action, the plaintiffs argued, that the Additional Fares have unjustly enriched WestJet.
- [8] The plaintiffs seek to bring this action on their own behalves and on behalf of others who:
- (a) have a disability requiring them, under a defendant's tariff, to be accompanied by an attendant who can provide disability-related care in-flight and/or safety-related services in the event of an emergency or decompression ("Attendant"); or
 - (b) due to obesity, they cannot lower the arm rest of a coach or economy class seat; or
 - (c) have a disability that requires additional seating to accommodate that disability.
- [9] In their second amended notice of civil claim, the plaintiffs proposed one subclass with respect to WestJet:

The "WestJet Cross International Flight Class", comprised of:

- i) Every resident of Canada with a Disability who paid Additional Fare for an international flight (including a flight to the United States) operated by WestJet or an agent for WestJet from December 5, 2005 onwards, except those people who reside in Quebec;

ii) Every resident of Canada who paid Additional Fare to be an attendant on an international flight (including a flight to the United States) operated by WestJet or an agent for WestJet from December 5, 2005 onwards, except those people who reside in Quebec.

[10] The relief sought by the plaintiffs includes:

- (a) an order certifying this action as a class proceeding and appointing the plaintiffs as representative plaintiffs;
- (b) a declaration that any contract, or term of a contract, requiring payment of an Additional Fare, is void and unenforceable because it is unconscionable and contrary to the doctrines of public policy and statutory illegality;
- (c) rescission of any contract or term of a contract that required payment of Additional Fare;
- (d) a declaration that the Defendants have each been unjustly enriched by the receipt of the Additional Fares paid by the Classes;
- (f) an order that the Defendants account for and make restitution to the Plaintiffs and the other Class Members

(a) WestJet's Position

[11] WestJet contends that it is permitted to charge "per seat" for international flight itineraries under the exemption in s. 31(2) of the Accessible Transportation for Persons with Disabilities Regulations, SOR/2019-244 [ATPDR].

[12] WestJet asserted that the claims against it are in substance claims for discrimination over which this Court has no jurisdiction. They suggest that the claims depend for their legitimization on the Canada Transport Act, S.C. 1996, c. 10 [CTA] or the Canadian Human Rights Act, R.S.C. 1985, c. H-6 [CHRA]

[13] In the alternative, WestJet submitted that I ought to decline to exercise my jurisdiction, insofar as Parliament intended that the Canadian Transportation Agency (the "Agency") decide matters involving human rights considerations for persons with disabilities in the federal transportation network.

[14] In the further alternative, WestJet asserted that the claims are bound to fail and should be dismissed in accordance with r. 9-5(1) of the Supreme Court Civil Rules, B.C. Reg 168/2009 [Rules]. They argue that it is plain and obvious that the charging of Additional Fares, which is expressly permitted by regulation, would not be found to be unconscionable and/or a breach of consumer protection legislation.

[15] Finally, having submitted a Notice of Constitutional Question, WestJet asserted that the plaintiffs' claims disclose no reasonable cause of action on the basis of federal paramountcy, or, in the alternative, interjurisdictional immunity.

(b) Air Canada's Position

[16] Air Canada has not brought any application before me at this time.

(c) Constitutional Question

[17] On May 1, 2023, WestJet served a Notice of Constitutional Question pursuant to s. 8(2)(a) of the Constitutional Question Act, R.S.B.C. 1996, c. 68, on the Attorney General of Canada ("AGC") and the Attorney General of British Columbia ("AGBC") advising, in part, that:

- (a) WestJet is a defendant in a class proceeding in which a variety of relief is sought, including under the British Columbia Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 [BPCPA] in respect of WestJet's charging of fares for additional seating required by persons with disabilities on international itineraries;
- (b) The plaintiffs allege that the charging of Additional Fares is an unconscionable act or practice under the BPCPA, and that the plaintiffs and proposed class members are entitled to damages thereunder, relying on ss. 8, 9, 10, 171 and 172 of the BPCPA;
- (c) To the extent these sections prohibit the charging of Additional Fares as alleged by the plaintiffs, their applicability to WestJet's charging of Additional Fares will be challenged by WestJet, as they:
 - (i) frustrate a federal purpose (the express permission for airlines to charge Additional Fares under s. 31 of the ATPDR enacted under the CTA and the finding of the Agency that to require airlines to provide additional seating required by persons with disabilities on international itineraries free of charge would constitute undue hardship, and thus are inapplicable on the basis of federal paramountcy; and
 - (ii) significantly trammel the exercise of the core of the federal power over aeronautics, as they have the effect of regulating airlines' pricing - a key element of bilateral air transport agreements between countries - which is a power granted to the Agency pursuant to s. 86(h) of the CTA and are thus inapplicable on the basis of interjurisdictional immunity.

[18] The Attorney General for Canada elected to take no part on WestJet's application.

[19] The Attorney General of British Columbia ("AGBC") participates in these proceedings pursuant s. 8(6) of the Constitutional Question Act.

(d) The Orders Sought by WestJet

[20] In this application, WestJet seeks an order that the plaintiffs' claim be dismissed for lack of jurisdiction, or, in the alternative, that it be dismissed under r. 9-5(1)(a) of the Rules, on the basis that it discloses no reasonable cause of action. WestJet argued that the plaintiffs' claim is, in substance, a claim for discrimination over which this Court has no jurisdiction. In their alternative arguments, they suggested that the impugned conduct is expressly permitted by regulation, and that, in the further alternative, the consumer protection claims should be struck on federalism grounds.

- [21] For the reasons that follow, WestJet's application is dismissed. While this matter arises from circumstances relevant to a claim in discrimination, the plaintiffs have pleaded common law and statutory claims that are known to law as independent from human rights law or the public policy that underlies it. Moreover, it is not plain and obvious - as a matter of statutory interpretation - that the impugned conduct is expressly permitted, nor is it plain or obvious that the claim should be struck on federalism grounds.
- (e) The Legislative Scheme
- (i) The Canadian Transportation Act
- [22] Section 5 of the CTA declared Canada's "National Transportation Policy" included that transportation services be "accessible without undue obstacle", and "without barriers" to persons with disabilities.
- [23] Responsibility for determining whether there is an "undue obstacle" barrier to the mobility of persons with disabilities is assigned by the CTA to the Agency. Where such obstacles are found to exist, the Agency is also responsible for determining what corrective measures are appropriate in accordance with the CTA and human rights principles.
- [24] The term "undue obstacle" has been replaced in the CTA by the term "undue barrier", but the test applied by the Agency is in all material respects the same. The Agency is required under this test to apply "the principles of the CHRA, including the principle of reasonable accommodation" when it identifies and remedies undue barriers.
- [25] In determining whether an undue barrier exists under s. 172 of the CTA: Council of Canadians with Disabilities v. VIA Rail Canada Inc., 2007 SCC 15 at para. 115 [VIA Rail]; See also Decision No. 6-AT-A-2008 at para. 3 and Decision No. 228-AT-A-2011 at para. 25.
- [26] Pursuant to s. 25 of the CTA, the Agency has all the powers, rights and privileges that are vested in a superior court with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations, and the entry on and inspection of property.
- [27] A decision or order of the Agency may be made an order of the Federal Court or of any superior court and is enforceable in the same manner as such an order pursuant to s. 33 of the CTA.
- [28] A decision of the Agency may be appealed to the Federal Court of Appeal on a question of law or jurisdiction with leave of that court under s. 41 of the CTA. In addition, the Governor in Council may rescind or vary any decision of the Agency under s. 40 of the CTA, and a review by the Governor in Council may be sought on any question, not only those not appealable to the Federal Court of Appeal under s. 41 (Canadian National Railway v. Canada (Attorney General), 2014 SCC 40 [CNR] at paras. 46-49).

- [29] Section 86(h) of the CTA states that the Agency has the power to regulate airline "tariffs, fares, rates, charges and terms and conditions of carriage for international air service".
- [30] Section 110 of the CTA states that "except as provided in an international agreement, convention or arrangement respecting civil aviation", before commencing the operation of an international service, the carrier shall file a tariff with the Agency.
- [31] Section 111 states that all "tolls and terms and conditions of carriage" "shall be just and reasonable". "Toll" is defined in s. 2.1 as meaning "any fare, rate or charge established by an air carrier in respect of the transportation of passengers or goods or of any service that is incidental to those services".
- [32] Section 113 of the CTA gives the Agency the power to suspend or disallow any portion of a tariff that it considers is not just or reasonable, and to establish and substitute another tariff or portion thereof for any tariff or portion thereof that has been disallowed.
- [33] Section 122 of the CTA sets out a list of items that every tariff must contain.
- [34] Sections 127 and 129 of the CTA contemplate that tariff provisions may be "disallowed" by the "competent authorities of a foreign state".
- [35] Under Part V of the CTA, entitled "Transportation of Persons with Disabilities", the Agency has the power to make regulations for the purpose of identifying or removing barriers to the mobility of persons with disabilities in the federal transportation network.
- [36] Under s. 170(1) of the CTA.

The Agency may, after consulting with the Minister, make regulations for the purpose of identifying or removing barriers or preventing new barriers - particularly barriers in the built environment, information and communication technologies and the design and delivery of programs and services - in the transportation network under the legislative authority of Parliament to the mobility of persons with disabilities, including regulations respecting

- (a) the design, construction or modification of, and the posting of signs on, in or around, means of transportation and related facilities and premises, including equipment used in them;
 - (b) the training of personnel employed at or in those facilities or premises or by carriers;
 - (c) tariffs, rates, fares, charges and terms and conditions of carriage applicable in respect of the transportation of persons with disabilities or incidental services; and
 - (d) the communication of information to persons with disabilities.
- [37] Where the Agency is satisfied that regulations made under s. 170(1) of the CTA, that are applicable in relation to a matter, have been complied with, or have not been contravened, it may determine that there is an undue barrier in relation to that matter. However, if it does so, it may only require the taking of appropriate corrective measures pursuant to s. 173(3) of the CTA. It may also decline to award compensation. Consequently, if the Agency were to

determine that the failure to implement international one person, one fare constituted an undue barrier to mobility, it could not award compensation or reimbursement of expenses, as there is a regulation made under s. 170.

[38] Section 171 of the CTA states that the Agency and the Canadian Human Rights Commission ("Commission") shall coordinate their activities in relation to the transportation of persons with disabilities in order to foster complementary policies and practices and to avoid jurisdictional conflicts.

[39] Section 172(1) of the CTA provides that:

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

Remedies

- (2) On determining that there is an undue barrier to the mobility of persons with disabilities, the Agency may do one or more of the following:
 - (a) require the taking of appropriate corrective measures;
 - (b) direct that compensation be paid for any expense incurred by a person with a disability arising out of the barrier, including for any costs of obtaining alternative goods, services or accommodation;
 - (c) direct that compensation be paid for any wages that a person with a disability was deprived of as a result of the barrier;
 - (d) direct that compensation be paid up to a maximum amount of - subject to the annual adjustments made under section 172.2 - \$20,000, for any pain and suffering experienced by a person with a disability arising out of the barrier;
 - (e) direct that compensation be paid up to a maximum amount of - subject to the annual adjustments made under section 172.2 - \$20,000, if the Agency determines that the barrier is the result of a wilful or reckless practice.

(ii) The Canadian Human Rights Act

[40] Although the Agency is the preferred body to address certain issues, the Commission and Canadian Human Rights Tribunal ("CHRT") have jurisdiction concurrent with that of the Agency.

[41] Section 41(1) of the CHRA, states that the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that, among other things:

- (b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act.

(iii) The Accessible Transportation for Persons with Disabilities Regulations

- [42] The Agency enacted the ATPDR, which came into force on June 25, 2020. Section 31 of the ATPDR places certain service requirements on air carriers and prohibits them from charging Additional Fares to persons with disabilities for additional seating. The ATPDR imposes a 1 Person, 1 Fare ("1P1F") model. Section 31(2) of the ATPDR, however, excludes international flights from certain 1P1F requirements.
- [43] The requirements imposed on air carriers are expressed in Part 2 of the ATPDR, which is entitled "Service Requirements Applicable to Carriers". These requirements include, but are not limited to, assistance at check-in; priority boarding; assisting the person through security screening; assisting the person in boarding and disembarking; providing the person with an on-board wheelchair; assisting the person in moving between their seat and the washroom; assisting the person with a meal served to them, including opening packages and cutting large food portions; and assisting the person in proceeding through border clearance and in retrieving their checked baggage.
- [44] Part 2 of the ATPDR also includes requirements - ss. 50-52 - regarding seating for persons with disabilities, which, by operation of s. 31(2), air carriers are excluded from compliance with, in respect of international flights:
- a) Section 50 of the ATPDR requires an airline to accept for transport a support person in certain circumstances, and requires the airline "to provide a passenger seat for the support person that is adjacent to the passenger seat of the person with a disability";
 - b) Section 51 of the ATPDR requires an airline to accept a service dog for transport, and must provide any adjacent passenger seat necessary to ensure sufficient floor space is available for the service dog; and,
 - c) Section 52 of the ATPDR requires an airline to provide additional adjacent seating space to a passenger who needs more than one passenger seat because of the nature of their disability.
- [45] The Agency explained limiting of the 1P1F to domestic travel in the ATPDR in a Regulatory Impact Analysis Statement (Canada Gazette, Part I, Volume 153, Number 10: Accessible Transportation for Persons with Disabilities Regulations [ATPDR Regulatory Impact Analysis Statement]):

The CTA's consultations included questions as to whether some regulations currently applicable only to domestic flights involving aircraft of a certain size (i.e. under the ATR) should be extended.

Members of the disability community generally felt that robust, accessible service requirements should apply across both domestic and international travel (including the 1p1f policy, which protects those who need an attendant or service dog, for example, at no additional charge to the passenger). These stakeholders expressed frustration with uneven accessibility services and reported numerous challenges in achieving the right to accessible travel.

Industry stakeholders felt that any regulation of Canadian carriers' operations abroad should be consistent with regulations in the relevant foreign jurisdictions and voiced concern regarding overlapping or conflicting regulations across jurisdictions. Canadian air carriers also had concerns regarding unfair competition with international counterparts that might not face the same accessible service standards, and advocated for a level playing field. Finally, air stakeholders (Canadian and foreign) raised concerns regarding the extension of the 1p1f policy to international travel, for example, given international air treaty implications. Air carriers also suggested that the 1p1f requirement established in CTA jurisprudence represented potentially significant revenue loss and was therefore not appropriate to impose on industry, but rather should be covered by public funds.

Under the Regulations, most service provisions will apply to both domestic and international carriers and travel, and will also generally reflect current requirements or practices in both the United States and the European Union (EU). This addresses the need for consistency, both for members of the disability community and industry, and for regulatory alignment.

[46] The 1P1F requirement only applies to domestic travel, however, due to the need for further analysis and consultations at the international level (for example, with respect to the implications for international treaties). The 1P1F domestic requirement is included in this package given that it has been a well-established human right in Canada since 2008.

(iv) The Business Practices and Consumer Protection Act

[47] Sections 8-10 of the BPCPA provide:

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

- (2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.
- (3) Without limiting subsection (2), the circumstances that the court must consider include the following:
 - (a) that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;

- (b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect the consumer or guarantor's own interest because of physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;
- (c) that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;
- (d) that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;
- (e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;
- (f) a prescribed circumstance.

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

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

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

- (2) If a court determines that an unconscionable act or practice occurred in respect of a consumer transaction that is a mortgage loan, as defined in section 57 [definitions], the court may do one or more of the following:
 - (a) reopen the transaction and take an account between the supplier and the consumer or guarantor;
 - (b) despite any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken and relieve the consumer from any obligation to pay the total cost of credit at a rate in excess of the prevailing prime rate;
 - (c) order the supplier to repay any excess that has been paid or allowed by the consumer or guarantor;
 - (d) set aside all or part of, or alter, any agreement made or security given in respect of the transaction and, if the supplier has parted with the security, order the supplier, to indemnify the consumer;
 - (e) suspend the rights and obligations of the parties to the transaction.

[48] Sections 171-172 of the BPCPA provide:

171(1) Subject to subsection (2), if a person, other than a person referred to in paragraphs (a) to (e), has suffered damage or loss due to a contravention of this Act or the regulations, the person who suffered damage or loss may bring an action against a

- (a) supplier,
- (b) reporting agency, as defined in section 106 [definitions],
- (c) collector, as defined in section 113 [definitions],
- (d) bailiff, collection agent or debt repayment agent, as defined in section 125 [definitions], or
- (e) a person required to hold a licence under Part 9 [Licences]

who engaged in or acquiesced in the contravention that caused the damage or loss.

- (2) A person must not bring an action under this section if an application has been made, on the person's behalf, to the court in respect of the same defendant and transaction under section 192 [compensation to consumers].
- (3) The Provincial Court has jurisdiction for the purposes of this section, even though a contravention of this Act or the regulations may also constitute a libel or slander.

172(1) The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court for one or both of the following:

- (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
- (b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.
- (2) If the director brings an action under subsection (1), the director may sue on the director's own behalf and, at the director's option, on behalf of consumers generally or a designated class of consumers.
- (3) If the court grants relief under subsection (1), the court may order one or more of the following:
 - (a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;

- (b) if the action is brought by the director, that the supplier pay to the director the actual costs, or a reasonable proportion of the costs, of the inspection of the supplier conducted under this Act;
 - (c) that the supplier advertise to the public in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions that the court considers reasonable, particulars of any judgment, declaration, order or injunction granted against the supplier under this section.
 - (4) The director may apply, without notice to anyone, for an interim injunction under subsection (1) (b).
 - (5) In an application for an interim injunction under subsection (1) (b),
 - (a) the court must give greater weight and the balance of convenience to the protection of consumers than to the carrying on of the business of a supplier,
 - (b) the applicant is not required to post a bond or give an undertaking as to damages, and
 - (c) the applicant is not required to establish that irreparable harm will be done to the applicant, consumers generally or any class of consumers if the interim injunction is not granted.
 - (6) If the director applies, without notice to anyone, for an interim injunction under subsection (1) (b), the court must grant the interim injunction, on the terms and conditions it considers just, if the court is satisfied that there are reasonable grounds for believing there is an immediate threat to the interests of consumers dealing with the supplier because of an alleged contravention of this Act or the regulations in respect of a consumer transaction.
 - (7) In an action brought under subsection (1), or an appeal from it, the plaintiff is not required to provide security for costs.
 - (f) WestJet's International Tariff
- [49] The terms of the WestJet's International Tariff ("the Tariff") are incorporated into the contracts between WestJet and its passengers, which are standard-form contracts.

[50] Portions of the Tariff include:

- (J)a. Carrier may require that an attendant accompany a guest with a disability as a condition of providing transportation if the guest is not able to care for all his/her physical needs during the flight and requires special or unusual attention beyond that afforded to the general public.
- b. Carrier may require that an attendant accompany a guest with a disability as a condition of providing transportation if carrier determines that such an attendant is essential for safety in the following circumstances;
 - i. When the guest, because of a mental or cognitive disability, is unable to comprehend or respond to safety related instructions;

- ii. When the guest has impairments which affect both his/her hearing and vision with such severity that the guest is not able to establish a means of communication with the carrier's personnel sufficient to receive, assimilate and respond to safety related instructions;
- iii. When the guest has mobility impairment as severe as to be unable to assist in his/her own evacuation or don an oxygen mask in the case of decompression.
- iv. Provision of a safety attendant will be assessed on a case by case basis.
- c. In circumstances where an attendant is required by reason of the provisions of this rule, the carrier will charge the applicable fare for the seat occupied by the attendant.
- d. In circumstances where a guest requires extra seating to accommodate the guest's disability, the carrier will charge applicable fare(s) for additional seating required to accommodate the person's disability.

[51] "Attendant" is defined in the Tariff as:

a support person who is 18 years of age or older who is capable of and needed to provide assistance to a person with a disability, who because of the nature of their disability requires assistance (after departure and before arrival) with eating meals, taking medication, using the toilet, transferring to and from a passenger seat, orientation, or communication, or physical assistance in the event of an emergency, including in the event of an evacuation or decompression.

[52] Other parts of the Tariff include:

Rule 25 Transportation of a Passenger with a Disability

(A) Application

- (3) The carrier will provide services identified in this rule at no additional fare except for the provision of additional adjacent seating, for which the carrier requires the purchase of an additional fare.

(F) Services for which advance notice is required

Services - 48 hours advance notice

- (3) Subject to the Carrier's requirement for a person with a disability to provide information and/or documents identified in (4) below, the Carrier will provide the following services if requested by a person with a disability at least 48 hours before the scheduled time of departure of the person's flight:
 - (b) provide additional adjacent seats, in the following three situations;
 - (i) when the person with a disability must travel with an Attendant for transport if, because of the nature of their disability, the person with a disability after departure and before arrival, needs:

- (a) assistance with eating meals, taking medication, using the washroom;
 - (b) assistance with transferring to and from a passenger seat;
 - (c) assistance with orientation or communication; or
 - (d) physical assistance in the event of an emergency including the event of an evacuation or decompression;
- (ii) when the size of a Service dog belonging to a person with a disability is such that the person's seat does not provide sufficient floor space for the dog to lie down at the person's feet in a manner that ensures the safety and well-being of the dog and the person; or
- (iii) when a person with a disability needs more than one seat because of the nature of their disability, for example, if they are a person who has a fused limb or who is disabled by severe obesity.
- [53] Prior to 2008, WestJet charged airfare rates for domestic and international flights based on "per seat" pricing policies, as opposed to 1P1F pricing policies, with the result that people with disabilities who required additional space on airplanes could not travel by air unless they paid for additional seats or space to accommodate their disability.
- [54] At no time since the beginning of the claim period has the Tariff stated that WestJet will not charge per-seat fares to those who require additional seating for an attendant or to accommodate their disability.
- [55] For its international air service, including domestic segments of an international itinerary purchased as a single fare, WestJet charges the applicable passenger fare under the terms of its International Tariff on a per-seat basis to persons with disabilities. This includes, for example, those who are required to travel with an attendant, those who require more than one seat to accommodate their disability, and those who require more than one seat to ensure sufficient floor space for their service dog.

Background

- [56] The aviation rights of those with disabilities have been the subject of numerous decisions by the Agency and Superior Courts.
- (a) Prior Decisions of the Agency
 - (i) The Norman Decision

- [57] On January 10, 2008, the Agency rendered its decision in *Air Canada, Jazz Air LP v. Canada*, 6-AT-A-2008 [Norman], and held that the fare policies of Air Canada, Air Canada Jazz and WestJet, related to domestic air services, constituted undue obstacles to persons who require additional seating to accommodate their disabilities. Those with disabilities were, in essence, required by the contracts to pay more than other passengers to accommodate their disabilities.
- [58] The Agency confirmed that the accessible transportation provisions of the CTA "are, in essence, human rights legislation": Norman at para. 3.
- [59] In light of its finding of an undue obstacle, the Agency determined that the defendant airlines were no longer permitted to charge Additional Fares in respect of domestic air services, as this would not cause undue hardship to carriers: Norman at para. 916. The decision did not apply to "domestic segments of international trips purchased on a single fare", and ordered WestJet to implement 1P1F pricing for domestic flights: Norman at para. 487.
- [60] In Norman, WestJet and Air Canada asserted that 1P1F would be cost-prohibitive and heavily abused. The Agency noted the defendants controlled both the criteria used to qualify for a second seat and the screening process, which enabled them to limit abuse. In terms of cost, the Agency found that WestJet would forego approximately 16¢ in revenue per domestic trip; an annual decrease in revenue of 0.16%.

(ii) The Cheung Decision

- [61] On October 13, 2015, the Agency rendered Decision No. 324-AT-A-2015 [Cheung], in which a passenger with disabling spinal muscular atrophy brought a complaint against WestJet seeking additional seating to accommodate her disability on international flights.
- [62] The Agency held that "the appropriate accommodation to address Ms. Cheung's disability-related needs" included "one attendant and the provision of one extra seat, free-of-charge, for that attendant": Cheung at para. 34. WestJet's failure to provide such accommodation "constituted an obstacle to Ms. Cheung's mobility": Cheung at para. 37. Rather than shifting the burden to WestJet after finding the existence of an obstacle to show the obstacle was not "undue" - as the Agency had done in Norman - the Agency granted WestJet's request that it not consider the expansion of 1P1F to transborder and international carriage:

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

- [63] The Agency thus dismissed this complaint, stating at para. 63 that it would not consider expanding the application of 1P1F to international routes in the context of the complaint at that time because of the "unique factors that arise in the international context", including

bilateral air transport agreements between countries and code shares/alliances between carriers, and the resulting fact that "the extension of the principle of one-person, one-fare beyond Canada's borders would constitute a systemic solution that would have far-ranging implications, and, as such, could not be considered in isolation". Cheung at para. 63.

(iii) The Application of the Council of Canadians with Disabilities

[64] In 2016, the Council of Canadians with Disabilities ("CCD") filed an application against Air Canada seeking to bring the systemic case the Agency referred to in Cheung. Shortly after the CCD filed its application, the Agency stayed the complaint of the CCD, based, in part, on a regulatory review process that was underway in which the Agency was completing its adoption of the ATPDR.

[65] The test applied by the Agency in determining whether there is an undue barrier was set out in an interpretive decision of the Agency indexed at Decision No. 33-AT-A-2019 (the "Interpretive Decision"). An applicant is required to demonstrate, on a balance of probabilities, that they have a disability that, in interaction with a barrier, hinders a person's full and equal participation in society; that they faced a barrier, and some connection between their disability and the barrier.

[66] If it is determined that an applicant has a disability and faced a barrier, the onus then shifts to the carrier to either explain how it proposes to remove the barrier through a general modification to a rule, policy, practice, technology, physical structure, or anything else constituting a barrier, or, if a general modification is not feasible, an individual accommodation measure; or demonstrate, on a balance of probabilities, that it cannot remove the barrier without experiencing undue hardship.

(iv) The Interpretive Decision

[67] In the Interpretive Decision at para. 27, the Agency held that the point of undue hardship is reached only when there are constraints that make the removal of the barrier impossible, impracticable or unreasonable. Such constraints may relate to cost, economic viability, and safety.

(v) The Lukacs Decision

[68] In Decision No. 1-AT-C-A-2019 ("Lukas"), Gabor Lukacs filed a complaint against Delta Air Lines, Inc. for requiring obese passengers to buy a second seat on international flights. While the Agency confirmed it had the ability to appoint an inquiry officer or hold an inquiry to obtain evidence to decide the issue, it declined to do so, it again held that "proceeding by way of adjudication involving a single complainant is not the most appropriate means of addressing the systemic question of whether the one-person one-fare principle should be expanded to international air services".

[69] The Agency pointed to a number of factors supporting its decision including, reference to the Regulatory Modernization Initiative, which was then ongoing, and elaborated as follows:

- [60] [P]roceeding to adjudicate Mr. Lukács' application would be duplicative of other, more efficient and effective processes currently under way, namely the development of new accessible transportation regulations. Mr. Lukács correctly indicates that Parliament has given the Agency tools to prospectively prevent, and not just retrospectively address, harm to travellers. One of the most important of these tools is the making of regulations to remove and prevent undue obstacles to travellers with disabilities. Work on an integrated, binding set of accessible transportation regulations is well-advanced, and has involved consultations with the Agency's Accessibility Advisory Committee, which is composed of numerous representatives of disability rights organizations and the transportation industry, and the receipt of over 190 submissions, including from Mr. Lukács.
- [61] During these consultations, it became evident that the question of whether the one-person one-fare requirement should be extended to international flights is highly complex, as some stakeholders and experts believe such a step could, in respect of non-Canadian air carriers, be inconsistent with certain of Canada's international treaty obligations. Therefore, the Agency has determined that this question, along with several others, will continue to be considered in the second stage of work on accessible transportation regulations, which is expected to begin in late 2019.
- [62] A broad regulatory review involving a wide range of relevant stakeholders and experts is a more efficient and effective method of addressing the issues raised in the application than proceeding with an adjudication of an individual application. It will allow the Agency to consider information and advice brought forward by, amongst others, numerous groups that represent passengers who would be directly affected by the issue in question, as well as the air carriers that would be required to accommodate them.

(vi) The Yale Decision

- [70] On July 21, 2022, the Agency rendered Decision No. 95-AT-A-2022 ("Yale"), which involved a passenger complaint against Air Canada by Marcia Yale, who is blind and travels with a guide dog. Her complaint raised the lack of a 1P1F policy on an international itinerary (including both a within-Canada segment and a Canada-US segment) to ensure sufficient space for her service dog. She travelled in October 2019, but her complaint was stayed pending the finalization of the ATPDR.
- [71] Following the completion of that process, the Agency lifted the stay on Ms. Yale's application but refused to consider her application, explaining in its reasons, that, during the process for adopting the Accessibility Regulations, the airlines took the position that the Agency could not impose 1P1F pricing on foreign airlines. In para. 3, the Agency held:
- [3] For the reasons set out below, the Agency declines to determine the application, pursuant to section 37 of the CTA. As such, the Agency is not issuing a decision on the merits of the application and closes the file.
- [72] The Agency explained its reasoning as follows:

- [23] In 2016, the Agency launched its Regulatory Modernization Initiative (RMI) to seek the input of stakeholders, experts and Canadians in general on updating and improving the regulations it administers to ensure that they keep pace with changes in business models, user expectations and best practices in the regulatory field.
- [24] During the second phase of consultations, the position advanced by domestic and foreign carriers was that 1P1F for international carriage would constitute interference with pricing. Pricing is a key element in bilateral air transport agreements between countries, which are bound by the provisions of these agreements. These bilateral agreements are the foundation for the operation of international air transport.
- [25] As a result, the Agency's consideration of a 1P1F international policy must take into account constraints established in the numerous bilateral air transportation agreements to which Canada is a party. Under these international treaties, which contain detailed obligations that Canada and its trading partners must adhere to with respect to commercial air transportation, foreign carriers often have an ability to oppose policies that do not leave pricing to market forces. In addition, and perhaps most importantly, if Canada imposes a tariff requirement with which a foreign government does not agree, that foreign government has the ability to reject or disallow the provision.
- [27] Should the Agency conclude that 1P1F for international carriage should be imposed, conflicting views internationally would very likely lead to the dispute resolution or disallowance provisions of air transport agreements being triggered by other states. Disjointed international standards would introduce a greater level of uncertainty for passengers with disabilities, particularly in the case of codeshare flights or where a government or governments reject or disallow these provisions. Moreover, such disjointed international standards would put Canadian carriers at a competitive disadvantage vis-à-vis foreign carriers, as the cost of applying 1P1F to accommodate persons with disabilities would be borne by Canadian carriers and would not be borne by their direct competitors. In light of the objectives of the National Transportation Policy found in section 5 of the CTA, which include the competitiveness of Canada's national transportation system, the Agency is not willing to impose such an obligation on Canadian carriers unless and until international carriers are bound by the same obligation, as this particular type of competitive disadvantage would constitute undue hardship on Canadian carriers.
- [29] Accordingly, in order for Canada to respect the commitments it has made to other states, the Agency finds that the application of 1P1F to international carriage is best addressed through ongoing efforts to achieve international cooperation and coordination among governments.
- [30] Noting that 1P1F applied to international carriage is the only corrective measure requested in this application, the Agency exercises its discretion under section 37 of the CTA and declines to determine the application.

(vii) Unresolved Applications to the Agency

[73] After this action was filed, the CCD withdrew its application in favour of these proceedings on the basis that the CCD "can no longer be complicit in a process that has failed to address the issue of 1P1F by having an application pending before the Agency, while persons with disabilities continue to experience hardship by being required to pay additional fares for the right to travel by air as any other air traveller".

Prior Judicial Decisions

(a) Supreme Court of Canada Decisions

[74] In *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181, 1981 CanLII 29 [Bhadauria], the Supreme Court of Canada considered the development of a new intentional tort related to a plaintiff's interest not to be discriminated to the extent that that interest flows from human rights law. Chief Justice Laskin framed the issue before the Court in the following way at pages 182-183:

The issue in this appeal is whether this Court should affirm the recognition by the Ontario Court of Appeal of a new intentional tort. The tort was recognized to protect a plaintiff against unjustified invasion of his or her interest not to be discriminated against in respect of a prospect of employment on grounds of race or national origin. The case was argued in the Ontario Court of Appeal on the alternative footing that a civil right of action flowed directly from a breach of The Ontario Human Rights Code, R.S.O. 1970, c. 318, as amended by 1971 (Ont.), c. 50, s. 63; 1972 (Ont.), c. 119 and 1974 (Ont.), c. 73. Wilson J.A., having found that the tort arose at common law through the invocation of the public policy expressed in the Code as supplying applicable standards, refrained from addressing the alternative argument.

In this Court, considerable emphasis, pro and con, was laid on the question whether a breach of the Code could itself be sufficient to establish civil liability without calling in aid common law principles relating to intentional invasions of legally protected interests. It is common ground that there is no known case in this country, at least in common law jurisdictions, where such a tort is recognized on either of the two grounds on which it was posited by the plaintiff-respondent; nor were counsel able to produce any instance in a comparable foreign jurisdiction.

In my opinion, the attempt of the respondent to hold the judgment in her favour on the ground that a right of action springs directly from a breach of The Ontario Human Rights Code cannot succeed. The reason lies in the comprehensiveness of the Code in its administrative and adjudicative features, the latter including a wide right of appeal to the Courts on both fact and law. I will come to the provisions of the Code shortly. For the moment, and for the purposes of this case, it is enough to say that the naked legal question which is raised here came before the courts below and is before this Court on a motion by way of demurrer under Ontario Rule 126. The facts alleged in the statement of claim are to be taken, therefore, as provable according to their recitation. Of course, no statement of defence has as yet been delivered.

[75] Later in his reasons, at page 188, Laskin C.J.C. held that:

The comprehensiveness of the Code is obvious from this recital of its substantive and enforcement provisions. There is a possibility of a breakdown in full enforcement if the Minister refuses to appoint a board of inquiry where a complaint cannot be settled and, further, whether penalties on prosecution will be sought also depends on action by the Minister. I do not, however, regard this as supporting (and no other support was advanced by the respondent) the contention that the Code itself gives or envisages a civil cause of action, whether by way of election of remedy or otherwise. The Minister's discretion is simply an element in the scheme.

[76] In conclusion, at pages 194-195, Laskin C.J.C. held that:

In the present case, the enforcement scheme under The Ontario Human Rights Code ranges from administrative enforcement through complaint and settlement procedures to adjudicative or quasi-adjudicative enforcement by boards of inquiry. The boards are invested with a wide range of remedial authority including the award of compensation (damages in effect), and to full curial enforcement by wide rights of appeal which, potentially, could bring cases under the Code to this Court. The Ontario Court of Appeal did not think that this scheme of enforcement excluded a common law remedy, saying in the words of Wilson J.A. (which I repeat):

Nor does the Code, in my view, contain any expression of legislative intention to exclude the common law remedy. Rather the reverse since s. 14(a) appears to make the appointment of a board of inquiry to look into a complaint made under the Code a matter of ministerial discretion.

I would have thought that this fortifies rather than weakens the Legislature's purpose, being one to encompass, under the Code alone, the enforcement of its substantive prescriptions. It is unnecessary to consider here how far the Minister's discretion is untrammelled, or whether a clue to its character is afforded by the ensuing provisions for appeal to the courts from a decision or order of a board of inquiry.

The view taken by the Ontario Court of Appeal is a bold one and may be commended as an attempt to advance the common law. In my opinion, however, this is foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime which does not exclude the courts but rather makes them part of the enforcement machinery under the Code.

For the foregoing reasons, I would hold that not only does the Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the Code. The Code itself has laid out the procedures for vindication of that public policy, procedures which the plaintiff respondent did not see fit to use.

The appeal is, accordingly, allowed, the judgment of the Ontario Court of Appeal is set aside and the judgment of Callaghan J. dismissing the action is restored. In the circumstances, there will be no order as to costs, either here or in the courts below.

[77] In VIA Rail at para. 2, the Supreme Court of Canada held that:

Responsibility for determining whether there is an "undue obstacle" to the mobility of persons with disabilities is assigned by the CTA to the Agency. Where such obstacles are found to exist, the Agency is also responsible for determining what corrective measures are appropriate in accordance with the CTA and human rights principles...

Parliament's decision to use this particular legislation as the source of human rights protection for persons with disabilities ensures specialized protection, applying practical expertise in transportation issues to human rights principles.

[78] The Supreme Court of Canada further confirmed that the Agency was bound by its decision in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3, 1999 CanLII 652: VIA Rail at para. 109.

[79] In *Honda Canada Inc. v. Keays*, 2008 SCC 39, [Honda] at para. 63, a majority of the Court explained the reasoning in *Bhadauria* as follows:

[63] In that case, this Court clearly articulated that a plaintiff is precluded from pursuing a common law remedy when human rights legislation contains a comprehensive enforcement scheme for violations of its substantive terms. The reasoning behind this conclusion is that the purpose of the Ontario Human Rights Code is to remedy the effects of discrimination

(b) Decisions of Provincial Appellate and Trial Courts

[80] In *Jaffer v. York University*, 2010 ONCA 654 [Jaffer], the plaintiff student argued that it was an implied term of his contract with the university that obligated it to accommodate his disabilities. He did not plead human rights legislation or assert any claim for discrimination. At para. 44, the Ontario Court of Appeal determined that whether a claim for a breach of the duty to accommodate could proceed in the courts "depends on whether or not the pleading discloses a reasonable cause of action that does not arise solely from a breach of the Code".

[81] The court struck the claim with leave to amend if the plaintiff could point to an express term of the contract that imposed an obligation to accommodate. *Karakatsanis J.A.*, as she then was, observed that in the absence of a specific contractual term, the duty to accommodate a disability "arises from the Code", and "is a central part of the public policy enshrined in the Code" (at para. 36). On the pleading, there was no suggestion that the university had intended to bind itself to an obligation to accommodate his disability independent of its obligations under the Code. There was thus no "tenable cause of action for breach of contract" (at para. 49).

[82] *Picard v. Air Canada*, 2011 QCCS 5186 [Picard], was a class proceeding in which the plaintiffs sought damages against Air Canada for the charging of additional fares on domestic flights. The claim was brought under article 1458 of the Civil Code of Québec, CQLR c CCQ-1991 [Civil Code], which creates a cause of action for contractual fault based on a wrongful act where the relationship between the parties is governed by a contract. There is no common law equivalent to this cause of action.

- [83] The Quebec Superior Court acknowledged that the Supreme Court had ruled out any possibility of a civil action based directly on a contravention of human rights law where that legislation provided for substantive rights and a comprehensive enforcement mechanism, the implementation of which was entrusted to a designated tribunal. However, the Court agreed with some academic commentators that this position must now be broadened such that the CHRA could be enforced other than through the Commission and CHRT. In particular, the judge reasoned that at the time relevant to Bhadauria, the Ontario Human Rights Code had a provision granting exclusive jurisdiction over claims of contravention of the Code to boards of inquiry, and the CHRA contained no similar clause conferring exclusive jurisdiction over the CHRT.
- [84] *Chabot v. WestJet*, 2015 QCCS 2288, [Chabot SC] was a class proceeding against WestJet in Quebec that sought damages for people with disabilities who paid Additional Fares in Quebec for both domestic and international flights, alleging that WestJet committed a contractual fault by failing to comply with obligations under the CTA, the CHRA, or the Civil Code of Québec. Under article 1458 of the Civil Code of Québec, breach of a statute may be a civil fault that gives rise to damages.
- [85] As in *Picard*, the asserted cause of action was based on article 1458 of the Civil Code. Justice Castonguay referred to the "essence" of the claim being "an action in contractual liability for breach of an obligation under the Civil Code of Quebec and the CHRA, since the respondents relied on the appellant's pricing policy to criticize it for its discriminatory practice.
- [86] Justice Castonguay dismissed WestJet's jurisdictional challenge, finding the CTA did not grant the Agency exclusive jurisdiction, expressly or implicitly, over this issue. He held that the Agency's adjudicative powers are discretionary, indicating Parliament did not intend to dispense with the court's ability to hear claims for damages the Agency left unresolved.
- [87] At paras. 41, 46, and 51, Castonguay J. wrote:
- [41] The attribution of jurisdiction noted by the Supreme Court in *Via Rail Canada Inc.* in regard to section 172(1) does not mean, by extension, that the CTA has exclusive jurisdiction. Such jurisdiction must flow from a general interpretation of the Act, the objectives sought by the legislator, and finally, the prior application of the Act and its powers by the administrative tribunal at issue, the CTA.
- [46] If the legislator had wanted to grant exclusive jurisdiction to the CTA over the transportation of persons with disabilities, even implicitly, it would have used a term other than "may".
- [51] The Court concludes that, even giving a liberal interpretation to the Act that created the CTA and considering the CTA's application of the Act in the exercise of its jurisdiction, there is no doubt that the CTA lacks exclusive jurisdiction over the damages claimed in the present matter.

- [88] Justice Castonguay found that the Agency's statutory regime created a regulator, and that the Agency exercised its powers in a manner consistent with that role. The Agency did not replace the courts as an adjudicator of individual claims for damages:
- [47] It should also be noted that the [Agency]'s [Norman Decision], provided for future non-monetary relief and did not award any monetary "relief" or compensation to the complainants.
- [48] Clearly, in applying the Act, the [Agency] has instead adopted a global and restorative mission in regard to transportation throughout Canada, without awarding monetary relief even though it has the power to do so.
- [49] This application by the [Agency] of the powers granted by the Act fits perfectly with the objectives of the Act set out in section 5, which generally seek to provide Canadians with a transportation system that promotes all modes of transportation and that is safe, satisfying, and accessible for all citizens.
- [50] When a problem is identified, these objectives are achieved through an "ad futurum" solution that favours all Canadians, rather than awarding "relief" or indemnifying an individual complainant, even though the [Agency] has the power to do so.
- [89] Justice Castonguay concluded the CTA did not oust his jurisdiction to decide claims for damages in contract law.
- [90] The decision of Castonguay J. was upheld by the Quebec Court of Appeal in reasons indexed at *WestJet v. Chabot*, 2016 QCCA 584, leave to appeal to SCC ref'd 37027 (27 October 2016) [Chabot CA]. In those reasons Justice Hogue, for the Court, determined at paras. 23-25 and 58-59 that:
- [23] The Superior Court does not have the jurisdiction to regulate means of transportation in Canada, including the direct or indirect imposition of the type of regulations contemplated in subsection 170(1) of the CTA for the mobility of persons with disabilities.
- [24] In the Canadian constitutional framework, while judicial and legislative functions are not necessarily officially distinct from each other, the fact remains that a court of original general jurisdiction such as the Superior Court cannot take on a legislative or regulatory power that does not fall within its inherent powers without a legislative mandate to do so. The judicial function therefore generally relies on a pre-existing legislative framework and generally consists in settling particular disputes by applying pre-existing legal rules. Thus, in the absence of an enabling statutory provision, the judicial function of the Superior Court does not include the jurisdiction to impose a regulatory framework governing economic activities such as airline rates.

- [25] Thus, insofar as the purpose or effect of the class action brought by the respondents is to regulate WestJet's rates, the Superior Court does not have jurisdiction. If, however, the purpose or effect of the action instead calls on its adjudicative powers, then the question is whether this jurisdiction has been withdrawn from the Superior Court by virtue of the adjudication powers conferred upon the Agency under section 172 of the CTA.
- [58] Section 172 of the CTA, *supra*, therefore does not deprive the Superior Court of its adjudicative powers because it may be called upon to interpret the CTA in the context of the class action. This provision allows the Agency to rule on some complaints within a specific legislative framework without stripping the Superior Court's jurisdiction over similar proceedings based on contractual liability. The possibility of the Superior Court being asked to rule on certain provisions of the CTA does not mean that we must conclude that Parliament withdrew its adjudicative powers. That is certainly neither the effect nor the scope of section 172 of the CTA.
- [59] Therefore, it would not be appropriate to take the interpretive approach suggested by the appellant. The CTA does not contain any specific and express provision assigning exclusive jurisdiction over disputes such as this one to the Agency, and this is sufficient to find that the Superior Court has retained its jurisdiction to hear and ultimately decide the class action.
- [91] At paras. 70 and 73, Hogue J.A. wrote:
- [70] The objective of Part V of the CTA is mainly to "eliminate undue obstacles to the mobility of persons with disabilities from the federal transportation network". It is intended to "eliminate" these obstacles rather than compensate harm.
- [73] The objective pursued by the CTA in conferring upon the Agency the power to identify whether there are obstacles to mobility and to offer relief is different from the power of the Superior Court to determine whether a fault was committed and, if so, to award damages necessary to compensate for the prejudice this fault may have caused. The aim of each of these exercises is not the same.
- [92] In *PA v. Air Canada*, 2019 QCCS 606, *aff'd* 2021 QCCA 873, leave to appeal *ref'd* 2022 CanLII 16716 (SCC) [PA], Justice La Rosa, as she then was, found that the CHRA did not have an exclusive jurisdiction clause and held that the legislation authorized the Commission to refer complaints of discrimination to another forum.
- [93] Justice La Rosa held that "current legislative policy advocates in favour of concurrent jurisdiction" and that "the legislature's intent was not to restrict the remedies available to complainants, particularly for constitutional and quasi- constitutional rights such as these". The decision was upheld on appeal indexed at *Air Canada v. PA*, 2021 QCCA 873.
- [94] In *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182 [Macaraeg], at para. 74, Justice Chiasson noted that whether a statute "provides effective enforcement" of the right is an important indicium of the legislature's intent, and that where it does, "there is no need for enforcement outside the statute and *prima facie* there is no civil cause of action" and

rejected that rights under employment standards legislation are implied terms of employment contracts, and concluded that the statutory provisions presented a complete code for the granting and enforcement of those rights.

[95] The plaintiffs argued that Macaraeg involved an attempt to enforce statutorily conferred rights through a civil action. In those circumstances, the Court of Appeal held that a civil action for relief based on a breach of the statutory obligation could not be maintained because doing so would frustrate legislative intention.

[96] In that case the Court stated a "general rule" that there is no cause of action at common law to enforce statutorily-conferred rights. An exception to that general rule arose only "when, on a construction of the legislation as a whole, the court concludes that the legislators intended that statutorily-conferred rights can be enforceable by civil action" under a "recognized cause of action".

[97] In *Lewis v. WestJet Airlines*, 2019 BCCA 63 leave to appeal to SCC ref'd 38600 (18 July 2019) [Lewis], the plaintiff sought to bring a class proceeding alleging WestJet breached a term of her employment contract that promised a harassment free workplace. WestJet argued that properly framed, the case sought to enforce human rights and therefore the Court had no jurisdiction to hear the case.

[98] In *Lewis*, at para. 19, Justice Harris, for the Court, commented:

The terms of the Anti-Harassment provisions may reasonably be seen as derived from, and intended to implement, WestJet's statutory obligations. Without deciding the point, it also may be that WestJet has expressly incorporated into the contracts of employment alleged terms that correspond exactly to, and go no further than, its statutory obligations. In my opinion, however, standing alone, this is not sufficient to demonstrate that the court does not have jurisdiction to hear the plaintiff's claim.

[99] Justice Harris referred to *Macaraeg* at para. 22 stating:

22 as a general rule, if a right arises solely from statute, a claimant will have to look to the mechanisms provided for, or contemplated, by the statute to vindicate those rights: *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182 at para. 73. *Macaraeg* involved an attempt to enforce statutorily conferred rights through a civil action. In those circumstances, this Court held that a civil action for relief based on a breach of the statutory obligation could not be maintained because doing so would frustrate legislative intention.

[100] At paras. 44-46, Harris J.A. wrote:

[44] This is not a case of exclusive jurisdiction. It does not involve competing statutory jurisdiction like *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14 [Regina Police]. It does not involve mandatory arbitration under a collective agreement like *Weber and Ferreira*. It no longer involves issues within the exclusive jurisdiction of the Workers' Compensation Board. The cases relied on by WestJet do not

demonstrate that the combined effect of the CLC and CHRA is to oust the jurisdiction of the courts in relation to an otherwise recognized cause of action (breach of contract) either expressly or by necessary implication. Nor do they support the proposition that where the court's jurisdiction is not ousted, and no necessary jurisdictional issue is raised, the court should nevertheless treat a breach of contract claim as if it is in reality an attempt to enforce statutory rights.

- [44] This case involves a claim that, given its substantive legal character, falls within the jurisdiction of the courts as well as alleging facts that could ground a complaint before the Canadian Human Rights Tribunal. The issue then is whether there is some basis to infer that the CHRA ousts the jurisdiction of the courts.
- [45] I am unable to discern a basis to oust the jurisdiction of the courts in a case alleging breach of an employment contract engaging discrimination or harassment. Neither statute has an exclusive jurisdiction clause applicable to this case. The breach of contract claim could be advanced even if the CHRA was never enacted. If Parliament intended the CHRA to oust the court's jurisdiction over matters otherwise subject to its jurisdiction, I would expect it to do so expressly. It has not.
- [46] Further, I am not persuaded that it is plain and obvious that the CHRA ousts the jurisdiction of the courts by necessary implication. Recognizing that the legislation creates an administrative regime that is intended to be flexible, efficient, and expeditious, suggests that Parliament intended to create statutory rights capable of being vindicated by an administrative tribunal. Alone, this is not enough in my view to support an argument that by creating such a scheme Parliament intended to deprive plaintiffs of access to the courts they would otherwise enjoy.
- [101] Justice Harris found that the claim in *Lewis* was fundamentally one for breach of contract, even if WestJet's obligations under the CHRA had been incorporated into the contracts of employment, and observed that the plaintiff did not argue that WestJet's failure to fulfil the anti-harassment promise was "in and of itself, a discriminatory act": *Lewis* at para. 30.
- [102] Having found that the breach of contract claim was a "recognized independent cause of action and an independent source of rights" that fell within the Court's jurisdiction, Harris J.A. concluded that the Court's jurisdiction was not ousted by the CHRA or the Canada Labour Code, RSC 1985, c L-2, and that the breach of contract claim could be advanced even if the CHRA was never enacted: *Lewis* at para. 32.

Constitutional Principles

[103] The AGBC contended that where the Attorney General of Canada declines to participate in a proceeding to contest the validity of a provincial statute, despite being served with a Notice of Constitutional Question, the Court ought to proceed cautiously. In *OPSEU v. Ontario (Attorney General)* [1987] 2 S.C.R. 2, the Supreme Court of Canada found at para. 24 that "the Court should be particularly cautious about invalidating a provincial law when the federal government does not contest its validity".

[104] In addition to this caution, I accept that as a general rule, courts should avoid answering constitutional questions that do not squarely arise for decision and are not essential for determination of a case. As Justice Sopinka explained in *Phillips v. Nova Scotia (Commissioner, Public Inquiries Act)*, [1995] 2 S.C.R. 97 (S.C.C.) [Phillips], this policy of restraint is based on the realization that unnecessary constitutional pronouncements may prejudice future cases, with unforeseen implications. It also engages the doctrine of mootness and the need to conserve judicial resources in the administration of justice.

[105] The correct approach to deciding a constitutional question related to division of powers was affirmed by the Supreme Court of Canada in *Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10 [Murray-Hall]. There, at paras. 22-25, Chief Justice Wagner explained:

22 To decide whether a law or some of its provisions are constitutionally valid under the division of powers, courts must first characterize the law or provisions and then, on that basis, classify them by reference to the heads of power listed in ss. 91 and 92 of the Constitution Act, 1867 (*Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, [2020] 2 S.C.R. 283, at para. 26, citing *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 15).

23 At the characterization stage, what must be determined is the pith and substance of the law (*Reference re Genetic Non-Discrimination Act*, at para. 28, citing *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 26). In its jurisprudence, the Court has described the aim of this exercise as being to identify the "dominant purpose" of the law (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 29), its "dominant or most important characteristic" (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 62-63) or its "leading feature or true character" (*R. v. Morgentaler*, [1993] 3 S.C.R. 463, at pp. 481-82). At the classification stage, in turn, what must be determined is whether the pith and substance thereby defined comes within one of the heads of power of the enacting legislature (*Reference re Firearms Act*, at para. 25).

24 To ascertain the pith and substance of a law, courts look at its purpose and effects (*Reference re Firearms Act*, at para. 16). This essentially interpretative exercise is meant to be neither technical nor formalistic, to use the words of the late Professor Peter W. Hogg (*Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at p. 15-12, cited in *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 18). Indeed, in addition to the words used in the law itself, courts may consider the circumstances surrounding its enactment (*Ward*, at para. 17, citing *Reference re Firearms Act*, at paras. 17-18, and *Morgentaler*, at p. 483).

25 To analyze the purpose of a law, courts rely on intrinsic evidence, that is, the actual text of the law, including its preamble and purpose clauses, as well as extrinsic evidence, such as parliamentary debates and minutes of parliamentary committees (Canadian Western Bank, at para. 27; Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture), 2002 SCC 31, [2002] 2 S.C.R. 146, at paras. 53-54; Reference re Assisted Human Reproduction Act, 2010 SCC 61, [2010] 3 S.C.R. 457 ("Reference re AHRA"), at paras. 22 and 184). In looking at the effects of the law, courts consider both its legal effects, namely those related directly to the provisions of the law itself, and its practical effects, that is, the "side" effects arising from its application (Kitkatla Band, at para. 54, citing Morgentaler, at pp. 482-83).

[106] If a court finds that a law is valid, it should then consider whether the doctrines of paramountcy or interjurisdictional immunity apply.

(a) The Doctrine of Paramountcy

[107] The doctrine of paramountcy may justify giving precedence to a federal law where there is an operational conflict between a federal and valid provincial law or where the purpose of a federal law is frustrated: Murray-Hall at para. 84. WestJet argues only the latter, that a federal purpose is frustrated. In such circumstances, dual compliance is possible, but the provincial law is incompatible with the purpose of the federal legislation: Alberta (Attorney General) v. Moloney, 2015 SCC 51 at para. 18.

[108] In Quebec (Attorney General) v. Canadian Owners and Pilots Association, 2010 SCC 39 [COPA], the Supreme Court of Canada held that "[t]he standard for invalidating provincial legislation on the basis of frustration of federal purpose is high; permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission": at para. 66.

[109] The application of a provincial law may frustrate the federal purpose if the federal law provides a positive entitlement instead of being merely permissive; and the provincial law is more restrictive than the federal law.

[110] In Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd., 2015 SCC 53, the Supreme Court of Canada held that the principles of paramountcy and interjurisdictional immunity must be applied with restraint. With respect to the doctrine of paramountcy, the Court stated:

[21] Given the guiding principle of cooperative federalism, paramountcy must be narrowly construed. Whether under the operational conflict or the frustration of federal purpose branches of the paramountcy analysis, courts must take a "restrained approach", and harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility

- [111] In *Unlu v. Air Canada*, 2012 BCSC 60 [Unlu BCSC], Justice Adair found that the BC BPCPA was not part of the core of the federal jurisdiction over aeronautics and validly applied to Air Canada's alleged conduct in including a fuel surcharge in the tax portion of the class members' tickets, as neither paramountcy nor interjurisdictional immunity applied. She held that consumer transactions were not a core area of federal jurisdiction over aeronautics.
- [112] The decision of Adair J. was affirmed by the Court of Appeal at 2013 BCCA 112 [Unlu BCCA].
- (b) Interjurisdictional Immunity
- [113] The doctrine of interjurisdictional immunity dictates that the core of an exclusive head of power under the Constitution Act, 1867, 30-31 Vict., c. 3 (UK), can be protected from the effects of a law validly enacted by the other order of government to the extent that it impairs the federal core.
- [114] The application of a provincial law may frustrate the federal purpose if the federal law provides a positive entitlement instead of being merely permissive; and the provincial law is more restrictive than the federal law.
- [115] Where possible, a court should favour the ordinary application of statutes enacted by both levels of government. As a general rule, the common law and a statutory regime will be allowed to co-exist where they do not conflict with one another. If a court determines that the interjurisdictional immunity doctrine applies, the legislation will be read down to limit the scope of its application, or rendered inapplicable.
- [116] A restrained application of the doctrine is consistent with the flexible federalism that the constitutional doctrines such as pith and substance and federal paramountcy are designed to promote. Courts should therefore apply the interjurisdictional immunity doctrine with restraint. A court should favour, where possible, the ordinary application of statutes enacted by both levels of government.
- [117] Where there is frustration of a federal purpose, compliance with both laws is possible, but the provincial legislation interferes with a federal purpose. For example, if provincial law (allegedly) prohibits a certain action but a federal law permits it, it would be possible to comply with both if the action were avoided. However, the federal purpose would be frustrated.
- [118] In *Air Canada v. Ontario (Liquor Control Board)* [1997] 2 S.C.R. 581 [Air Canada], the Supreme Court of Canada initially defined the scope of the core federal aeronautics power by reference to the physical act of flight: "The flight and period of flight from the time the machine clears the earth to the time it returns successfully to the earth and is resting securely on the ground."
- [119] In *COPA*, at para. 27, Chief Justice McLachlan set out a two-pronged test to determine if the doctrine of interjurisdictional immunity should be invoked:

- a) At the first step, the court must determine whether the provincial law trenches on the protected 'core' of a federal competence.
- b) If it does, the court must determine whether the effect of the overlap impairs the exercise of the federal core.

[120] The "core" of a power is the "basic, minimum and unassailable content" or the "authority that is absolutely necessary to enable Parliament to achieve the purpose for which exclusive legislative jurisdiction was conferred", see *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 137.

[121] It is important to keep in mind that what is integral does not equate to what is core: *Desgagnés Transport Inc. v. Wärttilä Canada Inc.*, 2019 SCC 58 at para. 95 [Desgagnés]. In order to apply interjurisdictional immunity, a court must "identify the essential, vital elements of the head of power in question by reference to the jurisprudence": Desgagnés at para. 95.

[122] The second step of the two-pronged test requires the court to determine whether the encroachment is sufficiently serious. Rather than just 'affect' the core, the impugned legislation must impair it for interjurisdictional immunity to apply.

[123] In *Canadian Western Bank v. Alberta*, 2007 SCC 22, at para. 48, the Supreme Court of Canada stated that encroachment would involve an "adverse consequence" that placed the core "in jeopardy", although without necessarily "sterilizing or paralyzing" it.

Discussion

(a) Multiple Causes of Action

[124] In *Lewis*, the Court of Appeal held that "the same facts may be the source of different legal rights or legal rights sounding in different causes of action": at para. 21. This is a case where multiple causes of action may arise out of discriminatory circumstances.

[125] Here, unlike the plaintiff in *Bhadauria*, the proposed class members have contracts with WestJet that they allege to be unconscionable. The plaintiffs asserted, and I agree, that unconscionability is a fundamental doctrine of contract law, and exists independently of any human rights legislation. I note that this separation exists both as a practical matter and as a matter of the underlying policy.

[126] WestJet contended that the plaintiffs' claims are distinguishable from cases such as *Lewis* and *Jaffer*, as in those cases there was a pleaded contractual obligation to provide the accommodation requested, and thus an independent source of the legal right to be free from discriminatory conduct.

[127] More specifically, WestJet argued that, in *Jaffer*, the plaintiffs' claim was struck, despite the plaintiff's failure to plead human rights legislation or even that the failure to accommodate was discriminatory, noting that "[t]here is no free-standing duty to accommodate" - it "does

not exist independent of the Code", and that it is the substance, not the form, of the claim that matters: at para. 40. Yet, in Jaffer, the Court of Appeal for Ontario determined that whether a claim for a breach of the duty to accommodate could proceed in the courts "depends on whether or not the pleading discloses a reasonable cause of action that does not arise solely from a breach of the Code": at para. 44.

[128] I accept the plaintiffs' submission that the underlying subject matter may be the same, but can give rise to different legal wrongs and arguably different relief. A claim that a contract is unconscionable may well constitute a reasonable cause of action that does not arise solely from a breach of human rights legislation.

(b) Unconscionability

[129] The plaintiffs said that they are not advancing claims based on a breach of the CHRA or the CTA. Moreover, aside from their consumer protection claims, the plaintiffs said that they are not relying on statutorily conferred rights or seeking statutory remedies; they are not asking me to find that WestJet's contracts for Additional Fares are an undue obstacle under the CTA, or asking for reasonable accommodation or for this Court to regulate WestJet. Ultimately, they suggested that they are simply asking this Court to determine whether WestJet's contracts are unconscionable or contrary to public policy and, if so, to provide them with remedies.

[130] WestJet contended that discrimination forms the substance of the plaintiffs' claims, and that these claims depend for their legitimation on the CHRA or CTA, or, in the alternative, the public policy expressed in those acts. They said that complaints relating to discriminatory conduct in the federal transportation network should be dealt with by the Agency with the Commission/CHRT in a supporting role. They say that the plaintiffs' claim is plainly for discrimination insofar as it is based on alleged differential treatment due to disability.

[131] The plaintiffs contended that the ability to have an unconscionable contract set aside is a common law right and argued that the question for this Court will be primarily whether they have established the test for unconscionability, not whether they are entitled to relief under the CHRA or the CTA.

[132] Unconscionability is an equitable doctrine used to set aside unfair agreements that were formed due to an inequality in bargaining power. To set aside a bargain for unconscionability, the plaintiffs must establish:

- a. inequality of bargaining power between the parties; and,
- b. proof of substantial unfairness in the bargain: *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at para. 54 [Uber].

- [133] In *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122, the Court of Appeal confirmed that a claim based on an alleged unconscionable act under consumer protection legislation has the same essential elements as common law unconscionability: at para. 54.
- [134] The plaintiffs contended that common law rules of unconscionability do not conflict with human rights legislation or the CTA: *Tucci v. Peoples Trust Company*, 2020 BCCA 246 at para. 19 [Tucci]. Moreover, they said that not only does unconscionability entail a different legal test than what the Agency or CHRT would apply in respect of a discrimination claim, but that the elements of unconscionability are, on balance, more difficult to establish.
- [135] The plaintiffs have pleaded that WestJet's contracts for Additional Fares are "standard form" and are unilaterally prepared by WestJet and that proposed class members have no ability to bargain with WestJet over its Tariffs, pricing policies, or contracts. They say that WestJet's fares and contractual terms are a "take it or leave it" proposition, leaving the proposed class members with no alternative but to pay the Additional Fares to travel by air with WestJet.
- [136] This Court has previously noted that that unconscionability can arise in contracts of adhesion, which are contracts "in which the parties are so imbalanced in bargaining power that one party simply has no ability to negotiate terms": *Bergen v. Westjet Airlines Ltd.*, 2021 BCSC 12 at para. 75, *aff'd* 2022 BCCA 22 [Bergen]. In *Uber*, the Supreme Court of Canada noted that there are "many ways in which standard form contracts can impair a party's ability to protect their interests in the contracting process and make them more vulnerable": at para. 89.
- [137] WestJet asserted that there will always be inequality of bargaining power in the case of a standard form contract but contended that the plaintiffs have no support for their claim that class members were taken advantage of because of their disabilities, or that WestJet's charging of Additional Fares was otherwise unconscionable under consumer protection legislation.
- [138] I am not satisfied that the plaintiffs will not be able to establish an inequality of bargaining power.
- [139] In *Uber*, *Abella and Rowe JJ.* set out the following:
- [75] Improvidence must be assessed contextually (McInnes, at p. 528). In essence, the question is whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized. An undue advantage may only be evident when the terms are read in light of the surrounding circumstances at the time of contract formation, such as market price, the commercial setting or the positions of the parties (see *Chen-Wishart* (1989), at pp. 51-56; *McInnes*, at pp. 528-29; *Reiter*, at pp. 417-18).

- [76] For a person who is in desperate circumstances, for example, almost any agreement will be an improvement over the status quo. In these circumstances, the emphasis in assessing improvidence should be on whether the stronger party has been unduly enriched. This could occur where the price of goods or services departs significantly from the usual market price.
- [140] In respect of the second criteria from *Uber*, the plaintiffs pleaded that there was an improvident bargain insofar as Additional Fares may make it more difficult, and sometime cost prohibitive, for persons with disabilities to travel by air.
- [141] The plaintiffs submitted that WestJet's contracts are substantially unfair because Additional Fares are imposed on people who are least able to pay and least able to advocate for their rights, given the severity of their disabilities and social disadvantages. In *Uber*, Abella and Rowe JJ. noted that the "Court has often described the purpose of unconscionability as the protection of vulnerable persons in transactions with others": at para. 60. It is not required that there was an intention held by the stronger party to take advantage of the weaker party: *Uber* at para. 80. It is true that the plaintiffs also pleaded that substantial unfairness flows from the circumstance where class members are charged more for airline travel than other Canadian residents.
- [142] WestJet suggested that as a matter of the plaintiffs' pleadings, the improvidence discussed by Abella and Rowe JJ. in *Uber* may only be realized to the extent that the experiences of class members is compared to those of others; it contends that the conduct can only be legally wrongful because it allegedly places a burden on persons with disabilities that is not placed on able-bodied persons who do not require additional seating to travel - the charging of "a premium" for persons with disabilities to travel by air. WestJet argued it would follow that the essence of the claim was the differential treatment of persons on a protected ground. Yet, 'difficulties' and 'costs' are not implications that may only be suffered in the context of discrimination and may nonetheless mark or flow from an improvident bargain.
- [143] The plaintiffs further argued that their common law claims are not "merely duplicative" of any applicable discrimination claims because they do not suffer from the same jurisdictional limitations as an order from the Agency. They suggest that, as the Quebec Courts found in the Chabot SC and Chabot CA, the remedies available through the courts are broader than those applicable in the Agency context. In principle, they suggest, this is consistent with the Supreme Court of Canada's finding in *Pioneer Corp. v. Godfrey*, 2019 SCC 42 [Godfrey] that the availability of punitive damages indicates that common law claims are not merely duplicative. There is force to the plaintiffs' submission that the limit on the monetary compensation for pain and suffering under the CTA is narrower than the jurisdiction of this Court.
- [144] I am mindful of Abella and Rowe JJ.'s reminder in *Uber* that:

[78] Because improvidence can take so many forms, this exercise cannot be reduced to an exact science. When judges apply equitable concepts, they are trusted to "mete out situationally and doctrinally appropriate justice" (Rotman, at p. 535). Fairness, the foundational premise and goal of equity, is inherently contextual, not easily framed by formulae or enhanced by adjectives, and necessarily dependent on the circumstances.

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

(c) Jurisdiction

[146] As the Court of Appeal did in *Lewis*, accepting that the plaintiffs are pleading a case in breach of contract that is a recognized independent cause of action with an independent source of rights, I must determine whether the Court's jurisdiction should be ousted through the enactment of the applicable human rights legislation.

[147] The plaintiffs contended that the claims they advance were based on recognized rights that fall within the Court's jurisdiction, and that none of the cases *WestJet* relied upon sufficiently supported its position that recognized common law contract claims have been extinguished by the CHRA or the CTA.

[148] While the plaintiffs' proposed claim does not refer to the CTA or CHRA, or plead any breaches thereof, *WestJet* submitted that it is an artful pleading designed to avoid the argument being made on this application and does not change the fact that the stated basis for the claim of unconscionability is that the charging of Additional Fares is "blatantly discriminatory". *WestJet* contended that the proposed claim is plainly one for discrimination, dressed up in the language of common law causes of action to attempt to avoid the claim being struck.

[149] Even if I find that I have jurisdiction over some or all of the plaintiffs' claims, *WestJet* submitted that I should decline to exercise it, as Parliament clearly intended that claims relating to a failure to accommodate a passenger's disability in the federal transportation network be decided by the body best-placed to do so, due to its specialized expertise: the Agency. They argued that this intention is supported by the legislative scheme and the comments of the Supreme Court in *VIA Rail*, and that there is no common law equivalent to the claim made in *Chabot SC* and *Picard*.

[150] I note that the plaintiffs argued that consumer protection statutes are sources of rights that are obviously within the Court's jurisdiction, and neither the Agency or the CHRT can decide claims or issue relief under those statutes. I agree.

(d) Parliament's Intention

- [151] Some statutes operate as "comprehensive codes" and are intended to supplant rather than supplement the common law. In some cases, a statute may also specifically state that it is intended to displace the common law, and such a statement will be effective. For example, the Criminal Code, R.S.C. 1985, c. C-46 specifically sets out the rules for applying the common law in criminal cases in ss. 8 and 9. If a right arises solely from statute, a plaintiff will have to look to the mechanisms provided for, or contemplated, by the statute to vindicate those rights: *Macaraeg* at para. 73.
- [152] WestJet asserted that even if this Court has jurisdiction based on a recognized independent cause of action and independent source of rights, through the CTA and creation of the Agency, Parliament has implicitly removed the jurisdiction of superior courts in this area. They suggest that "matters involving human rights considerations for persons with disabilities in the federal transportation network" are properly within the Agency's jurisdiction. In other words, WestJet argued that Parliament created a comprehensive scheme, primarily under the CTA with the CHRA in a supporting role, for the identification and resolution of barriers to the mobility of persons with disabilities in the federal transportation network. It argued that the scheme includes both wide-ranging remedial authority, including the ability to order the cessation of the discriminatory conduct as well as compensation for pain and suffering and for wilful or reckless conduct, as well as a broad right of review.
- [153] The plaintiffs argue that if Parliament intended to oust the jurisdiction of a Superior Court, it must do so with "clear and explicit statutory wording to this effect": *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 at para. 46, 1998 CanLII 771. There is a presumption that Parliament does not intend to abrogate common law rights: see *Janus v. The Central Park Citizen Society*, 2019 BCCA 173 at para. 24 [*Janus*], *Lewis* at para. 32, and *Godfrey* at para. 85. It is undisputed that neither the CHRA nor the CTA have exclusive jurisdiction clauses. The plaintiffs asserted that the test to determine whether common law claims have been ousted by "necessary implication" makes clear that Courts retain jurisdiction over their claims. They said that the applicable factors are:
- i. the alternative statutory dispute resolution process and whether there is a privative clause;
 - ii. the nature of the dispute and its relation to the rights and obligations created by the overall scheme of the legislation; and,
 - iii. the capacity of the scheme to afford effective redress.
- [154] The plaintiffs rely on *Godfrey*, *Tucci*, *Janus*, and *Hopkins v. Kay*, 2015 ONCA 112 [*Hopkins*] that consider whether a common law right of action has been legislatively ousted.

- [155] In *Godfrey*, the question was whether the Competition Act, RSC 1985, c C-34 ousted the common law tort of civil conspiracy. The Supreme Court of Canada reiterated the matters to be considered in deciding whether or not to oust the common law by necessary implication as including: (i) whether Parliament intended to "occupy the whole field"; (ii) whether the common law is "not in any sense additive; it is merely duplicative"; and (iii) whether there is a "new and superior method of remedying a breach": *Janus* at para. 86.
- [156] *Tucci and Hopkins* concerned whether privacy legislation ousted the common law cause of action for breach of privacy. In *Tucci*, Justice Groberman set out the legal principles to be applied:
- [19] While some statutes are, indeed, codes that comprehensively regulate a domain and completely replace the common law, such statutes are comparatively rare. More often statutes modify the common law in particular ways, leaving it intact except to the extent that it has been displaced. As a general rule, then, the common law and a statutory regime will be allowed to co-exist where they do not conflict with one another.
- [20] Of course, where a statute is in direct opposition to a common law principle, the two cannot co-exist. As statutes overlay the common law, the statute will prevail in cases of direct conflict.
- [157] In *Janus*, the issue was whether the Residential Tenancy Act ousted the ability to bring a common law claim for personal injury against a landlord.
- [158] In the context of determining whether the Personal Health Information Protection Act [PHIPA] was an exhaustive code that ousted common law invasion of privacy rights, the Court of Appeal for Ontario in *Hopkins* said:
- [52] The above comparison leads me to conclude that allowing actions based on *Jones v. Tsige* to proceed in the courts would not undermine the PHIPA scheme. The elements of the common law cause of action are, on balance, more difficult to establish than a breach of PHIPA, and therefore it cannot be said that a plaintiff, by launching a common law action, is "circumventing" any substantive provision of PHIPA
- [159] In *1193652 B.C. Ltd. v. New Westminster (City)*, 2021 BCCA 176, Justice Dickson for a unanimous Court wrote:
- [66] In determining whether the Legislature intended to enact a comprehensive code encompassing all aspects of a subject matter, courts draw on the full range of interpretive principles and techniques available. For example, in addition to conducting a textual and purposive analysis, a court may consider the legislative history and debate surrounding the enactment of the statute in question: *Perron-Malenfant v. Malenfant (Trustee of)*, [1999] 3 S.C.R. 375 at paras. 28--35. Legislation that establishes a complete regulatory scheme or expressly deals with all aspects of a matter will generally be found to be exhaustive

- [160] WestJet contested the applicability of jurisprudence on which the plaintiffs rely concerning the legislative ousting of common law causes of action. It stated that in each of those cases, there was a "contest" between a well-established common law cause of action and a statute, with one party arguing that the enactment of the statute ousted the availability of the common law claim.
- [161] WestJet further argued that these cases are applicable to the instant facts insofar as they did not involve discriminatory conduct, which, it suggests cannot ground a valid common law cause of action in light of the Supreme Court's decision in Bhadauria.
- [162] As set out above, however, I am not satisfied that the plaintiffs' unconscionability claims solely arise from human rights law.
- [163] The plaintiffs argued that in addressing the issue of jurisdiction, it is important to keep in mind that some statutes deal expressly with jurisdictional issues by conferring exclusive jurisdiction on one forum at the expense of another. For example, the British Columbia Labour Relations Code, R.S.B.C. 1996, c. 244, ss. 99-100, allocates jurisdiction either to the Labour Relations Board or the Court of Appeal depending on the nature of the issue. The Canada Labour Code, R.S.C. 1985 c. L-2, as a further example, confers exclusive jurisdiction on arbitrators to adjudicate disputes arising from the interpretation and application of collective agreements.
- (i) The Privative Clause
- [164] The plaintiffs argued that the CHRA does not contain a privative clause and say that in Lewis at para. 43, the Court of Appeal made clear that the existence of that dispute resolution process is not enough to show that "Parliament intended to deprive plaintiffs of access to the courts they would otherwise enjoy. The plaintiffs argued that where the CHRT declines to hear complaints regarding transportation matters, the dispute resolution process under the CHRA is not immediately the proper forum for these claims.
- [165] The plaintiffs contended that while there is a privative clause in the CTA, that is not determinative, as the statutory dispute resolution process under the CTA is not designed for the resolution of all complaints, as the Agency's own conduct demonstrates. They pointed to the fact that the Agency has repeatedly exercised its discretion to decline to decide whether charging Additional Fares on international flights is an undue obstacle.
- [166] The plaintiffs also relied upon the certification of a class action against WestJet in Bergen with respect to its baggage fees as support for the viability of their claims against WestJet. There, Justice Francis noted that "the Agency is empowered to hear individual claims with respect to WestJet's baggage fees", but dealt with the existence of the Agency's jurisdiction under the preferable procedure criteria and did not use the existence of the Agency's dispute resolution powers as a basis to oust her jurisdiction to hear the claims: Bergen at para. 97.

(ii) The Nature of the Dispute

[167] WestJet argued that it was clear that the Agency is meant to adjudicate transportation matters, despite the lack of an exclusive jurisdiction clause. They relied on a passage from Via Rail where Justice Abella stated:

112 Part V of the Canada Transportation Act was enacted to confirm the protection of the human rights of persons with disabilities in the federal transportation context. The history of this regulatory scheme shows that it was Parliament's intention that what is now Part V of the Act be interpreted according to human rights principles and that "transportation legislation rather than human rights legislation should be used" to enforce the accessibility standards provided in the predecessor legislation, the National Transportation Act, 1987, R.S.C. 1985, c. 28 (3rd Supp.) (House of Commons Debates, vol. VI, 2nd Sess., 33rd Parl., June 17, 1987, at p. 7273 (Hon. John C. Crosbie)).

[168] Moreover, in noting that the same evaluative balancing was required in respect of the issue of undue hardship in the human rights context, and the test of "as far as practicable" under the CTA at the relevant time, in Via Rail the Court stated that "[t]hat is precisely why Parliament charged the Agency with the public responsibility for assessing barriers, not the Commission. The Agency uniquely has the specialized expertise to balance the requirements of those with disabilities with the practical realities - financial, structural and logistic - of a federal transportation system": at para. 138.

(iii) Effective Redress

[169] The plaintiffs contended that the ouster of this Court's jurisdiction would leave them and potential class members without a remedy because there is no just and appropriate relief available through another tribunal. They asserted that they have no remedy for WestJet's conduct except through the courts, because the Agency has refused to decide the issue of international 1P1F, and there is no evidence the CHRT has heard, or will hear, a complaint involving this issue.

[170] WestJet submitted there are two answers to this. First, it was Parliament's legislative choice to allow the Agency discretion over whether to hear complaints made to it - this is "simply an element in the scheme". Referring to the Agency decisions set out above, it exercised its discretion to decline to adjudicate complaints on three occasions, but neither appeal nor review of those decisions by the Governor-in-Council appears to have been sought by any of the complainants, nor, apparently, have they pursued a complaint to the Commission on the basis that the Agency has refused to hear them. And second, there has been no challenge to the constitutionality of the regulations enacted by the Agency that expressly allow the conduct at issue. WestJet submitted that the plaintiffs have remedies, but that they are simply choosing not to pursue them.

- [171] WestJet contended that Parliament clearly intended that the legislative scheme set out above be the mechanism by which claims of discrimination be resolved, by two bodies with particular expertise in adjudicating such claims. This is particularly so in respect of the Agency, which has specialized expertise in policy issues that affect transportation, and a mandate to balance a number of factors in determining obligations on carriers to accommodate persons with disabilities.
- [172] The remedies available to complainants through the Agency are restricted as set out above. WestJet contended that under s. 172 of the CTA, if the Agency determines there is an undue barrier, it has the power to order a wide range of remedies, including appropriate corrective measures to be taken, as well as monetary compensation for pain and suffering of up to \$20,000 CAD, and up to an additional \$20,000 CAD if the Agency determines that the barrier is the result of a wilful or reckless practice.
- [173] WestJet argued that the Agency has an adjudicative role with respect to matters of transportation of persons with disabilities, and has the power under the CTA to inquire into a matter in relation to which a regulation could be made under s. 170(1) in order to determine whether there is an undue barrier to the mobility of persons with disabilities.
- [174] Moreover, under the CTA, review is available with leave, through a statutory appeal on questions of law or jurisdiction, review by the Governor-in-Council on any question, and judicial review of the latter's decisions. In respect of decisions of the CHRT, judicial review is available.
- (e) Conclusion and Possibility to Decline Jurisdiction
- [175] Having regard to the law and submissions canvassed, I am not satisfied that the jurisdiction of this Court in a case alleging, inter alia, unconscionability is ousted. The applicable statutes do not lead to exclusive jurisdiction, and an unconscionability claim could be advanced absent their existence. Parliament has also not made express that jurisdiction over the instant matters should be ousted. Moreover, I am not satisfied that it is plain and obvious that this Court's jurisdiction has been ousted by necessary implication.
- [176] WestJet argued that I should nonetheless decline jurisdiction and that doing so would not operate an injustice on the plaintiffs. WestJet repeated that claims relating to a failure to accommodate a passenger's disability in the federal transportation network be decided by the Agency, and that, in fact, the Agency has rendered such a decision in Yale.
- [177] The plaintiffs maintained that they have valid causes of action and should be allowed to pursue them. They referred to *Canada (Attorney General) v. British Columbia Investment Management Corp.*, 2019 SCC 63:
- [36] In deciding whether to exercise its jurisdiction, a court must determine the essential nature of the claim. A superior court may decline to exercise its jurisdiction if it concludes a party is using "artful pleading" to bring a claim in an inappropriate forum. However, a party is also entitled to make genuine strategic choices about how to pursue a claim. If the pleadings

disclose a reasonable basis for pursuing a valid claim in a provincial superior court, the party advancing the claim is generally entitled to pursue it... [Emphasis added, citations omitted.]

[178] I note that some submissions were made at this point on the "essential character" test set out by the Supreme Court of Canada in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14. Like in *Lewis*, this is not a case of competing statutory jurisdiction: at para. 44.

[179] In light of the discussion above, I am not satisfied that it is plain and obvious that jurisdiction should be declined.

(f) Section 31(2) of the ATPDR

[180] WestJet argued that in any case, the plaintiffs' claim may be precluded by operation of s. 31(2) of the ATPDR, which excludes international flights from certain 1P1F requirements. WestJet suggested that this provision renders it plain and obvious that the plaintiffs' claims will fail. The plaintiffs opposed any such suggestion. The AGBC made submissions in respect s. 31(2) and the Constitution Act, 1867, some of which I consider here.

[181] WestJet contended that there is very clear support with respect to why the Agency adopted the permissive approach it did in s. 31(2). It had carried out a regulatory modernization initiative, through which it sought and received comment from a variety of stakeholders, including members of the public. It considered the submissions of some of those stakeholders that imposing international 1P1F would be undesirable due to the possibility of disjointed international standards if foreign states disallowed the Agency's attempt to do so through its bilateral air transport agreements, and the competitive disadvantage that would be placed on Canadian carriers if they were the only ones required to provide additional seating at no charge on international itineraries, which, in the Agency's view, would constitute undue hardship.

[182] WestJet argued that having gone through this exercise; the Agency decided that it was not desirable to impose international 1P1F, and implemented this through an express exemption to the prohibition on charging for services provided to persons with disabilities.

[183] The plaintiffs argued that it is inappropriate for WestJet to rely on the Agency's transportation service providers covered by the ATPDR, a guide or other evidence in support of its interpretation of s. 31(2) of the ATPDR and contended that it would be an error to strike the plaintiffs' claims based on this evidence. They contended that the meaning of the one sentence WestJet relies on in the guide is ambiguous at best and should not be taken as a clear expression of the Agency's intentions to insulate airlines from civil liability. They argued that the fact that WestJet is pointing to interpretive aids demonstrates it is not plain and obvious s. 31(2) was intended to extinguish the plaintiffs' claims.

[184] I am unable to agree with the plaintiffs' submission that this evidence is inadmissible on the application before me. Regulatory impact analysis statements were deemed admissible to aid in the interpretation of regulations in *Unlu BCCA*.

(i) WestJet's Position

[185] WestJet argued that it is expressly permitted by s. 31(2) of the ATPDR to charge Additional Fares on international flights, and that, as a result, I cannot find that doing so is discriminatory. It argued that the proper avenue to challenge the express permission in s. 31(2) on the basis that it is discriminatory would be a constitutional challenge under s. 15 of the Charter, and not a civil claim against the party who is simply doing what it is permitted to do by the legislation. WestJet submitted that the latter is a collateral attack on the legislation, and the plaintiffs' claim must fail on that basis alone.

[186] WestJet further submitted that that conduct is expressly permitted by law, and that has never been found discriminatory, cannot be unconscionable. The difficulty with this submission is that it is squarely at odds with the Agency's decision in *Norman*, insofar as domestic flights are concerned, and I can see no principled basis for ignoring the findings of the Agency with respect to adversity, one-sidedness or inequity. Moreover, I have not been referred to any authority to suggest that unconscionable conduct - as it is expressed in *Uber* - cannot otherwise have been permitted by law and/or must have been found to be discriminatory.

(ii) The Plaintiffs' Position

[187] The plaintiffs argued that whether s. 31(2) of the ATPDR was intended to shield WestJet from civil liability is a question of statutory interpretation that must consider the language of the regulations, their objective, and the enabling provision under the CTA, and that this analysis would not support WestJet's interpretation. They contended that the ATPDR are expressly not intended to be exhaustive, and were adopted to improve conditions for people with disabilities. That the ATPDR address some but not all of the issues people with disabilities face, the plaintiffs continue, should not be interpreted as shielding WestJet from liability. If the ATPDR was a complete answer to this case, the plaintiffs asserted, it would also have been a complete answer in the litigation in Quebec, canvassed above.

[188] While WestJet argued that s. 31(2) of the ATPDR gives it express permission to charge Additional Fares on international flights, the plaintiffs argued that the Agency has merely chosen not to address the issue, due to its limited authority over foreign airlines - outlined in *Yale* - which leaves the door open for the courts to address it.

[189] Moreover, the plaintiffs argued that WestJet must overcome the presumption against interpreting legislation in a manner that would interfere with common law rights. To overcome this presumption, there must be "precise and explicit direction from the legislature", so as to shield the common law from inadvertent legislative encroachment: *Bryan's Transfer Ltd. v. Trail (City)*, 2010 BCCA 531 at para. 45. They argued that it is not

plain and obvious that s. 31(2) of the ATPDR is a "precise and explicit direction" that the court cannot consider whether the applicable contracts are unconscionable.

- [190] The plaintiffs further argued that it is well-established that "mere compliance with a statute does not, in and of itself, preclude a finding of civil liability": *Ryan v. Victoria (City)*, [1999] 1 SCR 201 at para. 29. In *Wakelam v. Johnson & Johnson* 2011 BCSC 1765 [Wakelam], for example, the plaintiff alleged that cough syrup manufacturers misrepresented their products' safety for use in young children. In 2008, Health Canada directed manufacturers to re-label the medicines to instruct consumers that their products should not be used for children under the age of six. The plaintiff claimed the defendants knew their products were unsafe for young children before Health Canada issued its direction, and sought damages for misrepresentation under the BCPA, breaches of the Competition Act, unjust enrichment and tort.
- [191] In *Wakelam*, the defendants argued they could not be liable because they complied with Health Canada's regulations regarding "the labelling and packaging, and the offering, exposing and advertising for sale of drugs, the specifications of packages of drugs, and the use of any substance as an ingredient in any drug": at para. 22. The plaintiff did not dispute this.
- [192] Justice Grauer nonetheless found it was not plain and obvious that the plaintiff's claims were bound to fail because "while the Health Canada regime is no doubt intended to protect consumers from misrepresentation and deception, whether it is also intended to insulate manufacturers of drugs from civil liability to consumers is a different question": at para. 39.
- [193] WestJet submitted that *Wakelam*, has no application as the regulatory scheme in that case did not expressly permit the defendants to make misrepresentations.
- [194] The plaintiffs contended that WestJet must establish that despite the lack of express language, it was nonetheless the intention of Parliament to narrow the remedies and forums available to people with disabilities, by enacting human rights legislation.
- [195] More broadly, the plaintiffs contended that s. 31(2) must be interpreted harmoniously with the scheme and object of the ATPDR as a whole, and that those are expressly not exhaustive. Section 2(a) of the ATPDR states "[f]or greater certainty, nothing in these Regulations is to be construed as limiting the duty to accommodate under the CHRA or any other Act of Parliament". Section 2.1 of the ATPDR states: "[t]hese Regulations are to be interpreted as requiring that persons with disabilities be treated with dignity."

(iii) The AGBC's Position

- [196] The AGBC submitted that s. 31(2) of the ATPDR permits airline carriers to charge Additional Fares but does not require them to do so. The section is structured as a prohibition, followed by an exemption from that prohibition. It does not prohibit airline carriers from charging Additional Fares for international travel but also does not create a positive entitlement for them to do so where such charges would conflict with valid provincial laws

(or the common law). Moreover, the AGBC submitted, the Agency could have, but did not, create a right or entitlement to charge Additional Fares when it drafted the ATPDR.

(iv) Conclusion on Section 31(2) of the ATPDR

[197] Applying the test from *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980, 1990 CanLII 90 (S.C.C.) [Hunt], and having considered *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22 at para. 43 [Trotman], I am not satisfied that it is "perfectly clear" or "plain and obvious" that the pleadings in this case disclose no reasonable cause of action. As the question related to s. 31(2) of the ATPDR turns on statutory interpretation, I find that the plaintiffs have put forward a sufficiently "arguable" interpretation that will permit their claim to proceed.

(g) Constitutional Question

[198] WestJet suggested that the plaintiffs' claims under the applicable Consumer Protection Statutes should be struck as disclosing no reasonable cause of action on the basis of federal paramountcy or, in the alternative, interjurisdictional immunity.

(i) Federal Paramountcy

[199] The doctrine of federal paramountcy provides that if there is an operational conflict between otherwise valid provincial legislation and federal legislation, or if the provincial legislation interferes with the purpose of the federal legislation, the provincial legislation will be considered inoperative to the extent that it purports to affect the federal matter: COPA at para. 62.

[200] WestJet argued only the second of these criteria - frustration of a federal purpose - suggesting that the applicable provisions of the BPCPA frustrate the purpose of the CTA. In making this allegation, WestJet is subject to a high burden of proof: *Murray-Hall* at para. 85. The plaintiffs oppose these arguments, as does the AGBC, and the AGC declined to participate in these proceedings.

(ii) The Federal Purpose

[201] The plaintiffs and the AGBC agreed that, read in its statutory context, the purpose of s. 31(2) of the ATPDR should be understood to be consistent with the purpose of the ATPDR and the role of the Agency; namely to remove barriers to the transportation of people with disabilities.

[202] While WestJet did not suggest the purpose of the ATPDR is irrelevant, it argued that it is obvious that the relevant purpose for the paramountcy analysis is the purpose of the section itself, particularly in this case where it is an exemption to the rest of the legislative scheme. It is the purpose of this section that WestJet alleged is frustrated, not the general purpose of the ATPDR.

- [203] WestJet added that the instant purpose is evinced not only by the express permission in s. 31(2) of the ATPDR to charge Additional Fares on international flights, but also by the Agency's decisions in Cheung and Yale and the concerns that the Agency identified with mandating 1P1F for Canadian airlines on international flights, noted in those decisions as well as in the ATPDR regulatory impact analysis statement. In Yale, for example, the Agency stated that "[p]ricing is a key element in bilateral air transport agreements between countries, which are bound by the provisions of these agreements. These bilateral agreements are the foundation for the operation of international air transport": at para. 24. They say that, in result, the Agency found it was not desirable to impose international 1P1F and crafted s. 31(2) with an express exemption.
- [204] Individual provisions in any legislation are not to be read in isolation from the whole of the statute in question. As the Supreme Court of Canada held in Murray-Hall, courts should consider the impugned provisions "in light of their interaction with the scheme to which they belong": at para. 31. The purpose of s. 31(2) should be understood in a manner that is consistent with the purpose of the ATPDR and the role of the Agency: to remove barriers to the transportation of people with disabilities.

(iii) Frustration of Federal Purpose

- [205] WestJet submitted that prohibiting airlines from charging Additional Fares would be a clear frustration of the federal purpose it proposes. WestJet acknowledges that without more, "mere permissive federal legislation does not suffice" to establish a frustration of a federal purpose. It submitted, however, that the "more" that is required is established here. It submits that the facts are distinguishable from COPA, where the Court said as follows:
- [68] One must also reject the argument that Parliament deliberately implemented a permissive regulatory framework for the purpose of encouraging the widespread construction of aviation facilities. The difficulty is that while Parliament has occupied the field, there is no proof that the Governor in Council deliberately adopted minimal requirements for the construction and licensing of aerodromes in order to encourage the spread of aerodromes. As discussed above, invocation of federal paramountcy on the basis of frustration of purpose, as opposed to operational conflict, requires clear proof of purpose; mere permissive federal legislation does not suffice. That proof is lacking here. Accordingly, this branch of the paramountcy argument cannot succeed.
- [206] The plaintiffs argued that consumer protection statutes are laws of general application and that there is thus a presumption that they apply to WestJet. They argued that rather than frustrate the purpose of the ATPDR, the consumer protection statutes provide an additional layer of protection for consumers and are entirely consistent with the purpose of the regulations in the form they propose it, which I accepted above.

- [207] The AGBC submitted that I can properly interpret the ATPDR so as to allow the concurrent operation of both laws. Both laws are intended to be remedial. The ATPDR are intended to remove barriers to the transportation of people with disabilities. The BPCPA is intended to provide protection to consumers in the sale of goods. In this case, the provincial statute provides an added layer of protection for consumers in British Columbia who purchase airline tickets.
- [208] The doctrine of paramountcy is to be applied with restraint. The standard for invalidating provincial legislation on the basis of frustration of a federal purpose is high, and that WestJet bears the burden of proof to do so: Unlu BCSC at para. 65.
- [209] The restrained approach to paramountcy was reaffirmed by the Supreme Court of Canada in Murray-Hall where the Court found that a provincial prohibition on the home cultivation of cannabis plants did not conflict with the purpose behind federal legislation that exempted the same conduct from the Criminal Code, which could only be used to prohibit conduct, not permit it. The plaintiffs contend that while Murray-Hall dealt with Parliament's criminal law power (as opposed to its power over aeronautics), the case demonstrates the Court's reluctance to interfere with the operation of a valid provincial scheme.
- [210] The AGBC argues that the ATPDR are analogous to the legislative scheme in Murray-Hall, which involved a permissive federal scheme and a prohibitive provincial one. In Murray-Hall, the Court found that an exemption provision in the federal legislation was permissive and did not create an entitlement or positive right to engage in the activities covered by those exceptions or exemptions. Although the Court was addressing criminal legislation made pursuant to the federal government's power over criminal law, the same principles should apply here. As set out above, permissive legislation will not generally lead to the application of the doctrine of paramountcy.
- [211] In Unlu BCSC, the BPCPA was found to apply validly to Air Canada's alleged conduct in including a fuel surcharge in the "tax" portion of the class members' tickets, as neither paramountcy nor interjurisdictional immunity applied. As this Court observed, it would be "absurd" to suggest that the Agency would mandate a requirement that was prohibited under provincial consumer protection legislation: Unlu BCSC at para. 67.

(iv) Paramountcy and the Common Law

- [212] The AGBC argued that the application of the doctrine of paramountcy in this case would have only a limited impact. If charging the Additional Fares offends the doctrine of unconscionability, the Additional Fares would violate not only the BPCPA, but the common law. As set out above, the BPCPA is simply a codification of the existing common law doctrine of unconscionability. Unconscionability at common law and under the BPCPA has the same essential elements. Unlike the common law, the BPCPA places the onus of proof on the defendant, however, the substance of the common law doctrine of unconscionability is otherwise unchanged under the statute.

[213] The AGBC argued that the doctrine of paramountcy does not apply to an inconsistency between the common law and a valid legislative enactment. If the Court were to find an inconsistency between the BPCPA and the ATPDR, it would mean that the Court deemed the ATPDR to be inconsistent with the common law. The paramountcy doctrine does not operate in these circumstances to permit the federal government to avoid the operation of the common law.

(v) Conclusion

[214] I conclude that the doctrine of paramountcy does not require that the applicable provincial statutes be rendered inoperative. The plaintiffs and AGBC have proposed an interpretation of s. 31(2) of the ATPDR that could render that section compatible with the BPCPA. Moreover, WestJet's interpretative framework is premised on a narrower view of the impugned section - absent necessary statutory context - than the applicable case law demands.

(h) Interjurisdictional Immunity

[215] WestJet contended that this is a clear case where consumer protection legislation would trammel the exercise of federal power. They suggest that the regulation of fares goes to the core of the federal aviation power. WestJet acknowledges that courts will be hesitant to apply the doctrine of interjurisdictional immunity in an area where it has not previously been applied: *Unlu BCCA* at para. 34. It contended, however, that its application to new circumstances is not foreclosed in novel circumstances.

[216] The plaintiffs and AGBC responded that the regulation of airline prices does not fall within the protected core of federal jurisdiction, and even if it does fall within the protected core of federal jurisdiction, the consumer protection legislation would not seriously impair it.

[217] The AGBC added that the doctrine of interjurisdictional immunity has limited application as an aspect of Canadian constitutional analysis and is generally reserved for situations that are already covered by precedent. Absent a genuine inconsistency, the AGBC argued that courts will favour an interpretation of federal legislation that allows the concurrent operation of both laws, and to apply interjurisdictional immunity to a novel situation, the Court must identify some exceptional rationale for extending the doctrine.

(i) The Federal Core

[218] WestJet submitted that aeronautics falls under the federal peace, order, and good government power: COPA. The Supreme Court has defined the scope of the power as "[t]he flight and period of flight from the time the machine clears the earth to the time it returns successfully to the earth and is resting securely on the ground": *Air Canada* at para. 72. In COPA, at para. 31, the Supreme Court of Canada reviewed the scope of Parliament's core power over aeronautics, and determined that it consisted of "the regulation of the operation of aircraft", as well as the regulation of the operation, design, and location of airports. It was also found that provincial legislation may apply to aviation-related matters in some

circumstances.

- [219] WestJet suggested that the regulation of fares falls within the core of the aeronautics power insofar as the imposition of 1P1F in the international context would implicate the bilateral discussed above agreements.
- [220] In *Unlu BCSC*, Justice Adair found that the BPCPA was not part of the core of the federal jurisdiction over aeronautics and validly applied to Air Canada's alleged conduct in including a fuel surcharge in the tax portion of the class members' tickets. She held that consumer transactions were not a core area of federal jurisdiction over aeronautics. The decision of Adair J. was affirmed by the Court of Appeal in *Unlu BCCA*.
- [221] The AGBC asserted that consumer transactions are not part of the physical act of flight as they are not essential to the operation of the aircraft or to the operation of the airport. The plaintiffs added that, except for a general regulatory requirement that airfares be "reasonable", airfares are not directly regulated in Canada. On that basis, they argued that it is difficult to see how federal control over airline prices is "absolutely necessary" to the federal power over aeronautics in these circumstances.
- [222] WestJet did not refer me to any precedent to ground their version of the federal core, and although that is not necessarily determinative, I do not find that the record here supports an expansion of that core to novel circumstances.

(ii) Impairing the Core

- [223] WestJet submitted that this is a clear case where consumer protection legislation would significantly trammel the exercise of the federal power, as it has the effect of regulating airlines' pricing, dictating that they must provide free additional seating where required by persons with disabilities, and may not charge the posted fare applicable to other passengers.
- [224] WestJet argued that the imposition of 1P1F in the international context would not only dictate fares and create "a competitive disadvantage" for Canadian carriers but that it would also result in "disjointed international standards" and conflicting views internationally (as no other countries require 1P1F for international travel). Such circumstances, they argued "would very likely lead to the dispute resolution or disallowance provisions of air transport agreements being triggered by other states" (with reference to *Yale*, at para. 27).
- [225] The AGBC argued that even if consumer transactions are a core area of federal jurisdiction over aeronautics, the provisions of the BPCPA do not impair the exercise of the federal core; rather, they are entirely compatible with the federal legislation.
- [226] The AGBC contended that the BPCPA simply protects consumers from unconscionable transactions and codifies the common law doctrine of unconscionability. Its provisions do not explicitly prohibit airline carriers from charging Additional Fares, and do not otherwise impair Parliament's power to regulate airline carriers' fares. Rather, ss. 8-10 of the BPCPA

are entirely compatible with the federal protected core; to find otherwise would be to reach the "absurd" conclusion that Parliament intended to entitle airline carriers to be able to engage in unconscionable transactions, a conclusion the AGBC argues this Court rejected over a decade ago in Norman.

[227] As I have set out above, based upon the reasoning in Phillips, courts should avoid answering constitutional questions that do not squarely arise for decision and are not essential for determination of a case. In light of my finding with respect to the federal core, I need not make any determination on whether the federal core might be trammelled.

Conclusion

[228] I am not satisfied that this Court's jurisdiction has been or should be ousted in this case, nor am I satisfied that it is plain and obvious that the plaintiffs' proposed claims, to the extent they were implicated in WestJet's application to strike, will plainly and obviously fail.

[229] WestJet's application is therefore dismissed. "

"The Honourable Chief Justice Hinkson"

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