

# Transportation Notes: Québec Superior Court Allows Class Action Against Sunwing, But Not Other Airlines

July 27, 2021

By Carlos Martins and Agatha Wong

In a recent decision, the Superior Court of Québec allowed a class action to proceed against Sunwing Airlines and its tour operator, Sunwing Vacations. The central allegation is that Sunwing offered passengers travel credits rather than refunds for flights cancelled due to the COVID-19 pandemic.

In the same decision, the court did not allow the claim to proceed as against Air Canada, Air Canada Vacations, Air Transat, Transat Tours, WestJet, and WestJet Vacations. Like Sunwing, these air carriers had initially offered some passengers travel credits instead of refunds. However, after legal proceedings were commenced, all but Sunwing implemented refund programs for passengers.

## The Proposed Classes

The representative plaintiffs, Alain Lachaine and Grégory Bonnier, sought to bring a class action on behalf of passengers who had received no refund for their cancelled tickets or packages or had only been reimbursed by a third party (rather than the airline) after some delay. The proposed classes were defined as follows:

- Individuals who had purchased, in Canada, an air ticket or travel package issued directly or indirectly by Air Transat or Air Canada;
- Individuals who had purchased online, outside of Canada, an air ticket or travel package issued directly or indirectly by Air Transat or Air Canada; and
- Individuals who had purchased, in Québec, an air ticket or travel package issued directly or indirectly by Sunwing or WestJet.<sup>[1]</sup>

## Class Actions Regime in Québec

In Québec, the certification process for class actions is known as the “authorization” stage. Under [article 575](#) of the Code of Civil Procedure of Québec, a class action will be authorized if four criteria are met:

1. the claims of the class members raise identical, similar or related issues of law or fact (i.e. common issues);
2. the facts alleged appear to justify the conclusions sought (i.e. existence of an arguable case);
3. the composition of the class makes it difficult or impracticable to apply the rules for joinder or representative proceedings; and
4. the representative plaintiffs are in a position to properly represent the class members.

## Common Issues

Each of the four airlines had its own set of tariffs with different provisions. The terms and conditions applicable to a given air ticket or

travel package also varied according to diverse factors, such as the booking method used by the class member, the class of service purchased and the price of that service. Faced with numerous contractual documents that differed from one another in content, scope, and effect, Justice Tremblay concluded that there were no common issues of law or fact among the claims of the class members.

Justice Tremblay noted that he might have come to a different conclusion if the representative plaintiffs had brought separate proceedings against each of the airlines.

### **Arguable Case**

Although Air Canada, Air Transat, and WestJet had already implemented reimbursement programs for their passengers, the representative plaintiffs argued that they nonetheless had a viable claim against those airlines for interest, additional indemnity under the Civil Code of Québec<sup>[2]</sup> as well as moral and punitive damages.

Justice Tremblay rejected this argument. In the absence of a judgment against the airlines, class members did not have a standalone claim for interest and additional indemnity. Although the representative plaintiffs claimed punitive damages under the Québec *Consumer Protection Act* (the CPA), they failed to point to a breach of any provision of the CPA that would justify punitive damages in these circumstances. Similarly, moral damages were not warranted to compensate the plaintiffs for the time and stress associated with bringing a lawsuit against the airlines. The airlines could not be faulted for opposing the application for authorization as they had always maintained that they had no legal obligation to issue refunds to class members.

Justice Tremblay therefore concluded that there was no arguable case against Air Canada, Air Transat, or WestJet.

He did, however, find that there was an arguable case against Sunwing. Unlike the other airlines, it had not established a reimbursement program for passengers.

Sunwing's tariffs consistently characterized an epidemic as a *force majeure* event and excluded refunds if flights were cancelled due to a *force majeure* event. The representative plaintiffs argued that the court should treat Sunwing's *force majeure* provisions as null and void. Those provisions, class counsel asserted, were "abusive" clauses in a consumer contract or contract of adhesion as defined in article 1437 of the Civil Code. The representative plaintiffs also argued that even if *force majeure* relieved Sunwing of its contractual obligation to provide flights to class members, the airline still had a duty to refund passengers by virtue of article 1694 of the Civil Code. That article requires debtors to make restitution even where performance of a contract is impossible.

Justice Tremblay preferred to leave the interpretation of articles 1437 and 1694 to a hearing on the merits, when the court would have a full evidentiary record. For the purposes of the authorization hearing, he was satisfied that Sunwing's tariffs and *force majeure* clauses gave rise to common issues of fact and law among class members.

### **Class Composition**

The airlines did not argue that the composition of the class made it difficult or impractical to deal with the claims of the class members using the procedure for joinder or representative proceedings.

### **Adequate Representation by Representative Plaintiffs**

The representative plaintiffs had purchased air tickets issued by Air Transat and Air Canada. However, Justice Tremblay ultimately declined to authorize class actions against Air Transat or Air Canada because there was no arguable case against these airlines. There was only an arguable case against Sunwing.

Since Lachaine and Bonnier had no dealings with Sunwing, they could not adequately represent class members in an action against that airline. However, Justice Tremblay ruled that it would be contrary to the interests of justice to deny authorization on this sole basis. He therefore authorized the class action against Sunwing and ordered that Lachaine and Bonnier be replaced as representative plaintiffs by individuals who had claims against Sunwing.

### Limits to the Class Action against Sunwing

The class action against Sunwing is limited to individuals who purchased their now-cancelled air tickets or travel packages in Québec. Although class counsel sought to include all individuals who had purchased flights or packages issued “directly or indirectly” by Sunwing, Justice Tremblay chose to limit the class to individuals who had purchased tickets or packages directly from Sunwing.

Justice Tremblay also refused to authorize the claim for punitive damages against Sunwing, finding no legal basis for this claim.

*Lachaine c. Air Transat AT inc.*, [2021 QCCS 2305](#)

[1] The Sunwing and WestJet class was limited to individuals in Québec because these airlines do not have registered offices in the province. Class counsel likely wanted to avoid a jurisdictional challenge. Had class counsel proposed a worldwide class, the airlines might have argued that a Québec court had no jurisdiction to hear disputes between parties that did not contract or reside in Québec.

[2] Article 1619 of the Civil Code of Québec allows a plaintiff to seek indemnity on top of its award of damages: “An indemnity may be added to the amount of damages awarded for any reason, which is fixed by applying to the amount of the damages, from either of the dates used in computing the interest on them, a percentage equal to the excess of the rate of interest fixed for claims of the State under section 28 of the Tax Administration Act (chapter A-6.002) over the rate of interest agreed by the parties or, in the absence of agreement, over the legal rate.”

***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.***

For more information or inquiries:



### Carlos Martins

Toronto  
416.619.6284

Email:  
cmartins@weirfoulds.com

Carlos Martins is a skilled litigator with 30 years' experience providing legal advice in diverse sectors. He is a member of the firm's Commercial Litigation Practice Group and specializes in aviation and defamation law.

# WeirFoulds<sup>LLP</sup>

[www.weirfoulds.com](http://www.weirfoulds.com)

## Toronto Office

4100 – 66 Wellington Street West  
PO Box 35, TD Bank Tower  
Toronto, ON M5K 1B7

Tel: 416.365.1110

Fax: 416.365.1876

## Oakville Office

1320 Cornwall Rd., Suite 201  
Oakville, ON L6J 7W5

Tel: 416.365.1110

Fax: 905.829.2035