

CANADA

(Class Action)
SUPERIOR COURT

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N° : 500-06-000884-177

MARTIN PREISLER-BANOON

Applicant

-vs-

AIRBNB IRELAND UC

-and-

AIRBNB INC.

-and-

AIRBNB PAYMENTS UK LTD.

Defendants

**DEFENDANTS' APPLICATION FOR LEAVE TO ADDUCE RELEVANT EVIDENCE
(Art. 574 Code of civil procedure ("CCP"))**

TO THE HONOURABLE JUSTICE PIERRE-C. GAGNON, S.C.J., OR TO ONE OF THE HONOURABLE JUSTICES OF THE SUPERIOR COURT SITTING IN THE CLASS ACTION DIVISION, IN AND FOR THE DISTRICT OF MONTREAL, THE DEFENDANTS RESPECTFULLY SUBMIT THE FOLLOWING:

I. INTRODUCTION

1. Applicant Martin Preisler-Banoon (the "**Applicant**") seeks to institute a class action on behalf of the following class, as appears from his *Application to authorize the bringing of a class action and to appoint the status of representative plaintiff* dated August 22, 2017 (the "**Application**"):

"Every consumer, pursuant to the terms of Quebec's Consumer Protection Act ("CPA"), who since August 22nd, 2014 (the "Class Period"), while located in the province of Quebec, made a booking for anywhere in the world using Airbnb's websites and/or mobile application and who paid a price higher than the price initially advertised by Airbnb (excluding the QST or the GST);"

2. The three Defendants are distinct entities forming part of the Airbnb group of companies ("**Airbnb**");

3. The Applicant alleges that Airbnb would have "*unlawfully charged*" him with "Service Fees" which were not advertised "*at the first step*" (see Paragraph 22 of the Application) but rather were only indicated on a subsequent web page for a specific listing, which the Applicant refers to as "*Step 2*";
4. The Application is based on one alleged booking the Applicant made as a Guest using the Airbnb platform on August 1, 2017 (Exhibit P-8);

II. RELEVANT EVIDENCE

5. Airbnb seeks leave to produce in the Court record relevant evidence for the hearing on the authorization of the class action, the whole in order to provide this Court with an opportunity to assess the criteria for authorization provided at article 575 CCP, more particularly:
 - a) whether the facts alleged appear to justify the conclusions sought, and thus a serious appearance of right (575 (2) CCP); and
 - b) whether the class member appointed as representative plaintiff is in a position to properly represent the class members (575 (4) CCP);
6. More specifically, Airbnb seeks leave to produce an executed Affidavit similar to the draft affidavit communicated herewith as **Annex A**, in order to provide this Court with a complete overview of the relevant facts susceptible of being analyzed to assess whether these criteria are met in the present instance;
7. The Affidavit sets out details on the following subjects:
 - a) the Airbnb platform and the way it is operated;
 - b) user consent to the applicable terms of service;
 - c) how pricing is controlled by Hosts and displayed to potential Guests; and
 - d) Applicant's use of the Airbnb platform as a Guest and as a Host;
8. In support of this Affidavit, Airbnb seeks leave to adduce into evidence the following documents described hereinafter and communicated as Exhibits A-1 to A-11 thereto:
 - a) Airbnb's records showing the timestamps of when the Applicant accepted and agreed to Airbnb's various versions of the Terms of Service (Exhibits A-1 and A-5);
 - b) Airbnb's Terms of Service (the various versions are communicated as Exhibits A-2, A-3 and A-4) and Payments Terms of Service (Exhibit A-6);
 - c) Applicant's communications with the Host of the Hollywood, Florida property alleged in paragraph 20 of the Application (Exhibit A-7);
 - d) Applicant's listings for his properties on the Airbnb platform (Exhibit A-8) and a spreadsheet summarizing his rentals thereof (Exhibit A-9);

9. These documents and the Affidavit constitute a necessary complement to the allegations contained in the Applications, some of which, it is respectfully submitted, are incomplete or erroneous and do not allow this Court to properly assess Airbnb's commercial practices and the alleged cause of action;
10. Indeed, Exhibits A-1 to A-6 provide the complete terms applicable to the contractual relationship between the Applicant and Airbnb;
11. The Affidavit provides for a more complete representation of the user experience on the Airbnb platform;
12. With regards to the Applicant's alleged booking of a property in Florida, the communications at Exhibit A-7 provide further context thereto;
13. Finally, Exhibits A-8 and A-9 would enable this Court to appreciate the Applicant's use of the Airbnb platform in its entirety, including as a Host (a situation which was not mentioned in the Application), as well as the Applicant's capacity to properly represent the class members;
14. In addition to documentary evidence, Airbnb also seeks leave from this honourable Court to examine the Applicant, for a maximum duration of 90 minutes, on the follow topics:
 - a) the Applicant's use of the Airbnb platform;
 - b) the Applicant's awareness of the "Service Fees" charged;
 - c) the Applicant's capacity to properly represent the class members;
15. Defendants submit that it would be contrary to the interests of justice to refuse the presentation of evidence directly relevant to the assessment of the criteria for authorization of a class action;

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT Defendants' *Application for leave to adduce relevant evidence*;

ALLOW Defendants to file an executed affidavit substantially similar to the draft affidavit communicated as Annex A hereto, including Exhibits A-1 to A-9 in support thereof;

AUTHORIZE Defendants to examine the Applicant for a maximum duration of 90 minutes on the topics mentioned in paragraph 14:

THE WHOLE without costs, save in case of contestation.

MONTREAL, January 19, 2018

Stikeman Elliott LLP

STIKEMAN ELLIOTT LLP

Attorneys for Defendants Airbnb Ireland UC,
Airbnb Inc. and Airbnb Payments UK Ltd.

Me Yves Martineau

Me Jean-François Forget

STIKEMAN ELLIOTT LLP

1155 René-Lévesque Boulevard West

41st floor

Montréal, Québec H3B 3V2

Phone: (514) 397-3380

ymartineau@stikeman.com

Phone: (514) 397-3072

jfforget@stikeman.com

NOTICE OF PRESENTATION

To: Mtre Joey Zukran
LPC Avocat Inc.
5800 Cavendish Boulevard, Suite 411, Côte St-Luc (Québec) H4W 2T5
514 379 1572
jzukran@lpclex.com

Attorneys for Applicant Martin Preisler-Banoon

TAKE NOTICE that the *Application for leave to adduce relevant evidence* will be presented before one of the Honourable Justices of the Superior Court, sitting in and for the District of Montreal, on such date and time as she or he may deem fit, in a room to be determined of the Montreal Courthouse, located at 1 Notre-Dame Street West, Montreal, Quebec, H2Y 1B6.

DO GOVERN YOURSELF ACCORDINGLY.

MONTREAL, January 19, 2018



STIKEMAN ELLIOTT LLP

Attorneys for Defendants Airbnb Ireland UC,
Airbnb Inc. and Airbnb Payments UK Ltd.

Me Yves Martineau

Me Jean-François Forget

STIKEMAN ELLIOTT LLP

1155 René-Lévesque Boulevard West

41st floor

Montréal, Québec H3B 3V2

Phone: (514) 397-3380

ymartineau@stikeman.com

Phone: (514) 397-3072

jfforget@stikeman.com

ANNEX A

C A N A D A

(Class Action)
SUPERIOR COURT

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N° : 500-06-000884-177

MARTIN PREISLER-BANOON

Applicant

-vs-

AIRBNB IRELAND UC

-and-

AIRBNB INC.

-and-

AIRBNB PAYMENTS UK LTD.

Defendants

AFFIDAVIT OF ●
(Art. 574 C.C.P.)

I, ●, [POSITION] at AIRBNB ●, having a place of business at ●, [CITY], [STATE/Province], being duly sworn, do solemnly swear and affirm the following:

1. I am currently employed by Airbnb Inc. (“**Airbnb Inc.**”) as a ●. As such, I work with the computer code that generates the platform and website pages maintained by Airbnb Ireland UC (“**Airbnb**”), including the parts of the code that display Airbnb’s sign-up screens and subsequent events that require user assent or consent (“**Consent Events**”) on both computer and mobile devices (the “**Code**”).

The Airbnb Platform

2. Airbnb and Airbnb Inc. provide an online platform that connects third-parties who wish to offer their unique accommodations (called “**Hosts**”) with third-party travelers seeking to book accommodations (called “**Guests**”). In Canada, the platform is operated by Airbnb and is accessible online at <http://www.airbnb.ca> and via mobile applications.

3. Hosts alone are responsible for listing their accommodations on the platform, including deciding whether, to whom, when, and on what material terms they offer or book their accommodations. Airbnb is not a party to the accommodation agreements,

which are made directly between Hosts and Guests, and it does not own, operate nor manage the accommodations that Hosts list on the platform.

4. The Airbnb platform provides a means by which interested Hosts can choose to list their accommodations, a means by which Hosts and Guests can locate each other, a means for them to communicate directly and determine the terms for their booking. It also provides, through third-party payment processors, a secure payment processing service to permit Hosts to receive payments electronically.

5. In consideration for the use of the platform services, Airbnb receives a services fee from both the Guest and the Host. The "**Guest Fee**" and the "**Host Fee**" (collectively called "**Service Fees**") are determined as a percentage of the Accommodation Fee, which fee is set solely by the Host. The Service Fees cover the costs of operating the platform, including search, communication, payment processing and other services.

6. The Service Fees are defined and explained in the Terms of Service mentioned below.

Users Consent to the Terms of Service During Account Creation and Updates

7. At all times relevant to this litigation, Airbnb users, including Applicant, were required to agree to the then-current Terms of Service before they could create an Airbnb account, list or book an accommodation via the Airbnb platform, or send messages via the Airbnb platform.

8. Prospective users who sought to transact using the Airbnb platform were first required to proceed through Airbnb's account creation process. That process required prospective users to affirmatively click an electronic button agreeing to create an Airbnb account—typically using their email address, Google account, Facebook account—above text stating that "By signing up, I agree to Airbnb's Terms of Service . . ." and to certain other policies and agreements. After March 2016, new users agreed to the Terms of Service and the Payments Terms of Service at sign-up. The phrase "Terms of Service" was set off as different colored text and hyperlinked to the then-current version of the full Terms of Service. The names of other policies and agreements to which new users agree were similarly set off and hyperlinked. Thus, prospective users were notified about the Terms of Service and, after March 2016, the Payments Terms of Service, had the opportunity to review them, and agreed to them in the process of signing up and creating an Airbnb account.

9. Thereafter, when Airbnb updated its Terms of Service and Payments Terms of Service, it required its account holders to agree to the updated Terms of Service, Payments Terms of Service and certain other updates as a condition of their continued use of the Airbnb platform, website, and services through a Consent Event. In order to inform users of the update before the effective date, Airbnb sent emails to each of its account holders notifying them of the update and providing them an opportunity to preview the updated Terms of Service and other new or updated agreements directly from the email via hyperlink. Then, the first time that account holders logged into their Airbnb account after the effective date of the update, they were required to affirmatively click an electronic button agreeing to the updated Terms of Service and certain other new or updated agreements.

Applicant Consented to the Terms of Service

10. I have reviewed Airbnb's business records associated with the account of Martin Preisler-Banoon, and confirmed that he accepted Airbnb's Terms of Service.

11. Attached hereto as **Exhibit A-1** is a screenshot of Airbnb's records showing the timestamps of when the Applicant accepted and agreed to Airbnb's Terms of Service.

12. As noted above, Applicant would have initially consented to the Terms of Service as part of his account creation process. According to Airbnb's records, Applicant accepted Version 3 of the Terms of Service when he initially signed up for his account on January 10, 2015. Applicant subsequently accepted Versions 4 and 5 of the Terms of Service respectively on November 28, 2015 and May 27, 2016. Attached hereto as **Exhibit A-2**, *en liasse*, are copies of Versions 3, 4 and 5 of the Terms of Service.

13. Prior to the filing of his Application, the most recent version of the Terms of Service to which Applicant consented (on December 7, 2016) was Version 6. Attached hereto as **Exhibit A-3** is a copy of Version 6 of the Terms of Service.

14. On September 1, 2017, Applicant accepted an updated version of the Terms of Service, namely Version 7. Attached hereto as **Exhibit A-4** is a copy of Version 7 of the Terms of Service.

15. Financial terms for Hosts are expressly laid out in the Terms of Service, namely at sections 7 and 10 of the Payments Terms of Service. Beginning in March 2016, contractual provisions relating to payments were moved from the Terms of Service to form a standalone agreement to which Airbnb users must agree. Users that registered prior to March 2016 were required to agree to an updated Terms of Service and accept the new Payments Terms of Service during the May 19, 2016 Consent Event, as was the case with Applicant, or, for users that signed up after the Payments Terms of Service were detached by accepting the Payments Terms of Service at sign-up. Attached hereto as **Exhibit A-5** is a rendering of the Consent Event screen presented to such existing users in connection with the May 19, 2016 Consent Event. Attached hereto as **Exhibit A-6** is a copy of the latest version of the Payments Terms of Service.

Host Pricing Control

16. Hosts control the nightly accommodation fee, additional guest fees and cleaning fee for listings that they post on Airbnb's platform. Airbnb provides tools that allow hosts to set different nightly, weekly or monthly rates. Hosts can also set different prices based on individual calendar dates. This allows Hosts to adjust their pricing based on seasonality, day of the week or other factors.

17. Under the Terms of Service, Hosts and Guests agree that they are solely responsible for compliance with any and all laws, rules, regulations, and tax obligations that may apply to their use of the Airbnb platform. They further agree that they will not violate any local, provincial or national law or regulation.

Pricing Displayed to Potential Guests

18. Guests can identify listings on Airbnb by navigating directly to the individual listing page URL or by using Airbnb's search tool. If a Guest uses the search tool, Airbnb displays a page (or multiple pages) with series of listing results based on the parameters provided by the guest. The potential Guest can then click on the image or text of a listing result and view detailed information about the listing on the individual listing page.

19. When a Guest searches for listings without dates, Airbnb displays listings that match the location and other initial parameters specified by the Guest based on the rates set by the Host but does not—and could not—provide exact accommodation fees until the Guest specifies their dates and, in certain cases, the number of people within their travelling party. Guests can narrow search results by providing information about dates, number of guests in the traveling party and using a variety of other filters. Once a Guest identifies a listing that appears to fit their desired parameters, they can click the listing result to navigate to the individual listing page.

20. The listing page sets forth all relevant details about an individual listing such as the narrative description of the listing, check-in time, check-out time, cancellation policy, nightly rate, cleaning fees, additional guest fees, house rules and price information. It also displays the nightly rate for each night on the listing calendar.

21. Prior to booking and tendering of payment, potential Guests must input the dates of travel and number of guests in their traveling party. Once this information is provided, the listing page is dynamically updated to provide an itemized list of the average nightly accommodation fee, the associated fees such as cleaning fee, Guest Fee, taxes, and any other costs associated with a particular listing. All fees charged by Airbnb to Guests in connection with a reservation are disclosed prior to the Guest's creation of a booking request from the Listing Page. An example of the itemized fees dynamically displayed on a current listing page is copied below as Figure 1.

The screenshot shows a pricing calculator interface. At the top, it displays '\$200 per night'. Below this, there are input fields for 'Dates' (03/29/2018 to 04/01/2018) and 'Guests' (1 guest). A table lists the following items and their costs: '\$200 x 3 nights' for \$600, 'Cleaning fee' for \$80, 'Service fee' for \$87, and 'Occupancy Taxes' for \$81. The 'Total' is \$848. A 'Book' button is present, with a note below it stating 'You won't be charged yet'. At the bottom, there is a promotional message: 'This home is on people's minds. It's been viewed 162 times in the past week.' accompanied by a lightbulb icon.

Item	Amount
\$200 x 3 nights	\$600
Cleaning fee	\$80
Service fee	\$87
Occupancy Taxes	\$81
Total	\$848

22. Prior to tendering payment, the Guest is taken to a checkout page where they must tender payment in order to create a booking. All fees charged by Airbnb in connection with a specific booking are also disclosed to the Guest on the checkout page. In order to create a booking, the Guest must click a button authorizing payment on the checkout page. An example of the itemized fees displayed on the current checkout page is copied below as Figure 2.



The screenshot shows an Airbnb checkout page for a property titled "Brand new ocean front unit in Hollywood Florida". The listing is an "Entire home/apt in Hollywood". The booking is for 1 guest from Mar 29, 2018 to Apr 1, 2018. The price breakdown is as follows:

Item	Amount
\$200.00 x 3 nights	\$600.00
Cleaning fee	\$80.00
Service fee	\$86.40
Occupancy Taxes	\$81.54
Total (USD)	\$847.94

Below the price breakdown, it indicates "Flexible — free cancellation" with a shield icon, and notes "Cancel within 48 hours of booking to get a full refund. More details".

Applicant Uses the Airbnb Platform as a Guest to Book Reservations

23. According to Airbnb's records, Applicant used his Airbnb account to book a property located at 3901 South Ocean Drive, Hollywood, Florida 33019, as is alleged in the Application (the "***Listing***").

24. On July 30, Applicant contacted the Host of the Listing from the listing page for the Listing using the "Contact Host" button. Between July 30 and August 1, Applicant corresponded with the Host of the Listing regarding location and other details using Airbnb's messaging tool. According to my review of Airbnb records, Applicant exchanged messages with his Host around the relevant period, as appears from a copy of the print-out of his exchange with the Host filed as **Exhibit A-7**.

25. At any time prior to booking the listing, Applicant could have inputted his parameters into the listing page and would have been displayed full price in a screen materially similar to the one submitted as **Figure 1**.

26. On August 1, Applicant decided to complete a booking of the property for a reservation from August 2 to August 7. Prior to tendering payment for this reservation, Applicant would have seen the precise amount of all fees charged by Airbnb in connection with the reservation on the checkout page on a screen materially similar to **Figure 2**.

Applicant Uses the Airbnb Platform as a Host

27. According to Airbnb's records, starting on December 31, 2015, Applicant used his Airbnb account as a Host to list multiple properties in Québec. Attached hereto as **Exhibit A-8** is a copy of these listings.

28. Applicant had accepted over 100 bookings for his Québec listings. Each of these Guests has been charged the same fees at issue in this proceeding. A spreadsheet summarizing the Host's rentals of his properties is attached as **Exhibit A-9**.

AND I HAVE SIGNED:

●

SOLEMNLY AFFIRMED before me, in ●,
this ___ day of ●, 2018

Notary Public

CANADA

(Class Action)
SUPERIOR COURT

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N° : 500-06-000884-177

MARTIN PREISLER-BANOON

Applicant

-vs-

AIRBNB IRELAND UC

-and-

AIRBNB INC.

-and-

AIRBNB PAYMENTS UK LTD.

Defendants

**LIST OF EXHIBITS
IN SUPPORT OF THE ANNEX A OF THE DEFENDANTS' APPLICATION
FOR LEAVE TO ADDUCE RELEVANT EVIDENCE**

- Exhibit A-1: Copy of screenshot of Airbnb's records showing the timestamps of when the Applicant accepted and agreed to Airbnb's Terms of Service;
- Exhibit A-2: Copies of Versions 3, 4 and 5 of Airbnb's Terms of Service;
en liasse
- Exhibit A-3: Copy of Version 6 of Airbnb's Terms of Service;
- Exhibit A-4: Copy of Version 7 of Airbnb's Terms of Service;
- Exhibit A-5: Copy of rendering of the Consent Event screen presented to such existing users in connection with the May 19, 2016 Consent Event;
- Exhibit A-6: Copy of the latest version of Airbnb's Payments Terms of Service;
- Exhibit A-7: Copy of the print-out of Applicant's communications with the Host of the Listing in Hollywood, Florida;
- Exhibit A-8: Copy of the Applicant's listings;

Exhibit A-9: Spreadsheet summarizing the Applicant's rentals of his properties;

Montréal, ●, 2017

(S) *STIKEMAN ELLIOTT S.E.N.C.R.L., s.r.l.*

STIKEMAN ELLIOTT LLP

Attorneys for Defendants Airbnb Ireland UC,
Airbnb Inc. and Airbnb Payments UK Ltd.

Me Yves Martineau

Me Jean-François Forget

STIKEMAN ELLIOTT LLP

1155 René-Lévesque Boulevard West
41st floor

Montréal, Québec H3B 3V2

Phone: (514) 397-3380

ymartineau@stikeman.com

Phone: (514) 397-3072

jfforget@stikeman.com

SUPERIOR COURT
(Class Action)

Nº. 500-06-000884-177

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

MARTIN PREISLER-BANNOON

Applicant

- VS -

AIRBNB IRELAND UC, AIRBNB INC. and AIRBNB PAYMENTS
UK LTD.

Defendants

BS0350

File: 142638-1001

DEFENDANTS' APPLICATION FOR LEAVE TO ADDUCE
RELEVANT EVIDENCE
(ART. 574 CODE OF CIVIL PROCEDURE ("CCP"))
NOTICE OF PRESENTATION

ANNEX A

LIST OF EXHIBITS IN SUPPORT OF THE ANNEX A OF THE
DEFENDANTS' APPLICATION FOR LEAVE TO ADDUCE
RELEVANT EVIDENCE
EXHIBITS A-1 TO A-9

ORIGINAL

Mtre. Yves Martineau

514-397-3380

Fax: 514-397-3580

Mtre. Jean-François Forget

514-397-3072

Fax: 514-397-3222

STIKEMAN ELLIOTT

Stikeman Elliott LLP BARRISTERS & SOLICITORS
1155 René-Lévesque Blvd. West, 41^h floor
Montréal, Canada H3B 3V2