

# EXCESS BAGGAGE: ROUND TWO OF THE WESTJET BAGGAGE FEE CLASS ACTION

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Westjet's baggage fee woes are not over. We have [previously reported](#) on a decision of the B.C. Supreme Court to certify a class proceeding against the defendants WestJet Airlines Ltd. and WestJet Encore Ltd. (together, "**WestJet**") relating to the charging of baggage fees ("**Bergen #1**").<sup>[1]</sup> The Court had found common issues in the plaintiff's breach of contract and unjust enrichment claims and granted leave to amend deficiencies in the notice of civil claim in respect of the *Competition Act* claims.

In a subsequent decision, the Court accepted the plaintiff's amendments and certified additional common issues under section 54 of the *Competition Act*, which relates to the offence of double-ticketing ("**Bergen #2**").<sup>[2]</sup> Westjet then appealed this decision.<sup>[3]</sup>

The two issues on appeal were:

1. Did the certification judge err in concluding that the facts as pleaded can support a cause of action under section 54 of the *Competition Act*? Alternatively, do they fail to support a cause of action for class members commencing travel outside Canada and not paying through WestJet's website?
2. Did the certification judge err in certifying the common issues with respect to the *Competition Act* claims and determining that a class proceeding was the preferable procedure for resolving those claims?

## **Facts**

The plaintiff alleged that WestJet's tariffs in relation to domestic and international flights at specified periods of time (the "**Tariffs**") contained conflicting provisions as to whether a fee would be charged for a passenger's first checked bag or if the bag would be accepted free of charge.

Section 54 of the *Competition Act* prohibits double ticketing. The requisite elements are: (a) the supply of a product; (b) at a price that exceeds the lowest of two or more prices; (c) the two prices must be clearly expressed on the product, on something attached to or accompanying the product, or on a point of purchase display; and (d) the two prices must be expressed at the time the product is supplied.

In *Bergen #1*, the Court found that the pleadings did not assert that the two prices were expressed at the time

the product was supplied and were therefore deficient. In *Bergen #2*, the Court was satisfied that the plaintiff's proposed amendments addressed this deficiency and certified additional common issues in relation to the section 54 claim.

**Issue 1 - Do the facts as pleaded support a cause of action under section 54 of the Competition Act? Alternatively, is the claim bound to fail outside of Canada?**

On appeal, WestJet argued that the plaintiff's pleadings were still deficient and could not support a finding that the first price was expressed at the time of supply; any finding about the manner in which the second price was expressed; or that both prices were expressed in a manner enumerated in section 54(1).<sup>[4]</sup>

A. Expression of the first price

WestJet asserted that the "availability of the Tariffs...and signage referring to them" could not constitute a "clear expression" of the first price.

The plaintiff pointed to certain allegations in its claim that could satisfy this requirement, including that "[a]t the time of, or immediately prior to checking for checked baggage, the Tariffs or the prominent notices or signs referring to the Tariffs, were displayed to the passengers...".

B. Manner of expression of the second price

WestJet argued that the pleadings failed to disclose how the second price was expressed, only that it was "expressed by WestJet or its agents at the time of or immediately prior to a payment for a first checked bag".

At the hearing, the plaintiff clarified that the second price was expressed in the Tariffs just prior to the charging of the baggage fee. The plaintiff agreed to further amend its pleadings to improve clarity if necessary.

C. Expression of prices in a manner listed in section 54(1)

WestJet argued that the plaintiff did not plead facts that could establish clear expression of prices in any of the modes listed in section 54. WestJet argued that section 54 should be interpreted narrowly to exclude oral expressions.

The plaintiff stated that they were not relying on oral expressions of price and the law was unsettled as to how the listed modes applied in the modern sales context. Accordingly, the pleadings could not be said to be bound to fail.

**Alternative claim – the section 54 claim is bound to fail outside of Canada**

WestJet asserted that the section 54 claim was bound to fail outside of Canada, because the plaintiffs relied on

regulatory requirements that WestJet have Tariffs available at its business offices and on signs indicating such. However, WestJet was not required to have these Tariffs available for inspection outside of Canada.

The plaintiff argued that WestJet's position incorrectly assumed that "business office" could only apply to locations in Canada. Further, the pleadings do not restrict how the first price is expressed within Canada alone.

### **Analysis**

The Court observed that WestJet based its arguments on what it interpreted section 54 to require, rather than on established, but limited, caselaw. The Court also considered the Federal Court decision of *Lin v Airbnb, Inc.*,<sup>[5]</sup> in which Justice Gascon cautioned that "novel or difficult questions of statutory interpretation" should not be determined at the certification stage.

At the same time, the Court acknowledged the gate-keeping role of a certification judge, and if complex questions of statutory interpretation could be resolved such that a claim is struck, that would save the expense of judicial resources, citing *Wakelam v Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*<sup>[6]</sup>

The Court ultimately concluded that where statutory interpretation is required, "if it is arguable", the certification judge should not engage in a merits-based analysis. However, where there is binding precedent or the interpretive exercise is so straightforward that it is plain and obvious that the claim would fail, then the judge should exercise their gate-keeping role.

### **Issue 1 - Do the facts as pleaded support a cause of action under section 54 of the Competition Act?**

#### A. Expression of the first price

The Court concluded that the interpretation of the manner of expression required by section 54 was not settled. Accordingly, it was not plain and obvious that the reference to Tariffs or signs referring to them could not constitute the expression that is required by section 54.

#### B. Manner of expression of the second price

The Court concluded that the pleadings could be read to include an assertion that the second price is expressed in the Tariffs, and if necessary, the pleadings were reasonably capable of amendment to clarify the manner in which the second price was expressed.

#### C. Expression of prices in a manner listed in section 54(1)

The caselaw regarding manner of expression required by section 54 was not settled. WestJet's argument relied on a specific interpretation of this section that went to the merits of the claim.

## **Alternative claim – the section 54 claim is bound to fail outside of Canada**

The pleadings were not bound to fail as they were not based on mere assertions that WestJet is not required to post signs outside of Canada. Rather, the pleadings actually alleged that notices or signs were posted at every airport terminal where Westjet operates (and not just within Canada).

## **Issue 2 – Does the Competition Claim produce common issues? Is a class proceeding preferable?**

WestJet argued that even if the pleadings were adequate, there were no common issues. This was because the manner of expression of the first price and the clarity of that expression would need to be determined on a site-by-site basis and might change over time. As different determinations would need to be made, a class proceeding would not be preferable.

The plaintiff responded that notice and expression of the Tariffs when class members paid for their baggage fee online or at a self-serve kiosk had been pled. Although WestJet could prove that these expressions did not occur or that they did not constitute “clear expression” at trial, this should not bar certification.

## **Decision**

The Court of Appeal unanimously dismissed Westjet’s appeal.

The Court found that the pleadings were sufficient, or could be reasonably amended, to support a section 54 claim. It was not plain and obvious that the claim was bound to fail.

Further, there was a real possibility that the issues in relation to the *Competition Act* claim would be resolved in common for the entire class. At the certification stage, it is unnecessary to believe that the common issues will be answered identically for every class member. Although some individual-issues trials may become necessary, this does not preclude certification of issues in common.

Although not necessary to decide the appeal, the Court commented that a class proceeding had already been certified that had not been appealed (in relation to breach of contract and unjust enrichment).<sup>[7]</sup> Because there would be some overlap between those claims and the section 54 claim, one could not ignore the fact that a class proceeding would be moving forward in any event when assessing the judicial economy in having the section 54 claim heard in a class proceeding.

## **Takeaways**

This decision confirms that, at the certification stage, the court is not to engage in a merits based analysis, particularly where complex questions of statutory interpretation must be resolved. At the same time, the Court recognized that in certain instances, it would be appropriate for the certification judge to exercise its gate-

keeping role, where it is obvious that a claim will fail.

Even if it is possible that some individual-issues trials may become necessary in the future, this does not preclude certification if there is a real possibility that issues would be resolved in common for the entire class once again making it challenging for defendants to stop class actions at an early juncture.

[1][ps2id id='1' target=''] *Bergen v WestJet Airlines Ltd*, 2021 BCSC 12.

[2][ps2id id='2' target=''] *Bergen v WestJet Airlines Ltd*, 2021 BCSC 351.

[3][ps2id id='3' target=''] *Trotman v WestJet Airlines Ltd*, 2022 BCCA 22.

[4][ps2id id='4' target=''] Section 54(1) requires expression of both prices (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.

[5][ps2id id='5' target=''] 2019 FC 1563.

[6][ps2id id='6' target=''] 2014 BCCA 36, leave to appeal refused.

[7][ps2id id='7' target=''] *Bergen #1*.

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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