

CANADA / JUDGMENT

Sharifi v. WestJet Airlines Ltd.

2020 BCSC 1996

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1996 Sharifi v. WestJet Airlines Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sharifi v. WestJet Airlines Ltd.,

2020 BCSC 1996

Date: 20201216

Docket: S197552

Registry: Vancouver

Between:

Tiana Sharifi

Plaintiff

And

WestJet Airlines Ltd.

Defendant

Brought under the Class Proceedings Act, R.S.B.C. 1996, c.50

Before: The Honourable Madam Justice Francis

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

October 7 and 8, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 16, 2020

Table of Contents

Factual Background. 3

Certification Requirements. 4

Do the Pleadings Disclose a Cause of Action?. 5

Is there an identifiable class of two or more persons?. 12

Does the Claim Raise Common Issues?. 14

Common issue re: application of consumer protection legislation. 14

Common issues re: breach of legislation. 15

Common issues re: remedies. 16

Punitive damages. 17

Additional common issues. 18

Is a Class Proceeding the Preferable Procedure for Resolving the Common Issues?. 18

Is there a Suitable Representative Plaintiff?. 20

Conclusion. 21

[1] The plaintiff applies for certification of this matter as a class proceeding under the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA].

- [2] The proposed representative plaintiff brings this action against WestJet Airlines Ltd. for alleged violations of the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 [BPCPA]. Ms. Sharifi purchased flights with WestJet and later cancelled them. Upon cancelling her flights, Ms. Sharifi was issued travel bank credits with WestJet ("WTB Credits") equivalent to the price of her flights, less cancellation fees. WTB Credits expire after one year. Ms. Sharifi used some, but not all, of her credits before the one-year period expired.
- [3] The primary issue in the claim is whether WestJet's travel bank program, whereby customers receive credits for, among other things, cancelled flights, is akin to a "prepaid purchase card" or "gift card" as those terms are used in the BPCPA and similar consumer protection statutes in other provinces. Consumer protection legislation in many provinces in Canada prohibits expiry dates on prepaid purchase cards and gift cards. The plaintiff claims that WTB Credits meet the definition of a prepaid purchase card or gift card and therefore consumer protection legislation applies to prohibit WestJet from applying a one-year expiry date to their travel bank credits.

Factual Background

- [4] WestJet issues WTB Credits to its customers for a variety of reasons including flight cancellations, lost baggage, and customer dissatisfaction. WTB Credits can be exchanged by the customer for the future purchase of travel on WestJet flights. They are also transferable to third-parties. For the most part, WTB Credits expire one year after the day on which they are provided.
- [5] Internally, WestJet categorizes WTB Credits as "hard credits" and "soft credits". The defendant submits that, for different reasons, neither hard credits nor soft credits can meet the definition of "prepaid purchase cards" or "gift cards" under provincial consumer protection legislation.
- [6] Hard credits are given to a customer after a change or a cancellation to that customer's reservation. They are characterized by WestJet as part of its "refund policy" because the credits are issued for the value of a cancelled flight, less fees.
- [7] Soft credits are offered to customers for a variety of reasons, including lost luggage, customer dissatisfaction, and promotions. WestJet characterized soft WTB Credits as "part of WestJet's business strategy and marketing platform in furtherance of WestJet's goals to maintain customer satisfaction".
- [8] The expiry date of a hard WTB Credit can be extended for one additional year for a fee of \$20. The expiry date of a soft WTB Credit cannot be extended.
- [9] Ms. Sharifi received a hard credit in the amount of \$993.26 when she cancelled flights she had booked with WestJet. She was able to use \$571.46 of her WTB Credit for a subsequent booking but, 12 months after she received her WTB Credit, the \$421.80 in remaining credit expired.

[10] The plaintiff estimates that there are tens of thousands of people in Canada who, like Ms. Sharifi, have had their WTB Credits expire or have been required to pay fees to avoid the expiry of their WTB Credits.

Certification Requirements

[11] Section 4(1) of the CPA requires the court to certify a class proceeding if all of the following requirements are met:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) there is a representative plaintiff who
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[12] The certification requirements are to be interpreted generously, taking into account the objects of class action legislation and the perceived benefits of such proceedings: *Gary Jackson Holdings Ltd. v. Eden*, 2010 BCSC 273 at para. 28.

[13] The class procedure has three principal goals: behaviour modification, judicial economy and access to justice: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 27.

[14] The certification analysis does not involve a consideration of the merits of the claim. The question at certification is not whether a claim is likely to succeed but rather whether the suit is appropriately brought as a class proceeding: *Hollick* at para. 16.

[15] Subsection 4(1)(a), the requirement that the pleadings disclose a cause of action, is assessed by means of the same test that would apply to a motion to strike. A plaintiff will satisfy this requirement unless, assuming all the facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed or has no reasonable prospect of success: *Pro-Sys Consultants v. Microsoft Corporation*, 2013 SCC 57 at para. 63 [Pro-Sys].

[16] With respect to the remaining subsections 4(b) - (e), the plaintiff must show "some basis in fact" to establish that the certification requirements have been met. In determining whether this standard has been met, the court should not engage in any detailed weighing of evidence at the certification stage but should confine itself to whether there is some basis in the evidence to support the certification requirements: *AIC Limited v. Fischer*, 2013 SCC 69 at para.43.

Do the Pleadings Disclose a Cause of Action?

[17] Whether the pleadings disclose a cause of action must be determined on the basis of the pleadings alone. The court may not consider evidence in determining whether the criteria under s. 4(1)(a) have been met: *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at paras. 16-19.

[18] The novelty of a claim is not fatal under the s. 4(1)(a) test. Rather, the fact that a claim is novel or an issue is unsettled in the jurisprudence may be good reason not to strike a claim at the pleadings stage: *Finkel* at para. 17.

[19] In this case, the plaintiff's cause of action is very straightforward. She claims that WTB Credits meet the statutory definition of a "prepaid purchase card" or "gift card". As such, she argues that consumer protection legislation applies to WTB Credits and WestJet was not allowed to impose an expiry date on them or charge fees to extend their expiry dates.

[20] The plaintiff has pled the following material facts:

- a) WTB Credits are issued to WestJet customers for a variety of reasons, including cancellation refunds, price difference refunds for itinerary changes, compensation to customers for flight delays and missing bags, and compensation for general inconvenience.
- b) WTB Credits have a dollar value, whereby each dollar of a WTB Credit is the equivalent of one Canadian dollar and can be exchanged for purchase of future travel on any WestJet flight.
- c) WTB Credits expire after one year.

[21] The plaintiff has pled that the WTB Credits are governed by consumer protection legislation in British Columbia, Saskatchewan, Manitoba, Ontario, Newfoundland and Labrador, Nova Scotia, New Brunswick, and Prince Edward Island. Each of these province's consumer protection legislation contains specific provisions about either "prepaid purchase cards" or "gift cards." The specific provisions in each province are attached to this judgment as Schedule "A". The language is not the same in every jurisdiction but, broadly speaking, each jurisdiction defines a prepaid purchase card or gift card as having the following characteristics:

- a) it must be a voucher or device;
- b) it must have a monetary value;

- c) it must be issued to a person; and
- d) it must be exchangeable for the future supply of goods or services.[1]

[22] On the basis of the above noted legislation and material facts, the plaintiff says that WTB Credits fit within the definition of prepaid purchase cards or gift cards because:

- a) A WTB Credit is a "voucher or device";
- b) A WTB Credit has "monetary value";
- c) A WTB Credit is issued to class members; and
- d) A WTB Credit can be exchanged for goods or services at a later date.

[23] Consequently, pursuant to consumer protection legislation, a WTB Credit cannot expire, and WestJet is prohibited from charging fees to extend the one year expiry date.

[24] The plaintiff relies on a line of cases involving the consumer protection rules that apply to prepaid purchase cards including *Jiang v. Peoples Trust*, 2016 BCSC 368 [Jiang SC 1], aff'd 2017 BCCA 119 [Jiang CA 1], re-applied for certification 2018 BCSC 299, aff'd 2019 BCCA 149; *Bernstein v. Peoples Trust Company*, 2017 ONSC 752; and *Sankar v. Bell Mobility*, 2013 ONSC 5916. In these cases, the court certified class proceedings involving similar common issues as the ones proposed in this case.

[25] The defendant argues that it is plain and obvious that WTB Credits are neither a gift card nor a prepaid purchase card. Rather, with respect to hard credits, they are a return policy and goodwill customer service gesture akin to the store credit that a person would receive if they returned a retail purchase. Just as a retailer can grant store credit for exchanged goods, and such credit may be time-limited, so too can WestJet impose a time limit on the credits it offers to customers for exchanged travel.

[26] WestJet argues that that soft credits are not gift cards or prepaid purchase cards for a different reason. WestJet submits that soft credits fall squarely under the regulations that exempt gift cards issued for "marketing, advertising or promotional purposes" from the prohibition on expiry dates. WestJet says that all of its soft credits, whether they be compensation to unhappy passengers for flight delays or lost baggage, or given for purely promotional purposes as part of marketing campaigns, fall under the exemption in the regulations.

[27] WestJet submits that if any scrutiny is applied to hard and soft credits and the reasons for which they are granted, it is plain and obvious that WTB Credits cannot be made to fit within the definition of prepaid purchase cards or gift cards. As such, WestJet is entitled to impose expiry dates on WTB Credits and to charge fees to extend those expiry dates.

[28] Much of the disagreement between the plaintiff and the defendant on the analysis under s. 4(1)(a) is about the extent to which the court ought to consider the merits at all in determining whether the claim is bound to fail. The plaintiff argues that I am prohibited

from engaging in any merits-based inquiry under s. 4(1)(a). The defendant argues that I can interpret the BPCPA at the certification stage and make a determination that a WTB Credit is not a prepaid purchase card, thus disposing of the proceeding on the basis that it is bound to fail.

[29] I am satisfied that, as part of the court's gatekeeping role in class proceedings, it is open to me to engage in some form of limited merits-based inquiry in order to determine whether a proceeding is bound to fail. As Chief Justice Bauman noted in *Jiang CA 1*, the determination of whether a claim is bound to fail is "an entirely appropriate merits-based inquiry and one that the court may be called on to answer in any particular case": at para. 59.

[30] In *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 at para. 64, Justice Newbury stated that, where the question of law is plain and obvious, the certification judge should not sidestep a determination that will dispose of the class proceeding:

scarce judicial resources may be squandered when difficult questions of law are continually side-stepped in the class action context. Certainly the *Hunt v. Carey* test is an easy one to meet, but it is not surmounted in all cases. As recent decisions of the Supreme Court of Canada discussed below illustrate, it is likely to be beneficial to all concerned, including the justice system, if such questions are directly addressed when raised at an early stage, rather than left for a trial that may never take place, or for another court in another case.

[31] In *Jiang (CA 1)* at para. 64, Bauman C.J. rejected the defendants' suggestion that *Wakelam* stood for the proposition that courts should always attempt to resolve contested issues of statutory interpretation at the certification stage:

Rather, in my view, the court was directing certification judges to save parties the expense of judicial resources where a complex question of statutory interpretation could be resolved such that the claim is struck as disclosing no reasonable cause of action. The court did not suggest that judges should finally resolve all questions of statutory interpretation at the certification stage. This would effectively eliminate any common issues that involved such questions, and deprive future courts of the opportunity to consider such questions with the benefit of a full evidentiary record.

[32] As such, I must only resolve the question of whether WTB Credits are prepaid purchase cards or gift cards under provincial consumer protection legislation if, on the basis of the pleadings alone, it is plain and obvious that they are not and therefore that the plaintiff's claim discloses no reasonable cause of action.

- [33] The defendant relies on the decision of the Quebec Superior Court in *Benamor c. Air Canada*, 2019 QCCS 208, a case with facts very similar to the one before me. In *Benamor*, the plaintiff purchased a flight pass from Air Canada and was required to pay an additional \$250 to extend the period of validity of his flight pass. The plaintiff sought to certify a class proceeding against Air Canada on the basis that, by imposing a validity period on flight passes, Air Canada contravened consumer protection legislation.
- [34] The Quebec court held that at certification, it is proper for the court to pronounce on a question of law if the success of the action is contingent on the determination. The court considered the Ontario and BC decisions in *Sankar*, *Jiang*, and *Bernstein*, and held that they were distinguishable. In doing so, Justice Prevoist specifically remarked that the differences in consumer protection and class proceeding legislation between provinces militate against finding a Canada-wide standard for handling class proceedings that invoke prepaid purchase card rules: at paras. 27-28.
- [35] After considering legal argument and evidence, the court in *Benamor* determined that Air Canada flight passes did not fall under the definition of "prepaid card" in the consumer protection legislation of Quebec or Alberta, the two provinces under which the plaintiff in that case sought relief. The court concluded that the first branch of the test for certification had not been met because the facts alleged by the plaintiffs did not appear to justify the conclusions sought.
- [36] The defendant urges me to take the same approach as taken by the certification judge in *Benamor*. However, *Benamor* concerned different consumer protection legislation than the legislation before me (this case invokes neither the Quebec nor the Alberta consumer protection laws), and it also considered different class proceeding legislation. The analogous provision to s. 4(1)(a) of the CPA under the Quebec Code of Civil Procedure, C.Q.L.R. c. C-25.01, calls upon the court to determine whether "the facts alleged seem to justify the conclusions sought": art. 575(2). On its face, this is a different test than the question of whether it is plain and obvious that the claim is bound to fail or has no reasonable prospect of success.
- [37] Further, the court in *Benamor* expressly appears to have considered evidence in determining whether the claim was bound to fail, something I am precluded from doing under binding authorities in this province.
- [38] As such, I find *Benamor* to be of limited application in the matter before me.
- [39] In this case, I cannot find that the claim discloses no reasonable cause of action. The defendant argues that the very nature of WTB Credits is completely different from that of a prepaid purchase card or gift card, and as such it would stretch the words of the legislation beyond meaning to interpret the legislation to include travel bank credits. At its core, the defendant's argument is that a WTB Credit is part of a return policy (in the case of hard credits) or an exempt promotional tool (in the case of soft credits), never a gift card. While the defendant may be successful in making such an argument at a common issues trial, I

cannot find that the claim that WTB Credits are governed by the prepaid purchase card and gift card provisions in the BPCPA and other consumer protection legislation is bound to fail.

- [40] It is telling on this point that the defendant, in its submissions about whether the claim is bound to fail, averts to a considerable amount of evidence about how the WTB Credit program works. The defendant relies on the distinction between hard and soft credits and argues that only hard credits have a value that bears any relationship to funds paid by the customer. In its written submissions, the defendant analyzes the legislation and notes how the language in each statute applies to hard credits and the different categories of soft credits.
- [41] The distinction between hard and soft credits and the reason why one or the other is issued, the terms on which they are issued, and how the expiry dates operate, are all grounded in the defendant's own evidence. None of these are matters that are appropriate for me to consider in determining whether the cause of action is bound to fail under s. 4(1)(a).
- [42] As the defendant's argument makes eminently clear, a determination of the plaintiff's claim will require the court to consider evidence about how WestJet administers hard and soft credits. A review of the evidence about WTB Credits could lead to a conclusion that one, both, or neither of hard and soft credits fall within the scope of consumer protection legislation governing prepaid cards. At this stage, the mere fact that a consideration of evidence is required in order to determine the central issue in this litigation is sufficient for the plaintiff to meet the requirements of s. 4(1)(a).

Is there an identifiable class of two or more persons?

- [43] The class definition must be sufficiently clear that class members can determine whether they are in the class and can decide whether they wish to participate in the class proceeding: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46.

- [44] The plaintiff initially sought certification on the basis of the following class definition:

All individuals residing in Canada (except residents of Alberta, Quebec, Yukon, Nunavut and the Northwest Territories) who had a WestJet Travel Bank credit at any time since October 1, 2009* that was issued in relation to an itinerary that was booked primarily for a non-business purpose.

*From September 1, 2010 in PEI, April 1, 2011 in Newfoundland, and February 1, 2010 in Nova Scotia (the "Class" and "Class Members")

- [45] The defendant argues that the class definition proposed by the plaintiff is overbroad. The defendant raises two main arguments with respect to class definition:
- a) According to Jiang (CA 1) at para. 87, in order for the class definition to include only those who are protected by the BPCPA, the class definition must include the qualification that the consumer transactions in question were made for a "personal, family or household" purpose.

- b) By including all individuals who have been awarded a WTB Credit in the class definition, the definition includes people who received a WTB credit and used it before its expiry. These individuals would have no cause of action against WestJet because their credits didn't expire.
- [46] With respect to the first issue raised by the defendant, the plaintiff has agreed to have the class definition amended to include the "personal, family or household" qualifier.
- [47] With respect to the defendant's argument that the definition includes those with no compensatory claim, in reply submissions, the plaintiff conceded this point and consented to an amended class definition that would only include individuals whose credits expired or who had fees deducted from their WTBs. As such, the amended class definition provided by the plaintiff is:

All individuals residing in Canada (except residents of Alberta, Quebec, Yukon, Nunavut and the Northwest Territories) who had a WestJet Travel Bank credit at any time since October 1, 2009* that was issued in relation to an itinerary that was booked primarily for a personal, family, or household purpose, who paid fees to extend their Travel Bank credit or whose credit expired

*From September 1, 2010 in PEI, April 1, 2011 in Newfoundland, and February 1, 2010 in Nova Scotia (the "Class" and "Class Members")

- [48] The defendant points out that there is a market for WTB Credits. People who are unable to use their credits before expiry sometimes sell them to others, usually at a discount. The existence of this market complicates the class definition, as a person who sold their credits at a discount would not meet the class definition while the person who purchased the credits at a discount would meet the class definition. In that scenario, the only person who suffered a loss is the person who sold the credits at a discount and the definition excludes them.
- [49] At this stage, the plaintiff must only satisfy the court that there is an identifiable class of two or more persons. The plaintiff has done that. If the class definition is overbroad and includes individuals who are ultimately found not to have a claim against the defendant, or equally if the definition is insufficient to encompass everyone with a compensable claim, I am satisfied that those concerns can be dealt with through alternative procedural mechanisms afforded by the CPA. For example, they can be addressed after a common issues trial, under s. 27 of the CPA, or in administrative protocols in the claims adjudication process dealing with eligibility.
- [50] As such, I find that the plaintiff has met the requirements of s. 4(1)(b) of the CPA.

Does the Claim Raise Common Issues?

- [51] In determining commonality, the Court does not need to resolve conflicts in the evidence. The common issues requirement will be met if there is some basis in fact for the proposition that the issues can be determined on a class-wide basis: Pro-Sys at para. 99.

- [52] Commonality must be approached purposively. It is not necessary that common issues predominate over non-common issues, however there must be some commonality and the court should examine the significance of the common issues in relation to individual issues: Pro-Sys at para. 108.
- [53] For common issues to be certifiable, they need only be "issues of fact or law that move the litigation forward": Stanway v. Wyeth Canada Inc., 2012 BCCA 260 at para. 8.
- [54] The plaintiff has proposed certain common issues that are reproduced as Schedule "B" to this judgment.

Common issue re: application of consumer protection legislation

- [55] The first common issue proposed by the plaintiff deals with whether provincial consumer protection law as it pertains to prepaid cards applies to the WTB Credits issued by WestJet to consumers.
- [56] The defendant concedes that this issue is common.

Common issues re: breach of legislation

- [57] The plaintiff has proposed a number of common issues related to WestJet's alleged breach of consumer protection legislation.
- [58] The defendant submits that any attempt to determine the common issues proposed by the plaintiff would inevitably collapse into individual proceedings. This is because it would be necessary to inquire into the individual circumstances of each class member in order to determine whether their credits were soft credits issued for promotional purposes which, on the defendant's submission, fall under the exemption to the expiry date prohibition; or whether they are a different form of soft credit or a hard credit, which may not fall under the expiry date prohibition exemption.
- [59] The defendant's submission is inconsistent with its own evidence tendered in this certification motion. This evidence included a "Service Credit Summary" table that described, for each of the 17 different categories of credit, whether the credit is hard or soft, the amount of time the credit is valid, whether the credit is extendable for a fee, and which department at WestJet is empowered to issue the credit. WestJet has a common policy for categorizing and recording hard and soft credits, meaning an individual inquiry into the circumstances of each plaintiff is not necessary in order to determine whether, based on the characteristics of the hard or soft credit they received, they are entitled to relief under consumer protection legislation.
- [60] The jurisprudence is clear that the common issues requirement will not be defeated simply because there is differentiation amongst the class members. In this case, the fact that there are different categories of hard credits and soft credits with different characteristics does not preclude a finding that there are common issues for the purposes of class certification.

At a common issues trial, it would be open for the court to consider each type of credit separately to analyze whether it is a prepaid purchase card and whether it is subject to an exemption. The determination of that issue would be common for all class members in receipt of that particular type of credit.

[61] I am satisfied that the following common issues proposed by the plaintiffs are common:

2. Did WestJet charge any fees in relation to the WestJet Travel Bank and/or the WTB Credits?
3. If Question 2 is yes, were those fees contrary to any of the Provincial Prepaid Card Laws?
4. Did WestJet issue WTB Credits that had expiry dates contrary to any of the Provincial Prepaid Card Laws?
5. If Question 4 is yes, is imposing an expiry date on a WTB Credit a "deceptive act or practice", "unfair practice" or an "unconscionable act or practice" under the Provincial Consumer Protection Laws?

Common issues re: remedies

[62] The plaintiff has proposed a number of common issues related to the quantification of damages in the event WestJet is found to be in violation of consumer protection laws.

[63] The defendant argues that whether a recipient provided anything of value in exchange for their credit, thus entitling them to damages, is a matter of evidence that will require consideration of individual circumstances. However, the defendant once again overlooks its own evidence in making this argument. Inherent in the categories of credit is the answer to whether the customer provided something of value for the credit.

[64] For example, a soft credit issued for purely promotional purposes is categorized by WestJet as "Promo." Such a credit can only be issued by WestJet's marketing department. It is implicit in WestJet's evidence that a recipient of a "promo" soft credit did not provide anything of value in exchange for that credit. On the other hand, "baggage comp" is a category of soft credit issued to customers as compensation for mishandled luggage. There is likely an argument to be made about whether a recipient of a "baggage comp" soft credit provided something of value for that credit. But whether or not something of value is given by a customer whose bags are lost or mishandled and who receives a soft credit as compensation, the issue is the same for every WestJet customer who received a "baggage comp" soft credit.

[65] As such, any class member's entitlement to compensation will be common for each category of credit issued by WestJet.

- [66] The plaintiff made some concessions in reply submissions with respect to common issues regarding remedies. The plaintiff agreed to withdraw two of its proposed common issues on the basis of the defendant's submissions, namely, whether the class members are entitled to damages for the monetary equivalent for any discount from the transfer of WTB Credits to a third-party, and whether Class Members in British Columbia are entitled to an accounting or restoration from WestJet under the BPCPA, s. 172(3)(a).
- [67] In this case, I am satisfied that the issues relating to the remedies proposed by the plaintiff (as amended in reply argument) are indeed common:
7. Are Class Members entitled to damages from WestJet under any of the Provincial Prepaid Card Laws and/or the Provincial Consumer Protection Laws for:
 - a. The monetary equivalent of the WTB Credits that have been forfeited to WestJet?
 - b. Any fees paid to WestJet for the extension of WTB Credits?
 8. Are Class Members entitled to a declaration that any expiry dates on their WTB Credits are legally ineffective?
 9. Should WestJet be required under BPCPA, s 172(3)(c) to advertise to the public in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions that this Court considers reasonable, the particulars of any judgment, declaration, order granted against WestJet?

Punitive damages

- [68] The defendant argues that punitive damages should not be certified as a common issue because the plaintiff has not pled sufficient particularity to justify a punitive damages award. The defendant relies on Jiang SC 1, in which Bowden J. refused to certify punitive damages.
- [69] At this stage of the proceeding, I need not consider whether the plaintiff has a likely claim against WestJet for punitive damages. I need only consider whether it is adequately pled and whether it is common. I find that it is both adequately pled and common, and therefore I am prepared to certify it as a common issue.

Additional common issues

- [70] The plaintiffs have proposed a number of "general" common issues to which the defendant did not directly respond in argument. I find these issues also to be common:
10. If WestJet is found liable to the Class, should the Court make an aggregate award or awards of damages and, if so, in what amount?
 11. Is WestJet liable to pay interest on the award from the initial date WestJet issued the WTB Credits to Class Members?

12. What is the appropriate distribution of damages or disgorgement to the Class, and should WestJet pay the costs of distribution?

[71] In the course of submissions, the plaintiff conceded that, pursuant to the defendant's submission, the applicability of the limitation period under each provincial statute should also be a common issue. I agree that this should be a common issue, with reference to the applicable statute in each jurisdiction in which the plaintiff's claim is brought.

Is a Class Proceeding the Preferable Procedure for Resolving the Common Issues?

[72] In considering whether a class proceeding is the preferable procedure, I am bound to consider the criteria set out in s. 4(2) of the CPA:

- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
- (d) whether other means of resolving the claims are less practical or less efficient;
- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[73] The term "preferable" captures two ideas: first the question of whether a class action is a "fair, efficient and manageable method" of advancing a claim and second, whether a class proceeding is preferable to other available processes: Hollick at para. 28.

[74] In determining whether a class action is preferable, the court must evaluate the common issues in the context of the proceeding as a whole: Hoy v. Medtronic Inc., 2003 BCCA 316 at para. 43.

[75] The preferability question is often considered with reference to a "cost/benefit" analysis assessing whether a class proceeding would advance the claims in any meaningful way: Hoy at para. 54.

[76] The defendant's position on preferability depends on the court accepting the defendant's position on the common issues. The defendant argues that the predominance of individual issues over common issues makes a class proceeding unsuitable. Given my findings about common issues, I cannot accept this argument. Because of the straightforward nature of the claim and the systematic means by which WestJet categorizes WTB Credits, there are very few individual issues to be determined in this case.

- [77] The only element of this claim that could descend into individual inquiry is the assessment of damages. Section 7(a) of the CPA precludes this Court from denying certification on the basis that individual assessments of damages are required. The CPA contains a number of procedural mechanisms for dealing with the assessment of damages after a common issues trial.
- [78] The defendant submits that there are alternative mechanisms under the BPCPA, particularly s. 172(1)(a), which empowers the Director to bring an action for injunctive or declaratory relief. I cannot agree that this is a viable alternative method for resolving the claims in this action. There is simply no evidence that the Director has any interest in pursuing this matter, despite being served with this proceeding.
- [79] Given the very small dollar value of some of the claims, it appears clear that absent a class proceeding, the claims of the class members will not be adjudicated. There is therefore a compelling access to justice basis for certifying this matter as a class proceeding.
- [80] I am satisfied that a class action is a fair, efficient, and manageable method of advancing the claims raised in this proceeding and is preferable to other available processes.

Is there a Suitable Representative Plaintiff?

- [81] The defendant argues that Ms. Sharifi is not a suitable representative plaintiff because she was a recipient of hard credits for a flight cancellation and therefore has no claim against WestJet with respect to soft credits.
- [82] The defendant relies on *Koo and Gingras v. Canadian Airlines International Ltd.*, 2000 BCSC 281 [Koo], for the proposition that a proposed representative plaintiff must have a viable cause of action against the proposed defendant. The plaintiff argues that Koo has been overtaken by more recent appellate authorities which hold that a cause of action is to be considered from the perspective of the class, not only the representative plaintiff: *MacKinnon v. Instalogs Financial Solution Centres (Kelowna) Ltd.*, 2004 BCCA 472 at para. 49, *Bank of Montreal v. Marcotte*, 2014 SCC 55 at paras. 43-47.
- [83] I need not consider the dispute between the plaintiff and the defendant about the applicability of Koo because Ms. Sharifi clearly has a cause of action against the defendant. The fact that the particulars of her cause of action, a claim based on hard credits, may be different from the particulars of other class members whose claim is based on soft credits, does not render her ineligible as a representative plaintiff. A representative plaintiff need not be "typical" of the class nor the best possible representative, so long as she will vigorously and capably prosecute the interests of the class: *Dutton* at para. 41.
- [84] I am satisfied that Ms. Sharifi is an appropriate representative plaintiff.

Conclusion

[85] The plaintiffs have met the requirements for certification. I therefore certify this action as a class proceeding. The common issues proposed by the plaintiff, as amended in reply argument, are appropriate.

[86] The parties are directed to set down a judicial management conference to take place within 90 days of these reasons to speak to any required amendments to the litigation plan and further steps in this class proceeding.

"Francis, J"

Schedule A - Summary of Prepaid Card Statutory Provisions

Definition of "Gift Card" or "Prepaid Purchase Card"

Province

British Columbia

Business Practices and Consumer Protection Act, S.B.C 2004, c. 2, s. 56.1

[BC BPCPA].

"prepaid purchase card" means a card, written certificate or other voucher or device with a monetary value that is issued or sold to a person in exchange for the future supply of goods or services to a consumer, and includes a gift card and gift certificate, but does not include a cash card as defined in Part 6.1.

Saskatchewan

The Consumer Protection and Business Practices Act, S.S. 2013, c. C-30.2, s. 47 [SK CPBPA].

"prepaid purchase card" means, subject to the regulations, an electronic card, written certificate or other voucher or device with a monetary value, that is issued or sold in exchange for the future purchase or delivery of goods or services, and includes a gift card and gift certificate.

Manitoba

Consumer Protection Act, C.C.S.M., c. C200, s. 170 [MB CPA].

"prepaid purchase card" means, subject to the regulations, an electronic card, written certificate or other voucher or device with a monetary value, that is issued or sold in exchange for the future purchase or delivery of goods or services, and Includes a gift card and gift certificate.

Ontario

General, O. Reg. 17/05, s. 23, enacted under the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A [Ontario CPA Reg.].

"gift card" means a voucher in any form, including an electronic credit or written certificate, that is issued by a supplier under a gift card agreement and that the holder is entitled to apply towards purchasing goods or services covered by the voucher.

Newfoundland and Labrador

Gift Card Regulations, N.L.R. 14/11, s. 2 [NFLD GCR].

"gift card" means an electronic card, written certificate or other voucher or payment device, including a gift certificate, that has an express or implied monetary value and is issued or sold in exchange for the future purchase or delivery of goods or services.

Nova Scotia

Gift Card Regulations, N.S. Reg. 325/2009, s. 2 [NS GCR].

"gift card" means an electronic card, written certificate or other voucher or payment device, including a gift certificate, that has an express or implied monetary value and is issued or sold in exchange for the future purchase or delivery of goods or services, but does not include a cash card as defined in the Payday Lenders Regulations made under the Act.

New Brunswick

Gift Cards Act, R.S.N.B. 2011, c. 165, s. 1 [NB GCA].

"gift card" means, subject to the regulations, an electronic card, written certificate or other voucher or device with a monetary value, that is issued or sold in exchange for the future purchase or delivery of goods or services, and includes a gift certificate.

Prince Edward Island

Gift Cards Act, R.S.P.E.I. 1988, c. G-4.1, s. 1 [PEI GCA].

"gift card" means, subject to the regulations, an electronic card, written certificate or other voucher or device with a monetary value, that is issued or sold in exchange for the future purchase or delivery of goods or services, and includes a gift certificate.

Prohibition Against Expiry Dates

Province

British Columbia

BC BPCPA, s. 56.2(1): Except as may be provided by the regulations under section 56.5 [regulations respecting prepaid purchase cards], a supplier must not issue or sell a prepaid purchase card that has an expiry date.

Saskatchewan

SK CPBPA, s. 49(1): No person shall issue or sell a prepaid purchase card that has an expiry date, except as may be provided in the regulations made pursuant to this Part.

Manitoba

MB CPA, s. 171(1): No person shall issue or sell a prepaid purchase card that has an expiry date, except as may be provided in the regulations.

Ontario

Ontario CPA Reg., s. 25.3(1): No supplier shall enter into a gift card agreement that has an expiry date on the future performance of the agreement.

Newfoundland and Labrador

NFLD GCR, s. 3(1): A supplier shall not issue or sell a gift card that has an expiry date.

Nova Scotia

NS GCR, s. 3(1): Except as provided in Section 4, a supplier must not issue or sell a gift card that has an expiry date.

New Brunswick

NB GCA, s. 3(1): No person shall issue or sell a gift card that has an expiry date, except as may be provided in the regulations.

Prince Edward Island

PEI GCA, s. 3(1): No person shall issue or sell a gift card that has an expiry date, except as may be provided in the regulations.

Prohibition Against Associated Fees

British Columbia

BC BPCPA, s. 56.3(1): A supplier must not charge a fee to a consumer for anything in relation to a prepaid purchase card, except as may be permitted by the regulations under section 56.5 [regulations respecting prepaid purchase cards].

Saskatchewan

SK CPBPA, s. 51: No person who issues or sells a prepaid purchase card shall: (a) charge an inactivity or dormancy fee in relation to the prepaid purchase card; or (b) except in accordance with the regulations made pursuant to this Part, charge any other fee to the holder of the prepaid purchase card for anything in relation to the card.

Manitoba

Prepaid Purchase Cards Regulation, Man Reg. 98/2007, s. 2(1) [MB PPCR]: No supplier shall charge a fee to the holder of a prepaid purchase card for anything in relation to the card, except in the following cases: . . .

Ontario

Ontario CPA Reg., s. 25.4(1)(b): No supplier under a gift card agreement that is not an open loop gift card agreement shall charge a fee to the holder of a gift card for anything in relation to the card, other than a fee for replacing a lost or stolen gift card or a fee to customize a gift card.

Newfoundland and Labrador

NFLD GCR, s. 5(2): A supplier shall not charge a fee to a purchaser or holder of a gift card for anything in relation to the gift card except as authorized under this section.

Nova Scotia

NS GCR, s. 5(2): A supplier must not charge a fee to the purchaser or holder of a gift card for anything in relation to the gift card except as authorized in this Section.

New Brunswick

NB GCA, s. 4(2): No person shall charge a fee to the purchaser or holder of a gift card for anything in relation to the gift card, except as may be permitted by the regulations.

Prince Edward Island

PEI GCA, s. 4(2): No person shall charge a fee to the purchaser or holder of a gift card for anything in relation to the gift card, except as may be permitted by the regulations.

Exception for Promotional Gift Cards

British Columbia

Prepaid Purchase Cards Regulation, B.C. Reg. 292/2008, s. 2:

2 Section 56.2(1) [no expiry date] does not apply to any of the following: . . . (c) a prepaid purchase card that is issued or sold (i) for marketing, advertising or promotional purposes, and (ii) to a person who (A) provides nothing of value in exchange for the card . . .

Saskatchewan

Consumer Protection and Business Practices Regulations, R.R.S., c. C-30.2, Reg. 1, ss. 4-1(1)-(2):

4-1(1) The prohibition set out in section 49 of the Act does not apply to a person who issues a prepaid purchase card to a consumer in the following circumstances: (a) if the prepaid purchase card is issued for a charitable purpose; (b) if the consumer provides nothing of value for the prepaid purchase card.

(2) Section 51 of the Act does not apply to a person who issues a prepaid purchase card to a consumer in the following circumstances: (a) if the prepaid purchase card is issued for a charitable purpose; (b) if the consumer provides nothing of value for the prepaid purchase card.

Manitoba

MB PPCR, ss. 2(1) and 4(1):

2(1) No supplier shall charge a fee to the holder of a prepaid purchase card for anything in relation to the card, except in the following cases: . . . 2. A supplier may charge a fee in relation to a prepaid purchase card if the card was not issued or sold for cash or other consideration.

4(1) The prohibition in subsection 171(1) of the Act [no expiry date] does not apply to a prepaid purchase card (a) that is issued or sold for a specific good or service; or (b) for which the holder provides nothing of value when the card is issued.

Ontario

Ontario CPA Reg., ss. 25.1(1):

Sections 25.2 to 25.5 apply to every gift card agreement entered into on or after the day this section comes into force and to every gift card issued under that agreement, but do not apply to,

- (a) a gift card that a supplier issues for a charitable purpose;
- (b) a gift card that covers only one specific good or service;
- (c) a gift card issued by a financial institution; or
- (d) the gift card agreement under which a gift card described in clause (a), (b) or (c) is issued.

Newfoundland and Labrador

NFLD GCR, ss. 4(1) and 5(3):

4(1) Notwithstanding section 3, an expiry date is permitted for the following gift cards: (a) a gift card issued or sold for a charitable purpose; and (b) a gift card issued for a marketing, advertising or promotional purpose.

5(3) A supplier may charge a fee on the following gift cards: (a) a gift card issued or sold for a charitable purpose; and (b) a gift card issued for a marketing, advertising or promotional purpose.

Nova Scotia

NS GCR, ss. 4(1) and 5(2):

4(1) An expiry date is permitted for the following gift cards: (a) a gift card issued or sold for a charitable purpose; and (b) a gift card issued for a marketing, advertising or promotional purpose.

5(3) A supplier may charge a fee on the following gift cards: (a) a gift card issued or sold for a charitable purpose; and (b) a gift card issued for marketing, advertising or promotional purposes.

New Brunswick

General Regulation - Gift Cards Act, N.B. Reg. 2008/152, ss. 3 and 4(1) [NB GCA Reg.]:

3 The following gift cards may have expiry dates: (a) those issued or sold for a charitable purpose; (b) those issued or sold for a specific good or service; and (c) those issued for a marketing, advertising or promotional purpose.

4(1): A person who issues or sells a gift card may charge fees on the following gift cards: (a) those issued or sold for a charitable purpose; and (b) those issued for a marketing, advertising, or promotional purpose.

Prince Edward Island

Gift Cards Act General Regulations, P.E.I. Reg. EC346/10, ss. 2 and 3 [PEI GCA Reg.]:

2 The following gift cards may have expiry dates: (a) those issued or sold for a charitable purpose; (b) those issued or sold for a specific good or service; and (c) those issued for a marketing, advertising or promotional purpose.

3 A person who issues or sells a gift card may charge fees on the following gift cards: (a) those issued or sold for a charitable purpose; and (b) those issued for a marketing, advertising or promotional purpose.

Schedule B: Plaintiff's Proposed Common Issues

1. Do the laws and regulations of the relevant provinces (collectively the "Provincial Prepaid Card Laws") apply to the WestJet Travel Bank and/or the WTB Credits issued by WestJet to consumers?
 - a) British Columbia - BC BPCPA, s. 56.2.
 - b) Saskatchewan - SK CPBPA, s. 47.
 - c) Manitoba - MB CPA, s. 170.
 - d) Ontario - Ontario CPA Reg., s. 23.
 - e) Newfoundland and Labrador - NFLD GCR, s. 2.
 - f) Nova Scotia - NS GCR, s. 2.

- g) New Brunswick - NB GCA, s. 1.
- h) Prince Edward Island - PEI GCA, s. 1.
- 2. Did WestJet charge any fees in relation to the WestJet Travel Bank and/or the WTB Credits?
- 3. If Question 2 is yes, were those fees contrary to any of the Provincial Prepaid Card Laws?
 - a. British Columbia - BC BPCPA, s. 56.3.
 - b. Saskatchewan - SK CPBPA, s. 51.
 - c. Manitoba - MB PPCR, s. 2(1).
 - d. Ontario - Ontario CPA Reg., s. 25.4
 - e. Newfoundland and Labrador - NFLD GCR, s. 5(2).
 - f. Nova Scotia - NS GCR, s. 5(2).
 - g. New Brunswick - NB GCA, s. 4(2).
 - h. Prince Edward Island - PEI GCA, s. 4(2).
- 4. Did WestJet issue WTB Credits that had expiry dates contrary to any of the Provincial Prepaid Card Laws?
 - a. British Columbia - BC BPCPA, s. 56.2.
 - b. Saskatchewan - SK CPBPA, s. 49.
 - c. Manitoba - MB CPA, s. 171.
 - d. Ontario - Ontario CPA Reg., s. 25.3.
 - e. Newfoundland and Labrador - NFLD GCR, s. 4.
 - f. Nova Scotia - NS GCR, s. 3.
 - g. New Brunswick - NB GCA Reg., s. 3.
 - h. Prince Edward Island - PEI GCA Reg., s. 2.
- 5. If Question 4 is yes, is imposing an expiry date on a WTB Credit a "deceptive act or practice", "unfair practice" or an "unconscionable act or practice" under the Provincial Consumer Protection Laws?
 - a. British Columbia - BC BPCPA, ss. 4-9.
 - b. Saskatchewan - SK CPBPA, ss. 4-9.
 - c. Manitoba - MB CPA, ss. 2-3.
 - d. Ontario - Consumer Protection Act, 2002, SO 2002, c. 30, Sched. A, ss. 14-17.

- e. Newfoundland and Labrador - Consumer Protection and Business Practices Act, S.N.L. 2009, c. C-31.1, ss. 7-9.
- 6. [Common issue no longer being advanced by plaintiff.]

Remedies

- 7. Are Class Members entitled to damages from WestJet under any of the Provincial Prepaid Card Laws and/or the Provincial Consumer Protection Laws for:
 - a. The monetary equivalent of the WTB Credits that have been forfeited to WestJet?
 - b. Any fees paid to WestJet for the extension of WTB Credits?
 - c. The monetary equivalent for any discount from the transfer of WTB Credits to a third-party?
- 8. Are Class Members in British Columbia entitled to an accounting or restoration from WestJet under the BPCPA, s. 172(3)(a) and, if so, in what amount?
- 9. Are Class Members entitled to a declaration that any expiry dates on their WTB Credits are legally ineffective?
- 10. Should WestJet be required under BPCPA, s. 172(3)(c) to advertise to the public in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions that this Court considers reasonable, the particulars of any judgment, declaration, order granted against WestJet?

General

- 11. If WestJet is found liable to the Class, should the Court make an aggregate award or awards of damages and, if so, in what amount?
- 12. Is WestJet liable to pay interest on the award from the initial date WestJet issued the WTB Credits to Class Members?
- 13. What is the appropriate distribution of damages or disgorgement to the Class, and should WestJet pay the costs of distribution?
- 14. Is WestJet's conduct deserving of an award of punitive damages and, if so, in what amount?

- [1] While some provinces refer to "prepaid purchase cards" and some to "gift cards," the definition of prepaid purchase cards/gift cards is almost the same in the jurisdictions under which the plaintiff claims. The only exception is Ontario. O. Reg. 17/05: General, s. 23, under the Consumer Protection Act, 2002 S.O. 2002, c. 30, Sched. A, which defines "gift card" as "a voucher in any form, including an electronic credit or written certificate, that is issued by a supplier under a gift card agreement and that the holder is entitled to apply towards purchasing goods or services covered by the voucher". "Gift card agreement" is defined in the regulation as "a future performance agreement under which the supplier issues a gift card to the consumer and under which [] the consumer makes payment in full when

entering into the agreement": at s. 23.

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