

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gomel v. Live Nation Entertainment, Inc.*,
2026 BCSC 1276

Date: 20260709
Docket: S1811318
Registry: Vancouver

Between:

David Gomel

Plaintiff

And

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

Defendants

Before: The Honourable Justice M. Tammen

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.
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July 9, 2026

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Introduction and Overview

[1] On April 15, 2021, I certified common issues related to deceptive acts or unconscionable acts or practices, contrary to ss. 4 and 8 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [BPCPA], in a judgment indexed as *Gomel v. Live Nation Entertainment, Inc.*, 2021 BCSC 699. Among the common issues I certified was a claim for damages related to the plaintiff's theory that the defendants' actions had caused a general inflationary effect in the secondary ticket sales market. I declined to certify causes of action under the *Competition Act*, R.S.C. 1985, c. C-34 [Competition Act], as well as claims for unjust enrichment and disgorgement.

[2] Both parties appealed and the Court of Appeal allowed both appeals in part, in reasons indexed as *Live Nation Entertainment, Inc. v. Gomel*, 2023 BCCA 274. That judgment remitted for reconsideration the plaintiff's claims related to alleged breaches of s. 52 of the *Competition Act*, unjust enrichment and disgorgement. The Court of Appeal also remitted for reconsideration the issue of damages based on the general inflationary effect theory, noting that at the certification hearing, the plaintiff presented no expert evidence showing a plausible methodology for proving damages pursuant to that theory on a class-wide basis.

[3] On September 18, 2024, I granted the plaintiff's application to adduce further evidence at the reconsideration hearing, specifically the affidavit of an economist, Dr. Guillermo Marshall. I also ordered that the defendants be permitted to file responsive affidavit evidence, which they did in the form of an affidavit of Dr. Timothy Snail, also an economist. The plaintiff then filed Dr. Marshall's reply affidavit.

[4] I now have for consideration two applications, one from each party. The plaintiff asks me to certify most of the claims that were remitted for reconsideration by the Court of Appeal. The defendants oppose that application and bring their own application, seeking to have the entire claim decertified.

[5] I will shortly address the thrust of submissions made by each of the parties and attempt to do justice to their arguments and give reasons for my conclusions. However, before doing so, I wish to comment on the manner in which the parties argued the two applications, which, in my view, was a model of efficient and effective advocacy. I am indebted to all counsel for the manner in which they presented their written materials in advance, including extremely helpful written submissions, and then distilled their primary arguments in oral submissions.

Issues and Evidentiary Backdrop

[6] Although several issues remain to be determined in these applications, the overarching question I must decide is this: does the expert evidence of Dr. Marshall clear the “some basis in fact” hurdle with respect to the plaintiff’s burden to provide a plausible methodology for establishing damages on a class-wide basis?

[7] That question is based primarily on the Court of Appeal’s decision and the questions that it remitted for reconsideration. Both parties have helpfully summarized their positions, focusing on the adequacy of Dr. Marshall’s proposed methodology and making it the linchpin of these applications.

The Court of Appeal Decision

[8] At para. 85, Marchand J.A. (as he then was) distilled and succinctly set out his understanding of the plaintiff’s general inflationary effect theory of damages. Both parties at this hearing relied on that characterization, and I will therefore reproduce para. 85, along with the important surrounding paragraphs, here.

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

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

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

- As a result, consumers trusted Ticketmaster, had confidence in the secondary market and purchased tickets on the secondary market. The demand for tickets on the secondary market drove prices up.
- Contrary to its representations, in order to earn substantial additional fees, Ticketmaster fostered an artificial secondary market by facilitating or turning a blind eye to professional ticket resellers using ticket bots in the primary market to exceed ticket limits.
- If consumers were aware of the true state of affairs, they would have lost trust in Ticketmaster, concluded that the secondary market was unfair and declined to participate in the secondary market.
- Further or alternatively, in the absence of the representations, consumers may have been wary of the activity of professional ticket resellers on the Ticketmaster website, concluded that the secondary market was unfair and declined to participate in the secondary market.
- As a result, demand on the secondary market would have decreased, resulting in lower prices.

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

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

[9] Thus, the Court of Appeal, in addition to summarizing the plaintiff’s theory of damages, expressly held that establishing the theory, although potentially difficult, was not doomed to fail.

[10] The Court of Appeal also certified the plaintiff’s restoration claim made pursuant to s. 172(3)(a) of the *BPCPA*, and noted that certain class members may be entitled to both damages and restoration of increased fees paid to the defendants. At para. 107, the Court of Appeal held:

[107] If the plaintiff succeeds with his deceptive and/or unconscionable conduct claims with damages measured by his general inflationary effect theory, class members will recover damages from Ticketmaster based on the increased prices paid by class members to ticket vendors that can be attributed to Ticketmaster’s representations. On the other hand, if successful, the plaintiff’s restoration claim would result in Ticketmaster returning the

increased portion of the fees paid by certain class members to Ticketmaster that flow from the general inflationary effect caused by Ticketmaster's representations. As can be seen, certain class members may recover two different things: damages associated with inflated prices paid to ticket vendors and restoration of increased fees paid to Ticketmaster.

[Emphasis in original.]

[11] The Court of Appeal remitted for reconsideration the plaintiff's claim for damages under s. 36 of the *Competition Act*, based on alleged breaches of s. 52 of that statute. The Court of Appeal held that it was not necessary for the plaintiff to plead detrimental reliance in order to make that claim, and that the general inflationary effect satisfied the causation requirement under s. 36: paras. 86, 126–127.

[12] The Court of Appeal also remitted for reconsideration the plaintiff's claim of unjust enrichment, noting as follows at para. 143:

... Reading the plaintiff's pleading generously, I am satisfied that he has adequately pleaded his claim in unjust enrichment. If the plaintiff succeeds in (1) establishing that Ticketmaster breached the *BPCPA* or *Competition Act* and (2) his general inflationary effect theory, then (3) at a minimum, any associated increase in the fees paid to Ticketmaster would necessarily represent a deprivation to the fee-paying class member and (4) there would be no juristic reason due to the statutory breach(es).

[13] With respect to the issue of damages more broadly, the Court of Appeal allowed the defendants' appeal and remitted the issue for reconsideration, based on an absence of evidence establishing a plausible methodology for proving damages on a class-wide basis. At para. 154, the Court of Appeal concluded on this point as follows:

[154] Although I would set aside the judge's certification of common issues (i) and (k), I am not saying that the plaintiff's general inflationary effect theory is no longer available or viable in relation to his claims under the *BPCPA*. The certification judge will be reconsidering damage and loss issues under the *Competition Act* and unjust enrichment in any event. In doing so, it will be open to him to permit the plaintiff to adduce evidence and advance arguments regarding a methodology to establish his general inflationary effect theory. In these circumstances, I see no serious prejudice to Ticketmaster in also remitting the plaintiff's proposed common issues (i) and (k) for reconsideration in light of any evidence permitted by the certification

judge in relation to the plaintiff's *Competition Act* and unjust enrichment claims.

[14] Finally, the Court of Appeal remitted for consideration the issue of disgorgement, which had not been part of the original certification decision but was pursued by the plaintiff on appeal. The Court of Appeal noted that disgorgement may simply be an alternative measure of loss or damage under the *Competition Act*, and thus could be considered at this hearing along with the other *Competition Act* issues (para. 157).

[15] The Court of Appeal also noted, at para. 108, that it would be open to me as certification judge to decertify any claims under the *BPCPA* that depend on the plaintiff establishing a plausible methodology for proving class-wide damages if the plaintiff was unable to do so at this hearing.

[16] That portion of the Court of Appeal judgment is the fundamental basis for the defendants' application to decertify the class proceeding. It also puts the expert evidence at the epicentre of the entirety of matters under consideration on these applications. The plaintiff's additional issues cannot be certified in the absence of a plausible methodology for proving class-wide damages; equally, the previously certified *BPCPA* claims are also unlikely to remain certified as common issues in the absence of such a methodology.

The Expert Evidence

[17] Dr. Marshall, in his initial report, answered the following questions:

- 1) Is there a method(s) available to determine whether prices in the secondary market for tickets that were sold by Ticketmaster in the primary market through its online sales platform were subject to a general inflationary effect following:
 - a) the date when Ticketmaster added secondary market sales to primary market sales on Ticketmaster's online sales platform; or
 - b) alternatively, the date when Ticketmaster launched TradeDesk.

- 2) If the answer to question (1) is yes, can the amount (if any) of such general inflationary effect be expressed in terms of an aggregate dollar amount during the class period (June 30, 2015 to April 15, 2021) or any part of it?
- 3) If the answer to question (1) is yes, can Ticketmaster's share of additional fees (if any) generated by such general inflationary effect on the secondary market during the class period or any part of it be assessed?
- 4) If the answer to question (1) is yes, please identify the sources of the data required to implement the method(s).

[18] Dr. Marshall answered "yes" to questions (1) through (3), listed the type of data required for his calculations and identified some potential sources for that data.

[19] Dr. Marshall proposes to use a regression model to assess whether prices in the secondary market changed after June 30, 2015, the date Ticketmaster launched TradeDesk and commenced widely participating in the secondary market.

[20] Dr. Marshall's methodology is based on looking at ticket prices in the primary and secondary markets, both before and after Ticketmaster's entry into the secondary market. He proposes to isolate relevant factors that impact the supply and demand of tickets.

[21] Dr. Marshall proposes an equation, set out in mathematical terms in his report, that he says controls for various factors that impact resale prices, including general inflation and various market forces.

[22] Dr. Marshall further notes that regression models are a common and accepted method employed by economists to estimate the relationship between a dependent variable (or outcome variable) and independent variables (or explanatory variables).

[23] Dr. Snail opines that Dr. Marshall has not provided a plausible methodology for measuring damages on a class-wide basis and offers various detailed critiques of

Dr. Marshall's report and its expert opinions. In broad strokes, the primary points made by Dr. Snail are these:

- 1) The proposed methodology does not actually seek to measure damages caused by the alleged unlawful misrepresentations;
- 2) The proposed methodology identifies changes that occurred after a specific date (July 2015) but cannot distinguish between any of the potential causes for those changes;
- 3) The proposed methodology overestimates the effects of ticket purchases and cannot reliably determine who would have purchased tickets but for the alleged misrepresentations or whether purchasers would otherwise have satisfied the class definition;
- 4) The proposed methodology has no means of accounting for the pro-competitive aspects of the defendants' conduct, such as increasing competition between secondary market ticket platforms due to the launch of TradeDesk;
- 5) The proposed methodology cannot estimate the alleged "additional resale fees" that the plaintiff wishes to attribute to a "general inflationary effect" arising out of Ticketmaster's alleged misrepresentations; and
- 6) The proposed methodology is not plausible because the data Dr. Marshall asserts would be required to implement the methodology is likely unavailable and, in any event, would not account for the inherent uniqueness of factors driving ticket prices for live events in the secondary market.

[24] In his reply report, Dr. Marshall responds to some, but not all, of Dr. Snail's criticisms, and his opinion remains unchanged. He asserts that his methodology can determine damages on a class-wide basis. Dr. Marshall continues to opine that he can control for all relevant variables, and that the data required to measure ticket prices in the entire secondary market will be available.

[25] Of note, Dr. Marshall does not directly respond to the first two enumerated points above. Rather, he points out that his mandate was not to propose a methodology to test whether any alleged price changes happened solely because of the circumvention of ticket limits. Instead, he was asked to propose a methodology to determine whether there was a general price increase in the secondary market

after a certain date, namely, July 2015, when the defendants launched TradeDesk and entered the secondary ticket sales market.

The Defendants' Position

[26] The defendants helpfully and succinctly distill the crux of the two applications at paras. 36 and 37 of their written submissions. There, they submit that the applications raise two interrelated issues:

- 1) Whether the common issues that were remitted by the Court of Appeal for reconsideration should be certified; and
- 2) Whether the common issues previously certified by this Court should be decertified.

[27] Paragraph 37 states:

At their core, both of these issues turn on whether the plaintiff has met its burden to show a plausible methodology to establish harm on a class-wide basis; that is, a general inflationary effect in the secondary ticket market caused by the alleged misrepresentations.

[28] The defendants correctly note that the test on reconsideration or decertification is identical to the test on certification: the plaintiff must show some basis in fact for the existence of common issues among class members, including a plausible methodology for determining damages on a class-wide basis.

[29] The defendants submit there are “three core reasons why the plaintiff has not met its burden”:

- 1) Dr. Marshall's proposed approach does not account for the causal link at the heart of the general inflationary effect theory that the plaintiff advances;
- 2) Dr. Marshall's proposed approach does not account for important factors influencing the price of tickets in the secondary market; and
- 3) The plaintiff has not shown that the evidence required for Dr. Marshall's proposed approach is available.

[30] Although the defendants make comprehensive and considered submissions on all three reasons, the one which they advance most powerfully is the first, the

complete absence of a causal link between the alleged misrepresentations and the alleged harm to consumers. The defendants correctly note that Dr. Marshall neither attempts to nor purports to measure the impact of the alleged misrepresentations on ticket prices in the secondary market. Rather, he measures the cost of tickets, controlling for a host of variables, before and after June 2015, the date TradeDesk was launched.

[31] The defendants submit that the absence of a causal link between the alleged misrepresentations and the alleged harm to consumers is fatal to all of the plaintiff's claims, including the claims already certified under the *BPCPA* and the new proposed claims remitted by the Court of Appeal. The defendants note that the plaintiff has staked his claim on the premise that the defendants' deception, namely, the misrepresentations, distorted the secondary market, resulting in a general inflationary effect, and that, as a result, consumers paid more than they should have for tickets purchased in the secondary market. Ticketmaster also collected additional fees.

[32] The additional fees, the defendants submit, are thus tethered to the general inflationary effect theory of damages. Since those additional fees are at the heart of the plaintiff's claims for restitution, restoration and disgorgement, those claims cannot be certified.

The Plaintiff's Position

[33] The plaintiff submits that Dr. Marshall's evidence demonstrates some basis in fact for the existence of a plausible methodology to establish class-wide harm.

[34] The plaintiff makes several points in reply to the specific criticisms of the methodology made by the defendants, including the following:

- 1) The defendants exaggerated the complexity of the causation issues which arise in this case;
- 2) The defendants set the bar too high, in effect asking the Court to assess the ultimate merits of the causation theory on certification, as opposed to simply determining if there is "some basis in fact" for the theory of damages;

- 3) To some extent, the defendants ask the Court to engage prematurely in a “battle of the experts” and resolve the conflict in expert testimony, which is more appropriately decided at trial; and
- 4) Dr. Marshall’s opinion that there is or will be available data to implement his methodology is sufficient for certification purposes, given that there has not yet been any discovery.

[35] In overall response to the defendants’ position, the plaintiff submits that there is no real “disconnect” between what the plaintiff must prove and what Dr. Marshall says he can measure, for a straightforward reason. The plaintiff submits that June 2015, the date on which Ticketmaster launched TradeDesk and fully entered the secondary market, is the date on which the representations in the terms of use regarding the prevention of ticket bots *became* misrepresentations. The plaintiff’s theory is that the defendants entered the secondary market on deceptive terms. The defendants ceased making any effort to combat ticket bots at that time because it no longer served their purposes and profit motive to do so.

[36] The plaintiff submits that the time to fully test that theory and weigh the evidence supporting its factual premises is at trial, not at certification. At this juncture, assuming the plaintiff can establish the facts necessary to sustain its basic theory, Dr. Marshall’s methodology can measure damages on a class-wide basis.

Discussion and Analysis

[37] Because the “causal link” issue is the linchpin to these applications, I will address it last. The other two objections made by the defendants are much more easily addressed than is the issue of causation.

The Necessary Evidence May Not Be Available

[38] The defendants point out that to determine whether there was an inflationary effect on the entire secondary market post-June 2015, Dr. Marshall will need transaction-level data from other major secondary-market players, such as Vivid Seats and StubHub. Ticketmaster does not possess such data.

[39] The plaintiff counters that, in almost every price-fixing class action, third-party data is required and can often be obtained by plaintiffs via various pre-trial discovery methods.

[40] In any event, Dr. Marshall opines that he can extrapolate by using only Ticketmaster data, if other vendor data is unavailable, to estimate secondary price changes across the entire market. Dr. Marshall points out that “the characteristics and factors affecting the resale price of a particular ticket” are the same regardless of the platform used by the reseller. That assertion appears sound. Thus, Dr. Marshall opines that one might reasonably assume that a ticket reseller would set similar prices across multiple platforms for a given ticket.

[41] Although I tend to agree with the defendants that the issue of available data and the impact on Dr. Marshall’s methodology if that data is unavailable is understated by both Dr. Marshall and plaintiff’s counsel, I do not consider that issue fatal to certification.

[42] As an overarching matter (and this observation will echo throughout the balance of these reasons), in the absence of any discovery, it is premature to stop the plaintiff in his tracks based on the potential unavailability of critical evidence. If, at a much later date, all discovery mechanisms have been exhausted and Dr. Marshall cannot implement his proposed methodology because of the unavailability of that evidence, the action may become hopeless and need to be decertified.

[43] On the other hand, it may be that Dr. Marshall can properly extrapolate, using only Ticketmaster’s own data.

[44] Ticketmaster may also already possess a significant amount of ancillary data about its main secondary market competitors, which it analyzed prior to launching TradeDesk. The certification record contains a filing made in a suit brought against the defendants by the US Federal Trade Commission for similar or identical conduct to that at issue here. One of Ticketmaster’s own documents excerpted in that filing is a study of the potential lost revenue to Ticketmaster if it shut down some of the

prime offenders who breached ticket purchase limits in the primary market. It thus appears that the defendants may have a significant amount of market data that will inform Dr. Marshall's calculations.

[45] In short, it is simply too early to tell whether the absence of required data will be fatal to the proposed methodology.

Accounting For All Important Variables

[46] Dr. Snail opines that Dr. Marshall does not account for a large number of variables that “tend to increase prices in the Secondary Ticket Market Segment over time independent of prices in the Primary Ticket Market Segment (and independent of the Alleged Conduct).” These factors include the following:

- 1) A sports team's prospects for making (or missing) the playoffs;
- 2) An artist whose popularity changes over time (i.e. between date of initial sales launch and event);
- 3) Artists who choose to perform at smaller venues within a given geographic area, rather than attempting to sell out the largest venue;
- 4) Artists and teams who deliberately undervalue tickets in the primary market, thus creating a false appearance of popularity;
- 5) Increased complexity and production and logistics costs of events over time;
- 6) Local time-specific live event substitutes;
- 7) Non-live event substitutes for the ticketed live events; and
- 8) A change in the mix of artists and venues over time.

[47] Dr. Marshall, in his reply report, asserts that he can account for many of the variables in his calculations and that his proposed formula has a control (X_i) to measure a broad range of such variables. However, Dr. Marshall states that he would decide which variables to build into his formula “at the time of the empirical implementation of my proposed method—that is, after discovery.”

[48] Dr. Marshall then addresses some of the specific variables referred to by Dr. Snail, and concludes:

In summary, my proposed method accommodates the inclusion of these “omitted factors” without requiring a change to my proposed methodology. As well, these factors can be measured and included in my proposed analysis, if warranted. For these reasons, I continue to hold the opinion that my proposed method is suitable for answering the questions in my mandate.

[49] In my view, the defendants’ criticisms of Dr. Marshall’s opinion on this score are premature. They really go to the ultimate results of the application of the methodology and any ensuing opinion. Dr. Marshall has yet to perform any of that work. Dr. Marshall has only opined that he can do so and given a mathematical formula which he says is capable of measuring any general inflationary effect in the secondary market.

[50] Dr. Snail does not criticize the formula or methodology itself, but rather the manner in which it may be implemented. Such criticisms may well remain after Dr. Marshall has collected the data and implemented his methodology, resulting in his expert opinion for the common issues trial. Clearly, that is an issue for trial, not one that needs to be addressed at certification.

[51] In short, this criticism is aimed at the potential results of the ultimate expert opinion, not at the methodology by which that opinion will be formed. At this juncture, the plaintiff must only demonstrate some basis in fact for the methodology to establish class-wide harm, not the actual existence of such harm.

The Required Causal Link

[52] The defendants’ submissions on causation are by far the strongest arguments in favour of decertification. At its core, this submission makes the straightforward point that there is a fundamental disconnect seemingly baked into the plaintiff’s proposed methodology. The plaintiff must show that the misrepresentations caused the general inflationary effect, yet Dr. Marshall does not purport to measure the impact of the misrepresentations on the secondary market. Rather, he determines and measures the inflationary effect, if any, after a specific date, June 2015.

[53] The defendants point out that, in distilling the plaintiff’s theory of damages, the Court of Appeal noted that the theory is that “the secondary market may have

been distorted “due to” Ticketmaster’s representations, potentially causing loss to consumers through the payment of higher ticket prices.”

[54] Of course, the phrase in quotes, “due to,” is from s. 171(1) of the *BPCPA*, which permits an individual to bring an action if they have “suffered damage or loss due to a contravention of this Act.”

[55] In any event, the basic law of causation requires the plaintiff to prove that the alleged wrongdoing caused the claimed loss. Here, the defendants submit, the plaintiff has fundamentally and fatally failed to show any causal link between the alleged wrongdoing, the misrepresentations, and class-wide harm (premised exclusively on the general inflationary effect theory of damages).

[56] The defendants submit that this case is legally similar, perhaps identical, to *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111.

[57] In *Kirk*, residents of an evacuation zone commenced a class proceeding following a helicopter fuel spill. The Court of Appeal struck a proposed common issue concerning alleged diminution of property value because the plaintiff did not demonstrate a plausible methodology for establishing class-wide harm as a result of the defendant’s tortious conduct. Specifically, the plaintiff’s expert evidence, from a property appraiser, did not explain how any decrease in property values resulted from the spill on a class-wide basis. Rather, the expert methodology simply measured the decrease in property values following the date of the spill and presumed that any decrease was caused by the spill, without ruling out other possible factors that could account for changes in property values.

[58] The Court of Appeal identified multiple problems with the expert evidence, chief among them, these:

- 1) The expert assumed a diminution in value in houses within the spill affected area, despite some evidence suggesting the contrary;
- 2) Even more fundamentally, the expert assumed the very fact that his methodology was intended to demonstrate, that the diminution in value was

caused by the spill. The methodology was simply a mass appraisal system that would measure the values of properties within the affected area before and after the spill.

[59] I note in our case that Dr. Marshall has not assumed that there has been a general inflationary effect in the secondary market post-June 2015. He is careful to point out that his methodology will measure *if* there has been such an effect, and then account for many variables that could have caused it. Obviously, if there has not been a general inflationary effect in the secondary market, the plaintiff's case, or at least a significant portion of it, will be stopped in its tracks before getting out of the starting blocks. That remains to be seen, and cannot be predicted at this juncture.

[60] The more pressing issue is whether Dr. Marshall's methodology falls prey to the same failings as did the expert evidence in *Kirk*.

[61] In written submissions, the plaintiff somewhat refines the theory of damages, stating:

4. The plaintiff alleges the defendants' deceptive, misleading and unconscionable conduct distorted the Secondary Market, resulting in an inflationary effect on the Secondary Market. As a result, consumers paid more than they should have when they bought tickets in the Secondary Market.

[62] The plaintiff submits that it is the overall conduct of the defendants that caused the market distortion. Although the misrepresentations are a major part of that conduct, they are not the sole conduct at issue. The plaintiff's position is that Ticketmaster entered the secondary market on fundamentally deceptive and unlawful terms, simultaneously launching TradeDesk and ceasing any efforts it had previously made to combat the use of ticket bots to circumvent ticket sales limits.

[63] At that juncture, the representations in the Terms of Use policy that Ticketmaster forbade the use of ticket bots and would cancel the tickets and accounts of those who used them became untrue and thus became misrepresentations. From that point onward, the defendants actively encouraged professional resellers to accumulate large volumes of tickets, or inventory, using ticket bots for later resale on Ticketmaster's site using the TradeDesk software.

Clearly, the evidence referenced in paragraph one of my earlier judgment supports the last prong of that theory.

[64] The fundamental point made by the defendants is unassailable: Dr. Marshall's methodology does not measure class-wide harm caused by the alleged misrepresentations. However, assuming there is a general inflationary effect, Dr. Marshall's methodology would control for many other factors (including general inflation), and thus the plaintiff would argue that the cause must be the "deceptive, misleading and unconscionable conduct" of the defendants, which commenced in June 2015.

[65] That argument may not succeed at trial. Indeed, it seems likely the plaintiff will face a steep uphill climb to persuade a trier of fact of its theory. However, I cannot say that the theory is hopeless or doomed to fail. I agree with the defendants' submission that, by staking his claim on the broad market distortion theory, the plaintiff has taken on a difficult case. Nonetheless, I decline to prevent the plaintiff from proceeding at this stage. The plaintiff should be given an opportunity to build its case and advance its theory through the normal discovery processes.

[66] I do not view this case as factually identical to *Kirk*. There, the commodity said to have suffered class-wide changes in value was residential homes, among the most unique commodities imaginable. Here, we are concerned with tickets and classes of tickets to sporting, musical and other entertainment events. Such a commodity is not at all comparable to residential homes, and certainly nowhere near as unique. Beyond that, the expert in *Kirk* was performing a basic mass appraisal of prices before and after the spill. There was no control for market factors that may have impacted the appraised value. Here, Dr. Marshall has developed a formula, using a regression model, which he says will control for those variables. Thus, the proposed methodology here is quite different from that envisaged in *Kirk*.

[67] In this case, the plaintiff has shown some basis in fact for a methodology to prove damages on a class-wide basis. The real issue is whether he can and will succeed in proving causation, namely, class-wide harm caused by the tortious

conduct of the defendants at trial. The plaintiff concedes, as he must, that the issue of causation will be hard fought at trial. The defendants may persuade the trial judge that there is no case to meet, after assessing the substantive evidence proffered by the plaintiff on causation. The defendants are, of course, entitled to present contrary evidence, including substantive expert opinion evidence, seeking to show that any inflationary effect in the secondary market was not caused by their conduct.

[68] It may be that, once there has been discovery, exchange of expert reports, and perhaps cross-examination on those reports, the issue of causation can be heard as a summary trial or other hybrid, bifurcated hearing. If the plaintiff is unable to prove causation of class-wide harm based on his general inflationary effect theory, the matter may well be conclusively decided in the defendants' favour. However, in my view, to put an end to this proceeding now by decertifying the entire action would not be appropriate or just. The plaintiff should be given an opportunity to fully develop his theory at least through the pre-trial discovery phase.

Conclusion

[69] For the foregoing reasons, I dismiss the defendants' application to decertify the class proceeding. I allow the plaintiff's application to certify the issues which were remitted for reconsideration by the Court of Appeal, with one exception. Proposed common issue (c), which addressed reliance by the plaintiff on the misrepresentations, is no longer being pursued by the plaintiff, and is thus not certified.

[70] I would also certify the new issue, remitted by the Court of Appeal, of disgorgement, proposed common issue (q). As noted by the Court of Appeal, disgorgement may simply be an alternative measure of loss or damage under the *Competition Act*. It is thus appropriate that it be certified along with the other *Competition Act* questions.

[71] Finally, I would certify the issues related to aggregate damages, proposed common issues (u) through (w). I declined to certify those issues previously, stating that I would address them at the conclusion of the common issues trial. That part of

my earlier decision was not appealed. However, relying once again on *Pioneer Corp. v. Godfrey*, 2019 SCC 42, I find that it is appropriate to now certify questions related to aggregate damages. I agree with the plaintiff that the expert evidence of Dr. Marshall provides the requisite basis in fact for doing so. As noted by the Court in *Pioneer Corp.*, at paras. 113–115, the failure to certify such issues does not preclude their consideration at the conclusion of the common issues trial. In any event, issues of aggregate damages are only considered once all other issues of fact and law have been decided, as mandated by s. 29(1)(b) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

[72] For ease of reference, I attach Schedule “A” of the plaintiff’s notice of application, the list of proposed issues for certification, to this judgment as Appendix “A”. I should note that issues (c) and (d) should be corrected to (d) and (e), respectively. Issue (c) was not pursued at this application.

[73] I make no order of costs.

[74] Finally, unless there is an appeal, I direct that the parties schedule a further case management conference within 90 days of the release of this judgment.

“Tammen J.”

SCHEDULE "A"

Common Issues

Contraventions of the Competition Act

- a. Did the defendants, or any of them, knowingly or recklessly make, send, or cause to be sent, representations to the public were was false or misleading in a material respect such that they contravened s. 52 of the *Competition Act*, RSC 1985, c 34 (the "*Competition Act*")?
- b. As a result of the representations, was the market for event tickets originating from the defendants distorted such that it led to higher prices for event tickets in the Secondary Sales market. ("Secondary Sales" means the resale of event tickets by or on behalf of an event ticketholder)?
- c. What loss or damage, if any, are Class Members entitled to recover from the defendants, or any of them, pursuant to section 36 of the *Competition Act*?
- d. What amounts, if any, should the defendants, or any of them, pay Class Members for the costs of any investigation in connection with this matter and for the costs of these proceedings pursuant to section 36 of the *Competition Act*?

Contraventions of the Business Practices and Consumer Protection Act

- i. Have the Class Members suffered damage or loss due to a contravention of the *BPCPA*?
- k. What amounts, if any, should the defendants, or any of them, pay Class Members as a result of the defendants' contravention(s) of the *BPCPA*?

Unjust Enrichment

- m. Were the defendants, or any of them, enriched by receipt of fees on event tickets sold through Secondary Sales?
- n. Did Class Members suffer a corresponding deprivation as a consequence of fees on event tickets sold through Secondary Sales?

- o. Is there a juridical reason why the defendants, or any of them, should be entitled to retain the fees, or any of the fees, given the defendants' wrongful and unlawful acts, including contraventions of the *Competition Act*?
- p. What restitution, if any, is payable by the defendants, or any of them, to Class Members?

Damages and Distribution

- q. Are the defendants, or any of them, required to disgorge or account for their revenues or, alternatively, their profits as a result of their breaches of the *Competition Act* or unjust enrichment?
- u. Can damages for the Class Members be measured on an aggregate basis and, if so, what are the aggregate damages?
- v. What is the appropriate distribution of damages and/or restitution, including interest, to Class Members?
- w. Who should pay the cost of that distribution?