

Court File No. C60176

COURT OF APPEAL FOR ONTARIO

BETWEEN:

CELIA SANKAR

Plaintiff (Appellant)

- and -

BELL MOBILITY INC.

Defendant (Respondent)

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE RESPONDENT

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PART I - OVERVIEW

1 The Appellant purchased prepaid wireless service from Virgin Mobile, a Bell Mobility Inc. brand ("Bell"). She paid \$15 for 30 days of service, subject to usage limits. Her breach of contract claim against Bell amounts to saying Bell should have allowed her more than 30 days for her \$15. The Motion Judge correctly dismissed her breach of contract claim.

2 She further seeks to extend regulations applicable to gift card agreements to a service purchased for personal use. The Motion Judge correctly interpreted Ontario's *Gift Card Regulation* based on its express use of the word "gift" and the legislative history which focused on non-personal use. In so doing, he correctly found the *Gift Card Regulation* does not apply to prepaid wireless service purchased for personal use (as opposed to a gift). The Motion Judge further correctly found that, in any event, the *Gift Card Regulation* does not preclude time-based services purchased using a gift card, but if it did prepaid wireless service falls under the single service exemption under the Regulation.

3 The Appellant's appeal fails to demonstrate a palpable and overriding error in the Motion Judge's contractual interpretation of Bell's contracts with its subscribers. She further has not demonstrated the Motion Judge's interpretation of the *Gift Card Regulation* was incorrect.

PART II - THE FACTS¹

A. Top Ups

4 During the Class Period,² Bell offered the service of prepaid access to its wireless telecommunications network via cell phones and smartphones ("**Wireless Service**"). It offered Wireless Service under three brands: Bell Mobility, Solo Mobile and Virgin Mobile ("**Brands**").³

5 Prepaid Wireless Service subscribers made payments in advance to an account opened by the respective Brand corresponding to their mobile phone number ("**Prepaid Account**").⁴ Subscriber payments to a Prepaid Account are known as "top ups" ("**Top Ups**").

B. Duration of Wireless Service Based on Top Ups

6 The period of time for which a Top Up entitled a subscriber to Wireless Service depended on the value of the Top Up and the subscriber's usage of the Wireless Service on a pay-per-use basis (e.g. to make voice calls, send or receive text messages or emails, browse the Internet, or download data).⁵

¹ Except where otherwise noted herein, the Respondent does not agree with the Appellant's summary of facts.

² May 4, 2010 to December 16, 2013

³ Affidavit of Maria Ferranti, sworn December 1, 2014 ("**Ferranti Affidavit**"), paras. 4-6, Respondent's Compendium, Tab 2, pp. 16-17.

⁴ Ferranti Affidavit, paras. 9-10, Respondent's Compendium, Tab 2, p. 17.

⁵ Ferranti Affidavit, paras. 5 and 11, Respondent's Compendium, Tab 2, p. 17.

7 Bell Mobility and Virgin Mobile subscribers could purchase Top Ups ranging from \$15 to \$200 which in turn corresponded to up to 30, 60 or 365 days of Wireless Service. Solo Mobile subscribers could purchase Top Ups ranging from \$20 to \$75 corresponding to up to 45, 75 and 150 days of Wireless Service.⁶

8 The Motion Judge found as an undisputed fact that, “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.”⁷

9 What was disputed was when the Brands were contractually entitled to treat as expired any unused Top Up values in a subscriber’s Prepaid Account.

C. Contractual Terms Regarding Expiry of Prepaid Account Balances

10 During the Class Period, the Brands’ respective contractual terms expressly provided for the expiry of Top Ups. Paragraphs 15 and 16 of the Appellant’s factum excerpt the relevant portions of the Brand’s terms and conditions during the Class Period.⁸ The wording of the Brands’ terms and conditions differed from one another. Specifically, whereas the Virgin Mobile terms refer to an “active period” and “expiry date”, the Bell Mobility/Solo Mobile terms refer only to a “specified period of time”.

11 Each of the Brands amended their contractual terms on November 17, 2013.⁹ The Appellant does not argue that Bell breached the contractual terms and conditions in place from November 17, 2013 onward following those amendments.¹⁰

⁶ Ferranti Affidavit, para. 21, Respondent’s Compendium, Tab 2, pp. 19-20.

⁷ Summary Judgment on Common Issues Reasons dated February 12, 2015 (“Reasons”) at para. 12, Respondent’s Compendium, Tab 1, p. 4.

⁸ Factum of the Appellant (“Sankar Factum”), p. 7.

⁹ Amendments were undertaken by Bell to reflect requirements under the Canadian Radio-Television and Telecommunications Commission (“CRTC”) Wireless Code which came into effect shortly thereafter. The

12 She also no longer asserts that Virgin Mobile breached its terms and conditions throughout the entire Class Period, but only for a subset of that period.¹¹

13 For the remaining Class Period, the Appellant's contractual challenge centres on the meaning of "expiry date" under the Bell Mobility and Virgin Mobile contracts and "specified time period" under the Solo Mobile contract. Neither term is defined in the contracts.

14 However, the information subscribers received prior to making a Top Up clearly set out when Top Ups would expire (by referencing a number of days corresponding to each Top Up value). The Appellant disregards that information. Instead, she argues that "expiry date" and "specified time period" mean some date or time period unknown to subscribers when they bought a Top Up that is later generated by the Brands' internal systems. In her factum, the Appellant also relies on the reminder date communicated to Class Members after a Top Up is activated.

D. Available Information At The Time of Contracting

15 Top Ups could be purchased and then added to a Prepaid Account by one of two means: prepaid cards and credit card/debit payments.¹²

(a) Prepaid Cards

16 The first means of purchasing a Top Up was through prepaid cards. Subscribers could purchase from retailers Top Up values for each of the Brands. These

Wireless Code requires wireless service providers to reinstate expired Top Ups if a subscriber makes a further Top Up within seven days; Ferranti Affidavit, para. 24-26, Respondent's Compendium, Tab 2, p. 21.

¹⁰ Sankar Factum, para. 23, pp. 11-12.

¹¹ See Sankar Factum, para. 23. Specifically, the Appellant does not assert any breach of contract for Virgin Mobile Top Ups expired between May 4, 2010 and September 9, 2010 and after January 28, 2013.

¹² Ferranti Affidavit, para. 14, Respondent's Compendium, Tab 2, p. 5.

Top Up values, along with the corresponding number of days before expiry, were printed on prepaid cards displayed by retailers.

17 The prepaid cards displayed by retailers expressly stated that Top Up values would expire after a specified number of days:

(i) Bell Mobility Prepaid Card

- Once funds are deposited into your account, the following terms apply:
 - \$15 valid for 30 days
 - \$25 valid for 60 days
 - \$50 valid for 60 days
 - \$100 valid for 365 days
- Unused funds will expire after this period
- Your new balance and expiry date will be reflected on your account within 48 hours of adding the funds.

This voucher is non-refundable. ... Subject to terms of service. For details visit bell.ca/wirelessprepaid.¹³

(ii) Solo Mobile Prepaid Card

- Once funds are deposited into your account, the following terms apply:
 - \$20 valid for 45 days
 - \$30 valid for 75 days
 - \$75 valid for 150 days
- Unused funds will expire after this period
- Your new balance and expiry date will be reflected on your account within 48 hours of adding the funds.

This voucher is non-refundable. ... Subject to terms of service. For details visit solomobile.ca.¹⁴

¹³ Ferranti Affidavit, para. 41 and Exhibit "I-i", Respondent's Compendium, Tab 2, pp. 25 and 81.

¹⁴ Ferranti Affidavit, para. 42 and Exhibit "I-ii", Respondent's Compendium, Tab 2, pp. 25-26 and 92.

(iii) Virgin Mobile Prepaid Card

\$15 Prepaid Card: "Funds expire 30 days after activation"

\$25 Prepaid Card: "Funds expire 60 days after activation"

\$50 Prepaid Card: "Funds expire 60 days after activation"

\$100 Prepaid Card: "Funds expire 365 days after activation"¹⁵

18 The Appellant has acknowledged that Class Members who purchased a Top Up based on a prepaid card would receive this expiry information printed on cards.¹⁶

19 A prepaid card is presented to a retailer's cashier. Upon payment to the retailer, a subscriber would receive a receipt with an activation code/unique personal identification number ("PIN") necessary to later activate the Top Up whenever a subscriber decided to start receiving Wireless Service.¹⁷ The receipt sets out the period of time each Top Up value remains valid before expiring:¹⁸

(iv) Bell Mobility Receipt

\$15.00 valid 30 days

\$25.00 valid 60 days

\$50.00 valid 60 days

\$100.00 valid 365 days

The PIN expiry date will be updated within 48 hours. Bell Mobility vouchers are non-refundable and are subject to terms and conditions.

(v) Solo Mobile Receipt

\$20.00 - Good for 45 days

\$30.00 - Good for 75 days

\$75.00 – Good for 150 days

¹⁵ Ferranti Affidavit, para. 43 and Exhibit "I-iii", Respondent's Compendium, Tab 2, pp. 26 and 94.

¹⁶ Ferranti Affidavit, para. 44, Respondent's Compendium, Tab 2, p. 26.

¹⁷ Ferranti Affidavit, para. 14(a), Respondent's Compendium, Tab 2, p. 18.

¹⁸ Exhibit "J" to Ferranti Affidavit, Respondent's Compendium, Tab 2, p. 96.

Thanks from Solo Mobile

Legal - ... Your account will be updated within 48 hours. No refund or replacement for lost or stolen PIN or unauthorized use of the service. Subject to terms of service. For details visit www.solomobile.ca.

(vi) Virgin Mobile Receipt

Funds expire,

\$15 – 30 days

\$25 – 30 days

\$50 – 60 days, and

\$100 – 365 days after activation.

20 To activate the Top Up in their Prepaid Account, the subscriber must look on her receipt for the PIN. Accordingly, a subscriber would see the expiry information printed on the PIN receipt when she chose to activate the Top Up.

(b) Credit Card / Debit Payment

21 Subscribers of all three Brands could also make a Top Up using their credit card, or in the case of Virgin Mobile subscribers, by also transferring payments directly from their bank account.¹⁹

22 Before a subscriber decided whether to make a Top Up using these methods, the expiry date associated with different Top Up values was disclosed by the Brands through various different means.

23 Bell Mobility's brochures available at retailers set out the expiry dates applicable to Top-Ups as follows:²⁰

¹⁹ Ferranti Affidavit, para. 14, Respondent's Compendium, Tab 2, p. 18. Top Ups could also be made on a pre-authorized basis automatically. The Action does not concern automatic Top Ups.

²⁰ Ferranti Affidavit, para. 48 and Exhibit "K", Respondent's Compendium, Tab 2, p. 27.

TOP-UP AMOUNTS:

\$15	\$25	\$50	\$100
30-day expiry	60-day expiry	60-day expiry	365-day expiry

24 Each of the Brand's respective websites included the expiry dates applicable to Top-Ups as follows:

(i) Bell Mobility

You must use your prepaid minutes before they expire. ...

Card Rate	Expiry
\$15	30 days
\$25	60 days
\$50	60 days
\$100	365 days ²¹

(ii) Solo Mobile

... Top up before your funds expire and carry over your unused minutes.

Card Rate	Expiry
\$20	45 days
\$30	75 days ²²

(iii) Virgin Mobile

Top-Up Cards or Cash	Top Up Value Credit or Debit	Expiry (In Days)
\$100	\$100 - \$200	365
\$ 50	\$50 - \$99	60
\$ 25	\$25 - \$49	60
\$ 15	\$15 - \$24	30
Starter Credit	\$5	30 ²³

²¹ Ferranti Affidavit, para. 38 and Exhibit "G", Respondent's Compendium, Tab 2, pp. 24-25 and 77.

²² Ferranti Affidavit, para. 39 and Exhibit "H", Respondent's Compendium, Tab 2, pp. 25 and 79.

²³ Ferranti Affidavit, paras. 35-36 and Exhibit "F", Respondent's Compendium, Tab 2, pp. 23-24 and 75.

25 In addition to directing subscribers to the Brand's website, Bell Mobility's and Solo Mobile's terms and conditions provided customer service phone numbers for subscribers to speak to a representative for further information.²⁴ Customer service representatives were trained to provide the same expiry period information as noted above.²⁵

E. Expiry Date Assigned by Bell and Expiry of Top Ups

26 Throughout the Class Period, unused Top Up balances expired after the expiry period stated on the Brands' prepaid cards, PIN receipts, brochures and websites. Indeed, it was the Brand's practice to expire unused Top Ups one or two days later than the period stated on prepaid cards, PIN receipts, brochures and websites.²⁶ The Appellant does not dispute this.²⁷

27 More specifically, Virgin Mobile's internal system treated unused Prepaid Account balances as expired as follows:

- (a) Up to and including September 9, 2010, between midnight and 4:00 a.m. on the second day after the time period indicated on prepaid cards, PIN receipts and the Virgin Mobile website (32nd, 62nd and 367th day); and
- (b) From September 10, 2010 onward, the first day after the time period indicated on prepaid cards, PIN receipts and the Virgin Mobile website (31st, 61st and 366th day) at the same time of day as when the most recent Top Up was made.²⁸

²⁴ Ferranti Affidavit, para. 29, Respondent's Compendium, Tab 2, p. 22.

²⁵ Ferranti Affidavit, para. 102(f) and Exhibit "W", Respondent's Compendium, Tab 2, p. 39 and 126-148.

²⁶ Ferranti Affidavit, para. 50, Respondent's Compendium, Tab 2, p. 27.

²⁷ See "When Funds Seized" column, Sankar Factum, para. 23, pp. 11- 12.

²⁸ Ferranti Affidavit, para. 51, Respondent's Compendium, Tab 2, pp. 27-28.

28 Bell Mobility and Solo Mobile's internal systems treated unused Prepaid Account balances as expired as follows:

- (a) Up to and including January 31, 2011, at the end of the first day after the end of the time period indicated on prepaid cards, PIN receipts, Bell Mobility brochures and Bell Mobility and Solo Mobile's respective websites (31st/46th; 61st/76th and 366th/151st day); and
- (b) From February 1, 2011 onward, on the first day after the time period indicated on prepaid cards, PIN receipts, Bell Mobility brochures and Bell Mobility and Solo Mobile's respective websites (31st/46th; 61st/76th and 366th/151st day) at the same time of day as when the most recent Top Up was made.²⁹

29 Subscribers of any of the Brands could avoid the expiry of their Prepaid Account balance by making a new Top Up before their balance expired. In such case, any unused balance was "carried over" and became valid for the same time period as the new Top Up.³⁰

30 In addition, if a subscriber missed making a Top Up in time to carry over any unused balance, each Brand provided, as a one-time courtesy upon request, restoration of the expired Top Up balances.³¹

F. Expiry Date Reminders Communicated After Contract Formed

31 The Appellant's breach of contract allegation (as summarized in the fifth and sixth columns of the charts at paragraph 23 of her factum) is based on the expiry date

²⁹ Ferranti Affidavit, para. 52, Respondent's Compendium, Tab 2, p. 28.

³⁰ Ferranti Affidavit, para. 53, Respondent's Compendium, Tab 2, p. 28.

³¹ Ferranti Affidavit, para. 57, Respondent's Compendium, Tab 2, p. 29.

“assigned” by Bell’s systems and subsequently communicated in reminders to subscribers. That specific date is only generated after a subscriber has purchased and activated a Top Up and hence after entering into a contractual relationship with Bell.

32 Using the example of a \$15 Bell Mobility or Virgin Mobile Top Up that was activated by a subscriber at 10:00 a.m.,³² column three of the charts at paragraph 23 of the Appellants’ factum summarizes the expiry date (and time) stated in reminder notices available to and/or sent to subscribers through the different communications methods used by Bell.³³

33 For Solo Mobile, the minimum Top Up was \$20 for 45 days of Wireless Service. Solo Mobile prepaid cards, PIN receipts and website identified a \$20 Top Up as expiring after 45 days. Accordingly, for purposes of the chart at paragraph 23 of the Appellants’ factum references to 30th day/30 days and 31st day/31 days should instead be to 45th day/45 days and 46th day/46 days.³⁴

³² Columns 3 and 4 of the chart at paragraph 23 of the Sankar Factum are based on an activation by a subscriber at 10:00 a.m. See paragraph 27 above for the time when Bell’s systems treated unused Top Ups as expired. See paras. 104 and 107, Ferranti Affidavit for times which would have been communicated to subscribers in reminder notices.

³³ These methods included:

- (a) A text message with reminder information was sent to subscribers of all three Brands’ Mobile Phone within three days of the end of the Active Period Extension;
- (b) Bell Mobility and Solo Mobile sent “whisper messages” (i.e. a voice message) with reminder information that subscribers would hear if they made a call on their Mobile Phone within the three days before the end of the Active Period Extension;
- (c) Reminder information was available to subscribers of all three Brands via an application on their Mobile Phone at any time during the Active Period;
- (d) Reminder information was available to subscribers of all three Brands at their online account on their Brand’s website; and
- (e) Reminder information was also available to subscribers of all three Brands using their Brand’s automated interactive voice response (IVR) system.

See Ferranti Affidavit, para. 102, Respondent’s Compendium, Tab 2, pp. 38-39.

³⁴ Ferranti Affidavit, paras. 21, 104(b) and 107(c), Respondent’s Compendium, Tab 2, pp. 19-20, 43 and 47.

G. The Appellant

34 As summarized below, in all instances, the Appellant's Top Ups expired after the number of days stated on Virgin Mobile prepaid cards, PIN receipts and website. The Appellant's Top Ups further expired after the date and time "assigned" by Virgin Mobile's system.

35 The Appellant purchased a Virgin Mobile prepaid mobile phone on April 28, 2011. At that time, she received a \$15 prepaid credit in her Prepaid Account. She acknowledges that the sales person told her, and that her understanding was, that she would have to make a Top Up every month to keep her balance.³⁵

36 Despite that understanding, the Appellant failed to Top Up her Prepaid Account and, on the 31st day following the activation of her \$15 credit (i.e. May 29, 2011), her unused Prepaid Account balance expired. On June 3, 2011, Virgin Mobile reinstated the Appellant's expired Prepaid Account balance for an additional period as a courtesy after she contacted Virgin Mobile concerning the expiry of her unused Prepaid Account balance.³⁶

37 During the Class Period, the Appellant Topped Up her Prepaid Account a dozen times,³⁷ carrying over unused Prepaid Account balances on five occasions.

38 On all seven of the occasions her Prepaid Account balance was treated as expired, Virgin Mobile did not forfeit her unused balance until after both the expiry period disclosed on Virgin Mobile's prepaid cards, PIN receipts and website and the date and time Virgin Mobile's internal system treated the Top Up as expired:

³⁵ Ferranti Affidavit, para. 60, Respondent's Compendium, Tab 2, pp. 29-30; quoting from the transcript of the cross-examination of Celia Sankar from the certification motion, qq. 129 and 133.

³⁶ Ferranti Affidavit, paras. 61-63, Respondent's Compendium, Tab 2, p. 30.

³⁷ Ferranti Affidavit, para. 94, Respondent's Compendium, Tab 2, p. 34-36.

Date and time of Top Up (Top Up Amount)	Virgin Mobile Expiry Period (No. of Days) ³⁸	When Virgin Mobile "Assigned" Balances to Expire ³⁹ (No. of Days)	When Forfeiture Occurred ⁴⁰ (No. of Days)	Forfeited Unused Balance
August 3/11 8:28 (\$15)	30 days	Sept. 3/11 8:28 (31 days)	Sept. 3/11 8:36 (31 days)	\$40.80
Jan. 19/12 12:59 (\$15)	30 days	Feb. 19/12 12:59 (31 days)	Feb. 19/12 13:18 (31 days)	\$58.60
April 29/12 10:27 (\$15)	30 days	May 30/12 10:27 (31 days)	May 30/12 11:00 (31 days)	\$3.55
June 15/12 7:40 (\$70)	60 days	Aug. 15/12 7:40 (61 days)	Aug. 15/12 8:01 (61 days)	\$59.85
Nov. 20/12 16:06 (\$15)	30 days	Dec. 21/12 16:06 (31 days)	Dec. 21/12 17:26 (31 days)	\$14.95
Apr. 19/13 16:03 (\$15)	30 days	May 19/13 16:03 (31 days)	May 19/13 16:11 (31 days)	\$15.00
Dec. 2/13 13:56 (\$15)	30 days	Jan. 2/14 13:56 (31 days)	Jan. 2/14 14:59 (31 days)	\$15.00

39 Moreover, prior to March 1, 2012 when Virgin Mobile's reminder notifications only included dates, the Appellant's prepaid Account Balances were all forfeited after the dates in IVR reminder notifications.⁴¹ On and after March 1, 2012, when Virgin Mobile's reminder notifications specified both a date and time, the Appellant's Prepaid

³⁸ Ferranti Affidavit, para. 21, Respondent's Compendium, Tab 2, pp. 19-20.

³⁹ Ferranti Affidavit, para. 51(b), Respondent's Compendium, Tab 2, p. 28.

⁴⁰ Ferranti Affidavit, para. 94, Respondent's Compendium, Tab 2, pp. 34-36.

⁴¹ Ferranti Affidavit, paras. 49 and 107(a), Respondent's Compendium, Tab 2, pp. 27 and 44-46.

Account balances were all forfeited after the date and times specified in those reminders:⁴²

Date and time of Top Up (Top Up Amount)	Virgin Mobile Expiry Period (No. of Days)	Reminder Notifications ⁴³ (No. of Days)	When Forfeiture Occurred ⁴⁴ (No. of Days)	Forfeited Unused Balance
August 3/11 8:28 (\$15)	30 days	Sept. 2/11 (IVR) (30 days) Sept. 3/11 (website, mobile phone and text message) (31 days)	Sept. 3/11 8:36 (31 days)	\$40.80
Jan. 19/12 12:59 (\$15)	30 days	Feb. 18/12 (IVR) (30 days) Feb. 19/12 (website, mobile phone and text message) (31 days)	Feb. 19/12 13:18 (31 days)	\$58.60
April 29/12 10:27 (\$15)	30 days	May 29/12 (IVR) (30 days) May 30/12 @ 10:27 (website) (31 days) May 30/12 (mobile phone and text message) (31 days)	May 30/12 11:00 (31 days)	\$3.55
June 15/12 7:40 (\$70)	60 days	Aug. 14/12 (IVR) (60 days) Aug. 15/12 @ 7:40 (website and text) (61 days) Aug. 15/12 (mobile phone) (61 days)	Aug. 15/12 8:01 (61 days)	\$59.85

⁴² Ferranti Affidavit, para. 94, Respondent's Compendium, Tab 2, pp. 34-36.

⁴³ Ferranti Affidavit, paras. 104(a) and 107(a), Respondent's Compendium, Tab 2, pp. 39-42 and 44-46.

⁴⁴ Ferranti Affidavit, para. 94, Respondent's Compendium, Tab , pp. 34-36.

Date and time of Top Up (Top Up Amount)	Virgin Mobile Expiry Period (No. of Days)	Reminder Notifications ⁴³ (No. of Days)	When Forfeiture Occurred ⁴⁴ (No. of Days)	Forfeited Unused Balance
Nov. 20/12 16:06 (\$15)	30 days	Dec. 20/12 (IVR) (30 days) Dec. 20/12 @ 16:06 (website and mobile phone) (30 days) Dec. 21/12 @16:06 (text) (31 days)	Dec. 21/12 17:26 (31 days)	\$14.95
Apr. 19/13 16:03 (\$15)	30 days	May 18/13 (IVR and text) (30 days) May 18/13 @16:03 (website and mobile phone) (30 days)	May 19/13 16:11 (31 days)	\$15.00
Dec. 2/13 13:56 (\$15)	30 days	Jan. 1/14 (IVR) (30 days) Jan. 1/14 @ 11:59:59 p.m. (website and mobile phone) (30 days) Jan. 1/14 @ midnight (text)	Jan. 2/14 14:59 (31 days)	\$15.00

40 In submissions to the CRTC made in connection with public hearings leading to the Wireless Code (“Appellant’s Wireless Code Submissions”), the Appellant acknowledged that, according to Virgin Mobile’s contractual terms and conditions, her August 3, 2011 Top Up was to expire on September 2, 2011.⁴⁵ Virgin Mobile expired the unused portion of that Top Up after that date on September 3, 2011.⁴⁶

41 When the Appellant contacted Virgin Mobile to complain and request that her expired Prepaid Account balance be restored, she asserted that Virgin Mobile acted contrary to its reminder notification that her balance would expire on September 3, 2011 by not waiting until the very end of September 3, 2011 before expiring her balance. She

⁴⁵ Ferranti Affidavit, paras. 67-68, and Exhibit “L”, Respondent’s Compendium, Tab 2, pp. 31.

⁴⁶ Ferranti Affidavit, para. 69, Respondent’s Compendium, Tab 2, p. 31.

was told by Virgin Mobile representatives that subscribers are to Top Up before the date communicated in reminder notices and subscribers did not have until the end of the day referenced in the reminder notice to Top Up.⁴⁷

42 Despite having been previously advised of Virgin Mobile's position as to when Top Ups must be made to avoid being forfeited, the Appellant failed to make a timely Top Up to carry over her unused balances associated with her three January 19, 2012 Top Ups. As part of the Appellant's Wireless Code Submissions to the CRTC, the Appellant stated that under Virgin Mobile's contractual terms and conditions her January 19, 2012 Top Ups would expire on February 18, 2012.⁴⁸ She failed to Top Up by the end of February 18, 2012. On February 19, 2012 her unused balances expired and were forfeited.⁴⁹

43 The five remaining forfeitures of the Appellant's unused Prepaid Account balances have all occurred since the Appellant commenced this Action, wherein she pleaded that Virgin Mobile \$15 Top Ups purport to be subject to a 30 day expiry and Tops Up between \$25 - \$99 purport to be subject to a 60 day expiry.⁵⁰ Four of the remaining forfeitures were of \$15 Top Ups and occurred after 30 days. Forfeiture of the Appellant's June 15, 2012 Top Up of \$70 occurred after 60 days. All five of these forfeitures occurred when the Appellant had access to reminders indicating both the date and time when unused Prepaid Account balances would be treated as expired, and were forfeited after the stated date and time.⁵¹

⁴⁷ Ferranti Affidavit, paras. 70 – 75 and Exhibits "M" and "N", Respondent's Compendium, Tab 2, pp. 31-32, 111 and 117.

⁴⁸ Ferranti Affidavit, para. 79 and Exhibit "L", Respondent's Compendium, Tab 2, pp. 32-33 and 104.

⁴⁹ Ferranti Affidavit, para. 80, Respondent's Compendium, Tab 2, p. 33.

⁵⁰ Ferranti Affidavit, para. 82 and Exhibit "O", Respondent's Compendium, Tab 2, pp. 33 and 122-123.

⁵¹ Ferranti Affidavit, paras. 94 and 107(a)(iii)-(vi), Respondent's Compendium, Tab 2, pp. 34-36 and 44-47.

H. Gift Card Regulation

44 All of the Appellant's Top Ups were solely for her own personal use.

45 In advising the Ontario Legislature of the government's plans to enact legislation that would grant the government regulation-making authority over gift card agreements, the then Minister of Government Services described the focus of the regulation-making authority as being gift cards purchased for family and friends:

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 ...⁵²

46 When the bill was introduced for its second reading, the Minister again referred to a gift card as something one gives to a friend and family member rather than for personal use:

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 other words, you say, "I want to get \$100 gift card. I'm going to give it to a friend or a family member."⁵³

⁵² Affidavit of Lisa Hagglund, sworn November 24, 2012 ("**Hagglund Affidavit**"), para. 6 and Exhibit "B", Respondent's Compendium, Tab 3, pp. 150 and 160-161.

⁵³ Hagglund Affidavit, para. 7 and Exhibit "C" (excerpt), Respondent's Compendium, Tab 3, pp. 150-151 and 165.

PART III - ISSUES AND THE LAW

A. Summary of Bell's Position on Issues Under Appeal

47 Bell submits that the Motion Judge did not err in his interpretation of either the Virgin Mobile contract or the Bell Mobility/Solo Mobile contracts. Further, Bell submits that the Motion Judge correctly found no breach of the *Gift Card Regulation*.

B. Standard of Review

48 Questions of contractual interpretation attract a deferential standard of review. While Bell does not dispute the Appellant's submissions at paragraph 26, they are incomplete in failing to include the Supreme Court of Canada's direction that, "Courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation" since, among other considerations, "the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific."⁵⁴ Accordingly, the Supreme Court of Canada held, " ... that the circumstances in which a question of law can be extricated from the interpretation process will be rare."⁵⁵

49 Bell agrees that a standard of correctness applies to statutory interpretation.

C. Issue One: Bell's Expiry Practices Did Not Breach the Brands' Terms and Conditions

50 The Motion Judge correctly considered what expiry information was known or ought to have been known to Class Members at the time they purchased a Top Up (and hence entered into a contractual relationship with Bell). In doing so, he followed established contract interpretation principles.

⁵⁴ *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] S.C.J. No. 53 at paras. 52-55, Respondent's Book of Authorities ("**Bell Authorities**"), Tab 7.; *Martenfeld v. Collins Barrow Toronto LLP*, 2014 ONCA 625 at para. 41, Bell Authorities, Tab 6.

⁵⁵ *Ibid.*

51 In particular, this Court has previously directed that the “facts that were known or reasonably capable of being known by the parties when they entered into a written agreement” should be considered in interpreting the words of a contract. Indeed, the Supreme Court of Canada has noted that, “The meaning of words is often derived from a number of contextual factors”.⁵⁶

52 This Court has further accepted that contractual terms found in collateral documents are binding, even when not read by a customer, when the other party has taken reasonable steps to bring those terms to the customer’s attention.⁵⁷

53 Accordingly, it was appropriate for the Motion Judge to have considered the expiry information on prepaid cards, PIN receipts, brochures and the Brands’ respective websites in interpreting the meaning of “specified time period” in the Bell Mobility and Solo Mobile terms and conditions and the meaning of “expiry date” in the Virgin Mobile terms and conditions.

54 With that context, the Motion Judge found there was no ambiguity and that a reasonable interpretation of the contractual terms was that with a \$15 Top Up, subscribers had 30 days to use or further top up their Prepaid account, otherwise any unused Top Ups would expire (at the end of Day 30) and would be seized (at any time on Day 31).⁵⁸

55 Effectively, the Appellant asks this Court to stray from its own contract interpretation principles and instead ignore the surrounding context and corollary documents to a subscriber’s purchase of a Top Up. The various errors asserted by the

⁵⁶ *Dumbrell v. Regional Group of Companies Inc.* 2007 ONCA 59 (“*Dumbrell*”) at paras. 53-54, Bell Authorities, Tab 4. *Saltva, supra*, at paras. 47-48.

⁵⁷ *Craven v. Strand Holidays (Canada) Ltd.* (1982), 40 O.R. (2d) 186 at pp. 193-194 (C.A.), leave to appeal to SCC refused, [1983] SCCA No. 407 (“*Craven*”), Bell Authorities, Tab 3.

⁵⁸ Reasons at paras. 21 – 27, Respondent’s Compendium, Tab 1, pp. 6-8.

Appellant (summarized below) do not withstand an actual review of the Motion Judge's reasons and/or existing authority. The Motion Judge's reasons do not contain any error, let alone a palpable and overriding error.

i. A review of the surrounding circumstances should be a factor in interpreting contracts of adhesion

56 The surrounding circumstances considered by the Motion Judge were corollary documents setting forth when different Top Up values expire. As noted, this Court has previously held that corollary documents setting forth terms may be considered in interpreting a consumer contract.⁵⁹ Indeed, the Appellant's own interpretation requires subscribers to look at communications outside the express Virgin Mobile terms and conditions to interpret the meaning of "expiry date".

57 Pricing and other details of consumer transactions are frequently set out in corollary documents such as marketing materials. The Appellant's submission ignores the reality of consumer transactions by submitting that courts should ignore pricing and other information reasonably available to consumers before they decide to make a purchase.

58 The Alberta and single Ontario authorities cited by the Appellant are out of step with the prevalent opinion of Ontario courts that the factual matrix is to be considered in interpreting contracts of adhesion.⁶⁰ The fact that a contract is a contract of adhesion is itself a surrounding circumstance.

⁵⁹ *Craven, supra*, Bell Authorities, Tab 3.

⁶⁰ See e.g. *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252 at para. 416, appeal dismissed 2012 ONCA 867, Bell Authorities, Tab 5; *Clarke v. Alaska Canopy Adventures LLC*, 2014 ONSC 6816 at paras. 33-34, Bell Authorities, Tab 2.

ii. The Motion Judge's analysis of the surrounding circumstances did not lead him to overlook the express wording of the Virgin Mobile terms and conditions

59 There is no foundation to the Appellant's submission that the Motion Judge ignored the express words of the Virgin Mobile contract. The reasons show that the Motion Judge took into account the words "active period" and "expiry date" in the terms and conditions. His ultimate interpretation is a question of mixed fact and law that is reviewable on a palpable and overriding error standard.

60 There is nothing inconsistent between the express words of the Virgin Mobile terms and conditions and interpreting "expiry date" as meaning the last day / end of the active period. Indeed, common sense suggests the expiry date will correspond with the end of the active period. Moreover, the evidence of what subscribers were told about when Top Ups would expire at the time of their decision to purchase a Top Up (i.e. on prepaid cards, PIN receipts, brochures and website information) affirms that common sense interpretation.

61 The Motion Judge's analysis did not "merge" the terms "active period" and "expiry date", as submitted by the Appellant, but merely interpreted each term in a manner harmonious with the another.

iii. The Motion Judge did not disregard communications of expiry dates to Class Members

62 The Motion Judge did not ignore Bell's reminder notifications and account summary information communicated subsequent to a Top Up purchase. However, the Motion Judge correctly noted that a contract is to be interpreted as of the date it was

made,⁶¹ and that there was no ambiguity in the contractual language that necessitated reference to subsequent conduct.⁶² In *Dumbrell*, this Court commented that a court is to examine “the facts that were known or reasonably capable of being known by the parties when they entered into the written agreement.”⁶³

63 Far from ignoring Bell’s reminder notifications and account summary information, the Motion Judge correctly found the Appellant’s argument to be misconceived because it interpreted the contract in isolation and without regard to the facts known or facts that reasonably ought to have been known by the parties at or before the date of contracting.⁶⁴ There is no palpable and overriding error in the Motion Judge’s interpretation.

64 The same reasoning applies to the Appellant’s submission that the Motion Judge erred in not finding the surrounding circumstances to favour the Appellant’s interpretation. The Appellant’s interpretation runs counter to the “practical, common-sense approach not dominated by technical rules of construction”⁶⁵ affirmed by the Supreme Court of Canada in *Sattva*.

65 A Virgin Mobile class member who purchased a \$15 Top Up by means of a prepaid card would have seen on the prepaid card that “Funds expire 30 days after activation”. When that class member went to activate her Top Up, she would need the activation code (or PIN) on the PIN receipt which included the statement that “Funds expire, \$15 – 30 days.” Consistent with the Virgin Mobile terms and conditions, Virgin Mobile’s internal system treated any unused portion of that Top Up as expired after 30

⁶¹ Reasons at para. 26, Respondent’s Compendium, Tab 1, p. 8.

⁶² Reasons at para. 27, Respondent’s Compendium, Tab 1, p. 8.

⁶³ *Dumbrell, supra*, at para. 53-54, Bell Authorities, Tab 4.

⁶⁴ Reasons at para. 26, Respondent’s Compendium, Tab 1, p. 8.

⁶⁵ *Sattva, supra*, at para. 47, Bell Authorities, Tab 7.

days. It is within this overall context that the Motion Judge held, "I find it reasonable to conclude the parties understand 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."⁶⁶

66 In contrast, the Appellant's submission leads to the commercially untenable result that Bell can never remind subscribers of the actual date unused Top Ups would expire. This is apparent from the Appellant's submission that Virgin Mobile breached its terms and conditions when it expired unused Top Ups between May 4, 2010 and January 31, 2011 because it forfeited unused Top Ups at 11:59:59 p.m. on the same date it communicated in reminder notices (i.e. 0.01 second too soon). According to the Appellant, the balances could only expire the day following the date stated on reminder notices. But according to the Appellant's position, if Bell had communicated the following day as the expiry date, it would not have been allowed to expire Top Ups on that date either, because Bell is only permitted to treat balances as expired on the day following the one communicated: in effect, Bell would never be able to tell its subscribers the actual date of expiration.

67 The Motion Judge observed that the communications subscribers received after they entered into a Top Up agreement *might* give rise to causes of action for negligent misrepresentation or promissory estoppel but such claims were not pursued by the Appellant because of the need to establish individual reliance.⁶⁷ The Appellant's submission that the Motion Judge ignored these communications because he viewed them as only relevant to claims for negligent misrepresentation or promissory estoppel

⁶⁶ Reasons at para. 25, Respondent's Compendium, Tab 1, pp. 7-8.

⁶⁷ Reasons at paras. 4 and 28, Respondent's Compendium, Tab 1, pp. 2 and 9.

is not borne out by the reasons which show these communications were considered and reconciled within the fuller factual context in his breach of contract analysis.⁶⁸

68 It is simply incorrect to suggest, as the Appellant does in her factum (see paragraph 8), that the Motion Judge misconstrued the nature of her claim to find it contained a reliance element. Rather, the Motion Judge clearly identified that the class proceeding was certified as a breach of contract case and not an action which required proof of individual reliance.⁶⁹

iv. The Motion Judge did not interpret the Brands' terms and conditions by reading in language from the November 2013 amendments to Bell's contractual terms

69 There is no foundation to the Appellant's submission on this issue. The Motion Judge made clear in his reasons that the interpretation issue before him was with respect to the agreements that were in place during the class period.⁷⁰ It does not follow from the fact that he ultimately concluded that the contractual terms during the Class Period up to November 2013 had the same meaning as the amended terms after that date that he read the later terms into the earlier terms.

v. The Motion Judge did not disregard that ambiguity must be resolved to the benefit of the Class

70 The Motion Judge expressly found no ambiguity in Bell's contractual language.⁷¹ Accordingly, neither the doctrine of *contra proferentem* nor s. 11 of the *Consumer Protection Act, 2002* were applicable.

⁶⁸ Reasons at para. 26, Respondent's Compendium, Tab 1, p. 8.

⁶⁹ Reasons at para. 4, Respondent's Compendium, Tab 1, p. 2.

⁷⁰ Reasons at para. 10, Respondent's Compendium, Tab 1, p. 4.

⁷¹ Reasons at para. 27, Respondent's Compendium, Tab 1, p. 8.

D. Issue Two: Expiry of Top Ups Not In Breach of *Gift Card Regulation*

71 The Motion Judge correctly found that the *Gift Card Regulation* did not apply to Top Ups acquired for personal use, as opposed to those purchased as gifts for other persons.⁷² Moreover, where a Top Up via a prepaid card/PIN receipt was acquired as a gift to a third party, there was no time limit on how long a person had to activate the Top Up and hence no expiry date.⁷³ Irrespective of the above, the *Gift Card Regulation* does not extend to preclude services, such as Wireless Service, acquired using a “gift card” from having an associated time limit.⁷⁴ Finally, the Motion Judge correctly noted that voice calls, text messages and data downloads are not separate services but merely aspects of the single service of wireless network access and hence fall under the exemption for a single service in s. 25.1(b) of the Regulation.⁷⁵

i. ***Gift Card Regulation* does not apply to all future performance agreements but only to gift card agreements**

72 Section 25.3 of the Regulation provides that, “No supplier shall enter into a gift card agreement that has an expiry date on the future performance of the agreement.” [emphasis added]

73 A “gift card agreement” is defined as “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.” [emphasis added]

74 It is apparent that, as the Motion Judge found, while a gift card agreement must be a future performance agreement, not every future performance is a gift card

⁷² Reasons at paras. 38-46, Respondent's Compendium, Tab 1, p. 11-13.

⁷³ Reasons at para. 44, Respondent's Compendium, Tab 1, p. 12.

⁷⁴ *Ibid.*

⁷⁵ Reasons at para. 46, Respondent's Compendium, Tab 1, p. 13.

agreement. Accordingly, to be a gift card agreement, a Top Up has to be both a “gift card” and a “future performance agreement.”

75 The definition of “gift card” similarly makes it apparent that not every voucher/electronic credit constitutes a gift card but only those issued by a supplier under a “gift card agreement.”

76 The Motion Judge correctly noted the deliberate use of the word “gift” in the definitions of “gift card” and “gift card agreement”. He gave proper weight to the express words of the *Gift Card Regulation*. On the other hand, the Appellant’s submission asks this Court to ignore the deliberate use of the word “gift” and instead extend the Regulation to any future performance agreement involving a voucher/electronic credit. Not only does the Appellant’s submission run counter to the express wording of the Regulation, it ignores the legislative history leading up to the Regulation wherein the responsible Minister described the focus being only on gift cards purchased for friends and family.⁷⁶

ii. Evidentiary record supports Top Ups as not being gifts

77 All the Top Ups purchased by the Appellant were for her personal use. Furthermore, evidence was led that, “Wireless prepaid cards are generally not given as a gift by one person to another; rather are generally bought and used by the end customer.”⁷⁷

⁷⁶ Hagglund Affidavit, paras. 6 and 7 and Exhibits “B” and “C”, Respondent’s Compendium, Tab 3, pp. 150-151, 160-161 and 163-165.

⁷⁷ See Hansard excerpts of the presentation made by Rogers Communications Inc. and Telus Mobility to the Standing Committee on Social Policy, Exhibit “D”, Hagglund Affidavit, Respondent’s Compendium, Tab 3, pp. 168-171.

78 While Bell conceded during the motion that a prepaid card could have been purchased as a gift in some cases, it did not agree that Top Ups by way of credit or debit payment were of the nature to be a gift (i.e. other than for personal use). No evidence was led by the Appellant that Top Ups by these means were other than for personal use.

iii. Motion Judge did not rely on Ministry website

79 The Appellant submits that the Motion Judge erred in relying on the statement on the Ontario Ministry of Consumer Affairs website advising consumers that the expiry prohibition under the Regulation does not apply to prepaid phone cards.⁷⁸ The Appellant's submission confuses the Motion Judge taking note of statements made on various provincial websites with what he based his decision on. As he clearly stated, "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."⁷⁹

80 Regardless, the Motion Judge would not have erred in relying on website statements as an aid to interpreting the Regulation.⁸⁰ Indeed, the website is consistent with the Minister's statements before the Legislature that the ban on expiry dates was never intended to apply to prepaid phone cards which were viewed as being subject to federal jurisdiction.⁸¹ A regulation cannot exceed the actual regulation-making power conferred by the Legislature.⁸² It is apparent from Hansard and the Ministry's website

⁷⁸ See Exhibit "F", Hagglund Affidavit, Respondent's Compendium, Tab 3, p. 179.

⁷⁹ Reasons at paras. 41-42, Respondent's Compendium, Tab 1, p. 25-26.

⁸⁰ *Williams (Litigation Guardian of) v. Bowler* (2006), 81 OR (3d) 209 at para. 23 (Sup.Ct.J.), Bell Authorities, Tab 8.

⁸¹ Hagglund Affidavit at para. 10 and Exhibit E, Respondent's Compendium, Tab 3, p. 151-152 and 175.

⁸² *Bristol-Myers Squibb Co. v. Canada (Attorney General)* 2005 SCC 26 at para. 38, Bell Authorities, Tab 1.

that the Legislature did not intend to weigh into regulating prepaid phone cards through the *Gift Card Regulation*.

iv. Motion Judge correctly relied on prepaid cards not having any time limit on when the Top Up may be activated

81 The Appellant's submission that the Motion Judge misconceived the nature of the transaction in question as well as the correct operation of the Regulation turns on a factual question of what is the nature of a Top Up.

82 The Motion Judge correctly noted that the prohibition on expiry dates applies only to a "gift card agreement" but not the goods or services purchased with a gift card.⁸³ There is no time limit to how long a subscriber has to activate a Top Up using a PIN receipt.⁸⁴ However, once a Top Up is activated, a subscriber has purchased access to Bell's wireless network for a specific period of time up to specific usage limits based on pay-per-use rates. Top Ups are not simply electronic credits as suggested by the Appellant, but instead purchases of a service with defined time and usage limits.⁸⁵

83 The Motion Judge's understanding of Top Ups was correct; indeed, the CRTC has similarly determined that Top Ups are a form of billing mechanism which "provide access to the network for a specified period of time with specific usage limitations that are distinct for each aspect of the service."⁸⁶

84 Likewise, the Saskatchewan Government has adopted the same interpretation of its comparable regulation as not prohibiting time limits on Wireless Service activated

⁸³ *Reasons* at para. 44, Respondent's Compendium, Tab 1, p. 12. Section 25.3(1) provides that, "No supplier shall enter into a gift card agreement that has an expiry date on the future performance of the agreement." [emphasis added]

⁸⁴ Ferranti Affidavit, para. 14(a), Respondent's Compendium, Tab 2, p. 18.

⁸⁵ Exhibit D, Hagglund Affidavit, Respondent's Compendium, Tab 3, p. 169.

⁸⁶ Telecom Regulatory Policy CRTC 2013-271 at para. 349, Hagglund Affidavit, Exhibit "Z", Respondent's Compendium, Tab 3, p. 189.

by a Top Up. The Saskatchewan Ministry of Justice website states, "If the card is activated and used to keep open a phone line for a period of time, the card is only good for that period even if associated talk or text time usage is not fully utilized. If the card is not activated, it does not expire."⁸⁷

v. Top Ups cover the single service of wireless network access

85 Top Ups cover the single service of access to Bell's wireless network for a fixed period of time up to specific usage limits. A subscriber cannot make or receive voice calls, send or receive texts, or send or download data without network access. Voice calls, text messages and data downloads are not separate services but merely incidental aspects of the single service of wireless network access. As such, the Motion Judge did not make a palpable and overriding error in factually finding that the Regulation's single service exception applied.

PART IV - ADDITIONAL ISSUES

86 As noted by the Appellant in her factum,⁸⁸ the parties agreed to defer arguments raised by Bell as to the constitutional validity of the *Gift Card Regulation* to Wireless Service pending determination of the statutory interpretation issue as to whether the wording of the Regulation captures Top Ups. The constitutional argument was deferred to accommodate the decision of the Ontario Attorney General to intervene.

87 The Motion Judge's statement at footnote 27 of his reasons are simply *obiter* comments. They do not amount to a determination of the constitutional validity of the application of the *Gift Card Regulation* as that issue remains to be argued. Before the

⁸⁷ Hagglund Affidavit, para. 17 and Exhibit "K", Respondent's Compendium, Tab 3, p. 153 and 182.

⁸⁸ See, Sankar Factum at para. 50, pp. 24-25.

constitutional issue is decided, Bell, the Appellant and the Ontario Attorney General are entitled to make submissions to the Motion Judge on this issue.

PART V - ORDER REQUESTED

88 The Respondent requests that the appeal be dismissed with costs.

89 In the alternative:

- (a) if the appeal is allowed for common issue (A)(1), namely, the general breach of contract claim, the Order must reflect that the Appellant has conceded that there was not a breach throughout the entire Class Period. Accordingly, common issue (A)(1) cannot be answered as an unqualified yes as proposed by the Appellant but only for those periods this Court finds that there was, in fact, a breach; and
- (b) if the appeal is allowed for common issue B(1)(b), namely whether there has been a breach of the *Gift Card Regulation*, the Order should refer common issues B(1)(a) and (b) back to the Motion Judge to hear the constitutional arguments raised by Bell.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of June 2015.



Steve Tenai
Norton Rose Fulbright Canada LLP

Lawyer for the Defendant (Respondent)
Bell Mobility Inc.

CERTIFICATE

I, Steve Tenai, lawyer for the Respondent, certify that:

- (i) The record and the original exhibits from the court or tribunal from which the appeal is taken are not required.
- (ii) The estimated time of my oral argument is 1 hour, not including reply.

June 26, 2015

A handwritten signature in black ink, appearing to read "Steve Tenai", written in a cursive style.

SCHEDULE "A"
LIST OF AUTHORITIES

- 1 *Bristol-Myers Squibb Co. v. Canada (Attorney General)* 2005 SCC 26
- 2 *Clarke v. Alaska Canopy Adventures LLC*, 2014 ONSC 6816
- 3 *Craven v. Strand Holidays (Canada) Ltd.* (1982), 40 O.R. (2d) 186 (C.A.),
leave to appeal to SCC refused, [1983] SCCA No. 407
- 4 *Dumbrell v. Regional Group of Companies Inc.* 2007 ONCA 59
- 5 *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252 at para. 416,
appeal dismissed 2012 ONCA 867
- 6 *Martenfeld v. Collins Barrow Toronto LLP*, 2014 ONCA 625
- 7 *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] S.C.J. No. 53
- 8 *Williams (Litigation Guardian of) v. Bowler* (2006), 81 OR (3d) 209 at para. 23
(Sup.Ct.J.).

SCHEDULE "B"
RELEVANT STATUTES

Consumer Protection Act, 2002, c. 30, Sch. A

Interpretation

1. In this Act,

"consumer" means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes;

[...]

"future performance agreement" means a consumer agreement in respect of which delivery, performance or payment in full is not made when the parties enter the agreement;

* * *

Gift Card Regulation, O. Reg. 17/05 to the Consumers Protection Act, 2002, c. 30.

FUTURE PERFORMANCE AGREEMENTS

Definitions

23. In the Act and this Part,

"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;

"open loop gift card agreement" means a gift card agreement that entitles the holder of a gift card to apply it towards purchasing goods or services from multiple unaffiliated sellers.

[...]

GIFT CARD AGREEMENTS

Application of sections

25.1 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; or
- (b) a gift card that covers only one specific good or service; or
- (c) the gift card agreement under which a gift card described in clause (a) or (b) is issued.

No expiry dates

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

(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.

CELIA SANKAR
Plaintiff (Appellant) and BELL MOBILITY INC.
Defendant (Respondent)

Court File No. C60176

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at TORONTO

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