IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Creery v. Match Group LLC,*
2025 BCSC 1299

Date: 20250710
Docket: S213988
Registry: Vancouver

Between:

Kevin Creery

Plaintiff

And

Match Group LLC

Defendant

Before: The Honourable Mr. Justice Crossin

Reasons for Judgment

Counsel for the Plaintiff:	S. Turner S. Jaworski R. Matheuszik
Counsel for the Defendant:	R. von Ruti
Place and Dates of Hearing:	Vancouver, B.C. November 18-20 & 22, 2024, December 11, 2024 & January 8, 2025
Place and Date of Judgment:	Vancouver, B.C. July 10, 2025

Introduction

[1] The defendant, Match Group LLC ("Tinder"), owns and operates a mobile phone application (an "app") known as Tinder. The Tinder app is a virtual dating service that facilitates connection between prospective romantic partners. The use of the Tinder app is free however users can purchase additional features which are promoted as improving the likelihood of connecting with a potential romantic partner.

[2] These additional features are referred to as "Premium Features". There are three tiers of Premium Features: 1. Tinder Plus also referred to as Tinder+, which was introduced in March 2015; 2. Tinder Gold which was introduced in June 2017; and 3. Tinder Platinum which was introduced in 2020.

[3] With each subsequent tier, app users pay additional money and, in exchange, gain access to additional app features.

[4] It is common ground that from 2015, when Tinder launched Tinder+, until June 2022, the price of these features varied depending on the age of the app user. During this period app users who registered for the app prior to turning 29 years old paid around half the price for Premium Features, as compared to app users who registered after turning 29 years of age. The function of the Premium Features was the same, regardless of the price differential.

[5] The defendant has referred to the price differential as a "youth discount". The plaintiff takes issue with this characterization, pointing out that the defendant did not promote the differential pricing as a "youth discount" on either its app or its website.

[6] In any event, regardless of the characterization, the parties are in agreement that the age-based price differential was not disclosed to app users when they purchased Premium Features. Instead, at the time of purchase, app users were shown one price; the price they would be charged for accessing the Premium Feature of their choosing. The age-based price differential was also not explicitly disclosed anywhere on the Tinder app or the Tinder website.

[7] The proposed representative plaintiff, Mr. Kevin Creery, purchased both "Tinder+" and "Tinder Gold" between 2018 and 2021. Mr. Creery was over 29 years of age when he made these purchases and was therefore charged the higher price to access Tinder's Premium Features.

[8] The plaintiff submits that Tinder's age-based pricing practices violated ss. 4, 5, 8 and 9 of the *Business Practises and Consumer Protection Act*, S.B.C. 2004, c. 2 (the "*BPCPA*"). The plaintiff also asserts that Tinder's conduct violates the relevant consumer protection legislation in Alberta, Saskatchewan, Manitoba, Ontario, Québec, Newfoundland and Labrador and Prince Edward Island. The plaintiff requests that his claim be certified as a class proceeding pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "*CPA*").

[9] The relevant provisions of ss. 4 and 5 of the *BPCPA* read as follows:

> 4 (1) In this Division:
>
> "deceptive act or practice" means, in relation to a consumer transaction,
>
> > (a) an oral, written, visual, descriptive or other representation by a supplier, or
> >
> > (b) any conduct by a supplier
>
> that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;
>
> "representation" includes any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction.
>
> (2) A deceptive act or practice by a supplier may occur before, during or after the consumer transaction.
>
> (3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:
>
> > (a) a representation by a supplier that goods or services
> >
> > > (i) have sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that they do not have,
> > >
> > > (ii) are of a particular standard, quality, grade, style or model if they are not,
> > >
> > > (iii) have a particular prior history or usage that they do not have, including a representation that they are new if they are not,

(iv) are available for a reason that differs from the fact,

(v) are available if they are not available as represented,

(vi) were available in accordance with a previous representation if they were not,

(vii) are available in quantities greater than is the fact, or

(viii) will be supplied within a stated period if the supplier knows or ought to know that they will not;

(b) a representation by a supplier

(i) that the supplier has a sponsorship, approval, status, affiliation or connection that the supplier does not have,

(ii) that a service, part, replacement or repair is needed if it is not,

(iii) that the purpose or intent of a solicitation of, or a communication with, a consumer by a supplier is for a purpose or intent that differs from the fact,

(iv) that a consumer transaction involves or does not involve rights, remedies or obligations that differs from the fact,

(v) about the authority of a representative, employee or agent to negotiate the final terms of a consumer transaction if the representation differs from the fact,

(vi) that uses exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading,

(vii) that a consumer will obtain a benefit for helping the supplier to find other potential customers if it is unlikely that the consumer will obtain the benefit,

(viii) that appears in an objective form such as an editorial, documentary or scientific report if the representation is primarily made to sell goods or services, unless the representation states that it is an advertisement or promotion, or

(ix) to arrange for the consumer an extension of credit for a fee, unless the fee is deducted from the advance, as defined in section 57 [definitions];

(c) a representation by a supplier about the total price of goods or services if

(i) a person could reasonably conclude that a price benefit or advantage exists but it does not,

(ii) the price of a unit or instalment is given in the representation, and the total price of the goods or services is not given at least the same prominence, or

(iii) the supplier's estimate of the price is materially less than the price subsequently determined or demanded by the supplier unless the consumer has expressly consented to the higher price before the goods or services are supplied;

(d) a prescribed act or practice.

Prohibition and burden of proof

5 (1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.

(2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

[10] The relevant portions of ss. 8 and 9 of the *BPCPA* read as follows:

Unconscionable acts or practices

8 (1)An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.

(2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.

(3) Without limiting subsection (2), the circumstances that the court must consider include the following:

(a) that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;

(b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect the consumer or guarantor's own interest because of physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;

(c) that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;

(d) that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;

(e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;

(f) a prescribed circumstance.

Prohibition and burden of proof

9 (1)A supplier must not commit or engage in an unconscionable act or practice in respect of a consumer transaction.

> (2) If it is alleged that a supplier committed or engaged in an unconscionable act or practice, the burden of proof that the unconscionable act or practice was not committed or engaged in is on the supplier.

[11] Section 8 of the *BPCPA* does not define an "unconscionable" act or practice.

[12] The plaintiff also seeks relief pursuant to s. 172 of the *BPCPA*, as follows:

> 172 (1)The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court for one or both of the following:
>
> > (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
> >
> > (b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.
>
> …
>
> (3) If the court grants relief under subsection (1), the court may order one or more of the following:
>
> > (a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;
> >
> > (b) if the action is brought by the director, that the supplier pay to the director the actual costs, or a reasonable proportion of the costs, of the inspection of the supplier conducted under this Act;
> >
> > (c) that the supplier advertise to the public in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions that the court considers reasonable, particulars of any judgment, declaration, order or injunction granted against the supplier under this section.

[13] The claim of the plaintiff was originally filed in April 2021. The initial skirmishing came before me throughout 2023.

[14] The plaintiff initially brought on two applications for hearing. The first; an application to further amend the claim. The second; to certify the proposed claim as a class action. The defendant opposed both applications and also brought an application to strike the claim; including the 'proposed' claim that was the subject

matter of the amendment application. It became apparent to me during the course of the applications that the conglomeration of applications was not entirely consistent with an efficient and pragmatic approach to the lawsuit. I determined the better way forward was to firstly settle the issue of the pleadings, and adjourn the conclusion of the certification application to a future date pending the outcome concerning the proposed amendments.

[15] In February 2024 I largely granted the plaintiff's application to amend the pleadings, and mostly dismissed the defendant's application to strike the proposed amendments. In describing my approach to matters I commented as follows in *Creery v. Match Group LLC*, 2024 BCSC 149:

> [17] In my view this was, and is, the appropriate approach, at least in the particular circumstances at bar. The policy considerations underpinning the class proceedings legislation quite properly focus on providing timely and affordable access to justice. Courts must be ever mindful of these goals concerning sequencing of applications, and the hearing and determination of applications in the course of the litigation.
>
> [18] That said, the proceeding before the court is not a class proceeding. It is, at this point, a claim by Mr. Creery. In this context, the simultaneous hearing of a mosh pit of applications, the outcome of each, in whole or in part, informed by the result of the other; is not consistent with the court's overarching duty to facilitate the fair and orderly unfolding of proceedings. The approach inevitably required submissions of a hypothetical nature; necessitated by the unresolved state of the pleadings. It was, at least from my perspective, not entirely satisfactory.

[16] The certification application of the plaintiff was rescheduled to resume in November 2024. In the interim, in June 2024, the defendant filed an application for summary judgment pursuant to Rule 9-6 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009; seeking to have the application heard at the same time as the resumption of the certification application.

[17] Upon the commencement of the proceedings in November 2024, the plaintiff took an initial position that the defendant's application for summary judgment ought to be adjourned and heard after a determination of the certification application. This position was primarily based upon the submission that the lateness of the filing of the defendant's application had prevented the plaintiff from 'marshalling additional

evidence' to meet the application. The plaintiff did not really develop this point. It remains unclear, on the evidence, why the plaintiff, if so advised, was prevented from filing additional evidence between June and November 2024; or what the nature of that evidence might have been. Consequently it was most difficult to assess the point.

[18] The plaintiff also objected on the basis that to insert a summary judgment application 'into the mix' of the certification application was not consistent with economy and judicial efficiency.

[19] In any event, the plaintiff did not seek a preliminary ruling, but made full submissions in response to the summary judgment application in the course of completing submissions concerning the certification application.

[20] In the end, in all the circumstances, I proceeded in hearing both applications.

[21] Therefore there are two issues before the court. Tinder applies to dismiss the plaintiff's claim on a summary basis. The plaintiff seeks to have the court certify the proposed class proceedings.

Summary Judgment

[22] Tinder requests that the court summarily dismiss the plaintiff's claims under Rule 9-6 of the *Supreme Court Civil Rules*. The request of Tinder essentially rests on the assertion that the plaintiff's claims are meritless and, consequently, bound to fail.

[23] While the summary judgment application is brought in the context of a class action certification, a "proposed class proceeding has no special status and, until certified, it is to be treated as any other individual action": *Dussiaume v. Sandoz Canada Inc.*, 2023 BCSC 795 at para. 21.

[24] The law relating to Rule 9-6 has been recently and neatly summarized by Justice Hughes in *Wang v. Lu*, 2024 BCSC 126:

> Legal Principles

[61] Rule 9-6 permits a defendant to apply for summary judgment on all or part of a claim, providing in relevant part as follows:

> (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.
>
> (5) On hearing an application under subrule (2) or (4), the court,
>
> > (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
> >
> > (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
> >
> > (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
> >
> > …

[62] The principles that apply on an application for summary judgment are summarized by the Court of Appeal in *Zheng v. Bank of China (Canada) Vancouver Richmond Branch*, 2023 BCCA 43:

> [31] The balance that has been struck in R. 9-6 is to allow a party the opportunity to bring a preliminary application to show the court that a claim or defence has no merit and therefore it should not be allowed to proceed to trial. However, the burden on the applicant is high. It is not enough to show that the claim or defence has little merit, nor is it appropriate to ask the court to weigh competing evidence. Rather, the applicant must show that the claim or defence presents no genuine issue for trial and it is bound to fail.
>
> [32] This Court in *Vandev Consulting Limited v. Pacific Maple Manufacture Inc.*, 2022 BCCA 97, noted that a defendant can succeed on a R. 9-6 application "by showing the case pleaded by the plaintiff is unsound [does not support a cause of action] or by adducing sworn evidence that gives a complete answer to the plaintiff's case": at para. 42, citing Beach Estate at para. 48.
>
> [33] However, if the plaintiff submits evidence contradicting the defendant's evidence in some material respect, or if the defendant's evidence fails to meet all the causes of action raised by the plaintiff's pleadings, the application must be dismissed: at paras. 42–43, citing *Beach Estate* at para. 48 and *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at para. 11; see also *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 at paras. 12–13. Where the plaintiff has pleaded a cause of action and facts in support are within the defendant's knowledge and control, a defendant bringing a summary judgment application must provide

> evidence that the pleaded claim is without merit: *Balfour v. Tarasenko*, 2016 BCCA 438 at para. 43.
>
> [34] A judge on a summary judgment application is not permitted to weigh evidence, assess credibility or draw unfavourable inferences against the party defending the application: *Aubichon v. Grafton*, 2022 BCCA 77 at para. 27.

> [63] As noted in *Zheng*, the bar on an application under Rule 9-6 is high. The onus on a party seeking summary judgment has been described as requiring that it be "plain and obvious", "manifestly clear" or "beyond a doubt" that there is no genuine issue of material fact requiring trial: *Beach Estate v. Beach*, 2019 BCCA 277 at para. 48; *Lameman*, at para. 11. Accordingly, summary judgment should only be granted where the respondent's case is bound to fail: *Deline v. Vancouver Talmud Torah Assn.*, 2020 BCSC 251 at para. 36; *Beach Estate* at paras. 48, 66–67.
>
> [64] Although an application under Rule 9-6 invokes the court's consideration of evidence, it is not a summary trial. I am not permitted to weigh evidence, assess credibility or draw unfavourable inferences against the party defending the application: *Zheng* at para. 34, citing *Aubichon v. Grafton*, 2022 BCCA 77 at para. 27. Any weighing of evidence beyond determining whether it is incontrovertible may only be done in a trial: *Beach Estate* at para. 49; *Tran v. Le*, 2017 BCCA 222 at para. 2; *Century Services Inc. v. LeRoy*, 2015 BCCA 120 at para. 32; *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 at paras. 8–12 [*Skybridge*]. Accordingly, a matter is not appropriate for determination by way of summary judgment where determinations of fact are required: *Wang v. Niu*, 2022 BCSC 1027 at para. 51 [*Niu*], aff'd 2023 BCCA 153, citing *Skybridge* at para. 8.
>
> [65] Further, issues of law should only be decided under Rule 9-6 if there is no real dispute about the material facts and the issue is well-settled by authoritative jurisprudence. Rule 9-6 is not well-suited for determining novel points of law: *Niu* at para. 52; *Malak v. Hanna*, 2021 BCSC 115 at para. 10; see also *L.D. (Guardian ad litem of) v. Provincial Health Services Authority*, 2012 BCCA 491 at paras. 12, 19.

[25] In consideration of the above propositions, in order for me to dismiss the plaintiff's action summarily, I would need to be satisfied that his claims raise no genuine issue for trial and are bound to fail. Tinder bears the burden of proving that there is no genuine issue. The bar for such proof is high.

[26] I also observe the principle that our British Columbia Court of Appeal has repeatedly endorsed that the courts should be hesitant to summarily dismiss claims which raise novel or relatively unexplored legal issues. Justice Griffin (as she then was) in *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485

addresses this proposition in the context of the Court of Appeal decision in *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.*, 2002 BCCA 138; as follows:

> [86] In *Bacchus* the parties sought summary determination of an issue in the litigation, namely, the plaintiff's ability to claim as agent for damages suffered by the plaintiff's undisclosed principal. The plaintiff was advancing a claim in contract, breach of a duty of good faith, and for negligent misrepresentation. One of the defences advanced was that the plaintiff as agent could not claim for damages suffered by another party. This was the issue determined by way of summary trial.
>
> [87] On appeal in *Bacchus*, the Court of Appeal concluded that it was not appropriate to determine the issue by summary trial. There were two factors leading to this conclusion:
>
> > a) The Court considered that the issue that had been determined on summary trial raised important, rare and unsettled questions of law. These questions of law might not have been necessary to answer, had the case gone to trial and the plaintiff failed in proving the necessary facts to succeed in a claim. The Court of Appeal held that these issues ought not to be addressed at the appellate level unless the case at hand, in all its aspects, required it: at paras. 25, 29.
> >
> > b) The determination of the issue by summary trial meant that an appeal ensued, and the original trial date for the entire cause was thereby missed. The sense of the Court's judgment was that the Court did not consider that this assisted the goal of an efficient resolution of the proceeding: at paras. 27-28.
>
> [88] The Court in *Bacchus* did not establish an absolute rule against the use of the summary trial procedure where the above factors are present. Rather, these factors combined to make the Court conclude that summary trial of an issue ought not to have occurred in that case, based on the issues in that litigation. The issue determined by summary trial was whether the defendant engineers owed a duty of care to the plaintiff.
>
> [89] There are other cases where important and novel issues have been determined on a summary procedure, despite the fact that other issues remain for trial. One example is the case of *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.*, 1993 CanLII 67 (SCC), [1993] 3 S.C.R. 206, [*Edgeworth*]. The issue determined by summary trial was whether the defendant engineers owed a duty of care to the plaintiff.

[27] As referenced above, there is not, of course, an absolute bar to a summary determination of novel legal issues; however, the jurisprudence is largely in alignment that a court should "decide an issue of law under Rule 9-6 only if it is satisfied that there is no real dispute about material facts and that the issue is well settled by authoritative jurisprudence. Rule 9-6 is not well suited for deciding novel

points of law”: see *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198 at para. 71.

[28] Of course it is not uncommon that judges must tackle novel or unique issues in a variety of matters before the courts. It is often the case that the legal context of the factual background is, in fact, not bounded by ‘well-settled, authoritative jurisprudence’. The caveat however, suggested by appellate jurisprudence in this area, is that resolving certain legal issues within the legal contours of a summary application may not be the most helpful, constructive, or fair record to decide the point.

[29] In its summary judgment application, Tinder asserts that the parties agree on the material facts, and the evidence before the court, as a matter of law, cannot give rise to a viable cause of action under *BPCPA*. Tinder also argues that resolving the plaintiff's claim would not require this Court to either weigh evidence or make credibility assessments because, based on the evidence before the court, it is clear and unambiguous that no unlawful conduct occurred.

[30] The plaintiff says that his claims raise issues which are not well settled by authoritative jurisprudence and are therefore not appropriate for determination by a summary judgment. The plaintiff also takes issue with Tinder’s assertion that the parties agree on all the material facts.

Sections 4 and 5: Deceptive Acts or Practices

[31] It is not in dispute that Tinder did not overtly disclose the age-based price differential on either its website, or on its mobile app. When app users purchased Premium Features they were presented with one price: the price they needed to pay.

[32] The plaintiff says that this conduct was deceptive and in violation of s. 4 and s. 5 of the *BPCPA*. Section 5 prohibits deceptive acts and practices, while s. 4(1) defines a deceptive act or practice as “an oral, written, visual, descriptive or other representation by a supplier […] that has the capability, tendency or effect of deceiving or misleading a consumer”.

[33] Section 4(3)(b) provides some examples of what constitutes a "representation by a supplier", including s. 4(3)(b)(vi) which states that "exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading" constitutes a representation. A failure to state a material fact, if the effect of that failure is misleading, therefore constitutes a deceptive act and is captured by the *BPCPA*. Much of the plaintiff's claim rests on s. 4(3)(b)(vi).

[34] Non-disclosure of a material fact alone, absent a corresponding oral, written, visual or descriptive representation, can ground a cause of action under s. 4(3)(b)(vi) of the *BPCPA*.

[35] In his claim, the plaintiff says that the age-based pricing differential was a material fact and that the effect of Tinder's nondisclosure was misleading as it gave the impression that users were all paying the same price for the same features, when, in fact, they were not.

[36] In the area of differential pricing the defendant's initial overarching position is that there is no prospect that 'discounted rates' could be found to be unlawful under the legislation in issue. Tinder submits there is no such prohibition in the legislation; making it 'manifestly clear' it is lawful conduct in these circumstances.

[37] Tinder also asserts that in this case, the price differential was not a material fact. Tinder characterizes the price differential as a "youth discount" and asserts that targeted youth discounts are widespread industry practice that does not violate the *BPCPA*. In the view of Tinder, the *BPCPA* does not require service providers to give notice of youth discounts to all potential customers, including customers who do not qualify for the discount. It also asserts that, if this Court does in fact find that the price differential is a material fact, that it publicly disclosed its so-called "youth discount" and, therefore, any assertion that it failed to disclose such information is bound to fail.

[38] The plaintiffs claim pursuant to s. 4(3)(b)(vi) requires the court to consider two issues. First, in this context, what does it mean to "fail to state a material fact"? That

is, to what extent, and in what way, must digital content suppliers disclose material facts to their customers in order to comply with the *BPCPA*. In this case, the alleged material fact is a differential pricing scheme, but the underlying question remains the same. The second question is whether an age-based differential pricing scheme constitutes a material fact that is captured by s. 4(3)(b)(vi) of the *BPCPA*.

[39] It is apparent on the facts and evidence before me that Tinder disclosed its age-based price differential to the news media. Tinder adduced several news articles from 2015 and one news article from 2017 which demonstrate this public reporting. Tinder also disclosed the age-based pricing differential to the US Securities and Exchange Commission.

[40] I must say I am somewhat skeptical of the suggestion that the court should infer that a Canadian Tinder app user who purchased Premium Features in, for example, 2020, was aware of Tinder’s differential pricing scheme because of this kind of disclosure. In my view, whether third-party news outlets reported on Tinder’s pricing policies, or whether Tinder disclosed its pricing policies to a third-party regulatory body, is not the question before me. The *BPCPA* regulates representations “by a supplier” to a consumer. Tinder’s disclosure of its pricing policies to third-party entities is really not dispositive of the issues before the court, nor does it doom the plaintiff's claim to fail.

[41] Tinder however also asserts that it directly disclosed the age-based price differential to its consumers in the following ways:

a. The Tinder website stated “we also use information about you to deliver offers and discounts tailored to your profile” and “sometimes we offer special promotions and discount pricing on Tinder’s Premium Features”.

b. Subsequent to 2018; the terms of use Tinder represented stated it uses customer’s information to “administer sweepstakes, contests, discounts or other offers”.

c. Tinder's terms of use stated that "pricing varies by a number of factors" and that Tinder "frequently offer(s) promotional rates – which can vary based on region, length of subscription, bundle size and more".

[42] The plaintiff says that none of these disclosures were sufficient to comply with the *BPCPA*, as, in addition to stating that the nondisclosure of a material fact can ground a cause of action, s. 4(3)(b)(vi) also states that "ambiguity about a material fact" constitutes a representation capable of supporting a claim of deceptive acts or practices.

[43] Additionally, in accordance with s. 5 of the *BPCPA*, once the plaintiff alleges that "a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier". The plaintiff says that Tinder has not displaced this burden.

[44] In my view, concerning the issue of whether Tinder properly disclosed the price differential, I conclude that none of these actions clearly dispose of the plaintiff's claims. A court could conclude that Tinder's actions were insufficient to disclose the age-based pricing difference to the consumer.

[45] Additionally, I find that a court could reasonably conclude that the somewhat vague references above to discounts and sweepstakes created either ambiguity about the age-based price differential or constitute a complete failure to state the existence of the age-based price differential. Accordingly, it cannot be said that the plaintiff's s. 4 claim is bound to fail.

[46] There is also a broader question underlying the issue that is not suitable for determination by way of summary judgment; that is, in the context of digital transactions, how much, and what kind of disclosure is required by the *BPCPA*? Tinder contends that requiring suppliers to disclose all possible discounts to all possible consumers, even if those consumers do not qualify for the discount, is unworkable and would prohibit widely used sales practices.

[47] In other words, if one were to assume that two consumers attend a movie theatre and one consumer qualifies for a so-called “youth discount” and the other does not, Tinder says that the movie theatre is not required to disclose the existence of the age-based pricing differential to the consumer who does not qualify for the discount. It argues that it follows that Tinder should not be required to disclose the “youth discount” to app users above 29 years old, as these users did not qualify for the discount in any event.

[48] While the analogy has a superficial attraction, it must be kept in mind that consumer purchases are mediated by the Tinder app, which is in Tinder’s exclusive control. This control makes it more difficult for consumers to protect their own interests. The plaintiff therefore asserts that, to comply with s. 4(3)(b)(vi), Tinder was required to disclose the age-based pricing differential to its consumers at the point-of-sale, or, at a minimum, disclose the age-based pricing differential on its app and website.

[49] In this context, the court is being invited to determine the parameters of required disclosure under the *BPCPA* when consumers are purchasing digital products, directly from digital suppliers, and buyer platforms exclusively controlled by the digital supplier. In my view this question raises a justiciable issue, the resolution of which ought to have the benefit of a more enhanced record. In particular, where consumers exist, evermore increasingly, in a world mediated by digital technology, including mobile phone applications.

[50] Counsel are unable to direct me towards precedent that full and properly disposed of the question: in the context of digital content suppliers, what level of disclosure is necessary to satisfy s. 4(3)(b)(vi) of the *BPCPA*?

[51] Was Tinder’s disclosure of the pricing scheme to news media and the US Securities Commission sufficient to satisfy its disclosure obligations? Did Tinder satisfy its disclosure obligation but vaguely stating in its terms of service that provides discounts and promotional rates? Was Tinder required to clearly state the age-based pricing differential on its app or its website? Based upon the evidentiary

record and the cases before me, I am unable to properly answer these questions in the context of a summary judgment application.

[52] The second question before me, in relation to s. 4(3)(b)(vi), is whether an age-based differential pricing scheme even constitutes a material fact that is captured by s 4(3)(b)(vi) of the *BPCPA*. Tinder submits that the plaintiff is not eligible for the so-called “youth discount” and would therefore have paid the same price whether or not he was aware of the age-based price differential. It therefore asserts that the price differential is not a material fact for the purpose of the *BPCPA*.

[53] In submitting that the differential pricing scheme does not constitute a material fact, a good deal of time was spent parsing *Pantusa v. Parkland Fuel Corporation*, 2022 BCSC 322. In this particular case the plaintiff was a retail gasoline consumer who claimed that he was overcharged for gasoline, because the defendant, who sold gasoline in BC at a wholesale level, systemically overcharged its wholesale customers. As a result, the companies who purchase the wholesale gasoline allegedly sold the gas to the retail consumers at an overinflated price. The plaintiff asserted that this pricing scheme is unconscionable, and contrary to s. 9 of the *CPA*.

[54] Specifically, Tinder focusses on para. 125 of *Pantusa* which reads as follows:

> In that regard, Mr. Pantusa alleges, first, that he and other consumers are at an informational disadvantage vis-à-vis the defendants, a disadvantage that the defendants have exploited. <u>The difficulty I have with that allegation is that a consumer’s choice to purchase gasoline at a particular price cannot realistically be said to be driven by the extent of his or her knowledge (or lack of it) about the dynamics of the wholesale gasoline market</u>. Consumers with full knowledge of the defendants’ pricing practices are likely to pay the same price for retail gasoline as others who are ignorant.
>
> [Emphasis added.]

[55] Tinder submits that, based on these comments, this Court can infer that the age-based price differential is not a material fact. Specifically, the defendant asserts that “a consumer choice to purchase Premium Features at a particular price point cannot realistically be driven by the extent of his or her knowledge or lack of it about pricing or discounts made available to others for which he or she was not eligible”.

[56] I respectfully disagree. The circumstances of *Pantusa* are fundamentally different than the matter before the court. In *Pantusa* the wholesale defendant did not sell the products to the plaintiff; they sold the products to a wholesale purchaser who then – in turn – sold the products to the plaintiff. Justice Milman concluded that the sale price of gasoline in a third-party transaction to which the plaintiff was not a party could not be said to influence the plaintiff's decision to purchase gasoline from a retail supplier. In *Pantusa*, the court also noted the following:

> [131] I appreciate that an impugned practice may still be unconscionable under the *BPCPA* even if it is not proscribed by the *Competition Act*. <u>But if a consumer transaction were to be considered unconscionable merely because wholesale suppliers in an oligopolistic market can charge more for their products than they would in a more competitive one</u>, then the doctrine of unconscionability would be stretched beyond all recognition. It would render actionable conduct that has long been held to be lawful. It would also extend the reach of the doctrine to cover many other segments of the economy, wherever a market is less than perfectly competitive.
>
> [Emphasis added.]

[57] I read Justice Milman's conclusion as that the *BPCPA* does not apply to the plaintiff's claims due to the court’s reticence to expand consumer protection legislation to regulate wholesale market supply. This caution is warranted, as wholesale transactions are reasonably distinguishable from consumer transactions, and consumer protection legislation, as the name suggests, is only intended to protect consumer transactions.

[58] On balance I find that *Pantusa* does not foreclose this Court's ability to find that an age-based price differential is a material fact captured within s. 4 of the *BPCPA*. The material presented to the court does not change this fundamental proposition.

[59] I reiterate that Rule 9-6 is intended to dispose of matters where there are no disputed material facts and where the issue is well settled by authoritative jurisprudence. In this regard, I am unable to find the plaintiff's claims are bound to fail. In my view the material facts remain in dispute and the legal issues have not been clearly answered jurisprudentially. In my view these issues ought not to be resolved on the record before the court.

<u>Section 8 and 9: Unconscionable Acts or Practices</u>

[60] The plaintiff also asserts that Tinder engaged in unconscionable acts or practices contrary to ss. 8 and 9 of the *BPCPA*. This claim is contained in para. 45 of the FANOCC which reads as follows:

> Specifically, Tinder took advantage of the inability of consumers per *BPCPA*, s-s 8(3)(b), including the Plaintiff Creery and Class Members, to reasonably protect their own interests because of their ignorance or inability to understand the character or nature of the consumer transaction and Tinder's misconduct within it, as set out above, based on their total control over the service and their deliberate concealment of the higher price they were charging the Plaintiff and Class Members for the same service. This informational imbalance constituted an inequality of bargaining power between Tinder on the one hand and the Plaintiff and Class Members on the other. This inequality of bargaining power resulted in an undue advantage for Tinder and an improvident bargain for Class Members who unwittingly paid more than non-Class Members for an identical service.

[61] Tinder says that this matter can be disposed of in the summary trial context because the plaintiff has not pled either of the necessary elements of unconscionability. The elements of unconscionability are: 1. an inequality of bargaining power, resulting in 2. an improvident bargain.

[62] In this case, the plaintiff's assertion is grounded in his claim that app users were at a "cognitive asymmetry" vis-à-vis Tinder, as Tinder had total control over the presentation and operation of the Tinder app., leading to an inequality in knowledge and, therefore, an inequality in bargaining power.

[63] Tinder submits that, for a number of reasons, this proposition cannot succeed.

[64] Firstly Tinder asserts that it in fact disclosed the age-based pricing differential. I have already determined that deciding whether Tinder disclosed the pricing differential cannot be determined in this context.

[65] Tinder also says that there was no inequality of bargaining power between the parties because: 1. the plaintiff voluntarily entered into the contract, in a situation where he could have alternatively subscribed to another dating website, and 2. the

Premium Features were not “essential elements of everyday life” that would render the plaintiff particularly dependent or vulnerable.

[66] To support the assertion of choice, Tinder requests this Court take judicial notice of the fact that “alternatives to Tinder are readily available”. That is, there are other dating apps that offer what Tinder was offering in these particular circumstances. I regret to say, I am not able to do that, nor prepared to do that in any event, particularly in the context of the summary judgment application. Similarly, there is very little assistance, either in submissions or jurisprudence, that allows the court to conclusively resolve the notion of whether Premium Features were “essential elements of everyday life”.

[67] Tinder also highlights that for an unconscionability claim to succeed, the inequality in bargaining power must have <u>resulted in, or caused</u> the improvident bargain. Tinder submits that the plaintiff has not pled anything, nor offered any evidence, that indicates a causal link between the alleged inequality of bargaining power and the plaintiff's decision to purchase Premium Features. In Tinder’s view, the plaintiff purchased Premium Features to improve his chances of getting potential dating matches, and there is no allegation or proof that this purchasing decision was <u>caused by</u> a disadvantage in bargaining power.

[68] The plaintiff says that the defendant’s framing of this issue misapprehends the causation requirement, as, in his submission, the focus of the unconscionability analysis is not whether the inequality caused an improvident purchase, but rather whether the inequality caused an improvident bargain. In the plaintiff's submission, the improvident bargain is the fact that he paid double what app users under the age of 29 paid to access the same Premium Features.

[69] Tinder however submits that even if this causal link is found, the bargain entered into by the plaintiff was not improvident as the plaintiff received exactly what he bargained for. Tinder notes that the representative plaintiff continued to purchase and renew his subscription to Premium Features after he became the representative plaintiff and was therefore aware of the age-based price differential. Tinder submits

that the plaintiff's actions indicate that he did not, subjectively, consider the bargain to be improvident.

[70] The record indicates that the plaintiff first purchased Tinder’s Premium Features in 2018. At this time he was not aware of the age-based price differential. He then became the representative plaintiff in late-2022. In June of 2022 Tinder ceased its age-based pricing differential. The plaintiff then purchased additional Premium Features in 2023. I am unable to accept Tinder’s assertion that this latter purchase, which occurred after the discontinuance of age-based pricing, is a blanket affirmation of his earlier purchases, especially in the face of the affidavits which indicate he viewed the age-based pricing differential as unfair. This factual issue cannot be determined in this context.

[71] In my view, whether there was a cognitive asymmetry between the parties and whether that asymmetry resulted in an improvident bargain is an issue that is best left to a trial as both require assessing, and weighing, the evidence of the parties.

[72] To adopt some language in *Beach Estate*. I am not persuaded beyond a reasonable doubt that there is no genuine issue for trial. Nor can I conclude the plaintiff's claims are bound to fail. Accordingly Tinder’s application for summary judgment is dismissed.

Certification

Legal Principles

[73] The plaintiff requests the court certify a class action under s. 4(1) of the *BPCPA*. In accordance with s. 4(1) this Court must certify a class action if the plaintiff establishes:

> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> > (i) would fairly and adequately represent the interests of the class,
> >
> > (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> >
> > (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[74] The burden of proof is well entrenched in the jurisprudence. A most recent recitation is found in *Sharifi v. WestJet Airlines Ltd.*, 2020 BCSC 1996 (rev'd on other grounds 2022 BCCA 149). It was described by Justice Francis as follows:

> [15] Subsection 4(1)(a), the requirement that the pleadings disclose a cause of action, is assessed by means of the same test that would apply to a motion to strike. A plaintiff will satisfy this requirement unless, assuming all the facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed or has no reasonable prospect of success: *Pro-Sys Consultants v. Microsoft Corporation*, 2013 SCC 57 at para. 63 [Pro-Sys].
>
> [16] With respect to the remaining subsections 4(b) – (e), the plaintiff must show "some basis in fact" to establish that the certification requirements have been met. In determining whether this standard has been met, the court should not engage in any detailed weighing of evidence at the certification stage but should confine itself to whether there is some basis in the evidence to support the certification requirements: *AIC Limited v. Fischer*, 2013 SCC 69 at para.43

[75] Certifying a class action is not an affirmation of the underlying merits of the action nor should the court, no matter how tempting any given case might present, weigh into the merits of the underlying action during a certification hearing. The fact is, the certification stage is largely a procedural exercise which considers whether the action can properly be prosecuted as a class action.

[76] Class action legislation is remedial and should be given a broad, liberal and purpose of interpretation. The court must therefore interpret certification criteria generously, keeping in mind the underlying goals of a class action; namely, judicial economy, improved access to justice, and modifying behaviour of potential wrongdoers. Accordingly, while the threshold for certification is low it clearly is not a

token inquiry. The certification judge ultimately acts as a gatekeeper and must screen out claims which are not suited for resolution via a class action.

Cause of Action: Section 4(1)(a)

[77] Section 4(1)(a) of the *CPA* requires the plaintiff's pleadings to disclose a cause of action. The plaintiff asserts that Tinder charged nearly twice as much to users over the age of 29 and that Tinder wilfully concealed this age-based pricing differential. The plaintiff says that Tinder's conduct violated four sections of the *BPCPA*, namely:

a. sections 4 and 5 which prohibits "deceptive acts or practice in respect of the consumer transaction"; and

b. sections 8 and 9, which prohibits suppliers from engaging in "unconscionable acts or practices".

[78] The plaintiff has pled that Mr. Creery and the proposed class members are "consumers", that the defendants are "suppliers", and the payment for the purchase of Premium Features was "a consumer transaction" within the definitions of the *BPCPA*. Tinder did not take issue with this characterization. I proceed then on the basis that the *BPCPA* applies to this transaction.

[79] In assessing whether the plaintiff's pleadings disclose a cause of action under s. 4(1)(a) of the *CPA* the court must apply the same test used when assessing a motion to strike. That is, the pleading will be found to disclose a cause of action unless, assuming all of the facts asserted in the statement of claim are true, it is plain and obvious that the plaintiff's claim cannot succeed: *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22 at para. 42 ("*Trotman*"). Stated otherwise, the pleadings must be found to disclose a cause of action unless there is no reasonable prospect of success.

[80] I have previously dismissed Tinder's motion to strike and concluded that it is not plain and obvious that the plaintiff's claims are bound to fail: *Creery v. Match*

Group LLC, 2024 BCSC 149. Given that the "plain and obvious" standard applies to both the motion to strike and s. 4(1)(a) of the *CPA*, it necessarily follows in my view that the plaintiff's pleadings also disclose a sufficient cause of action to meet the requirements under s. 4(1)(a) of the *CPA*.

[81] That is, additional issues were subsequently raised during final submissions.

Sections 4 and 5: Deceptive Acts and Practices

[82] It is undisputed that Tinder did not expressly disclose the age-based price differential on either its website or on its mobile app. That is, when app users purchased Premium Features, they were presented with one price; the price they needed and were required to pay.

[83] As referenced, Tinder disputes that the plaintiff's claim discloses a cause of action under s. 4(3)(b)(vi) of the *BPCPA*, submitting that the essential elements of a claim under s. 4(3)(b)(vi) of the *BPCPA* are not present. This is so, submits Tinder, because Tinder publicly disclosed its age-based pricing scheme and, even if it failed to disclose the pricing differential, the existence of a so-called "youth discount" is not a material fact.

[84] I have previously dealt with this issue in my analysis concerning the application for summary judgment and will not say anything further on the subject.

[85] In accordance with s. 5 of the *BPCPA*, once the plaintiff alleges "that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier".

[86] In my view it would not be unreasonable for a court to conclude that the references to discounts and sweepstakes may be considered rather vague, and consequently created either ambiguity about the age-based price differential or constituted a complete failure to state the existence of the age-based price

differential. Either of these conclusions could ground a cause of action under s. 4(3)(b)(vi) of the *BPCPA*.

[87] I conclude that, on the issue of disclosure, the plaintiff's claim is therefore not bound to fail.

[88] Consequently, I find that the first question before me is not one which can be answered at the certification stage nor in the context of the evidence presented at this stage. It is not plain and obvious that the plaintiff’s claim that Tinder failed to state a material fact to consumers -- in this case the age-based price differential -- is bound to fail, and, given the importance of this novel legal question to both digital suppliers and consumers, it also cannot be said that there is “no genuine issue of material fact requiring a trial”.

[89] The second question before me, in relation to s. 4(3)(b)(vi) is whether an age-based differential pricing scheme constitutes a material fact that is captured by s. 4(3)(b)(vi) of the *BPCPA*.

[90] Again, I have previously addressed this issue in the context of the summary judgment application.

[91] While the court may well ultimately find the age-based pricing differential is not a material fact in this case, it cannot be said, based upon the pleadings and the evidence presented in this case, there is no genuine issue to be tried. It follows, ss. 4 and 5 of the *BCPCA* disclose a cause of action and the evidence does not establish there is no genuine issue to be tried.

<u>Sections 8 and 9: Unconscionable Acts or Practices</u>

[92] The plaintiff also states that Tinder engaged in unconscionable acts or practices contrary to ss. 8 and 9 of the *BPCPA*. I addressed this claim in my previous decision regarding Tinder's motion to strike. Given that the same test applies to both s. 4(1)(a) of the *BPCPA* and a motion to strike, I reiterate my comments in their entirety:

[48] Assuming the plead facts to be true, in my view, it is not plain and obvious that the claim is bound to fail. At para. 45 of the FANOCC, the plaintiff pleads the following:

> 45. Specifically, Tinder took advantage of the inability of consumers per *BPCPA*, s. 8(3)(b), including the Plaintiff Creery and Class Members, to reasonably protect their own interests because of their ignorance or inability to understand the character or nature of the consumer transaction and Tinder's misconduct within it, as set out above, based on their total control of the service and their deliberate concealment of the higher price they were charging the Plaintiff and Class Members for the same service. This informational imbalance constituted an inequality of bargaining power between Tinder on the one hand and the Plaintiff and Class Members on the other. This inequality of bargaining power resulted in an undue advantage for Tinder and an improvident bargain for Class Members who unwittingly paid more than non-Class Members for an identical service.

[49] In support of its claims that the transaction between the prospective representative plaintiff and the defendant was unconscionable, the plaintiff pleads in the FANOCC the following material facts:

> a) Tinder sells the Premium Features directly to its app and website users and is a supplier of those services (para. 17);
>
> b) Tinder dictated all terms of the consumer transaction and were presented to consumers on a take it or leave it basis (para. 19);
>
> c) Tinder willfully concealed the fact that they charged users age 29 and over more for the exact same Premium Features as users under the age of 29, and thus the plaintiff and class members were unable to understand or appreciate this aspect of the transaction (para. 20);
>
> d) the plaintiffs were ignorant to the existence of the differential pricing scheme because Tinder controlled every aspect of the Tinder app, the Tinder website, and all terms of the consumer transactions related to the Premium Features therein (para. 21);
>
> e) Tinder charged nearly twice as much to users over age 29 solely because of their age (para. 23); and
>
> f) that Tinder employed its total control over the Tinder app to exploit their users (para. 24).

[50] In my opinion, the plaintiff has plead the elements required for a claim in unconscionability. The plaintiffs claim clearly suggests that there was an inequality in bargaining power stemming from the plaintiffs lack of knowledge about the price differential. The improvident bargain arose because the plaintiff and prospective class members did not know about the price differential—they paid nearly double the price for the exact same service. It may well be difficult at trial for the plaintiff to prove that the advantage Tinder received from charging the higher price was 'undue'; however, the question at the stage is not whether the claim is likely to succeed.

[93] I will also address an additional point which arose during oral submissions. The plaintiff alleges that Tinder's age-based price differential violates s. 8(3)(c) of the *BPCPA*, which directs that in assessing a claim of unconscionability, the court must consider whether: "at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers".

[94] The crux of the plaintiff's argument is that the app users over the age of 29 are similar consumers to app users under the age of 29, and that the age-based pricing differential was therefore unconscionable and contrary to s. 8(3)(c).

[95] During oral submissions I requested the parties direct me to case law which defined "similar consumers". Counsel were unable to provide such case law. Again, I come to the view that the question of whether consumers of different ages constitute "similar consumers" within the meaning of the *BPCPA* is before the court for the first time. I am inclined to err on the side of permitting the claim to be certified to proceed to trial.

[96] Given the above, assuming all the facts pled in the statement of claim are true, it cannot be said it is plain and obvious the plaintiff's claims under ss. 8 and 9 cannot succeed, especially given the novel legal questions raised by the claims under s. 8(3)(c). I therefore find the plaintiffs pleadings relating to ss. 8 and 9 disclose a cause of action.

Remedy

[97] The plaintiff has pled ss. 172(1)(a)-(b) and 172(3) of the *BPCPA*. Tinder submits that the plaintiff's claims under s. 172 are bound to fail as the plaintiff has failed to plead the required elements for such a claim as laid out in *Krishnan v. Jamieson Laboratories Inc.*, 2021 BCSC 1396:

> [77] The requirements for a restoration order under s. 172(3)(a) of the *BPCPA* are set out in *Ileman v. Rogers Communications Inc.*, 2015 BCCA 260 [*Ileman* B.C.C.A] as follows:

> a) The court must make a declaratory or injunctive order under s. 172(1) before it can make an order under s. 172(3) - this requirement is set out in the opening words of s. 172(3);
>
> b) The supplier must have acquired something ("money or other property or thing") because of a contravention of the legislation - this requirement is explicit in s. 172(3)(a);
>
> c) The beneficiary of an order under s. 172(3) must have been the source of money or some other thing acquired by the supplier - this requirement is a necessary implication of the use of the word "restore"; and
>
> d) The beneficiary must have "an interest" in the thing to be restored - this requirement is explicit in s. 172(3)(a).
>
> [78] On the last requirement, while "an interest" need not be a proprietary interest in specific property, it must be an interest recognized by law outside of s. 172(3)(a). A right to recover damages under s.171, would be a sufficient interest to allow recovery under s. 172(3)(a): *Ileman* B.C.C.A at para. 60.

[98] Tinder's primary assertion is that to be entitled to relief under s. 172(3)(a) the plaintiff is required to demonstrate "an interest" in the money the plaintiff requests be restored. Tinder says that a precondition to having an interest under s. 172(3)(a) is having, and pleading, a "right to recover damages under s. 171 of the *BPCPA*". The plaintiff has not requested relief under s. 171 of the *BPCPA*. In the result, Tinder submits that the plaintiff's claim pursuant to s. 172(3)(a) is bound to fail as the plaintiff has not pled "an interest" sufficient to support his claim.

[99] I also observe, that in Tinder's view, the plaintiff does not have a right to recover damages under either s. 171 or s. 172 as he has not suffered damage or loss which can be causally linked to Tinder's contravention of the *BPCPA*. I will address this claim below.

[100] In response to Tinder's claim that he must plead s. 171 in order to be entitled to remedy under s. 172, the plaintiff observes that he is unable to bring a claim under s. 171 of the *BPCPA* because of the binding arbitration agreement contained within Tinder's Terms of Use. That said, the plaintiff says that such an arbitration agreement is invalid to the extent that it limits the right to bring an action for relief under s. 172. Tinder did not dispute this point (see *Seidel v. TELUS Communication Inc.*, 2011 SCC 15).

[101] In *Seidel* the plaintiff brought a claim against TELUS under both s. 171 and 172 of the *BPCPA*. TELUS resisted this claim on the basis that the mediation and arbitration clause in the cellular phone services plan prevented such claims from being adjudicated by the courts. After considering the text of the *BPCPA*, and the public-interest dimension of consumer protection legislation, the Supreme Court of Canada found that the arbitration clause was void where it attempted to limit the plaintiff's right to recover under s. 172.

[102] The Supreme Court of Canada permitted Ms. Seidel to seek certification of her s. 172 claim, but not her s. 171 claim. Accordingly, I find that a plaintiff must be able to advance a claim under s. 172 without having pled s. 171 of the *BPCPA* and that “an interest” in the thing to be restored may be created by operation of other factors beyond a s. 171 claim.

[103] In making a determination of whether the plaintiff has demonstrated an interest in this case, I am also guided by the remarks of Justice Bennett in *Ileman v. Rogers Communication Inc.*, 2015 BCCA 260:

> [57] What, then, constitutes “an interest”? The chambers judge considered that, in order to qualify for a remedy under s. 172(3)(a), a person must demonstrate a “proprietary nexus” to the “money or other property or thing” being claimed. In a typical case where the claimant paid money to a supplier, a claim under s. 172(3)(a) could be advanced only if the claimant could trace the money into a particular fund or piece of property held by the supplier. The claim would be defeated if the claimant’s money had been co-mingled with other funds.
>
> [58] Such a severe limit on recovery under s. 172(3)(a) is not in keeping with the tenor of the statute, which is to provide broad protection against unfair business practices. I am not persuaded that a claimant under s. 172(3)(a) must prove that property or funds can be traced into specific assets held by the supplier.
>
> [59] In my view, the proper interpretation of s. 172(3)(a) begins with the understanding that a restoration order is merely ancillary to a declaration or injunction. The purpose of s. 172(3)(a) is not to create a new legal right, but rather to allow existing private rights to be recognized within the context of public interest litigation.
>
> [60] While “an interest” need not be a proprietary interest in specific property, then, it must be an interest recognized by law outside of s. 172(3)(a). A right to recover damages under s. 171, for instance, would be a sufficient interest to allow recovery under s. 172(3)(a).

[104] I also note the language of s. 172(3)(a) which reads as follows:

> [T]hat the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;

[105] In his FANOCC the plaintiff pled the following:

> The plaintiff and class members have suffered damages and loss due to the age-based pricing in the amount of the difference between what Tinder charged users under the age of 29 years old for the Premium Features and the higher price that it charged class members for the exact same features without their knowledge. Tinder has obtained a corresponding benefit in the form of the difference between what it charged users under the age of 29 years old for the Premium Features and the higher price that it charged class members for the exact same features without their knowledge. Those benefits were acquired by the defendants from the plaintiff and class members as a result of their contraventions of the *BPCPA* and related consumer protection legislation, set out below in part three.

[106] The plaintiff's interest in the money sought by the plaintiff rests on the claim that Tinder, via its breach of ss. 5, 6, 8 and 9 of the *BPCPA*, extracted an additional sum of money from the class members above the amount which it was entitled. The plaintiff now requests that Tinder return the money which it obtained in violation of the *BPCPA*. The interest in question is “recognized by law outside of s.172(3)(a)” as it is recognized by ss. 5, 6, 8 and 9.

[107] I find that it would be contrary to the purpose of consumer protection legislation, and the language of the statute, to find that, for the purpose of s. 172 of the *BPCPA*, a plaintiff does not have an interest in funds obtained because of an alleged breach of the *BPCPA*. Accordingly, I conclude that it is not plain and obvious that the plaintiff does not potentially have “an interest” in the money in Tinder’s possession.

[108] In addition, as stated above, Tinder also says that the plaintiff has failed to demonstrate that there is a causal link between Tinder’s actions and the plaintiff's loss which, they say, is a necessary element of s. 172(3)(a).

[109] It is not disputed that s. 172(3)(a) contains a causal element. Tinder however insists that the use of the phrase “because of” should be interpreted to mean that, in

order to succeed, the plaintiff would need to demonstrate that if they had known about the youth discount, they would have made a different purchasing decision. In effect, Tinder asserts that <u>reliance</u> is necessary to satisfy the causal element of s. 172(3)(a). Therefore, absent pleadings that the plaintiff relied on Tinder's actions, the plaintiff's causes of action are bound to fail.

[110] The plaintiff disputes that reliance is necessary to satisfy the causation element. Instead, the plaintiff says that the causal link between Tinder's age-based pricing differential and the class member's loss is that, but for Tinder's breach of the *BPCPA*, "class members would not have paid double the price of users under the age of 29". In this way, the plaintiff says that the causation of loss has been, and can become established through means other than reliance.

[111] For the purpose of certification, I accept the plaintiff's submissions on this point and find that the plaintiff is not required to demonstrate that the plaintiff relied on Tinder's conduct, to his detriment. I find some comfort in this regard in the remarks of Justice Horsman in *MacKinnon v. Pfizer Canada Inc.*, 2021 BCSC 1093, affirmed except with respect to punitive damages, 2022 BCCA 151:

> [61] The defendants' submission that reliance is a pre-requisite to a claim under the *BPCPA* must be placed in context. The provisions of the *BPCPA* do not, on their face, require that an individual seeking remedies for a contravention of s. 5 must prove detrimental reliance. Section 171(1) does require that, in order to obtain a remedy in damages, the person bringing an action must have suffered loss or damage "<u>due to</u> a contravention of this Act or the regulations". A condition of a restoration order under s. 172(3)(a) is that the money or other property was "acquired <u>because of</u> a contravention of this Act or the regulations". In order to obtain these remedies, therefore, the plaintiff must show a causal relationship between the alleged contravention of the BPCPA and the damage claimed by the consumer, or the money acquired by the supplier: *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 at para. 49.
>
> [62] There has been some suggestion in the case law that the causal link required by s. 171 of the *BPCPA* can only be established, in the context of an alleged breach of s. 5, by showing detrimental reliance on the representation that is said to be deceptive and misleading. The law on this point is, at the very least, unsettled. In *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361, the Court of Appeal commented on the need for reliance in the context of a claim for damages under s. 171 for a contravention of s. 5:

> [83] In my view, the causal link required between a breach of s. 5 of the *BPCPA* and damages for the cause of action created by s. 171 is not equally well-settled. Nor is it equally apparent that reliance will always be necessary for causation purposes given the differing nature of the statutory breach and the potential loss. As this Court noted in *Collette v. Great Pacific Management Co. Ltd.*, 2004 BCCA 110 at para. 34 in the context of a tort claim, reliance may not be required to establish a causal link between a breach of duty and a loss in all misrepresentation cases. The reason for insistence on reliance is to <u>prove</u> causation. They are not independent requirements. Accordingly, if a breach of duty can be adequately linked to a loss by alternate means, individual reliance need not be shown.

> [Emphasis in the original]
>
> …
>
> [64] In the present case, the plaintiffs plead that the defendants' conduct constitutes deceptive acts and practices, including the misrepresentations they made that Alesse contains 20 mcg of estrogen and that Alesse is more than 99% effective in preventing pregnancy. It is pleaded that the defendants' deceptive acts and practices also includes their failure to disclose all material facts regarding the risks of using Alesse. The non-disclosure of a material fact can, on its own, amount to a deceptive act or practice under the *BPCPA*: *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260 at para. 80 [*Stanway*]. The plaintiffs also plead causation. They say that as a result of the defendants' deceptive acts and practices, the plaintiffs and class members have suffered loss and damage, including unintended pregnancy, emotional upset, and the cost of purchasing the defective medication.
>
> [65] In my view, the Second Amended NOCC pleads material facts that are sufficient to ground cause of action under ss. 171 and 172 of the BPCPA. It is not plain and obvious that the cause of action is doomed to fail.

[112] I also observe the remarks made by the British Columbia Court of Appeal in *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361:

> [83] In my view, the causal link required between a breach of s. 5 of the *BPCPA* and damages for the cause of action created by s. 171 is not equally well-settled. Nor is it equally apparent that reliance will always be necessary for causation purposes given the differing nature of the statutory breach and the potential loss. As this Court noted in *Collette v. Great Pacific Management Co. Ltd.*, 2004 BCCA 110 at para. 34 in the context of a tort claim, reliance may not be required to establish a causal link between a breach of duty and a loss in all misrepresentation cases. The reason for insistence on reliance is to <u>prove</u> causation. They are not independent requirements. Accordingly, if a breach of duty can be adequately linked to a loss by alternate means, individual reliance need not be shown.
>
> [Emphasis in original.]

[113] The plaintiff has pled that but for Tinder's age-based pricing differential, and corresponding conduct that was allegedly contrary to the *BPCPA*, class members would have paid a lower quantum for Premium Features. This creates a causal link between Tinder's actions, and the money the plaintiff seeks to be returned. Considering the pleadings and given the unsettled law surrounding whether reliance is necessary in this context to prove causation, it cannot be said that it is plain and obvious this claim is bound to fail due to the lack of causation.

[114] While Tinder asserts that the class members could not have experienced any loss as they were not eligible for the so-called "youth discount", the issue of whether the age-based pricing differential was, in fact, a "youth discount" is an issue that must be left to the trier of fact.

[115] In sum, Tinder claims that the plaintiff's s. 172 cause of action is bound to fail as the pleadings do not properly disclose a cause of action. Considering the above I find that it is not plain and obvious that the plaintiff's s. 172 claim cannot succeed.

Extra-provincial Legislation: The Notice Requirement

[116] The plaintiff submits that the extra-provincial consumer protection legislation relies on the same constituent elements as a claim under the *BPCPA*. It is submitted therefore, if I find that the pleadings disclose a cause of action under the *BPCPA*, the plaintiff argues I should find his pleadings also disclose a cause of action under the related extra-provincial enactments. I accepted this logic in my prior decision.

[117] Tinder now requests that I reconsider this decision on the basis that following those previous proceedings there was a jurisprudential change as a result of *MacKinnon v. Pfizer Canada Inc.*, 2023 BCSC 2223. In *MacKinnon*, the plaintiff sought the certification of a multijurisdictional consumer protection allegation. Justice Hughes determined that the Ontario, Alberta and PEI's consumer protection legislation included a notice requirement, and that because the plaintiffs failed to plead material facts to support that the notice requirements were met, the claims under these provincial statutes were bound to fail.

[118] Justice Hughes reasoned as follows:

> [49] Section 7.1(1) of the Alberta *CPA* provides that if a consumer wishes to cancel a consumer transaction or seek recovery if cancellation is not possible, the consumer must give notice within one year of a supplier having engaged in an unfair practice related to that transaction. Section 7.1(2) permits notice to be given in any manner so long as it indicates the consumer's intention to cancel the transaction or seek recovery and the reasons for seeking cancellation or recovery. Notice must be delivered to the supplier with whom the consumer entered into the consumer transaction: Alberta *CPA*, s. 7.1(3) and (4). Finally, if a consumer has delivered notice and not received a satisfactory response with in the prescribed period, the consumer may then commence an action in the Alberta Court of King's Bench: Alberta *CPA*, s. 7(5).
>
> [50] Sections 18(3)-(8) of the Ontario *CPA* are to similar effect. A consumer must give notice within one year after entering into a consumer agreement if they seek to rescind that agreement or, if rescission is not possible, seek recovery: s. 18(3). The notice must indicate the consumer's intention to rescind the agreement or to seek recovery where rescission is not possible and the reasons for doing so: s. 18(4). If a consumer has delivered notice and has not received a satisfactory response within a prescribed period, the consumer may commence an action in the Ontario Superior Court of Justice: ss. 18(8) and (9).
>
> [51] Finally, under the PEI *BPA*, a consumer may seek a remedy under s. 4(1) of that act, namely rescission of an agreement or damages in lieu, "by the giving of notice of the claim by the consumer in writing to each other party to the agreement within six months after the agreement is entered into": s. 4(5). Section 4(8) further provides that "this section applies notwithstanding any agreement or waiver to the contrary".

[119] Ultimately Justice Hughes found that the plaintiffs had not pled the facts to support the notice requirements. The court also declined to permit the plaintiffs the opportunity to amend their pleadings. The refusal to permit an amendment was grounded on the fact that firstly, even if an amendment was permitted, the plaintiffs would not be able to satisfy the notice requirement as their initiating proceeding did not advance a claim under the Ontario, Manitoba and PEI statutes and, secondly, the plaintiffs had already been given an opportunity to amend their pleadings and failed to do so.

[120] In Tinder's view, the plaintiff in this case has not pled any material facts capable of establishing effective notice in accordance with the requirements under the Ontario, Alberta and PEI statutes. Tinder therefore requests that this court

conclude that the claims under the Ontario, Alberta and PEI provincial statutes are bound to fail and raise no cause of action.

[121] Conversely, the plaintiffs submit that the issue is *res judicata* as, in my previous decision, I found:

> [19] … The application to amend and file the FANOCC; and the defendant's resistance to the amendment application, in the form of the motion to strike the proposed FANOCC. In the event the FANOCC amendments do not survive the challenge; it is clear the ANOCC would not survive. Similarly, the outcome of the applications is determinative as it relates to the claims pursuant to other provincial legislation.

[122] If I do not find the issue is *res judicata*, the plaintiff requests that I permit the FANOCC to be further amended to cure any potential defects in relation to the Alberta and PEI statutes. Specifically the plaintiff requests that the following be inserted after paragraph 55:

> The plaintiff is a resident of British Columbia and did not purchase Premium Services in Alberta. In the circumstances, pursuant to s. 7.2(3) of the Alberta *CPA*, the interests of justice warrant disregarding the requirement that the plaintiff give notice under s. 7.1 of the Alberta *CPA*.

[123] And that the following be inserted after paragraph 10 of Schedule A of the FANOCC:

> On behalf of class members resident in Prince Edward Island the plaintiff has satisfied the notice requirement under s. 4(5) of the Prince Edward Island *BPA* through service of this pleading.

[124] The plaintiff identified he has pled the notice 'requirements' concerning the Ontario statute. The relevant section of the FANOCC reads as follows:

> 59. The plaintiff is a resident of British Columbia who did not purchase Premium Services Ontario. In the circumstances, pursuant to s. 18(15) of the Ontario *CPA*, the interests of justice warrant disregarding the requirement that the plaintiff give notice under s. 18(3) of the Ontario *CPA*. (see the *MacKinnon* decision at paras. 52–53).

[125] I note however this is contained in the legal basis portion of the claim; not the material facts section. This similar proposition contributed to the demise of the cause of action in the circumstances before Justice Hughes. I do not find the

circumstances at bar quite so stark. I am prepared to allow an amendment so as to allow the pleading to be placed in the more appropriate section of the notice.

[126] Given the decision in *MacKinnon*, which was released after the motion to strike hearing, I find it necessary to address the issue raised by Tinder; namely given Justice Hughes' findings in *MacKinnon*, and accepting that Alberta and PEI's consumer protection legislation includes a notice requirement, the failure to address this requirement in the pleadings will result in the claim failing to disclose a cause of action.

[127] The plaintiff's current pleadings do not address, in any way, the notice requirement under the Alberta or PEI legislation.

[128] In considering whether it would be appropriate to amend the claim, I am guided by the comments of Justice Branch in *Krishnan v. Jamieson Laboratories Inc.*, 2021 BCSC 1396. In *Krishnan*, the plaintiff failed to plead the notice requirement under the Ontario consumer protection legislation. On this point Justice Branch made the following statement:

> [87] An issue arises as a result of s. 18(3) of the *Ontario Consumer Protection Act*, which provides that a "consumer must give notice within one year after entering into the agreement" if seeking rescission or damages under ss. 18(1) or (2). No material facts are pled in this respect. Without pleading these material facts, the claim under the Ontario statute would be bound to fail: *Bhangu* at paras. 59-60. I do note that, under s. 101, the court has the power to waive the notice requirement if it is in the "interest of justice to do so": *Bernstein v. Peoples Trust Company*, 2019 ONSC 2867 at paras. 285-291. However, the plaintiff does not address s. 101 in their claim. That said, given the relatively technical nature of this deficiency and the consistency of the claims with the other theories advanced, I would grant leave to the plaintiff to amend the claim as necessary to address the Ontario notice issue: *Bhangu* at para. 61.

[129] Conversely, in *MacKinnon*, Justice Hughes did not permit the plaintiffs to amend their pleadings given that an amendment could not cure the pleadings deficiency, and the plaintiffs had already been notified by the court that they ought to have amended their pleadings and failed to do so. Neither of these circumstances are present in this case.

[130] I note that both the Alberta and Ontario statutes allow the court to waive the notice requirement if it is in the interests of justice to do so. I have already permitted the plaintiff to amend his pleadings to address the notice requirement under the Ontario statute. Refusing to permit a similar amendment under the Alberta statute would arbitrarily exclude class members in one Canadian province and would undermine the purpose of consumer protection legislation. Accordingly, and in the interest of justice I will permit the plaintiff's request to amend the pleadings vis-à-vis the Alberta statute as stated above.

[131] I note that while both the Alberta and Ontario statutes allow the court to waive the notice requirement, the PEI statute does not. Instead, the PEI statute reads as follows:

> 4(5) A remedy conferred by subsection 1 may be claimed by the giving of notice of the claim by the consumer in writing to each other party to the agreement within six months after the agreement is entered into.

[132] The required form of notice is not specified. The plaintiff submits that he did, in fact, provide the statutorily required notice when he delivered his initiating pleadings to Tinder on September 15, 2022. These initiating pleadings alleged breaches of the PEI consumer protection statutes; namely s. 2(a)(x), 2(b)(i), and 2(b)(ii) of the *Business Practices Act*, R.S.P.E.I. 1988, c. B-7.

[133] The only evidence I was taken to concerning the PEI issue was not in accord with the submission of the plaintiff. The PEI claim appears to have been added for the first time through the ANOCC filed February 8, 2023. This exceeds the six-month window contained in the PEI statute. On this basis, I decline to certify the claim under the PEI statute.

[134] In my view, following the amendments, it cannot be said that the plaintiff's remaining extra-provincial claims are bound to fail. These pleadings, if accepted as true, are sufficient to attain the notice requirements of the respective extra-provincial statutes.

[135] Further, I reiterate that I accept the plaintiff's position that the consumer protection legislation in Alberta, Saskatchewan, Manitoba, Ontario, Québec, Newfoundland and Labrador are substantially similar to the *BPCPA*.

[136] For the same reasons I have articulated above, I am not persuaded that the claims made under these extra-provincial legislations are bound to fail.

Identifiable Class of Two or More Persons: Section 4(1)(b)

[137] As described above, for an action to be certified, the plaintiff is required to show that there is “some basis in fact” to prove each of the remaining certification requirements: *Hollick* at para. 25.

[138] The “some basis in fact” threshold can be understood as being in contrast to “no basis in fact”. While the threshold is low, the plaintiff must provide the court with a minimum evidentiary basis to support certifying the action. Having said this, I reiterate that the record does not need to be exhaustive as, at the certification stage, the court does not undertake an analysis of the merits of the underlying claim.

[139] The second requirement for certification is that there must be an identifiable class of two or more persons. In *Jiang v. Peoples Trust Company*, 2017 BCCA 119, leave to appeal to the SCC refused 38738 (14 November 2019), Chief Justice Bauman outlined the principles governing the identifiable class requirement of s. 4(1)(b) of the *BPCPA*:

> [82] In sum, the principles governing the identifiable class requirement may be summarized as follows:
>
> - the purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment;
> - the class must be defined with reference to objective criteria that do not depend on the merits of the claim;
> - the class definition must bear a rational relationship to the common issues — it should not be unnecessarily broad, but nor should it arbitrarily exclude potential class members; and
> - the evidence adduced by the plaintiff must be such that it establishes some basis in fact that at least two persons could self-

> identify as class members and could later prove they are members of the class.

[140] In his FANOCC, the plaintiff seeks to certify the following class: “all persons in Canada who have purchased Tinder Premium Features who registered on the Tinder app with an age of 29 or older between January 1, 2015 and June 30, 2022.”

[141] The plaintiff submits that, under this class definition, to qualify as a class member an individual must be “(i) a person, (ii) resident in Canada, (iii) who purchased one of the Tinder Premium Features, (iv) during the class period, (v) and was charged a premium due to their stated age being 29 or higher at the time of the charge(s)”.

[142] The plaintiff's proposed class period extends from January 1, 2015 to June 30, 2022. The material filed by Tinder confirms that its so-called “youth discount” began in 2015 with the inception of Premium Features and ended on about June 28, 2022.

[143] After review of the principles governing the identifiable class requirement, as laid out in *Jiang*, I find that the plaintiff's proposed class is overbroad. That being said, I find that the proposed class definition is otherwise sound and can therefore be certified on the condition that the proposed class definition be amended to resolve the issue of overbreadth.

[144] Tinder asserts that the proposed class is overbroad, as it includes all residents of Canada, even though the plaintiff has not asserted a claim on behalf of the residents of New Brunswick, Québec, Nova Scotia, Yukon and the Northwest Territories or Nunavut.

[145] In response, the plaintiff says that including all residents of Canada in the class definition ensures that “individuals with an interest in the resolution of the common issues receive notice, even if they no longer reside in the relevant province in which they purchased Premium Features.”

[146] The plaintiff submits that if the court remains concerned about the issue of overbreadth that the class definition could be amended to read:

> All persons who are resident in any of Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Ontario, Québec and/or Saskatchewan when they purchased Tinder Premium Features and who registered on the Tinder app with an age of 29 or older between January 1, 2015 and June 30, 2022.

[147] In *Hollick*, the Supreme Court of Canada stated the following:

> [21] … where the class could be defined more narrowly, the court should either disallow certification or allow certification on the condition that the definition of the class be amended.

[148] I find that the amended class definition, as proposed by the plaintiff, fully addresses Tinder's concern. I also find that this modified definition is neither unnecessarily broad, not arbitrarily restrictive, as it accurately captures the individuals whose legal interests are implicated by the plaintiff's FANOCC.

[149] I also find that the amended class definition is defined with reference to objective criteria that do not depend on the merits of the claim. The criteria are also rationally connected to the proposed common issues, as the amended class definition only includes individuals who were charged a higher cost to access Premium Features due to their being over the age of 29, and who were resident, at the time of the purchase, in the jurisdictions included in the plaintiff's FANOCC.

[150] The plaintiff has also adduced affidavits from two separate individuals who self-identify as being part of the class and assert they purchased Premium Features during the relevant class period, while over the age of 29. This demonstrates some basis in fact at least two persons self-identify as class members.

[151] There is some disagreement between the parties as to how many people will ultimately qualify as class members, and how these class members can be identified; however I do not consider this disagreement to be determinative of certification.

[152] Tinder argues that based on the information in its possession, it is unable to determine which app user should be included within the proposed class.

[153] In this regard the plaintiff drew the court's attention to a similar class action which was advanced in California. In the California case, Tinder's lawyers swore a declaration which stated that the “total number of settlement class members is approximately 240,000”. Tinder has not tendered an explanation as to why it was able to provide an estimate of the numbers of class members in the California proceeding, but not in this proceeding.

[154] The plaintiff also questions Tinder's claim that it is unable to identify proposed class members. In this regard, the plaintiff points to the affidavit of Thomas Jacques. The affidavit of Mr. Jacques provides granular details about the plaintiff's app usage, including the date he purchased Premium Features, which Premium Features he purchased, and the duration to which he accessed the Premium Features. I would think if Tinder has access to this data about the plaintiff, it follows that it also has data which would allow Tinder to confirm individual's membership in the proposed class.

[155] The plaintiff has also adduced the expert opinion evidence of Robert Ziedman, an electrical engineer who has expertise in reverse engineering hardware and software, including user interfaces. It is the evidence of Mr. Ziedman that if he was provided access to Tinder’s servers, he would likely be able to determine the class size and the class members.

[156] I pause here to observe that Tinder has applied to strike the affidavit of Mr. Ziedman on the basis that the information contained in the affidavit has no relevance to any issue at the certification stage in these particular circumstances.

[157] In my view Mr. Ziedman's affidavit does have some relevance at this stage but, even in the event Mr. Ziedman's methodology is unable to produce a list of eligible class members, I find that there is some basis in fact to support an individual's ability to self-identify as class members based on their own knowledge of their Tinder use. Tinder has proven its capacity to confirm the veracity of such self-reporting; however, as a last resort, if Tinder is unable or unwilling to verify whether self-identified class members did purchase the Premium Features, potential class

members may prove their class eligibility by providing receipts of their purchase of Premium Features. Such receipts were provided by the plaintiff.

[158] Given the above, I find that the plaintiff has demonstrated some basis in fact that there is an identifiable class of two or more persons, and, thus, has discharged their burden under s. 4(1)(b). Notwithstanding Tinder's objections, I also find that there are reasonable methods which would enable the parties to identify additional class members.

[159] Having found that the amended class definition conforms with the principles set out in *Jiang*, and, in alignment with the guidance from *Hollick*, I am prepared to allow certification on the condition that the definition of the class be amended to reflect the amended class definition as described above by the plaintiff.

Common Issues: Section 4(1)(c)

[160] Section 4(1)(c) requires the plaintiff to prove that “the claims of the class members raise common issues”. Section 1 of the *CPA* defines “common issue” as: “(a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.”

[161] In *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 Justice Strathy outlined a non-exhaustive list of factors that courts may consider when assessing common issues:

> [140] The following general propositions, which are by no means exhaustive, are supported by the authorities:
>
> > **A**: The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis.
> >
> > **B**: The common issue criterion is not a high legal hurdle, and an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution.
> >
> > **C**: There must be a basis in the evidence before the court to establish the existence of common issues. The plaintiff is required to establish “a sufficient evidential basis for the existence of the common issues”

> in the sense that there is some factual basis for the claims made by the plaintiff and to which the common issues relate.
>
> **D**: In considering whether there are common issues, the court must have in mind the proposed identifiable class. There must be a rational relationship between the class identified by the Plaintiff and the proposed common issues.
>
> **E**: The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim.
>
> **F**: A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class.
>
> **G**: With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class.
>
> **H**: A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant.
>
> **I**: Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis.
>
> **J**: Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient".
>
> [Citations omitted.]

[162] The British Columbia Court of Appeal endorsed the above analytical approach in both *Charlton v. Abbott Laboratories, Ltd.*, 2015 BCCA 26 at para. 85 and *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 23.

[163] Tinder submits that to demonstrate the existence of a common issue the plaintiff must show that a common issue exists <u>and</u> that the common issue can be answered in a common way across the class. The plaintiff disagrees that the determination of common issues must be completed via a two-part analysis.

[164] Tinder's position forms part of an ongoing jurisprudential debate about whether the test for commonality is a one-step test, which inquires only about whether the plaintiff's common issues can be answered on a class-wide basis, or a two-part test, as proposed by Tinder.

[165] The BC Court of Appeal addressed this debate in *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338. In *Mueller*, Nissan argued "that there are two steps to the 'some basis of fact' test under the 'common issues' requirement: the plaintiff must show (1) some basis in fact that the common issue actually exists and (2) some basis in fact that the issue is common for the entire class" (para. 125).

[166] In response to Nissan's argument the British Columbia Court of Appeal concluded:

> [132] I do not agree with Nissan that the test as to whether there is evidentiary support for a common issue in a claim of alleged dangerous product liability requires two distinct categories of evidence: some evidence that there is a common defect; and some evidence that the alleged defect is dangerous.
>
> [133] In analyzing whether there is some basis in fact for a common issue, the court must consider the language of the common issue that is proposed, and whether there is some evidence that supports the argument that it is a common issue across members of the class.
>
> [134] This is a low threshold. The purpose of the requirement is to ensure there is a minimum evidentiary foundation to support the certification order: *Hollick* at para. 24; *Atlantic Lottery* at para. 138. Because the standard is simply to ensure that the action is suited to a class proceeding, it does not entail a robust analysis of the merits of the claim: *Atlantic Lottery* at para. 138; *Pro-Sys* at paras. 103, 105. However, the court must undertake more than superficial scrutiny of the sufficiency of the evidence: *Pro-Sys* at para. 103; *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307 at para. 27, leave to appeal to SCC refused, 39882 (17 March 2022). This standard requires "an evidentiary basis" to show the plaintiff has met the certification requirements: *Hollick* at para. 25. Such evidence does not have to be conclusive or satisfy the civil standard of a balance of probabilities, and the particular level of evidence that is sufficient is highly fact-specific: *Sharp* at para. 27.

[167] I am also guided by the comments of former Chief Justice Hinkson in *O'Connor v. Canadian Pacific Railway Limited*, 2023 BCSC 1371:

> [261] In considering the authorities above, regardless of whether it is called a one- or two-step test, the plaintiff's burden is the same. He must show some basis in fact that the issues are common to the class. He need not

> prove on a balance of probabilities that the defendants actually caused or contributed to the Wildfire. However, as stated in *Hollick* at para. 25, he must show some basis in fact that the claims raise common issues, "other than the requirement that the pleadings disclose a cause of action."
>
> [262] Put another way, "is there some evidence of class-wide commonality, that is some evidence that the proposed common issue can be answered on a class-wide basis": *Trotman* at para. 57, citing *Grossman v. Nissan Canada*, 2019 ONSC 6180.
>
> [263] I struggle to see how the plaintiff can meet his burden of showing that an issue can be proven in common for the class without providing some basis in fact that there is a common issue in the first place. Thus, whether the one-step or two-step articulation of the test is used, the outcome is the same.

[168] Although the one-step/two-step distinction may be material in some cases, in this case, and in alignment with Chief Justice Hinkson's comments, I find that the dispute between the parties is largely academic as the burden of proof on the plaintiff remains the same: he must show some basis in fact that the proposed common issues are common to the class.

[169] Chief Justice Hinkson's comments have similarly been endorsed by this Court in *Bowman v. Kimberly-Clark Corporation*, 2023 BCSC 1495 at para. 135 and *Bosco v. Mentor Worldwide LLC*, 2024 BCSC 1931 at para. 89.

[170] The plaintiff is seeking to certify many common issues. For ease of reference, the proposed common issues are attached to these reasons and labelled as Appendix A. I note that there were some typographical differences between the plaintiff's proposed common issues, as listed in his Schedule A, when compared to the common issues listed in the plaintiff's written submissions. As these differences did not impact the meaning of the plaintiff's proposed common issues where these differences existed I have deferred to the plaintiff's Schedule A.

<u>Issues 1-3: Tinder's Premium Features and the Tinder app</u>

[171] The plaintiffs first three proposed common issues relate to the existence of Tinder's Premium Features, and the price charged for Premium Features during the class period. Proposed common issues 1-3 are as follows:

> 1. When did Tinder introduce each of the Premium Features in the Tinder app:

   a. Tinder Plus
   b. Tinder Gold
   c. Tinder Platinum
   d. A la cart purchases of Premium Features

2. What did Tinder charge for each of the Premium Features during the class period?
3. Did Tinder charge different prices for the Premium Features to:
   a. Person’s age 29 over? If so, what price(s) and for what period(s)?
   b. Any other age threshold(s)? If so, what price(s) and for what period(s)?
   c. If the answer to any questions 3(a) or 3(b) is yes did Tinder do so deliberately?
   d. If the answer to any of the questions [3](a) or [3](b) is yes, was the conduct disclosed to users?
   e. If the answer to any questions [3](a) or [3](b) is yes, was there any material difference between the Premium Features offered to people in the higher age category versus the Premium Features offered to people in the lower age category?
   f. If the answer to any of the questions [3](a) or [3](b) is yes, how much money did Tinder collect from Class Members in the higher age category? And what is the difference between that amount and what would have been charged if they had been charged the same price at the lower age category?

[172] Common issue 1(d) relates to a claim which has since been abandoned by the plaintiff, I therefore will not certify common issue 1(d).

[173] The remainder of the common issues 1-3 relate directly to the subject matter of this litigation. Question 1 inquires into when Tinder introduced Premium Features; this is relevant to determining the class period and provides background information which is necessary to resolve all the class members claims.

[174] Questions 2 and 3 inquire into the pricing of Premium Features. Question 3 also inquires into whether Tinder deliberately charged app users different prices for the same product, and whether the age-based price differential was disclosed to app users. All of these issues are central to the plaintiff's allegation that Tinder engaged in age-based differential pricing contrary to the *BPCPA*. The answers to these

questions is pertinent to all prospective class members and can be answered in a common way across the class.

[175] It is common ground between the parties that Tinder did offer Premium Features to app users, for a fee, and that this fee differed depending on the app user's age. There is therefore some basis in fact to support that common issues 1-3 are common issues for all class members and that the resolution of these issues will advance the litigation.

[176] Accordingly I find that with the exception of 1(d) these common issues should be certified.

Issues 4-9: Does the *BPCPA* apply?

[177] The plaintiff's proposed common issues 4-9 relate to the applicability of the *BPCPA* to the plaintiff's allegations. Proposed common issues 4-9 are as follows:

4. Are the class members “consumers” within the meaning of the *BPCPA* (s. 1)?
5. Is the Tinder app a “service” within the meaning of the *BPCPA* (s. 1)?
6. Are the Premium Features a “service” within the meaning of the *BPCPA* (s. 1)?
7. Is the defendant a “supplier” within the meaning of the *BPCPA* (s. 1)?
8. Is the purchase of a Tinder App subscription a “consumer transaction” within the meaning of the *BPCPA* (s. 1)?
9. Is the purchase of the Premium Features a “consumer transaction” within the meaning of the *BPCPA* (s. 1)?

[178] Proposed common issues 4-9 are threshold issues which are relevant to the plaintiff's claims. Both parties have put evidence before the court which outlines the structure of the Tinder app and the way in which app users purchase Premium Features. This demonstrates some basis in fact that the sale of Premium Features is captured within the above *BPCPA* definitions. Tinder does not take issue with this point.

[179] Determining the applicability of the *BPCPA* on a class-wide basis will advance the litigation and avoid duplicate fact-finding. Common issues 4-9 are certified.

<u>Issue 10: Has Tinder Violated the *BPCPA*?</u>

[180] Proposed common issue 10 speaks to the heart of the plaintiff's claim that Tinder's age-based pricing differential was deceptive and/or unconscionable. Proposed common issue 10 reads as follows:

> 10. If the answer to any of Questions 3(a) or [3](b) is yes, then did the Defendant breach the *BPCPA* sections 4-5 or 8-9, whether or not the factors in [ss.] 8(3) or 4(3) are present in any individual case? To wit:
>
> a. Did the Defendant take advantage of Class Members inability to protect their own interests because of ignorance of any matter related to the transaction or inability to understand the character or nature of the transaction, in breach of *BPCPA*, [ss.] 8(3)(b)?
>
> b. Did the total price grossly charged to Class Members for the Premium Features exceed the total price at which similar subjects of similar consumer transactions were readily [available] by similar consumers, in breach of *BPCPA* s. 8(3)(c)?
>
> c. Were the terms or conditions on or subject to which Class Members entered for the purchase of Premium Features from the Defendant so harsh or adverse to these consumers as to be inequitable because of the inequality of bargaining power and the lack of candid disclosure by the Defendant about the age-based pricing discrimination, in breach of s. 8(3)(e)?
>
> d. If the answer to Question 3(e) is no, then were the prices displayed by Tinder displayed in such a way that a person could reasonably conclude that a price benefit or advantage existed, but it did not, because the exact same service was being sold to non-Class Members for a lower price, in breach of *BPCPA* s. 4(3)(c)(i)?
>
> e. If the answer to Question 3(d) is no, then was Tinder's failure to disclose the age-related pricing to Class Members a failure to state a material fact with a misleading effect, in breach of *BPCPA* s. 4(3)(b)(vi)?

[181] Tinder takes issue with these common issues on a number of grounds.

<u>Contention vis-à-vis ss. 4 and 5 of the *BPCPA*</u>

[182] Tinder submits that the questions which inquire into whether Tinder breached ss. 4 or 5 of the *BPCPA* should not be certified. To support this point, Tinder drew my attention to para. 67 of *Ileman v. Rogers Communications Inc.*, 2014 BCSC 1002 (*Ileman* BCSC), which reads as follows:

> I am unable to conclude that the decisions in *Loychuk* and *Bryan* to the effect that a consumer must establish that he or she relied on the alleged deceptive

> representation would have been decided differently had the courts been alerted to the earlier decisions in *Knight*. It is my view that the apparent divergent lines of authority in *Knight* and *Loychuk* can be reconciled on the following basis:
>
> > a) where the composition of the representation is such that a determination can be made as to whether it had the capability, tendency or effect of deceiving or misleading under the provisions of the *BPCPA* without the need for additional facts, the plaintiff need not prove that he or she was actually deceived by it because there is no need for individual inquiry to determine what comprised the representation. This will be the circumstance in most products liability and failure to warn cases. Examples include *Knight* (cigarette packages branded as “light” and “mild”) and Jones (press release claimed a 99.5 percent success rate with the manufacturer’s hip replacement implant);
> >
> > b) where the composition of the representation is such that a determination cannot be made as to whether it had the capability, tendency or effect of deceiving or misleading under the provisions of the *BPCPA* without additional facts, the plaintiff must demonstrate that he or she was aware of those additional facts. This was the situation in *Loychuk* (statements on a website that the plaintiffs may or may not have read and may or may not have induced them to act) and *Bryan* (the equipment had been used by the hospital, not by the plaintiff, and there was no allegation that the plaintiff was aware of or relied upon the manufacturers statement).

[183] Tinder submits the above commentary established two categories of liability, which can be summarized as follows:

> [A] would the deceptive nature as evident from its composition […] Pleading reliance is unnecessary [objective standard]; and
>
> [B] where the representations misleading effect cannot be assessed without further factual inquiry, reliance must be demonstrated to establish the causal link [subjective standard].

[184] I will use Tinder's proposed categories for ease of reference, but my usage is not intended necessarily as an affirmation of Tinder’s interpretation of *Ileman*.

[185] It is my understanding that it is Tinder's position that the plaintiff has not pled sufficient facts to demonstrate some basis that it is liable in either of the above categories. Specifically, it says that it is “not evident on the face that Tinder's differential pricing had the potential capacity, tendency or effect of deceiving or misleading consumers” and that, therefore, Tinder's actions cannot be slotted in Category A.

[186] Similarly, Tinder asserts that the plaintiff has not pled any facts which suggests that the plaintiff would have made different purchasing decisions had he known about the age-based differential pricing. In effect, Tinder submits that the plaintiff has not shown the reliance that it says is necessary to ground Category B liability. I observe however Tinder conceded that the law is unsettled as to whether reliance is necessary to ground s. 4 or s. 5 claims under *BPCPA*.

[187] The plaintiff says that Tinder's actions fall squarely within Category A. The position of the plaintiff is that Tinder failed to disclose the age-based price differential on their app or website, and this universal omission had the objective capacity or tendency to deceive. This universal omission was experienced equally by all the class members.

[188] Tinder does not dispute that they did not disclose the age-based price differential on either its app or website, and, in my view, there is some basis in fact to support the existence of this universal omission. Whether or not this omission violated s. 4 or 5 of the *BPCPA* is the basis of the plaintiff's proposed common issue 10, 10(e), and 10(d).

[189] In my view Tinder’s submissions on this point invite me to opine on the underlying merits of the plaintiff's claim; an invitation which I must decline.

[190] At this stage it is my role to determine whether there is some basis in fact that the proposed common issues are common across the class. Upon reviewing the evidence, I find that the plaintiff has demonstrated some basis in fact that the differential pricing scheme was not disclosed on either the Tinder app, or the Tinder website, and that the plaintiff had no knowledge of the pricing differential when he originally purchased Premium Features.

[191] I am also satisfied there is some basis in fact that Tinder's omission had the capability, tendency, or effect of deceiving or misleading the plaintiff and that answering whether Tinder's omission breached ss. 4 and 5 of the *BPCPA* will advance the litigation and avoid duplicate fact-finding. Tinder's argument implies that

such a conclusion is not possible because of the decision in *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122. It appears to me the issue before this court is somewhat distinct from the issue before the court in *Loychuk*.

[192] In *Loychuk*, the plaintiffs submitted that a representation on the defendant's website was deceptive as it misled the plaintiffs as to the safety of zip lining; however, the plaintiffs had never read this representation, and therefore, it could not have misled them.

[193] In the case at bar, the plaintiff argues that the absence of a representation on Tinder's website about the age-based pricing differential misled them into believing that all app users were charged the same price. These are different issues.

[194] Tinder also disputes the certification of proposed common issue 10(d). Proposed common issue 10(d) reads, in part "were the prices displayed by Tinder displayed in such a way that a person could reasonably conclude that a price benefit or advantage existed". Tinder states that the plaintiff has not levelled any allegations "respecting Tinder's <u>display</u> of pricing" and that there is therefore no basis in fact to support the certification of this common issue.

[195] Affidavit evidence before the court indicates that the price which was displayed to app users over 29 was higher than the price displayed to users under 29. It is also common ground between the parties that a price was displayed to app users; that this price varied by age; and that this price variance was not disclosed on Tinder's app or website. In my view this is not the forum at this point to parse the semantic discussion concerning the word "display".

[196] Lastly, Tinder takes issue with the proposed common issue 10(d). At this point, Tinder reasserts that its Terms of Use and its disclosure to the news media make it impossible for this Court to find that it failed to state a material fact. Again, this issue wades into the merits and is to be left for the trial judge's determination. The affidavit evidence before me indicates that neither Mr. Creery nor Mr. Rao were aware of the price-based age differential. This is some basis in fact to certify this

common issue. Answering whether Tinder's omission constituted a failure to disclose a material fact advances the litigation and can be determined on a class-wide basis.

Contention vis-à-vis ss. 8 and 9 of the *BPCPA*

[197] Tinder broadly takes issue with common issue 10 on the basis that the plaintiff has not pled either of the necessary elements of unconscionability, which are (1) an inequality of bargaining power, resulting in (2) an improvident bargain: *Pantusa* at paras. 47–48. I have previously addressed this issue in the context of the summary judgment analysis. I adopt the conclusions in this regard in the context of the certification application.

[198] At this stage, there is some evidence before me to support the certification of the common issues relating to ss. 8 and 9 of the *BPCPA*. I also find that the questions can be answered in a common way across class as Tinder did not disclose the age-based pricing differential to any of its app users on its website or app.

[199] That said, it is true that some app users may have been aware of the pricing differential by other means, and that this may change the alleged “cognitive asymmetry”. Nevertheless, common features can properly be certified where the issues are “not necessarily identical issues of law that arise from common but not necessarily identical facts”.

[200] In this case, answering these questions on a class-wide basis will avoid the duplication of fact and legal finding, and any differentiation between class members’ actual knowledge can be addressed at trial.

[201] Tinder also takes issue with the wording in proposed common issue 10(a) which asks whether it took “advantage of class members inability to protect their own interests because of ignorance of <u>any matter</u> related to the transaction”. Specifically, Tinder says that this common issue is overbroad and disconnected from the pleadings, which focus only on the plaintiff's knowledge of the age-based pricing differential.

[202] The plaintiff says that this argument is wholly semantic, as price is a matter related to the transaction and is therefore captured by the concept of "any matter".

[203] While I recognize Tinder's concern, the language "any other matter related to the transaction" forms part of the statutory language of s. 8(3)(b) of the *BPCPA*. The plaintiff's common issues are therefore in alignment with the relevant statutory language and is appropriate in the circumstances.

[204] Tinder also takes issue with proposed common issue 10(b) on the basis that customers who are eligible for a "youth discount" are not "similar consumers" and are therefore not captured by s. 8(3)(c). I have already determined that this matter is best left for trial. It is common ground between the parties that Tinder charged an increased rate to app users over the age of 29. This satisfies the some basis in fact standard to certify common issue 10(b). Whether consumers of different ages constitute "similar consumers" is a matter to be left to the trial judge.

[205] Lastly, Tinder submits that proposed common issue 10(c) is unsupported by the evidence. It says that the plaintiff "has not called into question any specific terms or conditions" nor has he specified which terms and conditions are allegedly harsh or adverse. In response, the plaintiff asserts that "price itself is a fundamental term and condition of any transaction".

[206] I am not persuaded by the plaintiff's argument that the words "terms and conditions" should be interpreted to mean "price". I accept Tinder's position that the plaintiff's evidence does not raise an issue which is indicative that the terms and conditions of the purchase were harsh or adverse.

[207] Based on the foregoing, I find that common issue 10 will be certified, with the exception of common issue 10(c).

<u>Issues 11-13: Damages and Remedy</u>

[208] These proposed common issues read as follows:

11. If the answer to any of Questions 10(a)-(e) is yes, then are Class Members entitled to a declaration under the *BPCPA*, s. 172(1)(a) that the Defendant has contravened the *BPCPA*, and if so on what terms?
12. If the answer to any of questions 10(a)-(e) is yes, then are Class Members entitled to restoration of the funds spent on Premium Features or the Tinder App under the *BPCPA*, s. 172(3)(a), and, if so, in what amount?
13. If the answer to any of Questions 10(a)-(e) is yes, then should the court order a permanent injunction under the *BPCPA*, s. 172(1)(b) restricting the Defendant from engaging in any of the practices found to have been engaged in, and, if so, on what terms?

[209] The plaintiff says that class members' entitlement to a remedy is grounded upon the liability of the defendant, not the unique circumstances of the class members. In the plaintiff's view, if Tinder's age-based price differential is found to violate the *BPCPA* then class members should have paid the lower, under 29, price for Premium Features. The plaintiff therefore seeks a restoration of all the money that Tinder obtained by charging class members above the amount charged to app users under the age of 29.

[210] The plaintiff asserts that the appropriate way to determine the quantum of damage is to determine Tinder's aggregate liability. To do so, the plaintiff proposes that the court undertake the following calculation for each of the impugned Premium Features:

	(PRICE PAID BY ≥29 FOR FEATURE X)	
-	(PRICE PAID BY <29 FOR FEATURE X)	
=	***difference in price***	**SUBTOTAL**
X	(NUMBER OF PURCHASES OF FEATURE X BY ≥29 CLASS MEMBERS DURING CLASS PERIOD)	
=	***Total damages for feature X***	**TOTAL**

[211] The plaintiff submits that calculating Tinder's aggregate liability in this way is supported by *Pearce v. 4 Pillars Consulting Group Inc.*, 2019 BCSC 1851 where the court made the following determination in a case involving an alleged breach of the *BPCPA*:

> [231] The Plaintiffs contend that damages or restitution can be determined by referring to the records of the fees paid by the Defendants' clients. Accordingly, they say that there is some basis in fact upon which to conclude that an aggregate award can be determined and, therefore, constitutes an appropriate common issue.
>
> [232] With respect to methodology, the Plaintiffs say that the 4 Pillars Defendants used a client tracking system to record client data, which can be used to calculate, for example, the average fees paid by each client and the frequency of very high fees. The Plaintiffs also say that the Full Circle Defendants kept detailed information about their clients and that they have provided estimates of the total gross fees paid by clients referred to a LIT.
>
> [233] Section 29(1)(c) of the *CPA* provides that this Court may make an order for an aggregate monetary award if:
>
> > …the aggregate or part of the defendant's liability to some or all class members can reasonably be determined without proof by the individual class members.
>
> [234] I am satisfied that the Court may be able to determine the Defendants' aggregate liability for certain categories of class members by relying upon the Defendants' records, subject to the appropriate customer records being disclosed. This includes, for example, those who paid fees but never submitted a consumer proposal and those who paid fees in excess of prescribed amounts.
>
> [235] I am also satisfied that the Defendants' customer records may provide sufficient information to allow the court to determine whether it is appropriate for the Defendants to retain any portion of the fees charged. I find that issue #18 is an appropriate common issue. However, as Justice Brown noted in *Godfrey*, it is ultimately up to the trial judge to determine if aggregate damages should, in fact, be awarded (at para. 113).

[212] The plaintiff also says that it is proper to certify a common issue which is framed as "if so, and what amount" as similar phrasing as was used in both *Pearce* and *LaSante v. Kirk*, 2023 BCCA 28 at para. 78-94.

[213] I find there is some basis in fact to support that the quantum of restitution can be determined on an aggregate basis, by reference to Tinder's records. The plaintiff placed an expert report, authored by Robert Zimmerman, before the court. I have previously found this affidavit has some relevance in the context of the certification application.

[214] This expert report indicates that it is likely that the Tinder servers contain "user information including the user's pictures, personal information, and dating preferences".

[215] Mr. Zimmerman indicated that if he was granted access to Tinder’s servers, he would likely be able to determine the number of users over 29 who purchased various Premium Features. Using this number, the plaintiff would be able to calculate Tinder's aggregate liability using the proposed formula.

[216] The plaintiff also says that Tinder must track its revenue from Premium Features, as it provided detailed financial filings to the US Securities and Exchange Commission which indicate that its “direct revenue is primarily derived from users in the form of recurring subscriptions”.

[217] I accept that Tinder likely maintains records of transactions, and that these records can be used to determine Tinder's aggregate liability. Accordingly, I find there is some basis in fact that Tinder’s quantum of aggregate liability can be determined without inquiring into the circumstances of individual class members. The common issues relating to remedy are therefore common to the class and will be certified.

[218] I also note that Tinder asserted that common issue 12 should not be certified as the plaintiff has failed to demonstrate some basis in fact that there is a causal link between Tinder's actions and the plaintiff’s loss. On this point, Tinder once again claims that reliance is a necessary element of causation under s. 172(3)(a). Having addressed this argument above, I will not repeat my findings.

[219] I find that the common issues relating to remedy can be answered on a class-wide basis, and that answering these questions will avoid duplicate fact-finding and legal analysis. These combinations shall be certified.

<u>Issue 14: Other Jurisdictions</u>

[220] Proposed common issue 14 relates to the claims made under extra-provincial consumer protection legislation, and reads, in part, as follows:

> 14. Are the answers to these questions under *BPCPA* the same for class members claiming under each of: Alberta, Ontario, Québec,

> Saskatchewan, Manitoba, Newfoundland and *Prince Edward Island* (now excluded).
>
> [Italics added.]

[221] Tinder says that if the plaintiff fails to establish some basis in fact for each of the *BPCPA* proposed common issues, it is fatal to his claims under the various other extra-provincial consumer protection legislations.

[222] I have found some basis in fact for all the plaintiff's proposed common issues, with the exception of 1(d) and 10(c). Given that the corresponding consumer protection legislations operate in substantially the same way, and in practice, that these extra-provincial issues could be tried together, I find that the plaintiff has similarly pled some basis in fact to certify all the common issues listed in question 14, with the exception of those with reference terms or conditions.

[223] For the same reason discussed above vis-à-vis proposed common issue 10(c), I find that there is no basis in fact to support the certification of the following proposed issues 14(h), 14(v), 14(aaa), and 14(uuu).

[224] Common issue 14 is certified, with the exception of: 14(h), 14(v), 14(aaa), and 14(uuu).

<u>Issues 15 and 16: Interest and Distribution</u>

[225] Common issues 15 and 16 relate to Tinder's liability for court ordered interest and inquire into the appropriate way to distribute damages to the class. These proposed common issues read as follows:

> 15. What is the liability, if any, of the defendant, for court ordered interest?
> 16. What is the appropriate distribution of any aggregate damages award to the class, and should the defendant pay for the cost of that distribution?

[226] Tinder does not take issue with the certification of these common issues. I find that these issues can be answered in a common way across the class. These proposed common issues are certified.

Preferable Procedure: s. 4(1)(d)

[227] Section 4(1)(d) requires the plaintiff to prove that "a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues". Section 4(2) of the *CPA* dictates that:

> 4 (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> > (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
> >
> > (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
> >
> > (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
> >
> > (d) whether other means of resolving the claims are less practical or less efficient;
> >
> > (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[228] These five factors do not provide an exhaustive list of factors to be considered when assessing whether a class action is the preferable procedure; although these five issues must be addressed. The court must also keep in mind that under that the underlying goals of class actions; namely, judicial economy, access to justice, and behaviour modification.

[229] Tinder broadly asserts that the plaintiff has not provided any evidence to show that a class proceeding is the preferable procedure for a fair and efficient resolution to the common issues. These submissions did not specifically address the five factors listed above.

[230] In any event, based on the material before me, I find that the common issues, as certified above, predominate over any questions affecting only individual members. Tinder asserts that it will be impossible to determine individual class member's damages without conducting an individualized inquiry. Conversely, the plaintiff says that aggregate damages can be calculated using Tinder's records. I

have already found that there is some evidence before me to suggest that the claims related to remedy can be adjudicated on a class-wide basis using Tinder's records.

[231] While some inquiry into individual factual circumstances may become necessary if Tinder's records are not able to disclose the number of class members who purchase Premium Features, the need for limited individual inquiries does not outweigh the many common issues that can be answered for all class members. In this case, the common issues predominate over individual issues. Factor (a) supports certification.

[232] There is nothing before me that would suggest that individual class members have filed their own overlapping claims in other jurisdictions. Nor is there any evidence that putative class members wish to pursue their claims on an individual basis. Factors (b) and (c) weigh in favour of certification.

[233] In respect of factors (d) and (e) the plaintiff states that the costs associated with prosecuting an individual claim would far exceed the value of such claim. I am cognizant of the fact that a class member’s damage could be as low as $13 if they purchased only one month of Tinder+.

[234] Notwithstanding this rather bracing statistic, Tinder correctly asserts that an otherwise unworkable class action cannot be certified merely because it would be economically viable to advance the individual claims. In support of this proposition Tinder cited *Clark v. Energy Brands Inc.*, 2014 BCSC 1891 at para. 155:

> [155] The fact that a class proceeding may be the only practical procedure available to the plaintiff cannot justify certification of an unworkable class proceeding that involves individual evidence and fact-finding; it is not enough for the plaintiff to establish that there is no other preferable procedure, as the court must also be satisfied that a class proceeding would be fair, efficient, and manageable: *Marshall*, at para. 235.

[235] While I agree with Tinder’s statement of the law, I do not find this consideration to be particularly relevant to the issue at hand. The plaintiff’s proposed class action is not “an unworkable class proceeding that involves individual evidence

and fact-finding". I have already found that the common issues which are certified are common across class members and can be determined on a class-wide basis.

[236] While minor individual fact-finding may become necessary, the need for such inquiries does not lead to a conclusion that it would be more efficient to adjudicate the entirety of the plaintiff's claims on an individual basis. In my assessment, adjudicating these claims on an individual basis would result in duplicative fact-finding; and in relation to judicial efficiency, this must be avoided. Accordingly factor (d) weighs in favour of certification.

[237] There is nothing before me to suggest that adjudicating the issue on a class-wide basis would create greater difficulties than what would be experienced if the claim proceeded on an individual basis. Factor (e) therefore weighs in favour of certification.

[238] I also accept the plaintiff's position that certifying this claim will achieve the underlying goals of class action; namely: judicial economy, access to justice, and behaviour modification, in a way that individual claims could not. Accordingly I am satisfied that there is some basis in fact that a class proceeding is the preferable procedure.

<u>Proper Representative Plaintiff: s. (4)(1)(e)</u>

[239] Section 4(1)(e) requires the court to consider whether the representative plaintiff:

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[240] As expressed by Justice Branch in *Krishnan*:

> [230] A representative plaintiff need not be "typical" of the class, nor the "best" possible representative: *Dutton* at para. 41. The test for the adequacy

> of a proposed representative plaintiff is whether he or she will vigorously prosecute the action: *Campbell* at paras. 75-76.

[241] Tinder submits that the plaintiff is neither a proper representative plaintiff, nor has he proposed a sufficient litigation plan to advance the proceedings on behalf of the proposed class.

[242] The plaintiff, Mr. Creery, says that he is a suitable representative plaintiff and that he has no conflict with other class members and that he has developed a suitable litigation plan. Accordingly he asked that he be certified as the representative plaintiff.

Adequacy of the Plaintiff

[243] Tinder submits that Mr. Creery is not a proper representative plaintiff. It's assertion on this point rests on the argument that Mr. Creery did not suffer any loss or damage due to its conduct, and, therefore, that he does not have a personal cause of action against Tinder. Tinder asserts that a representative plaintiff requires “one personal cause of action against at least one defendant”.

[244] Assessing the adequacy of a representative plaintiff is not an opportunity to investigate the merits of the underlying claim made by the said plaintiff. I have already determined that the plaintiff's claims raise a cause of action against Tinder. As determined by the Supreme Court of Canada, the “proposed representative need not be ‘typical’ of the class, nor the ‘best’ possible representative. The court should be satisfied, however, that the proposed represent will vigourously and capably prosecute the interests of the class”: *Dutton* at para. 41.

[245] Up until this point, Mr. Creery has diligently prosecuted this claim on behalf of the class. There is nothing before me to suggest that his diligence will not persist. I accept that Mr. Creery is a suitable representative plaintiff.

Litigation Plan

[246] Tinder states that the plaintiff's litigation plan is insufficient as it does not adequately grapple with the substantive individual issues which it asserts will

inevitably arise in relation to proof of causation and the loss experienced by the class members.

[247] The plaintiff disputes this point and maintains that both of these issues can be resolved on a class-wide basis. The plaintiff also submits that a litigation plan need only provide a reasonable procedural roadmap for the issues which are expected to arise, and then amendments to the litigation plan may be made if, and as, necessary.

[248] On this point the plaintiff drew my attention to the comments of the British Columbia Court of Appeal in *Jiang v. Vancouver City Savings Union*, 2019 BCCA 149:

> [53] The appellants argue that this plan is superficial and ignores many difficult individual issues regarding the proof of the elements of each individual claim, including how a person would prove that they purchased a prepaid credit card from one of the defendants to use as a consumer and not for business purposes.
>
> [54] In addressing the adequacy of the litigation plan, the certification judge relied (at para. 44) on the principles set out in *Fakhri v. Alfalfa's Canada Inc.*, 2003 BCSC 1717, aff'd 2004 BCCA 549:
>
>> [77] The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members.
>>
>> [Emphasis added; citations omitted.]
>
> [55] The certification judge then came to the following conclusion:
>
>> [45] I note that the litigation plan anticipates the use of the court's powers under s. 25 of the *CPA* and the case management powers under s. 27. The plan contains specific provisions for using computer technologies in making assessments and determining the amounts distributable to class members. In light of the comments by the Court of Appeal ([*Jiang #1 BCCA*] at para. 113) as to how individual issues, such as a determination of the primary purpose of the use of a prepaid card, may be carried out using ss. 12, 27 and 28 of the CPA, it is my view that the draft litigation plan is likely capable of

> bringing a final resolution of the claims of class member at the common issues trial or, if necessary, at an individual inquiry.
>
> [46] Class proceedings are flexible and dynamic and a litigation plan need only be a workable framework for moving the case forward. (*Tucci v. Peoples Trust Company*, 2017 BCSC 1525). In my view the plaintiff's plan is such a framework.
>
> [47] I find the plaintiff's litigation plan to be satisfactory at this stage of the proceeding.

[249] I find that the plaintiff's litigation plan is sufficient to create a workable framework to advance this litigation, and then amendments to the plan can be made, as necessary. My conclusion rests, in part, on the fact that I am unable to agree with Tinder's submission that the plaintiff's litigation plan fails to account for the possibility of individual issues. The relevant portion of the plaintiff's plan reads as follows:

> Individual Issues Determination
>
> 21 If the defendant is wholly successful in the common issues, the case will be at an end and no individual issues for determination will be required.
>
> 22 The plaintiff proposes that if any or all of the common issues are resolved in favour of the class, then the parties will convene for argument under sections 27 and 28 of the *Class Proceeding Act* to determine the appropriate course for any remaining issues. At this time the plaintiff intends to present the following process:
>
> > a. after determination of the common issues, the parties and the court will consider whether there are any issues remaining that may be determined as secondary common issues.
> >
> > b. the court shall appoint an assessor to determine any individual issues of liability that may remain after the common issues trial and assess the damages to which each claim class members entitled.

[250] While the plaintiff says that the proposed common issues can be resolved on a class-wide basis it is clear he is prepared to resolve any individual issues, should they arise. While neither party raised this issue, I find there is a small technical defect in the litigation plan which must be amended. The proposed litigation plan states "the common issues trial will proceed on a date to be fixed in 2023 for 10 days" this obviously will need to be amended.

[251] For the above reasons I find the plaintiff's proposed litigation plan is adequate at this stage of the proceedings and ought to be certified, with the minor amendment.

Conclusions

1. The summary judgment application of the defendant is dismissed.

2. The claim is certified as a class action.

3. The class definition shall be amended in accordance with these reasons.

4. The proposed common issues are certified subject to the exclusions in accordance with these reasons.

5. The plaintiff shall have leave to file amendments to his claim in accordance with these reasons.

“Crossin J.”

Appendix A

Tinder Premium Features and the Tinder App

1. When did Tinder introduce each of the Premium Features in the Tinder App:

    a. Tinder Plus

    b. Tinder Gold

    c. Tinder Platinum

    d. A la carte purchases of Premium Features.

2. What did Tinder charge for each of the Premium Features during the class period?

3. Did Tinder charge different prices for the Premium Features to:

    a. Persons age 29 and over? If so, what price(s) and for what period(s)?

    b. Any other age threshold(s)? If so, what price(s) and for what period(s)?

    c. If the answer to any of questions (a) or (b) is yes, did Tinder do so deliberately?

    d. If the answer to any of questions (a) or (b) is yes, was the conduct disclosed to users?

    e. If the answer to any of questions (a) or (b) is yes, was there any material difference between the Premium Features offered to people in the higher age category versus the Premium Features offered to people in the lower age category?

    f. If the answer to any of questions (a) or (b) is yes, how much money did Tinder collect from Class Members in the higher age category? And what is the difference between that amount and what would have been charged if they had been charged the same price as the lower age category?

Business Practices and Consumer Protection Act and related provincial enactments

4. Are the class members “consumers” within the meaning of the *BPCPA*, s 1?

5. Is the Tinder App a “service” within the meaning of the *BPCPA*, s 1?

6. Are the Premium Features a “service” within the meaning of the *BPCPA*, s 1?

7. Is the Defendant a “supplier” within the meaning of the *BPCPA*, s 1?

8. Is the purchase of a Tinder App subscription a “consumer transaction” within the meaning of the *BPCPA*, s 1?

9. Is the purchase of the Premium Features a “consumer transaction” within the meaning of the *BPCPA*, s 1?

10. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant breach the *BPCPA* sections 4-5 or 8-9, whether or not the factors in s-s 8(3) or 4(3) are present in any individual case? To wit:

    a. Did the Defendant take advantage of Class Members inability to protect their own interests because of ignorance of any matter related to the transaction or inability to understand the character or nature of the transaction, in breach of *BPCPA*, s-s 8(3)(b)?

    b. Did the total price grossly charged to Class Members for the Premium Features exceed the total price at which similar subjects of similar consumer transactions were readily [obtainable*] by similar consumers, in breach of *BPCPA*, s-s 8(3)(c)?

c. Were the terms or conditions on or subject to which Class Members entered for the purchase of Premium Features from the Defendant so harsh or adverse to these consumers as to be inequitable because of the inequality of bargaining power and the lack of candid disclosure by the Defendant about the age-based pricing discrimination, in breach of s- 8(3)(e)?

d. If the answer to Question 3(e) is no, then were the prices displayed by Tinder displayed in such a way that a person could reasonably conclude that a price benefit or advantage existed, but it did not, because the exact same service was being sold to non-Class Members for a lower price, in breach of *BPCPA* s-s 4(3)(c)(i)?

e. If the answer to Question 3(d) is no, then was Tinder's failure to disclose the age-related pricing to Class Members a failure to state a material fact with a misleading effect, in breach of *BPCPA* s-s 4(3)(b)(vi)?

11. If the answer to any of Questions 10(a) – (e) is yes, then are Class Members entitled to a declaration under the *BPCPA*, 172(1)(a) that the Defendant has contravened the *BPCPA*, and if so on what terms?

12. If the answer any [sic] of Questions 10(a) – (e) is yes, then are Class Members entitled to restoration of the funds spent on Premium Features or the Tinder App under the *BPCPA*, s 172(3)(a), and, if so, in what amount?

13. If the answer any [sic] of Questions 10(a) – (e) is yes, then should the Court order a permanent injunction under the *BPCPA*, s 172(1)(b) restricting the Defendant from engaging in any of the practices found to have been engaged in, and, if so, on what terms?

14. Are the answers to these Questions under the *BPCPA* the same for Class Members claiming under each of:

<u>Alberta</u>

a. Are class members in Alberta are [sic] “consumers” within the meaning of the Alberta *Consumer Protection Act*, RSA 2000, c C-26.3, s 1

b. Is Tinder is [sic] a “supplier” within the meaning of the Alberta *Consumer Protection Act*, RSA 2000, c C-26.3, s 1

c. Are the Premium Features are [sic] “goods” and “services” within the meaning of the Alberta *Consumer Protection Act*, RSA 2000, c C-26.3, s 1

d. Is the payment for access to or purchase of Premium Features within Tinder is [sic] a “consumer transaction” within the meaning of the Alberta *Consumer Protection Act*, RSA 2000, c C-26.3, s 1

e. If the answer to any of Questions 3(a) or (b) is yes, then was the sale of the Premium Services [sic] to class members at a higher price an unfair practice in breach of the Alberta *Consumer Protection Act*, RSA 2000, c C-26.3, s5

f. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant take advantage of the consumer as a result of the consumer’s inability to understand the character, nature, language or effect of the consumer transaction or any matter related to the transaction in breach of the Alberta *Consumer Protection Act*, RSA 2000, c C-26.3, s 6(2)(b)

g. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant charge a price for goods or services that grossly exceeds the price at which similar goods or services are readily available without informing the consumer of the difference in price and the reason for the difference in breach of the Alberta *Consumer Protection Act*, RSA 2000, c C-26.3, s 6(2)(c)

h. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant include in a consumer transaction terms or conditions that are harsh, oppressive or excessively one-sided in breach of the Alberta *Consumer Protection Act*, RSA 2000, c C-26.3, s 6(3)(c)

i. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant say or do anything that might reasonably deceive or mislead a consumer in breach of the Alberta *Consumer Protection Act*, RSA 2000, c C-26.3, s 6(4)(a)

j. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant represent that a price benefit or advantage existed when it did not in breach of the Alberta *Consumer Protection Act*, RSA 2000, c C-26.3, s 6(4)(o)

k. If the answer to any of these questions related to the Alberta CPA [sic] are "yes", then are class members entitled to recover the amount by which the consumer's payment under the consumer transaction exceeds the value of the goods or services to the consumer, or to recover damages, or both pursuant to the Alberta *Consumer Protection Act*, RSA 2000, c C-26.3, ss 7(3) or 13

<u>Ontario</u>

l. Are class members in Ontario "consumers" within the meaning of the Ontario *Consumer Protection Act*, 2002, SO 2002, c 30, Sch A, s1

m. Is Tinder is [sic] a "supplier" within the meaning of the Ontario *Consumer Protection Act*, 2002, SO 2002, c 30, Sch A, s1

n. Are the Premium Features are [sic] "goods" and "services" within the meaning of the Ontario *Consumer Protection Act*, 2002, SO 2002, c 30, Sch A, s 1

o. Is the payment for access to or purchase of Premium Features within Tinder is [sic] a "consumer transaction" within the meaning of the Ontario *Consumer Protection Act*, 2002, SO 2002, c 30, Sch A, s1

p. If the answer to any of Questions 3(a) or (b) is yes, then was the sale of the Premium Services to class members at a higher price an unfair practice in breach of the Ontario *Consumer Protection Act*, 2002, SO 2002, c 30, Sch A, s14

q. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant represent that a specific price advantage existed where it did not in breach of the Ontario *Consumer Protection Act*, 2002, SO 2002, c 30, Sch A, s14(2)(11)

r. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant fail to state a material fact if such use or failure deceives or tends to deceive not in breach of the Ontario *Consumer Protection Act*, 2002, SO 2002, c 30, Sch A, s14(2)(14)

s. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant make an unconscionable representation in breach of the Ontario *Consumer Protection Act*, 2002, SO 2002, c 30, Sch A, s 15(1)

t. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant knew [sic] or ought to have known that the class members were not reasonably able to protect their interests because of ignorance or inability to understand the language of an agreement or similar factors in breach of the Ontario *Consumer Protection Act*, 2002, SO 2002, c 30, Sch A, s 15(2)(a)

u. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant knew [sic] or ought to have known that the consumer transaction was excessively one-sided in favour of someone other than the consumer in breach of the Ontario *Consumer Protection Act*, 2002, SO 2002, c 30, Sch A, s 15(2)(e)

v. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant knew [sic] or ought to have known that the terms of the consumer transaction were so adverse to the consumer as to be inequitable in breach of the Ontario *Consumer Protection Act*, 2002, SO 2002, c 30, Sch A, s 15(2)(f)

w. If the answer to any of these questions related to the Ontario CPA [sic] are “yes”, then are class members entitled to recover the amount by which the consumer’s payment under the agreement exceeds the value that the goods or services have [sic] to the consumer or to recover damages, or both, following the Ontario *Consumer Protection Act*, 2002, SO 2002, c 30, Sch A, s18(2)

<u>Quebec</u>

x. Are class members in Quebec “consumers” within the meaning of the Quebec *Loi Sur La Protection Du Consommateur*, chapitre P-40.1, s1

y. Is Tinder is [sic] a “merchant” or a “manufacturer” within the meaning of the Quebec *Loi Sur La Protection Du Consommateur*, chapitre P-40.1, s1

z. Are the Premium Features are [sic] “goods” within the meaning of the Quebec *Loi Sur La Protection Du Consommateur*, chapitre P-40.1, s1, and/or “goods” and/or “services” within the meaning of the Quebec *Loi Sur La Protection Du Consommateur*, chapitre P-40.1, s2 aa. Is the payment for access to or purchase of Premium Features within Tinder is [sic] a “contract for good [sic] and services” within the meaning of the Quebec *Loi Sur La Protection Du Consommateur*, chapitre P-40.1, s2

bb. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant make false or misleading representations in breach of the Quebec *Loi Sur La Protection Du Consommateur*, chapitre P-40.1, s219

cc. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant falsely ascribe certain special advantages to goods or services in breach of the Quebec *Loi Sur La Protection Du Consommateur*, chapitre P-40.1, s220

dd. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant fail to mention an important fact in any representation made to a consumer in breach of the Quebec *Loi Sur La Protection Du Consommateur*, chapitre P-40.1, s228

ee. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant make false representations concerning any aspect of a business opportunity offered to a consumer in breach of the Quebec *Loi Sur La Protection Du Consommateur*, chapitre P-40.1, s229

ff. If the answer to any of the questions related to the Quebec CPA [sic] ss220, 228, or 229 are “yes”, can it be assumed that had the consumer been aware of such practice, he would not have agreed to the contract or would not have paid such a high price pursuant to the Quebec *Loi Sur La Protection Du Consommateur*, chapitre P-40.1, s253

gg. If the answer to any of these questions related to the Quebec CPA [sic] are “yes”, then are class members entitled to have their contracts reduced, rescinded, set aside, or annulled, and damages, and punitive damages pursuant to the Quebec *Loi Sur La Protection Du Consommateur*, chapitre P-40.1, s272

Saskatchewan

hh. Are class members in Saskatchewan “consumers” within the meaning of the Saskatchewan *Consumer Protection and Business Practices Act*, SS 2013, c C-30.2, s2

ii. Is Tinder is [sic] a “supplier” within the meaning of the Saskatchewan *Consumer Protection and Business Practices Act*, SS 2013, c C-30.2, s2

jj. Are the Premium Features are [sic] “goods” or “services” within the meaning of the Saskatchewan *Consumer Protection and Business Practices Act*, SS 2013, c C-30.2, s2

kk. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant engage in an unfair practice by doing or saying anything, or failing to do or say anything, and as a result class members might have been reasonably be [sic] deceived or misled in breach of the Saskatchewan *Consumer Protection and Business Practices Act*, SS 2013, c C-30.2, s6(a)

ll. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant engage in an unfair practice by taking advantage of class members’ inability to understand the nature of the transaction or proposed transaction in breach of the Saskatchewan *Consumer Protection and Business Practices Act*, SS 2013, c C-30.2, s6(c)

mm. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant represent that a price benefit or advantage existed where it did not exist in breach of the Saskatchewan *Consumer Protection and Business Practices Act*, SS 2013, c C-30.2, s7(i) nn. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant fail to disclose a material fact in a manner that was deceptive or misleading [sic] breach of the Saskatchewan *Consumer Protection and Business Practices Act*, SS 2013, c C-30.2, s7(o)

oo. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant enter into an agreement with class members when the price of the goods or services grossly exceeded the price at which similar goods or services were readily obtainable in a similar transaction by like consumers in breach of the Saskatchewan *Consumer Protection and Business Practices Act*, SS 2013, c C-30.2, s7(r)

pp. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant commit an unfair practice in breach of the Saskatchewan Consumer Protection and Business Practices Act, SS 2013, c C-30.2, ss8 & 9

qq. If the answer to any of these questions related to the Saskatchewan BPCPA [sic] are “yes”, then are class members entitled to recover exemplary damages pursuant to the Saskatchewan *Consumer Protection and Business Practices Act*, SS 2013, c C-30.2, s36

rr. If the answer to any of these questions related to the Saskatchewan BPCPA [sic] are “yes”, then are class members entitled to restitution, damages, exemplary damages, and/or punitive damages pursuant to the Saskatchewan *Consumer Protection and Business Practices Act*, SS 2013, c C-30.2, s93

Manitoba

ss. Are class members in [Manitoba*] “consumers” within the meaning of the Manitoba *Business Practices Act*, CCSM c B120, s1

tt. Is Tinder is [sic] a “supplier” within the meaning of the Manitoba *Business Practices Act*, CCSM c B120, s1

uu. Are the Premium Features are [sic] “goods” within the meaning of the Manitoba *Business Practices Act*, CCSM c B120, s1

vv. Is the payment for access to or purchase of Premium Features within Tinder is [sic] a “consumer transaction” within the meaning of the Manitoba *Business Practices Act*, CCSM c B120, s1

ww. If the answer to any of Questions 3(a) or (b) is yes, then was the sale of the Premium Services to class members at a higher price an unfair practice in breach of the Manitoba *Business Practices Act*, CCSM c B120, s2(1)

xx. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant represent that a price benefit or advantage existed where it did not exist in breach of the Manitoba *Business Practices Act*, CCSM c B120, s2(3)(l)

yy. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant fail to disclose a material fact in respect to a consumer transaction in breach of the Manitoba *Business Practices Act*, CCSM c B120, s2(3)(p)

zz. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant take advantage of the class members’ inability to protect their own interests due to any matter related to the transaction in breach of the Manitoba Business Practices Act, CCSM c B120, s3(2)(a) aaa. If the answer to any of Questions 3(a) or (b) is yes, then were the terms or conditions of the consumer transaction so adverse or harsh as to be inequitable in breach of the Manitoba *Business Practices Act*, CCSM c B120, s3(2)(c)

bbb. If the answer to any of these questions related to the Manitoba BPA [sic] are "yes", then are class members entitled to rescind the consumer transaction, [sic] repayment by the Defendant of any amount paid by the class members, and/or damages pursuant to the Manitoba *Business Practices Act*, CCSM c B120, s23

<u>Newfoundland</u>

ccc. Are class members in Newfoundland ''consumers" within the meaning of the Newfoundland *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s1

ddd. Is Tinder is [sic] a "supplier" within the meaning of the Newfoundland *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s1

eee. Are the Premium Features are [sic] "goods" or "services" within the meaning of the Newfoundland C*onsumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s1

fff. Is the payment for access to or purchase of Premium Features within Tinder is [sic] a "consumer transaction" within the meaning of the Newfoundland *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s1

ggg. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant make a representation that a specific price advantage exists where it does not in breach of the Newfoundland *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s7(l) hhh. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant use ambiguity as to a material fact in breach of the Newfoundland *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s7(w)

iii. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant enter into a consumer transaction with class members [where*] price grossly exceeded the price at which similar goods or services were available to similar consumers in breach of the Newfoundland *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s8(c)

jjj. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant take advantage of the class members ignorance of the character, nature or language of the consumer transaction in breach of the Newfoundland *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s8(f)

kkk. If the answer to any of Questions 14(bbb) - (eee) are yes, then did the Defendant breach the Newfoundland *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s9

lll. If the answer to any of these questions related to the Newfoundland CPBPA [sic] are “yes”, then are class members entitled to rescind the consumer transaction, repayment by the Defendant of any amount paid by the class members, and/or damages (including exemplary and punitive damages), or any other remedy under the common law, pursuant to the Newfoundland *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s10

Prince Edward Island

mmm. Are class members in Saskatchewan “consumers” within the meaning of the Prince Edward Island *Business Practices Act*, RSPEI 1988, c B-7, s1

nnn. Are the Premium Features are [sic] “goods” or “services” within the meaning of the Prince Edward Island *Business Practices Act*, RSPEI 1988, c B-7, s1

ooo. Is the representation of the price of the Premium Services [sic] a “consumer representation” within the meaning of the Prince Edward Island *Business Practices Act*, RSPEI 1988, c B-7, s1

ppp. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant make a representation that a specific price advantage existed when it did not in breach of the Prince Edward Island *Business Practices Act*, RSPEI 1988, c B-7, s2(a)(x)

qqq. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant fail to state a material fact and the failure to state that material fact deceived or tended to deceive in breach of the Prince Edward Island Business Practices Act, RSPEI 1988, c B-7, s2(a)(xiii)

rrr. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant know or ought to have known that the consumer was not reasonably able to protect his interests because of ignorance of factors in the agreement in breach of the Prince Edward Island *Business Practices Act*, RSPEI 1988, c B-7, s2(b)(i)

sss. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant know or ought to have known that the price of the Premium Features purchase [sic] by class members grossly exceeds the price at which similar goods or services are readily available to like consumers in breach of the Prince Edward Island *Business Practices Act*, RSPEI 1988, c B-7, s2(b)(ii)

ttt. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant know or ought to have known that the proposed transaction was excessively one-sided in favour of someone other than the consumer in breach of the Prince Edward Island *Business Practices Act*, RSPEI 1988, c B-7, s2(b)(v)

uuu. If the answer to any of Questions 3(a) or (b) is yes, then did the Defendant know or ought to have known that the terms or conditions of the proposed transaction were so adverse to the consumer as to be inequitable in breach of the Prince Edward Island Business Practices Act, RSPEI 1988, c B-7, s2(b)(vi)

vvv. If the answer to any of these questions related to the Prince Edward Island BPA [sic] are “yes”, then are class members entitled to rescind the consumer transaction, restitution, damages, exemplary damages, and/or punitive [sic] pursuant to the Prince Edward Island *Business Practices Act*, RSPEI 1988, c B-7, s4

Interest

15. What is the liability, if any, of the Defendant, for court-ordered interest?

Distribution

16. What is the appropriate distribution of any aggregate damages award to the Class, and should the Defendant pay for the cost of that distribution?

[* I have undertaken minor corrections to make it comprehensible.]