

## Double Ticketing Class Actions Take Off

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Class actions based on an obscure *Competition Act* provision known as double ticketing have taken off recently, with the certification of claims alleging that WestJet's baggage fees, and Airbnb's service fees, breach the provision. Now, businesses that add mandatory fees to their advertised prices (a practice known as drip pricing), or that make pricing errors, may face consumer class actions.

### Two Prices on One Product

Double ticketing occurs when a business puts two prices on a product, and charges the higher of the two. Double ticketing is an offence under the *Competition Act*. Customers who have been overcharged because of double ticketing can sue to recover the overcharge.

For the provision to apply, the two prices must be clearly expressed on the product, accompanying the product, or on an in-store or other point of purchase display or advertisement, at the time of supply. Prices that are on ads that are not in-store or at the point of purchase, such as newspaper ads, do not count.

The double ticketing provision was first enacted in 1975, long before the internet or online shopping was even contemplated. The applicability of this provision to online price representations has yet to be decided.

### Expensive Baggage

The claim against WestJet alleges that WestJet's practice of charging passengers \$25 to check their first bag while its tariff said that passengers were entitled to check their first bag for free, constitutes double ticketing. (Another part of the tariff said that passengers had to pay \$25 for the first bag.) The plaintiff also asserted claims based on breach of contract and unjust enrichment.

WestJet argued that because passengers can buy an airline ticket without ever looking at WestJet's tariff, the free check bag price was not "clearly expressed," as required by the *Competition Act*. WestJet also pointed out that the plaintiff had failed to plead that the two prices were expressed at the time of supply. The plaintiff argued that because tariffs are published pursuant to government regulations, and form part of the contract with the passenger, they are continuously expressed to passengers. The British Columbia Supreme Court expressed skepticism about this theory, noting that whether the two prices were clearly expressed at the time of supply was a different issue from whether the tariffs are a binding contract.

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In a decision issued in early January 2021, the Court granted the plaintiff leave to propose amendments to plead the temporal requirement, and certified the claim in relation to the breach of contract and unjust enrichment claims.

## Accommodation Service Fees

The WestJet case followed the path established by the 2019 *Airbnb* decision.

The plaintiff in that case contends the service fee that Airbnb charges to guests, which is a percentage of the accommodation price, breaches the double ticketing provision, because when a customer searches for accommodations, the platform displays the accommodation price, but not the added service fee. The service fee is added later on in the transaction, resulting in a second, higher price, for the accommodation.

Airbnb argued at certification that there are two different products involved in the transaction: the provision of accommodations, and the booking services offered by Airbnb, with different fees for each. It relied on a case that held that adding soft drink bottle deposits to the price of a soft drink did not violate the double ticketing provision.

The Federal Court certified the *Airbnb* claim as a class action in late 2019.

## Online Pricing Risks Increase

The fact that these two cases were certified does not mean that the claims will succeed. Indeed, in both cases the courts expressed skepticism about the plaintiffs' theories. At certification, however, courts do not consider whether a claim is likely to succeed, but only whether it is plain and obvious that it cannot succeed.

Both cases raise the challenge of applying the double ticketing provision to online sales. The plaintiff in *WestJet*, for example, will need to convince a court that a tariff that is buried deep within the airline's website constitutes a point of purchase display or advertisement. Whatever the technical merits of the claim, it is unlikely that anyone was misled, as almost no one will have seen the free bag term in the tariff. By contrast, the *Airbnb* case raises the possibility that consumers were unpleasantly surprised to see the service charges added before they booked.

While WestJet appears to have made an error in its tariff, Airbnb's fees are an example of a practice known as drip pricing. Drip pricing occurs when a merchant adds fees for non-optional services to an advertised price. The Competition Bureau has been challenging instances of drip pricing for several years, and has collected over \$20 million in fines to date. Most recently, in 2019, Ticketmaster agreed to pay \$4.5 million to settle allegations that the ticket prices it quoted were misleading because of various fees it added

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afterwards, such as facility charges, order processing fees, and resale service fees. See *Ticketmaster Pays a Hefty Price for Advertising Unattainably Low Prices*.

Businesses that add non-optional fees to their advertised prices have long faced the possibility of a Competition Bureau investigation and large fines. They now face defending class actions based on the double ticketing provisions, and potentially paying out large judgments to plaintiffs.

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