

# Transportation Notes: Pair of Passenger Class Actions Certified Against WestJet

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The British Columbia Supreme Court has certified two class actions against WestJet. In one, the central allegation is that WestJet charged baggage fees despite stating in its tariff (at least in part) that the first checked bag would be carried for free. In the other, the one-year expiry on travel credits issued by the airline is alleged to violate consumer protection legislation in a number of Canadian provinces.

## Baggage Fees – [Bergen v WestJet](#)

Over several years, the domestic and international tariffs that WestJet filed with the Canadian Transportation Agency and published on its website pursuant to the *Canada Transportation Act* contained a similar inconsistency: In one part, the tariffs stated that “for each fare paying passenger travelling, the carrier permits a free checked baggage allowance of one (1) item,” while in another they stated that each passenger would be charged a fee of \$25 (domestic) and between \$25-\$35.40 (international) for the first checked bag.

It appears that someone forgot to check the checked baggage provisions in the tariffs.

In Canadian common law provinces (i.e.. other than Quebec, which has a slightly different test), there are five criteria that must be met before a proceeding will be certified as a class action:

1. The pleadings disclose a cause of action;
2. There is an identifiable class of two or more persons;
3. The claim raises common issues among class members;
4. A class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and
5. There is an appropriate representative plaintiff who can adequately represent the interests of the class.

In this case, the representative plaintiff sought to bring a claim on behalf of a worldwide class of individuals who paid a fee for their first checked bag during a period in which WestJet’s tariff stated – at least in part – that their first checked bag would be carried for free. With respect to the first criterion, three causes of action were pleaded: (1) breach of contract; (2) unjust enrichment; and (3) “double ticketing” under s. 54 of Canada’s *Competition Act*.

Because WestJet’s tariffs contradicted themselves on the issue of baggage fees for the first checked bag, it conceded that it was not “plain and obvious” that the claim did not disclose a cause of action in breach of contract and unjust enrichment. It was at least arguable that a baggage fee should not have been collected where the applicable tariff appeared to state that no fee would be charged.

However, WestJet did argue that the claim did not disclose a cause of action under the *Competition Act*. “Double ticketing”, a practice prohibited by s. 54 of the *Competition Act*, is “the supply [of] a product at a price that exceeds the lowest of two or more prices clearly expressed...in respect of the product...at the time at which it is so supplied, (a) on the product, its wrapper or container; (b) on anything attached to, inserted in or accompanying the product, its wrapper or container or anything on which the product is mounted for display or sale; or (c) on an in-store or other point-of-purchase display or advertisement.”

The plaintiff pleaded that s. 54 was violated in that WestJet’s tariffs clearly expressed that the price for a first checked bag was zero dollars, while also clearly expressing (and charged) a price of between \$25 and \$35.40 at the time of check-in.

WestJet argued that publication of a price in a tariff, which many passengers will not review prior to or at the time of purchase, does not amount to “clear expression” sufficient to meet the criteria of s. 54. Justice Francis rejected this argument on the basis that determining whether it had merit would require an evaluation of evidence, something that cannot be done at the certification stage.

However, the court accepted that the claim, as originally drafted, did not sufficiently plead that the two alleged prices were expressed “at the time of supply,” or at the same time. Because the original claim pleaded that the zero price in the tariff was expressed at the time of booking and the second price was expressed at the time of travel, Justice Francis held that a necessary element of the claim under the *Competition Act* had not been adequately pleaded.

This was not the end of the matter. Justice Francis was of the view that the deficiency in pleading could be rectified and granted the plaintiff leave to amend the claim to do just that.

In March 2021, the court reviewed the amended pleading and the defendants’ arguments that it remained the case that a *Competition Act* claim was bound to fail. Justice Francis was satisfied that the deficiency she noted had been cured and certified the plaintiff’s s. 54 *Competition Act* claim to proceed with the breach of contract and unjust enrichment claims.

In her first decision, Justice Francis accepted that the plaintiff had established “some basis in fact” for the remaining four certification criteria.

**Identifiable Class:** The court rejected WestJet’s argument that a worldwide class would be unwieldy and difficult to manage. Similarly, the court held that there was no reason to exclude passengers who did not see the tariffs prior to booking their tickets on the basis that these contracts bind the parties even if they are not read.

**Common Issues:** Because the tariffs are “adhesion” or standard form contracts, Justice Francis rejected WestJet’s argument that the precise terms of the contract would depend on the reasonable expectations of each individual class member. While accepting that the tariffs are ambiguous, the court held that this was not a reason to deny certification. Rather, the interpretation of the tariffs would be among the issues to be determined at a common issues trial.

**Preferable Procedure:** WestJet argued that the proposed class proceeding was not the preferable procedure on the basis that the Canadian Transportation Agency provides a better means of resolving class members’ claims. The court rejected this argument both because it would not be cost effective to proceed before the Agency given the small dollar value of each individual claim combined with the potentially very large class; and because the Agency could not adjudicate the claims for unjust enrichment or punitive damages.

**Representative Plaintiff:** Finally, the court rejected the argument that it was necessary to have a representative plaintiff who could testify that they relied on the free baggage representation in one or both of the tariffs.

At the end of 2020, the BC court also certified a class action relating to WestJet's issuance of travel credits, which expire after one year. The claim alleges that the expiry of these credits violates the consumer protection legislation of several Canadian provinces, which prohibit the expiration of "pre-paid purchase" or gift cards.

WestJet issues two broad types of credits, which it calls "hard" and "soft". Hard travel credits are issued after a change or cancellation to a passenger's reservation as part of the carrier's refund policy. Soft credits are issued as part of WestJet's marketing or business strategy to maintain customer satisfaction in a number of circumstances, including where luggage is lost, a customer expresses dissatisfaction, or as a promotion.

While WestJet argued that neither hard nor soft credits met the consumer protection legislation definitions of pre-paid purchase or gift cards, the court held that all of these arguments depended heavily on an evaluation of evidence. As such, these arguments and determinations should be left to trial. All that the plaintiff must show at the certification stage is that it is not plain and obvious on the face of the pleading that the claim will fail.

With respect to the other criteria, the court emphasized the relatively straightforward nature of the plaintiff's claim and the fact that WestJet treated the various types of credits it issues in a very systematic way. These factors militated in favour of certification. While WestJet may well succeed in proving that either or both of the "hard" and "soft" credits are not captured by Canadian consumer protection legislation's prohibition on the expiry of pre-paid purchase or gift cards, that question will have to be answered at trial.

***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 particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

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