

# Transportation Notes: Class Action Regarding Flight Passes Denied Certification

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The Québec Superior Court recently declined to certify a class action based on the application of certain sections of the *Consumer Protection Act* or its Alberta equivalent to the sale of flight passes sold by Air Canada.

## Facts

The representative plaintiff, Joseph Benamor, claimed that, in March 2015, he purchased a flight pass from Air Canada for CAD\$2,562, equivalent to eight flights to/from Florida. It was valid for one year until March 2016.

This flight pass could be used by Mr. Benamor or a guest, whose identity could be changed for a supplemental fee, which Mr. Benamor claims he paid.

In February 2016, Mr. Benamor alleged that Air Canada required that he pay an additional CAD\$250 to extend the pass for three months.

Mr. Benamor claimed that the expiry date, the additional fees to add a guest and the fee to extend the pass violated Québec's consumer protection laws or their Albertan equivalent.

Specifically, Mr. Benamor relied on s. 187.1-187.5 of Québec's *Consumer Protection Act*, which relates to prepaid cards and gift cards.

## Class Action Certification

Mr. Benamor sought to certify a class action for "all consumers worldwide (subsidiarily in Canada or in the province of Québec) who from August 16, 2013, purchased, received, and/or acquired one or more Air Canada Consumer Flight Pass(es) with a specified number of flight credits".

Québec's class proceedings legislation requires a court to certify a proceeding as a class proceeding if the following criteria are met:

1. the claims of the members of the class raise identical, similar, or related issues of law or fact
2. the facts alleged appear to justify the conclusions sought
3. the composition of the class makes it difficult or impracticable to apply the rules regarding other forms of representative actions or consolidation of proceedings
4. the class member appointed as representative plaintiff is in a position to properly represent the class members

In this case, Air Canada challenged certification on the basis that the facts alleged did not justify the conclusions sought (in other

words, there was no reasonable cause of action). Air Canada also challenged Mr. Benamor's ability to properly represent the class members.

### **Position of the Parties**

The plaintiff, Mr. Benamor, took the position that the flight passes were pre- paid cards within the meaning of ss. 187.1-187.5 of Québec's *Consumer Protection Act*. He argued that the flight passes met the definition of a prepaid card in the legislation because:

1. there was a payment in advance
2. involving a card or other instrument of exchange
3. it permitted the consumer to procure a service from Air Canada

Québec's consumer protection legislation prohibits prepaid cards from expiring and prohibits additional charges for the use of prepaid cards.

Therefore, Mr. Benamor argued, Air Canada should be required to provide compensation for the damages sustained because of failing to abide by its obligations under the legislation.

The defendant, Air Canada, took the position that the flight passes were more akin to public transit passes.

Air Canada's evidence was that the flight passes did not carry a monetary value, but rather that they were comprised of a fixed number of flight credits for one-way trips which could fluctuate in value over time. Applicable taxes and fees were worked into the total cost of the flight pass.

Air Canada argued that when a consumer purchases a flight pass, Air Canada also assumes the risk of fluctuations in the price of tickets and any governmental or airport fees associated with operating the flights.

Air Canada also noted that it did sell gift cards with a fixed monetary value. For gift cards, the taxes and fees were not worked into the price. These cards did not expire.

Air Canada also argued that Mr. Benamor had no personal action because he bought the flight pass using a business credit card, suffering no personal damages. Therefore, he could not properly represent the class members.

### **Decision**

The Québec Superior Court declined to certify the proposed class action, holding that the prepaid card provisions in the consumer protection legislation did not apply to Air Canada's flight passes.

The Court also considered whether Mr. Benamor would qualify as an adequate representative plaintiff. The Court held that he would qualify at this stage of the action.

### **Consumer Protection Act Claim**

In dealing with the first issue, the Court considered the nature and function of the flight passes.

The Court held that prepaid cards are generally a substitute for cash, whereas the flight passes did not represent a fixed amount of money.

The Court noted the fact that taxes and fees were included in the price of the flight passes, while taxes were generally charged at the time of use for prepaid cards.

The Court held that the flight passes could be understood as an immediate purchase of a service to be rendered within a specified territory and period.

The Court held the same reasoning applied to the Alberta consumer protection legislation.

### **Adequacy of Representative Plaintiff**

With respect to the second issue, the Court held that, though it was unnecessary to decide the issue, Mr. Benamor could not be disqualified as an adequate representative plaintiff at this stage for two reasons:

1. though he charged the flight pass in question to his company credit card, there wasn't adequate evidence to decide whether the damages alleged were suffered solely by the business, rather than Mr. Benamor personally
2. Benamor would meet the low threshold of having an interest in the claim, being competent, and having no conflict with the other class members

### **Comment**

This decision will be notable for carriers selling flight passes, as it provides clarity on the types of transactions subject to consumer protection laws.

Carriers selling gift cards representing a fixed monetary value should be aware of their obligations under consumer protection laws.

***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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