IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Unlu v. Air Canada,*
2012 BCSC 60

Date: 20120118
Docket: S102554
Registry: Vancouver

Between:

Bulent Unlu

Plaintiff

And

Air Canada

Defendant

- and -

Docket: S102555
Registry: Vancouver

Between:

Bulent Unlu

Plaintiff

And

Deutsche Lufthansa Aktiengesellschaft

Defendant

Brought under the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50

Before: The Honourable Madam Justice Adair

Reasons for Judgment

Counsel for the plaintiff (in both actions):	James M. Poyner, Kenneth Baxter and Samuel Poyner
Counsel for the defendant Air Canada (Action No. S102554) and the defendant Deutsche Lufthansa Aktiengesellschaft (Action No. S102555):	David T. Neave, Violet A. Allard and T. Siddiqui
Counsel for the Attorney General of British Columbia	Nancy Brown and E. W. (Heidi) Hughes
Place and Date of Hearing:	Vancouver, B.C. May 9, 10 and 11, 2011 and January 13, 2012
Place and Date of Judgment:	Vancouver, B.C. January 18, 2012

Introduction

[1] These are proposed class proceedings in which the plaintiff, Bulent Unlu, asserts that by including an international fuel surcharge coded as "YQ" within the "XT" or tax portion of his electronic airline tickets, the defendants Air Canada and Deutsche Lufthansa Aktiengesellschaft ("Lufthansa") engaged in a deceptive act or practice, contrary to the ***Business Practices and Consumer Protection Act***, S.B.C. 2004, c. 2 (the "***BPCPA***"). Mr. Unlu alleges that Air Canada and Lufthansa (the "Airlines") falsely represented that the "YQ" charge is a tax charged and collected by the Airlines on behalf of a third-party government body, rather than a surcharge collected for the Airlines themselves.

[2] Each Airline denies Mr. Unlu's allegations.

[3] Moreover, the Airlines assert that the ***BPCPA*** is constitutionally inapplicable to airline ticketing practices, and that the ***BPCPA*** is inapplicable to them because they are federally regulated undertakings. In October 2010, Lufthansa filed and served a Notice of Constitutional Question pursuant to the ***Constitutional Question Act***, R.S.B.C. 1996, c. 68, challenging the constitutional applicability of the ***BPCPA*** to the matters at issue in the Lufthansa Action, and in December 2010, Air Canada did likewise in respect of the Air Canada Action.

[4] The Airlines have now applied for a summary trial of the constitutional question. Each Airline seeks a declaration that the ***BPCPA*** is constitutionally inapplicable to it by virtue of the doctrine of paramountcy, or, alternatively, the doctrine of interjurisdictional immunity. The Airlines say that, since the claims in Mr. Unlu's Actions are entirely dependent on a finding that each Airline has breached the ***BPCPA***, if they obtain the declarations they seek, the Actions must be dismissed.

[5] The Airlines' applications are opposed by both Mr. Unlu and by the Attorney General of B.C. (the "AGBC"), who appears in response to the notices of constitutional question. Both say the applications should be dismissed. Although

served with the notices of constitutional question, the Attorney General of Canada did not file any application response and did not attend the hearing.

Background

[6] I will first review the allegations in the notices of civil claim and the Airlines' responses, relevant to the constitutional question. The pleadings, particularly the allegations in the notices of civil claim, provide essential context for the discussion of the constitutional question. I will then set out the relevant federal and provincial legislation, and, finally, review the affidavit evidence.

(a) Mr. Unlu's claims and the Airlines' response

[7] In his notice of civil claim in the Air Canada Action, Mr. Unlu alleges that:

> 5. On or about October 15, 2008 . . ., the Plaintiff purchased a ticket to travel . . . from the Agent [a travel agent alleged to be Air Canada's agent in the sale of airplane travel tickets]. The price quoted by the Agent . . . was $870.26 plus taxes of $445.74 for a total price of $1,316.00 which the Plaintiff paid to the Agent and received the airplane ticket in return.
>
> 6. . . . [T]he Agent also delivered to the Plaintiff a document entitled "ELECTRONIC TICKET ITINERARY/RECEIPT" . . . which coded the tax portion of the cost of the airplane ticket as "XT". Within the "XT" or tax portion of the cost of the airplane ticket is an item coded as "YQ" and the cost of that item was $340.40.
>
> 7. By including the $340.40 "YQ" item within the "XT" or tax portion of the cost of the airplane ticket, the Defendant [Air Canada] knowingly and willingly represented the "YQ" item as a tax charged to and collected from the Plaintiff by the Defendant on behalf of a third party government agency or body (the "Representation").
>
> 8. Contrary to the Representation, the $340.40 "YQ" item was not a third party tax at all. Rather, the Defendant retained and diverted the monies paid by the Plaintiff for the "YQ" item to its own use.
>
> **Part 2: RELIEF SOUGHT**
>
> 1. The Plaintiff seeks a declaration pursuant to s. 172(1)(a) of the [***BPCPA***] that the Defendant's representation contravenes the BPCPA.
>
> 2. The Plaintiff also seeks a permanent injunction pursuant to s. 172(1)(b) BPCPA restraining the Defendant from contravening the BPCPA by way of the Representation.
>
> 3. The Plaintiff seeks an order pursuant to s. 172(3)(a) of the BPCPA that the Defendant restore to him and all other putative class members any

> and all monies which the Defendant has acquired in contravention of the BPCPA, including an order that the Defendant refund all monies charged by the Defendant to the class members for "YQ". In the alternative, the Plaintiff seeks an order that . . . the Defendant disgorge to the class members all revenues collected in respect of "YQ".
>
> . . .
>
> 6. The Plaintiff claims on his own behalf and on behalf of all putative class members, the following:
>
> (a) a declaration pursuant to s. 172(1)(a) of the BPCPA that the Defendant's Representation contravenes the provisions of the BPCPA;
>
> (b) a permanent injunction pursuant to s. 172(1)(b) BPCPA restraining the Defendant from contravening the BPCPA by way of the Representation;
>
> (c) an Order pursuant to s. 172(3)(a) of the BPCPA that the Defendant restore to him and all other putative class members any and all monies which the Defendant has acquired in contravention of the BPCPA, including an order that the Defendant refund all monies charged by the Defendant to the class members for "YQ".
>
> . . .
>
> **Part 3: LEGAL BASIS**
>
> 1. This is a proposed class proceeding on behalf of the Plaintiff and a putative class of people in British Columbia who, when purchasing an airline travel ticket, were improperly charged a "tax" by the Defendant which was not in fact a third-party tax but was a charge collected by the Defendant and retained for its own use. . . .
>
> . . .
>
> 4. The transaction by which the Plaintiff purchased a plane ticket from the [Agent] . . . was a "consumer transaction" within the meaning of that term as defined in s. 1 of the BPCPA.
>
> 5. The Representation constitutes a "deceptive act or practice" within the meaning of s. 4 of the BPCPA in that it had the capability, tendency or effect of deceiving or misleading the Plaintiff by creating a false impression that the $346.40 "YQ" item included within the "XT" or "total taxes" portion of the airplane ticket invoice was a tax collected by the Defendant for remittance to a third party government agency, when in fact it was simply additional monies charged, collected and retained by the Defendant on its own behalf and for its own use.

[8] In the notice of civil claim in the Lufthansa Action, after alleging facts concerning the purchase of his ticket and delivery of the "electronic ticket itinerary/receipt" document, Mr. Unlu alleges:

> 6. . . . Within the "XT" or tax portion of the cost of the airplane ticket is an item coded as "YQ" and the cost of that item was $331.86.
>
> 7. By including the $331.86 "YQ" item within the "XT" or tax portion of the cost of the airplane ticket, the Defendant [Lufthansa] knowingly and willingly represented the "YQ" item as a tax charged to and collected from the Plaintiff by the Defendant on behalf of a third party government agency or body (the "Representation").
>
> 8. Contrary to the Representation, the $331.86 "YQ" item was not a third party tax at all. Rather, the Defendant retained and diverted the monies paid by the Plaintiff for the "YQ" item to its own use.

The "Relief Sought" and "Legal Basis" are substantially the same as the allegations in the Air Canada Action.

[9] I pause here to note several important points. There is no challenge anywhere in either notice of civil claim to the Airline's right or ability to charge a fuel surcharge. Mr. Unlu does not take issue with the terms of any tariff or the tariff's validity. There is no allegation that the YQ item is unreasonable, or that charging a fuel surcharge is unreasonable or contrary to the ***BPCPA***. Rather, Mr. Unlu's complaint and allegation is that, in the circumstances pleaded, the surcharge was misrepresented as a tax.

[10] In its Response, Air Canada pleads in Part 1 that (among other things):

> 10. . . . [Air Canada] is federally regulated pursuant to, *inter alia*, the *Canada Transportation Act*, S.C. 1996, c. 10 (the "Act") and the Air Transport Regulations (the "Regulations").
>
> 11. Regulatory and decisional authority under the Act is exercised by the Canadian Transportation Agency (the "Agency"). In particular, the Agency has been given and exercises authority to regulate tariffs, fares, rates, charges and terms and conditions of carriage for international service and, in specific cases, to disallow fares, rates and charges set out in the tariff of an international airline.

[11] In Part 3 (the "Legal Basis") of its Response, Air Canada pleads on the jurisdiction issue:

> 1. Pursuant to Section 91 of the *Constitution Act, 1867*, the federal Parliament exercises exclusive legislative jurisdiction over the subject matter of aeronautics.

> 2. In the exercise of its authority over aeronautics, Parliament has enacted the Act, and has vested final decisional authority over questions of airline tariffs, fares, charges and ticketing in the Agency.
>
> 3. The [***BPCPA***] is constitutionally inapplicable to airplane ticketing practices by virtue of the doctrine of paramountcy.
>
> 4. Alternatively, the BPCPA is inapplicable to Air Canada, as a federally regulated undertaking, by virtue of the doctrine of interjurisdictional immunity.
>
> 5. In the further alternative, the Plaintiff's complaint lies within the exclusive jurisdiction of the Agency.

[12] Lufthansa's pleadings on the jurisdiction issue are to the same effect.

[13] In the notices of constitutional question, the Airlines repeat allegations from their Responses and say (quoting from the Air Canada notice):

> 10. In the exercise of its authority over aeronautics, Parliament has enacted the Act, and has vested final decisional authority over questions of airline tariffs, fares, charges and ticketing in the Agency.
>
> 11. The BPCPA is constitutionally inapplicable to airline ticketing practices by virtue of the doctrine of paramountcy.
>
> 12. The BPCPA is also inapplicable to Air Canada, as a federally regulated undertaking, by virtue of the doctrine of interjurisdictional immunity.

(b) The Legislation

(i) Federal

[14] The main federal statute in issue is the ***Canada Transportation Act***, S.C. 1996, c. 10 (the "***Transportation Act***").

[15] The "National Transportation Policy" is set out in s. 5, which provides:

> 5. It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when
>
> > (a) competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;

> (b) regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;
>
> (c) rates and conditions do not constitute an undue obstacle to the movement of traffic within Canada or to the export of goods from Canada;
>
> (d) the transportation system is accessible without undue obstacle to the mobility of persons, including persons with disabilities; and
>
> (e) governments and the private sector work together for an integrated transportation system.

[16] By s. 7, the "National Transportation Agency" is continued as the "Canadian Transportation Agency" (the "Agency"). The ***Transportation Act*** establishes the Agency as an administrative tribunal. With respect to the powers of Agency, the ***Act*** provides (among other things) that:

> 25. The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property, all the powers, rights and privileges that are vested in a superior court.
>
> . . .
>
> 26. The Agency may require a person to do or refrain from doing any thing that the person is or may be required to do or is prohibited from doing under any Act of Parliament that is administered in whole or in part by the Agency.
>
> 27. (1) On an application made to the Agency, the Agency may grant the whole or part of the application, or may make any order or grant any further or other relief that to the Agency seems just and proper.
>
> . . .
>
> 30. The fact that a suit, prosecution or proceeding involving a question of fact is pending in any court does not deprive the Agency of jurisdiction to hear and determine the same question of fact.
>
> 31. The finding or determination of the Agency on a question of fact within its jurisdiction is binding and conclusive.

[17] Under s. 33, a decision or order of the Agency may be made an order of the Federal Court or of any superior court and is enforceable in the same manner as

such an order. Section 36.1 provides for mediation (by agreement) of disputes concerning a matter within the Agency's jurisdiction.

[18] Part II of the ***Transportation Act*** deals specifically with air transportation.

[19] Section 55 sets out a number of defined terms. "Air service" is defined as "a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both." "Tariff", a key term for purposes of the applications before me, is defined to mean "a schedule of fares, rates, charges and terms and conditions of carriage applicable to the provision of an air service and other incidental services."

[20] Section 69 gives the Agency the power to issue a licence to operate a scheduled international service. Both Air Canada and Lufthansa operate such a service. Section 71 provides that the Agency:

> . . . may, on the issuance of a scheduled international licence or from time to time thereafter, make the licence subject, in addition to any terms and conditions prescribed in respect of the licence, to such terms and conditions as the Agency deems to be consistent with the agreement, convention or arrangement pursuant to which the licence is being issued, including terms and conditions respecting . . . tariffs, fares, rates and charges . . . .

The holder of a scheduled international licence is required to comply with every term and condition to which its licence is subject: s. 71.(2). Where the Agency determines that a licensee has contravened or does not meet the requirements of its licence, the Agency may suspend or cancel the licence: s. 72(2)(a).

[21] Under s. 76, where the Minister of Transport determines that it is necessary or advisable to provide direction to the Agency in respect of the exercise of any of the Agency's powers or the performance of any of its duties or functions under Part II in relation to international travel, the Ministry may issue directions to the Agency.

[22] The Agency is given the power to act in relation to international agreements, conventions or arrangements, where the Agency is identified as the aeronautical authority for Canada under those agreements, conventions or arrangements: see

sections 77 and 78 of the ***Transportation Act***. Examples of such international agreements are found at Exhibit "W" (stated to be an "Air Transport Agreement between the Government of Canada and the Government of the Federal Republic of Germany") (the "Canada-Germany Air Transport Agreement") and Exhibit "X" (stated to be an "Agreement on Air Transport between Canada and the European Community and its Member States") to the affidavit of Daniel Magny.

[23] In respect of "air travel complaints," s. 85.1 provides in part:

> (1) If a person has made a complaint under any provision of this Part, the Agency, or a person authorized to act on the Agency's behalf, shall review and may attempt to resolve the complaint and may, if appropriate, mediate or arrange for mediation of the complaint.
>
> (2) The Agency or a person authorized to act on the Agency's behalf shall report to the parties outlining their positions regarding the complaint and any resolution of the complaint.
>
> (3) If the complaint is not resolved under this section to the complainant's satisfaction, the complainant may request the Agency to deal with the complaint in accordance with the provisions of this Part under which the complaint has been made.
>
> (4) A member of the Agency or any person authorized to act on the Agency's behalf who has been involved in attempting to resolve or mediate the complaint under this section may not act in any further proceedings before the Agency in respect of the complaint.

[24] Section 86 provides that the Agency may make regulations, including regulations:

> (h) respecting traffic and tariffs, fares, rates, charges and terms and conditions of carriage for international service and
>
> > (i) providing for the disallowance or suspension by the Agency of any tariff, fare, rate or charge,
> >
> > (ii) providing for the establishment and substitution by the Agency of any tariff, fare, rate or charge disallowed by the Agency,
> >
> > (iii) authorizing the Agency to direct a licensee or carrier to take corrective measures that the Agency considers appropriate and to pay compensation for any expense incurred by a person adversely affected by the licensee's or carrier's failure to apply the fares, rates, charges or terms or conditions of carriage applicable to the service it offers that were set out in its tariffs, and

> (iv) requiring a licensee or carrier to display the terms and conditions of carriage for its international service on its Internet site, if the site is used for selling the international service of the licensee or carrier;

[25] Section 86.1 is entitled "Advertising Regulations," and provides:

> (1) The Agency shall make regulations respecting advertising in all media, including on the Internet, of prices for air services within, or originating in, Canada.
>
> (2) Without limiting the generality of subsection (1), regulations shall be made under that subsection requiring a carrier who advertises a price for an air service to include in the price all costs to the carrier of providing the service and to indicate in the advertisement all fees, charges and taxes collected by the carrier on behalf of another person in respect of the service, so as to enable a purchaser of the service to readily determine the total amount to be paid for the service.
>
> (3) Without limiting the generality of subsection (1), the regulations may prescribe what are costs, fees, charges and taxes for the purposes of subsection (2).

[26] Section 86.1 was brought into force by order-in-council on December 15, 2011: see SI/2011-119 in the ***Canada Gazette***, Part II, vol. 146, no. 1, at p. 222. The publication in the ***Canada Gazette*** includes an "explanatory note" that is not part of the order, and which states:

> ***Proposal***
>
> This Order would bring into force section 27 of *An Act to amend the Canada Transportation Act and the Railway Safety Act and to make consequential amendments to other Acts* (the Act), assented to on June 22, 2007. This would bring into force sections 86.1 and 86.2 of the *Canada Transportation Act*.
>
> ***Objective***
>
> The result of bringing into force section 86.1 will require the Canadian Transportation Agency (the Agency) to make regulations requiring air carriers to include all fees, charges and taxes in their advertised prices. This would ensure greater transparency of advertised airfares by airlines and allow consumers to readily determine the cost of an air service.
>
> . . .
>
> ***Implications***
>
> By bringing into force section 27, the Government would promote fair competition and enhance consumer protection by making the full costs of an airline ticket more transparent and clear in advertising.

> This is in keeping with similar initiatives in major trading partners, notably the United States and the European Union.
>
> ***Consultations***
>
> The Agency will carry out consultations with key air and travel industry stakeholders before commencing the process of drafting regulations requiring air carriers to include all fees, charges and taxes in their advertised prices. In addition, a consultation document will be made available to the general public on the Agency's Web site with an invitation for comments.
>
> The consultation process will begin as soon as possible after the bringing into force of section 27 and is expected to last approximately four months. Based on the outcome of this consultation process, the Agency will begin the process of creating drafting instructions. The development of the required regulations will follow the normal regulatory process, including pre-publication in the *Canada Gazette*, Part I.

[27] The Airlines rely on the power given to the Agency under s. 86.1 in support of their paramountcy and interjurisdictional immunity arguments, including the argument that consumer protection lies at the protected "core" of the federal jurisdiction over aeronautics. For the purposes of the Airlines' arguments, it is the fact of the power given to the Agency that is important. From the Airlines' perspective, it does not matter that no regulations have been made, and the content of any regulations that might be made in the future under s. 86.1 is irrelevant.

[28] The relevant Regulations made under s. 86 of the ***Transportation Act*** are the ***Air Transport Regulations***, SOR/88-58 (the "***Regulations***").

[29] Section 18 of the ***Regulations***, concerning licence conditions, provides (in s. 18(b)) that "the licensee shall not make publicly any statement that is false or misleading with respect to the licensee's air service or any service incidental thereto." The Airlines point to this section as an example where the Agency has been given specific legislative authority to deal with consumer protection matters, including false or misleading statements.

[30] Section 110 deals with the filing of tariffs for an airline that operates an international service (with some exceptions that are not relevant here), and provides in part that:

> (1) Except as provided in an international agreement, convention or arrangement respecting civil aviation, . . . an air carrier or its agent shall file with the Agency a tariff for that service, . . . in the style, and containing the information, required by this Division.
>
> (2) Acceptance by the Agency of a tariff or an amendment to a tariff does not constitute approval of any of its provisions, unless the tariff has been filed pursuant to an order of the Agency.
>
> (3) No air carrier shall advertise, offer or charge any toll [defined as "any fare, rate or charge established by an air carrier in respect of the shipment, transportation, care, handling or delivery of passengers or goods, or in respect of any service incidental thereto] where
>
> > (a) the toll is in a tariff that has been rejected by the Agency; or
> >
> > (b) the toll has been disallowed or suspended by the Agency.
>
> . . .

[31] Section 111(1) provides that:

> All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

The Airlines point to this section as another example of the consumer protection provisions contained in the federal legislation.

[32] In that regard, the Airlines also note sections 113 and 113.1 of the ***Regulations***, which provide that:

> 113. The Agency may
>
> > (a) suspend any tariff or portion of a tariff that appears not to conform with subsections 110(3) to (5) or section 111 or 112, or disallow any tariff or portion of a tariff that does not conform with any of those provisions; and
> >
> > (b) establish and substitute another tariff or portion thereof for any tariff or portion thereof disallowed under paragraph (a).
>
> 113.1 If an air carrier that offers an international service fails to apply the fares, rates, charges or terms and conditions of carriage set out in the tariff that applies to that service, the Agency may direct it to
>
> > (a) take the corrective measures that the Agency considers appropriate; and

> (b) pay compensation for any expense incurred by a person adversely affected by its failure to apply the fares, rates, charges or terms and conditions set out in the tariff.

[33] Air carriers must keep tariffs available for public inspection, including on their Internet sites: see sections 116 and 116.1. of the ***Regulations***.

[34] Section 122 of the ***Regulations*** describes what every tariff for international service must contain, and provides (among other things) that:

> Every tariff shall contain
>
> (a) the terms and conditions governing the tariff generally, stated in such a way that it is clear as to how the terms and conditions apply to the tolls named in the tariff;
>
> (b) the tolls, together with the names of the points from and to which or between which the tolls apply, arranged in a simple and systematic manner . . . ; and
>
> (c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,
>
> > (i) the carriage of persons with disabilities,
> >
> > (ii) acceptance of children for travel,
> >
> > (iii) compensation for denial of boarding as a result of overbooking,
> >
> > (iv) passenger re-routing,
> >
> > (v) failure to operate the service or failure to operate on schedule,
> >
> > (vi) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,
> >
> > (vii) ticket reservation, cancellation, confirmation, validity and loss,
> >
> > (viii) refusal to transport passengers or goods,
> >
> > (ix) method of calculation of charges not specifically set out in the tariff,
> >
> > (x) limits of liability respecting passengers and goods,
> >
> > (xi) exclusions from liability respecting passengers and goods, and
> >
> > (xii) procedures to be followed, and time limitations, respecting claims.

[35] The Airlines rely on all of these provisions in the ***Transportation Act*** and the ***Regulations*** in support of their arguments that Parliament intended to provide a complete code regulating contracts for international carriage by air and that the

Agency has been granted exclusive authority to regulate all of the business and economic matters relating to air travel.

(ii) The *BPCPA*

[36] Mr. Unlu pleads and relies on s. 4 of the ***BPCPA***. That section defines a "deceptive act or practice" to mean:

> in relation to a consumer transaction
>
> > (a) an oral, written, visual, descriptive or other representation by a supplier, or
> >
> > (b) any conduct by a supplier
>
> that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;

A "representation" includes "any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction."

[37] Section 5 of the ***BPCPA*** provides that:

> 5 (1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.
>
> (2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

[38] Compliance orders may be made under s. 155, which provides in part:

> 155 (1) After giving a person an opportunity to be heard, an inspector may order the person to comply with this Act and the regulations if satisfied that the person is contravening, is about to contravene or has contravened this Act or the regulations.
>
> (2) A compliance order must
>
> > . . .
> >
> > (b) describe the person's act or practice that is contravening, is about to contravene or has contravened this Act or the regulations,
> >
> > . . .
>
> (3) In a compliance order, an inspector may order a person to stop engaging in or not engage in a specified act or practice.

> (4) The director may include one or more of the following orders in a compliance order:
>
> . . .
>
> (c) that a person take specified action to remedy an act or practice by which the person is contravening, is about to contravene or has contravened this Act or the regulations;

A compliance order made under s. 155 may be filed with the court, and, when so filed, it is deemed for all purposes (except appeal) to be an order of the B.C. Supreme Court and enforceable as such: see s. 157.

[39] Mr. Unlu seeks relief under s. 172, which provides in part:

> 172 (1) The director or a person other than a supplier . . . may bring an action in Supreme Court for one or both of the following:
>
> (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
>
> (b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.
>
> . . .
>
> (3) If the court grants relief under subsection (1), the court may order one or more of the following:
>
> (a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;
>
> . . .

(c) The Affidavit of Daniel Magny

[40] The Airlines have filed an affidavit sworn by Daniel Magny, and Mr. Magny's affidavit was the only affidavit evidence submitted in connection with the applications. Since I am not being asked to rule on the merits of either the claims or the defences, the Airlines' intention was to confine Mr. Magny's evidence to matters relevant only to the constitutional question. Thus, even though copies of Mr. Unlu's ticket receipts (Exhibit "A") and Air Canada's tariff issued August 11, 2008 (Exhibit "G") were included among the exhibits to Mr. Magny's affidavit, I make no findings

that are relevant to the merits of the claims or defences (other than the constitutional question), based on them.

[41] Mr. Magny is a lawyer and has been a member of the Québec bar since 1996. He joined Air Canada in 2002 as its counsel for Regulatory and International Affairs. Currently, Mr. Magny is senior counsel for International, Alliances & Regulatory Affairs for Air Canada, working in Montréal. Mr. Magny says that, as a result of his training and experience, he has extensive knowledge of and expertise with the national and international airline industry, and, in particular, with:

(a) Canadian, U.S. and international regulations and bilateral treaties applicable to the airline industry, including those applicable to ticketing, taxes, tariffs and surcharges issues; and

(b) the applicable regulatory agencies that oversee the airline industry in Canada and elsewhere, and specifically the Agency and Transport Canada.

[42] In his affidavit, Mr. Magny describes the Canadian legislation and bilateral treaties which, in his experience, are applicable to international airlines with respect to the tariffs that such airlines (including Air Canada and Lufthansa) levy on tickets for international flights from and to Canada. He also describes, from his perspective as senior counsel within Air Canada, the role that the Agency performs in regulating international airlines that operate passenger services from and to Canada, and, in particular, the regulation of tariffs on international airline tickets.

[43] Of course, Mr. Magny is not a representative of the Agency. Moreover, I treat his statements, opinions and conclusions about the nature of the Agency (for example “The Agency is an independent, quasi-judicial, federal administrative tribunal”) and what it does, and the scope of the Agency’s mandate under the applicable legislation, as in the nature of argument, rather than evidence. That must be so, particularly since these applications are brought under Rule 9-7. Attaching a copy of the Agency’s 2008-2009 Annual Report as an exhibit to Mr. Magny’s affidavit

does not mean that the Report is thereby admissible to prove the truth of its contents.

[44] Despite that, I note the following comments concerning air travel complaints in the Agency's Annual Report, at pp. 22-23 (**bold** in original):

> **Resolving Air Travel Complaints**
>
> Each year, the Agency receives a large number of complaints from air travellers related to the problems they have experienced with air carriers operating publicly available services to, from or within Canada.
>
> The Agency can deal with such issues as:
>
> - Baggage (e.g., damages, delayed, excess, liability, lost, size limits, theft);
> - Flight disruptions (e.g., cancellation, missed connection, revised schedules);
> - Tickets and reservations (e.g., lost, refunds, restrictions, availability of seats, cancellation);
> - Denied boarding (e.g., inability to fly as a result of carrier overbooking);
> - Refusal to transport (e.g., late check-in, reconfirmation, travel documents);
> - Passenger fares and charges;
> - Cargo . . . ; and
> - Carrier-operated loyalty programs . . . .
>
> . . .
>
> **Facilitating the resolution of air travel complaints**
>
> The majority of air complaints are resolved informally through a facilitation process [i.e., s. 85.1 of the ***Transportation Act***]. Complaints are assessed against the carrier's tariff – the published terms and conditions of services, including fares, rates and charges – as well as Canadian transportation law and international conventions.
>
> . . .

[45] These comments, together with the decisions and orders attached as exhibits to Mr. Magny's affidavit, provide examples of the types of matters that the Agency deals with.

[46] Mr. Magny provides a helpful discussion of international fuel surcharges. He explains that many airlines operating international flights (including those to and from

Canada) levy such a surcharge and add it to the base fare of an airline ticket as a temporary measure to offset partially the volatility and fluctuations in the price of jet fuel. To illustrate the Agency's involvement with and oversight of surcharges (including under international air transport agreements), Mr. Magny has attached as exhibits to his affidavit a number of decisions and orders made by the Agency, pertaining to filings that airlines have made regarding these surcharges.

[47] Mr. Magny explains that the filings are generally made under the airline's "International Passenger Rules and Fare Tariff" under Rule C27 in Tariff CTA(A) No. 458. He has attached as exhibits to his affidavit examples of Air Canada's filings in this regard, including for the period in issue in Mr. Unlu's claim. Mr. Magny explains that each of the filings sets out in detail the international fuel surcharge that Air Canada added to the cost of each international airline ticket, in addition to the base price. He says that each filing provided that such surcharges for trans-Atlantic or trans-Pacific flights were to be shown separately in the TAX/FEE/Charge box of the ticket under the code "YQ" (except for fares originating in certain South American countries where the surcharge was to be under the code "Q"). Mr. Magny explains that the coding system used by airlines has been developed by IATA, an international trade body representing about 230 airlines (including Air Canada and Lufthansa). The "YQ" and "Q" codes are "airline use only" codes used by IATA members to designate various charges collected by the airline, such as international fuel surcharges.

[48] Included among the orders and decisions of the Agency that are attached as exhibits to Mr. Magny's affidavit are several involving Air Canada. For example, in "Order No. 2002-A-216", the Agency concluded that the proposed surcharge was not reasonable under s. 111(1) of the ***Regulations***. In Order No. 2007-A-89, the Agency concluded that a proposed extension of an international fuel surcharge for one year was unreasonable, and substituted a different expiry date.

[49] In Decision No. 456-C-A-2009, the Agency ruled in Air Canada's favour on a complaint by a consumer (Mr. Wyant) that the international fuel surcharge on two

tickets was unjust, unreasonable and discriminatory. The Agency noted its jurisdiction under sections 111 and 113 of the ***Regulations*** to consider the complaint, concluded that, given the fuel price volatility and taking into account competitive considerations, the addition of the fuel surcharge to Mr. Wyant's tickets was not unreasonable. The Agency concluded further that if Air Canada were required to incorporate the fuel surcharge into its base fares, it would be at a competitive disadvantage.

[50] Mr. Magny sets out his views on the potential impact of provincial regulation on Air Canada. He says that Air Canada's operations would be "impaired" if the consumer legislation in each of the ten provinces and three territories were to be applied to ticket pricing and the tariffs Air Canada has filed or will file with the Agency. He explains that Air Canada has applied and continues to apply an international fuel surcharge "to attempt to recover unstable and unavoidable operating costs resulting from fluctuating fuel prices." According to Mr. Magny, the surcharge is not used to cover the total cost of fuel, but rather is a means to offset the volatility of, and fluctuations in, fuel costs. He explains why it is not feasible for Air Canada to include the international fuel surcharge amounts in its base fares, citing among other things the complex competitive environment. Mr. Magny says that the Agency has accepted such considerations as justifying a separate fuel surcharge, referring to a ruling by the Agency from March 2007 involving Air Canada ("Order No. 2007-A-89") as an example.

[51] Mr. Magny says that the Agency "has the expertise and familiarity with the realities of air transportation, both domestic and international, to appreciate the practical and competitive position of air carriers in this regard." He says that provincial consumer regulators, by contrast, "do not have the same expertise and as a result may purport to impose upon air carriers requirements that are practically and commercially unfeasible." In this regard, Mr. Magny refers to a letter sent to Air Canada's president in October 2010 by the Office de la protection du consummateur of Québec, which (among other things) advised that under the applicable consumer protection legislation the advertised price for goods or services must correspond with

the total amount that the consumer will have to pay, with limited exceptions. Mr. Magny says that:

> 57. It is not reasonable to expect Air Canada, or other international air carriers, to comply with various provincial regulatory schemes in the various provinces regarding pricing and ticketing practices, in addition to the federal regime. This would entail compliance with varying and potentially conflicting regulations while maintaining a single tariff for all Canadian purposes in compliance with the pricing, publication of prices and tariff requirements of the *Canada Transportation Act* and the *Air Transportation Regulation*.
>
> 58. I believe that it is unlikely that Air Canada can comply with the current regime for pricing, publication of prices and tariff requirements under *Canada Transportation Act* and the *Air Transportation Regulation* and at the same time comply with provincial consumer protection legislation in each of the Canadian jurisdictions.

Discussion and Analysis

(a) Should consideration of the Constitutional Question be postponed?

[52] As a preliminary point in response to the Airlines' applications, the AGBC argues that the court should first consider whether the airline tickets in issue violate the ***BPCPA*** – in other words, first determine the merits of the plaintiff's claims – before deciding whether the ***BPCPA***, as a matter of constitutional law, applies to the Airlines. The AGBC argues that, for example, if statutory interpretation or some other non-constitutional issue determines the merits (for example, Mr. Unlu is unable to prove, in relation to the Airlines, a "representation" made by a "supplier"), or if the factual basis no longer supports the constitutional question, or if the constitutional question becomes hypothetical, it would then be unnecessary to address that question. The AGBC also notes that constitutional questions should not be discussed in a factual vacuum, citing ***Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)***, 2002 SCC 31, [2002] 2 S.C.R. 146, at para. 46, in support.

[53] In response, the Airlines say that the constitutional question is neither hypothetical nor moot. They say that there is a sufficient factual underpinning (in Mr. Magny's affidavit) to determine the constitutional question and that the basic facts

underlying that question are not in dispute. The Airlines say that the determination of the constitutional question will be dispositive of the Actions and the question should be decided at the earliest opportunity. In support of their position, they cite ***Shapray v. British Columbia (Securities Commission)***, 2009 BCCA 322, where, in responding to an argument similar to that advanced by the AGBC here, the Court said (at para. 27):

> At the end of the day, if it is the legislation that is being challenged, the issue should be addressed directly, not only in the interests of efficiency but in the interests of ensuring that laws that may be unconstitutional are recognized as such and set aside or modified at the earliest date.

[54] The Airlines also argue that the Court is given a more active role in the supervision and management of class proceedings, as compared with traditional litigation. They argue that one of the purposes of class action legislation is judicial economy and the efficient handling of potentially complex cases. The Airlines say that, for the Court to refrain from deciding the constitutional question (as the AGBC suggests) could lead to a significant waste of judicial resources. The Airlines argue that a party to a class action faces the possibility of defending two "trial" battlegrounds: a certification hearing and a common issues trial. The Airlines say that, as a result, courts have looked favourably on pre-certification applications, in appropriate circumstances, citing ***Consumers' Assn. of Canada v. Coca-Cola Bottling Co.***, 2006 BCSC 863, at para. 35, in support.

[55] The Airlines argue that resolution of the constitutional question may significantly reduce the judicial resources necessary to resolve matters in issue, and that the possibility of two "trial" battlegrounds militates in favour of the constitutional question being determined first. The Airlines say, citing ***Unifund Assurance Co. v. Insurance Corporation of British Columbia***, 2003 SCC 40, [2003] 2 S.C.R. 63, at para. 17, that if the ***BPCPA*** is constitutionally inapplicable to them, there is no practical or principled reason for either of them to endure a certification hearing and possible common issues trial before a determination of the constitutional question.

[56] However, the other side of the Airlines' argument based on efficiency and allocation of judicial resources is that, in the context of class proceedings, litigation by instalments can be inefficient: see Mr. Justice Iacobucci's observations in ***Garland v. Consumers' Gas Co.***, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 90.

[57] Here, I accept the Airlines' arguments that, in the interests of efficiency and judicial economy, the constitutional question should be determined first, and they should not have to endure a certification hearing and possible common issues trial before determination of that question. I recognize that this creates a risk of the scenario described (and criticized) by Mr. Justice Iacobucci in ***Garland***. However, I have concluded that the Airlines are entitled to have a ruling at this time on the constitutional question they have brought before the Court. Based on the authorities discussed below, the Airlines bear the burden of proof.

(b) Analytical Framework for the Constitutional Question

[58] It is well established that the resolution of a case involving the constitutionality of legislation in relation to the division of powers must begin with an analysis of the "pith and substance" of the impugned legislation: see ***Canadian Western Bank v. Alberta***, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 25. However, in this case, the Airlines do not challenge the constitutional validity of the ***BPCPA***. Rather, they dispute its applicability, based first on the doctrine of paramountcy, and secondly, and, in the alternative, on the doctrine of interjurisdictional immunity.

[59] It is also well established that the federal government has jurisdiction over matters relating to air travel under its general power "to make Laws for the Peace, Order, and good Government of Canada" (also known as the "POGG" power) under s. 91 of the ***Constitution Act, 1867***. See ***Québec (Attorney General) v. Canadian Owners and Pilots Association***, 2010 SCC 39, [2010] 2 S.C.R. 536 ("***COPA***"), at paras. 2 and 28-31. In this case, there is a dispute between the Airlines and the AGBC concerning the scope of that jurisdiction: whether the Agency has been given the exclusive and final decision-making authority with respect to matters of air travel,

and whether consumer protection lies at the protected "core" of the Agency's mandate.

[60] As I observed above, no representative of the Attorney General of Canada participated in this hearing. The Airlines therefore had no support in advancing their arguments that the ***BPCPA*** is constitutionally inapplicable on the basis of paramountcy and concerning the law's effects on what they asserted is the core of a federal power. In that regard, I note Chief Justice Dickson's comments in ***OPSEU v. Ontario (Attorney General)***, [1987] 2 S.C.R. 2, at p. 19, that "the Court should be particularly cautious about invalidating a provincial law when the federal government does not contest its validity."

[61] On this same point, I also note the court's comments in ***Northwestern Outback Aviation Ltd. v. Ontario (Attorney General)***, 2011 ONSC 1063, [2011] O.J. No. 1081 (Div. Ct.), which involved a constitutional challenge by a flight training school to the ***Private Career Colleges Act, 2005***, S.O. 1990, c. 28. The Court rejected both the paramountcy and interjurisdictional immunity arguments of the flight school, and concluded the legislation was constitutionally applicable and operative. The Court said, at para. 22:

> There is one further consideration to be mentioned. It is our understanding that the Attorney-General for Canada has been served with a Notice of Constitutional Question in respect of this proceeding and has elected not to intervene. . . . While the position taken by the Attorney-General for Canada on this application is not per se an independent consideration bearing on the constitutionality of the [Act], it does inform the Court's approach to the conduct of the analysis set out above.

(c) Is the *BPCPA* inapplicable based on Paramountcy?

[62] The doctrine of paramountcy deals with the way in which the federal power is exercised: see ***COPA***, at para. 62. When the operational effects of provincial legislation are incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility: see ***Canadian Western Bank***, at para. 69.

[63] In ***COPA***, Chief Justice McLachlin explained, at para. 64, that claims in paramountcy may arise from two different forms of conflict:

> The first is operational conflict between federal and provincial laws, where one enactment says "yes" and the other says "no", such that "compliance with one is defiance of the other": *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191, per Dickson J. In *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, at p. 155, La Forest J. identified a second branch of paramountcy, in which dual compliance is possible, but the provincial law is incompatible with the purpose of federal legislation [citations omitted]. Federal paramountcy may thus arise from either the impossibility of dual compliance or the frustration of a federal purpose: *Rothmans* [*Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13], at para. 14.

See also ***Québec (Attorney General) v. Canada (Human Resources and Social Development)***, 2011 SCC 60, at para. 17.

[64] The Airlines say that both types of conflict – operational and frustration of a federal purpose – exist here. The AGBC says that neither exists.

[65] The party seeking to invoke the doctrine of federal paramountcy on the basis of frustration of a federal purpose bears the burden of proof: see ***Canadian Western Bank***, at para. 75 and ***British Columbia (Attorney General) v. Lafarge Canada Inc.***, 2007 SCC 23, [2007] 2 S.C.R. 86, at para. 77. To prove that the impugned legislation frustrates the purpose of a federal enactment, that party must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose. Moreover, the standard for invalidating provincial legislation on the basis of frustration of federal purpose is high: see ***COPA***, at para. 66. Invocation of federal paramountcy on the basis of frustration of purpose, as opposed to operational conflict, requires clear proof of purpose; mere permissive federal legislation does not suffice: see ***COPA***, at para. 68.

[66] The Airlines' primary argument is that the ***BPCPA*** is inapplicable because it frustrates the purpose of the federal law. However, they also say that there is an operational conflict between the federal law and the ***BPCPA***. I will deal first with their operational conflict argument.

[67] In my view, there is no operational conflict. For an operational conflict to exist, and in the context of the issues raised in Mr. Unlu's pleadings, the Agency would have to require that an airline display a tariff containing a statement or statements that have the capability, tendency or effect of deceiving or misleading a consumer, something prohibited under the ***BPCPA***. To put it another way, there would be an operational conflict if the Agency accepted an act or practice that would be deceptive under the ***BPCPA***. However, I see nothing in either the ***Transportation Act*** or the ***Regulations*** to suggest that the Agency would impose such a requirement on an air carrier, or conclude it was acceptable. The idea borders on the absurd.

[68] In my view, the requirement under s. 86.1 of the ***Transportation Act*** that the Agency make regulations respecting advertising does not advance the Airlines' case. Since no regulations have been made, there is nothing potentially in conflict. Moreover, the logic of the Airlines' argument is that an operational conflict could result because the Agency could require an airline to advertise something as a tax (thus creating the possibility of a deceptive act or practice under provincial legislation such as the ***BPCPA***), when in fact it was a charge, not a tax. However, the express provisions of s. 86.1(2) – including the separate reference to "fees," "charges," and "taxes" – support the opposite conclusion, in my view. The Airlines' argument is premised on the Agency requiring an airline to engage in conduct that, rather than ensuring greater transparency of advertised airfares, would have the opposite result. Again, the idea borders on the absurd.

[69] The Airlines also argue that a compliance order could be issued under s. 155 of the ***BPCPA***, even though the Airline was in full compliance with the ***Transportation Act***, the ***Regulations*** and international agreements. This argument appears to be based on the premise that Mr. Unlu's complaint is about the fact of the international fuel surcharge. However, based on the pleadings, it is not. There is no challenge in either Action to the Agency's acceptance of a tariff allowing the Airline to charge a fuel surcharge, or to describe the surcharge using the code "YQ." If (hypothetically) a determination were to be made in either Action that an Airline had

identified the surcharge as a tax and that was a deceptive act or practice, such a determination would not conflict with the Agency's decision concerning the contents of the tariff.

[70] The Airlines argue further that the Agency has specifically approved their tariffs, which permit them to impose an international fuel surcharge, to impose the surcharge separately rather than include it in the base fare, and to code it "YQ" on the tickets. They say that to the extent the ***BPCPA*** forbids these practices, there is a direct operational conflict between it and the ***Transportation Act***. I note that, under s. 110(2) of the ***Regulations***, acceptance by the Agency of a tariff or amendment does not constitute approval of any of its provisions, unless the tariff has been filed pursuant to an order of the Agency. In my view, the evidence does not support a finding that the Agency has "specifically approved" the Airlines' tariffs. "Acceptable" and "accepted" (rather than "approved") are the words used in Article 12 of the Canada-Germany Air Transport Agreement.

[71] In any event, the Airlines' argument is based on the premise that Mr. Unlu is challenging the tariff and the ability of the Airlines to charge a fuel surcharge in accordance with an accepted tariff. That premise is false. Mr. Unlu does not allege that charging a fuel surcharge is a deceptive act or practice. He does not complain about advertising. He complains about a statement he claims was made on his electronic ticket receipt.

[72] I turn then to the Airlines' main argument: that the ***BPCPA*** is incompatible with or "frustrates" the purpose of the federal legislation.

[73] The Airlines argue that the ***Transportation Act*** and the ***Regulations*** vest the Agency with final decisional authority over all economic aspects of air travel, in accordance with the objects in s. 5 of the ***Act***. They say that Parliament intended the legislation to be a complete code for regulating contracts for international carriage by air. The Airlines say that the Agency has been given exclusive and final decision-making authority with respect to matters relating to air travel. They assert that the Agency's authority (including its authority under s. 18 of the ***Regulations***)

would be frustrated by the application of the ***BPCPA***, and, further, that the scheme of the ***BPCPA*** would completely nullify the Agency's decision-making authority concerning the terms and conditions of a contract for carriage by air. The Airlines say that, in order for relief to be granted under sections 171 and 172 of the ***BPCPA***, the Court would have to find that the Agency was wrong in accepting a tariff whereby an international fuel surcharge was charged and shown separately, and thereby override the Agency's decision-making power in respect of tariffs, including international tariffs.

[74] Further, the Airlines assert that the application of the ***BPCPA*** could interfere with the policy objective of the ***Transportation Act*** by permitting a provincial regulator, or the Court, to proscribe practices that might be considered misleading, but without taking into account the larger context and implications for the air travel industry, air carriers and Canada's international commitments. The Airlines point out that the Agency has on many occasions considered the potentially misleading effect of adding surcharges to base fares, sometimes rejecting surcharges, sometimes permitting them. Because of its mandate and expertise, the Agency has been able to take into account the practical realities of the airline industry and the policy considerations underlying the ***Transportation Act***. The Airlines say that, inherent in the creation of a single federal authority (the Agency) to oversee all economic aspects of air travel is a policy choice in favour of a uniform set of laws across the country and internationally. Permitting a patchwork of provincial legislation to regulate airline practices would frustrate this federal purpose.

[75] However, Mr. Unlu's complaints are not about tariffs or the fact of a fuel surcharge or whether charging a fuel surcharge is just or reasonable. The complaints are not about the terms and conditions for carriage. The complaints are not about advertising. In that sense, Mr. Unlu's claims do not challenge anything within the mandate of the Agency. The Agency's jurisdiction and authority to deal with matters falling within its jurisdiction are unaffected.

[76] I do not accept the Airlines' argument that the federal legislation has as its purpose making the Agency the exclusive and final decision-making authority with respect to matters relating to air travel, particularly in relation to the subject matter of Mr. Unlu's complaints. The legislation is limited when it comes to consumer remedies. For example, s. 18(b) of the ***Regulations*** does not provide for any compensatory relief to a consumer, in the event a licensee has made a false or misleading statement. I do not see anything in the legislation to suggest that remedies described are to be the only remedies available to a consumer dealing with an air carrier. The Agency's handling of the types of complaints it describes in its Annual Report would not be frustrated if Mr. Unlu was able to prove the breach of the ***BPCPA*** he alleges in his notices of civil claim.

[77] In argument, Mr. Neave (on behalf of the Airlines) submitted that s. 113.1 of the ***Regulations*** provides the Agency with broad remedial powers. However, from the perspective of the consumer, any compensation would be limited to "any expense incurred by a person adversely affected by [the air carrier's] failure to apply the fares, rates, charges or terms and conditions set out in the tariff." This would not provide any compensation to Mr. Unlu, assuming he were able to prove what he alleges in his pleadings.

[78] Accordingly, in my view, no federal purpose is frustrated if the ***BPCPA*** applies to the act or practice about which Mr. Unlu complains in his notices of civil claim.

(d) Is the *BPCPA* inapplicable on the basis of interjurisdictional immunity?

[79] The analysis with respect to the doctrine of interjurisdictional immunity presumes the validity of a law and focuses exclusively on the law's effects on the core of a federal power. What matters, from the perspective of interjurisdictional immunity, is that the law has the effect of impairing the core of a federal competency. In those cases where the doctrine applies, it serves to protect the immunized core of federal power from any provincial impairment. See ***COPA***, at para. 57.

[80] The first step in the analysis is to determine whether a provincial law trenches on the protected "core" of a federal competence. If it does, then the second step is to determine whether the provincial law's effect on the exercise of the protected federal power is sufficiently serious to invoke the doctrine of interjurisdictional immunity. See ***COPA***, at para. 27.

[81] With respect to the first step, Chief Justice McLachlin said in ***COPA***, at paras. 35-36:

> [35] The test is whether the subject comes within the essential jurisdiction — the "basic, minimum and unassailable content" — of the legislative power in question [citations omitted]. The core of a federal power is the authority that is absolutely necessary to enable Parliament "to achieve the purpose for which exclusive legislative jurisdiction was conferred": *Canadian Western Bank*, at para. 77.
>
> [36] In *Canadian Western Bank*, Binnie and LeBel JJ. explained that the jurisprudence will frequently serve as a useful guide to identify the core of a federal head of power, and they concluded that interjurisdictional immunity should "in general be reserved for situations already covered by precedent" (para. 77).

[82] With respect to the second step, Chief Justice McLachlin wrote, at paras. 42-45:

> [42] . . . [I]t must be shown that this interference is constitutionally unacceptable. This raises the issue of how serious an interference must be to render a provincial law inapplicable.
>
> [43] After a period of inconsistency, it is now settled that the test is whether the provincial law impairs the federal exercise of the core competence: *Canadian Western Bank*, per Binnie and LeBel JJ. . . .
>
> [44] The impairment test established in *Canadian Western Bank* marks a midpoint between sterilization and mere effects. . . .
>
> [45] "Impairment" is a higher standard than "affects". It suggests an impact that not only affects the core federal power, but does so in a way that seriously or significantly trammels the federal power. In an era of cooperative, flexible federalism, application of the doctrine of interjurisdictional immunity requires a significant or serious intrusion on the exercise of the federal power. It need not paralyze it, but it must be serious.

[83] Here, and as an alternative to their paramountcy argument, the Airlines argue that the application of the ***BPCPA*** would seriously interfere with the Agency's

decision-making power as regards the terms and conditions of carriage, a core aspect of air travel. The AGBC says there is no precedent establishing that airline tickets are at the "core" of the federal jurisdiction over aeronautics and the "core" of that jurisdiction would not be impaired by the application of the ***BPCPA*** to the complaints made by Mr. Unlu.

[84] The Airlines say that the first element of the test – whether the provincial law trenches on the protected "core" of a federal competence – is clearly met on the facts of this case. The Airlines say that the ***BPCPA*** trenches on federal regulatory jurisdiction over the business of carrying passengers by air, a core area of federal competence. The AGBC says that the ***BPCPA*** does not intrude on the core of the federal jurisdiction over aeronautics, as that core does not include consumer transactions.

[85] As I noted above, in ***Canadian Western Bank***, Binnie and LeBel JJ. concluded that interjurisdictional immunity should in general be reserved for situations already covered by precedent. The Airlines look to maritime cases to argue that the situation here is covered by precedent. They argue that there is no principled basis to distinguish between contracts for carriage by air, and contracts for carriage by sea. In support of their argument concerning federal legislative authority to deal with the contractual aspects of transportation services that are within federal regulatory power, the Airlines cite (among other cases) ***Tropwood A.G. and others v. Sivaco Wire & Nail Co.***, [1979] 2 S.C.R. 157, at pp. 165-166.

[86] However, unlike ***COPA***, here there is no precedent available, in my view. I agree with the AGBC's submission that it is important to consider the source of Parliament's authority over aeronautics, which is distinct from those subject matters enumerated in s. 91 of the ***Constitution Act, 1867***. That provides a reasonable basis to distinguish the Airlines' cases discussing bills of lading in maritime shipping.

[87] However, even if I were to accept the Airlines' argument that the business of carrying passengers by air lies at the core of the federal jurisdiction over aeronautics, and that the ***BPCPA*** trenches on that protected core, I do not accept

that the impact of the ***BPCPA*** on the federal power is sufficiently serious to attract the doctrine of interjurisdictional immunity. Again, it is important to remember the context in which this question arises: Mr. Unlu's complaints as alleged in his notices of civil claim.

[88] As I noted above, the Airlines argue that the application of the ***BPCPA*** to air carriers would seriously interfere with and indeed would nullify the Agency's decision-making power concerning the terms and conditions of carriage. However, Mr. Unlu makes no complaint about those terms and conditions. The Airlines' argument is therefore based on a false premise.

[89] The Airlines argue further that the evidence here demonstrates that the application of the ***BPCPA*** to international airline tariffs would seriously impair the operation of air carriers as federally regulated undertakings. However, Mr. Unlu's claims do not raise any issue concerning the application of the ***BPCPA*** to tariffs. He does not assert the ***BPCPA*** applies to tariffs in any way.

[90] The Airlines raise the concern that air carriers would become subject to the decisions of provincial regulators who, unlike the Agency, have neither the mandate nor the expertise to take into account unique features of the airline industry or to take into account international fuel surcharges. However, Mr. Unlu does not complain about the fact of the fuel surcharges, or challenge the ability of the Airlines to levy them. For the doctrine of interjurisdictional immunity to apply, the impairment must seriously or significantly trammel the federal power. Provincial regulation of the deceptive acts and practices alleged by Mr. Unlu would not impair Parliament's power to regulate airline tariffs, tolls, terms and conditions of carriage or advertising, as contemplated by the ***Transportation Act*** and the ***Regulations***. In those circumstances, the Airlines' arguments based on the doctrine of interjurisdictional immunity cannot succeed.

Summary and Disposition

[91] In summary, the applications of the Airlines for declarations that the ***BPCPA*** is constitutionally inapplicable to them are dismissed.

[92] Unless the parties wish to make submissions on costs, costs will follow the event. If any party wishes to make submissions, that party must contact Trial Scheduling within 21 days of the date of this judgment to make arrangements to do so.

[93] I also direct that, within the next 45 days (and after consulting with counsel for the Airlines concerning convenient dates), counsel for Mr. Unlu contact Trial Scheduling to schedule a case planning conference for the purpose of (among other things) setting a schedule for the hearing of the certification applications.

"Adair J."