

# Transportation Notes: Proposed Class Action Claims Refunds for COVID-19 Cancellations

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Air Canada, WestJet, Air Transat, Sunwing, and Swoop are facing a proposed class-action for offering vouchers and credits in lieu of refunds for flights that were cancelled due to the COVID-19 pandemic.

## The Basis of the Claim

On March 27, 2020, a proposed class action was filed in the Federal Court of Canada alleging that these airlines are required to provide cash refunds for itineraries that were cancelled due to COVID-19 pursuant to their contracts with passengers and pursuant to their international and domestic tariffs incorporated into those contracts.

The claim further alleges that it is a term of the airlines' contracts of carriage and/or tariffs that passengers have a right to a refund of the fare paid (if they do not wish to accept a voucher or credit) if the carrier is unable to transport a passenger for a reason outside the passenger's control.

The claim describes each of the policies put in place by the airlines in response to COVID-19 with respect to cancelled flights and the provision of vouchers or credits, subject to certain restrictions (for instance, that they must be redeemed within 24 months).

The claim further states that, because each of the named airlines announced layoffs, the airlines would not be incurring certain operating costs, including labour, fuel, and landing fees. Therefore, it would be unconscionable for the airlines to retain the funds paid by the class members while not incurring the operating costs those funds were meant to cover.

The claim further alleges that the airlines' conduct in implementing these new policies is unconscionable, as the class members run the risk of the airlines becoming insolvent and the credits provided becoming worthless.

Moreover, the claim states that the airlines' policies are forcing class members "to spend their monies with the same [air carrier] in the future to purchase travel that the Class Members may not wish to undertake any longer, and likely at a substantially different price."

## The Representative Plaintiff

The representative plaintiff, Janet Donaldson (a resident of British Columbia), is alleged to have purchased a return ticket from WestJet from Vancouver to New York with a stopover in Toronto.

## The Proposed Class

The proposed plaintiff class is described in the Statement of Claim as follows:

“All persons, residing anywhere in the world, who before March 11, 2020 entered into a Contract of Carriage (defined below) with any of the Defendants for travel on a flight operated by a Defendant on a trip that was scheduled to commence between March 13, 2020 until the date the Government of Canada withdraws travel advisories for COVID-19, and have not received a refund in the original form of payment:

A further subclass of Class Members whose flights from March 13, 2020 until the dates listed below were cancelled and/or suspended by the Defendant in response to the COVID-19 situation (hereafter the Cancellation Sub-Class).

- May 31, 2020 (for Westjet and Swoop);
- April 30, 2020 (for Sunwing, Air Transat, and Air Canada); or
- Any other date to be determined by the Court.”

The statement of claim notes that “it is estimated that the Class includes tens of thousands (if not hundreds of thousands) of affected passengers”.

Class counsel's website states that “if your flight tickets were... included as part of a vacation package, it may not be included as part of this proposed class action.” The website states that the law firm is reviewing and will provide further information on this aspect of the claim at a later date.

### **The Class Period**

The Statement of Claim states that the class period will be between March 13, 2020 and the date the Government of Canada withdraws travel advisories related to COVID-19.

The claim describes the reason for selecting March 11 and 13 respectively as key dates for defining the class period. On March 11, 2020 the World Health Organization declared COVID-19 a global pandemic and on March 13, the Government of Canada issued a blanket travel advisory against non-essential travel outside Canada and restricting entry of foreign nationals into Canada.

### **Relief Sought**

The proposed class action seeks, among other things, an order requiring the airlines to provide monetary refunds to class members and to pay damages (including punitive damages).

The statement of claim also seeks various declarations from the Court, including that:

- the contracts of carriage between each class member and the relevant airline was terminated based on the doctrine of “frustration” as of March 13, 2020;
- contracts of carriage between each of the class members and the airlines include an expressed or implied term that entitles the class members to a full refund if carriage is no longer possible for reasons outside the control of the class member, and that each of the airlines breached this term; and
- the airlines have breached the duty to perform the contracts of carriage in good faith.

The statement of claim also outlines a number of other orders sought, including an order that:

- funds that were received by the airlines from the class members be paid into court pending a final disposition (i.e. a settlement or judgment);
- the airlines’ communications with class members, including messages posted on websites, “prominently refer to the fact that

there is a pending class action seeking various relief”; and

- the airlines process refunds in the original form of payment made by the class members.

## Comment

Air carriers have spent the past few weeks reacting to an unprecedented situation, including attempting to respond to government directives from all over the world and to assist in re-patriating those stranded far from home.

It remains to be seen whether a class action in Canada's Federal Court with such a wide scope—as opposed to a government bailout or co-ordinated response from regulators—will be considered the most efficient way to deal with the claims of those whose flights have been cancelled due to COVID-19.

Notably, the Canadian Transportation Agency (the body responsible for regulating air carriers in Canada), released a statement on March 25, 2020 regarding the use of vouchers in light of COVID-19, which states in part:

“[A]n appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases)”.

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any circumstances. For application of the law to specific situations, the reader should seek professional advice.***

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