

CITATION: Sankar v. Bell Mobility, 2015 ONSC 632
COURT FILE NO.: CV-12-452867-CP
DATE: 20150212

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Celia Sankar / Plaintiff

AND:

Bell Mobility Inc. and Bell Canada Enterprises Inc., / Defendants

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Louis Sokolov, Jordan Goldblatt and Jean-Marc Leclerc* for the Plaintiff

Steve Tenai for the Defendant

HEARD: January 28, 2015

SUMMARY JUDGMENT ON COMMON ISSUES

[1] This class action about pre-paid cell phone services and the expiry of unused “top-up” payments was certified as a class proceeding in 2013.¹ The class proceeding is brought on behalf of some one million Bell Mobility (“Bell”) customers who purchased pre-paid wireless services from Bell under three brand names: Bell Mobility, Solo Mobile and Virgin Mobile.²

¹ *Sankar v. Bell Mobility*, 2013 ONSC 5916. The certification Order dated October 4, 2013 defines the class as follows: “All persons in Ontario who contracted with the defendant for pre-paid mobile telephone services subject to the defendant’s Terms and Conditions, paid on a pay-per-use basis, and had balances remaining in their accounts at the end of an active period which expired between May 4, 2010 and the date on which the certification of this action is finally determined.” On December 16, 2013 the defendant’s motion for leave to appeal certification was dismissed.

² The action against Bell Canada Enterprises Canada Inc. was discontinued.

[2] The parties now cross-move for summary judgment seeking determination of the two core common issues: whether Bell breached its contract with the class members by seizing unused pre-paid credits before it was contractually entitled to do so; and two, whether their expiry and forfeiture in the case of consumer users was contrary to the provincial Gift Card Regulation.³

[3] For the reasons set out below, I find that Bell did not breach the terms of the “top-up” agreements. I further find that the expiry and forfeiture of unused credit balances was not contrary to the Gift Card Regulation.

[4] Many of the class members’ complaints were prompted in part by the defendant’s reminder messages noting the “expiration date.” If these expiration dates were one day longer than what was stated in the original top-up agreement, and class members reasonably relied on this additional day to their detriment, the appropriate remedy would be either a breach of contract claim arguing promissory estoppel⁴ or an action in misrepresentation – both of which would require proof of individual reliance and therefore not amenable to a class proceeding. This of course explains why neither remedy was alleged by the plaintiff or pursued herein. This class proceeding was certified as a straight-forward contractual and statutory interpretation case. I find that Bell prevails in both regards.

Background

[5] Much of the background was set out in the certification decision⁵ and will not be repeated here. Suffice it to say that the plaintiff’s main complaint is that Bell seized the unused credit balances remaining in the customer’s top-up account *on* the stated expiry date and not *after* the expiry date as was contractually required. For the sub-class of consumer users, the plaintiff says that the top-up payments were “gift card agreements” as defined in the Gift Card Regulation and the imposition of an expiration date was in breach of this regulation.

[6] The three Bell brands herein provided slightly different pricing and “active period” options. Bell Mobility customers could purchase 30, 60 and 365-day “active periods” for dollar amounts ranging from \$15 to \$200. Solo Mobile customers could

³ Sections 25.1 through 25.5 of O. Reg. 17/05, enacted under the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A.

⁴ I recognize that promissory estoppel would be used as a sword, and not simply as a shield. But recent case law suggests that this may well be possible: see, for example, *Greater Fredericton Airport Authority Inc. v. NAV Canada*, [2008] N.B.J. No. 108 at para. 29 (N.B.C.A.)

⁵ *Supra*, note 1.

purchase 45, 75 and 150-day periods for \$20 to \$75. Virgin Mobile customers could purchase 30, 60, 90 or 365-day periods for \$15 to \$200. If customers topped up their prepaid accounts before they expired, the unused balances were “carried over” along with the new top-up.⁶ In other words, any unused balance in a customer’s account was added to the new top-up value and became subject to the new top-up’s active period.

[7] The top-up payments could be made automatically or manually. With the former, customers could preauthorize an automatic top-up of their account by using a debit or credit card when their prepaid account balance fell below a certain value or was about to expire. Manual top-ups (the focus in this case) could be made in one of three ways:

- (i) *Retail purchase/PIN Receipt*: Customers could purchase different top-up values as advertised on prepaid cards displayed by the retailer, and upon payment to the retailer, would receive a receipt containing a unique personal identification number (“PIN Receipt”). When the customer was ready to activate the top-up, she would input the PIN on the brand’s website or her mobile phone (or provide the PIN over the phone to a customer service representative or via an automatic interactive voice recognition system) and the purchased top-up value would be transferred to her prepaid account;
- (ii) *Credit Card*: Customers of all three brands could top up by transferring payments from their credit cards through the brand’s website or by calling the brand’s customer service;
- (iii) *Debit*: Virgin Mobile subscribers could top up their prepaid accounts by transferring payments from their bank accounts through the Virgin Mobile website.

[8] I will use the \$15/30-day top-up as the archetype for my analysis herein. In others words, the core issue is whether Bell was entitled to seize unused balances on Day 31 or was contractually required to wait until Day 32. A similar analysis would obviously apply to the other time periods as listed above.

[9] One final background point. The CRTC enacted a *Wireless Code*,⁷ which came into effect on December 2, 2013. The *Code* required a wireless service provider to “keep open the accounts of customers with prepaid cards for at least seven calendar days following the expiration of an activated card, at no charge, to give the customer more

⁶ The word “top-up” is used to describe both the initial purchase and the subsequent payments.

⁷ *The Wireless Code* (Telecom Regulatory Policy, CRTC 2013-271).

time to “top-up” their account and retain their prepaid balance.”⁸ Each of the three brands amended their respective top-up agreements in November, 2013 to reflect this seven-day period to reinstate expired top-up balances:

Prepaid funds are valid for a specified number of days starting from the time on the day they are added to your account (“Active Period”). Unused funds will expire at the end of the Active Period. Expired Prepaid funds will be restored if you Top Up your account within 7 calendar days of their expiry. If you Top Up your account before your existing Prepaid funds expire (or are used up), then your Top Up will be added to your existing Prepaid funds and the Active Period for the Top Up will apply to the combined amount of Prepaid funds.

[10] The 2013 amendment made clear that unused funds would expire “at the end of the active period.” If this language – “unused funds will expire at the end of the active period” – had been used in the top-up agreements at issue herein, then as counsel for plaintiff acknowledged, “We wouldn’t be here today.” The question for this court is whether, on a reasonable interpretation of the top-up agreements that were in place during the class period herein, the same message was being conveyed. I find that it was.

Analysis

[11] Two preliminary points. First, for ease of reference I have attached a list of the certified common issues in the Appendix. Only common issues A(1) and B(1) are before me for adjudication.⁹ Secondly, I agree with counsel on both sides that these issues can be adjudicated summarily. The issues involve contractual and statutory interpretation and can be determined on the documentary record. In my view, this is a text-book example of a class proceeding where the core common issues can be summarily decided.

The first issue – breach of contract

[12] The following points are not in dispute. At no time during the class period did class members receive anything less than the full period of wireless service for which they had contracted to receive. As a general rule, any unused balances at the end of the active period were forfeited the next day, i.e. on Day 31. And, if contacted by a subscriber, all three brands restored expired prepaid account balances as a courtesy after

⁸ *Ibid.*, s. J.1.i.

⁹ Counsel for the plaintiff agreed that neither the unjust enrichment nor punitive damages issues were being pursued. The last issue, aggregate damages, will be argued at a later date if I find in favour of the plaintiff on the Gift Card question.

the first time they expired following a subscriber's failure to top up their account balance in time.

[13] The only issue in dispute is whether Bell was entitled to seize expired account balances on Day 31 or whether they were contractually obliged to wait until Day 32. Bell says that the top-up agreement was clear and that customers understood that expired balances would be forfeited on Day 31; the plaintiff argues ambiguity and *contra proferentem* and urges a Day 32 interpretation.

The terms of the top-up agreement

[14] Class Members were given copies of the terms of the agreement when they purchased hardware (i.e. a mobile telephone or a SIM card). They were also required to acknowledge their acceptance of the terms when they activated the hardware.

[15] The Bell Mobility and Solo Mobile agreements provided as follows:

Value deposited into your prepaid account is available as prepaid credits for your Service and such credits are non-refundable, non-transferable, and will expire after a specified time period.

[16] The Virgin Mobile agreement provided as follows:

All Top Ups [...] have specified active periods and an expiry date. The active period starts on the date you place the Top Up on your account. Any Top Up balance on your account after the expiry date is forfeited and non-refundable. If you Top Up your account before your existing credit expires or is used up, then your existing credit is added to the new Top Up value and the active period of the earlier Top Up is extended so that the later expiry date of the two Top Ups is valid for the entire amount.

[17] The question before me is this: at the time of contracting, what did the parties reasonably intend and understand by the words "after a specified period" (Bell Mobility and Solo Mobile) or "after the expiry date" (Virgin Mobile)?

[18] It is beyond dispute that contractual words and phrases cannot be read or interpreted in isolation.

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning

of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.¹⁰

[19] There is also no dispute about the basic proposition that regard must be had to the contract as a whole and the surrounding circumstances that gave rise to the contract.¹¹ A court should consider “facts that were known or reasonably capable of being known by the parties when they entered into the written agreement.”¹²

[20] In *Sattva Capital*,¹³ the Supreme Court concluded that “the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction”¹⁴ and that:

The overriding concern is to determine “the intent of the parties and the scope of their understanding” ... To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning ...¹⁵

[21] On the evidence before me, and again, using the 30-day archetype, I find that at the time of contracting the defendant intended and the subscribers understood that the top-up agreement and any unused funds would expire at the end of the active period (i.e. at the end of Day 30) and would be forfeited and seized the next day (i.e. Day 31.) I make this finding based on the following surrounding circumstances (and again, using the 30-day example):

- (i) *Brand brochures and pamphlets available at cell phone retailers:* The brochures and pamphlets stated that a \$15 top-up was subject to a 30 day expiry (“\$15 – 30 day expiry”).

¹⁰ *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.) at 115.

¹¹ *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53 at paras. 46, 47 and 58,

¹² *Dumbrell v. Regional Group of Companies Inc.* 2007 ONCA 59 at paras. 53-54

¹³ *Sattva Capital*, *supra*, note 11.

¹⁴ *Ibid.*, at para. 47.

¹⁵ *Ibid.* (case references omitted).

- (ii) *Pre-paid cards displayed by convenience store retailers:* Bell Mobility and Solo Mobile provided information on the back of the pre-paid card about the various top-up options along with the following statement: "Once funds are deposited into your account, the following terms apply: \$15 valid for 30 days. Unused funds will expire after this period." The Virgin Mobile card put it this way: "Funds will expire 30 days after activation."
- (iii) *PIN Receipts issued by retailers:* When buying a top-up from a retailer, the subscriber received a PIN Receipt for the value/option purchased. The PIN number was needed when the subscriber decided to activate the top-up and start the 30-day active period. While looking for the PIN number, the subscriber would also see the following information on the PIN Receipt: "\$15 valid 30 days" (Bell Mobility); "\$20 Good for 45 days" (Solo Mobile) and "Funds expire, \$15 – 30 days after activation" (Virgin Mobile).
- (iv) *Information available on the brands' websites:* Information on the Bell Mobility, Solo Mobile and Virgin Mobile websites stated that unused pre-paid credits would expire (in the case of the \$15/30 day top-up) at the end of Day 30. For example: "\$15, Expiry (in days): 30."

[22] I therefore conclude that Bell Mobility and Solo Mobile intended and their subscribers understood that unused funds would expire and could be seized "after a specified period" meaning at the end of the active period. I conclude that Virgin Mobile intended and its subscribers understood that unused funds could be seized "after the expiry date" meaning at the end of the active period. In all three cases, at the time of contracting, the defendant intended and the subscribers understood that any unused credits would expire at the end of the active period (Day 30) and could be seized after that date (i.e. on Day 31.)

[23] This is precisely what the defendant told the plaintiff, a Virgin Mobile subscriber, in an email dated October 11, 2011:

Here at Virgin Mobile, we ask our customers to top up before 11:59 PM the evening before their expiry date. This is because the balance can expire at any point during the day of the expiry.

[24] And this how the plaintiff herself understood the situation. In her submissions to the CRTC about the *Wireless Code*, Ms. Sankar acknowledged that as a Virgin Mobile subscriber her January 19, 2012 top-up would expire on February 18, 2012. Because she failed to top up by February 18 (Day 30) her unused balances expired and were forfeited on February 19 (Day 31.)

[25] The top-up agreements are obviously adhesion contracts. But there is no ambiguity in the contractual language at issue herein that requires the application of the *contra*

proferentem doctrine. Applying the established rules of contractual interpretation as amplified by the Supreme Court in *Sattva Capital*, I find that unused credits would expire at the end of the active period (at the end of Day 30) and could be seized at any time on Day 31. I find it reasonable to conclude that the parties understood that the defendant's use of "expiration date" in providing subscriber-account information or in sending reminder messages was intended to mean the date on which unused funds could be seized, i.e. Day 31.

[26] The plaintiff tried to argue that the "expiration date" as stated in the subscriber-account information and as communicated in the defendant's reminder messages should be understood as meaning the day that the unused funds expire. That one had the entire "expiration date" to top up one's account and that any unused funds could only be seized "after the expiry date" i.e. the next day. But this interpretation is misconceived because it focuses on the words "expiration date" and "after the expiry date" in isolation and without regard to what the parties understood these words to mean *at the time of contracting*. Recall again that the surrounding circumstances "are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting."¹⁶ It is my (I think reasonable) interpretation of the language in the top-up agreement in light of the surrounding circumstances already discussed that *at the time of contracting* the subscribers understood that they had 30 days to use or top up the credits in their account or any unused credits would expire (at the end of Day 30) and would be seized (at any time on Day 31.)

[27] It is true that a party's subsequent conduct may be relevant as evidence (by inference) of "what might have been intended at the time of execution."¹⁷ But, in the handful of cases where it has been considered, the court was confronted with "two reasonable alternative interpretations"¹⁸ or was otherwise struggling with some ambiguity in the contractual language that was then clarified by a party's subsequent conduct.¹⁹ Here, I found no ambiguity in the contractual language or in the intentions or understandings of the parties at the time of contracting – "expiry date" was intended and understood to mean "at the end of the 30 day active period." That is, the unused balance would be forfeited and could be seized anytime on Day 31.

¹⁶ *Ibid.*, at para. 60.

¹⁷ McCamus, *The Law of Contracts*, (2005) at 715.

¹⁸ *Re Canadian National Railway and Canadian Pacific Ltd.*, (1978) 95 D.L.R. (3d) 242 at 262 (B.C.C.A.).

¹⁹ *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.*, (1995) 24 O.R. (3d) 97 (Ont. C.A.).

[28] If any class member misunderstood the follow-up “expiration date” messages as meaning that unused funds would expire on Day 31 and would be seized on Day 32, and she relied on said messages to her detriment (by not topping up in time and forfeiting the unused balance) and the defendant did not grant a courtesy extension, then her remedy, as already noted, was two-fold: either a claim in breach of contract arguing promissory estoppel or a claim in misrepresentation. But both of these remedies would require proof of individual reliance and neither would be amenable to a class proceeding. That is why, as I have already noted, neither promissory estoppel nor misrepresentation was alleged by the plaintiff or pursued herein.

[29] The two “breach of contract” common issues that are before me can now be answered based on my interpretation of the language in the top-up agreements and the surrounding circumstances.

Common issue A(1)(a): Do the terms of the contracts between the defendant and class members require the defendant to wait until after the expiry of prepaid credits before the prepaid credits can be seized?

[30] The answer is “yes.” However, as explained above, the top-up agreements expired at end of the 30 Day active period, i.e. midnight, and any unused credits, if not topped up before midnight of Day 30 would be forfeited on Day 31.

Common issue A(1)(b): Did the defendant breach the terms of the contract by seizing prepaid credits before it was entitled to?

[31] The answer is “no.” The unused funds expired at the end of Day 30 and were seized on Day 31. I have found, based on the language of the agreements and the surrounding circumstances, that this was intended by the defendant and understood by the subscribers. The defendant did not breach the terms of the top-up agreements by seizing pre-paid credits before it was entitled to do so.

The second issue: the Gift Card Regulation

[32] Common issues B(1)(a) and (b) apply only to the consumer sub-class and ask about the applicability of the Gift Card Regulation.

[33] The analysis begins with s. 25.3 of the Regulation that prohibits expiry dates on gift card agreements:

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

25.3(2) A gift card agreement with an expiry date on its future performance shall be effective as if it had no expiry date if the agreement is otherwise valid.

[34] Almost everyone has purchased or received a gift card – a cash-equivalent card or voucher that can be redeemed for a supplier’s goods or services and is presented as a gift to a family member or friend. Section 25.3 makes clear that gift card agreements cannot have expiry dates. What is not clear is the reach of the Gift Card Regulation. Is it limited to gift cards as commonly understood or does it also include cards or vouchers that are simply purchased for personal use and not as gifts for third parties?

[35] There is nothing in the language of the Gift Card Regulation that explicitly limits or confines its application to gift cards as commonly understood. Further, as I noted in the certification decision, the definitions of “gift card” and “gift card agreement” suffer from an unfortunate degree of circularity.²⁰ Section 23 of the Regulation defines the terms as follows:

“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.

“Gift card agreement” means a future performance agreement under which the supplier issues a gift card to the consumer and in respect of which the consumer makes payment in full when entering into the agreement.

[36] Every gift card agreement clearly involves future performance as defined in the legislation - that is, a consumer agreement “in respect of which delivery, performance or payment in full is not made when the parties enter the agreement.”²¹ Every gift card agreement is a future performance agreement. But not every future performance agreement is a gift card agreement.²² Here, for example, I am satisfied that the top-up agreements are, at the very least, “future performance agreements.” The defendant’s supply of the purchased wireless service will be provided or delivered over 30 or 60 or more days. The question, however, is whether the top-up agreements are gift card agreements and thus subject to the Gift Card Regulation.

[37] Statutory interpretation requires that the words of an act or regulation be read within their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of the legislature.²³

²⁰ *Supra*, note 1, at para. 38.

²¹ *Consumer Protection Act, 2002*, S.O. 2002, c. 30, s.1.

²² For example, a season’s pass to certain sporting events or a one-year membership to a health club.

²³ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 2 at para. 21.

Evidence of legislative intention can be considered, “provided that it is relevant and reliable.”²⁴ One can also consider statements on government websites.²⁵

[38] In my view, any interpretation of “gift card” and “gift card agreement” must have regard to the deliberate use of the word “gift”. If one interprets the words “gift card” and “gift card agreement” in their grammatical and ordinary sense harmoniously with the scheme of the overall *Consumer Protection Act*, the object of the Act and the intention of the legislature, there is no doubt that the words mean gift cards as commonly understood. That is, cash-equivalent credits or vouchers that are purchased as gifts for third parties (family members and friends) and not simply for personal consumption.

[39] When the Gift Card Regulation was introduced by the Minister of Government Services in September, 2006, the Minister made clear that consumer gift cards meant just that – cards purchased as gifts for family members or friends. The government’s concern was the expiry date that required the gift card to be redeemed for its full value within a specified time frame:

I’m pleased today to tell the House that we will introduce legislation this fall that, if passed, will give the government regulation-making authority over consumer gift cards.

Gift cards are a rapidly growing segment of the retail industry in the province. These cards are purchased in good faith by the people of Ontario for their family and friends. They rightly expect that these cards should retain their full value until they are redeemed, no matter when that might be ...²⁶

[40] The same point – that a gift card is a gift or present that one gives to a family member or friend - was made again by the Minister a month later, in October 2006, when he introduced the bill for second reading:

The second area I want to touch on briefly is gift cards. This is not a completely new phenomenon, but it’s now a very large industry where individuals will go to a store and by [sic] a gift card for somebody; in

²⁴ *Francis v. Baker*, [1999] 3 S.C.R. 250 at para. 35,

²⁵ *Williams (Litigation Guardian of) v. Bowler* (2006), 81 O.R. (3d) 209 at para. 23 (Sup.Ct.).

²⁶ Ontario, Legislative Assembly, *Official Report of Debates* (Hansard), 38th Parl, 2nd Sess, No. 96 (25 September 2006) at 4914-15.

other words, you say, "I want to get \$100 gift card. I'm going to give it to a friend or a family member."²⁷

[41] I also note that the Ontario Ministry of Consumer Affairs' website states that the rules on expiry dates for gift cards do not apply to pre-paid phone cards. Other provincial governments have also taken the same position either because, as they see it, pre-paid phone cards fall within federal jurisdiction (British Columbia, Manitoba, New Brunswick Nova Scotia and Prince Edward Island) or because the pre-paid phone card itself has no expiry date until it is activated for a specific time-limited period (Saskatchewan).

[42] For my part, I prefer to base my interpretation of the words "gift card" and "gift card agreement" on the ordinary and common understanding of these words as reinforced by the strong and unequivocal evidence of legislative intention. I find that the provincial Gift Card Regulation only applies to cards or vouchers (as otherwise defined in the Regulation) that are purchased or acquired as gifts for third parties and not for personal use.

[43] It follows from this that the vast majority of pre-paid cell phone cards and top-up agreements are not subject to the Gift Card Regulation. They are purchased for personal use only and not as gifts for third parties. It is only if a pre-paid cell phone card (i.e. the PIN Receipt) is acquired by someone as a gift for a third party that the top-up agreement can fairly and correctly be described as a "gift card agreement." Under s. 25.3 of the Gift Card Regulation, the PIN Receipt cannot have an expiry date.

[44] However, as we know, none of the defendant's PIN Receipts had expiry dates. They could be redeemed, i.e. activated, at any time without limitation. The PIN Receipts that were purchased as gift cards were not in breach of s. 25.3 because they did not expire. And the fact that the wireless services provided thereafter were time-limited, i.e. after this particular gift card was redeemed (by activation), is not a breach of any provision in the Gift Card Regulation. As noted, section 25.3(1) prohibits an expiry date on the gift card itself and not on the goods or services purchased with that gift card.

²⁷ *Ibid.*, No. 114 (26 October 2006) at 5815. The Minister at one point also advised the legislature that the Gift Card Regulation did not apply to pre-paid phone card because "they are federally regulated and Ontario's new law cannot cover them." *Ibid.*, No. 178A (May 29, 2007) at 9061. For my part, I am not persuaded that the constitutional doctrines of inter-jurisdictional immunity or paramountcy would necessarily preclude a provincial law of general application (i.e. the Gift Card Regulation) from applying to pre-paid phone cards in cases where they were being purchased not for personal use but as gift cards for third parties. But given the outcome herein, I do not have to deal with the constitutional issue.

[45] In sum, I conclude as follows: the Gift Card Regulation only applies to gift cards as commonly understood; the Regulation will apply in any case where the defendant's pre-paid phone card (i.e. a PIN Receipt) is purchased as a gift for a third party; in such cases, however, there is no breach of s. 25.3 of the Gift Card Regulation because none of the defendant's PIN Receipts had expiry dates.

[46] If I am wrong in concluding as I have, and the Gift Card Regulation applies across the board to all top-up agreements, even those for personal use, I would still find for the defendant based on the exemption in s. 25.1(b) of the Regulation. In my view, the top-ups cover "only one specific good or service" namely, access to Bell's wireless network. Without network access, a subscriber cannot use the wireless network to make or receive voice calls, send or receive texts, or send or download data. Voice-calls, text messages and data downloads are not separate services but merely aspects of one service – wireless network access.

[47] I can now decide the common issues relating to the Gift Card Regulation.

Common issue B(1)(a): Are the pre-payments at issue in this action "gift cards", "gift card agreements" and "future performance agreements" within the meaning of the *Consumer Protection Act*, 2002 and O. Reg. 17/05, (the "Gift Card Regulation") and otherwise subject to the Gift Card Regulation?

[48] *Answer:* The pre-payments at issue in this action are all "future performance agreements" but are not, generally speaking, "gift cards" or "gift card agreements" because they are for personal use only and not in the nature of gifts as commonly understood. If a pre-paid cell phone card is purchased as a gift for a third party, it would qualify as a "gift card" and would be subject to the Gift Card Regulation.

[49] **Common issue B(1)(b): Is the expiry and seizure of pre-payment funds contrary to law pursuant to the *Consumer Protection Act* and the Gift Card Regulation?**

[50] *Answer: No.* The Gift Card Regulation is only concerned with expiry dates on the gift card or gift card agreement itself and not with any time-limitations on the services that are provided once the gift card is redeemed or, here, activated. If a PIN Receipt is acquired as a gift for a third party, it is a "gift card" but there is no breach of the Gift Card Regulation because the PIN Receipt itself has no expiry date. It can be redeemed (activated) at any time without limitation.

[51] Given this answer, there is no need to answer common issues B(1)(c) and (d).

Disposition

[52] The common issues are answered in favour of the defendant.

[53] The action against Bell Mobility Inc., in essence, is dismissed.

[54] If the parties cannot agree on costs, I would be pleased to receive brief submissions from the defendant within 10 days and from the plaintiff within 10 days thereafter.



Belobaba J.

Date: February 12, 2015

Appendix: Certified Common Issues

A. For the general class of "persons" (including "consumers")

1. Breach of Contract (General)

- a. Do the terms of the contracts between the defendant and class members require the defendant to wait until after the expiry of prepaid credits before the prepaid credits can be seized?
- b. If so, did the defendant breach the terms of the contract by seizing prepaid credits before it was entitled to?

2. Unjust Enrichment

- a. Has the defendant been enriched by the expiry of the pre-payment funds?
- b. Have the class members suffered a corresponding deprivation?
- c. Is there a juristic reason for the enrichment/deprivation?

3. Punitive Damages

Does the defendant's conduct justify an award of aggravated, exemplary or punitive damages?

B. For the sub-class of "consumers"

1. Breach of Contract (Gift Card Regulation)

- a. Are the pre-payments at issue in this action “gift cards”, “gift card agreements” and “future performance agreements” within the meaning of the *Consumer Protection Act, 2002* and O. Reg. 17/05, (the “Gift Card Regulation”) and otherwise subject to the Gift Card Regulation?
- b. If so, is the expiry and seizure of pre-payment funds contrary to law pursuant to the *Consumer Protection Act* and the Gift Card Regulation?
- c. If so, is it a term of the contracts between the defendant and class members that pre-payment funds not expire?
- d. If so, has the defendant breached its contract with the class members?

2. *Unjust Enrichment*

- a. Has the defendant been enriched by the expiry of the pre-payment funds?
- b. Have the class members suffered a corresponding deprivation?
- c. Is there a juristic reason for the enrichment/deprivation?

3. *Aggregate Damages*

Are the consumer class members entitled to an award of aggregate damages? If so

- a. what is the quantum? and
- b. what is the appropriate method or procedure for distributing the aggregate damages to class members?

4. *Punitive Damages*

Does the defendant’s conduct justify an award of aggravated, exemplary or punitive damages?
