CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-000883-179

No.:

COURT OF APPEAL

JOSEPH BENAMOR, domiciled and residing at 1000, Marlboro, Suite 401, Mount Royal, District of Montreal, QC, H4P 1C1

APPELLANT – PLAINTIFF

v.

AIR CANADA, domiciled and residing at 7373 De La Cote Vertu Blvd West, District of Montreal, QC, H4S 1Z3

RESPONDENT - DEFENDANT

NOTICE OF APPEAL
(Article 352 *C.C.P.*)
Appellant

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1. The appellant Joseph Benamor appeals from a judgment of the Superior Court rendered on January 30, 2019, by the Honourable André Prévost, District of Montreal, refusing an application for class action authorization and appointment of a class representative (attached as **Schedule 1**, hereinafter the "**Judgment**");

2. The judgment is dated January 30, 2019;

3. The duration of the authorization hearing was one day and strictly involved affidavit and transcript evidence, the Plaintiff's application for authorization and exhibits, written outlines filed by the parties, and oral submissions of the parties;

4. At the heart of this case is whether the Honourable Judge erred in his legal interpretation of "prepaid card" under the *Consumer Protection Act* in failing to apply the proper statutory interpretation analysis, an analysis that has been repeatedly confirmed by this Court and the Supreme Court of Canada;

5. The value of the subject matter of the dispute is unknown at this point in time;

6. This file is not confidential;

A. Facts

7. The Defendant Air Canada sells prepaid electronic wallets (hereinafter referred to as a "**Flight Pass**"), which contain "flight credits", where each "flight credit" can:

   a) be redeemed on a *later* date, prior to the expiry date (usually one-year from initial purchase of the electronic wallet), to acquire a particular flight ticket for an actual travel; and

   b) only be redeemed for travel within a specified list of geographical locations (pre-specified at the time of purchase) and the specific travel destinations to be elected by the consumer at the time of exchanging the flight credit for an actual flight ticket;

8. The Defendant's Flight Pass is sold to consumers all over the world and the Plaintiff seeks to represent a class consisting of:

> All consumers worldwide (subsidiarily in Canada or in the province of Québec) who from August 16, 2013, purchased, received, and/or acquired one or more Air Canada Consumer Flight Pass(es) with a specified number of flight credits (as defined in subparagraph 10(a) of this Application for Authorization)

9. It is uncontested that the impugned Flight Passes had expiry dates, additional fees being charged for usage of the prepaid Flight Passes, and that unused flight credits are forfeited to the Defendant upon expiry;[1]

10. The crux of the claim by the Plaintiff, and the proposed class, is that the Defendant's prepaid Flight Passes fall within the broad and all-encompassing definition of "prepaid card" under art. 187.1 of the *Consumer Protection Act*, which would attract the prohibitions against fees and expiry dates under art. 187.3-187.4 *CPA*;

> *187.1. For the purposes of this division, "prepaid card" means a certificate, card or other medium of exchange that is paid in advance and allows the consumer to acquire goods or services from one or more merchants.*
>
> [emphasis added]

11. The Honourable Judge assessed the Plaintiff's application for authorization under art. 575 *CCP* and rendered a decision on art. 575(4) in favour of the Plaintiff[2] and refused the Plaintiff's authorization application based solely on art. 575(2) *CCP*;[3]

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[1] Judgment at para. 23

[2] Judgment at para. 74

[3] Judgment at paras. 58-9

12. While the Honourable Judge did not give explicit reasons for art. 575(1) and art. 575(3) *CCP*, he noted that those two criteria were not seriously contested;[4]

13. However, the Honourable Judge did not opine on the residual issue of whether a class action consisting of both Quebec and non-Quebec residents be permitted when the Defendant is headquartered in Quebec (e.g. art. 3148 *CCQ* applied);

B. Errors of Law

Legal Error in the Statutory Interpretation Analysis

14. In assessing whether the requirement under art. 575(2) was met, the Honourable Judge, in addition to assessing the authorization criteria, engaged in the legal interpretation of whether the Defendant's Flight Pass was a "prepaid card" and answered in the negative;[5]

15. The Honourable Judge's merits legal interpretation, being a question of law, is reviewable by this Court on the correctness standard with no deference owed;

16. The appellant intends to demonstrate that the Honourable Judge failed to apply or even consider the well-known modern principle to statutory interpretation which is:[6]

> *The words of an Act are to be read in 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 Parliament.*

17. Courts in Quebec and also across Canada, in engaging in the above analysis, typically ask three questions in applying this modern principle:[7]

> *1. What is the meaning of the legislative text?*
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> *2. What did the Legislature intend?*
>
> *3. What are the consequences of adopting a proposed interpretation?*

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[4] Judgment at paras. 4 and 60

[5] Judgment at paras. 10, 25, 56, and 58

[6] *Rizzo & Rizzo Shoes Ltd. (Re),* 1998 CanLII 837 (SCC) at para. 21

[7] *Sparks v Holland*, 2019 NSCA 3 at paras. 17-29 citing *Rizzo & Rizzo Shoes Ltd. (Re),* 1998 CanLII 837 (SCC) and Sullivan on the Construction of Statutes, 6th ed (Markham, On: LexisNexis Canada, 2014) at pp. 9-10

18. The Honourable Judge was aware that there was no case law interpreting art. 187.1 *CPA.*[8] However, instead of considering the above modern principle to statutory interpretation (for which no mention was made by the Honourable Judge), the Honourable Judge simply deferred to a secondary doctrine whose source of legal interpretation is questionable at best because there was no applicable jurisprudence at the time;

19. The essence of the Honourable Judge's erroneous interpretation is that a prepaid instrument will be a "prepaid card" (as defined in the *Consumer Protection Act*) **only if** that instrument has a dollar amount marked on the face of the instrument itself. For other prepaid instruments, such as those redeemable for a pre-specified good or service (which may not have a dollar amount marked on its face), the Honourable Judge's conclusion will effectively exclude all such prepaid instruments from the definition of "prepaid card" and gut the protection for a significant category of prepaid instruments that are regularly purchased by consumers;

20. With respect to the first question (i.e. the plain meaning of the legislative text), the Honourable Judge did not consider that the clear language of art. 187.1 *CPA* does not implicitly, nor explicitly, require that the prepaid instrument have "monetary value".[9] Yet, the Honourable Judge stated that an instrument must have "monetary value" in order to be a "prepaid card";[10]

> *187.1. For the purposes of this division, "prepaid card" means a certificate, card or other medium of exchange that is paid in advance and allows the consumer to acquire goods or services from one or more merchants.*
>
> [emphasis added]

21. The Honourable Judge's approach to the clear words in the definition of "prepaid card" amounts to judicially "reading-in" additional elements into a statutory

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[8] Judgment at para. 38

[9] What the Honourable Judge actually meant by "monetary value" is also unclear and also a further error as discussed further below.

[10] Judgment at paras. 43 and 54

definition, an exercise that is not permitted under any theory of statutory interpretation;

22. Thereafter, the Honourable Judge justifies this erroneous interpretation by relying on a single Hansard statement made in passing during the passage of art. 187.1 *CPA*,[11] a fragmented statement that is incomplete and unreliable. The Honourable Judge was, again, engaging in an interpretive approach that warranted specific caution from the Supreme Court of Canada recently;[12]

> [133] In this appeal, the parties have pointed to excerpts from Hansard which they say shed light on the purpose behind the 1993 amendments. Although such evidence may be relevant in limited circumstances (for example, where the minister's speech on second reading addresses the objective behind the specific impugned provision), **reliance upon snippets of parliamentary debates as a means of identifying the legislative objective of a provision is, as a general proposition, a questionable practice.** Statements by individual legislators may not (and often could not) represent the collective intent of the legislature as jointly expressed in the legislative act. As this Court has recognized, "the intent of particular members of Parliament is not the same as the intent of Parliament as a whole" (*Heywood*, at p. 788).
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> ...
>
> [135] And, even if this problem could be overcome, **practical difficulties will persist, going to the reliability of such statements as indicators of legislative purpose**. For example, **statements by individual members may be partial, inchoate, tentative, or simply mistaken.** Further, consistent judicial reliance on Hansard materials may encourage strategic behaviour on the part of legislators, thereby obscuring rather than illuminating any "true" underlying purpose of a legislative enactment. Legislators advocating in favour of a bill may not give sufficient attention to the limited means by which the bill seeks to achieve a stated objective, thereby creating the risk — where relied upon by courts — of supporting unduly broad interpretations of purpose. These concerns, among others, have been canvassed at length by a range of leading scholars (see, e.g., W. N. Eskridge, Jr., *Dynamic Statutory Interpretation* (1994), at pp. 222-23; C. R. Sunstein, "Interpreting Statutes in the Regulatory State", (1989) 103 *Harv. L. Rev.* 405, at p. 433; A. Scalia and B. A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012), at pp. 369-90; J. H. Baker, "Case and Comment: Statutory Interpretation and Parliamentary Intention" (1993), 52 *Cambridge L.J.* 353, at pp. 356-57; J. Waldron, *Law and Disagreement* (2001), at pp. 142-46; and Ekins, *The Nature of Legislative Intent*).
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> [136] **Our Court has also warned about the "inherent unreliability" and "indeterminate nature" of speeches and statements made by legislators as a means of discerning legislative purpose** (*Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at pp. 508-9). While records of these statements are admissible, **we have *repeatedly* emphasized that they will usually be of limited reliability and weight**

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[11] Judgment at para. 45 – (We further note that the secondary doctrine, cited at paras. 42 and 44 of the Judgement likely relied upon the same unreliable Hansard statement to arrive at an erroneous opinion that the Honourable Judge then relied upon).

[12] *Frank v. Canada (Attorney General),* 2019 SCC 1 at paras. 133-136, while the cited paragraphs were found in the dissenting judgment, the majority and the dissent were not in dispute regarding treatment of Hansard statements.

(see, e.g., *Re Upper Churchill Water Rights Reversion Act 1980*, 1984 CanLII 17 (SCC), [1984] 1 S.C.R. 297, at p. 319; *Re Rizzo & Rizzo Shoes Ltd.*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 35; *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20 (CanLII), [2006] 1 S.C.R. 715, at para. 39; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 (CanLII), [2014] 2 S.C.R. 135, at paras. 44-47; Sullivan, at para. 23.88; see also *R. v. Morgentaler*, 1993 CanLII 74 (SCC), [1993] 3 S.C.R. 463, at p. 484).

[emphasis added in bold]

23. With respect to the second question (i.e. what did the legislature intend), the legislature clearly intended to protect consumers from various unfair practices relating to prepaid cards, including:

    i. The practice of expiring prepaid cards, resulting in forfeiting money to the merchant when goods/services were provided; and
    ii. The practice of charging additional fees for use of the prepaid cards, such that the consumer would not get full value for the moneys paid;

24. There was no evidence that the legislature intended to carve out an exception concerning prepaid instruments for redemption towards specific goods or services (such as the Flight Pass). In fact, although the Plaintiff cited various administrative interpretations issued by *Office de la protection du consommateur* (one example below) suggesting the opposite, the Honourable Judge failed to give any consideration to those interpretations nor explained why those interpretations should not be given weight or be applied;

> *Qu'est-ce qu'une carte prépayée?*
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> *Une carte prépayée est un instrument d'échange. Quand vous achetez une carte associée à un bien ou à un service précis, vous savez exactement ce que vous obtiendrez en échange de la carte. Vous ne pouvez pas choisir parmi tous les biens ou les services qu'offre le commerçant.*
>
> *La carte peut vous donner droit, par exemple, à :*
>
> - *un massage de 60 minutes dans un centre de santé;*
> - *une nuit dans une auberge;*
> - *un repas 4 services dans un restaurant;*
> - *un bijou d'un modèle précis, conçu par un designer donné.*
>
> [emphasis added]

25. The Honourable Judge's interpretation also directly conflicts with the *Regulation respecting the application of the Consumer Protection Act*, P-40.1, r. 3, which

confirms (at s. 79.2 of the statutory instrument[13]) that "prepaid card" captures those that are redeemable for a pre-specified good or service;

26. With respect to the third question (i.e. the consequences of the Defendant's interpretation of "prepaid card"), the Honourable Judge appears to have failed to give consideration to the effects of applying a strict narrow interpretation. The result of this interpretation is a judicial immunity for a large category of prepaid cards, which directly conflicts with art. 41 of the *Interpretation Act*, CQLR c I-16:

> *41. Every provision of an Act is deemed to be enacted for the recognition of rights, the imposition of obligations or the furtherance of the exercise of rights, or for the remedying of some injustice or the securing of some benefit.*
>
> *Such statute shall receive such fair, large and liberal construction as will ensure the attainment of its object and the carrying out of its provisions, according to their true intent, meaning and spirit.*
>
> [emphasis added]

27. The Honourable Judge's interpretation also undermines the Supreme Court of Canada's guidance that consumer protection legislation "*should be interpreted generously in favour of consumers*";[14]

28. The Honourable Judge's error in statutory interpretation is overriding because the Honourable Judge's decision that art. 575(2) *CCP* was not satisfied rests entirely on the erroneous conclusion of the Flight Pass not being a "prepaid card";

Legal Error in Not Rendering a Decision on the Remaining Authorization Issues

29. The Honourable Judge made a further legal error, contrary to this Court's guidance, by failing to render an explicit decision for art 575(1) and (3) *CCP*, although those were not seriously contested at the hearing.[15] In any event, this Court can sufficiently review these remaining authorization criteria at the appeal stage;

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[13] The principle that "the exception proves the rule" is demonstrated here as there is an exception made for prepaid cards for redemption of specific goods/services, thereby confirming that such instruments are within the broad definition of "prepaid card".

[14] *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 at para. 37

[15] Judgment at paras. 4 and 60

30. Similarly, the Honourable Judge noted that the parties were in dispute regarding "*la définition du groupe pouvant être articulée de différentes manières*" referring to whether to allow a class consisting of both Quebec and non-Quebec members;

31. In light of the fact that the Defendant failed to dispute the territorial jurisdiction of the Superior Court and the fact that courts in this province (and also other provinces) have repeatedly permitted class actions involving non-residents, this residual issue can be satisfactorily resolved on appeal in the Plaintiff's favour,[16] assuming the authorization criteria under art. 575 is otherwise met;

Legal Error in Weighing Merits Defenses at the Authorization Stage

32. The Honourable Judge made a further error of law in accepting the Defendant's characterization of their Flight Pass[17] (which was in dispute and even contradicted by the Plaintiff's pleadings, other evidence, and also common sense) as conclusively proven when the merits are not to be determined at authorization;

33. The Honourable Judge's approach is clearly contrary to this Court's guidance.[18]

> *[83]* ***By considering grounds of defence at this early stage, the judge thus trenched on the work of the trial judge****. This Court has been clear in its direction to motion judges* ***that the time to weigh such defences as against the allegations in the motion for authorization that are assumed to be true is, as a general rule, at trial****.[28] Speaking of the defence of immunity that the Attorney General sought to raise at authorization in a class action in Carrier,[29] my colleague Guy Gagnon, J.A. wrote for the Court:…*
>
> [emphasis added]

C. Palpable and overriding errors in findings of fact

34. The Honourable Judge committed a palpable and overriding error by failing to ascertain what the common sense understanding of "monetary value" should be

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[16] The Plaintiff notes that the Defendant attempted to introduce an affidavit containing contested facts going to the merits of the law applicable to non-residents. While the Honourable Judge did not refer to this affidavit in his reasons for judgment, it is clear that affidavit is, in essence, contrary to art. 105 and 222 of the *CCP* because the affiant was effectively "shielded" from any examination by not being present in the Court and the affidavit being introduced in the last thirty minutes of the one-day hearing only.

[17] Judgment at paras. 16 and 51

[18] *Sibiga c. Fido Solutions inc.*, 2016 QCCA 1299 at para. 83

and, instead, simply adopted the Defendant's bald assertion that "*Air Canada Flight Passes do not carry a monetary value.*" (emphasis in the original affidavit by Air Canada) as conclusive determination that the Flight Pass had no "monetary value";

35. The Honourable Judge further committed a palpable and overriding error by conclusively deciding that the Defendant's Flight Pass had no "monetary value" when the evidence demonstrated at least an arguable case that moneys were paid in order to acquire those Flight Passes and that the Defendant, who recognized doing such, assigns a dollar value to the Flight Pass (or each individual flight credit). The Defendant asserting that the Flight Passes have no "monetary value" but then accepting such passes in exchange for flight tickets is, at the minimum, bizarre;

36. The Honourable Judge, for all intents and purposes, equated "monetary value" with a novel requirement that the prepaid card must somehow have a dollar amount marked on the face of the instrument, a proposition which is not supported by any statutory text, nor interpretations from the *Office de la protection du consommateur*;

D. Summary

37. The Honourable Judge essentially took a "form over substance approach" that defies how ordinary consumers would understand a "prepaid card" and also undermined various principles of statutory interpretation including:

    i. the principle of broad and generous interpretation in favour of the consumer,
    ii. the principle that the law is "always speaking" and must be interpreted in the present reality of the marketplace, and
    iii. the principle that Court cannot stray from the text of a statute;

38. The Honourable Judge essentially adopted a strict, technical, merchant-friendly interpretation of the *Consumer Protection Act,*[19] at the expense of all consumers;

39. The legislator's clear will to give broad protection to consumers must be given due consideration in any legal interpretation or application of the statutory wording of the *CPA*. An erroneous legal interpretation or application of the *CPA*, a public order

[19] *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1 at paras. 11, 14, and 22-25

statute, carries significant risk of disrupting the marketplace and tilting the balance against the very persons that the *CPA* intended to protect.

E. Conclusions

The appellant will ask the Court of Appeal to:

I. **ALLOW** the appeal;

II. **SET ASIDE** the first instance judgment;

III. **GRANT** the application for class action authorization and appointment of the class representative; and

IV. **CONDEMN** the respondent to pay the appellant's legal costs both in first instance and on appeal.

This notice of appeal has been notified to Air Canada, to Me. Sylvie Rodrigue, Ad. E. (attorney for Air Canada) and to the Office of the Superior Court, District of Montreal.

this February 4, 2019 in Montreal

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Within 10 days after notification, the respondent, the intervenors and the impleaded parties must file a representation statement giving the name and contact information of the lawyer representing them or, if they are not represented, a statement indicating as much. If an application for leave to appeal is attached to the notice of appeal, the intervenors and the impleaded parties are only required to file such a statement within 10 days after the judgment granting leave or after the date the judge takes note of the filing of the notice of appeal. (Article 358, para. 2 C.C.P.).

The parties shall notify their proceedings (including briefs and memoranda) to the appellant and to the other parties who have filed a representation statement by counsel (or a non-representation statement). (Article 25, para. 1 of the Civil Practice Regulation)

If a party fails to file a representation statement by counsel (or non-representation statement), it shall be precluded from filing any other pleading in the file. The appeal shall be conducted in the absence of such party. The Clerk is not obliged to notify any notice to such party. If the statement is filed after the expiry of the time limit, the Clerk may accept the filing subject to conditions that the Clerk may determine. (Article 30 of the Civil Practice Regulation)