

Court of Appeal Dismisses Class Action Over Expiring Airline Credits

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By Andrew MacDonald

The British Columbia Court of Appeal recently overturned a lower court decision certifying a class action relating to WestJet travel bank credits (“WTB Credits”) and dismissed the case. The Court held that the motion judge erred in failing to carry out a proper statutory interpretation analysis of the consumer protection laws on which the claim was based. Though a low bar, the Court held that it was plain and obvious that the plaintiff failed to plead a reasonable cause of action and that the claim was doomed to fail.

While airline vouchers and travel credits have garnered significant attention in Canada during the COVID-19 pandemic, including in [class action proceedings](#), the decision in *Sharifi v WestJet Airlines*, [2022 BCCA 149](#), relates to a claim that was commenced months before the pandemic.

The central claim in the proposed *Sharifi* class action is that WTB Credits, which expire after one year, violate consumer protection laws in eight Canadian common law provinces, which prohibit the expiration of “prepaid purchase cards” or “gift cards.”

As noted in an earlier [post](#), WestJet argued at the certification motion that WTB Credits do not qualify as “prepaid purchase cards” or “gift cards” as those terms are defined in the various legislative schemes in issue. While the certification motion judge noted that these arguments may prove successful down the road, it was not “plain and obvious” that the claim would fail. The motion judge held that WestJet’s arguments depended heavily on an evaluation of evidence, which could only be considered at trial.

Travel Credits are not Prepaid Purchase Cards because they are “Contingent”

WestJet appealed the lower court’s decision on a number of grounds, but the BCCA only found it necessary to consider the first certification criterion: does the claim plead a reasonable cause of action?

The BCCA found that the motion judge erred in her approach to this question. In particular, rather than determining whether the plaintiff’s claim was bound to fail based on an ordinary and plain reading of the definitions of “prepaid purchase card” and “gift card,” the motion judge decided that it was not plain and obvious merely because WestJet relied on evidence in making that argument.

In the BCCA’s unanimous view, there was no need to rely on the evidence proffered by WestJet and, on a proper analysis (in which that evidence played no part), it was clear that the plaintiff’s claim was bound to fail.

In coming to this conclusion, the Court reviewed other decisions that have considered and interpreted the meaning of “prepaid purchase cards”, including prepaid credit cards and prepaid telephone cards. Based on that review, the BCCA concluded that a “prepaid purchase card” or “gift card” is a “card, written certificate, or other voucher or device with a monetary value which has a prepaid fixed amount which the purchaser or gift card holder may use up to the amount that has been prepaid, or ‘topped up’.”

With that definition in mind, because of their “entirely contingent nature,” it is plain and obvious that WTB Credits do not fit within its scope. In the BCCA’s view, what Ms. Sharifi purchased was a flight, not a card or gift certificate or voucher, and her receipt of the WTB Credits was “entirely contingent on future events.”

As such, WTB Credits were held to “represent an entirely different form of financial product or device than that which is contemplated” by the consumer protection legislation invoked by the plaintiff. The Court agreed that WTB Credits are similar to in-store credits that are issued pursuant to some retailers’ policies when a customer is allowed to return a purchased item.

Take-Aways

The BCCA’s decision in *Sharifi* is a reminder that while the onus on a party seeking certification of a class proceeding is not onerous, it is nonetheless a hurdle that must be met. While evidence cannot be considered in assessing the “reasonable cause of action” criterion, courts must be careful not to abdicate their gatekeeping function and must meaningfully assess whether the claim pleaded discloses a reasonable cause of action. Where a claim is based on an allegation that one or more statutory provisions have been violated, an examination of the statutory scheme and a statutory interpretation analysis sufficient to allow for such an assessment must be undertaken.

It has been relatively common for airline vouchers and travel credits, whether issued after a flight is canceled or as a marketing strategy to maintain customer satisfaction, to include expiry dates. The BCCA’s decision in *Sharifi* holds that it is plain and obvious that consumer protection statutes in eight Canadian provinces that prohibit expiry dates on “prepaid purchase cards” and “gift cards” have no application to these instruments.

However, the law on airline vouchers may be about to shift, at least as it relates to some circumstances in which they are issued. The COVID-19 pandemic revealed that Canada’s recently-instituted, federal *Air Passenger Protection Regulations* (“APPR”) do not require airlines to provide a refund (in any form) to passengers whose flights are cancelled for reasons outside the carrier’s control – such as a global pandemic.

The controversy this stirred has resulted in the development of [refund requirements](#) that are proposed to be added to the APPR. According to the draft regulations, where a carrier is required to provide a refund to a passenger under the proposed rules, it may offer that refund in the form of a voucher or a credit, but only subject to certain conditions. One of these is that the voucher or credit cannot expire.

If the proposed rules come into effect, many airlines operating in Canada will have to revisit their policies concerning the expiry of travel vouchers and credits, at least where they are issued after flight cancellations and lengthy delays.

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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