SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No.: 500-06-001041-207

DATE: January 11, 2022

BY THE HONOURABLE MARTIN F. SHEEHAN, J.S.C.

CHAFIK MIHOUBI
Applicant
v.
PRICELINE.COM, L.L.C.
HOTWIRE, INC.
HOMEAWAY.COM, INC.
ACCOR, S.A.
BEDANDBREAKFAST.COM, INC.
CANADASTAYS (1760335 ONTARIO INC.)
HILTON WORLDWIDE HOLDINGS, INC.
SIX CONTINENTS HOTELS, INC.
ORBITZ WORLDWIDE, L.L.C.
HYATT HOTELS CORPORATION
WYNDHAM HOTEL GROUP, L.L.C.
KAYAK SOFTWARE CORPORATION
BENJAMIN & BROTHERS, L.L.C. (RESERVATIONS.COM)
Defendants

JUDGMENT
(On an Application Seeking Permission to File a Class Action)

JS 1699

OVERVIEW

[1] The Applicant, Chafik Mihoubi, seeks permission to file a class action on behalf of Quebec consumers who reserved rooms through Defendants' websites. He alleges that, during the course of the reservation process, Defendants advertise an initial price and subsequently charge a higher price in violation of s. 224 of the Quebec *Consumer Protection Act*[1] ("**CPA**").

[2] Defendants contest the application on the basis that the criteria for the authorization of a class action are not met. In particular, Defendants allege that the CPA does not apply to contracts regarding "the sale, lease or construction of an immovable".[2]

ANALYSIS

[3] The Court must determine whether the Applicant meets the requirements for the issuance of a class action.

[4] If the answer to this question is yes, then the Court must describe the class whose members will be bound by the class action judgment, appoint a representative plaintiff as well as identify the main issues to be dealt with collectively and the conclusions sought in relation to those issues.

1. Does Applicant Meet the Requirements for the Authorization of a Class Action?

1.1 Conclusion

[5] Considering the low threshold that is applicable at this stage, the requirements are met and the class action is authorized.

1.2 Legal Principles

[6] A class action is a procedure by which a person, the class representative, sues on behalf of all members of a group that have a similar claim. Because the class representative is not specifically mandated to act on behalf of these members, prior authorization of the Court is required before a class action can be filed.[3]

[7] Article 574 CCP provides that an application for authorization to file a class action must set out: i) the facts on which the class action is based; ii) the nature of the class action; and iii) the class on whose behalf the representative intends to act.

---

1 *Consumer Protection Act*, CQLR c. P-40.1.
2 CPA, sections 6 and 6.1.
3 *L'Oratoire Saint-Joseph du Mont-Royal* c. *J.J.*, 2019 CSC 35, para. 6.

[8] According to article 575 CCP, the court must authorize the class action if it is of the opinion that:

1° the claims of the members of the class raise identical, similar or related issues of law or fact;

2° the facts alleged appear to justify the conclusions sought;

3° the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and

4° the class member appointed as representative plaintiff is in a position to properly represent the class members.

[9] The court's role at the authorization stage has been described as "screening." It must weed out those untenable and frivolous cases that clearly do not meet the requirements for the issuance of class action (article 575 CCP). The threshold is low. The requirements must be interpreted in a broad and liberal fashion designed to give effect to the social goals of class actions (facilitating access to justice, modifying harmful behaviour and preserving scarce judicial resources). When all four criteria are met, the court has no discretion to refuse the authorization. Moreover, if a doubt remains at the end of the analysis, this doubt should benefit the applicant and the authorization should be granted.[4]

[10] Nonetheless, the social objectives of class actions are not a substitute for the authorization conditions, and one must be careful not to authorize a class action that does not satisfy them simply because the proposed claim meets those objectives.[5] Indeed, while it is true that class actions constitute a formidable tool for access to justice, those who are called upon to defend against them should only be forced to do so against actions that are sustainable.[6]

---

4 *Desjardins Cabinet de services financiers inc.* c. *Asselin*, 2020 CSC 30, paras. 27, 55, 116 and 156; *L'Oratoire Saint-Joseph du Mont-Royal* c. *J.J.*, *supra*, note 3, paras. 6, 8, 18, 19, 20, 56 and 58; *Vivendi Canada Inc.* v. *Dell'Aniello*, 2014 CSC 1, paras. 1, 37, 55 and 67; *Infineon Technologies AG* v. *Option Consommateurs*, 2013 CSC 59, paras. 59 to 61; *Apple Canada inc.* c. *Badaoui*, 2021 QCCA 432, para. 25; *Benamor* c. *Air Canada*, 2020 QCCA 1597, para. 35; *Godin* c. *Aréna des Canadiens inc.*, 2020 QCCA 1291, paras. 49 and 50; *Tenzer* c. *Huawei Technologies Canada Co. Ltd.*, 2020 QCCA 633, para. 20 (Request of settlement approval granted, 2021 QCCS 4663); *Belmamoun* c. *Ville de Brossard*, 2017 QCCA 102, paras. 73 and 74; *Charles* c. *Boiron Canada inc.*, 2016 QCCA 1716, paras. 40 to 43 (Motion for leave to appeal to the Supreme Court dismissed with dissent (Can C.S., 2017-05-04) 37366); *Union des consommateurs* c. *Bell Canada*, 2012 QCCA 1287, para. 117 (Motion for permission to appeal to the Supreme Court of Canada dismissed (S.C. Can., 2013-01-17) 34994).

5 *Rozon* c. *Les Courageuses*, 2020 QCCA 5, para. 70 (Motion for permission to appeal to the Supreme Court of Canada dismissed (S.C. Can, 2020-11-16, 39115)).

6 *Harvey* c. *Vidéotron*, 2021 QCCA 1183, para. 21; *Levy* c. *Nissan Canada inc.*, 2021 QCCA 682, para. 27.

1.2.1 Similar Issues of Law and Fact (Article 575(1) CCP)

[11] This requirement is usually easy to meet.

[12] It is not required that the claims of group members be identical or that the determination of common issues lead to the complete resolution of the case. Common questions do not necessarily require common answers.[7] Nevertheless, some of the issues must be sufficiently interrelated, so that their adjudication will benefit all members.[8] A single identical, similar or related question of law is sufficient "provided that it is significant enough to affect the outcome of the class action" or to enable "all the claims to move forward."[9]

[13] Furthermore, when there are multiple defendants, it is not necessary for the class representative nor other class members to have a personal cause of action against each of the defendants.[10]

1.2.2 Allegations that Appear to Justify the Conclusions Sought (Article 575(2) CCP)

[14] With regard to the second criterion, article 575 CCP states that the facts alleged must "appear" to justify the conclusions sought.

[15] While it is possible to "read between the lines" in order to discern an arguable cause of action, the approach rests first, on the allegations of the proceeding.[11] Vague, general or imprecise claims are not sufficient to meet this burden. Nor are mere assertions made without factual basis or claims which are hypothetical or purely speculative.[12]

---

7 *Vivendi Canada inc.* v. *Dell'Aniello*, *supra*, note 4, para. 59.

8 Pierre-Claude LAFOND, *Le recours collectif, le rôle du juge et sa conception de la justice : impact et évolution*, Cowansville, Éditions Yvon Blais, 2006, p. 92.

9 *L'Oratoire Saint-Joseph du Mont-Royal* c. *J.J.*, *supra*, note 3, paras. 6, 8 and 44; *Vivendi Canada inc.* v. *Dell'Aniello*, *supra*, note 4, paras. 42, 53 to 59 and 72; *Infineon Technologies AG* v. *Option consommateurs*, *supra,* note 4, para. 72; *Apple Canada inc.* c. *Badaoui, supra,* note 4, para. 62; *Rozon* c. *Les Courageuses*, *supra*, note 5, para. 74; *Comité d'environnement de La Baie Inc.* c. *Société d'électrolyse et de chimie Alcan Ltée*, [1990] R.J.Q. 655 (C.A.), paras. 22 and 23.

10 *L'Oratoire Saint-Joseph du Mont-Royal* c. *J.J.*, *supra*, note 3, para. 44; *Bank of Montreal* v. *Marcotte*, 2014 SCC 55, paras. 41 to 47.

11 *Desjardins Cabinet de services financiers inc.* c. *Asselin*, *supra*, note 4, par. 11 to 21; *Haroch* c. *Toronto-Dominion Bank*, 2021 QCCA 1504, paras. 13 and 14.

12 *L'Oratoire Saint-Joseph du Mont-Royal* c. *J.J.*, *supra*, note 3, para. 59; *Infineon Technologies AG* v. *Option consommateurs*, *supra,* note 4, para. 67; *Charles* c. *Boiron Canada inc.*, *supra,* note 4, para. 43.

[16] This being said, the applicant's burden is one of demonstration, not proof. The applicant does not need to show that the claim is likely to succeed. All that is required is that the applicant demonstrates, on a *prima facie* basis, that there is an arguable case in light of the facts and the applicable law.[13]

[17] With regard to the law, the allegations need to be "specific enough to allow the legal syllogism to be considered", but "it is not necessary to provide step-by-step details of the legal argument." The allegations may be imperfect but their true meaning may nonetheless be clear. Inferences can be drawn from the allegations.[14]

[18] With regard to the facts, it is not required to specify in minute detail the evidence that the applicant intends to present on the merits of the case. The allegations of the proposed claim and the exhibits filed in support of them are assumed to be true, unless contradicted by summary and obvious evidence. This presumption applies only to the facts tendered by the applicant, not to those tendered in evidence by the respondent.[15]

[19] The authorization stage must be distinguished from the trial on the merits. The merits of the case should only be considered after authorization has been granted.[16] Authorization judges may decide questions of law when the presentation of additional evidence would not place them in a better position. However, they should refrain from doing so if the decision requires applying the law to findings of fact. Any analysis of the evidence should be deferred to the merits given the frugal and limited evidence available at the authorization stage and the fact that much of the relevant evidence may still be in the hands of the defendant.[17]

---

[13] *Desjardins Cabinet de services financiers inc.* c. *Asselin*, *supra*, note 4, para. 71; *L'Oratoire Saint-Joseph du Mont-Royal* c. *J.J.*, *supra*, note 3, paras. 7 and 58; *Vivendi Canada inc.* v. *Dell'Aniello*, *supra*, note 4, para. 37; *Infineon Technologies AG* v. *Option consommateurs*, *supra,* note 4, paras. 58, 59, 61, 65 and 66; *Sibiga* c. *Fido Solutions inc.*, 2016 QCCA 1299, para. 52.

[14] *Desjardins Cabinet de services financiers inc.* c. *Asselin*, *supra,* note 4, paras. 16 and 17.

[15] *L'Oratoire Saint-Joseph du Mont-Royal* c. *J.J.*, *supra*, note 3, para. 59; *Infineon Technologies AG* v. *Option consommateurs*, *supra,* note 4, para. 67; *Benamor* c. *Air Canada*, *supra,* note 4, paras. 35 and 44; *Baratto* c. *Merck Canada inc.*, 2018 QCCA 1240, para. 48 (Motion for leave to appeal to the Supreme Court dismissed (Can C.S., 2019-03-28) 38338); *Sibiga* c. *Fido Solutions inc.*, *supra*, note 13, para. 52.

[16] *Desjardins Cabinet de services financiers inc.* c. *Asselin*, *supra*, note 4, paras. 16 and 17; *L'Oratoire Saint-Joseph du Mont-Royal* c. *J.J.*, *supra*, note 3, paras. 7 and 22; *Vivendi Canada inc.* v. *Dell'Aniello*, *supra*, note 4, para. 37; *Infineon Technologies AG* v. *Option consommateurs*, *supra,* note 4, paras. 65 and 68.

[17] *Desjardins Cabinet de services financiers inc.* c. *Asselin*, *supra,* note 4, para. 55; *L'Oratoire Saint-Joseph du Mont-Royal* c. *J.J.*, *supra*, note 3, para. 55; *Pilon* c. *Banque Amex du Canada,* 2021 QCCA 414, para. 12 (Motion for leave to appeal to the Supreme Court, 2021-05-14 (Can C.S.) 39669); *Durand* c. *Subway Franchise Systems of Canada,* 2020 QCCA 1647, paras. 48 to 54; *Benamor* c. *Air Canada, supra,* note 4, para. 42; *Godin* c. *Aréna des Canadiens inc.*, *supra*, note 4, paras. 53, 54, 55, 93 and 113; *Belmamoun* c. *Ville de Brossard*, *supra*, note 4, paras. 81 and 82; *Sibiga* c. *Fido Solutions inc.*, *supra*, note 13, paras. 76 to 86.

[20] When several independent causes of action are invoked in support of the application for authorization, the applicant must demonstrate an appearance of right for each of them. Thus, the court must separately assess the merits of each and authorize only those that meet all the conditions.[18]

1.2.3 The Appropriateness of the Class Action Remedy (Article 575(3) CCP)

[21] Article 575(3) CCP requires that the composition of the class make it "difficult or impracticable" to use other procedural means (for example, a mandate to take part in judicial proceedings on behalf of others (articles 88 and 91 CCP) or consolidation of proceedings (article 143 CCP)). The words "difficult or impracticable" do not mean impossible.[19] The preferability rule does not apply in Quebec and therefore it is not necessary to prove that the class action procedure is the most appropriate procedural vehicle.[20]

[22] The Court of Appeal mentions that to satisfy this criterion, the applicant must show that the class action remedy is a "useful" means to achieve the goals sought by the class.[21]

[23] When assessing this usefulness, courts can look at the estimated number of members, their geographic location and the applicant's knowledge of their identity and contact details.[22]

[24] When the number of members is most likely important, this is usually sufficient to show that it would be "difficult or impracticable" to proceed otherwise.[23]

1.2.4 A Representative who can Properly Represent the Class Members

[25] This requirement is satisfied when the representative is: i) interested in the suit; ii) competent; and iii) has no demonstrated conflict of interest with the group members.[24]

---

[18] *Belmamoun* c. *Ville de Brossard*, *supra*, note 4, para. 77; *Delorme* c. *Concession A25, s.e.c.*, 2015 QCCA 2017, para. 6.

[19] *Abicidan* c. *Bell Canada*, 2017 QCCS 1198, para. 82.

[20] *Vivendi Canada inc.* v. *Dell'Aniello*, *supra,* note 4, para. 67; *Bramante* c. *Restaurants McDonald's du Canada limitée*, 2018 QCCS 4852, para. 55 (Request for approval of a settlement agreement granted in part, 2021 QCCS 955).

[21] *D'Amico* c. *Procureure générale du Québec*, 2019 QCCA 1922, para. 56 (Motion for leave to appeal to the Supreme Court dismissed (Can C.S., 2020-05-14) 39013).

[22] *Abicidan* c. *Bell Canada*, *supra*, note 19, para. 83.

[23] *Martel* c. *Kia Canada inc.*, 2015 QCCA 1033, para. 29 (Notice of Appeal, 2020-03-06 (C.A.) 500-09-028883-205); *Lévesque* c. *Vidéotron, s.e.n.c.*, 2015 QCCA 205, paras. 27 to 29; *Valade* c. *Ville de Montréal*, 2017 QCCS 4299, para. 26.

[24] *L'Oratoire Saint-Joseph du Mont-Royal* c. *J.J.*, *supra*, note 3, para. 32; *Infineon Technologies AG* v. *Option consommateurs*, *supra,* note 4, para. 149; *Tenzer* c. *Huawei Technologies Canada Co. Ltd.*, *supra*, note 4, para. 30; *Union des consommateurs* c. *Air Canada*, 2014 QCCA 523, par. 82; *Sibiga* c. *Fido Solutions inc., supra,* note 13, para. 97.

[26] These factors must be interpreted liberally. A representative should not be excluded "unless his or her interest or qualifications is such that the case could not possibly proceed fairly."[25]

[27] The duty previously imposed on the applicant to identify the members of the group has been tempered over time. When it is clear that a large number of consumers are in the same situation as the applicant, it becomes less important to try to identify them.[26]

1.2.5 Proportionality

[28] The principle of proportionality is not a fifth criterion independent of the others but it must be considered in the assessment of each of the four criteria.[27]

1.3 Discussion

1.3.1 The Proposed Claim

[29] Defendants operate websites that offer accommodations for rent around the world.

[30] Applicant describes some of the Defendants (Priceline.com, L.L.C. ("**Priceline**"), Hotwire, Inc. ("**Hotwire**"), Homeaway.com, Inc. ("**Homeaway**"), Bedandbreakfast.com, Inc. ("**B&B**"), Canadastays (1760335 Ontario Inc.) ("**CanadaStays**"), Orbitz Worldwide, L.L.C. ("**Orbitz**"), KAYAK Software Corporation ("**Kayak**") and Benjamin & Brothers, L.L.C. (Reservations.com) ("**Benjamin**")) as "price aggregators" who advertise lodging in various hotel chains or private properties.

[31] The other Defendants (Accor, S.A. ("**Accor**"), Hilton Worldwide Holdings, Inc. ("**Hilton**"), Six Continents Hotels, Inc. ("**Six Continents**"), Hyatt Hotels Corporation ("**Hyatt**") and Wyndham Hotel Group, L.L.C. ("**Wyndham**")) offer rooms within their own branded hotel chains.

[32] Each of the Defendants provides a similar user experience. The Applicant has filed videos[28] that illustrate the reservation process for each of the Defendants.

[33] The Priceline website will be used here as an example. The pictures are screenshots taken from the Priceline video.

[34] After selecting a destination, a date and the number of travellers, the customer is offered a choice amongst a variety of establishments.

---

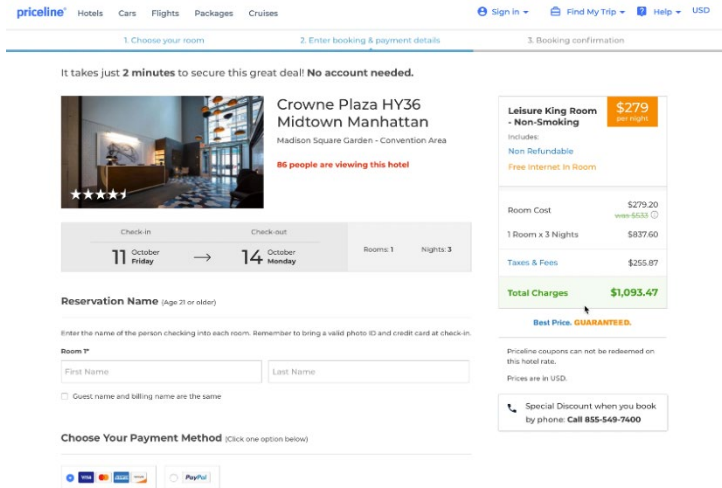
[25] *Infineon Technologies AG* v. *Option consommateurs*, *supra,* note 4, para. 149.
[26] *L'Oratoire Saint-Joseph du Mont-Royal* c. *J.J.*, *supra*, note 3, para. 31; *Apple Canada inc.* c. *Badaoui, supra,* note 4, para. 29; *Martel* c. *Kia Canada inc.*, *supra*, note 23, para. 29.
[27] *Vivendi Canada inc.* v. *Dell'Aniello*, *supra,* note 4, para. 66.
[28] Exhibits P-1 to P-17.

[35] Beside each establishment, a base price is listed for the cheapest available room for the selected period.

[36] Once an establishment is selected, a choice of available rooms is listed. Customers must then click on the reservation button to proceed to the next step:

[37] Again, the advertised price is a base price which excludes fees and taxes. Some of the Defendants add a warning, in small characters, that additional fees will be applied later.

[38] Once a choice is made, the total amount for the duration of the stay is displayed with details of applicable fees and taxes. The customer must then provide personal and banking information to complete the reservation.



[39] Once the reservation is completed, the customer receives a confirmation email that includes the details of the reservation, including the total price paid.

[40] Applicant alleges that the practice described above amounts to fragmented pricing which infringes section 224 of the CPA:

Article 224	**Section 224**
Aucun commerçant, fabricant ou publicitaire ne peut, par quelque moyen que ce soit: *a)* accorder, dans un message publicitaire, moins d'importance au prix d'un ensemble de biens ou de services, qu'au prix de l'un des biens ou des services composant cet ensemble; […]. *c)* exiger pour un bien ou un service un prix supérieur à celui qui est annoncé. […]. Aux fins du paragraphe *c* du premier alinéa, le prix annoncé doit comprendre le total des sommes que le consommateur devra débourser pour l'obtention du bien ou du service. Toutefois, ce prix peut ne pas comprendre la taxe de vente du Québec, ni la taxe sur les produits et services du Canada.	No merchant, manufacturer or advertiser may, by any means whatever, *a)* lay lesser stress, in an advertisement, on the price of a set of goods or services than on the price of any goods or services forming part of the set; […]. *c)* charge, for goods or services, a higher price than that advertised. […]. For the purposes of subparagraph *c* of the first paragraph, the price advertised must include the total amount the consumer must pay for the goods or services. However, the price advertised need not include the Québec sales tax or the Goods and Services Tax. More emphasis must be put on the

Le prix annoncé doit ressortir de façon plus évidente que les sommes dont il est composé.	price advertised than on the amounts of which the price is made up.

[41] According to the Applicant, section 224 forces the Defendants to include in the advertised price all of the costs that the consumer will be obliged to pay, except for federal and provincial taxes and duties. Indeed, section 91.8 of the *Regulation respecting the application of the Consumer Protection Act*[29] (the "***Regulation***") provides an exemption for duties imposed by a federal or provincial act where, under that act, the duties must be charged directly to the consumer to be remitted to a public authority.

[42] He adds that the CPA also prohibits breaking down the price into components and giving greater prominence to the price of the room rather than the all-inclusive price of the stay.

[43] Applicant relies on section 272 of the CPA and the presumption of prejudice that is implied in this section[30] to claim the difference between the price he paid and the advertised price. He also seeks punitive damages.

1.3.2 Similar Issues of Law and Fact (Article 575(1) CCP)

[44] Defendants plead that it would be inappropriate to proceed with a single class action involving all of the Defendants given that there are differences in their respective terms and conditions as well as their reservation processes. They argue this both with respect to the absence of common questions criterion and the inappropriateness of the proposed representative.

[45] To that end they refer to the recent case of *Lachaine* (currently under appeal).[31]

[46] This case is not helpful to them. In *Lachaine*, the proposed class members were seeking a reimbursement of travel fees paid to various airlines. The court described the case as a contractual remedy based on the tariffs as well as the terms and conditions applicable to each ticket purchase.[32]

[47] Here, the remedies that the class members are seeking are not based on the contractual terms and conditions. They derive from the public order provisions of the CPA. As such, differences between the terms and conditions are less material to the determination of a potential section 224 violation.

[48] The Supreme Court of Canada in *Marcotte* noted that nothing in the nature of class actions or the authorization criteria "requires representatives to have a direct cause of action against, or a legal relationship with, each defendant in the class action". What

---

29 *Regulation respecting the application of the Consumer Protection Act,* CQLR c. P-40.1, r 3, s. 91.8.

30 *Richard* v. *Time Inc.*, 2012 CSC 8, paras. 124 to 128; *Imperial Tobacco Canada ltée* c. *Conseil québécois sur le tabac et la santé*, 2019 QCCA 358, paras. 936 to 947.

31 *Lachaine* c. *Air Transat AT inc.*, 2021 QCCS 2305 (Motion for leave to appeal granted and stay of appeal, 2021 QCCA 1290).

32 *Ibid*, para. 48.

matters is: i) that there are identical, similar or related questions of law or fact; ii) that there is someone who can represent the class adequately; iii) that there are enough facts to justify the conclusion sought; and iv) that the class action remedy is appropriate.[33]

[49] Proportionality plays a role when assessing the existence of common questions, whether the representative is adequate, or whether the class contains enough members with personal causes of action against each defendant.[34]

[50] With regard to the reservation process, while some of the Defendants describe their fees differently,[35] in all cases the initial advertised price differs from the price which the consumer ends up paying. This suffices at this stage to meet the criterion.

[51] The Court is satisfied that the present claim raises similar issues of fact and law. Some of these common issues include:

51.1. Whether the first prices listed on the Defendants' websites can be considered an "advertised price" under section 224;

51.2. Whether Defendants breach their obligations under the CPA by advertising prices which are lower than those ultimately charged;

51.3. Whether Defendants breach their obligations under the CPA by placing more emphasis on the room price per night rather than the overall price of the stay;

51.4. Whether class members are entitled to compensation for the difference between the advertised price and the invoiced price, less taxes and duties provided for in the exceptions to article 224c).

[52] The principle of proportionality does not justify a different trial for each of the defendants when the impugned practices are all very similar.

[53] This criterion is met.

1.3.3 Allegations that Appear to Justify the Conclusions Sought (Article 575(2) CCP)

[54] At first glance, Applicant appears to have an arguable case.

---

33 *Bank of Montreal* v. *Marcotte*, *supra*, note 10, para. 43.

34 *Ibid*, paras. 44 and 45.

35 "Resort fee" (exhibit P-2); "Additional guest fee" (exhibits P-4 and P-25); "Service fee" (exhibits P-4, P-22, P-5 and P-17); "Resident fee" (exhibit P-6); "Frais de ménage" (exhibit P-7); "Cleaning fee" (exhibit P-8); "Booking fee" (exhibit P-8); "Resort Charge" (exhibit P-9); "Extra Persons Charge" (exhibits P-10, P-11 and P-12); "Daily Destination Fee" (exhibit P-12); "Destination Fee" (exhibit P-14); "Extra Guest Fee" (exhibit P-13); "Facility Fee" (exhibit P-15) and "Frais hôteliers" (exhibit P-16).

[55] The videos (exhibits P-1 to P-17) he filed demonstrate that the first price listed by the Defendants is not an overall price. Indeed, at the last step, fees and taxes are added. With regard to fees, irrespective of the terminology used to describe them, Applicant states that they should be included. With respect to taxes, Applicant alleges that only federal and provincial tax and duties are excluded from the *Regulation*. He concludes that Defendants have the obligation to include any applicable foreign taxes that may apply to the transactions. The wording of section 91.8 of the *Regulation* seems to support this view.

[56] Defendants have raised three arguments in support of their contestation:

56.1. Consumers who use the Defendants' websites are not misled because the overall price is disclosed prior to the consumer giving consent;

56.2. The CPA does not apply to the disputed transactions because they relate to the lease of an immovable;

56.3. The presumption of prejudice of section 272 of the CPA does not apply.

1.3.3.1 Absence of deception

[57] As a first argument, Defendants plead that section 224 of the CPA is not infringed because potential customers are not misled. They point out that the reservation process is fluid and takes only a few seconds. They add that all of the important information (including the amount of applicable fees and taxes) are disclosed to the customer before consent is confirmed. Some defendants point out that the process makes it clear that the initial price is a base price because the website either mentions that fees will be added later or indicates that the prices are "from" a certain amount. They invite the Court to apply the general impression test enunciated by the Supreme Court of Canada in *Richard* v. *Time*[36] and conclude that even a credulous and inexperienced consumer would not be deceived by the impugned practice.

[58] Defendants' arguments were considered and dismissed by the Court of Appeal in *Union des consommateurs* c. *Air Canada*.[37]

[59] In that case, the Court of Appeal was asked to reverse the finding of the trial judge who had refused to authorize a class action against Air Canada in circumstances that were very similar to those involved here.

[60] At the time, when potential travellers browsed the Air Canada website to purchase tickets for selected travel dates, they were offered a variety of options at a listed price for their flight to and from their destination. The site warned that these initial prices did not

---

36 *Richard* v. *Time Inc.*, *supra*, note 30, paras. 45 to 60.
37 *Union des consommateurs* c. *Air Canada*, *supra*, note 24.

include taxes, fees and other charges. Only after flights were selected did the website provide information on the total purchase price including taxes and fees.

[61] The trial judge refused to authorize the class action. He decided that while the first price was indeed an advertised price under section 224c) of the CPA, he did not believe that the consumer could be misled by the fact that two different prices were posted on the transactional site. In reaching this conclusion, he analyzed the general impression that the representations on the website as a whole might give a credulous and inexperienced consumer.

[62] The Court of Appeal reversed the judgment. It noted that the parliamentary debates made it clear that the enactment of section 224c) was to counter the practice of breaking down prices "by forcing the merchant to announce the correct price from the start and to put an end to the practice of adding charges, often indicated in fine print, at the time of payment".[38] The Court concluded that "the legislative provisions support the argument that even on a transactional site, as soon as the merchant advertises a price, it must reflect the total amount that consumers will be asked to pay".[39]

[63] With regard to the general impression test set out in section 218 CPA, the Court decided that it did not apply to section 224. It observed that "[s]ome business practices […] must be analyzed objectively" to determine "whether there was a prohibited practice".[40]

[64] The Court observed that when considering the prohibition on advertising an incomplete or fragmented price, "[t]he issue of whether there was a violation must be addressed objectively, and there is no reason to assess whether consumers understood the various elements of the actual price or even whether they were misled. The respondent's argument that a consumer, even a credulous and inexperienced one, would have understood that the actual price was the one posted at the second step is therefore irrelevant".[41]

[65] The Court of Appeal reiterated that a broad and liberal interpretation is required to fulfil the goals of remedial legislation like the CPA.[42]

[66] Some Defendants invited the Court to disregard *Air Canada* on the basis that it constitutes a misreading of the test as it was enunciated and applied by the Supreme Court of Canada in *Richard* v. *Time*.

[67] The Court must respectfully decline this invitation.

---

[38] *Ibid*, para. 53.
[39] *Ibid*, para. 68.
[40] *Ibid*, para. 72.
[41] *Ibid*, para. 73.
[42] *Union des consommateurs* c. *Air Canada, supra,* note 24, para. 59.

[68] Recently, in *R.* c. *Lapointe*, the Court of Appeal issued a reminder that the rule of *stare decisis* requires a court to follow the precedents of a higher court.[43] In *Lapointe*, the trial judge had disregarded a precedent of the Court of Appeal on the basis that this precedent had been superseded by a subsequent decision of the Supreme Court of Canada.[44] The Court of Appeal concluded that in doing so, the trial judge had committed an error of law.[45] The Court stated that *stare decisis* is a fundamental rule designed to ensure certainty of law and to promote predictability and fairness while discouraging arbitrariness. The rule also makes justice more efficient and economical and discourages the multiplication of legal proceedings.[46]

[69] Thus, the Superior Court is bound by the decisions of the Court of Appeal when the rule of law at issue is the same and the facts relevant to the dispute cannot reasonably be distinguished from those of the precedent relied upon. When the "lower court disagrees with the binding decision of the hierarchically higher court, it can certainly explain in its reasons what it considers problematic with the binding precedent, but it cannot refuse to apply it".[47]

[70] The principle of *stare decisis* applies here. In *Air Canada*, the Court of Appeal applied the same sections of the CPA. The facts at the root of the dispute are indistinguishable.

[71] In any event, the reasoning of the Court of Appeal in *Air Canada* is sound and has been applied by the Superior Court in subsequent class action proceedings.[48] There is no reason to depart from it.

1.3.3.2 The lease of an immovable

[72] Defendants' second argument calls into play sections 6 and 6.1 of the CPA which read:

---

43 *R.* c. *Lapointe*, 2021 QCCA 360, para. 31 (Motion for leave to appeal to the Supreme Court, 2021-04-29 (Can C.S.) 39655).
44 *Ibid*, para. 26.
45 *Ibid*, para. 29.
46 *Ibid*, para. 30.
47 *Ibid*, paras. 32, 34 and 35.
48 *Viot* c. *U-Haul Co. (Canada) ltée*, 2021 QCCS 4212, para. 73; *Lussier* c. *Expedia inc.*, 2019 QCCS 727, paras. 51 to 57; *Prince* c. *Avis Budget Group inc.*, 2016 QCCS 3770, paras. 46 to 68.

Article 6 Sont exclus de l'application de la présente loi, les pratiques de commerce et les contrats concernant: […] b) la vente, la location ou la construction d'un immeuble, sous réserve de l'article 6.1.	**Section 6** Business practices and contracts regarding […] b) the sale, lease or construction of an immovable, subject to section 6.1; are exempt from the application of this Act.
Article 6.1 Le présent titre, le titre II relatif aux pratiques de commerce, les articles 264 à 267 et 277 à 290.1 du titre IV, le chapitre I du titre V et les paragraphes c, k et r de l'article 350 s'appliquent également à la vente, à la location ou à la construction d'un immeuble, mais non à la location d'un immeuble régie par les articles 1892 à 2000 du Code civil.	**Section 6.1** This title, title II respecting business practices, sections 264 to 267 and 277 to 290.1 of title IV, chapter I of title V and paragraphs c, k and r of section 350 also apply to the sale, lease or construction of an immovable, but not to the leasing of an immovable governed by articles 1892 to 2000 of the Civil Code.

[73] Defendants conclude from these sections that:

73.1. In general, contracts regarding the lease of an immovable are not covered by the CPA;

73.2. As an exception to the above, the interpretation Title (sections 1 to 7), Title II (sections 215 to 253), sections 264 to 267 and 277 to 290.1 of Title IV, chapter I of Title V and paragraphs c, k and r of section 350 apply to the lease of an immovable that is not considered the lease of a dwelling under the *Civil Code of Quebec*.

[74] Defendants concede that the lease of a room situated in a hotel establishment is not considered the lease of a dwelling under the CCQ (article 1892(3) CCQ).

[75] Thus, they agree that section 224, which is part of Title II, could apply to their contracts. However, section 272 which provides the civil remedies that Applicant is seeking (the difference in price and punitive damages) and the presumption of prejudice implied in section 272[49] do not apply. Thus, the Applicant was under the obligation to allege that he suffered damages which he has failed to do. Defendants argue that a

[49] *Richard* v. *Time Inc., supra*, note 30, paras. 124 to 128; *Imperial Tobacco Canada ltée* c. *Conseil québécois sur le tabac et la santé, supra*, note 30, paras. 936 to 947.

violation of section 224 only exposes them to fines under section 215 or to a common law recourse under the *Civil Code of Quebec*.[50]

[76] Moreover, Defendants note that sections 19 and 22.1 which are part of Title I and prohibit jurisdiction and choice of law clauses in consumer contracts do not apply. They conclude that there is no prohibition for them to exclude the application of Quebec law or Quebec courts which is what many of them have done.

[77] It is true that, if section 272 of the CPA does not apply to Defendants' contracts, the Application case is rendered more difficult given that Applicant's cause of action relies mostly on section 272 of the CPA.

[78] Nonetheless, while Defendants' argument is creative, it cannot be accepted at this stage.

[79] Defendants allege that the application of section 6.1 of the CPA to the case at bar is a pure question of law and thus that the Court should decide it at the authorization stage.

[80] That is not the case.

[81] Applying section 6.1 requires the Court to determine whether the contracts that Defendants offer to their customers are contracts for the lease of an immovable. Thus, the application of section 6.1 is contingent on the characterization of the contracts at issue. When various obligations coexist within the same contract, this question is a question of mixed fact and law that requires appreciation of testimonial evidence.[51]

[82] While authorization judges may – but are not required to - decide questions of law when the presentation of additional evidence would not place them in a better position, it is now trite law that they should refrain from doing so if the decision requires applying the law to findings of fact. Any analysis of the evidence should be deferred to the merits given the frugal and limited evidence available at the authorization stage and the fact that much of the relevant evidence may still be in the hands of the defendants.[52]

[83] At this stage, it is not clear that the Defendants' contracts are exempt from the CPA.

[84] Defendants argue that article 1892 CCQ makes it clear that a contract for the rental of a hotel room is a contract of lease. They underline that if renting a hotel room was not considered a lease under the CCQ, there would be no reason for the legislator to exclude

---

[50] *Turgeon* c. *Germain Pelletier ltée*, [2001] R.J.Q. 291 (C.A.), paras. 39 to 41.

[51] *3091-5177 Québec inc. (Éconolodge Aéroport)* v. *Lombard General Insurance Co. of Canada*, 2018 CSC 43, para. 18; *Station Mont-Tremblant* c. *Banville-Joncas*, 2017 QCCA 939, paras. 63 and 64; *Montréal, Maine & Atlantique Canada Cie/Montreal, Maine & Atlantic Canada Co. (M.M.A.) (Arrangement relatif à)*, 2014 QCCA 2072, para. 20.

[52] See cases listed in note 17.

hotel room leases from the application of the residential lease regime. Article 1892 CCQ states:

Article 1892	**Article 1892**
Sont assimilés à un bail de logement, le bail d'une chambre, celui d'une maison mobile placée sur un châssis, qu'elle ait ou non une fondation permanente, et celui d'un terrain destiné à recevoir une maison mobile. […] Cependant, ces dispositions ne s'appliquent pas aux baux suivants: 1° Le bail d'un logement loué à des fins de villégiature; […] 3° Le bail d'une chambre située dans un établissement hôtelier; […]	The lease of a room, of a mobile home placed on a chassis, with or without a permanent foundation, or of land intended for the emplacement of a mobile home is considered to be the lease of a dwelling. […] The provisions of this section do not apply to 1° the lease of a dwelling leased as a vacation resort; […] 3° the lease of a room situated in a hotel establishment; […]

[85] They rely on Professor Lafond who concludes that leases for a dwelling used as a vacation resort and leases for a room situated in a hotel establishment are included in the definition of "lease of an immovable".[53] Author Stanislas Bricka is of a similar view in that he believes that contracts for the lease of a dwelling used as a vacation resort and contracts for the lease of a room situated in a hotel establishment should be considered commercial leases.[54]

[86] Applicant has pointed to cases[55] and legislation[56] that refer to the rental of a hotel room as "accommodation services", "hotel operations contracts", "contract for lodging", offering "lodging to the public" or "establishments providing accommodation to tourists in return for payment", as opposed to "contracts of lease".

---

53 Pierre-Claude LAFOND, *Droit de la protection du consommateur: théorie et pratique*, Cowansville, Éditions Yvon Blais, 2015, p. 14, para. 151 and footnote 229.

54 Stanislas BRICKA, *Commentaire sur l'article 1851 C.c.Q. / D.C.Q., August 2015*, EYB2015DCQ1716, para. 1851-620 and footnote 167.

55 *3091-5177 Québec inc. (Éconolodge Aéroport)* v. *Lombard General Insurance Co. of Canada*, *supra,* note 51, para. 18; *Hébergement Mont Ste-Anne B.B.F. inc.* c. *Société de gestion Cap-aux-Pierres inc.*, 1992 CanLII 3178 (QC CA), para. 6.

56 Art. 2298 CCQ.; CPA, s. 54.9; *Act respecting tourist accommodation establishments*, CQLR c. E-14.2, s. 1.

[87] As such, the equation between a hotel room contract and the lease of an immovable is not automatic.

[88] Nonetheless, this point does not need to be decided here.

[89] It suffices to point out that the way Defendants describe their own business practice is more in line with a service contract than a contract of lease. Thus, even if Defendants were correct to argue section 272 of the CPA does not apply to the rental of a hotel room, it is far from clear that the contracts that group members sign with the Defendants should be characterized as such.

[90] In its plan of arguments, Benjamin describes itself as “an online travel agent” or an “aggregator of prices” (paras. 24 and 27 of their plan; affidavit of Yanin Patel, para. 5). Benjamin’s terms and conditions specify that they do not control accommodation suppliers (exhibit P-33, pp. 235 to 240). Homeaway, B&B and CanadaStays describe themselves as “online accommodation aggregators” (para. 9) and their services as giving access to a website/platform allowing homeowners or property managers to offer vacation or short-term rentals (paras. 18, 19, 20, 21, 23, 24 and 25). Homeaway, B&B and CanadaStays specify that they are not a party to a rental contract (exhibit P-21, art. 1, exhibit P-22, art 1; exhibit P-25, art 1; exhibit P-26, art. 1). Hotwire describes itself as an “online accommodation aggregator” (para. 15 of the plan). Its terms and conditions indicate that their website is provided solely to assist customers in gathering information and transacting business with travel suppliers (exhibit P-20, p. 23). Orbitz describes itself as a “travel fare aggregator” and a “travel metasearch engine” (Affidavit of Christopher Jehle, para. 2). Priceline described itself as a website that allows third-party suppliers to provide hotel reservation services while Kayak described itself as an “internet search engine” (para. 33 of their Plan of Arguments) and specifies that it does not offer travel products and services (exhibit P-32A, p. 223). Six Continents notes that it operates “hotel reservation systems” (para. 8 of their plan). Accor’s terms and conditions refer to “reservation services” (exhibit A-2 and P-24, p. 114). Hyatt’s affidavit refers to itself as a “booking platform operator” (para. 12 of their plan). Hilton’s terms and conditions note that when they offer reservation services for third party suppliers and that they are not involved in the transaction between the supplier and the customer (exhibit P-27, p. 166). Wyndham describes its services as “Web services” (exhibit P-31, p. 206).

[91] Thus, in the majority of cases, Defendants act as intermediaries between the customer and the hotel establishments they will be staying in. Such services have been described by authors as travel agent contracts subject to the CPA and the *Travel Agents Act*[57] rather than contracts for the lease of an immovable. It is worth noting that the *Travel Agents Act* defines a travel agent as a person who, on account of a third party, offers, “the booking or reservation of lodging accommodation”.[58]

---

[57] *Travel Agents Act*, CQLR c. A-10. See for example, Nicole L’HEUREUX and Marc LACOURSIÈRE, *Droit de la consommation*, 6th ed., Cowansville, Éditions Yvon Blais, 2011, pp. 406 and 407.

[58] *Travel Agents Act, supra,* note 57, s. 2.

[92] Similarly, the *Act Respecting the Quebec Sales Tax*[59] distinguishes providers of a "digital accommodation platform" who bring together the supplier of an accommodation unit and its user from "operators of a sleeping-accommodation establishment" who carry on activities related to renting rooms in such an establishment.

[93] Here, Defendants activities are much closer to platform operators than accommodation providers. Most of them do not own the establishments they offer for rent. While it is true that a contract of lease does not require the lessor to be the owner of the property being leased,[60] this is certainly a fact that can be taken into account in the characterization.

[94] Characterizing the contracts at issue will require that the trial judge consider "the full range of services offered" by the Defendants.[61]

[95] Suffice it to say that the characterization offered by the Defendants (i.e.: "contracts for the lease" of an immovable) is not sufficiently clear to rule on the matter at the authorization stage.

[96] Thus, Defendants' argument is dismissed. The judge on the merits will be in a better position to characterize the various contracts at the issue and, if need be, rule on the applicability of the CPA.

[97] While this point is not determinative, the Court notes that Defendants argued forcefully that there were no common issues because their terms and conditions and business plans were different and yet, they invited the Court to assume that they were sufficiently similar to rule on the applicability of s. 6 and 6.1 of the CPA for all of them.

[98] This comforts the Court that the question of the applicability of sections 6 and 6.1 should be identified as a common issue to be determined by the trial judge on the basis of the evidence presented by each of the Defendants.

1.3.3.3 No presumption of prejudice

[99] Defendants argue that the presumption of prejudice implied in section 272 does not apply here.

[100] Their first argument in support of their assertion. i.e.: that section 6.1 excludes the application of section 272 to immovable leases has already been dealt with.

[101] The second argument is that Applicant has failed to allege the factual requirements for the presumption to apply.

---

[59] *Act respecting the Québec sales tax*, CQLR c. T-0.1, s. 541.23.

[60] *9280-7536 Québec inc. (Syndic de)*, 2016 QCCS 3741, para. 36.

[61] *3091-5177 Québec inc. (Éconolodge Aéroport)* v. *Lombard General Insurance Co. of Canada*, *supra*, note 51, para. 19.

[102] The Supreme Court of Canada in *Time* noted that a consumer who wishes to invoke the presumption of prejudice must satisfy four conditions: (1) that the merchant or manufacturer failed to fulfil one of the obligations imposed by Title II of the *Act*; (2) that the consumer saw the representation that constituted a prohibited practice; (3) that the consumer's seeing that representation resulted in the formation, amendment or performance of a consumer contract; and (4) that a sufficient nexus existed between the content of the representation and the goods or services covered by the contract.[62]

[103] In the present matter, there is an allegation that Defendants breached section 224. There is little doubt that the consumer who made the reservation saw the initial advertised price. With regard to the causal effect or the sufficient nexus between the prohibited practice and the consent given, these questions are at best mixed questions of fact and law best left to the trial judge.

[104] For the time being, the Court must consider that it is not frivolous to claim that the presumption of prejudice applies. The Court notes that in *Air Canada*, the Court of Appeal observed that advertising a lower price in the initial phase was meant to attract and incite customers to continue using the website.[63]

[105] Thus, the second requirement is satisfied.

1.3.4 <u>The Appropriateness of the Class Action Remedy (Article 575(3) CCP)</u>

[106] Defendants note that the Application contains little information on this criterion. They point out that the number of potential members consists of a mere estimate on Applicant's part ("at a minimum tens of thousands" para. 4.1 of the Application).

[107] This is true. However, while the burden to show that the criteria are met falls upon the Applicant, one must take into consideration that, at the authorization stage, the bulk of the relevant information is in the hands of the Defendants. As justice Kasirer (then at the Court of Appeal) noted in *Sibiga*,[64] when Defendants presumably have a clear picture of how many consumers are involved and they have not yet been obliged to share this information with the Applicant, they should not be allowed to complain that it would be unfair for them to approve the class action because the Applicant is unable to estimate the number of members.

[108] Defendants are undoubtedly aware of the number of reservations which were made in Quebec. The relevant period spans five years. One would expect that the number of members is not insignificant.

---

62 *Richard* v. *Time Inc.*, *supra*, note 30.
63 *Union des consommateurs* c. *Air Canada*, *supra*, note 24, paras. 64 and 65.
64 *Sibiga* c. *Fido Solutions inc.*, *supra*, note 13, para. 148; *Lévesque* c. *Vidéotron, s.e.n.c.*, *supra*, note 23, paras. 28 and 29.

[109] Furthermore, there is no way for the Applicant to identify these potential members or communicate with them.

[110] Finally, the amount of damages that individual members may be entitled to would make it impractical to proceed otherwise.

[111] Thus, this criterion is satisfied.

1.3.5 A Representative who can Properly Represent the Class Members

[112] The threshold for this requirement is low.

[113] The representative is interested in the suit, he is competent and has no conflict with the other potential group members.

[114] The fact that he has cast a wide net is not a bar to authorization.[65]

2. How Should the Court Describe the Class, the Representative Plaintiff, the Main Issues to Be Dealt With Collectively and the Conclusions Sought in Relation to those Issues?

[115] Article 576 CCP states that the judgment authorizing a class action must:

115.1. describe the classes and subclasses whose members will be bound by the class action judgment;

115.2. appoint a representative plaintiff;

115.3. identify the main issues to be dealt with collectively and the conclusions sought in relation to those issues; and

115.4. determine the district in which the class action is to be instituted.

[116] The issue of the representative has been dealt with. The Applicant, Mr. Chafik Mihoubi, is appointed as class representative.

[117] There is no dispute as to the district in which the class action is to be instituted. The class action will be heard in the district of Montreal.

[118] This leaves the description of the class, the common questions and the conclusions.

---

65 *Union des consommateurs* c. *Air Canada*, *supra*, note 24, para. 82.

2.1 Class Description

[119] In *George* c. *Québec (Procureur général)*,[66] the Court of Appeal ruled that the description of a proposed class should meet the following requirements:

119.1. The definition of the group must be based on objective criteria;

119.2. The criteria must have a rational basis;

119.3. The group definition must not be circular or imprecise; and

119.4. The class definition must not be based on a criterion or criteria that are contingent on the outcome of the class action on the merits.

[120] These requirements need to be respected at the outset of the class action because the group description specifies who is entitled to notices, who is entitled to relief (if relief is granted) and who will be bound by the judgment.[67]

[121] The group definition must not be overly broad and remain in line with the reality and the scope of the problem at the origin of the dispute. The court can redefine a class to ensure that "its dimensions are better aligned with the claim as framed by the applicant". This remedy should be preferred to simply refusing authorization. The class can also be redefined at later stages in the proceedings.[68]

[122] Applicant wishes to file a class action on behalf of the following group:

Tous les consommateurs qui ont réservé, à partir du Québec, un hébergement par internet auprès des défenderesses et qui ont payé un prix supérieur au prix initialement annoncé, à l'exception des droits exigibles en vertu d'une loi fédérale ou provinciale lorsque, en vertu de cette loi, ces droits doivent être perçus directement du consommateur pour être remis à une autorité publique.	All consumers who have booked, from Quebec, accommodation on the internet with the defendants and who have paid a price higher than the price initially advertised, with the exception of fees payable under a federal or provincial law when, under this law, these fees must be collected directly from the consumer to be remitted to a public authority.

[123] The definition of the class is straightforward and easy to understand.

[124] Defendants argue that time brackets should be added in the form of a beginning and closing date.

---

66 *George* c. *Québec (Procureur général)*, 2006 QCCA 1204, para. 40.

67 *Cie de matériaux de construction BP Canada* v. *Fitzsimmons*, 2017 QCCA 1329, para. 49.

68 *M.L.* c. *Guillot*, 2021 QCCA 1450, paras. 25 and 26; *Levy* c. *Nissan Canada inc.*, *supra*, note 6, paras. 41 to 43; *Sibiga* c. *Fido Solutions inc., supra,* note 13, paras. 136 and 137; *Blouin* v. *Parcs éoliens de la Seigneurie de Beaupré 2 et 3, s.e.n.c.*, 2016 QCCA 77, paras. 10 and 14; *Citoyens pour une qualité de vie/Citizens for a Quality of Life* v. *Aéroports de Montréal*, 2007 QCCA 1274, para. 74.

[125] With regard to an initial date, Defendants are correct that any reservation made three years prior to the filing of the Application would be time barred. Thus, the date of January 27, 2017, will be used for the opening date.

[126] With regard to the closing date, they argue that one is required for group members to easily determine who is entitled to relief (if relief is granted) and who will be bound by the judgment. Knowing whether they are part of the group or not allows potential members to make an enlightened decision as to whether or not they wish to be excluded. The trend is to include a closing date.[69]

[127] In some cases the date of the authorization judgment is used.[70]

[128] Recently, the Court of Appeal suggested that, given that the reason for adding an end date is to allow members who wish to opt out to do so, a more appropriate date would be the date of publication of the notice to members announcing the certification of the class action. The court added that, the trial judge could always amend the class description at the time of trial.[71] This solution, which was adopted by the Justice Gagnon in *U-Haul*,[72] will be applied here.

[129] With regard to Defendants Homeaway, CanadaStays, B&B and Orbitz a different end date is warranted.

[130] On November 20, 2019, Homeaway migrated its websites Homeaway.com and Vacationrentals.com to Vrbo.com. On July 31, 2020, Canadastays.com migrated its website to Vrbo.com. Finally, on July 28, 2020, Bedandbreakfast.com migrated its website to Vrbo.com.[73]

[131] Vrbo.com modified its online bookings process on September 28, 2020. Orbitz modified its online booking process on June 4, 2020.

[132] After these dates, users of Vrbo.com and Orbitz were advised of the total amount they could be expected to pay at checkout on the preliminary search results page. This amount took into consideration the dates they had selected, the particular accommodation, and the number of visitors.

[133] Therefore, these end dates will be used for those defendants.

[134] Finally, Benjamin pleads that the class should be modified since the jurisdiction of Quebec Courts over consumer contracts requires that said consumers be domiciled or

---

[69] *Union des consommateurs* c. *Sirius XM Canada Holdings Inc.*, 2019 QCCS 4801, para. 38.

[70] *Lepage* c. *Société de l'assurance automobile du Québec*, 2019 QCCS 1195, para. 66; *Martel* c. *Kia Canada*, *supra*, note 23, para. 47; *Kennedy* c. *Colacem Canada inc.*, 2015 QCCS 222, para. 218 and 219.

[71] *Benamor* c. *Air Canada, supra,* note 4, para. 93.

[72] *Viot* c. *U-Haul Co. (Canada) ltée, supra*, note 48, para. 141.

[73] Affidavit of Kelly Lynn, exhibit P-2.

residents of the province of Quebec.[74] However, jurisdiction also exists when a fault was committed in Quebec or an injurious act was committed in Quebec. Applicant alleges that Defendants committed a fault in failing to respect the provisions of s 224 CPA regarding advertising. When the customer reserved in Quebec this improper advertising occurred in Quebec.

[135] Nonetheless, as Applicant's recourse is based on the CPA, the Court will use the wording approved by the Court of Appeal in *Air Canada*[75] which is "Consumers within the meaning of the *Consumer Protection Act*, residing in the province of Quebec at the time of purchase".

2.2 Common Questions and Conclusions sought

[136] With regard to the common questions, Defendants plead that punitive damages and the words "mobile applications" should be removed.

2.2.1 <u>Punitive Damages</u>

[137] With regard to the first point, Defendants argue that the alleged facts do not support a claim for punitive damages.

[138] Punitive damages can only be awarded when they are "provided for by law."[76]

[139] Here, Applicant relies on article 272 of the CPA, which provides for the possibility of punitive damages if the merchant fails to fulfil an obligation, imposed on them by the CPA.

[140] The Supreme Court of Canada[77] has stated that such damages have a preventive objective. Their purpose is "to discourage the repetition of undesirable conduct." They may only be awarded in the presence of "intentional, malicious or vexatious" violations of the CPA or conduct that displays "ignorance, carelessness or serious negligence with respect to their obligations and consumers' rights under the CPA." Such an evaluation requires consideration of "the whole of the merchant's conduct at the time of and after the violation."[78]

[141] Such a factual analysis of the overall circumstances would be inappropriate to conduct at the authorization stage.

[142] While it is true that courts have sometimes denied claims for punitive damages at the authorization stage, they have usually done so in the absence of factual allegations

---

[74] Art. 3149 CCQ.
[75] *Union des consommateurs* c. *Air Canada, supra,* note 24, para. 6.
[76] Art. 1621 CCQ.
[77] *Richard* v. *Time Inc.*, *supra*, note 30.
[78] *Ibid*, para. 180.

demonstrating intentional violations or carelessness[79] or in the presence of a manufacturer's timely recall.[80] In most cases, it does not fall upon the authorization judge to decide whether or not punitive damages are warranted.[81]

[143] Here, while the factual allegations are slim, Applicant does allege that the Defendants' violations are deliberate. He adds that the UK Competition and Markets Authority has identified widespread concerns with regard to hotel booking sites including the charging of hidden fees.[82] Most Defendants, notwithstanding the filing of the application and the ruling of the Court of Appeal in *Air Canada* have refused to modify their procedure.

[144] Without deciding on the appropriateness of punitive damages in the present case, it suffices to note that these allegations, if proven, could possibly lead to a court to decide that the claim for punitive damages fulfils the requirements of the test set out by the Supreme Court of Canada.

2.2.2 Mobile applications

[145] Defendants allege that there are no allegations regarding mobile applications. This is only partially true as section 2.1 contains a footnote that refers to mobile applications.

[146] The class already refers to consumers who made reservations using the internet. As such, the type of device used (computer, tablet or cell phone), the hardware method (Ethernet, Wi-Fi or Cell data) or software method (website or mobile app) through which group members connect to the internet are irrelevant to the determination of the answers to common questions.

[147] Therefore, though redundant, the terms "mobile applications" will be kept because any contract concluded through a mobile app would be already included in the group definition as such contracts would have been concluded through the internet.

[148] Thus, the questions to be dealt collectively and conclusions will be substantially as stated in the Re-Amended Application of November 1, 2021, with minor adjustments.

[149] Notably a question will be added with regard to the qualification of Defendant's contracts and the applicability of the exclusion of sections 6 and 6.1 of the CPA.

---

79 *Karras* c. *Société des loteries du Québec*, 2019 QCCA 813, paras. 48 and 49; *Perreault* c. *McNeil PDI inc.*, 2012 QCCA 713, paras. 75 and 76 (Motion for leave to appeal to the Supreme Court dismissed (Can C.S., 2012-10-25) 34877).

80 *Paquette* c. *Samsung Electronics Canada inc.*, 2020 QCCS 1160, paras. 43 to 45.

81 *Union des consommateurs* c. *Bell Mobilité inc.*, 2017 QCCA 504, para. 42.

82 *Re-modified Application dated November 1, 2021*, paras. 2.137 to 2.141; exhibit P-38.

CONCLUSION

[150] The class action is authorized.

[151] The proposed class is modified to add an end date.

[152] A common question is added regarding sections 6 and 6.1 of the CPA.

[153] With regard to the notices and the Applicant's request to obtain the email addresses of the class members, the Court will convene the parties to a case management hearing in the event they cannot agree on same.

FOR THESE REASONS, THE COURT:

[154] **GRANTS** the Modified Application to Authorize a Class Action dated November 1, 2021, in part;	**ACCORDE** en partie la Demande pour autorisation d'exercer une action collective et pour être représentant modifiée du 1er novembre 2021;
[155] **AUTHORIZES** the bringing of a class action in the form of an originating application in contractual liability and punitive damages;	**AUTORISE** l'introduction d'une action collective sous la forme d'une demande introductive d'instance en responsabilité contractuelle et en dommages punitifs;
[156] **APPOINTS** Applicant, Mr. Chafik Mihoubi, as representative plaintiff for the persons included in the following classes: 1) Consumers within the meaning of the *Consumer Protection Act*, residing in the province of Quebec at the time of their reservation, who, between January 27, 2017, and [the date which will be retained for the publication of notices], booked accommodation on the internet with the Defendants, Priceline.com L.L.C., Hotwire, Inc., KAYAK Software Corporation, Benjamin & Brothers L.L.C., Accor, S.A., Hilton Worldwide Holdings, Inc., Six Continents Hotels, Inc., Hyatt Corporation or Wyndham Hotels Group, L.L.C. and who paid a price higher than the price initially advertised, with the exception of fees payable under a federal or provincial law when, under this law, these fees	**ATTRIBUE** au demandeur, monsieur Chafik Mihoubi, le statut de représentant des personnes comprises dans les groupes ci-après décrits : 1) Tout consommateur au sens de la *Loi sur la protection du consommateur*, résidant au Québec au moment de la réservation, qui, entre le 27 janvier 2017 et [la date qui sera retenue pour la publication des avis], a réservé un hébergement par internet auprès des défenderesses Priceline.com L.L.C., Hotwire, inc., KAYAK Software Corporation, Benjamin & Brothers L.L.C., Accor, S.A., Hilton Worldwide Holdings, inc., Six Continents Hotels, inc., Hyatt Corporation ou Wyndham Hotel Group, L.L.C. et qui a payé un prix supérieur au prix initialement annoncé, à l'exception des droits exigibles en vertu d'une loi fédérale ou provinciale lorsque, en vertu de cette loi, ces droits doivent être perçus

must be collected directly from the consumer to be remitted to a public authority.

2) Consumers within the meaning of the *Consumer Protection Act*, residing in the province of Quebec at the time of their reservation, who, between January 27, 2017, and September 28, 2020, booked accommodation on the internet with the Defendants Homeaway.com, Inc., Bedandbreakfast.com, Inc. or Canadastays (1760335 Ontario, Inc.), and who paid a price higher than the price initially advertised, with the exception of fees payable under a federal or provincial law when, under this law, these fees must be collected directly from the consumer to be remitted to a public authority.

3) Consumers within the meaning of the *Consumer Protection Act*, residing in the province of Quebec at the time of their reservation, who, between January 27, 2017, and June 4, 2020, booked accommodation on the internet with the Defendant Orbitz Worldwide, L.L.C., and who paid a price higher than the price initially advertised, with the exception of fees payable under a federal or provincial law when, under this law, these fees must be collected directly from the consumer to be remitted to a public authority.

directement du consommateur pour être remis à une autorité publique.

2) Tout consommateur au sens de la *Loi sur la protection du consommateur*, résidant au Québec au moment de la réservation, qui, entre le 27 janvier 2017 et le 28 septembre 2020, a réservé un hébergement par internet auprès des défenderesses Homeaway.com, inc., Bedandbreakfast.com, inc. ou Canadastays (1760335 Ontario, Inc.) et qui a payé un prix supérieur au prix initialement annoncé, à l'exception des droits exigibles en vertu d'une loi fédérale ou provinciale lorsque, en vertu de cette loi, ces droits doivent être perçus directement du consommateur pour être remis à une autorité publique.

3) Tout consommateur au sens de la *Loi sur la protection du consommateur*, résidant au Québec au moment de la réservation, qui, entre le 27 janvier 2017 et le 4 juin 2020, a réservé un hébergement par internet auprès de la défenderesse Orbitz Worldwide, L.L.C. et qui a payé un prix supérieur au prix initialement annoncé, à l'exception des droits exigibles en vertu d'une loi fédérale ou provinciale lorsque, en vertu de cette loi, ces droits doivent être perçus directement du consommateur pour être remis à une autorité publique.

[157] **IDENTIFIES** the principal questions of fact and law to be treated collectively as follows:

1) Are the contracts between Class Members and Defendants contracts regarding the lease of an immovable within the meaning of sections 6 and 6.1 of the CPA?

2) Are the first prices that appear on the Defendants' websites and mobile applications following a search for accommodations advertised prices within the meaning of Section 224(c) of the CPA?

IDENTIFIE les principales questions de fait et de droit à être traitées collectivement comme suit :

1) Les contrats conclus entre les membres du groupe et les Défenderesses sont-ils des contrats concernant la location d'un immeuble au sens des articles 6 et 6.1 de la LPC?

2) Les premiers prix qui apparaissent sur les sites internet et les applications mobiles des défenderesses à la suite d'une recherche pour un hébergement sont-ils

3) Did the Defendants breach their obligations under the CPA by advertising on their websites and mobile applications a lower price than the one ultimately charged? 4) Did the Defendants breach their obligations under the CPA by placing more emphasis on the price per night than the price of the stay? 5) Are the class members entitled to compensation for the difference between the advertised price and the invoiced price, less taxes and duties provided for in the exceptions to article 224(3) CPA and article 91.8 of the *Regulation*? 6) Should the defendants be ordered to pay punitive damages to the class members? 7) Should the members' claims be recovered collectively? 8) What is the amount of the fees unlawfully charged to each class member?	des prix annoncés au sens de l'article 224 c) LPC? 3) Les défenderesses ont-elles manqué à leurs obligations sous la LPC en annonçant sur leurs sites et leurs applications mobiles un prix moins élevé que celui ultimement facturé ? 4) Les défenderesses ont-elles manqué à leurs obligations sous la LPC en accordant plus d'importance au prix par nuit qu'au prix du séjour? 5) Les membres du groupe ont-ils droit à une compensation correspondant à la différence entre le prix annoncé et le prix facturé, moins les taxes et droits prévus aux exceptions des articles 224, alinéa 3 de la LPC et 91.8 du *Règlement*? 6) Les défenderesses doivent-elles être condamnées à verser dommages punitifs aux membres du groupe? 7) Est-ce que les réclamations des membres doivent être recouvrées collectivement? 8) Quel est le montant des frais exigés illégalement à chaque membre du groupe?
[158] **IDENTIFIES** the conclusions sought by the class action to be instituted as being the following: GRANT the class action for all members of the classes. ORDER the Defendants to pay the difference between the amount charged and the amount advertised, less taxes and fees provided for in the exceptions of section 224(3) of the CPA and section 91.8 of the *Regulations*, with legal interest and additional indemnity from the date of the present request for authorization. ORDER the Defendants to pay punitive damages in an amount to be determined, with the legal interest and additional indemnity from the date of the judgment to be rendered.	**IDENTIFIE** les conclusions recherchées par l'action collective à intenter comme étant les suivantes : ACCUEILLIR l'action collective pour tous les membres des groupes. CONDAMNER les défenderesses à payer la différence entre le montant facturé et le montant annoncé, moins les taxes et droits prévus aux exceptions des articles 224(3) de la LPC et 91.8 du *Règlement*, avec l'intérêt légal et l'indemnité additionnelle à compter de la date de la présente demande d'autorisation. CONDAMNER les défenderesses à payer des dommages punitifs pour un montant à être déterminé, avec l'intérêt légal et l'indemnité

ORDER the collective recovery of these amounts. THE WHOLE with legal costs, including expert fees, the cost of notices and administrator expenses.	additionnelle à compter de la date du jugement à être prononcé. ORDONNER le recouvrement collectif de ces sommes. LE TOUT avec frais de justice, incluant les frais d'experts, d'avis et de dépenses d'un administrateur.
[159] **CONVENES** the parties to a further hearing to hear representations on the request for information, the content of the notices required under article 579 of the *Civil Code of Procedure*, the appropriate communication or publication of the said notice and the appropriate delay for a class member to request exclusion, such hearing to take place within 60 days of the present judgment, on a date to be determined between the parties and the Court;	**CONVOQUE** les parties à une audience afin d'entendre leurs représentations quant aux demandes de documents, le contenu de l'avis requis en vertu de l'article 579 du *Code de procédure civile*, la communication ou la publication appropriée dudit avis et le délai approprié pour qu'un membre du groupe demande l'exclusion, une telle audience doit avoir lieu dans les 60 jours du présent jugement, à une date à être déterminée entre les parties et le Tribunal;
[160] **DECLARES** that all class members who have not requested their exclusion will be bound by any judgment to be rendered on the class action to be instituted in the manner provided for by the law;	**DÉCLARE** que tous les membres du groupe qui n'ont pas demandé leur exclusion sont liés par tout jugement à rendre sur l'action collective à intenter de la manière prévue par la loi;
[161] **DECLARES** that the class action will be heard in the district of Montreal.	**DÉCLARE** que l'action collective sera entendue dans le district de Montréal.
[162] **THE WHOLE** with costs.	**LE TOUT** avec les frais de justice.

MARTIN F. SHEEHAN, J.S.C.

Mtre Mathieu Charest-Beaudry
Mtre Lex Gill
TRUDEL JOHNSTON & LESPÉRANCE
Mtre Bruno Grenier
Mtre Cory Verbauwhede
GRENIER VERBAUWHEDE AVOCATS INC.
Mtre Peter Shams
HADEKEL SHAMS S.E.N.C.R.L.
Counsels for the Applicant

Mtre Éric Préfontaine
Mtre Annie-Claude Authier
OSLER, HOSKIN & HARCOURT, S.E.N.C.R.L.,S.R.L.
Counsels for the Defendant Hyatt Hotels Corporation

Mtre Fadi Amine
MILLER THOMSON S.E.N.C.R.L.
Counsel for the Defendants Priceline.com, L.L.C. and Kayak Software Corporation

Mtre Eric Lefebvre
Mtre Claudette van Zyl
NORTON ROSE FULBRIGHT CANADA S.E.N.C.R.L., S.R.L.
Counsels for the Defendants Hotwire, Inc., Homeaway.com, Inc., Bedandbreakfast.com, Inc., Canadastays (1760335 Ontario Inc.) and Orbitz Worldwide, L.L.C.

Mtre Jean Saint-Onge
Mtre Alexander L. De Zordo
Mtre Karine Chênevert
BORDEN LADNER GERVAIS S.E.N.C.R.L., S.R.L.
Counsels for the Defendants Accor, S.A. and Hilton Worldwide Holdings, Inc.

Mtre Myriam Brixi
LAVERY, DE BILLY S.E.N.C.R.L.
M. Joseph David Timothy Pinos
CASSELS BROCK & BLACKWELL LLP
Counsels for the Defendant Six Continents Hotels, Inc.

Mtre Simon Jun Seida
Mtre Anthony Cayer
BLAKE, CASSELS & GRAYDON S.E.N.C.R.L.
Counsels for the Defendant Wyndham Hotel Group, L.L.C.

Mtre Joséane Chrétien
Mtre Yassin Gagnon-Djalo
MCMILLAN LLP
Counsels for the Defendant Benjamin & Brothers, L.L.C. (Reservations.com)

Hearing dates: November 1 and 2, 2021