



Court File No. **VLC-S-S-1810561**
No.
Vancouver Registry

In the Supreme Court of British Columbia

Between

JOHN WILLIAMS

PLAINTIFF

and

AUDIBLE INC., APPLE, INC., APPLE CANADA INC., AMAZON.COM, INC., AND
AMAZON.COM.CA, INC.

DEFENDANTS

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

NOTICE OF CIVIL CLAIM

This action has been started by the plaintiff for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff,

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

THE PLAINTIFF'S CLAIM

Part 1: STATEMENT OF FACTS

Overview

1. The dominance of online platforms is the subject of increasing public attention and controversy. Technology companies including Apple Computer, Inc. and Amazon.com, Inc. dominate the news-cycle and the marketplace. At the same time, consumers take for granted that these mega-corporations will at least compete with one another. In the market for digital audiobooks, however, Apple Computer, Inc. and Amazon.com, Inc. chose not to compete with each other. Instead, they manipulated the market for their mutual benefit, in breach of the *Competition Act* and the common law. Through this suit, Canadian consumers seek to hold the Defendants accountable for their unlawful conduct.

The Parties

2. Audible Inc. is a company incorporated under the laws of New Jersey, USA, with a principal place of business at One Washington Park, 16th Floor, Newark, New Jersey, USA 07101 (“**Audible**”). Audible is a subsidiary of Amazon.com, Inc. Audible carries on business in British Columbia and across Canada.

3. Apple, Inc. is a company incorporated under the laws of California, USA, with a principal place of business at One, Infinite Loop, Cupertino, California, USA 95014 (“**Apple Inc.**”) and an address for service c/o C T Corporation System, 818 West Seventh Street, Suite 930, Los Angeles, California 90017 USA. Apple Inc. carries on business in British Columbia and across Canada.

4. Apple Canada Inc. is a company incorporated under the laws of Ontario, Canada, with a principal place of business at 120 Bremner Boulevard, Suite 1600, Toronto, Ontario M5J 0A8 (“**Apple Canada**”). Apple Canada is extra-provincially registered in British Columbia, with an

address for service at 2600 – 595 Burrard Street, Vancouver BC V7X 1L3. Apple Canada is a wholly-owned subsidiary of Apple Inc. Apple Canada carries on business in British Columbia and across Canada.

5. Apple Inc. and Apple Canada are together “**Apple**”. These Defendants functioned as a joint enterprise. Each of these Defendants was an agent of the other for the purposes of developing, marketing, distributing, selling and managing Apple’s audiobooks business.

6. Amazon.com, Inc. is a company incorporated under the laws of Delaware, USA, with a principal place of business at 410 Terry Avenue North, Seattle, Washington, 98109-5210, USA and an address for service at Corporation Service Company, 251 Little Falls Drive, Wilmington, Delaware, USA (“**Amazon.com**”). Amazon.com carries on business in British Columbia and across Canada.

7. Amazon.com.ca, Inc. is a company incorporated under the laws of Delaware, USA, with an address for service at Corporation Service Company, 300 Deschutes Way SW, Suite 304, Tumwater, Washington 98501 USA (“**Amazon.ca**”). Amazon.ca is a subsidiary of Amazon.com. Amazon.ca carries on business in British Columbia and across Canada.

8. Amazon.com and Amazon.ca are together “**Amazon**”.

9. The plaintiff, John Williams, is a resident of Vancouver, British Columbia. He has purchased audiobooks from the Defendants.

10. The Plaintiff brings this claim on behalf of himself and customers of Audible, Amazon and Apple (“**Class Members**”, to be defined in the Plaintiff’s application for class certification) who purchased audiobooks from the Defendants during the class period.

Audiobooks

11. Audiobooks are spoken-word recordings of a text being read.

12. Starting in the 1950s, record companies began releasing recordings of poetry, comedy and stories on LPs. In the 1970s, recordings of books on cassette tapes became popular. Companies such as “Books on Tape” distributed recordings of novels, in abridged and unabridged forms, as

well as non-fiction works. Recordings were increasingly performed by professional actors. In the 1980s and 1990s, the audio publishing business matured into a multi-billion-dollar industry. Up until the 2000s, the most popular formats for audiobooks were cassettes and, later, compact discs.

13. A significant proportion of audiobooks are produced based on existing written works. Audiobook producers make arrangements with publishers and authors of those works to obtain the rights to make audiobook versions.

14. In the 1990s, the rise of the internet and technological developments lead to the creation of digital audiobooks. Digital audiobooks allowed listeners freedom from physical media, and the internet permitted near-instant downloading of titles from websites. By not later than about 2008, digital audiobooks accounted for more than 50% of all audiobooks sold.

15. Today, digital audiobooks (“**Audiobooks**”) are the main format by which spoken-word recordings are produced, distributed and sold.

Audible

16. Audible was founded in 1995 as a provider of digital audiobooks. In 1998, Audible was the first publisher to maintain a website - www.audible.com - from which digital audiobooks could be purchased and downloaded by customers, including customers in Canada.

17. Audible produces, distributes and sells Audiobooks directly as well as through other platforms, including www.amazon.com, www.amazon.ca and the iTunes Store.

18. Today, Audible is the world’s largest producer of Audiobooks and it has the biggest catalog of Audiobooks. Audible’s content includes more than 375,000 Audiobooks from publishers, entertainers, magazine and newspaper publishers and business information providers. Audiobook content includes books of all genres, as well as radio shows (classic and current), speeches, interviews, stand-up comedy, and audio versions of periodicals.

19. Audible went public in 1999. In 2008, Audible was acquired by Amazon.com for \$300-million USD. Audible remains a subsidiary of Amazon.com.

20. In September 2017, Audible opened www.audible.ca, a dedicated Canadian Audiobook service.

Audiobooks on Apple iTunes and Amazon

21. Apple is a multinational technology company that designs, develops, and sells consumer electronics, software and online services. Apple operates a variety of online marketplaces for the sale and distribution of digital products and services, including the iTunes Store.

22. Apple opened the iTunes Store on April 28, 2003. The iTunes Store is an online platform for the sale and distribution of digital media, including music and movies. The iTunes Store can be accessed on desktop and mobile devices, especially Mac computers and Apple iPods, iPhones and iPads. Apple, through the iTunes Store, is the largest music vendor in the world.

23. Apple began selling Audiobooks through the iTunes Store in about 2003, including in Canada.

24. Amazon is the world's largest online retailer. Amazon.com operates one of the world's largest online marketplaces at www.amazon.com. Amazon.com also operates through other websites and geographically-focused marketplaces including www.amazon.ca for Canada. Amazon sells consumer products through its websites and marketplaces. In addition to selling physical goods, Amazon is an online platform for the sale and distribution of digital media, including music and movies.

25. Amazon began selling Audiobooks on www.amazon.com and www.amazon.ca in about 2008 after it acquired Audible. Until that time, Amazon would direct customers who wanted to download Audiobooks to www.audible.com.

26. Amazon and Apple are and were competitors in the market for the sale of Audiobooks.

27. Together, Audible, Amazon and Apple had approximately 60% of the market for audiobooks (of all formats) in Canada, at material times.

28. Audible, Amazon and Apple are and were each sellers and distributors of Audiobooks.

29. Each of Audible, Amazon and Apple operated production facilities for the creation of digital media, including movies, television shows and music, at material times. Each of Audible, Amazon and Apple either produced or had the ability to produce Audiobooks at all material times.

30. Audible and Amazon are and were actual or potential competitors of Apple for the production, sale and delivery of Audiobooks.

Unlawful Agreement

31. In 2003, Audible and Apple entered into an exclusive, worldwide agreement for the provision of Audiobooks (the “**Exclusive Agreement**”). Under the terms of the Exclusive Agreement, Audible became the sole provider of Audiobooks to the iTunes Store. In addition, Audible was forbidden from supplying Audiobooks to any online platform for the sale of digital except for the iTunes Store or Audible’s own website - www.audible.com.

32. The Exclusive Agreement continued even after Amazon acquired Audible in 2008. During the term of the Exclusive Agreement, Audible’s Audiobooks were available only from Apple (through the iTunes Store), directly from Audible (at www.audible.com), and from Amazon (at www.amazon.com and www.amazon.ca). Concurrently, Audible and Amazon did not supply Audiobooks to any online platform for the sale of Audiobooks except for the iTunes Store, Amazon and www.audible.com.

33. As a consequence, from 2008 onwards, Apple and Amazon, as the two largest sellers of Audiobooks in the world, had an agreement or arrangement not to compete in the production, distribution and sale of Audiobooks. The Defendants excluded price competition and pressure from other sellers and platforms, enabling the Defendants to charge an unlawful premium for Audiobooks sold through the iTunes Store and Amazon, and on www.audible.com. The Defendants restricted the supply of Audiobooks, by excluding Audiobooks produced by third parties from a majority of the market.

34. The Exclusive Agreement had the effect of:

- a. Fixing, maintaining, increasing or controlling the price for the supply of Audiobooks;

- b. Allocating sales, territories, customers or markets for the production or supply of Audiobooks; and
 - c. Fixing, maintaining, controlling, preventing or lessening the production or supply of Audiobooks.
35. The Exclusive Agreement between the Defendants was contrary to the *Competition Act*, s 45 (“**Unlawful Agreement**”) or was at minimum an attempt to commit acts contrary to the *Competition Act*, s 45.
36. The effects of the Unlawful Agreement were felt directly by consumers in British Columbia and Canada.
37. The Defendants committed acts in furtherance of the Unlawful Agreement, including but not limited to:
- a. the exchange of contracts and agreements, and communications concerning the implementation of the Unlawful Agreement;
 - b. the listing for sale of Audiobooks in the iTunes Store, on www.audible.com, and on www.amazon.com and www.amazon.ca, in accordance with the terms of the Unlawful Agreement; and
 - c. the maintenance of digital and physical infrastructure for the production, delivery and sale of Audiobooks on the iTunes Store, on www.audible.com and on www.amazon.ca, in accordance with the terms of the Unlawful Agreement.
38. The senior officers and directors of Audible, Amazon and Apple were at all times fully aware of the Unlawful Agreement and took active steps to implement its terms.

The Overcharge

39. As a result of the Unlawful Agreement, the Defendants charged supra-competitive prices for all Audiobooks sold through the iTunes Store, www.amazon.ca, and www.audible.com.

40. In addition, or in the alternative, the Defendants benefitted from control of the market for Audiobooks as a result of the Unlawful Agreement to increase their market share and sales, and used their position to make preferential arrangements with publishers or other suppliers of content for Audiobooks, thereby increasing their margins on Audiobooks.

41. The Plaintiff and Class Members purchased Audiobooks through the iTunes Store, www.amazon.ca, and www.audible.com. As a result of the Unlawful Agreement, the Plaintiff and Class Members paid supra-competitive prices for those Audiobooks. The difference between what the Plaintiff and Class Members paid and what they should have paid in the absence of the Unlawful Agreement was an illegal, anti-competitive overcharge (“**Overcharge**”).

42. The Defendants collected the Overcharge from the Plaintiff and Class Members.

43. Amazon.com and Apple Inc. are the ultimate recipients or beneficiaries of part or all of the Overcharge from the sale of Audiobooks through the iTunes Store, www.amazon.ca, and www.audible.com. Amazon.ca, Audible and Apple Canada received and benefitted from part or all of the Overcharge.

44. The Plaintiff and Class Members have an interest in the funds received from them by the Defendants as a result of the Overcharge.

45. The Defendants wilfully concealed the existence of the Overcharge from the Plaintiff and Class Members.

End of the Exclusive Agreement

46. In November 2015, the German Bundeskartellamt (Federal Cartel Office) opened proceedings against Audible, Amazon and Apple for anti-competitive conduct in the global market for Audiobooks. The European Commission also began inquiries into Audible, Amazon and Apple’s activities in the Audiobooks market.

47. As a result of the European competition authorities’ investigations, Audible, Amazon and Apple agreed to end the Exclusive Agreement in January 2017.

48. The effects of the Unlawful Agreement have persisted after the end of the Exclusive Agreement. As a result of the dominant positions obtained by these competing firms through the Unlawful Agreement, Apple and Amazon have continued to extract the Overcharge for sales of Audiobooks through the iTunes Store, www.amazon.ca, and www.audible.com. In addition, or in the alternative, the market positions obtained by the Defendants as a result of the Unlawful Agreement has permitted them to continue making preferential arrangements with publishers or other suppliers of content for Audiobooks, thereby increasing their margins on Audiobooks, even after the end of the Unlawful Agreement.

Part 2: RELIEF SOUGHT

From Apple and Amazon.com:

49. Damages under the *Competition Act*, s 36 in the full amount of the Overcharge;

50. General damages for the tort of conspiracy in the full amount of the Overcharge;

51. An accounting and restitution of the benefits received by the Defendants in the full amount of the Overcharge;

52. In the alternative, disgorgement of the benefits received by the Defendants on account of the Unlawful Agreement;

53. Punitive damages;

54. Interest under the *Court Order Interest Act*, RSBC 1996, c 79;

From Audible and Amazon.ca:

55. A declaration that Apple Inc., Audible and Amazon.ca have contravened the *Business Practices and Consumer Protection Act*, SBC 2004, c 2, ss 8 and 9 (“*BPCPA*”);

56. A restoration order under the *BPCPA*, s 172(3) for return of the Overcharge;

From all defendants:

57. An order certifying this action as a class proceeding; and
58. Such further and other relief as this Honourable Court may deem just.

Part 3: LEGAL BASIS

Breach of the Competition Act

59. The *Competition Act* applies to business transacted in Canada, including sales made over the internet.
60. The Defendants have breached the *Competition Act*, s 45, as amended from time to time.
61. Audible and Amazon are and were “competitors” of Apple within the meaning of the *Competition Act*, s-ss 45(1) and (8).
62. Audiobooks are “products” within the meaning of the *Competition Act*, ss 2 and 45(1). The delivery of Audiobooks over the internet is a “service” within the meaning of the *Competition Act*, ss 2 and 45(1).
63. The iTunes store, www.amazon.ca, www.amazon.com and www.audible.com are “territories” or “markets” in the worldwide market for Audiobooks, within the meaning of the *Competition Act*, s 45(1)(b).
64. As set out above, by means of the Unlawful Agreement, Audible, Amazon and Apple have conspired, agreed and arranged to:
 - a. fix, maintain, increase or control the price for the supply of Audiobooks;
 - b. allocate sales, territories, customers or markets for the supply of Audiobooks; and
 - c. fix, maintain, control, prevent, lessen or eliminate the supply of Audiobooks.

65. As a result of the Defendants' breaches of the *Competition Act*, s 45, the Plaintiff and Class Members have suffered loss and damage in the form of the Overcharge.

66. In addition, or in the alternative, the Defendants Audible, Amazon.ca and Apple Canada implemented directives, instructions, intimations of policy or other communications from their American parents, which communication was for the purpose of giving effect to the Unlawful Agreement, in breach of the *Competition Act*, s 46.

67. The Plaintiff and Class Members are entitled to recover from Apple and Amazon.com an amount equal to the loss or damage suffered by them in the full amount of the Overcharge, under the *Competition Act*, s 36(1)(a), as well as the costs of investigation.

Unjust Enrichment

68. As set out above, Apple and Amazon.com have been enriched by the collection of the Overcharge from the Plaintiff and Class Members.

69. The Plaintiff and Class Members have been deprived through the payment of the Overcharge to the Defendants.

70. There is no juristic reason why Apple and Amazon.com should have received or should retain this benefit. The violations of the *Competition Act*, ss 45 and 46, the *Criminal Code*, s 463 (attempt) and s 380(2) (affecting the public market), and the doctrine of illegality, negate any juristic reason why the Apple and Amazon.com should have received or should retain this benefit, including any contract for the purchase of the Audiobooks. In particular, the contracts by which the Plaintiff and Class Members purchased Audiobooks are void and unenforceable.

71. As a result of its actions, Apple and Amazon.com have been unjustly enriched by the benefits they received from the Plaintiff and Class Members.

72. The Plaintiff and Class Members are entitled to restitution of the benefits received by Apple and Amazon.com from them in the form of the Overcharge.

73. In the alternative, justice and good conscience require that Apple and Amazon.com disgorge to the Plaintiff and Class Members an amount attributable to the benefits they received from the Unlawful Agreement.

Civil Conspiracy

74. As set out above, by means of the Unlawful Agreement, the Defendants have conspired to:

- a. fix, maintain, increase or control the price for the supply of Audiobooks;
- b. allocate sales, territories, customers or markets for the supply of Audiobooks; and
- c. fix, maintain, control, prevent, lessen or eliminate the supply of Audiobooks.

75. By their acts, the Defendants intended to cause damage to the Plaintiff and Class Members in order to benefit themselves.

76. In the alternative, the conduct of the Defendants was unlawful, in breach of the *Competition Act*, ss 45 and 46, and the *Criminal Code*, ss 463 and 380(2), and the Defendants knew or ought to have known that their actions would injure the Plaintiff and Class Members.

77. The Plaintiff and Class Members have suffered loss through the payment of the Overcharge to the Defendants.

78. The Plaintiff and Class Members should be compensated by Apple and Amazon.com for their losses.

Breach of the Business Practices and Consumer Protection Act

79. The Defendants have breached the *BPCPA*.

80. The Plaintiff and Class Members who purchased their Audiobooks for purposes that are primarily personal, family or household are “consumers” within the meaning of s. 1 of the *BPCPA*.

81. Audiobooks are “goods” within the meaning of s. 1 of the *BPCPA*. The delivery of Audiobooks over the internet is a “service” within the meaning of s. 1 of the *BPCPA*.

82. The Defendants are “suppliers”, within the meaning of s. 1 of the *BPCPA*. The *BPCPA* does not require privity of contract between suppliers and consumers.

83. The purchase and sale of Audiobooks is a “consumer transaction”, within the meaning of s. 1 of the *BPCPA*.

84. By their conduct set out above, the Defendants have breached ss. 8 and 9 of the *BPCPA*. The Defendants’ actions constitute unfair and unconscionable business practices. The Plaintiff and Class Members have an interest in the funds received from them by the Defendants as a result of the Overcharge and are entitled to the restoration of those amounts.

85. As a result of the Defendants’ breaches of the *BPCPA*, the Plaintiff and Class Members are entitled to a declaration and a restoration order against the Defendants, under the *BPCPA*, s 172.

Punitive Damages

86. The Defendants’ misconduct, as described above, was malicious, oppressive and high-handed, and departed to a marked degree from ordinary standards of decent behaviour. The Defendants’ actions are part of a pattern of willful disregard for customers’ rights by Amazon, Apple and other technology companies. The Defendants’ actions offend the moral standards of the community and warrant the condemnation of the Court such that an award of punitive damages should be made against Apple and Amazon.com.

Joint and Several Liability

87. Apple and Amazon.com are jointly and severally liable for the actions of and damages allocable to any of them.

Limitation Period

88. The unlawful conduct continued until at least January 2017. The misconduct was not discoverable until January 2017.

89. The Defendants willfully concealed the fact of the Overcharge from the Plaintiff and Class Members, and the fact that the Overcharge was caused or contributed to by the Defendants' acts or omissions.

90. The Plaintiff and Class Members rely on the doctrines of postponement and discoverability to postpone the running of the limitation period. The Plaintiff and Class Members plead and rely on and the *Limitation Act*, SBC 2012, c 13, s 21(3) and, in the alternative or in addition, the *Limitation Act*, RSBC 1996, c 266, s 6.

91. In the alternative, or in addition, the Plaintiff and Class Members rely on the *Limitation Act*, SBC 2012, c 13, s 30 and the *Limitation Act*, RSBC 1996, c 266.

Service

92. The Plaintiff and Class Members have the right to serve this Notice of Civil Claim on the Defendants pursuant to the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s 10 (*CJPTA*), because there is a real and substantial connection between British Columbia and the facts on which this proceeding is based.

93. The Plaintiff and Class Members rely on the following grounds, in that this action concerns:

- a. restitutionary obligations that, to a substantial extent, arose in British Columbia (*CJPTA*, s 10(f));
- b. a tort committed in British Columbia (*CJPTA*, s 10(g)); and
- c. a business carried on in British Columbia (*CJPTA*, s 10(h)).

Plaintiff's address for service:

Klein Lawyers LLP
1385 W 8th Ave #400
Vancouver, BC V6H 3V9

Place of trial: Vancouver, BC

The address of the registry is:

800 Smithe Street
Vancouver, BC
V6Z 2E1

Date: September 27, 2018

Signature of lawyer for plaintiff

Mathew P. Good

David A. Klein

Co-Counsel for the
Plaintiff

Co-Counsel for the
Plaintiff

Good Barrister

Klein Lawyers LLP

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

Appendix

[The following information is provided for data collection purposes only and is of no legal effect.]

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

This is a claim for damages and disgorgement arising out of the Defendants' unlawful agreements for the sale and delivery of audiobooks.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

Part 3: THIS CLAIM INVOLVES:

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

Part 4:

Business Practices and Consumer Protection Act, SBC 2004, c 2

Class Proceeding Act, RSBC 1996, c 50

Competition Act, RSC 1985, c C 34

Court Order Interest Act, RSBC 1996, c 79