CITATION: Airia Brands v. Air Canada, 2015 ONSC 5352
COURT FILE NO.: 50389CP
DATE: 20150826

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Airia Brands Inc., Startech.Com Ltd. and QCS-Quick Cargo Service GMBH Plaintiffs	L. Visser and Charles M. Wright, for the Plaintiffs
- and -	
Air Canada, AC Cargo Limited Partnership, Societe Air France, Koninklijke Luchtvaart Maatschappij N.V. dba KLM, Royal Dutch Airlines, Asiana Airlines Inc., British Airways PLC, Cathay Pacific Airways Ltd., Deutsche Lufthansa AG, Lufthansa Cargo AG, Japan Airlines International Co., Ltd., Scandinavian Airlines System, Korean Air Lines Co., Ltd., Cargolux Airline International, Lan Airlines S.A., Lan Cargo S.A., Atlas Air Worldwide Holdings Inc., Polar Air Cargo Inc., Singapore Airlines Ltd., Singapore Airlines Cargo PTE Ltd., Swiss International Air Lines Ltd., Quantas Airways Limited, and Martinair Holland N.V. Defendants	Katherine L. Kay, Danielle K. Royal and S. Hosseini for the Defendants, Air Canada and AC Cargo Limited Partnership John P. Brown, Brandon Kain and T. D. Chapman-Smith, for the Defendant, Cathay Pacific Airways Ltd. Paul J. Martin and Laura F. Cooper, for the Defendant, Asiana Airlines Inc. S. Bhattacharjee, A.T. McKinnon and Jon Smithen, for the Defendant, Korean Air Lines Co. Ltd. R. Russell and Zirjan Derwa, for the Defendant, British Airways PLC **HEARD:** December 15, 16, 17, 2014.

CERTIFICATION MOTION

LEITCH J.:

1. The Plaintiffs seek an order certifying this action as a class proceeding.

Introduction

2. The materials filed on this motion were summarized in reasons relating to a jurisdiction motion heard shortly before this motion was heard.

3. The background facts summarized in those reasons are relevant to this motion as is the fact that, as a result of the jurisdiction motion, I have stayed the action against absent foreign claimants, described more fully below.

4. I note that the Defendants describe this proposed class proceeding as "sweeping" and one involving "multiple insurmountable problems". They claim in para. 5 of their factum that "in an effort to avoid addressing the complex and varied nature of transactions for Airfreight Shipping Services that are at issue in this proceeding, at the 11th hour, the Plaintiffs attempted to recast their case for certification by delivering a factum that seeks to limit their proposed common issues to an alleged conspiracy to increase the fuel and security surcharges component of the pricing for Airfreight Shipping Services."

5. However, the Plaintiffs say that at its core, this case has always been about surcharges. They point to the detailed allegations in the statement of claim, the focus of their experts on surcharges, the materials they filed on settlement approval motions and the nature and scope of the guilty pleas in Canada for engaging in a conspiracy to fix the price of fuel surcharges for air cargo shipment from Canada in contravention of s. 45 of the *Competition Act*, R.S.C. 1985, c. C-34 (as in force during the class period).

Background Facts

6. The proposed class is to include persons who directly purchased Airfreight Shipping Services for shipments to or from Canada and indirect purchasers who purchased Airfreight Shipping Services for shipments to or from Canada through one or more intermediaries such as a freight forwarder. The class will not include persons who purchased Airfreight Shipping Services from integrated carriers, persons who have commenced litigation independently of this action and absent foreign claimants.

7. Two of the proposed representative Plaintiffs are indirect purchasers and the third is a German freight forwarder who purchased Airfreight Shipping Services from at least some of the Defendants.

8. The Plaintiffs' factum outlines in paras. 25 to 44 what are air cargo shipping services, how such services are priced, who provides these services, who purchases such services and what such services look like from start to finish.

9. Mr. David Rowsell was retained by the Defendants to provide an overview of the freight forwarding industry. He addressed in an extensive affidavit the role of freight forwarders in the shipment of airfreight, their services and the arrangements made with shippers and suppliers of Airfreight Shipping Services.

10. Mr. Rick Erickson was retained by the Defendants to provide an overview of the international air freight industry.

11. The affidavits from the representatives of the Defendants describe the market –driven and competitive nature of pricing for Airfreight Shipping Services, the different categories of rates established for certain circumstances, the variability of rates based on overall market circumstances and many other factors, such as, type of cargo, distance, season,

capacity, special handling requirements and the significant role of freight forwarders (who are either customers or competitors, depending on their services). The Defendants disagree with the Plaintiffs' expert economist, Dr. Lamb, that integrated carriers do not compete with their services. Representatives of the Defendants (in particular Air Canada) have given evidence that in its experience, integrated carriers have become key competitors. Competitors also vary depending on the route or OD Pairing.

12. In para. 21 of their factum, the Defendants observe that:

> the Plaintiffs' evidence was largely consistent with the Defendants' evidence;
>
> the Airfreight Shipping industry is complex and comprised of a number of different industry participants that may be both competitors and customers of each other;
>
> prices for Airfreight Shipping Services are highly variable, product-specific, market-specific and subject to negotiation and discounting;
>
> there is a geographic component to Airfreight Shipping Services such that supply and demand can vary between each origin-destination pairing as well as in each direction; and
>
> both the direct purchaser representative Plaintiffs typically passed on all surcharges to their customers.

13. The Defendants have described, in paras. 36 to 97 of their factum, the air cargo industry including industry participants, the main players in the industry, the service provided by freight forwarders, the types of air cargo services, supply and demand conditions, airfreight shipping markets and pricing of Airfreight Shipping Services including TACT rates, published tariff rates, contract rates, ULD or pallet pricing, freight all kinds ("FAK") rate, "spot" rates and rebate or incentive agreements dependent on volume.

14. The Defendants emphasize the varying type of cargo transported on particular routes, that pricing reflects the unique demand and supply conditions of that particular geographic market, competitors are different in certain locations, there are seasonality issues and treaty obligations that must be considered. According to the Defendants there is "overwhelming evidence" that there is no single market for Airfreight Shipping Services.

The certification criteria

15. Certification of an action as a class proceeding is mandatory where the requirements in s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992 c.6 (the "*CPA*") are met.

16. The criteria in s. 5(1) of the *CPA* are as follows:

> (a) the pleadings or the notice of action disclose a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;

(c) the claims or defenses of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(1) would fairly and adequately represent the interests of the class;

(2) has a plan which sets out a workable method for the advancement of the proceedings on behalf of the class, including notification of class members; and

(3) does not, on the common issues, have an interest in conflict with the interests of other class members.

Important points from the *Microsoft* and *Sun-Rype* decisions

17. In *Pro-Sys Consultants Ltd.* v. *Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477 ("*Microsoft*"), the proposed class was made up of ultimate consumers, indirect purchasers, who acquired *Microsoft's* products from re-sellers, who themselves purchased the products either directly or indirectly from *Microsoft* or from other re-sellers higher up the chain of distribution. It was alleged that *Microsoft* had overcharged for certain operating systems and application software. The plaintiff claimed that as a direct consequence of *Microsoft's* unlawful conduct, it and all of the class members paid, and continued to pay, higher prices for *Microsoft* operating systems and application software than they would have paid absent the unlawful conduct. The plaintiff alleged causes of action under s. 36 of the *Competition Act*, in tort for conspiracy and intentional interference of economic interest, and in restitution for unjust enrichment, constructive trust and waiver of tort.

18. The decision from the Supreme Court of Canada in *Microsoft* is important to this case because the court concluded that indirect purchasers do, as a matter of Canadian law, have a cause of action against a party who has effectuated the overcharge at the top of the distribution chain that has allegedly injured the indirect purchasers as a result of the overcharge being "passed on" to them through the chain of distribution.

19. The court reiterated that the class representative must show some basis in fact for each of the certification requirements set out in class proceedings legislation, other than the requirement that the pleadings disclose a cause of action. The court referenced the court's decision in *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158.

20. The court also observed at para. 101 that the standard of proof does not require evidence on a balance of probabilities. It does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action: rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding.

21. Further, each case must be decided on its own facts; there must be sufficient facts to satisfy the certification judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merit stage by reason of the requirements having been met (paras. 102 – 104).

22. To establish commonality, evidence that the acts alleged actually occurred is not required; rather, the factual evidence required at the certification stage goes only to establishing whether these questions are common to all class members.

23. If common issues that ask whether loss to the class members can be established on a class wide basis require the use of expert evidence in order for commonality to be established, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. It must offer a realistic prospect of establishing loss on a class wide basis so that if the overcharge, for example, is eventually established at the trial of a common issue, there is a means by which to demonstrate that it is common to the class. The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question, and there must be some evidence of the availability of the data to which the methodology is to be applied. The court specifically noted that resolving conflicts between the experts is an issue for the trial judge and not one that should be engaged in at certification (see paras. 114 – 126).

24. The question of whether damages assessed in the aggregate are an appropriate remedy can be certified as a common issue. However, this common issue should only be determined at the common issues trial after a finding of liability has been made. The ultimate decision as to whether the aggregate damage provisions of the *CPA would* be available is one that should be left to the common issues trial judge. The failure to propose or certify aggregate damages or another remedy as a common issue does not preclude a trial judge from evoking the provisions if he or she considers it appropriate (see paras. 127 – 135).

25. With respect to whether a class action is the preferable procedure, the court noted that in *Microsoft* there were common issues related to the existence of the causes of action and to loss to the class members. The loss-related issues could be said to be common because there was an expert methodology that had been found to have a realistic prospect of establishing loss on a class wide basis. If the common issues were resolved, they would be determinative of *Microsoft's* liability and of whether passing on of the overcharge to the indirect purchasers had occurred. Because such determinations would be essential in order for the class members to recover, a resolution of the common issues would significantly advance the action (see paras. 136 – 141).

26. The companion action to *Microsoft* was *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 S.C.R. 545 ("*Sun-Rype*"). Unlike *Microsoft*, that case concerned a class made up of both direct and indirect purchasers.

27. In *Sun-Rype*, the Supreme Court of Canada relied on *Microsoft* to find that indirect purchasers had a right to bring an action. The issue the court had to deal with was

whether complications resulting from having a class of both direct and indirect purchasers were sufficient to dismiss the action and if not how it affected certification.

28. Stated briefly, the majority of the court concluded that the presence of both direct and indirect purchasers in a class did not warrant dismissal of the action. The court found that double or multiple recovery would not result where direct or indirect purchasers were contained in the same class and expert evidence at the trial of common issues determined the aggregate amount of overcharge. The court noted that a court has the power to alter damage awards and settlement in relation to awards previously received in other jurisdictions and if a party establishes a double recovery could result (paras. 7 – 21).

29. However, the court concluded that the class could not be certified. Although the pleadings disclosed causes of action and common issues as in *Microsoft*, the case did not meet the certification requirements because there was no identifiable class of indirect purchasers. There was insufficient evidence to demonstrate some basis in fact that two or more persons would be able to determine if they were, in fact, class members. The court noted that the challenge in certifying a proceeding lies where insufficient evidence exists to demonstrate some basis in fact that two or more persons would be able to determine if they were, in fact, class members.

30. A class proceedings' purpose is to provide a more efficient means of recovery for plaintiffs who suffered harm but for whom it was impractical or unaffordable to commence an individual claim. That purpose is subverted when a class proceeding moves forward without determining two or more persons who would be able to demonstrate loss suffered because of the alleged over-chargers.

31. The court found that the plaintiff failed to produce evidence establishing a basis in fact that at least two class members would be able to prove during the class period they bought a product with the food product in issue. The indirect purchasers would not be able to know if an item they purchased contained that food product. Therefore despite harm the indirect purchasers may have suffered because of an alleged price-fixing, indirect purchasers were not able to self-identify and prove individual harm (see paras. 52 – 70).

32. Bearing in mind these principles from *Microsoft* and *Sun-Rype*, I will first deal with the requirement under s. 5(1)(b) of the *Class Proceedings Act* that there is an identical class of two or more persons that would be represented by the representative Plaintiffs.

The s. 5(1)(b) requirement – an identifiable class of two or more persons that would be represented by the representative Plaintiffs

33. The definition of the class originally proposed by the Plaintiffs was as follows:

> All persons (excluding Defendants, their respective parents, employees, subsidiaries, affiliates, officers, directors, persons currently resident in Australia who paid more than AUD$20,000 for the carriage of goods to and from Australia by air during the period January 1, 2000 to January 11, 2007, and persons who commence litigation in a jurisdiction other than Canada prior to

> the conclusion of the trial of the common issues) who purchased Airfreight Shipping Services* during the period January 1, 2000 to September 11, 2006, including those persons who purchased Airfreight Shipping Services through freight forwarders, from any air cargo carrier, including, without limitation, the Defendants, but not including Integrated Air Cargo Shippers.**
>
> *Airfreight Shipping Services means airfreight cargo shipping services for shipments to or from Canada (excluding shipments to and from the United States).
>
> **Integrated Air Cargo Shipper is defined as an air cargo shipper that manages an integrated system of people, airplanes, trucks and all other resources necessary to move airfreight cargo from a customer's point of origin to the delivery destination, and for greater certainty, includes but is not limited to FedEx, UPS, DHL and TNT.

34. As a result of the conclusion on the jurisdiction motion, the definition of the class will be amended to exclude absent foreign claimants.

35. Proposals to amend the class definition were made by both the Plaintiffs and the Defendants during the hearing of this motion. One amendment proposed by the Defendants was to define absent foreign claimants as persons who reside outside Canada, entered into contracts for Airfreight Shipping Services outside Canada and suffered any alleged losses outside Canada except those who expressly consent to the jurisdiction of this court. I agree this is a better definition of absent foreign claimants than originally proposed by the Defendants, as explained in the reasons relating to the jurisdiction motion.

36. As a result of an argument raised by the Defendants at the hearing of this motion, the Plaintiffs agreed that unnamed co-conspirators should also be excluded from the class and they proposed that those entities be specifically defined to resolve the concern expressed by the Defendants.

37. In my view, to include these exclusions in the class definition does not offend the requirement described by Chief Justice McLachlin in *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46, [2001] 2 S.C.R. 534 at para. 38 that it is essential that the class be defined clearly at the outset of the litigation. I am satisfied that this proposed definition meets the "Dutton" requirements and states objective criteria by which members of a class can be identified. It bears a rational relationship to the common issues asserted by all class members, it does not depend on the outcome of the litigation, any particular persons' claim to membership in the class can be determined by stated, objective criteria and it is not "unnecessarily broad".

38. While the Defendants at para. 129 of their factum, asserted generally that the proposed class definition is "over-reaching, complicated, not objective and overly vague, such that putative class members will not be able to identify whether they are a member of the proposed class", they outlined what they submitted were three significant problems in addition to the issue they raised with respect to co-conspirators.

39. Firstly, they asserted that the exclusion of persons, who commence litigation in a jurisdiction other than Canada prior to the conclusion of the trial of the common issues is "highly problematic" because any proposed class member who commences litigation against anyone for any reason will be excluded and membership in the class will be variable until the conclusion of the common issues trial.

40. With respect to this point, I agree with the Plaintiffs' position that it is implicit in the definition that reference to litigation commenced elsewhere relates to the alleged conspiracy and if that needs to be expressed explicitly that can be done.

41. In my view, the fact that this inclusion, designed to ensure no person receives double recovery, does not raise an identification problem that justifies a finding that the s. 5(1)(b) criteria is not met.

42. The Defendants took the position that the definition of "Integrated Air Cargo Shipper" as an air cargo shipper that manages an integrated system of people, airplanes, trucks and other resources, etcetera and includes certain named parties requires analysis to determine whether it applies to any particular air cargo shipper. If the parties with their knowledge of the industry believe that the definition requires further specification by identifying specific integrated carriers that can be done.

43. The third concern of the Defendants was that, although the Plaintiffs state that the purchasers of freight products shipped by air are not members of the proposed class, this is not clear from the proposed definition as those persons may also have purchased Airfreight Shipping Services. I agree with the Plaintiffs' statement that: "the proposed class includes persons who purchased Airfreight Shipping Services. Whether these same persons also purchased products shipped via Airfreight Shipping Services is irrelevant".

44. As set out above, there must be some "basis in fact" for a finding that there is an identifiable class of two persons. In addition, a class definition should use objective criteria; the definition should not turn on the merits of the claim; there must be sufficient evidence to show some basis in fact that two or more persons will be able to determine if they are, in fact, a member of the class; there must be some basis in fact to demonstrate that the information necessary to determine class membership is possessed by the putative class members; the Plaintiffs have an obligation at the certification stage to introduce evidence to establish some basis in fact that at least two class members can be identified; and, this is a relatively low evidentiary standard.

45. There is no issue that two of the representative Plaintiffs have produced air weigh bills that disclosed their purchase of Airfreight Shipping Services. This is consistent, as the Plaintiffs assert, with the evidence relied on by the representative Plaintiff in *Microsoft* where the court found that, by the representative Plaintiff adducing proof that he purchased the product in question in the form of an invoice, he had adduced evidence demonstrating that class membership was determinable and established some basis in fact that there was an identifiable class.

46. I am satisfied that the s. 5(1)(b)criteria is met.

47. As previously noted there were a number of class definitions exchanged by counsel during the hearing of this motion. The Plaintiffs were content with what was described as the "Defendants' Latest Version" in principle subject to some minor revisions. I trust that counsel can agree on those revisions.

48. I will turn next to the requirement under s. 5(1)(a) that the pleadings disclose a cause of action.

49. As the economic expert evidence relied on by the Plaintiffs and the Defendants is relevant to this issue (and all of the other certification requirements) I will describe that evidence here.

The Expert Evidence

50. The Plaintiffs retained Dr. Russell Lamb, an economist, to provide an opinion whether class members would have been impacted by the Defendants' alleged conspiracy to fix, raise, maintain and stabilize fuel and security surcharges and whether there exists a method to determine class wide damages suffered by class members as a result of the Defendants' alleged price fixing conspiracy using formulaic methods based on evidence common to all class members.

51. According to Dr. Lamb, base prices for wholesale air cargo shipping services are formulaic and based upon a common schedule for purchasers of such services. Thus any factor which elevated the price, such as the alleged conspiracy, would have caused prices to be higher for all or nearly all direct purchasers. He also concluded that purchasers who bought from freight forwarders were similarly harmed and at least some of the higher prices paid by freight forwarders would have been passed on to all or nearly all class members who purchase from them.

52. He ultimately concluded that he could use a benchmark analysis to determine the extent by which prices paid by direct purchasers for air cargo shipping services were higher. The extent to which these higher prices were passed through by freight forwarders to their customers could be measured using multiple regression analysis.

53. In response to the report prepared by the Defendants' expert, Ms. Margaret Sanderson, Dr. Lamb completed a second opinion reaffirming his conclusions in his first report and in light of Ms. Sanderson's suggestions making modest revisions to the methodology for measuring damages that he had first proposed.

54. In affirming his earlier finding of class wide impact, he specifically disagreed with Ms. Sanderson's finding that there is no method to determine class wide impact. He asserted that she ignored the important feature of a global market for air cargo shipping services. He also asserted that she ignored important features of the alleged conspiracy and failed to provide adequate economic analysis to support her findings. Further, he contended that many of her analyses are either wrong, as a matter of economics, or irrelevant.

55. He acknowledged that there are pricing variations for air cargo shipping services which he opined are a common feature of many markets, but it is wrong to infer, as Ms.

Sanderson did, that such pricing differences mean that a conspiracy would not raise the prices for all class members by the same percentage and thus it is impossible to measure damages on a class wide basis.

56. Dr. Lamb and Ms. Sanderson also had a difference of opinion with respect to the issue of whether integrated cargo carriers compete in the same market as the Defendants. In his second report, Dr. Lamb reaffirmed his conclusions that integrated carriers should be excluded from the class.

57. Dr. Lamb also reiterated in his second report his original findings that it is possible to measure class wide damages suffered by direct purchasers citing his experience in measuring damages arising from fuel surcharges, such as the ones alleged in this matter. He further reiterated the appropriateness, and feasibility of, undertaking the multiple regression analyses described in his first report.

58. As Plaintiffs' describe, Dr. Lamb will not be doing a "bottom-up analysis" but rather will be doing a "bottom-down analysis".

59. Ms. Sanderson was retained by the Defendants to address whether a class wide method exists to determine the existence of, and the extent of, any harm to members of the proposed class and whether the approach proposed by Dr. Lamb provided a workable class wide method to address these issues. Her conclusion was that no class wide method existed that will determine the existence of, or the extent of, harm to the members of the proposed class and the method proposed by Dr. Lamb cannot be applied on a class wide basis using evidence common to all members of the proposed class.

60. Ms. Sanderson replied to Dr. Lamb's second report and reiterated that his suggested methodology cannot be used to determine class-wide damages and he made what she described as several "false assumptions", which will be discussed further in these reasons.

61. Neither expert has been cross-examined.

The s.5(1)(a) requirement – the disclosure of a cause of action in the pleadings.

62. As reiterated in *Microsoft*, the same standard as that applicable on a motion to dismiss applies in relation to this criteria: a Plaintiff satisfies this criteria unless it is plain and obvious and beyond doubt that the Plaintiff's claim cannot succeed.

63. There is a very low threshold to prove the existence of a cause of action (see *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, [2011] O.J. No. 5049 at para. 176 aff'd 2012 ONSC 3692, [2012] O.J. No. 3120 (Div. Ct.) for a summary of the principles applicable to the cause of action requirement).

64. In the Fourth Fresh as Amended Statement of Claim, the Plaintiffs assert causes of action based on a tort of conspiracy and pursuant to ss. 36 and 45 of the *Competition Act*..

65. The applicable version of s. 45(1) (b) of the *Competition Act* in force at the time of the Defendants' alleged conduct makes it an offence to conspire, combine, agree or arrange

with another person to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof.

66. Section 36 of the *Competition Act* allows persons who have suffered loss or damage as a result of conduct that is contrary to Part VI of the *Competition Act* (which includes s. 45) to sue or recover from the wrongdoers, an amount equal to the loss or damage suffered.

67. What was contentious on this certification motion was whether the Plaintiffs had properly pled a breach of former s. 45 of the *Competition Act* and whether a claim for common law conspiracy was disclosed by the pleadings.

68. The Defendants referenced the Fourth Fresh as Amended Statement of Claim and took the position that it is "crystal clear" that this case is about the price of Airfreight Shipping Services overall and it does not just focus on surcharges. They note also that the common issues refer to the overall pricing and not just to surcharges.

69. As the Defendants note, the current wording of s. 45 has removed the market impact requirement. However, under the applicable version, the "old s. 45", there is a requirement that the conspiratorial conduct unduly lessened competition and unreasonably enhanced price.

70. The Defendants emphasize that the legal framework in the United States where there is no "unduly lessening requirement" is entirely different and yet the Plaintiffs rely on a US expert.

71. According to the Defendants the Plaintiffs have addressed the conspiratorial conduct by alleging an agreement but have not addressed the undue lessening of competition in the way the law requires.

72. The Defendants' position is that Dr. Lamb's methodology flows from his statement that there is a global market. And his methodology is inconsistent with the facts, as will be further discussed below.

73. The Defendants further emphasize their position that to establish a violation of s. 45 to ground their case, the Plaintiffs must prove an agreement, an undue lessening of competition flowing from the agreement, they must define the market, consider who was in the market, consider behaviour in the market and whether there has between an undue lessening of competition.

74. The Defendants assert that while the Plaintiffs on this motion have to show there is a methodology whereby this issue can be addressed on a common basis, the Plaintiffs have not done so.

75. According to the Defendants, any determination of whether there has been undue lessening of competition contrary to s. 45 of the *Competition Act* and competitive harm would need to account for the factual realities of the multiple markets and participants in those markets. It cannot be assumed they say that the alleged conspiracy resulted in an

undue lessening of competition in all relevant and properly defined markets or that it had common impact on the pricing of Airfreight Shipping Services worldwide.

76. The Defendants refer to the analysis under *R. v. Container Materials Ltd.* (1941), 3 D.L.R.145, aff'd [1942] S.C.R. 147 where unreasonable enhancement of price was considered, and submit that the same sort of analysis is required for the unduly lessening requirement.

77. The Defendants say that the marked impact point has not been addressed by the Plaintiffs. They say that an agreement with respect to surcharges that does not create an increase in price is not a violation of the old version of s. 45.

78. They point out that an agreement or methodology to pass on a charge cannot and does not unduly lessen competition. The Defendants submit that while they do not have to establish this point on this motion, the point they make is that the Plaintiffs have not set out a methodology to address this issue.

79. The Plaintiffs contend that in making the above argument the Defendants have ignored the second aspect of s. 45(1)(b) that is, that s. 45 is breached if the conspiracy unreasonably enhanced the price. The Plaintiffs emphasize that they rely on price enhancement.

80. In relation to the pleadings issue raised by the Defendants, I am satisfied that the Plaintiffs have met the s. 5(1)(b) requirements. The Plaintiffs reference the constituent elements of a conspiracy as described in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 2010 ONCA 466, 100 O.R. (3d) 721 leave to appeal refused 2011 CarswellOnt 499 (SCC) at para. 48 as well as the statement of the Supreme Court of Canada respecting the requirements for establishing the tort of conspiracy in *Canada Cement La Farge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at paras. 33 and 34. I agree with the Plaintiffs' submission that the Fourth Fresh as Amended Statement of Claim meets the requirements for a proper plea of conspiracy.

81. The Defendants' second point in relation to the cause of action issue is that the Plaintiffs cannot assert a claim in tort based on breaches of the *Competition Act* and therefore its common-law claim for unlawful act conspiracy fails to disclose a reasonable cause of action.

82. The Defendants reference the decision of the British Columbia Court of Appeal in *Wakelam v. Johnson & Johnson,* 2014 BCCA 36, 54 B.C.L.R (5^{th}) 7 for the proposition that a Plaintiff cannot rely on alleged breaches of Part VI of a *Competition Act* to found common-law claims in tort or seek restitutionary remedies. The court held that the *Competition Act* is a complete code and any remedies for its breach should be restricted to those set out in the statutory scheme. Specifically in *Wakelam*, the Court of Appeal held at para. 90 that the *Competition Act* does not indicate that "Parliament intended that the statutory right of action should be augmented by a general right in consumers to sue in tort or to seek restitutionary remedies on the basis of breaches of Part VI".

83. The Defendants submit that this proposition is equally applicable in Ontario and in this case, the Plaintiffs' claim for unlawful conspiracy cannot succeed because the only "unlawful conduct" that the Plaintiffs have alleged is a breach of the *Competition Act*.

84. The Plaintiffs assert that the Defendants are ignoring the Ontario jurisprudence that has held otherwise in addition to subsequent cases that have narrowed the application of *Wakelam*.

85. Specifically the Plaintiffs note that in *Apotex Inc. v. Hoffmann La-Roche Ltd*, 2000 O.J. No. 4732 at para. 21, the Court of Appeal held that a breach of the *Competition Act* can provide the unlawful means in relation to the tort of conspiracy. The court stated at para. 21 that the plaintiff could "rely upon breach of s.52 of the *Competition Act* as supplying the element of unlawful means for both unlawful interference with economic interests and conspiracy'" and referenced *Westfair Foods Ltd.* v. *Lippens Inc.* et al. (1989), 64 D.L.R. (4th) 335 (Man. C.A.) at 338.

86. The Defendants counter the Plaintiffs' submission by asserting that the Ontario Court of Appeal in *Apotex* relied on the Manitoba Court of Appeal decision in *Westfair* without analysis.

87. The position of the Defendants is that the decision in *Westfair* is not sound because it relies on an Ontario Court of Appeal decision, which was, decided when the *Competition Act* was not a complete code and they say that *Westfair* was decided when there was no private right of action, which we now see in s. 36.

88. The Defendants say that the second error in *Westfair* was the reliance on s. 62 of the *Competition Act*. They note that s. 62 was in Part VI – the offence section, whereas s. 36 is in Part IV of the special remedy section.

89. The position of the Defendants is that if s. 62 included the words "nothing in this act" or if it was included in Part IV they could not argue that that decision was in error. However, they submit that there are two strong reasons why *Westfair* is not persuasive and should not be followed.

90. In *Bram Enterprises Ltd. v. A.1.Enterprises Ltd.,* 2014 SCC 12, [2014] 1 S.C.R. 177, the Supreme Court of Canada held that a statutory breach could not provide the basis for the tort of unlawful interference with economic relations. The Plaintiffs say that the Supreme Court of Canada was careful to limit its findings to that tort commonly referred to as the unlawful means tort.

91. The Plaintiffs also note that in *Microsoft*, the Supreme Court of Canada certified restitutionary claims predicated on a breach of the *Act* and held that it was open for the defendant to seek the motion court's direction with respect to the causes of action in unlawful means conspiracy and intentional interference with economic interest following the court's ruling in *Bram* (see paras. 83, 88 and 89).

92. The Defendants in *Microsoft* argued a motion to strike portion of the Statements of Claim based on *Bram* and *Wakelam* arguing that *Bram* changed the law with respect to the

unlawful means conspiracy as well as unlawful means tort. However, the British Columbia Supreme Court, rejected this argument. The court concluded that *Wakelam* dealt only with statutory breaches and restitutionary remedies based on those breaches and did not deal with tort claims of conspiracy based on breaches of statute.

93. In another decision of the British Columbia Supreme Court, it was held that *Wakelam* must be interpreted in light of *Bram* and that tort claims based on a breach of the *Competition Act* are not bound to fail (*Fairhurst v. Anglo American PLC,* 2014 BCSC 2270, 247 A.C.W.S. (3d)510 at para. 15). The Defendants indicated in argument that this decision will be appealed. The Defendants also indicated in argument that on another certification hearing in British Columbia *Wakelam* was also not applied. That decision was argued on appeal and the appeal decision is under reserve. Therefore, as the Defendants put it in argument, the "Wakelam issues are before the British Columbia Court of Appeal."

94. Despite the able argument of counsel for the Defendants on this motion, and their views in relation to *Westfair* and the decisions of the British Columbia Supreme Court subsequent to *Microsoft* and *Bram*, I cannot conclude that it is plain and obvious and beyond doubt that the Plaintiffs' common-law claim for unlawful at conspiracy is certain to fail.

95. I am satisfied, therefore, that the Plaintiffs have met the requirements of s. 5(1)(a).

The s. 5(1)(c) requirement – the claims of the Class Members raise common issues

96. The Plaintiffs propose the following common issues:

(a) Are the Defendants, or some of them, liable for conspiracy to fix prices for Airfreight Shipping Services?

(i) Did the Defendants unlawfully conspire with each other to limit or lessen, unduly, the supply of Airfreight Shipping Services, or to enhance unreasonably the price of fuel and security surcharges imposed on Airfreight Shipping Services?

(ii) Was the Defendants' unlawful conduct directed towards the Plaintiffs and other class members?

(iii)Did the Defendants know, or ought they have known, in the circumstances that injury to the Plaintiffs and other class members was likely to result?

(iv)Did the Plaintiffs and other class members suffer injury?

(b) Did the Defendants, or some of them, breach Part VI of the *Competition Act* giving rise to liability pursuant to s. 36 of the *Competition Act?*

(i) Did the Defendants conspire with each other to limit or lessen, unduly, the supply of Airfreight Shipping Services, or to enhance unreasonably the price of fuel and security surcharges imposed on Airfreight Shipping Services?

(ii) Did the Plaintiffs and other class members suffer injury?

(c) Over what period of time did the conspiracy take place?

(d) Over what period of time did the conspiracy affect the price of uel and security surcharges imposed on Airfreight Shipping Services?

(e) Did the Defendants take affirmative and/or fraudulent steps to conceal the conspiracy?

(f) Can damages be measured on an aggregate, class-wide basis and if so, what are the aggregate damages?

(g) Was the conduct of the Defendants, or any of them, such that they ought to pay global exemplary or punitive damages to the Plaintiffs and class members?

(h) Should the full costs of investigation in connection with this matter, including the costs of the proceeding or part thereof, be fixed or assessed on a global basis pursuant to section 36 of the *Competition Act* and, if so, in what amount?

97. The Defendants take the position that the proposed conspiracy issues are not a common substantial ingredient of the Plaintiffs' claims. They point out that the Plaintiffs must establish some basis in fact that the conspiratorial agreement, the undue lessening of competition and the resulting harm can be litigated on a class wide common basis. The Defendants say that the Plaintiffs have not met that requirement.

98. They state at para. 147 of their factum that the Plaintiffs purported narrowing of the common issues does not assist the Plaintiffs in meeting the common issue requirement, as the issue of whether or not there was anti-competitive conduct with respect to surcharges is not a substantial ingredient of the Plaintiffs' claims nor is it capable of determination on a common basis.

99. The Defendants again point to what they say requires individual inquiries given the numerous products, numerous markets and the nature of the competition. They submit that the uncontested evidence is that the surcharges were a small part of the overall pricing and that prices varied significantly based on numerous factors as earlier referenced.

100. They state at para. 150 of their factum the following:

> ... even after the determination of the proposed common issues regarding surcharges, the Plaintiffs would still have to establish, on a class wide basis, that the alleged conspiracy resulted in higher overall prices for Airfreight Shipping Services. The importance of looking at whether there is competition

> in respect of the total price paid for a product as opposed to focusing on an input or surcharge to that total price is recognized in the case law. [referencing *R. v. Aluminum Co. Canada Ltd.* (1976), 29 CPR 2nd 183 (Quebec S.C.)

101. The Defendants submit that the Plaintiffs have not provided a methodology to address the complex question of whether or not there was class wide competitive harm.

102. The Defendants summarize in para. 4 of their factum that:

> The methodology proposed by the Plaintiffs' expert to address class wide harm wholly ignores the uncontested factual evidence in the record, including by assuming that there is one global market for Airfreight Shipping Services, not attempting in any way to account for the many varied factors that influence supply and demand for Airfreight Shipping Services, and failing to address the extensive evidence that cargo rates were routinely negotiated, highly variable and highly individualized.

103. The Defendants say that the Plaintiffs have failed to meet their onus of providing a class wide methodology for determining the existence or extent of overcharge, something that they say the *Microsoft* case requires it to do.

104. The Defendants' position is that Dr. Lamb's proposed methodology to establish class-wide overcharge is not grounded in the facts of the case.

105. They say that three key foundational assumptions he made are theoretical and thus not grounded in the facts and result in him assuming common harm rather than providing a methodology to prove common harm. They also say that his methodology to deal with the pass-through is theoretical and relies on the evidence of only one class member. They also are critical of Dr. Lamb's proposed methodology because he does not address s. 45 of the *Competition Act* and does not propose a methodology to establish the consequences of the conspiracy in a given market as described previously.

106. The Defendants also contest his methodology because of the fact that his analysis controls for less factors relating to pricing than exist according to the evidence. For example, the Defendants note that the type of cargo being shipped, the transit time, the routing of cargo, the origin and destination being served, the demands/supply conditions, the day of the week, the time of the year are not factors which are controlled in his multiple regression analysis to determine an overcharge. The Defendants assert that they are not engaging in a "battle of the experts" but rather are simply focusing on the deficiencies and inadequacies of what Dr. Lamb proposes.

107. The Defendants' strong position is that there is no basis in fact that AirFreight Shipping Services are sold on a global basis or that competition occurs on a global basis and the evidence is, therefore, clearly contrary to what Dr. Lamb is proposing.

108. The Defendants also assert that Dr. Lamb's proposed analysis is not grounded in the facts in relation to pricing because he does not account for the variability of rates such as, spot

rates, discount rates, negotiated contract rates, etcetera, as outlined above. They say that his theory that the surcharges would raise all rates is not grounded in the facts of the case.

109. In addition, the Defendants contend that his assumption that integrated carriers are competitors and thus are not considered in his analysis is not accurate. The Defendants assert that Dr. Lamb was wrong in assuming that integrated carriers would not provide competitive discipline in the marketplace. The Defendants note that a number of representatives of the Defendants clearly stated that integrated carriers are competitors as did Mr. Erickson and Mr. Rowswell.

110. Overall, the Defendants submit that things need to be looked at on a route-by-route basis, competitors change on a route-by-route basis, and competitors include integrated carriers, but none of this has been found to be relevant by Dr. Lamb, which renders his theory ungrounded on the facts.

111. The Defendants also criticize Dr. Lamb's pass-through methodology because of what they say is an inaccurate assumption that the market demand for AirFreight Shipping Services "across the board" is inelastic regardless of product, time and route.

112. The Defendants submit that given the uncontested facts, his theory that there will be a pass-through "by all to all" is not grounded on the facts.

113. They say that this approach to the pass-through is neither credible nor plausible and there is no realistic prospect that it could establish loss to all class members on a class-wide basis. They say that Dr. Lamb went wrong in relying on only one sample of data.

114. The Defendants also point to what they say is erroneous speculation on Dr. Lamb's part that the Defendants can produce data in order to compare anti-competitive data to competitive data. However, the Defendants point to the fact that there is evidence from representative of the Defendants that this data is not available.

115. In essence the Defendants take the position that the Plaintiffs have not met the evidentiary hurdle they need to meet and have not put forward a credible and plausible methodology that has a realistic possibility of establishing loss on a class-wide basis that is grounded in the facts of the case and is not hypothetical and theoretical.

116. In other words, the Defendants say that Dr. Lamb's reports do not meet the criteria laid out in *Microsoft*.

117. The Defendants acknowledge that the standard is not whether on the balance of probabilities the methodology will succeed, but they say it must be sufficiently credible and plausible to establish some basis in fact or a realistic possibility of establishing laws on a class-wide basis.

118. The Defendants make all of the above submissions without any reference to Ms. Sanderson's report. The Defendants say that there is no contest with respect to the type of methodology but rather a contest with respect to the facts of the industry and how it works, which must be considered in the context of the proposed methodology. They add

to their submissions by noting that Ms. Sanderson relied on affidavits filed in the certification record and conversations she had with representatives of the Defendants.

119. The difficulty I have on this motion with the arguments of the Defendants is that it seems to me that the Defendants are urging me to go beyond the some basis in fact standard and reach a conclusion that Dr. Lamb's assumptions are wrong.

120. The Defendants strongly believe in the accuracy of their argument. However, the Plaintiffs and Dr. Lamb equally strongly believe that the market is global.

121. As the Plaintiffs note, this court is not being asked to find that there is a global market.

122. The Plaintiffs argue the same point in relation to integrated carriers. The Plaintiffs point to evidence in the record from industry representatives that integrated carriers are not competitors. I agree with the Plaintiffs that the role of integrated carriers is not uncontroverted.

123. With respect to the availability of data, again the Plaintiffs and Defendants have a different view of the facts. The Plaintiffs believe equally strongly in a position contrary to the Defendants. As they note, Dr. Lamb's opinion that price data is available is supported in the evidence and they reference at para. 68 of their reply factum a number of points, including the fact that in each of the settlements the settling defendants have produced transactional data, including information regarding prices.

124. Put simply, the Plaintiffs point is that the factual differences highlighted by the Defendants are not to be resolved on this motion.

125. I agree with that position of the Plaintiffs. It is not the function of the court on this motion to decide the nature of the market, whether integrated carriers are competitors or whether the regression analysis is possible. The Plaintiffs realize that while this analysis has been accepted in an American case, it may or may not be accepted at this common issues trial.

126. As the Supreme Court of Canada explained in *Microsoft* at para. 114, "one area in which difficulty is encountered in indirect purchaser actions is in assessing the commonality of the harm or loss-related issues". In order to determine if the loss-related issues meet the "some basis in fact" standard, some assurance is required that the questions are capable of resolution on a common basis. In indirect-purchaser actions, plaintiffs generally seek to satisfy this requirement through the use of expert evidence in the form of economic models and methodologies".

127. The court stated further at para. 115 that "the role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole" referencing *Chadha v. Bayer Inc.,* 63 O.R. (3d) 22, 2003 O.J. No. 27 (Court of Appeal), leave to appeal refused, 2003 CarswellOnt 2810 (SCC) at para. 31. The court went on to explain further at para. 115 that "it is not necessary at the certification stage that the methodology establish the actual loss to the class, as long as the plaintiff has demonstrated that there is a methodology capable of doing so. In indirect

purchaser actions, this means that the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain".

128. As the court also noted at para. 116, "the most contentious question involving the use of expert evidence is how strong the evidence must be at the certification stage to satisfy the court that there is a method by which impact can be proved on a class-wide basis".

129. It is clear from *Microsoft* at para. 134 that "the question of whether damages assessed in the aggregate are an appropriate remedy can be certified as a common issue. However, this common issue is only determined at the common issues trial after a finding of liability has been made. The ultimate decision as to whether the aggregate damages provisions of the C.P.A. should be available is one that should be left to the common issues trial judge".

130. I agree with the position put forward by the Plaintiffs that the proposed common issues, (a)(i), (ii), and (iii), (b)(i), (c) and (e) relate to the existent scope and nature of the alleged conspiracy and these issues do not require an analysis of the individual circumstances of class members. Rather, to determine this issue will require an analysis and consideration of the conduct of the Defendants.

131. I am satisfied that all of the questions relating to the issue of the alleged conspiracy are common. I agree with the Plaintiffs that the proposed methodology does not need to establish class-wide harm (see *Crosslink Technologies Inc. v. BASF Canada*, 2014 ONSC 1682 at para. 113) although Dr. Lamb's conclusion is that all or substantially all of the class would have been harmed by the conspiracy.

132. Ultimately, I have concluded as the Plaintiffs assert in para. 62 of their reply factum:

> The fact that the Defendants have a different theory of the case should not prevent the Plaintiffs from being able to proceed with their theory of the case. Having a single court determine issues relating to, among other things, the relevant market, the role of integrated carriers, and the availability of substitutes, would avoid duplication of fact-finding and legal analysis, and would significantly advance the litigation. The Plaintiffs will either be able to prove their theory of the case or not.

133. I am satisfied that this claim raises the common issues proposed by the Plaintiffs.

The s.5(1)(d) requirement – the preferability of a class proceeding to resolve the common issues

134. I agree with the Plaintiff's that essentially the Defendants contentions in relation to the preferability issue is that a resolution of the proposed common issues would not significantly advance the litigation. I note that there were many issues raised with respect to the choice of law problem. As the Plaintiffs observed, the constitutional question was not filed on a timely basis in relation to the hearing of these motions and only one Defendant has filed a statement of defence.

135. With respect to this latter issue I agree with the Plaintiffs' submission that whether foreign law must be applied is uncertain at this stage of the litigation and this issue is no doubt impacted by the conclusion reached on the jurisdiction motion that the action will be stayed against absent foreign claimants.

136. I agree with the Plaintiffs that it is premature to deal with the choice of law issues. Potentially this could be addressed in the litigation plan.

137. In relation to the preferability issue I find the comment of the court in *Microsoft* para. 40 compelling:

> Unlike *Hollick*, here the loss related issues can be said to be common because there is an expert methodology that has been found to have a realistic prospect of establishing loss on a class wide basis. If the common issues were to be resolved, they would be determinative of *Microsoft's* liability and of whether passing on of the overcharge to the indirect purchasers has occurred. Because such determinations will be essential in order for the class members to recover, it can be said, in this case, that a resolution of a common issue would significantly advance the action.

138. *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69, [2013] 3 S.C.R. 949 provides direction that the preferability analysis is to be "conducted through the lens of the three principle goals of class actions". I find as the court did in *Fischer*. The Ontario provision is sufficiently broad to consider non-court alternatives. As in *Microsoft* a resolution of the common issues would be determinative of liability and whether the overcharge was passed on to indirect purchasers thus significantly advancing the action. This class proceeding would be consistent with the goals of the *CPA*. It offers access to justice, recognizing the "power economic barrier" in a price fixing conspiracy case commented on by my colleague Rady J. in *Crosslink*. There will be judicial economy by avoiding duplication of fact finding and legal analysis and behaviour modification will be achieved.

139. I turn to the remaining certification criteria in issue which focused on the litigation proposed by the Plaintiffs.

The s.5(1)(e) requirement – the representative Plaintiffs fairly and adequately represent the interests of the class; have a workable plan for the advancement of the class proceeding and do not, on the common issues, have an interest in conflict with the interests of other class members

140. The Defendants did not take any issue that the representative Plaintiffs fairly and adequately represented the interests of the class or that they had an interest in conflict with the interests of the other class members. The focus was on the limitations in the litigation plan from a practical perspective.

141. The Defendants criticize the litigation plan proposed by the Plaintiffs and assert that it is unworkable and deficient. Of significant issue when this motion was argued was the fact that it did not address the choice of law problems.

142. Now that the parties are aware of the decision on the jurisdiction issue, and that absent foreign claimants will not be included as class members, the Defendants cannot take the position as they do in para. 157 of their factum, that "it is fatal that the Plaintiffs litigation plan contains no provision at all for any of the choice of law problems" addressed in their factum.

143. I agree with the Defendants that there are some parts of this plan that are not practical. For example, the requirement that the Defendants provide statements of defence no later than 30 days following a decision on this motion in article 3.20 is unrealistic and unreasonable.

144. However, the Defendants acknowledge that they do not take a position that this action should not be certified because the litigation plan is deficient and they recognize a litigation plan can be amended. I am satisfied that while the proposed litigation plan is unrealistic and unreasonable in some respects, overall, I find that this last requirement under s. 5 is met.

145. I am satisfied that the litigation plan can be amended as required and the Defendants, as they note, are entitled to a certification order that will take "into account their substantive right to put forward a full and complete defence to the claims advanced against them".

Conclusion

146. For the foregoing reasons, this action is certified. If there are any issues with respect to finalizing the certification order, a case conference can be held or written submissions can be made to address issues that counsel cannot resolve,

"Justice L. C. Leitch"
Justice L. C. Leitch

Released: August 26, 2015

CITATION: Airia Brands v. Air Canada, 2015 ONSC 5352
COURT FILE NO.: 50389CP
DATE: 20150826

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Airia Brands Inc., Startech.Com Ltd. and QCS-Quick Cargo Service GMBH

Plaintiffs

- and -

Air Canada, AC Cargo Limited Partnership, Societe Air France, Koninklijke Luchtvaart Maatschappij N.V. dba KLM, Royal Dutch Airlines, Asiana Airlines Inc., British Airways PLC, Cathay Pacific Airways Ltd., Deutsche Lufthansa AG, Lufthansa Cargo AG, Japan Airlines International Co., Ltd., Scandinavian Airlines System, Korean Air Lines Co., Ltd., Cargolux Airline International, Lan Airlines S.A., Lan Cargo S.A., Atlas Air Worldwide Holdings Inc., Polar Air Cargo Inc., Singapore Airlines Ltd., Singapore Airlines Cargo PTE Ltd., Swiss International Air Lines Ltd., Quantas Airways Limited, and Martinair Holland N.V.

Defendants

REASONS FOR JUDGMENT

LEITCH J.

Released: August 26, 2015