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F I L E D	FEDERAL COURT COUR FÉDÉRALE	
	Mar 27, 2020	
Kimberly Lalonde		
Ottawa, ONT		

**PROPOSED CLASS PROCEEDING**

Action No: T-\_\_\_\_-20

**FEDERAL COURT**

BETWEEN:

**Janet Donaldson**

Plaintiff

AND:

**Swoop Inc.**

**Westjet Airlines Ltd.**

**Air Canada**

**Air Transat A.T. Inc.**

**Sunwing Airlines Inc.**

Defendant

**STATEMENT OF CLAIM TO THE DEFENDANTS**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served

within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

March 27, 2020

Issued by: \_\_\_\_\_  
(Registry Officer)

Address of local office: Thomas D'Arcy McGee Building  
90 Sparks Street, 5th floor  
Ottawa, Ontario  
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TO: **Swoop Inc.**  
c/o AHBL Corporate Services Ltd.  
2700 - 700 West Georgia Street  
Vancouver, BC, V7Y 1B8

**Westjet Airlines Ltd.**  
c/o AHBL Corporate Services Ltd.  
2700 - 700 West Georgia Street  
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**Air Canada**  
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Vancouver, BC, V7Y 1B8

**Air Transat A.T. Inc.**  
c/o David Edinger  
1200 - 925 West Georgia Street  
Vancouver, BC V6C 3L2

**Sunwing Airlines Inc.**  
c/o MacKenzie Fujisawa LLP  
1600-1095 West Pender Street  
Vancouver, BC V6E 2M6

## **OVERVIEW**

1. This is a consumer protection class action seeking to enforce each passengers' rights to a refund for monies paid for their air tickets, when they are not able to travel for reasons outside of the control of the passengers. The Defendants should not be permitted to hold the Class Members' monies indefinitely for a purchase that the Class Members may or may not wish to make in the future.

## **CLAIM**

2. The Plaintiff claims, on her own behalf and on behalf of the Class Members (as defined below):
  - a. an Order pursuant to Rules 334.16(1) and 334.17 of the *Federal Courts Rules* (the "**Rules**") certifying this action as a class proceeding and providing any ancillary directions;
  - b. an Order pursuant to Rules 334.12(3), 334.16(1)(e) and 334.17(b) appointing the Plaintiff as the representative plaintiff for the Class;
  - c. an interim Order that any of the Defendants' communications with the Class Members, including messages posted publicly on their own websites must prominently refer to the fact that there is a pending class action seeking various relief including: refund for the monies paid and punitive damages;
  - d. an Order under Rule 377 (or alternatively Rules 373 and/or 374) that the monies received by the Defendants in relation to the Class Members' Contracts of Carriage (defined further below) be paid into Court pending final disposition;
  - e. a declaration that the Contracts of Carriage between each of the Class Members and a Defendant have been terminated pursuant to the doctrine of frustration on March 13, 2020;
  - f. further, or in the alternative, a declaration that the Contracts of Carriage between each of the Class Members and a Defendant include an expressed or implied term that Class Members are entitled to a full refund if carriage is no longer possible for reasons outside the control of the Class Member, and that each of the Defendants have breached this term;

- g. further, or in the alternative, a declaration that the Defendants have breached the duty to perform the Contracts of Carriage in good faith;
- h. an Order that the Defendants refund to the original form of payment the monies received in relation to the Class Members' Contracts of Carriage;
- i. further, or in the alternative, an Order that the Defendants pay damages to each Class Member including: special damages, general damages, nominal damages, and/or punitive damages;
- j. an Order pursuant to Rule 334.28(1) and (2) for the aggregate assessment of the refund of monies to the Class Members;
- k. an Order pursuant to Rule 334.26-334.27 and 334.28(3) for individual assessment of compensatory damages to members of the Class and the appointment of a special referee for assessing each individual case using special modes of proof as directed by the Court;
- l. pre-judgment and post-judgment interest pursuant to sections 36 and 37 of the *Federal Courts Act*, RSC 1985, c. F-7; and
- m. such further and other relief as this Honourable Court deems just.

## **THE PARTIES**

- 3. The representative plaintiff, Janet Donaldson, is a resident of the province of British Columbia.
- 4. The Defendant, Swoop Inc., is a body corporate incorporated in Alberta and extra-provincially registered in British Columbia with an attorney in British Columbia at: AHBL Corporate Services Ltd., 2700 - 700 West Georgia Street, Vancouver, BC, V7Y 1B8 (hereafter "**Swoop**").
- 5. The Defendant, Westjet Airlines Ltd., is a body corporate incorporated in Alberta and extra-provincially registered in British Columbia with an attorney in British Columbia at: AHBL Corporate Services Ltd., 2700 - 700 West Georgia Street, Vancouver, BC, V7Y 1B8 (hereafter "**WestJet**").
- 6. The Defendant, Air Canada, is a body corporate incorporated under the laws of Canada and extra-provincially registered in British Columbia with an attorney in British Columbia at: AHBL Corporate Services Ltd., 2700 - 700 West Georgia Street, Vancouver, BC, V7Y 1B8 (hereafter "**Air Canada**").

7. The Defendant, Air Transat A.T. Inc., is a body corporate incorporated under the laws of Canada and extra-provincially registered in British Columbia with an attorney in British Columbia at: David Edinger, 1200-925 West Georgia Street, Vancouver, BC V6C 3L2 (hereafter "**Air Transat**").
8. The Defendant, Sunwing Airlines Inc., is a body corporate incorporated in Ontario and extra-provincially registered in British Columbia with an attorney in British Columbia at: MacKenzie Fujisawa LLP, 1600-1095 West Pender Street, Vancouver, BC, V6E 2M6 (hereafter "**Sunwing**").
9. Each of the Defendants are commercial airlines based in Canada licensed under the *Canada Transportation Act*, S.C. 1996, c. 10 and the accompanying regulations, operating domestic flights, international flights, and transborder (USA) flights.

## **THE CLASS**

10. The representative plaintiff brings this action on her own behalf and on behalf of all persons as follows (hereafter the "**Class**" or "**Class Member(s)**"):

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.

11. The representative Plaintiff is a member of the Class (including the Cancellation Sub-Class).

12. It is estimated that the Class includes tens of thousands (if not hundreds of thousands) of affected passengers.

### **THE DEFENDANT'S FLIGHT OFFERINGS**

13. Each of the Defendants offers the following categories of flights:
  - a. Domestic;
  - b. Transborder (USA); and
  - c. International.
14. Under section 67 of the *Canada Transportation Act*, each of the Defendants are required to publish a tariff providing for the terms and conditions applicable to domestic carriage (hereafter the "**Domestic Tariffs**").
15. Section 67(3) mandates that each of the Defendants must comply with the terms of its own Domestic Tariffs.
16. Under sections 110-112 of the *Air Transportation Regulations*, SOR/88-58, each of the Defendants are required to publish and file a tariff providing for the terms and conditions applicable to international, including transborder, carriage (hereafter the "**International Tariffs**").
17. Sections 110-112 also mandates that each of the Defendants must comply with the terms of its own International Tariffs.
18. When a person purchases an air ticket for travel on a flight with any of the Defendants, the terms of the applicable Domestic Tariff or International Tariff, as the case may be, are incorporated into the terms of the transaction between that person and the Defendant (hereafter the "**Contract of Carriage**").
19. It is an express and/or implied term of each of the Defendants' Domestic Tariffs, International Tariffs, and/or Contract of Carriage that passengers have a fundamental right to a refund of the monies paid if the air carrier is unable to transport them for any reason that is outside the passengers' control and that the carrier cannot keep the fare paid by the passengers and refuse to provide a refund on the basis that its inability to provide transportation was due to certain events.

## **THE PLAINTIFF'S AND THE CLASS MEMBERS' CIRCUMSTANCES**

20. On or about January 14, 2020, the Plaintiff booked a flight with another friend for travel with WestJet via an online travel agent (Expedia for TD) to travel to New York as follows:

- a. WestJet Flight 710 on April 17, 2020 from Vancouver to Toronto, with a connecting flight WestJet 1216 the same day from Toronto to New York.
- b. WestJet Flight 1211 on April 23, 2020 from New York to Toronto, with a connecting flight WestJet 719 the same day from Toronto to Vancouver.

(the "**Booking**")

21. The total cost of the Booking was \$361.39 CAD, which was paid to WestJet on or about January 14, 2020 using her credit card.

22. At the time of making the Booking, a Contract of Carriage was entered into between the Plaintiff and the Defendant Westjet.

23. Each of the Class Members before March 11, 2020 (a key date described below), entered into a Contract of Carriage with a Defendant for travel that is set to begin on or after March 13, 2020 (another key date described further below).

24. Individuals who commenced travel before March 13, 2020 or entered into their Contract of Carriage after March 11, 2020 are not included in this action.

25. The coronavirus (hereinafter "**COVID-19**") is a highly contagious virus that originated from the province of Hubei of the Peoples Republic of China, and began spreading outside of the Peoples Republic of China on or around February 2020.

26. On or about March 11, 2020, the World Health Organization declared COVID-19 as a global pandemic. Individuals that entered into the Contract of Carriage prior to March 11, 2020 would not be aware that a global pandemic would be declared by the World Health Organization.

27. On or about March 13, 2020, the Government of Canada issued a blanket travel advisory advising against non-essential travel outside of Canada until further notice and restricting entry of foreign nationals into Canada, akin to a "declaration of war" against COVID-19, and that those in Canada should stay home except if

absolutely necessary (hereafter the "**Declaration**").

28. Prior to March 13, 2020, there was no indication from the Government of Canada that there would be any forthcoming restriction on international travel or that the Declaration would be issued.
29. The provisions of the *Canada Transportation Act* (and accompanying regulations such as the *Air Passenger Protection Regulations*) and the written terms of the Domestic Tariffs and the International Tariffs only contemplated situations involving relatively localized and short-term delays, cancellations, and/or disruptions to flights. They never contemplated situations where the Declaration would be issued against a global pandemic of the scale of COVID-19.
30. The COVID-19 situation is outside of the Class Members' control.
31. Upon issuance of the Declaration, the Class Members complied with the guidance of the Government of Canada and did not commence the itineraries that they had booked prior to March 11, 2020.
32. Shortly after the issuance of the Declaration, the Defendants on their own initiative cancelled and/or suspended numerous flights up to and including May 31, 2020 (for Westjet and Swoop) and April 30, 2020 (for Sunwing, Air Transat, and Air Canada), with further cancellations and suspensions expected to be announced in the near future.
33. Regardless whether the flights were cancelled/suspended by the Defendants, or the Class Members adhering to the Declaration to not commence their itineraries, all of the Defendants failed to provide the Class Members with refunds of the monies they paid to a Defendant under their respective Contracts of Carriage.
34. Instead, all of the Defendants implemented new policies (that were never part of the International Tariffs, Domestic Tariffs, or Contracts of Carriage) seeking to keep all of the Class Members monies, and in exchange issue (or offer to issue) "travel credits" that are subject to various restrictions (detailed below).
35. In effect, each of the Defendants are forcing the Class Members to forego their fundamental right to a refund and to spend their monies with the same Defendant in the future to purchase travel that the Class Members may not wish to undertake any longer, and likely at a substantially different price.
36. In the case of Swoop, all international and transborder flights have been

suspended as of March 23, 2020, with substantial reductions to domestic flights, and Swoop would issue to the Class Members a non-transferable credit that is valid for 24 months from the cancellation date. In the case of itineraries containing more than one traveller, the non-transferable credit will be issued in the name of one of the travellers only and must be used in the future by that traveller only.

37. In the case of WestJet, all international and transborder flights have been suspended as of March 22, 2020, with substantial reductions to domestic flights, and WestJet would issue to the Class Members a transferable credit that is valid for 24 months from the cancellation date.
38. In the case of Air Canada, substantial reductions were implemented for domestic, international and transborder flights. Air Canada would issue to the Class Members a non-transferable credit that is valid for 24 months from the cancellation date. If the new booking is cheaper than the non-transferable credit, the monetary difference will be completely forfeited to Air Canada.
39. In the case of Air Transat, substantial reductions were implemented for domestic, international and transborder flights. Air Transat would issue to the Class Members a non-transferable credit that is valid for 24 months from the cancellation date. If the new booking is cheaper than the non-transferable credit, the remaining amount will be completely forfeited to Air Transat.
40. In the case of Sunwing, all international and transborder flights have been suspended as of March 17, 2020, with substantial reductions to domestic flights, and Sunwing would issue to the Class Members a non-transferable, non-refundable credit with no cash value that is valid for 24 months from the original departure date. It is not clear if the remaining amount will be forfeited to Sunwing if the new booking is cheaper than the non-transferable credit.
41. On or about March 24, 2020, WestJet (which includes its wholly owned subsidiary Swoop) officially announced that it will layoff 50% of its staff members amounting to 6,900 employees.
42. On or about March 20, 2020, Air Canada officially announced that it will layoff 5,000 of its staff members, mostly flight attendants and pilots.
43. On or about March 20, 2020, Air Transat officially announced that it will layoff 2,000 of its staff members, mostly flight attendants and pilots.
44. On or about March 17, 2020, Sunwing officially announced that it will layoff all of its flight attendants and pilots and suspend operations in the near term.

45. As a result of the layoffs above, the Defendants would not incur various operating costs associated with operating their flights, for example, labour, fuel, and landing fees.
46. It would be unconscionable and unreasonable for the Defendants to not provide the services, and also not having to incur the key operational costs for procuring the services, on the one hand, while seeking on the other hand that 100% of the monies paid by the Class Members to the Defendants be forfeited for the promise of a "credit" to be redeemed within two years.
47. It would also be unconscionable and unreasonable because the Class Members would bear the risk of any of the Defendants becoming insolvent, and as a result the "credits" becoming worthless.
48. The Defendants' conduct is high handed, lax and completely disregards the fundamental right of (and legitimate expectations of) the Class Members to a monetary refund when services could not (or will not) be rendered for reasons completely outside the control of the Class Members.
49. Each of the Defendants are experienced commercial airlines that have, or ought to have, proper contingency or financial planning to account for situations like COVID-19. In the alternative, each of the Defendants ought to have acquired proper business interruption insurance policies to limit their exposure to situations like COVID-19.

### **THE CLASS MEMBERS' BASIS FOR CLAIM**

50. The Class Members are in the same or similar situation as the Plaintiff in that all of the Class Members:
  - a. entered into a Contract of Carriage containing the same or similar terms, including an express and/or implied term providing for the absolute right to a refund in circumstances outside of the Class Members' control; and
  - b. their travel plans were all disrupted from the COVID-19 situation.

### **Frustration of the Contracts of Carriage**

51. The doctrine of frustration rests upon a term or a condition implied into the contract *ab initio*.

*Cheong Yue Steamship Company v. Hirji Mulji*, 1926 CanLII 523 (UK JCPC) at p. 922

52. By applying the doctrine the law is only doing what the parties really meant to do themselves and would have inserted into the contract had the situation occurred to them, on the basis of what is fair and reasonable and the main object of the contract.

*Cheong Yue Steamship Company v. Hirji Mulji*, 1926 CanLII 523 (UK JCPC) at pp. 922 and 927

53. The changed circumstances brought about by COVID-19 and the Declaration altered the fundamental nature of the Contracts of Carriage between each of the Class Members and the Defendants, frustrating the object of same and making performance as intended, impossible or radically different.

54. The main object of the Contracts of Carriage was:

- a. to carry the Class Member to their destination on the dates and times stipulated in their Contract of Carriage, with the allowance for short and reasonable delays; and
- b. that the carriage was to occur during “peace times” and not during global “war times” like the COVID-19 situation.

55. Irrespective of whether the Class Members would want to travel or not, the COVID-19 situation is clearly a prolonged situation that is not expected to subside in a reasonable time, and therefore the Contracts of Carriage could not be performed (as previously contemplated) within a reasonable time.

56. Upon the Government of Canada’s Declaration on or about March 13, 2020, the Contracts of Carriage have been frustrated since that moment, as a matter of law.

*Cheong Yue Steamship Company v. Hirji Mulji*, 1926 CanLII 523 (UK JCPC) at p. 923

57. The parties never meant to allow the Defendants to keep the monies received under the Contracts of Carriage when a situation like COVID-19 occurs. Furthermore, it is not just and reasonable to permit the Defendants to keep those monies, as the fundamental nature of the contract is altered in light of the changed circumstances.

58. The Class Members are entitled to a refund of the monies paid to the Defendants under the Contracts of Carriage.

*Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*, [1942] UKHL 4; cited with approval in *Cahan v. Fraser*, 1951 CanLII 253 (BC CA)

The Defendants' Breach of Contract

59. Each of the Domestic Tariffs and/or International Tariffs includes an express and/or implied term that each Class Member has a right to a refund of the monies paid if a Defendant is unable to transport them for any reason that is outside the Class Member's control and that the Defendant cannot keep the monies paid by the Class Member and refuse to provide a refund on the basis that its inability to provide transportation was due to certain events.
60. The Defendants' have breached the terms of the Contracts of Carriage by refusing to provide the refunds in accordance with the express and/or implied terms for a refund.
61. The Defendants have further breached the terms of the Contracts of Carriage by the imposition of a "new policy" that deprives the Class Members of their right to a refund and in exchange issues to the Class Members a future credit.
62. The Defendants' conduct is also a breach of the duty to perform contractual obligations in good faith, including the duty to properly inform the Class Members.
63. The Defendants are entitled to damages in an amount equivalent to the monies previously paid, plus special, general, nominal, and punitive damages for the Defendants' breach of the Contract of Carriage.

**JURISDICTION**

64. This Action concerns aeronautics and/or works and undertakings extending beyond the limits of province, and is governed by a comprehensive federal statutory framework including:
  - o. *Canada Transportation Act*, S.C. 1996, c. 10
  - b. *Air Transportation Regulations*, SOR/88-58
  - c. *Aeronautics Act*, R.S.C. 1985, c. A-2
65. Subsections 23(b) and 23(c) of the *Federal Courts Act* provide that the Federal Court has jurisdiction over the subject-matter.
66. Furthermore, and in particular, this Court has jurisdiction over contracts of carriage by air, which includes the Domestic Tariffs, International Tariffs, and the Contracts of Carriage.

*Warner-Lambert Canada Ltd. v. Canadian Pacific Airlines Ltd.*, 1981 CanLII 2627 (FC)

67. The Contracts of Carriage are governed by federal common law, including the law relating to breach of contracts, restitution, tort, unjust enrichment, and/or waiver of tort.

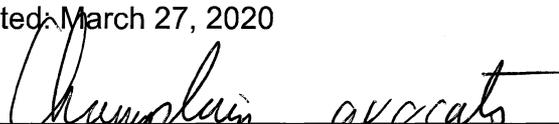
68. The members of the Class are within the territorial jurisdiction of this Court as the respective flights originate from Canada or have Canada as its destination and there is a "real and substantial connection" with Canada.

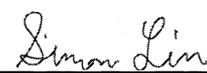
69. Regardless of the residency of the Class Member, their Contract of Carriage would be subject to and governed by the *Canada Transportation Act* and/or *Air Transport Regulations*, as the case may be.

### **Location of Trial**

70. The Plaintiff proposes that this action be tried at Vancouver, BC.

Dated: March 27, 2020

  
\_\_\_\_\_  
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