

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)
)
JOYCE BERNSTEIN) *Louis Sokolov, Jonathan Schacter, Nadine*
) *Blum and Charles Sinclair for the Plaintiff*
Plaintiff)
)
– and –)
)
PEOPLES TRUST COMPANY and) *Lawrence Thacker, and Jonathan Chen for*
PEOPLES CARD SERVICES LLP) *the Defendants*
)
Defendants)
)
)
)
Proceeding under the *Class Proceedings Act, 1992*) **HEARD:** April 5, 6, 2019
)

PERELL, J.

REASONS FOR DECISION

A.	Introduction	2
B.	Overview of the Arguments	4
C.	Evidentiary Background.....	7
D.	The Parties	7
E.	Ms. Bernstein’s Experience and her Class Action	8
F.	Peoples Trust’s Payment Cards	9
G.	Peoples Trust’s SLP Cards	14
H.	Peoples Trust’s GPR Cards	17
I.	The Class Members’ Damages Claim	20
J.	Legislation and Legislative History.....	22
K.	The Interpretation of the <i>Consumer Protection Act, 2002</i>	29
L.	Should Cardholder Agreements Governed by the Laws of British Columbia be Excluded from the Class?	30
M.	Are Peoples Trust’s Payment Cards Financial Products and Services that are Exempt under s. 2 (2) of the <i>Consumer Protection Act, 2002</i> ?	31
N.	Are Peoples Trust’s Cards Open Loop Gift Card Agreements?.....	34
O.	Are Peoples Trusts’ Payment Cards Future Performance Agreements?.....	35
P.	Is There a Gifting Component to a Gift Card?	36

Q. Are Peoples Trust’s Payment Cards a Voucher that the Holder is Entitled to Apply Towards Purchasing Goods or Services Covered by the Voucher?	37
R. <i>Sankar v. Bell Mobility Inc.</i>	38
S. Do Peoples Trust’s Payment Cards Create a Relationship of Privity with the Cardholder?39	
T. What is the Significance of <i>O. Reg. 202/18</i> , the 2018 Amendment to <i>O. Reg. 17/05</i> ?	40
U. Are Peoples Trust’s Cards “Single Service” Cards?	41
V. Are Peoples Trust’s SLP Cards Consumer Goods and Are the Class Members Consumers? 42	
W. Did Peoples Trust Impose Unlawful “Expiry Dates” and Forfeitures?	43
X. Did Peoples Trust Charge Illegal Fees?	45
Y. Did Peoples Trust Engage in Unfair Practices Contrary to the <i>Consumer Protection Act, 2002</i> ?	46
Z. Did Peoples Trust Charge for Fees Not Included in its Agreements and Make Unenforceable Post-contractual Representations?	48
AA. Did Peoples Trust Breach its Contracts with the Class Members?	49
BB. Was Peoples Trust Unjustly Enriched?.....	49
CC. The Notice Requirements and the Remedies Available to the Class Members	49
DD. Are the Class Members Entitled to an Award of Aggregate Damages?	51
EE. Is Peoples Trust Liable to pay Punitive Damages?.....	56
FF. Distribution Scheme.....	57
GG. The Answers to the Common Issues	59
HH. Conclusion.....	60

A. Introduction

[1] In this certified action under the *Class Proceedings Act, 1992*,¹ The Representative Plaintiff, Joyce Bernstein, was gifted a payment card. The card was issued by the Defendants Peoples Trust Company and Peoples Card Services LLP (collectively “Peoples Trust”). Peoples Trust sells payment cards, and it charges fees for the use of its cards. When Ms. Bernstein came to use her card to make a purchase, she discovered that its entire value had been depleted through fees.

[2] Ms. Bernstein brought a class action against Peoples Trust. The action was brought on behalf of all consumers in Ontario within the meaning of the *Consumer Protection Act, 2002*,² who purchased or acquired a prepaid payment card sold or issued by Peoples Trust between November 29, 2011 and April 30, 2014. It shall be important to note that consumers within the meaning of the *Act* excludes persons who are acting for business purposes.

[3] Ms. Bernstein alleges that Peoples Trust breached the Gift Card Regulations in *O. Reg. 17/05 (General)*, a regulation enacted pursuant to the *Consumer Protection Act, 2002*. She alleges that Peoples Trust perpetrated unfair practices under *Act*. She alleges that Peoples Trust charged fees that had not been contracted for in its agreements with the Class Members. She sues Peoples Trust for remedies under the *Act* and for damages, including punitive damages, for breach of contract, and for unjust enrichment.

¹ S.O. 1992, c. 6.

² S.O. 2002, c. 30, Sched. A.

[4] After a vigorously resisted certification motion, Ms. Bernstein's action was certified as a class proceeding.³ The certified common issues are:

Breach of Contract

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

(a) If so,

(i) is the expiry and seizure of unused funds associated with the Prepaid Cards at issue in this action contrary to law pursuant to the CPA, and the Gift Card Regulation, and/or

(ii) are any of the fees associated with the Prepaid Cards at issue in this action contrary to law pursuant to the CPA, and the Gift Card Regulation, and, if so, which ones?

(b) If so, have the defendants breached their contracts with the class members?

Consumer Protection Act, 2002

2. Did the defendants engage in unfair practices contrary to s. 17 of the CPA?

(a) If the answer to 2 is yes, what remedy should be ordered under s. 18 of the CPA?

3. Is the class, or any portion thereof, required to give notice under the CPA for recovery or rescission, and if so, is it entitled to a declaration waiving the notice provisions of s. 18 of the CPA?

Unjust Enrichment

4. Have the defendants been enriched by the expiry and seizure of unused funds associated with the Prepaid Cards at issue in this action, and/or have the defendants been enriched by the collection of fees associated with the Prepaid Cards at issue in this action?

(a) If the answer to 4 is yes, have the class members suffered a corresponding deprivation?

(b) Is there a juristic reason for the enrichment/deprivation?

Remedies

5. What remedies, if any, are class members entitled to?

6. Are 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?

7. Does the defendants' conduct justify an award of aggravated, exemplary or punitive damages?

³ *Bernstein v. Peoples Trust Company*, 2017 ONSC 752.

[5] Ms. Bernstein now moves for a summary judgment granting the Class Members' claims. She claims damages of \$36,842,000 plus prejudgement and postjudgment interest plus punitive damages plus costs.

[6] In defence of the summary judgment motion, Peoples Trust contested everything, conceded nothing, and regardless of its strength or weakness or discordance with its other arguments, Peoples Trust made every possible argument. By cross-motion, Peoples Trust moves for a summary judgment dismissing the class action. Without getting into the specifics, Peoples Trust submits that its payment cards are not subject to the *Consumer Protection Act, 2002* or if the *Act* applies, then it submits that its cards are exempt pursuant to the exceptions contained in the *Act*. Peoples Trust disputes that it charged fees that were not contracted for and it denies that it breached its contracts with the purchasers of its payment cards. It submits that if the *Act* applies and if there are contraventions or if there are breaches of contract, then Ms. Bernstein overstates the quantum of the Class Members' claim for damages.

[7] There is no dispute between the parties that the case is appropriate for a summary judgment.

[8] For the reasons that follow, I grant Ms. Bernstein a summary judgment for:

(a) \$6,186,000 to any Class Member who had a Single Load Prepaid Card ("SLP card"); this award is compensation for the unused balances on the card after the VALID THRU DATE.

(b) \$9,144,000; this award is the sum charged purchasers of SLP cards contrary to *O. Reg. 17/05* or in breach of contract.

(c) \$1,500,000 for punitive damages.

[9] I require further submissions about prejudgment and postjudgment interest and costs.

[10] I require further submissions about what is the appropriate method or procedure for distributing the awards to Class Members.

[11] For the reasons that follow, I grant Peoples Trust a summary judgment dismissing the balance of Ms. Bernstein's claims.

B. Overview of the Arguments

[12] As already noted, Peoples Trust sells two types of payment cards: (1) Single Load Prepaid Cards ("SLP cards"); and (2) General Purpose Reloadable Prepaid Cards ("GPR cards"), and it was Ms. Bernstein's argument that:

- a. Peoples Trust's payment cards were sold to consumers in Ontario and the transactions were subject to the *Consumer Protection Act, 2002* and the *O. Reg. 17/05* as a type of "future performance agreement" known as a "gift card agreement."
- b. The sale of Peoples Trust's payment cards was contrary to *O. Reg. 17/05* on two counts; namely:
 - i. Peoples Trust's seizure or forfeiture of the balances on the cards after the VALID THRU DATE contravened the *Act* and *O. Reg. 17/05*; and,
 - ii. Peoples Trust charged fees that contravened the *Act* and *O. Reg. 17/05*.

- c. These contraventions are also breaches of contract that unjustly enriched Peoples Trust, for which wrongdoing, she submits that the Class Members are entitled to damages.
- d. In the alternative, the terms of Peoples Trust's agreements charging fees are not enforceable as they are placed inside of the packaging and thus are not brought to the purchaser's attention until after the purchase, and the charges are, therefore, unenforceable post-contractual representations.
- e. Further, Peoples Trust engaged in unfair practices contrary to s. 17 of the *Consumer Protection Act, 2002* for which the remedy of damages should be awarded under s. 18 of the *Act* without the necessity of the Class Members having given prior notice of their claims. The unfair practices were:
 - i. That the cards are subject to an expiry date (the "VALID THRU DATE") contravenes s. 25.3 (1) of *O. Reg. 17/05*, and the forfeiture of funds after the expiry date is an illegal charging of fees.
 - ii. The charging of certain fees is contrary to the *Consumer Protection Act, 2002* and *O. Reg. 17/05*.
 - iii. The failure to indicate on the front of the card that there is fee information on the back of the card contravenes s. 25.4 (2.1)(c) of *O. Reg. 17/05*.
 - iv. The failure to set out clearly and prominently on the back of the card the terms associated with the monthly dormancy fee contravenes s. 25.4 (2.1)(d) of *O. Reg. 17/05*.
- f. If liability is established, Ms. Bernstein submits that the Class Members' damages can be awarded in the aggregate pursuant to s. 24 of the *Class Proceedings Act, 1992*.
- g. She calculates these damages as \$36,842,000 and she also claims punitive damages plus prejudgment and postjudgment interest.

[13] In its defence and in its cross-motion for a dismissal of Ms. Bernstein's class action (which defence and cross-motion, Ms. Bernstein in her factum described as the everything-but-the-kitchen-sink approach), Peoples Trust argues:

- a. Its payment cards are governed by the laws of British Columbia and outside of regulation by the *Consumer Protection Act, 2002* or *O. Reg. 17/05*.
- b. Its payment cards are financial products and services with the attributes of a bank's deposit account, and, thus, pursuant to s. 2 (2)(c) of the *Consumer Protection Act, 2002*, the cards are exempt from the application of the *Act* and *O. Reg. 17/05*.
- c. Its payment cards are not an "open-loop gift card agreement," because they are network-branded payment cards issued by a financial institution.
- d. The recent amendments to *O. Reg. 17/05* (i.e., s. 25.1 (1)(c)) confirm that network-branded payment cards have always been outside the application of the *Act* and of *O. Reg. 17/05*.
- e. Its payment cards are not future performance agreements. There is no future

performance, and performance is complete at time of purchase or at the time of the activation of the card when access to the payment network is provided.

- f. There is a gifting requirement to a gift card and its cards are, therefore, not gift cards.
- g. Its payment cards are not gift cards because they are not vouchers creating an entitlement to purchase any specific good or service. Rather, the cards are a cash replacement product used to store value that can be tendered for payment. The potential of a means of payment provided by the payment card does not by itself entitle the holder of the card to purchase any specific good or service.
- h. Its payments cards are not gift cards because a network-branded payment card does not create any privity of relationship between a cardholder and a merchant that would entitle the holder to tender the card as payment for the purchase of anything particularly offered by the merchant.
- i. *Sankar v. Bell Mobility Inc.* supports the conclusions that Peoples Trust's payment cards are not future performance agreements and that there is a gifting requirement to cards under *O. Reg. 17/05*.
- j. If its payment cards are gift cards, they are for a single service and thus exempt pursuant to s. 25.1(b) of *O. Reg. 17/05*.
- k. Ms. Bernstein and other Class Members do not have breach of contract claims because there is no privity of contract between them and Peoples Trust.
- l. Peoples Trust did not breach its contract with the purchasers of its payment cards, and there was no unjust enrichment.
- m. There was no forfeiture of funds by Peoples Trust.
- n. There is no merit to Ms. Bernstein's allegation that the sale of Peoples Trusts' payment cards were unfair practices or contravened the *Consumer Protection Act, 2002* and *O. Reg. 17/05*.
- o. The Class Members are not entitled to remedies under the *Consumer Protection Act, 2002* because no notice was given under s. 18 (3) of the *Act*, and the court should not exercise its discretion under s. 18(5) of the *Act* to waive the notice requirement.
- p. If its payment cards are subject to the *Consumer Protection Act, 2002* and *O. Reg. 17/05*, Ms. Bernstein has not proven on a class wide basis that the Class Members were consumers engaged in a transaction for consumer purposes. Individual issues trials are required to determine Peoples Trust's liability to any Class Members.
- q. In the alternative, even if liability could be proven without determining whether an individual cardholder is a consumer, the requirements for aggregate damages under s. 24 of the *Class Proceedings Act, 1992* are not satisfied.
- r. In the alternative, if an aggregate assessment of damages is available, the quantification of the claim is not as submitted by Ms. Bernstein.

C. Evidentiary Background

[14] Ms. Bernstein supported her motion for a summary judgment and resisted Peoples Trust's cross-motion for summary judgment with the following evidence:

- a. Affidavit of Ms. Bernstein dated January 24, 2018. Ms. Bernstein is the Representative Plaintiff. She was cross-examined.
- b. Affidavit of Ms. Annessa Cenerini dated March 27, 2019. Ms. Cenerini is a legal assistant at Sotos LLP, co-Class Counsel. (Goldblatt Partners LLP is the other co-Class Counsel.)
- c. Affidavit of Prem Lobo of Cohen Hamilton Steger & Co. Inc. who delivered an expert report (Loss Quantification Report) dated November 26, 2018. Mr. Lobo was cross-examined.
- d. Affidavit of Mr. Farley J. Cohen of Cohen Hamilton Steger & Co. Inc. who delivered a reply expert report dated February 25, 2019.

[15] Peoples Trust supported its own motion for summary judgment and resisted Ms. Bernstein's summary judgment motion with the following evidence:

- a. Affidavits of Peter Read dated February 2, 2018, February 28, 2018, March 5, 2019. Mr. Read is the President of Peoples Card Services Ltd., one of the Defendants. Mr. Read was cross-examined.
- b. Affidavit of Mr. Larry Andrade of Deloitte LLP, who delivered an expert report (Expert Report on the Quantification of Economic Losses) dated February 15, 2019. Mr. Andrade was cross-examined.

D. The Parties

[16] Ms. Bernstein is an epidemiologist who lives in Toronto. She is the Representative Plaintiff for the following class:

All "consumers" within the meaning of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A ("CPA") in Ontario, who were cardholders, between November 29, 2011 and April 30, 2014, of Prepaid Cards sold and/or issued by Peoples Trust Company.

[17] With respect to the Class Period, it should be noted that the originally proposed Class Period was from October 1, 2007, the date that *O. Reg. 17/05* came into force, and April 30, 2014, the day before the federal *Prepaid Payment Products Regulations (SOR/2013-209)* came into force. Ms. Bernstein's class action was commenced on November 29, 2013, and on the certification motion, because of limitation periods, the start date of the Class Period was changed to November 29, 2011.

[18] Peoples Trust Company is a trust company providing financial products and services. Peoples Trust Company provides a wide range of financial products and services, including residential and multi-family mortgage products, commercial and construction mortgage products, mortgages insured by the Canada Mortgage Housing Corporation, short-term and long-term guaranteed investment products, deposit services, including short and long term Guaranteed Investment Certificates, Registered Retirement Savings Plans, Tax Free Savings Accounts, online banking services, and network-branded payment cards.

[19] Peoples Card Services LLP is a British Columbia limited liability partnership. The limited partners of Peoples Card Services LLP are 1155329 Alberta Ltd. and the minority shareholders of Peoples Card Services Ltd. Peoples Card Services LLP provides network-branded payment cards and credit card programs and manages relationships with program managers (e.g. InComm, formerly known as Data Wave Systems Inc., and Blackhawk) and distributors (e.g. Money Mart retailers) of network-branded payment cards.

[20] Through an intermediate holding company, 1155329 Alberta Ltd., Peoples Card Services Ltd. is a subsidiary of Peoples Trust that manages all business operations relating to issuing and administering network-branded payment cards and the related network requirements.

[21] Peoples Trust Company is a federally incorporated trust company. Since 1997, Peoples Trust Company has been regulated by both the federal *Trust and Loan Companies Act*,⁴ and the Ontario *Loan and Trust Corporations Act*.⁵

E. Ms. Bernstein's Experience and her Class Action

[22] In September 2010, Ms. Bernstein received a payment card as a gift from a friend. The card was issued by Peoples Trust. The card was branded with the name "Vanilla Prepaid Visa". It had a face value of \$35, and the card stated that it was "valid thru 04/14." The bottom left-hand corner of the card stated "for you."

[23] The service fee policy for the card was printed on the reverse side of Ms. Bernstein's card in 5-point font and stated:

Except where prohibited by law, a service fee of \$2.50 per month will be applied to the remaining balance on the Card, beginning the 7th month from the date of purchase. By buying or accepting this Card you agree to be bound by the Cardholder Agreement, as amended from time to time.

[24] Three years' later, on September 22, 2013, Ms. Bernstein visited the website that was noted on the back of her card,⁶ where her account information could be accessed. After registering her card online, she learned that her account balance was zero, notwithstanding that she had never bought anything with the card.

[25] She reviewed the transaction history online. It indicated that on the 26th of each month \$2.50 had been deducted from the balance of the card. The final \$2.50 charge was applied on March 26, 2012, after which time there were no longer any funds left in her account.

[26] On November 29, 2013, Ms. Bernstein commenced this class action.

[27] In her Statement of Claim, Ms. Bernstein advances four causes of action; namely: (1) a statutory cause of action for violations of the *Consumer Protection Act, 2002*; (2) a common law breach of contract claim based on the violations of the *Consumer Protection Act, 2002*; (3) breach of contract under the common law for charging unenforceable fees; and (4) an unjust enrichment claim.

- a. She pleads that the cards that are subject to an expiry date contravene s. 25.3 (1) of *O. Reg. 17/05* and that the forfeiture of funds is an illegal charge of fees and is an

⁴ S.C. 1991, c. 45.

⁵ R.S.O. 1990, c. L. 25.

⁶ www.visaprepaidcanada.com

unfair practice under the *Consumer Protection Act, 2002*.

- b. Ms. Bernstein pleads that the standard form agreements make the cards subject to a variety of fees that are contrary to the *Consumer Protection Act, 2002* and *O. Reg. 17/05* and constitute an unfair practice under the *Act*.
 - i. She alleges that the following fees are illegal: (a) activation fees; (b) dormancy (monthly maintenance) fees; (c) transaction/point of sale fee for each transaction; (d) insufficient funds/decline fee; (e) reload fee; (f) customer service/inquiry fee; (g) refund processing fee; (h) PIN change fee; (i) ATM withdrawal fee; (j) re-activation fee; (k) foreign exchange fee; and (l) overdraft fee.
- c. Ms. Bernstein advances an unjust enrichment claim, and she pleads that when Peoples Trust receives illegal fees or forfeits funds it is unjustly enriched and there is no juristic reason for the enrichment.
- d. Ms. Bernstein pleads that the charging of illegal fees is a breach of the standard form agreement with the Class Members.
- e. In the alternative, she pleads that the terms of the standard form agreements are not enforceable as they are placed inside of the packaging and thus, on a class-wide basis, are not brought to consumers' attention until after the purchase and are, therefore, unenforceable post-contractual representations.
- f. Ms. Bernstein pleads that the failure to indicate on the front of the card that there is fee information on the back of the card contravenes s. 25.4 (2.1)(c) of *O. Reg. 17/05* and is an unfair practice under the *Consumer Protection Act, 2002*.
- g. She pleads that the failure to set out clearly and prominently on the back of the card the terms associated with the monthly dormancy fee contravenes s. 25.4 (2.1)(d) of *O. Reg. 17/05* and is an unfair practice.
- h. Ms. Bernstein submits that she is entitled to common law remedies and remedies under the *Consumer Protection Act, 2002* for recovery or rescission and is entitled to a declaration waiving the notice provisions of s. 18 of the *Act*.

F. Peoples Trust's Payment Cards

[28] As noted already several times, Peoples Trust issues two types of cards: (1) Single Load Prepaid Cards ("SLP cards"); and (2) General Purpose Reloadable Prepaid Cards ("GPR cards"), which Peoples Trust describes as Multiple Load Payment Cards ("MLPCs"). A major difference in the operation of a GPR and a SLP is that GPRs can be reloaded by the cardholder.

[29] Upon purchase, every prepaid payment card (single or multiple load) is accompanied by a written cardholder agreement that governs the use of the card. Key terms and conditions in the cardholder agreement, including all fees and expiry dates, are printed on the cards and are also available on a website, whose address is printed on each card.

[30] The prepaid payment cards include a signature line that should be signed. This signature confirms the acceptance by the purchaser, at the time of purchase, of the terms and conditions that apply to the card. Under the cardholder agreement, the act of using the payment card to purchase

any goods or services constitutes express acceptance by the cardholder of the terms and conditions governing the card's purchase and use.

[31] Although useable for both business and consumer purposes, Peoples Trust's payment cards were not marketed for business purposes, and the focus of its advertising, particularly of its SLP cards, was on consumers and for consumer purposes.

[32] Peoples Trust's SLP cards were marketed as gifts, which by their nature are generally intended for personal purposes. Peoples Trust described its Vanilla MasterCard and Visa as having been embraced by Canadian consumers.

[33] Peoples Trust's GPR cards were marketed for consumer uses including online shopping, paying bills, and gaming. Images that accompanied the ads include dice (alluding to online gambling), film (alluding to movies), sport, bicycles, tickets, and travel.

[34] Peoples Card Services' former Senior Manager described the role of its GPR cards as often being used by people such as immigrants or people with poor credit history, who need a MasterCard for online shopping or booking hotel rooms; *i.e.* for consumer purposes.

[35] Peoples Trust was not aware of any instance of its leading GRP card, the Nextwave Titanium+ card, being marketed for anything other than for consumer purposes. Peoples Trust was not aware of any information or research that indicated that its payment cards were used for non-consumer purposes.

[36] During the Class Period, Peoples Trust issued payment cards that were branded as part of the Visa or MasterCard network.

[37] Peoples Trust is a member of the Visa Canada and MasterCard Canada Payment Networks. Peoples Trust has contractual agreements with each of Visa Canada and MasterCard Canada that enable it to be an issuer of the payment cards for these payment networks. Peoples Trust is the financial institution that bears ultimate responsibility for complying with the payment networks' operating regulations, which encompass technical, financial, and regulatory requirements.

[38] When a prepaid payment card is activated, Peoples Trust is notified by the payment network of the particular card by its number. When a payment card issued by Peoples Trust is purchased, Peoples Trust deposits the purchase money into a pooled account for the benefit of the credit card company. When the holder of the prepaid payment card uses the card to make a purchase, Peoples Trust transfers funds from the pooled account to Visa or MasterCard via the Visa or MasterCard payment network.

[39] Without necessarily knowing the identity of the cardholder, Peoples Trust has records by card number of the history of debits and credits made with respect to each particular card that it issues. As the cardholder makes purchases, Peoples Trust withdraws money from the pooled account and pays the Visa or MasterCard network. As fees are charged, they are withdrawn from the pooled account and the card is debited.

[40] Every payment card is subject to an expiry date after which the card cannot be used, which Peoples Trust describes as a VALID THRU DATE. Visa and MasterCard stipulate that cards must have a defined expiry date to function on the Visa and MasterCard networks.

[41] I shall return to this topic later in these Reasons for Decision, but the value of the payment card, which is the prepaid credit balance, is not forfeit after the VALID THRU DATE; the value remains available for use by the cardholder. The value remains available for use by the cardholder

– if he or she asks for a newly issued card, i.e., a new card to replace the old card. The new card will have a new VALID THRU DATE. In People Trust's accounts, the value is recorded and reported as a liability.

[42] The payment cards are not credit cards. There is no extension of credit. The purchaser of the payment card pays Peoples Trust by pre-paying an amount that is credited to the card and that amount less fees can subsequently be used to purchase goods or services from vendors who accept Visa or MasterCard as a form of payment.

[43] Although there is no extension of credit, payment cards are very similar to credit cards or debit cards in their utility in paying for goods and services. The face value of the payment card is pre-paid and deposited with the issuer of the card, in this case, Peoples Trust. The issuer of the card, in turn, provides the purchaser of the card with access to a credit card company's payment network (e.g. Visa or MasterCard). The issuer of the payment card (Peoples Trust) earns revenue by charging fees against the payment card.

[44] Peoples Trust submitted that it provided purchasers with a variety of services including: (a) authorizing individual transactions; (b) providing twenty-four hour customer service; (c) providing fraud monitoring; and (d) providing lost card/replacement services. I foreshadow to note that this submission undermines its submission that its cards are not future performance agreements.

[45] When a SLP card is purchased, Peoples Trust does not know the identity of the purchaser. When a SLP card is purchased from one of Peoples Trust's distributors, the distributor activates the card, but the distributor does not capture information about the identity of the purchaser of the card. Peoples Trust would be able to identify of a purchaser of an SLP card only if the purchaser reported a lost card or if he or she asked for a replacement card. Peoples Trust tracks the use of the card by its number and not by the identity of the SLP cardholder. Peoples Trust does not have contact information with respect to SLP cardholders.

[46] In contrast, when a GPR card is purchased, Peoples Trust knows the identity of the purchaser, because the purchaser is required to show identification at the time of purchase and this information is recorded. Thus, in contrast to SLP cardholders, when a GPR card is purchased, information about the purchaser is captured.

[47] It is worth emphasizing that with an exception for Peoples Trust's Shell Prepaid Reloadable MasterCard, as a condition of purchase, the purchaser of a GPR card is required to identify himself or herself and to provide proof of identity at the time of purchase.

[48] The GPR cardholder must complete a know-your-client process, including providing verified information. GPR cards require the cardholder to enter a personal identification number (a "PIN" or "PIN number") to permit cash withdrawals from ATMs (Automated Teller Machines).

[49] Peoples Trust submits that the process of activating a GPR card is similar to opening a deposit account and because of this process, Peoples Trust submits that its GPR cards are unsuitable for gift purposes. It submits that by contrast with SLPs, GPR cards are very rarely used as gift cards because a customer must go through the know-your-client process.

[50] Peoples Trust submits that its payment cards are used by unbanked and underbanked persons that require the cards' deposit-like features, including: a repository for deposits, ATM cash access, electronic funds transfers, and remittances. Peoples Trust submits that its GPR cards are used for non-consumer purposes.

[51] Peoples Trust points out that under Federal anti-money laundering legislation, payment cards are regulated because they are capable of being utilized for money laundering and terrorist financing activities. Thus, GPR card issuers are required to perform the same customer identification and verification as required to open up a bank account or debit card.

[52] Issuers of payment cards are required to maintain an anti-laundering program for GPR payment cards (and for SLP cards for denominations greater than \$1,000). The anti-money laundering programs require the appointment of an anti-money laundering officer, sanction screening, velocity controls, transaction monitoring, and other controls. In contrast, federal anti-money laundering legislation excludes closed loop gift and open loop gift cards, the nature of which is described next below.

[53] In characterizing Peoples Trust's payment cards, the paramount question in the immediate case is whether Peoples Trust's two types of payment cards are gift cards under the *Consumer Protection Act, 2002* and *O. Reg, 17/05*.

[54] Subject to certain exemptions, the *Consumer Protection Act, 2002* and *O. Reg, 17/05* govern what are known as a "closed loop gift card" and an "open loop gift card." The major distinguishing feature of a closed loop gift card is that it is used to purchase goods and services from a particular seller of goods or services. In contrast, open loop gift cards, may be used to purchase goods or services from multiple unaffiliated sellers.

[55] Closed loop gift cards, which are also known as retail gift cards, are not actually defined by the *Consumer Protection Act, 2002* or by *O. Reg. 17/05*, but there is no dispute between the parties that closed loop gift cards are governed by *O. Reg. 17/05* and that Peoples Trust's payment cards are not closed loop gift cards. The dispute between the parties is about whether Peoples Trust's payment cards can be characterized as open loop gift cards.

[56] There is no dispute between the parties that the features of closed loop gift cards are: (a) issued by a specific merchant; (b) they are a pre-payment of goods or services to be provided by and only by that merchant; (c) they are typically recorded as revenue by the merchant when the card is sold; (d) they are accepted only by the issuing merchant and have no other value or use; (e) have no protection from merchant failure and resulting loss of value; (f) have no access to universal acceptance payment networks such as VISA or MasterCard; (g) increase sales revenue and merchant profits, including the lift factor resulting from additional amounts spent by gift recipients using a gift card and a reduction in merchandise returns normally resulting from the gift giving process; (h) they generate revenue and increased profits for the specific merchant as margin is derived from goods purchased from the merchant without the need to rely on user fees; (i) they have a lower cost structure due to the lack of any independent or incremental benefits or customer service associated with universally-accepted payment networks, and less risk and lower costs of unauthorized use from fraud, theft or loss because the cardholder has no protection from loss caused by lost, stolen or fraudulently used cards; and, (j) they are used primarily as gift-giving cards (and sometimes described colloquially as a "gift card" or traditional gift certificates.

[57] There is no dispute between the parties that the features of open loop gift cards are: (a) they are issued by regulated financial institutions that have been approved by internationally branded payment networks such as Visa or MasterCard; (b) they operate as a tender or a cash replacement card accepted by and capable of paying any merchant accepting Visa or MasterCard, including online and cross-border transactions; (c) may provide the ability to withdraw cash and make deposits through ATM machines, and send and receive electronic fund transfers; (d) they contain

no lift factor and generate no sales margin for the issuing financial institution; (e) the issuers of the cards rely on fees to support the program; (f) the cards have a higher cost structure than credit cards; (g) the payment cards can be used as personal spending cards for those unable to acquire traditional credit cards, or those attempting to limit credit card spending or to budget expenditures; and (h) payment cards can be used but are less frequently used as gifts than are the closed loop cards.

[58] For reasons that will become apparent later, it is worth emphasizing and worth keeping in mind that open loop gift cards utilize a payment network such as those offered by Visa or Mastercard as the means to effect purchases of goods or services from multiple unaffiliated sellers.

[59] The issuer of an open loop payment card has responsibility for the authorization platforms and security systems that ensure a network-branded payment card will be accepted by merchants. The platforms and related infrastructure and technology are provided and administered by Program Manager. The issuer of an open loop card must make a significant investment in financial and technological assets and management, all on an on-going basis, including: (a) the authorization platforms and security systems that ensure a credit card or prepaid network payment card will be accepted by merchants; and, (b) 24-hour customer service and fraud monitoring.

[60] Open loop cards include cards issued by a mall for use in its tenants' stores. To repeat what has been said above, it is a major disputed point between the parties as to whether financial institution issued cards that can be used at any store that accepts credit cards on the affiliated payment network (e.g., MasterCard or VISA) are caught by the definition of an open loop card. To repeat, while there is no dispute that Peoples Trust's payment cards are not closed loop cards, the major dispute between the parties is that Peoples Trust for a host of reasons submits that its payment cards are not open loop gift cards under *O. Reg. 17/05*.

[61] Peoples Trust submits that the reference to "open-loop" networks in the *Consumer Protection Act, 2002* is, in fact, what the industry refers to as Restricted Authorized Network Cards ("RAN Cards"). These payment cards are akin to a "closed-loop" or "single-loop" in that they are confined to a defined and limited association of related merchants, such as those located in a defined shopping mall or group of merchants under common ownership.

[62] Although the term is self-invented, Peoples Trust characterizes its payment cards as "universal loop" cards, rather than "open loop" cards. For universal-loop payment cards, as defined by Peoples Trust, the issuer (e.g. Peoples Trust) has no direct interest in any eventual transaction for which the card is used and the issuer provides the service of access to a payment network for which the issuer charges fees for providing access and conducting payment settlement services. Peoples Trust submits that participation in a payment network is the defining feature of the network-branded payment card which its labels a universal loop card.

[63] However, Peoples Trust also admits that the invented term is synonymous with open loop. Peoples Trust characterizes its Visa and MasterCard products as "open loop" on its website. In its annual reports, it described the core advantage of its prepaid cards as not limiting the cardholder to making purchasers with a particular vendor or brand name vendor of goods and services.

[64] Pausing here in Peoples Trust's own description of its payment cards, it is, at least, interesting also to note that the Canadian Prepaid Providers Organization, the "collective voice of the open loop prepaid payments Industry in Canada", of which Peoples Trust Company is a founding member, published an overview of the "Types of Open Loop Prepaid Cards" available

on the market. Its described “open-loop gift” and “General Purpose Reloadable” cards as “consumer funded” cards purchased by a consumer for his or her personal use to pay for purchases, bills and to access cash at ATMs.

[65] Notwithstanding these admissions and statements, Peoples Trust submits that the “open loop” in *O. Reg 17/05* is limited to shopping mall cards, or cards that are restricted for use at merchants within a particular mall or group of malls; *i.e.* RAN Cards. It submits that its payment cards are not the open loop gift cards that are governed by *O. Reg. 17/05*.

G. Peoples Trust’s SLP Cards

[66] In this action, six SLP cards are at issue; namely: (a) Vanilla Prepaid Visa; (b) Vanilla Prepaid MasterCard; (c) Shell Non-Reloadable MasterCard; (d) The Ideal Choice/Online Payment Card MasterCard; (e) House Points; and (f) Give and Go Prepaid Visa.

[67] The relevant standard terms of the SLP cards are set out below:

1. AGREEMENT BINDS USERS

The following terms and conditions govern your use of the [Card]. By signing or using the [Card] you are agreeing to these terms and conditions

2. DEFINITIONS

The term “Card” refers to the Prepaid [Card]. The value of the funds that are loaded onto the Card and are available for spending is referred to herein as the “Balance”. “Cardholder” means an individual who activates, receives and/or uses the Card. “Distributor” shall mean each distribution agent and retail outlet which offers the Cards for sale to consumers. Distributors are not agents or representatives of Peoples Trust and have no authority with respect to the Cards. “Transaction Amount” means the amount that is debited from the Balance in connection with your use of the Card, which amount includes both the amount of the Balance to be transferred and the fees imposed to complete the transaction. “Peoples Trust” means Peoples Trust Company the issuer of the Card.

[“MasterCard”/“Visa”] means MasterCard/Visa International, and its successors and assigns. “We,” “us,” and “our” mean Peoples Trust, and all associated and affiliated third parties required to fulfill and manage your Card. “You”, “your” and “yours” each mean the Cardholder.

3. (a) THE PREPAID CARD/GIFT CARD

The Card is a prepaid stored value Card that can be used anywhere that MasterCard/Visa is accepted, including mail order, online and point of sale retail merchants, subject to the terms of this Agreement.

The Card cannot be used at ATMs [POS device or by any other means]. The MasterCard/Visa logo is featured on your Card and will be imprinted along with the issuing institution’s name, Peoples Trust. The Card is not a credit card, charge card, or debit card and its usage will not enhance nor improve your credit rating. No interest dividends or other earnings or returns will be paid on the Card Balance. Neither the Card nor the Balance is a deposit account, and the Balance on your Card is not insured by the Canada Deposit Insurance Corporation (CDIC) or any other federal or provincial agency. The Card is not reloadable, returnable or refundable, and may not be cancelled by you. For greater certainty, you shall have no right to write cheques on or demand repayment of the outstanding balance of available funds on the Card, but are strictly limited to the right to use the Card in accordance with this Agreement as payment for goods and services from merchants [who accept MasterCard/Visa.]

(b) The Card has no fees except the foreign exchange service charge as further explained in the Agreement.

[...]

12. "VALID THRU"/Expiry DATE

Please note that the Card has a "valid thru" date imprinted on the face of the Card. This is the date after which you may not use the Card for any purpose.

If there is a remaining balance on your Card after the "valid thru" date, you will be charged a cancellation fee equal to the remaining balance.

or

Cards registered in Québec may be replaced on and following the expiry date indicated on and following of the Card at no cost to the Cardholder and without reducing the Balance. Cardholders may contact Customer Service at ... to request a replacement.

or

Cards may be replaced following the expiry dated on the face of the Card at no cost to the Cardholder and without reducing the Balance. Cardholders may contact Customer Service at ... to request a replacement

13. ADMINISTRATIVE FEES

(a) We encourage you to use your Card soon! Where permitted by law, we will charge a monthly Service Fee against the balance remaining on your Card after the lapse of a certain period from the date of the purchase of your Card. Please refer to the reverse side of the Card packaging or visit [website] for the amount of the Service Fee and when it will first be charged. This fee will not be charged once the balance on the Card reaches \$0.00. If you have any questions about the monthly Service Fee, please call Customer Service at [number]. Note: Service Fees will not apply in any province or jurisdiction in which they are prohibited. The amount of Service Fee and/or when they are first applied may vary in any province or jurisdiction where service fees are regulated.

(b) We encourage you to use your Card soon! Except where prohibited by law, a monthly service fee of X per month will be applied to the remaining balance of the Card beginning in the Xth month from the date of purchase. This fee will not be charged once the balance on the Card reaches \$0.0. If you have questions about the monthly service fee, please call Customer Service at [number]

(c) We encourage you to use your Card soon! If a Balance remains on the Card for more than twelve (12) months after the purchase date, we may deduct from the Balance a service fee of X per month beginning on the first month after x months from the purchase date. In addition, the amount of the service fee may be adjusted if required by applicable law. Please see above for a description of other administrative fees. Note: Such service fees will not apply in any province or jurisdiction in which they are prohibited or restricted.

[...]

22. GOVERNING LAW

The parties attorn to the jurisdiction of British Columbia and this Agreement shall be construed in accordance with and governed by the laws of the Province of British Columbia and Canada.

23. ENTIRE AGREEMENT

This Agreement sets forth the entire understanding and Agreement between You and us, whether written or oral, with respect to the subject matter hereof and supersedes any prior or contemporaneous understandings or agreements with respect to such subject matter.

[...]

25. SEVERABILITY

If any of the terms of this Agreement are invalid, changed by applicable law or declared invalid by order of court or regulatory authority, the remaining terms of this Agreement shall not be affected, and this Agreement shall be interpreted as if the invalid terms had not been included in this Agreement.

[68] During the Class Period, Peoples Trust marketed its SLP cards as gift cards. As noted above, in the standard terms, the cards are described as: “THE PREPAID CARD/GIFT CARD”. The SLP cards were sold at retailers, such as drug stores and convenience stores, typically alongside retail gift cards. In its Distribution Agreements with third-party payment processors, Peoples Trust’s cards were referred to as a gift card.

[69] On its website, Peoples Trust referred to its prepaid cards under the heading “Gifting.” In annual reports, Premium Trust boasted that it was a leading issuer of MasterCard and Visa payment cards, which it described as often used in place of traditional gift cards.

[70] As examples that Peoples Trust marketed its SLP cards as gift cards: (a) an ad for prepaid cards sold at 7-11 stores listed Vanilla Visa as an example of over “50 gift cards” available under the heading of “Santa’s Little Helpers”; (b) advertisements for Prepaid Vanilla Visa and MasterCard products had the “The Gift of Possibilities”, “The Perfect Gift for everyone on your list”, and “One Gift. A Million Options”; (c) advertisements graphics referred to shopping for gifts, gift boxes, ribbons, and Christmas elves; (d) the text for 2013 radio advertisements referred to prepaid Vanilla Cards as “gift cards”, and encouraged consumers to give “gift of possibilities this holiday season;” and (e) in 2007 and 2008, the Vanilla MasterCard was described as a “MasterCard Gift Card” on the card packaging and on the card itself.

[71] SLP cards were generally sold packaged in sealed envelopes (“carriers”) holding the card. The purchaser takes the envelope to the cashier, pays: (a) the face value of the card (the denomination of the card is stated on the exterior packaging); and (b) an “activation fee”. The cashier scans the bar code and activates the card at the point of purchaser. All of this occurs before the sealed envelope containing the card is opened.

[72] In general, SLP carriers displayed the face value in large lettering on the front, and the activation fee in tiny lettering. Some but not all of the cards specify in tiny lettering on the reverse that a monthly fee would be applied.

[73] On the reverse of the carrier containing the card, which is not visible on retail displays, the carrier states that the packaging contains an agreement setting out additional terms and conditions. The purchaser of the card, however, is instructed not to open the packaging or to purchase the product if the packaging had been tampered with before purchase. The back of the carrier discloses a monthly fee, a foreign transaction fee, and a card replacement fee, in small letters. Inside the packaging, the card had a VALID THRU DATE on the front.

[74] During the Class Period, the SLP cards were subject to an activation fee, which was a fee paid at the point of purchase and that was paid in addition to the face value of the card. The payment of the activation fee confirms the acceptance of the terms and conditions governing the use of the card. The activation fee varied with the value of the card, and, in general, the higher the value of the card, the higher the activation fee. Thus, SLPs were all subject to an activation fee between \$3.95 and \$7.50, depending on the value of the card.

[75] Every SLP card at issue in this case charged an activation fee of greater than \$2.50. If *O. Reg. 17/05* applies this charge violates s 25.4(1)(a).

[76] If *O. Reg. 17/05* applies to the extent that Peoples Trust charged a dormancy fees/monthly fees earlier than the 15th month after activation, the fee violated s 25.4 (2.1)(a)(i) of *O. Reg. 17/05*.

[77] All SLP cards were subject to a “foreign exchange fee” of 2.5%, in addition to the exchange rate.

[78] Effective July 1, 2012, Peoples Trust stopped charging maintenance fees on its best-selling products, the Vanilla Visa Card and the Vanilla MasterCard. After that date, the only fees imposed were activation fees and foreign exchange fees.

[79] After July 1, 2012, which was when an amended agreement was introduced, a cardholder could request a new card after the VALID THRU DATE, in which case, Peoples Trust would replace the expired card and credit the new card with the balance that was remaining on the expired card. There is no evidence that a single cardholder ever applied for a new card after the amendment to the agreement was introduced.

[80] The following table summarizes fees that Ms. Bernstein submits did not form part of Peoples Trust’s SLP cardholder agreements, which included an entire agreement clause excluding terms and representations outside the written contract:

Uncontracted for Fees in SLP Cardholder Agreements

	Vanilla Prepaid Visa	Vanilla Prepaid MasterCard	Shell Non-Reloadable MasterCard	Ideal Choice MasterCard	Give and Go Prepaid Visa
Activation Fee	Neither fee nor existence of fee disclosed	Neither fee nor existence of fee disclosed	Neither fee nor existence of fee disclosed	Neither fee nor existence of fee disclosed	Neither fee nor existence of fee disclosed
Dormancy Fees					Neither quantum nor timing of fee disclosed

H. Peoples Trust’s GPR Cards

[81] In this action, seven GPR cards are at issue: namely: (a) Nextwave Titanium+ Prepaid Visa; (b) Shell Prepaid Reloadable MasterCard; (c) EPIC Prepaid MasterCard; (d) Evolve Prepaid Visa; (e) HorizonPlus Prepaid MasterCard; (f) PTC Company US Dollar Prepaid MasterCard; and (g) YesCard Prepaid Visa.

[82] For present purposes, the relevant standard terms of the GPR cards are set out below:

1. CUSTOMER BOUND

This Prepaid MasterCard/Visa Agreement constitutes a binding agreement between Peoples Trust Company (the “Issuer”) and You (the “Customer”) with respect to the terms of use of the prepaid MasterCard/Visa that You receive from an authorized distributor (“Distributor”) of Peoples Trust Company. By accepting the Card from the Distributor, You agree to be bound by and accept the terms and conditions set out herein. In this Agreement, the words “You”, “Your” and “Yours” means the Customer and any person who uses the Card. You should keep a copy of this Agreement with Your

important records.

Verified by Visa [VbV] is a program designed to help make shopping online more secure. By registering a password for your Card with the VbV service and shopping online at VbV enabled merchants, your Card can only be used by you to make online purchases.

[...]

5. EXPIRY AND LIMITS

(a) The Card will be valid and usable until either the balance is used or the expiration date of the Card, whichever occurs first.

(b) Provided there is a minimum balance of \$10.00 on the Card and You call Customer Service at least two weeks prior to the expiration date on Your Card, a replacement Card with a new extended expiry date will be sent to You. Cardholders must be 18 years of age or older and are restricted to one Card per person. To obtain a balance on the Card, You will provide funds either directly to the Distributor or any other authorized merchant that offers the Card on behalf of Peoples Trust Company or by arranging for funds to be applied to the Card by Direct Load or Bill Payment methods through the Canadian Payments Association. This hereafter shall be referred to as "loading" the Card. Subject to applicable Card service charges, funds loaded to the Card will be available immediately after the load is confirmed by Peoples Trust Company.

The time before funds become available may vary for other load types. The maximum Balance [Discussion of Limits]

YOU ARE NOT ALLOWED TO EXCEED THE BALANCE AVAILABLE ON YOUR CARD FOR ANY POS TRANSACTION OR ANY ATM TRANSACTION.

(c) The card will be valid and usable until either the Balance is used or the expiration date of the Card, whichever occurs first. You will receive a replacement Permanent Card with a new, extended expiry date provided that your Card account is in good standing. Cardholders must be 18 years of age or older and are restricted to one Card per person. To load additional funds onto the Card you will provide funds either directly to the Distributor or any other authorized merchant who offers the Card on behalf of Peoples Trust or by arranging for funds to be applied to the Card by the direct load or payment methods through the Canadian Payments Association. This hereafter shall be referred to as "loading" the card. Subject to applicable Card fees, funds loaded to the Card will be available immediately after the load is confirmed by Peoples Trust. The maximum Balance that you may have on the Card at any time may not exceed [discussion of limits] **YOU ARE NOT ALLOWED TO EXCEED THE BALANCE AVAILABLE ON YOUR CARD FOR ANY POS TRANSACTION OR ANY ATM TRANSACTION.** From time to time Peoples Trust may change the maximum Card limits, the maximum and minimum load limits and the maximum POS transaction and ATM transaction limits without prior notice to you.

[...]

25. FEES/SERVICE CHARGES

(a) Card fees will be disclosed to you at the time of issuance of the instant issue Card or posted in the Distributor's location. Card fees are also available on the [website]. You acknowledge being advised of the fees and agree to pay applicable fees in effect for the services available under this Agreement.

(b) Service Charges will be disclosed to you at the time of registration/issuance for a Card and are available at [website]. You acknowledge being advised of the service charges and agree to pay applicable charges in effect for the services available under this Agreement.

(c) Card fees are detailed on the enclosed leaflet, and are included in this Agreement by reference. You acknowledge being advised of the fees and agree to pay applicable fees in effect for the services available under this Agreement.

26. Without limitation, service charges may be charged by Peoples Trust Company for Card Issuance, Card loading and reloading, monthly maintenance, ATM fees, Card replacement, de-activation, re-activation, Card statements and any other service charges published as described herein. Service charges may be changed by Peoples Trust Company from time to time by posting notice on the Website and new service charges will become effective ten (10) days after publication thereon, whether or not You have actually received such notice. By use of Your Card after the Effective Date, You agree to the new schedule of service and charges. You are aware that when using the Card, ATM operators and merchants may charge separate additional fees for their services.

[...]

31. ENTIRE AGREEMENT

This sets out the entire agreement between the parties with respect to the use of the Card. This Agreement replaces all prior agreements and understandings between the parties with respect to the Card.

[...]

34. GOVERNING LAWS

(a) This Agreement will be governed by the terms of the province where you first obtained the Card. The parties submit to the exclusive jurisdiction of the courts of that province in relation to any dispute arising out of this Agreement.

(b) The parties attorn to the jurisdiction of British Columbia and this Agreement shall be construed in accordance with and governed by the laws of the Province of British Columbia and Canada.

35. SEVERABILITY

If any part of this Agreement is found to be invalid or unenforceable by any court or government agency of competent jurisdiction, that invalidity or unenforceability shall not affect the remainder of this Agreement, which shall survive and be construed as if such invalid or unenforceable part had not been contained herein.

[83] Ms. Bernstein submits that the GPR cards were marketed to a vulnerable subset of consumers. The cards were commonly sold at payday loan companies like Money Mart, and marketed toward the “unbanked” and those who did not qualify for a credit card, such as recent immigrants or people with poor credit history. Some of the ads encouraged users to directly load their paycheques or government payment onto the card.

[84] There is little information on the packaging of GRP cards. For example, the Nextwave Titanium+ card’s individual and temporary carriers did not specify any fees; they stated in tiny lettering that “Use of the Card is governed by the agreement under which it was issued.” The card stated an expiry date on the front, but disclosed no fees on either side. The Evolve Visa carrier did not refer to fees or an agreement on either side of the packaging.

[85] GPR cards are subject to activation fees, ranging between \$9.95 and \$21.95. GPR cards also had monthly “administrative” or “maintenance” fees beginning in the first month following the date of purchase from as early as five or seven days after purchase to 30 days after purchase and then every month thereafter. These fees ranged between \$4.95 and \$9.95 per month.

[86] GPR cards were also subject to additional fees including: (a) foreign exchange fees; (b) “reload fees” (fees charged to add additional funds to a card beyond the first load); (c) “customer service” or “inquiry fees” (fees charged for inquiries about the balance on the card); (d) “refund

processing fees”, and “cancellation fees”.

[87] Every GPR card had an “expiry date.” Until 2014, if a GPR card had less than \$10.00 remaining on the expiry date, or if there was more than \$10.00 remaining on the card but the cardholder failed to request a replacement card two weeks before the expiry date, Peoples Trust claimed the remaining balance on the card.

[88] In 2014, Peoples Trust changed its expiry date policy respecting at least two GPR cards such that following the expiry date, Peoples Trust would provide a “replacement card,” credited with the expired balance (sometimes, less a “replacement card fee”), on request.

[89] The following table summarizes fees that did not form part of Peoples Trust’s GPR cardholder agreements:

Uncontracted for Fees in GPR Cardholder Agreements

	Nextwave Titanium	Shell Reloadable	EPIC MasterCard	Evolve	HorizonPlus	US Dollar Visa	YesCard Visa
Activation (Issuance) Fees			Not disclosed until October 1, 2013 agreement	Not disclosed	Disclosed until December 31, 2011, and then not disclosed for the balance of Class Period.	Not disclosed	Not disclosed
Other Fees (Including Dormancy)			Not disclosed until July 1, 2012 agreement	Not disclosed	Disclosed until December 31, 2011, and then not disclosed for the balance of Class Period.	Not disclosed	Not disclosed

I. The Class Members’ Damages Claim

[90] Ms. Bernstein retained loss quantification and forensic accounting firm Cohen Hamilton Steger & Co. Inc. to quantify the financial losses incurred by the Class Members as a result of the alleged violations of *O. Reg. 17/05*.

[91] Cohen Hamilton Steger analyzed records produced by Peoples Trust and quantified the activation fees, other fees, and forfeited balances allegedly wrongfully taken by Peoples Trust. It subtracted from these calculations any fees that Peoples Trust was legally permitted to charge during the Class Period. Where necessary, Cohen Hamilton Steger made estimates of missing data, based on extrapolation from data that Peoples Trust had made available.

[92] Peoples Trust did not provide information with respect to the actual amount of activation fees paid by Class Members. Cohen Hamilton Steger estimated the activation fees by applying the applicable activation fees charged for each card denomination. In cases where Peoples Trust did not provide information for a specific card denominations, Cohen Hamilton Steger estimated the proportion of each card denomination by assuming that the distribution of card denominations would be roughly equal across brands.

[93] Peoples Trust hired Deloitte LLP to analyze the same data and to quantify the total of the impugned fees charged and the unused credit balances on the Payment Cards that expired during the Class Period. Deloitte did not challenge Cohen Hamilton Steger's quantification or challenge its methodology. Deloitte, however, made deductions for estimated non-gift transactions and for estimated non-consumer transactions. The estimates were based on the directions of Peoples Trust from its experience in the payment card business.

[94] Deloitte did not include in its calculations any fees or unused balances taken during the Class Period from cards activated before the class period, and it did not include fees that were shared with Peoples Trust's service providers (*i.e.*, fees ultimately paid to third parties and not retained as revenue by Peoples Trust). In my opinion, these sums should have been included in the damages calculation. I see no basis for excluding any fees taken by Peoples Trust or its outsourcing minions, and that Peoples Trust incurred expenses in collecting the fees and unused balances is not a reason for a reduction in its liability for fees or unused balances taken during the Class Period.

[95] Deloitte's quantification can be reconciled within less than 2% of Cohen Hamilton Steger's quantification. A reconciliation of Cohen Hamilton Steger's and Deloitte's expert reports revealed that Cohen Hamilton's Steger's calculations were hundreds of thousands of dollars more favourable to Peoples Trust than were Deloitte's calculation of damages.

[96] Cohen Hamilton Steger quantified three types of allegedly unlawful charges; namely: (1) unused balances; (2) activation fees; and (3) unlawful fees exclusive of activation fees. These were fees or charges that were not permissible under *O. Reg. 17/05*. The unused balances equalled the values remaining on Peoples Trust's cards following the VALID THRU DATE which for some cards, and during part of the Class Period included a cancellation fee.

[97] As set out in the tables below, The Class Members claim \$15,330,000 with respect to the SLP cards and \$21,512,000 with respect to the GRP cards for a total claim of \$36,842,000 before prejudgement and postjudgment interest and before punitive damages and costs.

	SLP Fees and Balances		
	Cards activated prior to Class Period	Cards activated during Class Period	Total
Excess fees excluding activation fees	\$ 2,486,000	\$ 3,267,000	\$ 5,753,000
Excess activation fees	-	\$ 3,391,000	\$3,391,000
Unused balances	\$ 333,000	\$ 5,853,000	\$6,186,000
Total	\$ 2,819,000	\$ 12,511,000	\$15,330,000

	GRP Fees and Balances		
	Cards activated prior to Class Period	Cards activated during Class Period	Total

Excess fees excluding activation fees	\$ 12,155,000	\$ 6,587,000	\$18,742,000
Excess activation fees	-	\$ 2,180,000	\$ 2,180,000
Unused balances	\$ 159,000	\$ 431,000	\$ 590,000
Total	\$ 12,314,000	\$ 9,198,000	\$21,512,000

[98] As noted in the Overview portion of these Reasons for Decision and to foreshadow the discussion below, I shall be making no award with respect to the GRP cards because I conclude that these payment cards are exempt from the operation of the *Consumer Protection Act, 2002* and I conclude that there are no breaches of contract with respect to the GRP cards.

[99] Also as noted in the Overview portion of these Reasons for Decision, I shall be making an award with respect to the SLP cards, which award totals \$15,330,000, the sum calculated by Cohen Hamilton Steger. As I shall explain later in these Reasons for Decision, this award is based on an aggregate assessment of the Class Members' damages pursuant to s. 24 of the *Class Proceedings Act, 2002*. The aggregate assessment is based on the calculations described above.

[100] In this last regard, it should be noted that the above calculations do not involve statistical evidence pursuant to s. 23 (1) of the *Class Proceedings Act, 2002*, which states:

Statistical Evidence

23. (1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

[101] As I shall explain later, the aggregate assessment in the case at bar does not require any statistical evidence and is based on my finding of fact that all of the transactions for SLP cards are consumer transactions.

J. Legislation and Legislative History

[102] The relevant provisions from the *Consumer Protection Act, 2002* are set out in Schedule "A" to these Reasons for Decision. The relevant provisions of *O. Reg. 17/05 (General)* are set out in Schedule "B" to these Reasons for Decision.

[103] The *Consumer Protection Act, 2002* applies in respect of all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place.⁷

- a. "Consumer" means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes.⁸
- b. "Consumer agreement" means an agreement between a supplier and a consumer in

⁷ S.O. 2002, c. 30, Sched. A, s. 2 (1).

⁸ S.O. 2002, c. 30, Sched. A, s. 1.

which the supplier agrees to supply goods or services for payment.⁹

- c. “Supplier” means a person who is in the business of selling, leasing or trading in goods or services or is otherwise in the business of supplying goods or services, ...”.¹⁰
- d. “Consumer transaction” means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement.¹¹

[104] On December 20, 2006, the date of Royal Assent, the *Consumer Protection Act, 2002* was amended by Bill 152, *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006*,¹² to allow for the making of regulations governing various aspects of future performance agreements, including gift card agreements.

[105] The Ontario Government amended the *Consumer Protection Act, 2002* to regulate “future performance agreements”, including “gift card agreements”. Under the *Act*, “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.”¹³

[106] For the summary judgment motion, Ms. Bernstein obtained evidence that revealed that the Ministry of Government Services intensively researched the regulation of gift cards in other jurisdictions in North America and consulted widely with consumers, business and financial lobbyists about the regulation of gift cards. The Ministry was aware of the features of both closed loop cards and open loop cards, and it was aware that depending on the jurisdiction, open loop cards included both mall-issued cards that could be redeemed at unaffiliated merchants within a shopping centre as well as bank-issued cards that could be used at any store that accepts credit cards on the affiliated payment network.

[107] Internal communications between Ministry staff, Ministry discussion outlines, Ministry follow-up notes about stakeholder meetings, academic research, presentation materials from industry experts and legal consultants, and Minister’s briefing notes reveal that the Ministry was aware that the term open loop could and did include both mall-issued and bank-issued cards that allowed cardholders to effect purchases of goods or services from multiple unaffiliated sellers.

[108] In discussing the government’s plans to introduce legislation that would give the government regulation-making authority over gift cards, the then Minister of Government Services stated before the Legislative Assembly on September 25, 2006:

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.

We want to ensure that Ontario consumers purchasing gift cards get what they pay for.

⁹ S.O. 2002, c. 30, Sched. A, s. 1.

¹⁰ S.O. 2002, c. 30, Sched. A, s. 1.

¹¹ S.O. 2002, c. 30, Sched. A, s. 1.

¹² S.O. 2006, c. 34.

¹³ S.O. 2002, c. 30, Sched. A, s. 1.

[109] On October 26, 2006, the Bill 152 was introduced for second reading, the Minister stated:

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 buy 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."

[...] We want to move to give ourselves the authority to not permit expiry dates on gift cards. I look forward to working with our business community in the implementation of that.

[110] In 2007, the government introduced *O. Reg. 17/05*, which included, among other things, the regulation of gift cards. When *O. Reg. 17/05* came into effect on October 1, 2007, open loop gift cards were initially exempt, to give the Provincial Government time to determine how to regulate this type of gift card, which regulation arrived on September 1, 2008 when *O. Reg. 17/05* was amended by *O. Reg. 202/08* to apply to open loop gift cards.

[111] In introducing *O. Reg. 17/05* to the Legislative Assembly, the Minister of Government Services described the government's rationale for regulating cash-equivalent gift cards as follows:

This is an issue of fairness. When people buy or receive a cash-equivalent gift card, they think they are getting just that: cash. And I'll give you an example. If you find a \$20 bill in a jacket you haven't worn for a while, it's still worth \$20, even if you find it two or three years later. No one would say to you, "I'm sorry; that's an old \$20 bill and there's an expiry date." That's why we're taking these measures. It just makes sense. No one should lose money just because they haven't had a chance to spend it or because they haven't found something they want to buy yet. That is why we are doing this.

[112] *O. Reg. 17/05* defines gift card and gift card agreement, 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;

[113] Effective September 1, 2008, and throughout the Class Period, restrictions on fees and disclosure requirements became applicable to suppliers under an open loop gift card agreement. As noted above, there is no definition of "closed loop" in *O. Reg. 17/05*, but the definition of open loop in the as amended *O. Reg. 17/05* is:

"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.

[114] In a variety of government press releases, the Provincial Government announced its understanding of how *O. Reg. 17/05* applied to payment cards subject to federal jurisdiction.

- a. A News Release issued May 29, 2007 stated: "[*O. Reg. 17/05*] will not apply to [...] cards that are subject to federal jurisdiction [...]".
- b. A News Release issued September 30, 2007 stated: "[*O. Reg. 17/05*] will not apply to [...] cards that are subject to federal jurisdiction [...]".
- c. A News Release issued December 19, 2008 stated: "There are some exceptions [to the application of *O. Reg. 17/05*] – expiry dates and/or administrative fees may still apply to: [...] cards subject to federal jurisdiction, such as prepaid phone cards or credit card branded gift cards".

- d. An Information Bulletin published in 2011 stated: “[*O. Reg. 17/05* does] not apply to: [...] prepaid credit cards – the name may say ‘VISA’ or ‘MasterCard’, but these are actually gift cards, not credit cards. You pay a fee to buy one, but there is no fee when you use it. Fees apply if you: [h]old the card longer than six months, or [r]eplace a lost or stolen card”

[115] I pause in the legislative history to note that based on these announcements, Peoples Trust submits that the Provincial Government was announcing its legislative intention that *O. Reg. 17/05* does not apply to network-branded payment cards issued by a federally incorporated financial institution, including Peoples Trust, which is incorporated under the federal *Trust and Loan Companies Act*. Peoples Trust explains the announcements as based on the Provincial Government’s then mistaken understanding that it would be *ultra vires* its legislative authority to regulate federal institutions, including Peoples Trust.

[116] I do not believe that the Provincial Government’s announcements were based on constitutional law distribution of legislative powers concerns but rather were based on its officials’ understanding of s. 2 (2)(c) of the *Consumer Protection Act, 2002*, which provides an exemption for financial products and services.

[117] I shall discuss s. 2 (2)(c) further below, but, for immediate purposes, I need not determine what mistaken beliefs or thoughts animated the Provincial Government’s legislative intent, save to say that Peoples Trust’s submission ignores that provincial consumer protection laws are regularly applied to federal companies, including those in the bank and credit sector.¹⁴ And Peoples Trust ignores the fact that Part VII (sections 66-85 of the *Consumer Protection Act, 2002* and Part VII of *O. Reg. 17/05* (sections 53-71), which were part of the *Consumer Protection Act, 2002* - when it was enacted - regulate credit card agreements without exclusion of federally regulated financial institutions. I and my colleagues on the bench frequently experience federally regulated financial institutions using the quite favourable – to them – provisions of the *Consumer Protection Act, 2002* to sue consumers on MasterCard and Visa credit card debts. In *Canadian Western Bank v. Alberta*¹⁵ and *Bank of Montreal v. Marcotte*,¹⁶ the Supreme Court of Canada confirmed that banks and other federally regulated financial institutions must comply with provincial consumer protection legislation.

[118] And, in any event, as I shall explain below, I do not understand the government’s announcements to be so expansive, as Peoples Trust would have them to be. I rather understand the announcements to indicate that some - but not all - network-branded payment cards, including those cards subject to federal jurisdiction are exempt from *O. Reg. 17/05*, which is to say that but for the exemptions found in s. 2 (2)(c) of the *Consumer Protection Act, 2002*, discussed below, a network-branded gift card would be subject to the *O. Reg. 17/05*. And I foreshadow the discussion later to say that my interpretation of *O. Reg. 17/05* (up until its amendment in 2018) is that *O. Reg. 17/05* applied to Peoples Trusts’ SLP cards but not to its GPR cards.

[119] Moreover, I hasten to also point out that while how the Provincial Government announces

¹⁴ *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5; *Bank of Montreal v. Marcotte*, 2014 SCC 55; *Citi Cards v. Ross*, 2014 ONSC 114; *Royal Bank v. Raincock*, 2013 ONSC 2876; *Royal Bank of Canada v. Travani*, [2009] O.J. No. 5375 (S.C.J.); *Canadian Imperial Bank of Commerce v. Donnelly*, [2009] O.J. No. 2994 (S.C.J.); *Royal Bank of Canada v. Lau*, [2008] O.J. No. 5007 (S.C.J.); *Canadian Western Bank v. Alberta*, 2007 SCC 22.

¹⁵ 2007 SCC 22.

¹⁶ 2014 SCC 55.

and implements its legislation may be an interpretative aid, it is no more than that and statutory interpretation is ultimately a matter determined by the court and not by government press releases and announcements. I shall be able to interpret and apply *O. Reg. 17/05* without relying on the government's announcements.

[120] Returning to the legislative history, in 2014, the Federal Government enacted its *Prepaid Payment Products Regulation*, SOR/2013-209.

[121] In an argument that I will discuss below, Ms. Bernstein submits that pursuant to the operation of s. 2 (2)(c) of the *Consumer Protection Act, 2002*, in 2014, SOR/2013-209 displaced the application of the provincial gift card regulation to Peoples Trust's payment cards on a going forward basis.

[122] She submits, however, that until SOR/2013-209 came into force, which is to say during the Class Period, Peoples Trust's payment cards were governed by *O. Reg. 17/05*. To foreshadow the discussion below, I agree that that *O. Reg. 17/05* applied to Peoples Trust's SLP cards during the Class Period but not to its GPR cards, but I need not actually opine as to what was the effect of SOR/2013-209 on a going forward basis.

[123] However, for what it was worth, my view is that SOR/2013-209 did not displace *O. Reg. 17/05* in the sense of occupying legislative space that had been left for it to fill. Rather, SOR/2013-209 did not displace *O. Reg. 17/05* at all. In the modern era of co-operative federalism, concurrent provincial and the federal legislation will typically operate together because the doctrine of interjurisdictional immunity and the doctrine of paramountcy are narrowly applied. This approach to the interpretation was demonstrated in *Bank of Montreal v. Marcotte*,¹⁷ where consumer protection class actions¹⁸ were brought against a group of banks and financial institutions that on credit card transactions made in foreign currencies charged conversion charges contrary to Québec's *Consumer Protection Act*.¹⁹ In those cases, Québec's *Consumer Protection Act* was not displaced by the federal regulation of banks.

[124] Returning again, to the legislative history, in 2018, the Ontario Ministry of Government and Consumer Services released a consultation paper requesting comments from consumers, consumer associations, businesses, business associations, and academics. The consultation paper stated:

PROPOSAL TO CLARIFY THE GIFT CARD RULES UNDER THE CONSUMER PROTECTION ACT, 2002

The Ministry of Government and Consumer Services is proposing to clarify the gift card rules in *Ontario Regulation 17/05* under the *Consumer Protection Act, 2002*. The proposed change is part of the ministry's commitment to strengthening consumer protection in Ontario. The ministry is seeking your comments on the proposed changes.

[...]

Background

Ontario Regulation 17/05 (O. Reg. 17/05), made under the *Consumer Protection Act, 2002*, includes

¹⁷ 2014 SCC 55.

¹⁸ See also the companion cases of *Marcotte v. Fédération des caisses Desjardins du Québec*, 2014 SCC 57, and *Amex Bank of Canada v. Adams*, 2014 SCC 56

¹⁹ CQLR, c. P-40.1.

rules intended to protect consumers who buy gift cards. These rules, found in sections 25.1 to 25.5 of *O. Reg. 17/05*, generally prohibit expiry dates on gift cards and fees that reduce the face value of gift cards. The amendments came into effect in 2007. Since the rules came into effect, there has been some confusion in the marketplace about how the rules apply to certain types of cards, like prepaid credit cards.

1. PREPAID CREDIT CARDS

Financial institutions, like banks, issue prepaid credit cards. In 2014, federal regulations came into force governing all federally-regulated financial institutions that issue prepaid credit cards. The regulations include important consumer protection measures like disclosure requirements; limits on fees and a prohibition on the expiry of funds. You can find these rules here: www.canada.ca/en/financial-consumer-agency/services/payment/prepaid-cards.html

To clarify that *O. Reg. 17/05* does not apply to prepaid credit cards issued by certain financial institutions, the ministry proposes a clear exemption in the regulation for these types of cards. Some of these cards are issued by these financial institutions that are subject to other regulations - for example, the federal government has rules for prepaid credit cards issued by federally regulated financial institutions.

Section 25.1 of *O. Reg. 17/05* provides that the gift card rules do not apply to certain types of cards, like cards issued for charitable purposes or for only one specific good or service. The proposal is to add an exemption for "a gift card issued under an agreement between a card holder and a financial institution relating to the use of the card". *O. Reg. 17/05* would be amended to define a "financial institution" to mean:

1. A bank, authorized foreign bank or federal credit union as defined in section 2 of the *Bank Act (Canada)*;
2. A credit union registered under the *Credit Union and Caisses Populaires Act, 1994*; and,
3. A trust corporation or loan corporation as defined in the *Loan and Trust Corporations Act*.

2. GIFT CARDS NOT PURCHASED AS GIFTS

Gift cards are often purchased as gifts; however, there are instances where you might buy one for yourself. For example, you might participate in a rewards program that offers gift cards in exchange for points. Whether you buy a gift card for yourself or someone else, you should be protected by the rules in the *Consumer Protection Act, 2002* and *O. Reg. 17/05*.

To clarify that *O. Reg. 17/05* applies to gift cards regardless of whether the card was purchased as a gift, the ministry is proposing to clearly state that "for greater certainty, sections 25.2 to 25.5 apply to a gift card and its related gift card agreement whether or not the holder purchased the card for themselves or received the card as a gift from another person".

3. RELOADABLE GIFT CARDS

Some gift cards can be reloaded so that you can continue to use them to make purchases. For example, some coffee shops have cards with this option. Whether a gift card is reloadable or is not reloadable, you should be protected by the rules in the *Consumer Protection Act, 2002* and *O. Reg. 17/05*.

To clarify that *O. Reg. 17/05* applies to gift cards regardless of whether they can be reloaded, the ministry is proposing to clearly state that "sections 25.1 to 25.5 apply to a gift card, and the gift card agreement under which it was issued, where a consumer can add value after the initial purchase of the gift card."

[125] Following the consultation process, in July 2018, pursuant to *O. Reg. 202/18*, *O. Reg. 17/05* was amended to provide that the Provincial Government's regulation of gift cards did not apply to pre-paid credit cards issued by financial institutions. Section 25.1 of *O. Reg. 17/05* states:

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

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

(2) In subsection (1),

“financial institution” means,

- (a) a bank, authorized foreign bank or federal credit union as defined in section 2 of the *Bank Act* (Canada),
- (b) a credit union or a league as defined in section 1 of the *Credit Unions and Caisses Populaires Act, 1994*, or
- (c) a trust corporation or loan corporation registered under the *Loan and Trust Corporations Act*.

(3) For greater certainty, subject to subsection (1), sections 25.2 to 25.5 apply to a gift card agreement and a gift card issued under it if the holder of the card purchased it for themselves or received it from another person.

[126] *O. Reg. 202/18* does not apply retroactively, and so it is not determinative of the outcome of Ms. Bernstein's class action. If it did apply retroactively, save for the matter of the unjust enrichment claim associated with what Ms. Bernstein describes as unlawfully forfeited funds, Peoples Trust's sale of its payment cards would be inoculated from the operation of the *Consumer Protection Act, 2002* and *O. Reg. 17/05*.

[127] Notwithstanding that *O. Reg. 202/18* does not operate retroactively, however, in making its arguments about the application of *O. Reg. 17/05*, Peoples Trust relies on *O. Reg. 202/18* as confirming, which is to say not making new law but articulating old law, that the Provincial Government always intended that *O. Reg. 17/05* not apply to network branded payment cards. Peoples Trust submits that *O. Reg. 202/18* supports its argument that the Provincial Government always intended that *O. Reg. 17/05* not apply to network branded payment cards.

[128] Keeping in mind that Peoples Trust also argues that there is a gifting requirement to a gift card transaction for it to be regulated by *O. Reg. 17/05*, it would seem, ironically, that Peoples Trust regards *O. Reg. 202/18* as not confirming but as rather making new law about a gifting component not being a component of a gift card. For her part, Ms. Bernstein submits that *O. Reg. 202/18* is not helpful in interpreting how *O. Reg. 17/05* operated during the Class Period.

[129] I shall discuss the significance of *O. Reg. 202/18* below, but I foreshadow to say that I agree with Ms. Bernstein that nothing in the case at bar turns on the enactment of *O. Reg. 202/18*, which occurred outside of the Class Period.

K. The Interpretation of the Consumer Protection Act, 2002.

[130] Ms. Bernstein's action ultimately turns on the interpretation and application of the *Consumer Protection Act, 2002* and so it is necessary to say something about the principals that apply to the interpretation of the *Consumer Protection Act, 2002*.

[131] In interpreting statutory provisions, courts must read the words of an Act 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.²⁰

[132] Ontario's *Legislation Act, 2006* requires that statutes and regulations be interpreted as being remedial and be given "such fair, large and liberal interpretation as best ensures the attainment of its objects".²¹

[133] The *Consumer Protection Act, 2002* contains an anti-avoidance provision in s. 3 that requires courts and tribunals to consider the real substance of entities or transactions when determining whether the Act applies.

[134] Consumer protection laws are subject to special principles of interpretation: they must be interpreted broadly, in a manner that furthers their objective;²² they must be approached from the perspective of an average and unsophisticated consumer;²³ and they should be interpreted generously in favour of consumers.²⁴ Consumer legislation is to be construed as remedial and given a fair, large and liberal interpretation in favour of consumers.²⁵ As public welfare legislation, any exceptions for the application of the statute must be narrowly construed.²⁶

[135] The main purpose of the *Consumer Protection Act, 2002* is to protect consumers by establishing more ethical trade practices calculated to afford greater protection to the consuming public.²⁷

[136] Consumer protection laws, like the *Consumer Protection Act, 2002*, recognize that ordinary consumers often face an information or power imbalance in their dealings with sophisticated corporate counterparties.²⁸ Consumer protection laws express a legislative attempt to equitably reconfigure the imbalance in bargaining power in the marketplace and to rectify consumer vulnerability resulting from such common law principles as *caveat emptor*.²⁹

²⁰ *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para 21.

²¹ S.O. 2006, c. 21, Sch. F, s. 64(1)(2).

²² *Richard v. Time Inc.*, 2012 SCC 8 at para. *; *Weller v. Reliance Home Comfort Limited Partnership*, 2012 ONCA 360 at para. 15.

²³ *Richard v. Time Inc.*, 2012 SCC 8 at para. 65.

²⁴ *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 at para. 37.

²⁵ *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 at para. 37; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at para. 26.

²⁶ *R v. K-Tech Building Systems Inc.*, 2012 ONCJ 219 at para. 142; *Toronto (City) v. Nationwide Home Comfort Inc.*, 2017 ONCJ 854 at para. 43.

²⁷ *Richard v. Time Inc.*, 2012 SCC 8 at paras. 43 and 50; *R v. Colgate-Palmolive Ltd.*, [1970] 1 C.C.C. 100 at p. 102 (Ont. Co. Ct.).

²⁸ *Wright v. United Parcel Service Canada Ltd.*, 2011 ONSC 5044 at para. *.

²⁹ *Prebushewski v. Dodge City Auto (1984) Ltd.*, 2005 SCC 28 at para. 33; *Richard v. Time Inc.*, 2012 SCC 8.

L. Should Cardholder Agreements Governed by the Laws of British Columbia be Excluded from the Class?

[137] Peoples Trust's cardholder agreements are governed by the laws of British Columbia and Canada or of Ontario and Canada.

[138] Peoples Trust submits that any payment cards that are governed by cardholder agreements governed by the laws of British Columbia should be excluded from the class. Peoples Trust submits these cardholders should be excluded because the question of whether the fees are contrary to law are questions of British Columbia law that require an assessment of applicable British Columbia legislation. It submits that these issues are outside the scope of the operation of the *Consumer Protection Act, 2002* or *O. Reg. 17/05*.

[139] There is apparent desperation, but there is no merit to this argument.

[140] Peoples Trust carries on its business in Ontario. Peoples Trust has been registered under Ontario's *Loan and Trust Corporations Act*, since 1967. Section 2 (1) of the *Consumer Protection Act, 2002* provides that the *Act* applies in respect of all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place. The Class Members in the immediate case are alleged to be consumers engaged with a supplier of goods and services located in Ontario. The Class Members, and other Ontario residents, purchased Peoples Trust's payment cards in Ontario. The Class Members activated their payment cards in Ontario and mostly used the cards to make purchases in Ontario. Subject to taking cover under the exemptions under the Ontario legislation, there is no doubt that the *Consumer Protection Act, 2002* applies to Peoples Trust's sales of its payment cards to consumers in Ontario.

[141] There is nothing about British Columbia's legislation that would or could oust the jurisdiction of an Ontario court to interpret and apply Ontario legislation. And, there is nothing about British Columbia's consumer protection legislation that has to be interpreted or applied in Ontario.

[142] And, if, as a matter of choice of law, some aspect of British Columbia's law of contract applies to the purchases made in Ontario of Peoples Trust's cards, then an Ontario Court has the jurisdiction to apply that foreign law as a matter of fact-finding. Moreover, as a matter of fact-finding, the foreign law (of British Columbia) is assumed to be the same as domestic law of Ontario unless the contrary is proven. Moreover, Ontario and British Columbia's common law of contract is homogenized by the Supreme Court of Canada.

[143] Further, pursuant to s. 7(1) of the *Consumer Protection Act, 2002*, the substantive and procedural rights given under the *Act* apply despite any agreement or waiver to the contrary. Section 7(1) means the provisions of the *Act* prevail over any contrary terms in Peoples Trust's agreements with Ontario consumers.³⁰

[144] There is, therefore, no reason why Ontario consumers that enter into a contract governed by the laws of British Columbia and Canada should be excluded from class membership.

³⁰ *Seidel v. TELUS Communications Inc.*, 2011 SCC 15.

M. Are Peoples Trust's Payment Cards Financial Products and Services that are Exempt under s. 2 (2) of the Consumer Protection Act, 2002?

[145] The key provision of the *Consumer Protection Act, 2002* to interpret and apply in the case at bar is s. 2 (2) of the *Consumer Protection Act 2002*, which exempts certain transactions and services. Section 2 (2) states:

2. (2) This Act does not apply in respect of,

- (a) consumer transactions regulated under the *Securities Act*;
- (b) financial services related to investment products or income securities;
- (c) financial products or services regulated under the *Insurance Act*, the *Credit Unions and Caisses Populaires Act, 1994*, the *Loan and Trust Corporations Act* or the *Mortgage Brokerages, Lenders and Administrators Act, 2006*;
- (d) consumer transactions regulated under the *Commodity Futures Act*;
- (e) prescribed professional services that are regulated under a statute of Ontario;
- (f) consumer transactions for the purchase, sale or lease of real property, except transactions with respect to time share agreements as defined in section 20; and
- (g) consumer transactions regulated under the *Residential Tenancies Act, 2006*.

[146] In the case at bar, Peoples Trust claims the benefit of s. 2 (2)(c) of the *Consumer Protection Act, 2002*, which exempts financial products or services regulated under Ontario's *Loan and Trust Corporations Act*.³¹ Ms. Bernstein, however, submits that this exemption is not available for two reasons.

[147] First, she submits that Peoples Trusts payment cards are not financial products. Second, and in any event, she submits that all the exemptions of s. 2 (2) should be interpreted to mean that the exemptions become operative only when a conflicting consumer protection statute becomes operative.

[148] In other words, she interprets s. 2 (2) to be designed to avoid the conflicting application of multiple consumer protection statutes to the same transactions. Then, she submits that not until the Federal Government's *Prepaid Payment Products Regulations*, SOR/2013-209, came into force (which occurred outside of the Class Period in the immediate case), there was no conflicting application of multiple consumer protection statutes and, therefore, *O. Reg. 17/05* applied to Peoples Trust's financial services.

[149] Peoples Trust response to Ms. Bernstein's arguments is first, that its payment cards are financial products or services. Peoples Trust submits that its payment cards are at their core a cash replacement service, which is a financial service or product issued pursuant to a federal statute similar to the provincial *Loan and Trust Corporations Act* that is exempted from the *Consumer Protection Act, 2002*.

[150] Second, Peoples Trust submits that while it was not created under the provincial statute, since 1967 it has been registered and regulated under Ontario's *Loan and Trust Corporations Act*

³¹ R.S.O. 1990, c. L.25.

and, therefore, although incorporated as a trust company under the federal *Trust and Loan Companies Act*, it is, as a matter of statutory interpretation, entitled to the same exemption for financial products as available to corporations incorporated under the provincial statute. Thus, Peoples Trust does not interpret s. 2(2) as a conflict avoidance provision and it submits that it simply is entitled to the exemption provided by s. 2 (2)(c).

[151] Peoples Trust submits that from a policy perspective, it would make no sense that the exemption provided by the *Consumer Protection Act, 2002* for a provincially incorporated loan and trust company would not apply to a federally incorporated loan and trust company that is registered under the Ontario statute.

[152] Further, Peoples Trust submits that s. 2 (2)(c) of the *Consumer Protection Act, 2002* would have mentioned federal financial institutions but for the Provincial Government's mistaken belief, discussed above, that it would be *ultra vires* for the *Consumer Protection Act, 2002* and *O. Reg. 17/05* apply to purportedly apply to federal financial institutions.

[153] In short, Peoples Trust submits that the exemption for financial services and products is available to it because its cards are financial services and Peoples Trust itself comes within the language of s. 2 (2)(c). (And, as noted above and discussed further below, Peoples Trust submits that this interpretation of the *Consumer Protection Act, 2002* has been confirmed by *Reg. 202/18*.)

[154] I agree with Ms. Bernstein's, in part, and I disagree with her argument, in part. I agree with Peoples Trust's argument, in part, and I disagree with its argument, in part.

[155] I interpret "regulated under the *Loan and Trust Corporations Act*" in s. 2 (2)(c) to include corporations, like Peoples Trust, that are registered under the provincial *Loan and Trust Corporations Act*. I find Peoples Trust's GPR cards to be a financial product or service. However, I find Peoples Trust's SLP cards not to be a financial product or service.

[156] I do not interpret s. 2 (2) of the of the *Consumer Protection Act, 2002* as some sort of anticipatory conflict of statutes provision which would have the *Consumer Protection Act, 2002* apply and *O. Reg. 17/05* apply up until some other statute enacts regulations. The exemptions provided by s. 2 (2) of the *Consumer Protection Act, 2002* operate immediately because the subject matter of the exemption is the matter for another statute. The exemption is not inchoate awaiting the regulations of another consumer protection statute.

[157] As I interpret and apply s. 2 (2)(c) of the *Consumer Protection Act, 2002*, it means that the *Consumer Protection Act, 2002* does not apply in respect of genuine financial products or services provided by Peoples Trust, which is registered under the under the *Loan and Trust Corporations Act*.

[158] Where I part company with both Peoples Trust and also with Ms. Bernstein is that I conclude that only GPR payment cards are financial products. In my opinion, Peoples Trust's SLP cards are not a financial product exempt from the operation of the *Consumer Protection Act, 2002*. They SLP cards are gift cards regulated by *O. Reg. 17/05*.

[159] In their respective arguments about the characterization of Peoples Trusts' payment cards, both Peoples Trust and Ms. Bernstein ignored the aspect that access to a payment network, which is a common feature of both SLP and also GPR cards, is a means to different ends depending on whether the card was one or the other. Through the means of access to a payment network, the end of a SLP payment card is gifting. Through the means of access to a payment network, the end of a GPR card is banking (a financial product).

[160] Ms. Bernstein's own transaction illustrates the difference of the same means leading to different ends. The person who purchased the \$35 Vanilla Prepaid Visa payment card that was given to Ms. Bernstein was not purchasing a financial product (banking) for himself or herself, nor was he or she intending to gift a financial product (banking). The end goal of that SLP transaction was gifting, with the recipient of the card, Ms. Bernstein, having the same type of choice as the recipient of a mall card who uses access to a payment network as the means to the end of gifting.

[161] Practically speaking, a \$35 SLP payment card is useless as a financial product. The same cannot be said for a GPR card, even a \$35 card, which, practically speaking, is not much different than signing a deposit agreement with a financial institution, making a small opening deposit, and with more depositing to follow gaining the benefits of having a bank account. For a GRP cardholder access to a payment network is to achieve banking services.

[162] I appreciate that Peoples Trust states in every cardholder agreement that: (a) neither the card nor the balance on the card is a deposit account, and (b) the balance on the card is not insured by the Canada Deposit Insurance Corporation ("CDIC") or any other federal or provincial agency. This caveat is irrelevant to the characterization of the SLP cards, which, as I have already explained, is not a financial product or service. As for the GRP cards, the caveat does not negate that the GRP cards are used to access banking services, it just indicates that the recipient of the banking services is receiving second-class banking services. They get no interest on their deposits and the deposits are not insured by CDIC, but they do have access to a payment network.

[163] Both Ms. Bernstein and Peoples Trust pointed out that Peoples Trusts' cards are utilized by a sector of society that are second-class citizens to the business of banking, but Ms. Bernstein was wrong to suggest that this meant that these outsiders were not using their GPR cards for financial services. The opposite is true. GPR cards are designed to provide ongoing access to financial services for the cardholder. Ms. Bernstein, however, was correct that the SLP cards are not financial services or products because they are essentially useless as a financial product or service; their value is a means of making a gift.

[164] Thus, in my opinion, Peoples Trust's GPR cards are entitled to the exemption of s. 2 (2)(c) of the *Consumer Protection Act, 2002*.

[165] This conclusion dispenses with Ms. Bernstein's claims for contraventions of the *Consumer Protection Act, 2002* and *O. Reg. 17/05* with respect to the GPR cards. This conclusion dispenses with the Class Members' claims for remedies under the Act with respect to the GPR cards. It dispenses with the Class Member's claims for breach of contract based on the *Consumer Protection Act, 2002* with respect to the GPR cards.

[166] However, this conclusion does not dispense with breach of contract claims not based on the *Consumer Protection Act, 2002*, which I will discuss below.

[167] And, in any event, it still remains to be determined whether Peoples Trust's SLP cards are subject to the *Consumer Protection Act, 2002* and *O. Reg. 17/05*. That Peoples Trust's GPR cards are by virtue of s. 2 (2)(c) of the *Consumer Protection Act, 2002* exempt from the operation of the Act and that Peoples Trust's SLP cards are not entitled to the exemption of s. 2 (2)(c) begs the question of whether Peoples Trust's SLP payment cards are open loop cards governed by the Act, to which question, I now turn.

N. Are Peoples Trust's Cards Open Loop Gift Card Agreements?

[168] Peoples Trust argues that its payment cards are not open loop gift cards. Given the above finding that People Trusts' GPR cards are exempt from the *Consumer Protection Act, 2002*, it is, technically speaking, a moot question whether the GPR cards are open loop cards. It is, however, not a moot or academic question whether Peoples Trusts' SLP payment cards are open loop cards. For the reasons that follow, I conclude that the SLP payment cards are open loop gift cards.

[169] Under s. 23 of *O. Reg. 17/05*, "open loop gift card agreement" is defined as follows:

Future Performance Agreements

Definitions

23. In the Act and this Part,

[...]

"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.

[170] Ms. Bernstein submits that Peoples Trust's payment cards are literally within the definition open loop gift cards. The Prepaid Visa Card Cardholder Agreement, for example, states that "the Card is a prepaid stored value Card that can be used...as payment for goods and services from merchants...", "anywhere that Visa is accepted...".

[171] Ms. Bernstein submits that by their express wording, Peoples Trust's agreements entitle the holder of its cards to apply the value of the card towards purchasing goods or services from multiple unaffiliated sellers, which is precisely what open loop cards are by definition designed to do.

[172] Peoples Trust's argument against the literal meaning of the definition of open loop gift card agreement found in *O. Reg. 17/05* involves a series of contortionist arguments that begins with the very weak argument discussed in this section. Its argument is that its payment cards are not open loop gift card agreements because they are network-branded payment cards issued by a financial institution.

[173] This argument, which is more a hail-Mary plea about what Peoples Trust believes ought to be the interpretation of *O. Reg. 17/05* is weak for at least five reasons.

[174] First, the argument is weak precisely because it does not align with the literal meaning of the definition and seeks to avoid it.

[175] Second, the argument is weak because if it were true, it would make s. 2 (2)(c) of the *Consumer Protection Act, 2002* without purpose; why exempt financial products and services, if payment cards issued by a financial institution are not within the ambit of the *Act*?

[176] Third, in accord with the consumer protection purposes of the *Consumer Protection Act, 2002*, there is good reason to treat Ms. Bernstein's experience, where she received her network-branded payment cards in order to apply it towards purchasing goods or services from multiple unaffiliated sellers but ultimately had a valueless card, as an experience that *O. Reg. 17/05* was designed to outlaw.

[177] Fourth, there is no good reason for reading down the definition and literally meaning of open loop gift card agreement apart from the aspirations of a financial institution that does not want to comply with the *Act* because its payment cards would not be profitable if it complied with the *Act*. (It seems that compliance with the *Act* would not be profitable because the payment cards of a financial institution do not engender merchandise profits, including the lift factor resulting from additional amounts being spent by the cardholders using the card to purchase the card issuer's merchandise.)

[178] Five, the legislative history of the definition of open loop gift card agreements supports Ms. Bernstein's argument that the provision should be given its literally meaning.

[179] As noted above, a review of the legislation history of *O. Reg. 17/05* reveals that the Ministry defined open loop to include mall cards and bank-issued cards with access to a branded global payment network such as MasterCard or VISA. Peoples Trusts SLP cards are, practically speaking, indistinguishable from so called mall cards.

[180] In this last regard, amongst the cards issued by Peoples Trust are mall cards. For example, People Trust's Ivanhoe Cambridge MasterCard, which is not one of the cards in issue in this proceeding, is an SLP card that can be purchased at any of the twenty-one Ivanhoe Cambridge malls and the card can be used at any of the thousands of participating Ivanhoe Cambridge merchants at the malls. Peoples Trust admitted that *O. Reg. 17/05* applies to its mall cards in Ontario, and it confirmed that it requires that provincial gift card legislation be strictly adhered to with respect to its Ivanhoe Cambridge MasterCard.

[181] I conclude that subject to the Peoples Trust's arguments to be discussed next and having regard to the canons of statutory interpretation applicable to consumer legislation that Peoples Trust's payment cards, including its SLP cards, are open loop gift cards governed by the *Consumer Protection Act, 2002* and *O. Reg. 17/05*.

O. Are Peoples Trusts' Payment Cards Future Performance Agreements?

[182] Under the *Consumer Protection Act, 2002* and *O. Reg. 17/05*, open loop gift cards are a type of future performance agreement, and as part of its argument that its payment cards, both SLP and GRP, are not open loop gift card agreements Peoples Trust argues that its payment cards are not future performance agreements.

[183] Without blushing, Peoples Trust submits that its performance obligations for its payment cards are complete at the time the parties enter the agreement or when the card is activated when the purchaser is provided with access to the payment network. It submits that no performance remains outstanding on the part of Peoples Trust. It should blush, however, because apart from being inconsistent with its argument that its cards are a financial product or service, this submission belies its own advertising about all the benefits Peoples Trust provides over time to the purchaser of the card, particularly the purchasers of GRP cards, who can reload their cards from time to time and who indeed are encouraged to do so.

[184] Further, without blushing, Peoples Trust submits that it would be unfair to treat its contract as a future performance agreement because that would mean its performance would be tied to the future performance or delivery by a third-party supplier to which it has no connection and with whom it had no arrangements. I can immediately say that there is no need to weep for Peoples Trust, and I see no unfairness whatsoever in the circumstance that its cardholder can make purchases in

the future from a supplier of goods and services, which is precisely the purpose for which Peoples Trust sold the card.

[185] In any event, Ms. Bernstein rebuffs Peoples Trusts' argument. She submits that Peoples Trust's payment card agreements are literally within the definition of future performance agreement. The agreements require the consumer to make an up-front payment, and, in return, Peoples Trust agrees to "fulfill and manage" the card for the consumer's future use. The agreement contemplates future performance, and the agreements state that "from time to time Card services may be inoperative".

[186] I adopt what Ms. Bernstein states in paragraph 16 of her Reply factum:

16. The evidence is unequivocal that PTC [Peoples Trust] performs ongoing services, including authorizing individual transactions, providing twenty-four hour customer service and fraud monitoring, and providing lost card/replacement services. In any event, the Cardholder Agreements are premised on the fact that consumers will use the cards to make payments in exchange for goods and services. From the consumer's perspective, which is the perspective that matters under the *CPA*, [*Consumer Protection Act*, 2002] the contract is not complete until the consumer has had the opportunity to apply his or her prepaid funds towards desired goods and services.

[187] I agree with Ms. Bernstein. As a financial service product or as a gift card, Peoples Trust's payment cards are future performance agreements.

P. Is There a Gifting Component to a Gift Card?

[188] I now turn to several arguments about whether there is a necessary gifting component to an open loop gift card. As noted above, there is a dispute between the parties as to whether Peoples Trust's cards qualify as gift card agreements.

[189] Under s. 23 of *O. Reg. 17/05*, "gift card" and "gift card agreement" are defined as follows:

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;

[190] Although the definition of a gift card describes it as a "voucher including an electronic credit or written certificate", Peoples Trust submits that for a prepayment card to be a gift card, the paper or electronic voucher must actually be a gift or be a gifted electronic credit or written certificate.

[191] The legislative debates reveal that the Provincial Government sought to prevent the unfair depletion of value on payment cards through fees and expiry dates. The debates suggest that the term "gift card" combined with the word "voucher" was used as to mean to regulate prepaid cash-equivalent payment cards used by consumers. This is reflected in the fact that the debates highlight

a desire to protect those who “buy or receive” a cash equivalent card, which suggests that the Government did not intend its legislation to apply only to cards that were actually given away as gifts.

[192] The legislative history suggests that the Legislature was aware that the notion of a gift card included cards purchased to be gifted but also cards purchased for oneself. The Legislature made this clear in 2018 when it enacted *O. Reg. 202/88*, but the legislative history reveals that the Provincial Government never intended that gifting be a prerequisite to the protection provided to consumers by *O. Reg. 17/05*.

[193] Peoples Trust’s interpretation that open loop cards must actually be given as gifts would lead to absurd results in the application of the *Consumer Protection Act, 2002*. A gifting element to the definition of a voucher would require an issuer like Peoples Trust to monitor when each of its cards changes hands and alter its billing practices accordingly. It would entitle issuers of open loop cards to charge dormancy fees to the purchaser but only until he or she gives the card away.

[194] A voucher is defined as a paper that entitles the holder to a discount, or that may be exchanged for goods or services. Synonyms for voucher are coupon, token, ticket, document, certificate, license, permit, carnet, pass, paper, card, form, deed; chit, slip, stub, docket; chitty; ducat, comp. Vouchers can, of course, be given away as gifts but are not necessarily considered to be gifts. It would appear that the Provincial Government used the word voucher because it was neutral as to a gifting component. A voucher might be a gift, but it does not have to be one.

[195] The synonyms of gift are: present, donation, offering, contribution, handout, presentation, bestowal, largesse, alms, charity, bonus, award, premium, bounty, boon, favor, bequest, legacy, inheritance, settlement, subsidy, grant, endowment, benefaction. Had the Provincial Government intended to confine *O. Reg. 17/05*, it would have used a word different than “voucher.”

[196] I conclude that there is no actual gifting requirement in an open loop gift card agreement.

Q. Are Peoples Trust’s Payment Cards a Voucher that the Holder is Entitled to Apply Towards Purchasing Goods or Services Covered by the Voucher?

[197] In yet another argument, Peoples Trust submits that its payment cards are not gift cards because they do not create an entitlement to purchase any specific good or service. Rather, it submits that its cards are a cash replacement product used to store value that can be tendered for payment. It submits that the potential of a means of payment provided by the payment card does not by itself entitle the holder of the card to purchase any specific good or service.

[198] There is no merit to this argument which would read out of *O. Reg. 17/05* the idea that an open loop card is defined so that the holder of a card may to apply it towards purchasing goods or services from multiple unaffiliated sellers. There is no requirement that the card entitle the holder of the card to purchase any specific good or service.

[199] I agree with what Ms. Bernstein submits in paragraphs 18 – 23 of her Reply Factum:

PTC’s distinction between “enable” and “entitle” is nonsensical

18. PTC submits that its cards merely enable purchases and are therefore beyond the scope of the Regulation because they do not entitle cardholders to purchase goods and services. PTC notes that a merchant who displays goods for sale only makes such goods available as an invitation to treat and is free to accept or reject a consumer’s offer. “Merely possessing a payment card...does not entitle the

holder of the card to apply it to the purchase of anything from anyone. ...Only cards that in some way create such an entitlement can be caught by the Regulation.

19. This argument makes no sense. The cards at issue in this case entitle cardholders to make purchases. That is their entire *raison d'être*. The fact that an individual merchant may refuse to sell a specific product or service does not ameliorate this fact. The situation is no different for a holder of an open loop mall card. That person will have a general entitlement to purchase goods or services from a mall but no entitlement to purchase a specific good or service. Similarly, in the context of closed loop cards, the holder of a Starbucks card does not have a specific entitlement to be sold a pumpkin-spice latte in July, only a general entitlement to the products that the coffee chain sells at a particular time.

20. The term “entitlement” in the “open loop gift card agreement” definition is an entitlement to “apply” the voucher towards goods and services “from multiple unaffiliated sellers.” It is not an entitlement to any specific goods or services offered by any particular merchant; it is the right to apply the card towards whatever goods and services are offered by the unaffiliated sellers. [...] In other words, the goods and services “covered” by the prepaid cards, are those sold by sellers who accept Visa or MasterCard, as the case may be.

21. PTC’s proposed interpretation of the word “entitlement” would create an absurdity in the scheme that would render most gift cards outside the scope of the Regulation. In fact, the only vouchers that could conceivably overcome PTC’s interpretation are gift cards that cover “only one specific good or service”, and these are specifically carved out of the scheme.

22. This narrow, technical interpretive approach to the Regulation is designed to limit consumer protection. This is the antithesis of that interpretive approach that has been mandated both by statute and the jurisprudence. The fact that PTC treats its mall cards as subject to the gift card Regulation is evidence that it cannot seriously believe that this interpretation is correct.

[200] Notwithstanding Peoples Trust’s contortionist arguments to the contrary, its payment cards are a voucher that the holder is entitled to apply towards purchasing goods or services covered by the voucher.

R. Sankar v. Bell Mobility Inc.

[201] I mentioned at the outset of these Reasons for Decision under the heading “Overview of the Arguments” that one of People Trust’s arguments is that *Sankar v. Bell Mobility Inc.* supports the conclusions that People Trust’s payment cards are not future performance agreements and that there is a gifting requirement to gift cards under *O. Reg. 17/05*.

[202] I disagree with this argument.

[203] *Sankar v. Bell Mobility Inc.* is a class action case about *O. Reg. 17/05*, and it has a remarkable and extended judicial history that I shall footnote,³² but for present purposes I shall

³² Justice Belobaba certified the action as a class action; see *Sankar v. Bell Mobility Inc.*, 2013 ONSC 5916. The Divisional Court refused leave to appeal; see *Sankar v. Bell Mobility Inc.*, 2013 ONSC 7529 (Div. Ct.). Both parties brought summary judgment motions on the certified common issues. Justice Belobaba dismissed the action; see *Sankar v. Bell Mobility Inc.*, 2015 ONSC 632. The Court of Appeal affirmed the summary judgment decision; see *Sankar v. Bell Mobility*, 2016 ONCA 242. Ms. Sankar sought leave to appeal to the Supreme Court of Canada, and on the leave application, the Supreme Court remanded the case to the Court of Appeal for reconsideration; See *Sankar v. Bell Mobility Co.*, [2016] S.C.C.A. No. 251. The Court of Appeal reconsidered the case, and it confirmed its original decision; see *Sankar v. Bell Mobility Co.*, 2017 ONCA 295. Ms. Sankar sought leave to appeal to the Supreme Court for a second time, but leave was refused; see *Sankar v. Bell Mobility Co.*, [2016] S.C.C.A. No. 251 updated: October 19, 2017.

make only four brief comments about *Sankar v. Bell Mobility* that lead me to the conclusion that *Sankar v. Bell Mobility* neither hurts nor helps the parties in the immediate case.

[204] First, the *Sankar* case were about prepaid phone cards that provided access to the service of a wireless telecommunications network. Peoples Trust submits that its prepaid cards are analogous to prepaid phone cards because they provide access to the service of a payment network. In my opinion, however, the analogy is not sound and prepayment for phone service is a different type of service than provided by Peoples Trust's payment cards.

[205] In other words, the first point is that Bell Mobility's cards are a difference subspecies of pre-payment card, and while I do not dispute the correctness of the ultimate result in *Sankar v. Bell Mobility*, the case is not a helpful precedent for resolving the immediate case. Metaphorically, *Sankar* is a case about oranges and the immediate case is about grapefruits, a different citrus fruit.

[206] Second, in *Sankar v. Bell Mobility Inc.*, while Justice Belobaba was of the view that there is a gifting element to payment cards governed by *O. Reg. 17/05*; however, for the reasons set out above, I disagree with him, and I note that in affirming Justice Belobaba's decision on the summary judgment motions in *Sankar*, where the claims against Bell Mobility were dismissed, the Court of Appeal was very clear that it was not expressing any opinion on this point.

[207] Third, both Justice Belobaba and the Court of Appeal concluded that *O. Reg. 17/05* did not prohibit an agreement being time-limited and that *O. Reg. 17/05*'s purpose was to prevent an agreement expiring before the supplier had performed the promised service. In the *Sankar* case, it was; however, Chief Justice Strathy's opinion that class members received the full period of the wireless service promised and, therefore, there was no breach of contract. Precisely, the opposite can be said in the immediate case with respect to the unused balances on Peoples Trust's SLP cards after the VALID THRU DATE, and this is conceded by Peoples Trust which holds the unused balance as a liability on its balance sheet.

[208] Fourth, on the appeal of the summary judgment motions, Chief Justice Strathy expressly did not find it necessary to express an opinion about whether the prepaid phone cards were future performance contracts. For the reasons expressed above, my conclusion is that Peoples Trust's SLP cards are future performance contracts.

[209] Thus, *Sankar v. Bell Mobility Inc.* is of no assistance to Peoples Trust in the immediate case.

S. Do Peoples Trust's Payment Cards Create a Relationship of Privity with the Cardholder?

[210] Peoples Trust argues that its payments cards are not gift cards because a network-branded payment card does not create any privity of relationship between a cardholder and a merchant that would entitle the holder to tender the card as payment for the purchase of anything offered by the merchant.

[211] It is true that Peoples Trust's cards do not create privity between the cardholder and the merchant with whom the cardholder is transacting business. But, so what? Typically, privity between the cardholder and the merchant is not an issue; the cardholder will have an oral or written contract for the purchase of goods and services from the merchant, and the cardholder will use the payment card to discharge his or her side of the bargain, which is to pay for the goods and services.

In any event, the relationship between the cardholder and the merchant has nothing to do with whether payment cards are future performance contracts as between the cardholder and the card issuer.

[212] It seems that Peoples Trust's argument is really just an extension or corollary of its argument, discussed earlier, that its payment cards are not gift cards because they are not vouchers creating an entitlement to purchase any specific good or service. This corollary argument is as devoid of merit as the main argument, which was meritless.

[213] Peoples Trust also submits that Class Members, like Ms. Bernstein, who did not purchase the payment card but received it as a gift, have no privity of contract with Peoples Trust. It submits that none of the traditional exceptions to privity of contract are applicable to the facts underlying this motion, nor is the special reason for the relaxation of the rule that was present in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*,³³ where the Supreme Court of Canada allowed third party employees to rely on contractual provisions as a defence to an action in negligence brought by one of the contracting parties.

[214] Peoples Trust's argument is contradicted by the plain language of its standard form Cardholder Agreements. The standard terms of the Agreements for SLPs and GPRs, which are set out above, establish that there is privity between Peoples Trust and the cardholders, be they the immediate purchasers of the cards or be they a recipient of the card who activates it and agrees to be bound by the terms of the agreement.

[215] In particular, every SLP Card Agreement defines "Cardholder" to mean any individual "who activates, receives and/or uses the Card", and all but one of the standard forms indicates that the Cardholder assents to the terms and conditions by signing or using. The Ideal Choice agreement adds "accepting," to "signing or using" the card.

[216] The Class Members do not need any relaxation of the principles that require there to be privity of contract to enforce the contract. There is privity of contract between Peoples Trust and the Class Members, be those Class Members purchasers of the card or recipients of the card.

T. What is the Significance of O. Reg. 202/18, the 2018 Amendment to O. Reg. 17/05?

[217] Before moving on to consider more of Peoples Trust's arguments, it is convenient here to return to the topic of the significance, if any, of the recent amendments to *O. Reg. 17/05*.

[218] The discussion here can begin by noting that the case at bar is about the application of *O. Reg. 17/05* - as it existed during the Class Period of November 29, 2011 to April 30, 2014 - and thus the outcome of the case is not governed by the application of *O. Reg. 202/18*'s changes to *O. Reg. 17/05*. The parties agree that the case at bar is not governed by the current version of *O. Reg. 17/05*, which was amended by *O. Reg. 202/18*.

[219] The parties also agree that the *Legislation Act, 2006*³⁴ stipulates that the amendment of an Act or regulation does not imply anything about the previous state of the law³⁵ and that the amendment of an Act or regulation does not imply that the previous state of the law was different. Thus, when there is an amendment, the court is not to assume that the prior law was different or

³³ [1992] 3 S.C.R. 299.

³⁴ S.O. 2006, c. 21, Sched. F.

³⁵ S.O. 2006, c. 21, Sched. F, s. 56 (1).

that the prior law was the same as the amended law.³⁶

[220] However, Peoples Trust does not walk its talk about the significance of an amendment to the interpretation of a statute or regulation. It submits that the interpreting court must determine why the amendment was made and that this will shed light on the interpretation and application of *O. Reg. 17/05*. I disagree.

[221] It might be useful to determine why the amendments were made if I were interpreting the amendment, but I am not interpreting the amended *O. Reg. 17/05* as it now exists. I am interpreting *O. Reg. 17/05* as it existed during the Class Period.

[222] Above in these Reasons for Decision, I have interpreted *O. Reg. 17/05* as it existed during the Class Period. Since there is no suggestion that *O. Reg. 202/18* is to apply retroactively, there is nothing about it that changes my interpretation of *O. Reg. 17/05*.

U. Are Peoples Trust's Cards "Single Service" Cards?

[223] Returning to Peoples Trust's arguments, Peoples Trust submits that its cards offer the single service of cash replacement. It adds this argument to its fusillade because s. 25.1 (b) of *O. Reg 17/05* exempts gift cards from the operation of *O. Reg. 17/05* that "cover only one specific good or service."

[224] Peoples Trusts' argument does not work. In addition to the point made above that Peoples Trusts' cards provide a variety of services over time and from time to time, an examination of the legislative background to this exemption is that it was intended to provide an exception regarding expiry dates in gift cards for example, for a haircut, manicure, or message. The rationale for the exception is that these single good or service businesses are not expected to offer the same products and services for the same price indefinitely. That rationale does not apply to either type of Peoples Trust's payment cards.

[225] In any event, as noted above, Peoples Trust performs a variety of services in relation to its payment cards, including authorization and reconciliation of each transaction, customer service, and card replacement, and the ongoing services for which it charges maintenance fees, foreign exchange fees, and ATM fees. It admits as much in its Cardholder Agreements. For example, the Nextwave Titanium+ Prepaid Visa Card Agreement states that the available balance associated with the card may also be used for other services offered by Peoples Trust to the customer from time to time.

[226] Peoples Trust's submission also leads to an absurd interpretation of *O. Reg 17/05* because if its proposed interpretation was applied consistently, then all gift cards could be characterized as providing the single service of a cash replacement. Thus, all gift cards would be exempt from *O. Reg. 17/05*, an absurd result.

[227] I conclude that Peoples Trust's Cards are not "single service" cards and not entitled to the exemption found in *O. Reg 17/05*, s. 25.1 (b).

³⁶ *Demers v. B.R. Davidson Mining and Development Ltd.*, 2012 ONCA 384 at para. 42

V. Are Peoples Trust's SLP Cards Consumer Goods and Are the Class Members Consumers?

[228] Pausing again in the analysis of the parties' arguments, it is helpful and necessary to reorganize and address the questions of whether Peoples Trust's SLP cards are consumer goods and whether the Class Members are consumers under the *Consumer Protection Act, 2002*.

[229] These questions are significant because Peoples Trust submits that liability cannot be established and an aggregate assessment of damages is not available because each Class Member must prove that he or she is a consumer and "consumer" means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes.

[230] Peoples Trust submits that assuming that breaches of the *Consumer Protection Act, 2002* or of *O. Reg. 17/05* were proven, then each Class Member must undergo cross-examination at individual issues trials to establish his or her claim as a consumer. Thus, Peoples Trusts submits that its payment cards are not inherently personal or consumer in nature and that each Class Member would have to be cross-examined to determine whether he or she was a consumer.

[231] I would agree that this is might be true with respect to its GPR cards. I would agree that with respect to these cards there might be a problem of identifying consumer transactions as defined by the *Consumer Protection Act, 2002*. However, as the discussion above has revealed, the cardholders of GPR cards have no claims because Peoples Trust's GPR payment cards are exempt pursuant to s. 2 2(c) of the *Consumer Protection Act, 2002*. Thus, it is not necessary to determine whether the Class Members who purchased or who were given GPR payment cards were consumers as defined by the *Act*.

[232] But coming to the point, I do not agree with People Trust's submission with respect to Class Members who purchased or who were gifted Peoples Trust's SLP cards. I am satisfied that the evidence on the summary judgment motion (without the use of any statistical evidence) establishes on a common or class-wide basis that the Class Members who purchased the SLP cards were consumers. I am satisfied that the SLP cards are inherently personal or consumer in nature.

[233] Here, it should be recalled that Peoples Trust's SLP cards were marketed exclusively to consumers and for consumer purposes. The SLPs were marketed as gifts, which are by their very nature a personal, typically non-business, purpose. Peoples Trust described its Vanilla MasterCard and Visa as having been embraced by Canadian consumers.

[234] Peoples Trust's argument that the Class Members that purchased SLP cards are not consumers ignores the uncontradicted evidence and the sworn evidence of People Trust's witnesses. And, it ignores its own damages evidence about the quantification of damages, discussed above in these Reasons for Decision. This evidence invites the Court to assume that ten percent of the users of its cards are non-consumer users, which would appear to be an acknowledgment that at least ninety percent of its users are consumers as defined by the *Consumer Protection Act, 2002*.

[235] Mr. Read deposed that the cards at issue, including the GRP cards, are in the consumer category and used for personal purposes. He did not have any information as to whether the cards were used for non-consumer purposes.

[236] On a summary judgment motion, the Court is entitled to assume that each side has put its best foot forward. Peoples Trust has failed to lead any cogent evidence of material non-consumer

uses for its SLP cards. This was a live issue from the outset of this case, and, if Peoples Trust had any such evidence, the court is entitled to assume that it would have led it. Instead, it relies on an assumption of ten percent non-consumer use which Peoples Trust's counsel confirmed was speculative and came out of thin air. Furthermore, there is no support in the record for Peoples Trust's assertion that there was a twenty-nine percent business use of the cards.

[237] Peoples Trust's argument is in a sense a reprise of its unsuccessful argument at certification in which it asserted that the difficulty in identifying consumers from non-consumers rendered the case uncertifiable. I disagreed with this argument then, and it was rejected by the British Columbia Court of Appeal in a similar class action in that province.³⁷

[238] In the case of GPR cardholders, had they claims under the *Consumer Protection Act, 2002*, the difficulty of identifying consumers from non-consumers could and would have been addressed at individual issues trials. But more to the point, there is no similar difficulty with respect to purchasers of SLP cards, for whom the evidence on this summary judgment motion establishes were making consumer purchases not a business-orientated purchase. They bought what they were by all appearances sold, a consumer gift card. There is no evidence nor any basis to infer that there is anything other than *de minimis* non-consumer use of the People Trust's SLP cards.

[239] I, therefore, find as a fact based on the balance of probabilities that all the Class Members who purchased People Trust's SLP cards were consumers.

W. Did Peoples Trust Impose Unlawful "Expiry Dates" and Forfeitures?

[240] I now turn to one of Ms. Bernstein's major claims, which is that Peoples Trust imposed unlawful expiry dates and wrongfully forfeited the balances in the Class Members' payment card accounts.

[241] *O. Reg. 17/05* s. 23.3 prohibits the imposition of "expiry dates" in 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.

(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.

[242] Ms. Bernstein submits that Peoples Trust contravened *O. Reg. 17/05* to the extent that it: (a) imposed VALID THRU DATES after which the cards could not be used; or (b) charged "cancellation fees" to cancel remaining funds on a card following the VALID THRU DATE.

[243] The Class Members' claims for unused balances total \$6,186,000 for the SLP cards and \$590,000 for the GPR cards, but for the reasons already expressed above, I need not address the GPR cards. Because I have already concluded that the GPR cards are exempt from the operation of the *Consumer Protection Act, 2002* nothing more need be said about the Class Members' claim under the *Act* and *O. Reg. 2002* and *O. Reg. 17/05*. And I can quickly foreshadow the discussion below to add that absent a breach of the *Consumer Protection Act 2002* or *O. Reg. 17/05*, in my opinion, there is also no breach of contract or unjust enrichment with respect to the GPR cards. The Class Members' claims with respect to the GPR cards are not legally viable and it is for this reason that Peoples Trust is partially successful on its cross-motion for a summary judgment.

³⁷ *Jiang v. Peoples Trust Co.*, 2017 BCCA 119. See also *Jiang v. Peoples Trust Co.*, 2019 BCCA 149.

[244] With respect to the SLP cards, I agree with Ms. Bernstein's argument that Peoples Trust contravened *O. Reg. 17/05* s. 23.3 with respect to the VALID THRU DATES and its retention of the balances on the cards.

[245] I appreciate that Peoples Trust has been reporting and holding the unused funds as a liability, but the fact remains that the SLP cards are gift cards and the VALID THRU DATE IS an expiry date on the future performance of the agreement. The standard term in the SLP agreements provides: "Please note that the Card has a "valid thru" date imprinted on the face of the Card. This is the date after which you may not use the Card for any purpose." Peoples Trust asserts that it did not seize or forfeit consumers' unused balances, because it claims that the balances were always available for consumers to use. This assertion is contrary to the express terms of many of the Cardholder Agreements, and, practically speaking, the Class Members have been denied access to the payment network and the monetary utility of the SLP cards.

[246] The Cancellation Fee in the Give and Go Prepaid Visa and the Shell Non-Reloadable MasterCard (from November 29, 2011 – June 30, 2012) contained a provision providing that any remaining balance on the Card would be subject to a "cancellation fee equal to the remaining balance".

[247] For another example, cards registered in Québec - *i.e.*, the Vanilla Prepaid Visa and the Vanilla Prepaid MasterCard (from July 1, 2011 – June 30, 2012) and the Shell Non-Reloadable MasterCard (from July 2012 – April 29, 2014) - contained a term stating that cards "registered in Québec may be replaced on and following the expiry date at no cost to the cardholder and without reducing the balance". The problem however is that the Vanilla Prepaid Visa, the Vanilla Prepaid MasterCard, and the Shell Non-Reloadable MasterCard are sold in Ontario and there is no replacement provision for Ontario consumers after the VALID THRU DATE.

[248] Peoples Trust asserted that cardholders can always get a new card after the expiry date. However, this assertion was contrary to the record and ignored the fact that, from the beginning of the Class Period until July 2012, Peoples Trust's agreements covering single-load prepaid cards provided no basis for cardholders outside Québec to obtain replacement cards.

[249] I appreciate that after it stopped applying a cancellation fee, Peoples Trust did not actually forfeit the money for its own benefit, and I appreciate that a VALID THRU DATE is something that a VISA or MasterCard branded card must have, but those were problems that Peoples Trust had to resolve in order to comply with *O. Reg. 17/05*. I adopt what Ms. Bernstein states in paragraph 24 of its reply factum:

24. PTC states that Visa and MasterCard require prepaid gift cards to have expiry dates. If the cards fall within the scope of the Regulation, the networks' policies are irrelevant to consumers' rights in Ontario. PTC could have easily complied with the Regulation and the networks' policies by, for example, assuring *all consumers* throughout the class period that their balances would not expire and by proactively sending free replacement cards upon the "valid thru" date.

[250] I appreciate that Peoples Trust does not have contact information for the SLP cardholders, save for the very few cardholders that apply for a replacement card for a lost card or the very few cardholders who know that they can obtain a new card after the VALID THRU DATE but that ignorance, which could have been avoided by measures far short than the know-your-client regime, does not negate that Peoples Trust is liable (as it readily acknowledges in its financial statements) to these cardholders and that Peoples Trust cannot claim the unused funds as its own.

[251] Earlier in these Reasons for Decision, I discuss the calculation of the Class Members'

claims, and I concluded that the unused balances for the SLP cards equals \$6,186,000. It is this sum that Peoples Trust indicated as a liability in its financial statements. It is this sum that Peoples Trust is holding for the cardholders, and it is this sum that needs to be refunded and distributed. The problem of identifying entitlements will be discussed further below under the heading "Distribution Scheme."

[252] My immediate conclusion is that Peoples Trust did impose unlawful expiry dates and, practically speaking, until these funds are refunded, there was a forfeiture of \$6,186,000 and a contravention of *O. Reg. 17/05*.

X. Did Peoples Trust Charge Illegal Fees?

[253] Section 25.4 of *O. Reg 17/05*, as amended, governs what fees may be charged under an open loop gift card agreement as follows:

(1) [...]

(2) No supplier under an open loop gift card agreement shall,

(a) issue a gift card for less than the value of the payment made by the consumer for entering into the agreement less \$1.50 or hold out that the supplier can provide such a gift card; or

(b) charge a fee to the holder of a gift card for anything in relation to the card, other than a fee for replacing a lost or stolen gift card, a fee to customize a gift card or a dormancy fee in accordance with subsection (2.1).

(2.1) The supplier under an open loop gift card agreement may charge a dormancy fee to the holder of the gift card if,

(a) the fee is charged no earlier than,

(i) 15 months after the end of the month that the consumer entered into the agreement, if the holder does not request the supplier for an extension in that 15th month, or

(ii) 18 months after the end of the month that the consumer entered into the agreement, if the holder requests the supplier for an extension in the 15th month after the end of the month that the consumer entered into the agreement;

(b) the fee does not exceed \$2.50 per month;

(c) the card has a notice on the front of the card in 10-point font indicating that there is fee information on the back of the card;

(d) the card has a notice on the back of the card setting out, clearly and prominently, the information mentioned in clauses (a) and (b); and

(e) the supplier discloses the information mentioned in clauses (a) and (b) to the consumer at the time that the consumer enters into the agreement.

(3) If a supplier or a seller has charged a fee or an amount in contravention of subsection (2), the consumer or the holder of a gift card who paid the fee or the amount may demand a refund by giving notice to the supplier in accordance with section 92 of the Act within one year after making the payment.

(4) A supplier who receives a notice demanding a refund under subsection (3) shall provide the refund within 15 days of receiving the notice.

[254] Every card at issue in this case charged an “activation fee” greater than \$2.50, which violates s 25.4(1)(a) of *O. Reg. 17/05* if the *Consumer Protection Act, 2002* applies to the card, which is not the case with respect to its GPR cards but is the case with respect to the SLP cards.

[255] Further, Peoples Trust charges fees that are not permitted under *O. Reg. 17/05* which once again would be a contravention of s 25.4(1)(b) of *O. Reg. 17/05* if the *Consumer Protection Act, 2002* applies to the card, which is not the case with respect to its GPR cards but is the case with respect to the SLP cards.

[256] To the extent that Peoples Trust charged a dormancy fees/monthly fees earlier than the 15th month after activation, it violated s 25.4 (2.1)(a)(i) if the *Consumer Protection Act, 2002* applies to the card, which is not the case with respect to its GPR cards but is the case with respect to the SLP cards.

[257] The result is that Peoples Trust did charge illegal fees with respect to the SLP cards. As the discussion above about quantification reveals, it charged \$9,144,000 to cardholders with SLP cards contrary to *O. Reg. 17/05*.

Y. Did Peoples Trust Engage in Unfair Practices Contrary to the *Consumer Protection Act, 2002*?

[258] Ms. Bernstein submits that Peoples Trust engaged in unfair practices contrary to the *Consumer Protection Act, 2002*. Her submissions were directed at both the SLP cards and the GPR cards. However, I have concluded that the *Act* does not apply to the GPR cards and thus her arguments cannot apply to the GPR cards.

[259] Section 17 of the *Consumer Protection Act, 2002* prohibits the acts referred to in section 14, 15, or 16 of the *Act* and deems those acts to be unfair practices. Section 17 states:

Unfair practices prohibited

17. (1) No person shall engage in an unfair practice.

One act deemed practice

(2) A person who performs one act referred to in section 14, 15 or 16 shall be deemed to be engaging in an unfair practice.

[260] Sections 14 and 15 of the *Consumer Protection Act, 2002* states:

False, misleading or deceptive representation

14. (1) It is an unfair practice for a person to make a false, misleading or deceptive representation.

Examples of false, misleading or deceptive representations

(2) Without limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representations:

[...]

14. A representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.

[...]

Unconscionable representation

15. (1) It is an unfair practice to make an unconscionable representation.

Same

(2) Without limiting the generality of what may be taken into account in determining whether a representation is unconscionable, there may be taken into account that the person making the representation or the person's employer or principal knows or ought to know,

[...]

(e) that the consumer transaction is excessively one-sided in favour of someone other than the consumer;

(f) that the terms of the consumer transaction are so adverse to the consumer as to be inequitable;

[...]

[261] Ms. Bernstein argues that no fees would have been apparent to a purchaser of one of Peoples Trust's card looking at the retail display except for the activation fee. The expiry dates and Cardholder Agreements were concealed within the sealed carrier. Nothing on the packaging or face of the cards warns of the consequences of expiry. The only explanation is contained on the Cardholder Agreement, which, she submits, the consumer could not reasonably access until after purchase.

[262] Peoples Trust concedes that while some fees would be printed on cards, not all fees were disclosed on the card. For example, the packaging for the Vanilla Prepaid MasterCard in 2010-2012 discloses the activation fee in tiny lettering, but the face of the carrier fails to disclose the existence or quantum of other fees. The back of the packaging only discloses a monthly fee, a foreign exchange fee, and a card replacement fee; it does not mention the VALID THRU DATE. With respect to the monthly "service fee", the package states only that a monthly service fee "commences 7th month from date of purchase, except as otherwise required by law," but fails to state the amount of that fee.

[263] Ms. Bernstein submits that Peoples Trust's contracts mislead consumers about their rights to expired balances constitutes a misrepresentation and an unfair practice under the *Consumer Protection Act, 2002*. Further still, she submits that to the extent that Peoples Trust claims that consumers' rights were something other than what was stated in the terms of their contract, this constitutes an unfair practice under the *Consumer Protection Act, 2002*. Further, further still, Ms. Bernstein submits that it is an unfair practice for Peoples Trust to charge any fees that it omitted from the exterior packaging of its Prepaid Cards.

[264] I agree that all these practices constitute unfair practices or misrepresentations under the *Consumer Protection Act, 2002*.

[265] Peoples Trust argues that purchasers who actually acquired their cards as gifts from others have no claim under the *Consumer Protection Act, 2002* because they cannot prove that they were induced by Peoples Trust's representations. The Court of Appeal, however, has confirmed that there is no necessity to prove reliance in order to establish an unfair practice under the *Act*.³⁸

³⁸ *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921.

[266] I conclude that with respect to its SLP cards, Peoples Trust engaged in unfair practices contrary to the *Consumer Protection Act, 2002*.

Z. Did Peoples Trust Charge for Fees Not Included in its Agreements and Make Unenforceable Post-Contractual Representations?

[267] Ms. Bernstein advances a discrete claim that depends upon the law of contract unassisted by the *Consumer Protection Act 2002* or *O. Reg. 17/05*. Having regard to the conclusions above, this claim, unassisted as it is by the statutory claims, is superfluous with respect to the SLP cards for which Peoples Trust's liability has been established for contraventions of *O. Reg. 17/05* and for unfair practices under sections 14-17 of the *Consumer Protection Act, 2002*. Thus, the discrete contract law claim concerns Peoples Trust's GPR cards, which are exempt from the *Act* and the regulation.

[268] As a matter of pure contract law, Ms. Bernstein submits that Peoples Trust charged for fees that were not expressly provided for in the Cardholder Agreements and to the extent that it did so, it breached the agreements, which all contained entire agreement clauses that stated:

This Agreement sets forth the entire understanding and Agreement between You and us, whether written or oral, with respect to the subject matter hereof and supersedes any prior or contemporaneous understandings or agreements with respect to such subject matter.

[269] Further, Ms. Bernstein submits with an entire agreement clause, Peoples Trust cannot rely on the fine print on the back of the card or references to websites where the details of the charges and fees could be found. She submits that terms not disclosed at the time of purchase, including VALID THRU DATES are communications after the contract has been formed and do not form part of the Cardholder Agreement. Ms. Bernstein submitted that a reasonable consumer, in the course of his or her everyday life, cannot reasonably be expected to search for the Cardholder Agreements online and pore over their terms, or seek legal advice from the retail clerk. She submitted that Peoples Trust did not adequately disclose the onerous terms of the Cardholder Agreement and she submits that absent adequate notice, it cannot enforce the termination provisions of the agreements.

[270] Further still, she submits that the expiry provisions were onerous and unenforceable in accordance with the principles of the case law that establish that such terms are unenforceable. Relying on *Tilden Rent-A-Car v. Clendenning*,³⁹ Ms. Bernstein submits that a supplier cannot rely on terms in a standard form contract that it knows or ought to know do not represent the other party's intention, including stringent and onerous provisions of which the other party is unaware. She submits that there is an onus on Peoples Trust to point out any terms in a printed form that differ from what the consumer might reasonably expect and if the supplier fails to do so, the court will strike down the offending clause as a misrepresentation by omission.

[271] I am not persuaded by any of Ms. Bernstein's arguments with respect to the formation of the contracts for the GPR cards, the terms and conditions of the contracts, or the enforcement of those terms and conditions. The purchasers of Peoples Trust Company's GPR cards were purchasing those cards because they were financial products or services. There was a know-your-client process at the time of contracting. They were provided with adequate information about what they were purchasing and about the terms of the contracting including the fact that there

³⁹ (1978), 18 O.R. (2d) 601 (C.A.).

would be charges and fees as they reasonably might, would, and should have expected.

[272] Unregulated by the *Consumer Protection Act, 2002* and during the Class Period unregulated by the *Prepaid Payment Products Regulation, SOR/2013-209*, the GPR cardholder agreements were governed by the normal principles of the law of contract and the GPR cardholders are bound by the terms of the standard form contracts of which in my opinion they had adequate notice at the time at which the contract was formed.

[273] I conclude that with respect to the GPR cards that Peoples Trust did not charge for fees not included in its agreements and it did not make unenforceable post-contractual representations. As a matter of pure contract law, Peoples Trust was entitled to enforce the terms and conditions of the GPR cards.

AA. Did Peoples Trust Breach its Contracts with the Class Members?

[274] The above analysis reveals that Peoples Trust did not comply with the *Consumer Protection Act, 2002* and *O. Reg. 17/05* with respect to the SLP cards. I agree with Ms. Bernstein's argument that these contraventions are breaches of contract.

[275] As noted above, I disagree with Peoples Trust's argument that if the cardholder did not himself or herself purchase the card, then the cardholder cannot enforce the agreement or complain about breaches of the *Consumer Protection Act, 2002* for want of privity with Peoples Trust. There is privity of contract, and the Class Members who are SLP cardholders have breach of contract claims against Peoples Trust.

[276] The above analysis reveals that Peoples Trust did not need to comply with the *Consumer Protection Act, 2002* and *O. Reg. 17/05* with respect to the GPR cards, and as discussed in the section immediately above, I have concluded that as a discrete matter of contract law, there was no breach of contract with respect to these cards.

[277] The Class Members who are GPR cardholders do not have breach of contract claims against Peoples Trust.

BB. Was Peoples Trust Unjustly Enriched?

[278] The elements of a claim of unjust enrichment are: (1) the defendant being enriched; (2) a corresponding deprivation of the plaintiff; and, (3) no juristic reason for the defendant's enrichment at the expense of the plaintiff.⁴⁰

[279] Ms. Bernstein has established that with respect to the SPL cards, Peoples Trust has contravened *O. Reg. 17/05*, perpetrated unfair practices under the *Consumer Protection Act, 2002*, and breached its contracts with the Class Members who are SLP cardholders. These wrongful acts have deprived the Class Members, unjustly enriched Peoples Trust, and there is no juristic reason to justify the enrichment.

CC. The Notice Requirements and the Remedies Available to the Class Members

[280] What emerges from the discussion above is that reserving judgment on the matter of

⁴⁰ *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30; *Pacific National Investments Ltd. v. Victoria*, 2004 SCC 75; *Moore v. Sweet*, 2018 SCC 52.

prejudgment and postjudgment interest, I have concluded that the Ms. Bernstein is entitled to a summary judgment on behalf of Class Members who had an SLP card. As discussed above and further discussed below, the quantification of this judgment is: (a) \$6,186,000, as compensation for the unused balances on the cards after the VALID THRU DATE; and (b) \$9,144,000 as compensation for amounts charged contrary to *O. Reg. 17/05*. The total award is \$15,330,000.

[281] These awards can be explained as: (a) contraventions of *O. Reg. 17/05* of the *Consumer Protections Act, 2002*; (b) unfair practices contrary to the *Consumer Protection Act, 1992*; (c) breaches of contract; and (d) unjust enrichment claims.

[282] Peoples Trust, however, submits that these awards cannot be made, unless the Class Members, including Ms. Bernstein, complied with s. 98 of the *Consumer Protection Act, 2002*, which provides a remedy for illegal charges and payments to a consumer who paid the charge and made demand for a refund by giving notice in accordance with s. 92 within one year after paying the charge or making the payment.

[283] Using Ms. Bernstein as an example, Peoples Trust points out that: (a) she received her card in September 2010; (b) she never gave notice in accordance with s. 92 of the *Consumer Protection Act, 1992*; and (c) the first time any request was made to waive the notice requirement of the *Act* was in her Statement of Claim issued on November 29, 2013. Peoples Trust submits that she has never provided any explanation as to why the notice provision of the *Act* should not apply to preclude her claim as untimely.

[284] To address Peoples Trust's argument, it is necessary to consider sections 18, 92, 100, and 101 of the *Consumer Protection Act, 2002* which are set out in Schedule A to these Reasons for Decision.

[285] Under Part III (Unfair Practices) of the *Consumer Protection Act*, s. 18 provides consumers with a right of rescission or damages, where the consumer has entered an agreement after or while a person has engaged in an unfair practice. Section 18 contains a notice requirement with mandatory language, but s. 18 (3) along with s. 101 of the *Act* provides the court with a broad discretion to disregard any notice requirements, if it is in the interest of justice to do so.

[286] In the immediate case, I have found that Peoples Trust perpetrated unfair practices with respect to those Class Members who were SLP cardholders, and, in my opinion, it is in the interests of the justice to waive the notice requirement.

[287] Under Part IX (Procedures for Consumer Remedies) of the *Consumer Protection Act, 2002*, a consumer may demand a refund of certain fees by giving notice. Once again, pursuant to s. 101 of the *Act*, the court has discretion to waive the notice requirement when it is in the interests of justice to do so, and, once again, in the circumstances of the immediate case, in my opinion, it is in the interests of justice to do so.

[288] One of the reasons that it is in the interests of justice to waive the notice requirement is that the waiver is actually superfluous in the immediate case.

[289] The right to commence an action under s. 100 of the *Consumer Protection Act* is not subject to a notice requirement. Similarly, *O. Reg. 17/05* provides that a consumer may demand a refund by giving notice to a supplier who has charged illegal fees on open-loop cards; however, it is not a precondition for bringing an action that any notice be given.

[290] Further, there is no notice requirement for a common law action for breach of contract or

for unjust enrichment, and, thus, for the most part, the Class Members' actions, both statutory and non-statutory, are not subject to any notice requirement. Thus, it is superfluous to waive notice on the claims that overlap and that might require notice.

[291] In any event, as already noted, under s. 101 of the *Consumer Protection Act, 2001*, the court has discretion to "disregard" any notice requirements "if it is in the interests of justice to do so". Ms. Bernstein submits that it is in the interests of justice to waive the notice requirement for the unfair practices claims. Apart from the fact that waiver is superfluous, if it was not, it is not in the interests of justice to impose the notice requirement. To allow Peoples Trust to use the s. 18 notice requirement as a shield would defeat all three purposes of class proceedings, but particularly access to justice. Once the Class Members have demonstrated that they have viable claims, it would not be in the interests of justice to strictly apply the notice requirements of the *Consumer Protections Act, 2002*.

[292] Thus, I conclude that the Ms. Bernstein is entitled to a summary judgment on behalf of Class Members who had an SLP card of: (a) \$6,186,000 as compensation for the unused balances on their cards after the VALID THRU DATE; and (b) \$9,144,000 as compensation for amounts charged contrary to *O. Reg. 17/05*.

[293] If necessary, I waive any notice requirement pursuant to s. 101 of the *Consumer Protection Act, 2002*.

DD. Are the Class Members Entitled to an Award of Aggregate Damages?

[294] A brouhaha is defined as a noisy and overexcited response to something, and there was a brouhaha in the immediate case about whether the Class Members are entitled to an award of aggregate damages pursuant to s. 24 of the *Class Proceedings Act, 2002*.

[295] Section 24 of the *Class Proceedings Act, 2002* states:

Aggregate assessment of monetary relief

24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

- (a) monetary relief is claimed on behalf of some or all class members;
- (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
- (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

Average or proportional application

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.

Idem

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members.

Court to determine whether individual claims need to be made

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order.

Procedures for determining claims

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims.

Idem

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

- (a) the use of standardized proof of claim forms;
- (b) the receipt of affidavit or other documentary evidence; and
- (c) the auditing of claims on a sampling or other basis.

Time limits for making claims

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section.

Idem

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court.

Extension of time

(9) The court may give leave under subsection (8) if it is satisfied that,

- (a) there are apparent grounds for relief;
- (b) the delay was not caused by any fault of the person seeking the relief; and
- (c) the defendant would not suffer substantial prejudice if leave were given.

Court may amend subs. (1) judgment

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so.

[296] The noise of the aggregate assessment brouhaha, however, dissipates and then disappears once it is established – as it has been - that : (a) all of the SLP cardholders are consumers; and (b) Peoples Trust’s liability to those consumers based on its own transaction records is \$6,186,000 for unused balances after the VALID THRU DATE and \$9,144,000 for charges contrary to *O. Reg. 17/05*.

[297] Given the procedural nature of class proceedings legislation, its aggregate damages provisions are available only where liability is established and the only remaining issue to be

resolved concerns the remedy.⁴¹ With the above findings of fact and law, the elements of s. 24 (1) are satisfied; visualize: (a) monetary relief is claimed on behalf of the SLP cardholders who are Class Members; (b) no question of fact or law relating to the assessment of monetary relief remain to be determined to establish Peoples Trust's monetary liability; and (c) the aggregate of People Trust' liability can reasonably be determined without proof by individual Class Members. In short, with the above findings of fact and law, aggregate damages are available in the case at bar.

[298] In *Ramdath v. George Brown College of Applied Arts and Technology*,⁴² Justice Belobaba stated at paragraph 1:

1. Aggregate damages are essential to the continuing viability of the class action. If all or part of the defendant's monetary liability to class members can be fairly and reasonably determined without proof by individual class members, then class action judges should do so routinely and without hesitation. Aggregate damage awards should be more the norm, than the exception. Otherwise, the potential of the class action for enhancing access to justice will not be realized.

[299] In *Ramdath*, the Court of Appeal noted in that it is desirable to award aggregate damages where the criteria under s. 24(1) are met in order to make the class action an effective instrument to provide access to justice and the the standard to meet in determining whether an aggregate assessment will be ordered is reasonableness.⁴³ The Court of Appeal also noted that provided that Defendant's total liability is not over-stated, an aggregate damages methodology will be reasonable if some members of the class are over-compensated and some are under-compensated.⁴⁴

[300] In *Ramdath*, the Court of Appeal endorsed Justice Belobaba's approach to the quantification of agreement damages. Justice Belobaba held that provided that the liability of the defendant was not overstated, the standard of proof of aggregate damages did not have to achieve the same degree of accuracy as in an ordinary action and instead the standard was whether the damages could be reasonably determined without proof by individual class members.

[301] Thus, the court may award aggregate damages under s. 24(1)(c) of the *Class Proceedings Act, 2002* if the evidence put forward by class counsel is sufficiently reliable to permit a just determination of all or part of the defendant's monetary liability without proof by individual class members. In deciding whether aggregate damages should be awarded, the court should consider: (a) the reliability of the non-individualized evidence that is being presented; whether the use of this evidence will result in any unfairness or injustice to the defendant (for example, by overstating the defendant's liability); and whether the denial of an aggregate approach will result in a wrong eluding an effective remedy and thus a denial of access to justice.⁴⁵

[302] People Trust's essential argument against an aggregate assessment was that it submitted that it could not be determined without individual assessments and cross-examinations of each Class Members: (a) whether he or she was a consumer; and (b) whether he or she was a card purchaser or a card recipient by a gifting of the card. This argument, however, evaporates with my findings that all the SLP cardholders are consumers and that gifting is not an element to a gift card governed by *O. Reg. 17/05*.

⁴¹ *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 131.

⁴² 2014 ONSC 3066 at para. 1, aff'd 2015 ONCA 921. With respect to the trial aggregate assessment, see also supplementary reasons, *Ramdath v. George Brown College of Applied Arts and Technology*, 2014 ONSC 4215.

⁴³ 2015 ONCA 921 at para. 76.

⁴⁴ 2015 ONCA 921 at para. 51.

⁴⁵ *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921 at paras. 47-52.

[303] I also agree with Ms. Bernstein's submission in paragraph 45 of her reply factum that People Trust has no need or right to have cross-examinations of all of the Class Members to determine a proper aggregate assessment of its liability. She stated:

45. PTC's argument is effectively the same one that was explicitly rejected by the Court of Appeal more than a decade ago in *Markson*.⁴⁶ There is no issue that PTC has a substantive right to not be compelled to overpay in the aggregate,⁴⁷ however, it does not have the right to effectively defeat a class proceeding (and thereby keep monies improperly charged)⁴⁸ by positing a theoretical desire to cross-examine hundreds of thousands of class members. The *Class Proceedings Act* is a statute that is supposed to enhance justice, not defeat it.

[304] People Trust's essential argument would have failed even if I had found that some of the SLP cardholders were non-consumers. In this regard, it should be noted that the lynchpin to the availability of aggregate damages in the immediate case is that the maximum amount of Peoples Trust's liability is known from its own transaction records. That being the case, pursuant to s. 23 (1) of the *Class Proceedings Act, 1992*, it would have possible using statistical evidence to determine issues relating to the amount of a monetary award.

[305] Section 23 (1) of the *Class Proceedings Act, 1992* states:

Statistical Evidence

23. (1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

[306] As an alternative to her argument that there were no non-consumer transactions, Ms. Bernstein argued that an aggregate assessment was still available, and the court could conduct a simple survey to determine the appropriate discount of the maximum award.

[307] In the case at bar, using what might be described as anecdotal statistical evidence, Peoples Trust, as an alternative to its essential argument that an aggregate assessment was not available under s. 24 of the *Class Proceedings Act, 2002*, suggested that the damages award be discounted for non-gift and non-consumer transactions for a total discount of 84% percent.

[308] Peoples Trust instructed Deloitte to make a 29% deduction for non-consumer transactions and a 55% discount for non-gift transactions. These discounts were derived from figures in a 2016 report by the Canadian Prepaid Providers Organization. The report summarized online survey data regarding Canadian consumer awareness and use of open loop prepaid cards. The data was collected in 2016 by the market research company Leger.

[309] The survey was not specific to Peoples Trust's products. The questions concerned open loop cards generally. Cohen Hamilton Steger reviewed the survey data for Ms. Bernstein and concluded that the data did not provide any support for the non-consumer and non-gift discounts advanced by Peoples Trust.

[310] In any event, rejecting Deloitte's calculations, Ms. Bernstein submitted that given that the maximum amount of Peoples Trust's liability had been determined, if necessary, a sampling would be an appropriate way to complete an assessment of aggregate damages. She submitted that this

⁴⁶ 2007 ONCA 334 at paras. 46-49, leave to appeal ref'd [2007] SCCA No 346.

⁴⁷ *Healey v. Lakeridge Health Corporation*, 2010 ONSC 725 at para. 282.

⁴⁸ *Markson v. MBNA Canada Bank* 2007 ONCA 334 at paras. 46-49, leave to appeal ref'd [2007] SCCA No 346.

approach would not be an extrapolation to determine liability, which was the reason that an aggregate damages were not available in *Fulawka v. Bank of Nova Scotia*,⁴⁹ a class action for unpaid overtime pay, but would be similar to approach used in by Justice Belobaba and approved by the Court of Appeal in *Ramdath v. George Brown College of Applied Arts and Technology*, *supra*, where sampling was used to discount liability not to establish it. Thus, Ms. Bernstein stated at paragraphs 192 – 195 of her factum:

192. In *Fulawka*, an unpaid overtime class action, the Court of Appeal held that an aggregate assessment of damages was not appropriate because a determination of aggregate liability would require a sampling of class members whose sworn testimony about the overtime they worked would form the basis to extrapolate the defendant's total liability. The Court held that this would amount to "individual evidence of damages" forming the basis of an award of aggregate damages, which was impermissible.

193. Unlike in *Fulawka*, the sampling proposed in this case is not to serve as a basis to extrapolate liability from individual evidence. Like in *Ramdath*, it would be used as a basis to *discount* the award. There is nothing unfair about this to PTC. To the contrary, the purpose would be to make sure it does not pay damages in respect of any non-consumer use, however small.

194. The nature of the survey being proposed is also arguably more reliable than the proposed evidence in *Fulawka*. The survey would ask a simple, binary, objectively verifiable question. The *Fulawka* evidence was arguably much more subjective. Furthermore, unlike in *Fulawka*, the survey respondents here would have no interest in the proceeding in the sense that no one's claim will be related to their response on the survey.

195. Finally, in *Fulawka*, an individual claims process was a viable way to determine that defendant's liability. This is in stark contrast to the case here where there is no possible way to identify most of the cardholders, and there are far too many cardholders to contact. Statistical sampling offers a reasonable alternative.

[311] I agree that statistical evidence could have been used in the immediate case to complete an aggregate assessment of damages for the Class Members with SLP cards. However, having regard to the evidence that was presented in the immediate case, ultimately, it is not necessary to use any statistical evidence or to make any discount of the maximum established liability.

[312] For the moment, putting the matters of punitive damages and prejudgment and postjudgment interest aside, I, therefore, conclude that the Class Members with SLP cards are entitled to an aggregate judgment of \$15,330,000 (\$6,186,000 + \$9,144,000).

[313] I shall next move to the matter of punitive damages and then I shall consider the issue of a distribution scheme for the aggregate award of damages and for punitive damages but before doing so, I foreshadow to say that it is necessary to keep in mind several features of s. 24 of the *Class Proceedings Act, 2002* that are pertinent to a distribution scheme.

[314] In this regard, in making a distribution order, I shall rely on: (a) s. 24 (2), which provides that the court may order that an aggregate award be applied on an average or proportionate basis; (b) s. 24 (3), which provides that in making an aggregate award, the court shall consider whether it would be impractical and inefficient to determine the exact shares that would be allocated to individual class members; (c) s. 24 (4), which provides that the court shall determine whether individual claims need to be made to give effect to the aggregate damages award; and (d) s. 24 (5) - (10), which provide that the court may specify the procedure for determining individual claims.

⁴⁹ 2012 ONCA 443, leave to appeal refused [2012] S.C.C.A. No. 326.

EE. Is Peoples Trust Liable to pay Punitive Damages?

[315] Ms. Bernstein submits that Peoples Trust justifies an award of aggravated, exemplary, or punitive damages. In advancing this claim in addition to the common law's approach to punitive damages, Ms. Bernstein relies on sections 18 (1) and 100 (3) of the *Consumer Protection Act, 2002*. These provisions empower the court to award exemplary or punitive damages, in addition to other remedies awarded under the *Act*. Section 100 (3) provides the court with the discretion to order in addition to other remedies exemplary or punitive damages or such other relief as the court considers proper.

[316] The issue of when punitive damages are available in a consumer class action was examined by the Supreme Court of Canada in *Richard v. Time Inc.*⁵⁰ and *Bank of Montreal v. Marcotte*,⁵¹ where punitive damages were awarded in an action under s. 272 of Québec's *Consumer Protection Act*,⁵² which, similar to s. 100 (3) of Ontario's *Consumer Protection Act, 2002*, states that consumers may also claim punitive damages. In my opinion, although the Supreme Court was considering Québec civil and statutory law, its analysis of why, when, and how punitive damages should be awarded in a consumer class action applies to the situation in Ontario and to the case at bar.

[317] In *Richard v. Time Inc.* and *Bank of Montreal v. Marcotte*, the Supreme Court established the following principles:

- a. Punitive damages for a violation of consumer protection legislation must have the purpose of discouraging the repetition of undesirable conduct and may only be awarded in light of: (a) intentional, malicious, or vexatious violations of the legislation; or (b) conduct that displays ignorance, carelessness or serious negligence assessed in light of the merchant's conduct both before and after the violation.
- b. While punitive damages may be awarded under consumer protection statute when the merchant's conduct is malicious, oppressive, high-handed, or a marked departure ordinary standards of decency, which is a requirement for punitive damages under the common law,⁵³ such conduct is not a prerequisite for an award of punitive damages under the consumer protection statute.
- c. The fact that in a class action, the award of damages may in and of itself have a preventative and deterrent effect does not impose a higher threshold for awarding punitive damages, and the amount of the class action award is not a factor in the legal test for the determination of punitive damages for the Class Members.
- d. Neither evidence of antisocial behaviour nor reprehensible conduct is *required* to award punitive damages; rather, what is necessary is an examination of the overall conduct of the merchant, before, during and after the violation, for behaviour that was: (a) lax, passive or ignorant with respect to consumers' rights and to their own obligations; or (b) conduct that displays ignorance, carelessness or serious

⁵⁰ 2012 SCC 8.

⁵¹ 2014 SCC 55.

⁵² CQLR, c. P-40.1.

⁵³ *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18.

negligence.

- e. The whole of the merchant's conduct must be analyzed to determine whether the imperatives of prevention justify an award of punitive damages.
- f. The amount of the award of punitive damages must be rationally connected to the purposes for which the punitive damages are awarded. Rationally connected factors include: whether the merchant was diligent in observing its obligations under the consumer protection legislation; the seriousness of the violation, whether the merchant manifested disregard for its obligations; whether the merchant's conduct was willful or intentional; how the merchant responded to the consumer's complaint or grievance; and whether the merchant provided explanations or justifications for the violation.

[318] Applying the above principles, I am satisfied that an award of punitive damages of \$1,500,000 (approximately ten percent of the damages awarded before consideration of prejudice and postjudgment interest) is justified in the circumstances of the immediate case.

[319] Peoples Trust vigorously marketed its SPL as a consumer good and as a gift card but just as vigorously refused to provide the purchasers and the recipients of these cards the protections provided to consumers and which on moral grounds ought to have been provided for these cards even if they had been purchased by non-consumers. Peoples Trust vigorously marketed the SPL cards as gift cards and just as vigorously resisted the idea that the SPL cards were subject to *O. Reg. 17/05*.

[320] Peoples Trust's violations of the *Consumer Protection Act, 2002* were serious ones and went to the very heart of the Legislature's public purpose in providing protection to purchasers and recipients of open loop gift cards.

[321] Peoples Trust charged \$9,144,000 in fees that were contrary to *O. Reg. 17/05*. In addition, it held \$6,186,000 of the SPL cardholders' money, and while it acknowledged this money as a liability, it has taken this class action to find a means to restore the money to its owners.

[322] An award of punitive damages for these violations of *O. Reg. 17/05* would serve the purpose of discouraging the repetition of this undesirable conduct.

[323] While I do not find, Peoples Trust's conduct malicious, I do find it to be an intentional violation of the legislation and conduct that displays ignorance, carelessness, or serious negligence assessed in light of the its conduct both before and after the violation.

FF. Distribution Scheme

[324] As noted in the introduction to these Reasons for Decision, I require further submissions about what is the appropriate method or procedure for distributing the aggregate damages to Class Members. In this section, therefore, I shall only set the framework for those additional submissions.

[325] Continuing the discussion from the last two sections about distributing the aggregate assessment of \$15,330,000 and the punitive damages of \$1,500,000, in the immediate case, in addition to the provisions of s. 24 of the *Class Proceedings Act, 2002* described above, s. 26 (1) of the *Act* provides that the court may direct any means of distribution of amounts awarded under sections 24 or 25 that it considers appropriate. Section 26 states:

Judgment distribution

26. (1) The court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate.

Idem

(2) In giving directions under subsection (1), the court may order that,

(a) the defendant distribute directly to class members the amount of monetary relief to which each class member is entitled by any means authorized by the court, including abatement and credit;

(b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class until further order of the court; and .

(c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court.

Idem

(3) In deciding whether to make an order under clause (2) (a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant

Idem

(4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order.

Idem

(5) The court may make an order under subsection (4) whether or not all class members can be identified or all of their shares can be exactly determined.

Idem

(6) The court may make an order under subsection (4) even if the order would benefit,

(a) persons who are not class members; or

(b) persons who may otherwise receive monetary relief as a result of the class proceeding.

Supervisory role of the court

(7) The court shall supervise the execution of judgments and the distribution of awards under section 24 or 25 and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate.

Payment of awards

(8) The court may order that an award made under section 24 or 25 be paid,

(a) in a lump sum, forthwith or within a time set by the court; or

(b) in instalments, on such terms as the court considers appropriate.

Costs of distribution

(9) The court may order that the costs of distribution of an award under section 24 or 25, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment or may make such other order as it considers appropriate.

Return of unclaimed amounts

(10) Any part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court.

[326] In the case at bar, based on sections 24 and 26 of the *Class Proceedings Act, 2002*, I recommend that Ms. Bernstein, in consultation with Peoples Trust, propose a distribution plan.

[327] Strictly speaking, once Peoples Trust's liability has been determined, it has no say in how the court distributes the judgment, but I see no harm in it being consulted and it may have some valuable insights. In this last regard, its goodwill may be affected, and it should be recalled that \$6,186,000 of the judgment is already recognized as a liability in Peoples Trust's financial records.

[328] Since, as explained above, Peoples Trust's has the card numbers for its SLP cards but not the contact information for the cardholders, the greatest problem for the distribution scheme is that of notifying, identifying, and verifying those entitled to share in the \$16,830,000 (\$15,330,000 + \$1,500,000) judgment, or more, depending on the outcome of the resolution of the matters of prejudgment and postjudgment interest.

[329] I observe that currently, I see no reason to require that judgment claimants prove the quantum of their individual claim, and I would recommend a *per capita* as opposed to a *pro rata* distribution scheme. I note that if there is a *per capita* allocation amongst Class Members who were SLP cardholders, then depending on take-up, there will be some Class Members who will be overcompensated and some undercompensated, but there will be no unclaimed amounts. These prospects seems to have been envisioned by sections 24 and 26 of the *Class Proceedings Act, 2002*. In any event, I would recommend a very robust notice program to ensure the greatest take-up and the fairest *per capita* allocation.

[330] I note that the sum to be distributed will be net of Class Counsel fees and disbursements. And I note that pursuant to s. 26 (9) of the *Class Proceedings Act, 1992*, it remains to be determined whether the costs of distribution be paid out of the proceeds of the judgment, in which case the amount to be distributed will be further reduced.

GG. The Answers to the Common Issues

[331] It's been a long time coming, but for the above reasons, the answers to the common issues are as follows:

- a. Peoples Trust's SLP cards – but not its GPR cards - are “gift cards”, “gift card agreements” and “future performance agreements” within the meaning of the *Consumer Protection Act, 2002* and *O. Reg. 17/05* and subject to the Gift Card Regulation.

- b. There was a seizure of unused funds associated with Peoples Trust's SLP payment cards and a contravention of the *Consumer Protection Act, 2002* and *O. Reg. 17/05*.
- c. Peoples Trust charged fees on SLP cards contrary to the *Consumer Protection Act, 2002* and *O. Reg. 17/05*.
- d. Peoples Trust breached its contracts with the Class Members who were SLP cardholders.
- e. Peoples Trust engaged in unfair practices contrary to s. 17 of the *Consumer Protection Act, 2002* with respect to Class Members who were SLP cardholders.
- f. Pursuant to s. 18 of the *Consumer Protection Act, 2002*, the Class Members who were SLP cardholders are entitled to the remedy of damages.
- g. The Class Members who were SLP cardholders are not required to give notice under the *Class Proceedings Act* for the remedy of damages, but if notice is required, the court waives the requirement of notice.
- h. Peoples Trust has been unjustly enriched, and the Class Members who were SLP cardholders have suffered a corresponding deprivation by reason of Peoples Trust's breaches of contract and contraventions of the *Consumer Protection Act, 2002*. There is no a juristic reason for the enrichment or the deprivation.
- i. The Class Members who were SLP cardholders are entitled to the remedy of damages for contraventions of the *Consumer Protection Act, 2002*, breach of contract, and unjust enrichment.
- j. The Class Members who were SLP cardholders are entitled to an award of aggregate damages. The quantum of that award is \$15,330,000.
- k. The Class Members who were SLP cardholders are entitled to an award of punitive damages in the amount of \$1,500,000.
- l. The matter of prejudgment and postjudgment interest remains to be determined.
- m. The appropriate method or procedure for distributing the judgment remains to be determined.

HH. Conclusion

[332] For the above reasons, I grant the summary judgment motion as aforesaid.

[333] After the matters of prejudgment and postjudgment interest and the distribution scheme are resolved by Supplementary Reasons for Decision, if the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Ms. Bernstein's submissions within twenty days following the release of the Supplementary Reasons followed by Peoples Trust's submissions within a further twenty days.



 Perell, J.

Released: May 13, 2019

Schedule "A": *Consumer Protection Act, 2002*

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;

"consumer agreement" means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment;

[...]

"consumer transaction" means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement;

"credit card" means a card or device under which a borrower can obtain advances under a credit agreement, as defined in Part VII, for open credit;

[...]

"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;

"goods" means any type of property;

[...]

"payment" means consideration of any kind, including an initiation fee;

[...]

"representation" means a representation, claim, statement, offer, request or proposal that is or purports to be,

(a) made respecting or with a view to the supplying of goods or services to consumers, or

(b) made for the purpose of receiving payment for goods or services supplied or purporting to be supplied to consumers;

"services" means anything other than goods, including any service, right, entitlement or benefit;

"supplier" means a person who is in the business of selling, leasing or trading in goods or services or is otherwise in the business of supplying goods or services, and includes an agent of the supplier and a person who holds themselves out to be a supplier or an agent of the supplier;

[...]

Application

2. (1) Subject to this section, this Act applies in respect of all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place.

Exceptions

(2) This Act does not apply in respect of,

[...]

(b) financial services related to investment products or income securities;

(c) financial products or services regulated under the *Insurance Act*, the *Credit Unions and Caisses Populaires Act, 1994*, the *Loan and Trust Corporations Act* or the *Mortgage Brokerages, Lenders and Administrators Act, 2006*;

Anti-avoidance

3. In determining whether this Act applies to an entity or transaction, a court or other tribunal shall consider the real substance of the entity or transaction and in so doing may disregard the outward form.

[...]

No waiver of substantive and procedural rights

7. (1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.

Limitation on effect of term requiring arbitration

(2) Without limiting the generality of subsection (1), any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act.

[...]

Class proceedings

8. (1) A consumer may commence a proceeding on behalf of members of a class under the *Class Proceedings Act, 1992* or may become a member of a class in such a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.

Procedure to resolve dispute

(2) After a dispute that may result in a class proceeding arises, the consumer, the supplier and any other person involved in it may agree to resolve the dispute using any procedure that is available in law.

Settlements or decisions

(3) A settlement or decision that results from the procedure agreed to under subsection (2) is as binding on the parties as such a settlement or decision would be if it were reached in respect of a dispute concerning an agreement to which this Act does not apply.

Non-application of Arbitration Act, 1991

(4) Subsection 7 (1) of the *Arbitration Act, 1991* does not apply in respect of any proceeding to which subsection (1) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration.

[...]

Ambiguities to benefit consumer

11. Any ambiguity that allows for more than one reasonable interpretation of a consumer agreement provided by the supplier to the consumer or of any information that must be disclosed under this Act shall be interpreted to the benefit of the consumer.

[...]

**PART III
UNFAIR PRACTICES**

False, misleading or deceptive representation

14. (1) It is an unfair practice for a person to make a false, misleading or deceptive representation.

Examples of false, misleading or deceptive representations

(2) Without limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representations:

[...]

14. A representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.

[...]

Unconscionable representation

15. (1) It is an unfair practice to make an unconscionable representation.

Same

(2) Without limiting the generality of what may be taken into account in determining whether a representation is unconscionable, there may be taken into account that the person making the representation or the person's employer or principal knows or ought to know,

[...]

(e) that the consumer transaction is excessively one-sided in favour of someone other than the consumer;

(f) that the terms of the consumer transaction are so adverse to the consumer as to be inequitable;

[...]

Unfair practices prohibited

17. (1) No person shall engage in an unfair practice.

One act deemed practice

(2) A person who performs one act referred to in section 14, 15 or 16 shall be deemed to be engaging in an unfair practice.

[...]

18. (1) Any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages.

Remedy if rescission not possible

(2) A consumer is entitled to recover the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer or to recover damages, or both, if rescission of the agreement under subsection (1) is not possible,

- (a) because the return or restitution of the goods or services is no longer possible; or
- (b) because rescission would deprive a third party of a right in the subject-matter of the agreement that the third party has acquired in good faith and for value.

Notice

(3) A consumer must give notice within one year after entering into the agreement if,

- (a) the consumer seeks to rescind an agreement under subsection (1); or
- (b) the consumer seeks recovery under subsection (2), if rescission is not possible.

Form of notice

(4) The consumer may express notice in any way as long as it indicates the intention of the consumer to rescind the agreement or to seek recovery where rescission is not possible and the reasons for so doing and the notice meets any requirements that may be prescribed.

Delivery of notice

(5) Notice may be delivered by any means.

When notice given

(6) If notice is delivered other than by personal service, the notice shall be deemed to have been given when sent.

Address

(7) The consumer may send or deliver the notice to the person with whom the consumer contracted at the address set out in the agreement or, if the consumer did not receive a written copy of the agreement or the address of the person was not set out in the agreement, the consumer may send or deliver the notice,

- (a) to any address of the person on record with the Government of Ontario or the Government of Canada; or
- (b) to an address of the person known by the consumer.

Commencement of an action

(8) If a consumer has delivered notice and has not received a satisfactory response within the prescribed period, the consumer may commence an action.

Same

(9) If a consumer has a right to commence an action under this section, the consumer may commence the action in the Superior Court of Justice.

Evidence

(10) In the trial of an issue under this section, oral evidence respecting an unfair practice is admissible despite the existence of a written agreement and despite the fact that the evidence pertains to a representation in respect of a term, condition or undertaking that is or is not provided for in the agreement.

Exemplary damages

(11) A court may award exemplary or punitive damages in addition to any other remedy in an action commenced under this section.

Liability

(12) Each person who engaged in an unfair practice is liable jointly and severally with the person who entered into the agreement with the consumer for any amount to which the consumer is entitled under this section.

Limited liability of assignee

(13) If an agreement to which subsection (1) or (2) applies has been assigned or if any right to payment under such an agreement has been assigned, the liability of the person to whom it has been assigned is limited to the amount paid to that person by the consumer.

Effect of rescission

(14) When a consumer rescinds an agreement under subsection (1), such rescission operates to cancel, as if they never existed,

- (a) the agreement;
- (b) all related agreements;
- (c) all guarantees given in respect of money payable under the agreement;
- (d) all security given by the consumer or a guarantor in respect of money payable under the agreement; and
- (e) all credit agreements, as defined in Part VII, and other payment instruments, including promissory notes,
 - (i) extended, arranged or facilitated by the person with whom the consumer reached the agreement, or
 - (ii) otherwise related to the agreement.

Waiver of notice

(15) If a consumer is required to give notice under this Part in order to obtain a remedy, a court may disregard the requirement to give the notice or any requirement relating to the notice if it is in the interest of justice to do so.

Requirements for future performance agreements

22. Every future performance agreement shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements.

[...]

Illegal charges and payments

98. (1) If a supplier has charged a fee or an amount in contravention of this Act or received a payment in contravention of this Act, the consumer who paid the charge or made the payment may demand a refund by giving notice in accordance with section 92 within one year after paying the charge or making the payment.

Supplier to provide refund

(2) A supplier who receives a notice demanding a refund under subsection (1) shall provide the refund within the prescribed period of time.

Right of action

(3) The consumer may commence an action in accordance with section 100 to recover,

(a) the payment of a fee or an amount that was charged by the supplier in contravention of this Act; or

(b) a payment that was received by the supplier in contravention of this Act.

[...]

Action in Superior Court of Justice

100. (1) If a consumer has a right to commence an action under this Act, the consumer may commence the action in the Superior Court of Justice.

Judgment

(2) If a consumer is successful in an action, unless in the circumstances it would be inequitable to do so, the court shall order that the consumer recover,

(a) the full payment to which he or she is entitled under this Act; and

(b) all goods delivered under a trade-in arrangement or an amount equal to the trade-in allowance.

Same

(3) In addition to an order under subsection (2), the court may order exemplary or punitive damages or such other relief as the court considers proper.

Waiver of notice

101. If a consumer is required to give notice under this Act in order to obtain a remedy, a court may disregard the requirement to give the notice or any requirement relating to the notice if it is in the interest of justice to do so.

Schedule "B": O. Reg. 17/05

July 1, 2009 – March 9, 2014	As of July 1-, 2018
<i>Future Performance Agreements</i>	
<p align="center"><i>Definitions</i></p> <p>23. In the Act and this Part,</p> <p>“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;</p> <p>“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;</p> <p>“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.</p>	<p align="center"><i>Definitions</i></p> <p>23. In the Act and this Part,</p> <p>“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;</p> <p>“gift card agreement” means a future performance agreement under which the supplier issues a gift card to the consumer and under which,</p> <p>(a) if the card is not reloadable, the consumer makes payment in full when entering into the agreement, or</p> <p>(b) if the card is reloadable, the consumer makes payment in an amount equal to the initial value of the card when entering into the agreement;</p> <p>“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.</p> <p>“reloadable gift card” means a gift card to which the holder can add value after the initial purchase of the card.</p>
<i>Gift Card Agreements</i>	
<p align="center"><i>Application of sections</i></p> <p>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,</p> <p>(a) a gift card that a supplier issues for a charitable purpose; or</p> <p>(b) a gift card that covers only one specific good or service; or</p> <p>(c) the gift card agreement under which a gift card described in clause</p>	<p align="center"><i>Application of sections</i></p> <p>25.1 (1) Sections 25.2 to 25.5 apply to every gift card agreement entered into on or after the day this section comes into force and to every gift card issued under that agreement, but do not apply to,</p> <p>(a) a gift card that a supplier issues for a charitable purpose;</p> <p>(b) a gift card that covers only one specific good or service;</p> <p>(c) a gift card issued by a financial institution; or</p> <p>(d) the gift card agreement under which</p>

<p>(a) or (b) is issued.</p>	<p>a gift card described in clause (a), (b) or (c) is issued.</p> <p>(2) In subsection (1),</p> <p>“financial institution” means,</p> <p>(a) a bank, authorized foreign bank or federal credit union as defined in section 2 of the <i>Bank Act</i> (Canada),</p> <p>(b) a credit union or a league as defined in section 1 of the <i>Credit Unions and Caisses Populaires Act, 1994</i>, or</p> <p>(c) a trust corporation or loan corporation registered under the <i>Loan and Trust Corporations Act</i>.</p> <p>(3) For greater certainty, subject to subsection (1), sections 25.2 to 25.5 apply to a gift card agreement and a gift card issued under it if the holder of the card purchased it for themselves or received it from another person.</p>
<p><i>No expiry dates</i></p> <p>25.3 (1) No supplier shall enter into a gift card agreement that has an expiry date on the future performance of the agreement.</p> <p>(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.</p>	
<p><i>Limit on fees</i></p> <p>25.4 (1) No supplier under a gift card agreement that is not an open loop gift card agreement shall,</p> <p>(a) issue a gift card for less than the value of the payment made by the consumer for entering into the agreement or hold out that the supplier can provide such a gift card; or</p> <p>(b) charge a fee to the holder of a gift card for anything in relation to the card, other than a fee for replacing a lost or stolen gift card or a fee to customize a gift card.</p>	<p><i>Limit on fees</i></p> <p>25.4 (1) No supplier under a gift card agreement that is not an open loop gift card agreement shall,</p> <p>(a) issue a gift card for less than the value of the payment made by the consumer when entering into the agreement or hold out that the supplier can provide such a gift card;</p> <p>(a.1) add value to a reloadable gift card if the value added is less than the value of the payment made by the holder of the card to reload the card; or</p> <p>(b) charge a fee to the holder of a gift card for anything in relation to the card, other than a fee for replacing a lost or stolen gift card or a fee to customize a gift card.</p>
<p>(2) No supplier under an open loop gift card agreement shall,</p> <p>(a) issue a gift card for less than the value of the payment made by the consumer for entering into the</p>	<p>(2) No supplier under an open loop gift card agreement shall,</p> <p>(a) issue a gift card for less than the value of the payment made by the consumer when entering into the agreement less</p>

<p>agreement less \$1.50 or hold out that the supplier can provide such a gift card; or</p> <p>(b) charge a fee to the holder of a gift card for anything in relation to the card, other than a fee for replacing a lost or stolen gift card, a fee to customize a gift card or a dormancy fee in accordance with subsection (2.1).</p>	<p>\$1.50 or hold out that the supplier can provide such a gift card;</p> <p>(a.1) add value to a reloadable gift card if the value added is less than the value of the payment made by the holder of the card to reload the card; or (b) charge a fee to the holder of a gift card for anything in relation to the card, other than a fee for replacing a lost or stolen gift card, a fee to customize a gift card or a dormancy fee in accordance with subsection (2.1).</p>
<p>(2.1) The supplier under an open loop gift card agreement may charge a dormancy fee to the holder of the gift card if,</p> <p>(a) the fee is charged no earlier than,</p> <p>(i) 15 months after the end of the month that the consumer entered into the agreement, if the holder does not request the supplier for an extension in that 15th month, or</p> <p>(ii) 18 months after the end of the month that the consumer entered into the agreement, if the holder requests the supplier for an extension in the 15th month after the end of the month that the consumer entered into the agreement;</p> <p>(b) the fee does not exceed \$2.50 per month;</p> <p>(c) the card has a notice on the front of the card in 10-point font indicating that there is fee information on the back of the card;</p> <p>(d) the card has a notice on the back of the card setting out, clearly and prominently, the information mentioned in clauses (a) and (b); and</p> <p>(e) the supplier discloses the information mentioned in clauses (a) and (b) to the consumer at the time that the consumer enters into the agreement.</p> <p>(3) If a supplier or a seller has charged a fee or an amount in contravention of subsection (2), the consumer or the holder of a gift card who paid the fee or the amount may demand a refund by giving notice to the supplier in accordance with section 92 of the Act within one year after making the payment.</p> <p>(4) A supplier who receives a notice demanding a refund under subsection (3) shall provide the refund within 15 days of receiving the notice.</p> <p><i>Requirements for agreements</i></p> <p>25.5 For the purpose of section 22 of the Act, a future performance agreement that is a gift card agreement shall set out the following information:</p> <ol style="list-style-type: none"> 1. The fees that the supplier may charge under clause 25.4 (2) (b). 2. All restrictions, limitations and conditions that the supplier imposes on the use of the gift card. 	

CITATION: Bernstein v. Peoples Trust Company, 2019 ONSC 2867
COURT FILE NO.: CV-13-493837-00CP
DATE: 2019/05/13

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

JOYCE BERNSTEIN

Plaintiff

- and -

PEOPLES TRUST COMPANY and PEOPLES CARD
SERVICES LLP

Defendants

REASONS FOR DECISION

PERELL J.

Released: May 13, 2019