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CANADIAN IMPERIAL BANK OF COMMERCE – Claim

APPEAL FROM A DECISION OF THE BOARD UNDER THE
TRAVEL INDUSTRY ACT, 2002, S.O. 2002, c. 30, Sch. D

TO REFUSE A CLAIM FOR COMPENSATION

TRIBUNAL: ELIZABETH SPROULE, Vice-Chair

APPEARANCES: LAURIE A. MacFARLANE, Counsel, representing the Canadian
Imperial Bank of Commerce (“CIBC”), the Applicant

SOUSSANNA KARAS, Counsel, representing the Travel Industry
Council of Ontario, the administrative authority under the *Travel
Industry Act, 2002*, the Respondent

DATE OF
HEARING: February 24, 2011 Toronto

REASONS FOR DECISION AND ORDER

The Applicant appealed to the Tribunal from a decision of the Board of Directors of the Travel Industry Council of Ontario (“TICO”) under the *Travel Industry Act, 2002* (the “Act”) refusing its claim from the Travel Compensation Fund (the “Fund”) with respect to a refund of the cost of travel, pursuant to section 57 of O. Reg. 26/05 (the “Regulation”).

FACTS and EVIDENCE

The parties submitted an agreed statement of facts.

In addition, the Applicant called three witnesses: Lisa Doyle-Pask, Senior Director of Corporate Services, Polly Ko, Director of Product Manager, both of CIBC, and Cheryl Nicholson, Managing Director of Merit Travel Group Inc. (“Merit”).

The Respondent called two witnesses: Michael Pepper, President, Chief Executive Officer (“CEO”) and Registrar of TICO, and Lori Furlan, a Claims Co-ordinator with TICO.

Summary of the Agreed Facts

TICO is mandated to administer the Act and O. Reg. 26/05, the Regulation made under the Act. Its Board of Directors (the “Board”) administers and manages the Fund. The Board meets regularly to review and determine claim eligibility and eligible amount.

Conquest Vacations (“Conquest”), a tour operator registered with TICO, voluntarily terminated its registration with TICO on April 15, 2009, and filed an assignment in bankruptcy on April 27, 2009.

CIBC offers credit card products which have a points’ reward program. Points can be redeemed for travel services, among other things. CIBC entered into a contract with Merit, an Ontario travel agent registered with TICO, whereby CIBC will reimburse Merit for the points redeemed by a CIBC credit cardholder who purchases travel services from Merit. The contract provides that CIBC will reimburse Merit the actual cost of the portion of any travel services “paid” for by CIBC cardholders, using reward program points, at a certain rate (the “Payment Rate”)¹. The Payment Rate may be revised by CIBC in its sole discretion based on the value of the points awarded to the cardholder.

The redemption of points is based on the terms and conditions of the agreement between CIBC and its cardholder, and these terms and conditions provide, in part, that reward points have no monetary value and cannot be exchanged for cash or credit. The terms and conditions also provide that once the rewards points are redeemed, they are non-refundable, non-exchangeable and non-transferable. However, should the travel supplier fail to provide travel services to the cardholder, CIBC or Merit may attempt (but is not required) to arrange a suitable replacement or may choose (but is not required) to credit the redeemed points back to the cardholder.

In order to complete a transaction involving reward points, a cardholder contacts Merit by phone, to a travel agent or on-line through a booking engine. The cardholder makes the travel arrangements they desire and then pays for the travel by credit card or points or a combination of both. The credit card portion is processed as a regular credit card transaction by forwarding the credit card information to the supplier; here it was Conquest. The points’ portion of the transaction is recorded by Merit on its accounting system.

Merit sends an automatic file daily with the details of each points’ transaction, including the number of points to be processed and the cash value of the transaction to be settled by CIBC.

¹ Exhibit #4, tab 1

From this file, a report is generated which shows CIBC how much it owes Merit for each cardholder redemption pursuant to its agreement with Merit. Then CIBC sends a wire transfer settlement to Merit, daily, based on the transactions in the file and the corresponding settlement report. Merit then issues a cheque to Conquest for the portion “paid” by the consumer with their reward points, less Merit’s commission.

As a result of CIBC cardholders purchasing travel services through Merit, from Conquest, using a combination of reward points and credit cards, CIBC paid Merit the amount of \$15,117.85.

When Conquest went bankrupt, CIBC reinstated all reward points back to its cardholders.

Mr. Michael Pepper is the CEO, President and the Registrar of TICO. Mr. Pepper is entitled to attend and participate in the Board’s meetings in his capacity as an advisor. He does not have a voting privilege at the Board’s meetings. On May 26, 2009, Mr. Pepper sent CIBC an e-mail dealing with CIBC’s eligibility to claim under the Fund.

Summary of relevant testimony and other evidence

A copy of Mr. Pepper’s e-mail of May 26, 2009, was submitted into evidence by the Applicant.² It is addressed to Lisa Doyle-Pask and the subject line reads “Re: Additional TICO clarification for CIBC”. The e-mail reads:

Yes, I did communicate with Merit on this issue. In the scenario in question CIBC would be covered by the Ontario Travel Industry Compensation Fund up to the maximum per person (\$5,000) and maximum per event (\$5 million), in the event of the failure of Merit, provided that Merit receives payment directly from CIBC and documents each transaction with an invoice. CIBC would have to demonstrate that it did in fact make payments for the travel services being purchased for it’s (*sic*) clients and this procedure would facilitate a claim/claims in the event of such a failure. Under such a scenario, the end consumer, being the receiver of the gift certificate, would not be eligible to make a claim for reimbursement, but CIBC would be eligible.

Mr. Pepper indicated that his understanding at the time he provided this information was that CIBC would be the client, paying funds to Merit, and would receive an invoice. So that each transaction would have documentation which would indicate the name of the customer, details of the travel, the money paid by CIBC and an invoice would be issued from Merit to CIBC. He understood that CIBC clients would exchange points and that CIBC would purchase travel arrangements on their behalf. His response related to whether CIBC, as a client of Merit, would be covered in the event of Merit’s failure. It was not Mr. Pepper’s understanding that the CIBC clients would make the bookings and then CIBC would forward money to Merit. In this situation the “customer” was the consumer dealing directly with the travel agent.

² Exhibit #3, Tab 2

Mr. Pepper opined that a corporation can be protected if it is acting as a customer. In this case, CIBC is repaying for the “points” portion but the consumer is dealing with Merit and that is why CIBC is not the customer. Mr. Pepper was asked by the Tribunal how it could have been structured differently so that CIBC could have been covered at the same time as not contravening the Act: he was not able to provide an answer.

Ms. Furlan explained that the Applicant’s claim was denied on the basis of two main principles: 1) that it was not the consumer who made the booking and 2) that points are not eligible for compensation pursuant to section 57(3) 6. of the Regulation. It was concluded that CIBC did not enter into an agreement with Merit for travel arrangements. There were arrangements and invoices between Merit and Conquest, and Merit and the consumer. CIBC was simply an “afterthought”, in her words. A proper invoice has to outline all the details of the travel arrangements. Ms. Furlan pointed out that commissions were not covered, and a total of \$2,164.35 has been retained by Merit. Ms. Furlan made reference to paragraph 25 of the terms and conditions of the relevant Applicant’s rewards program, which states in part:

Once rewards are redeemed, they are non-refundable, non-exchangeable and non-transferable (unless you are advised otherwise).³

According to documentation disclosed by the Applicant, its customers have been credited back their points and money portion for the travel arrangements which were not provided.⁴

ISSUES

Is CIBC a “customer” who is entitled to make a claim for compensation to the Fund under section 57 of O. Reg. 26/05?

Is CIBC a “customer” who is eligible for compensation from the Fund under the circumstances detailed above?

THE LAW

The Act states:

Interpretation

1. (1) In this Act,...

“travel agent” means a person who sells, to consumers, travel services provided by another person; (“agent de voyages”)

³ Exhibit #4, Tab 2

⁴ Exhibit #3, Tab 5

"travel services" means transportation, sleeping accommodation or other services for the use of a traveller, tourist or sightseer; ("service de voyages")

"travel wholesaler" means a person who acquires rights to travel services for the purpose of resale to a travel agent or who carries on the business of dealing with travel agents or travel wholesalers for the sale of travel services provided by another person; ("voyagiste")

Prohibition against acting as a travel agent or travel wholesaler unless registered

4. (1) No person shall act or hold himself, herself or itself out as being available to act,
- (a) as a travel agent unless the person is registered as a travel agent under this Act; or
 - (b) as a travel wholesaler unless the person is registered as a travel wholesaler under this Act.

Compensation Fund

41. (1) The Travel Industry Compensation Fund established under the *Travel Industry Act* is continued.

Regulations

- (2) The Fund shall be administered and managed in accordance with the regulations.

The entitlement to claims on the compensation fund by a customer, and exclusions, are provided in the O. Reg. 26/05 in section 57:

Reimbursement of customer

57. (1) A customer is entitled to be reimbursed for travel services paid for but not provided if,
- (a) the customer paid for the travel services and the payment or any part of it was made to or through a registered travel agent;
 - (b) the customer has made a demand for payment from,
 - (i) the registered travel agent and the appropriate registered wholesaler,
 - (ii) any other person who has received the customer's money, and
 - (iii) any other person who may be legally obliged to reimburse or compensate the customer, including a person obliged under a contract for insurance; and
 - (c) the customer has not been reimbursed by,
 - (i) those of the registered travel agent and the appropriate registered wholesaler, who under section 25 of the Act are liable to make the reimbursement, because they,
 - (A) are unable to pay by reason of bankruptcy or insolvency,

- (B) have ceased carrying on business and are unwilling to pay, or
 - (C) have ceased carrying on business and cannot be located,
- (ii) any other person who has received the customer's money, or
 - (iii) any other person who may be legally obliged to reimburse or compensate the customer, including a person obliged under a contract for insurance.
- (2) A reimbursement under subsection (1) is limited to the amount paid to or through any registrant for the travel services that were not provided.
- (3) Despite subsection (1), a customer is not entitled to be reimbursed for:
1. Travel services that were not provided because an end supplier, other than a cruise line or airline, became bankrupt or insolvent or ceased to carry on business.
 2. A payment to or through a registrant for any travel services that were provided or for which alternate travel services were provided or made available.
 3. A payment for travel services that were available, but were not received because of an act or a failure to act on the part of the customer or of another person for whom the travel services were purchased.
 4. Counselling fees paid to a travel agent.
 5. Travel services that were to be received as a prize, award or goodwill gesture.
 6. Travel services that the customer obtained with a voucher, certificate, coupon or similar document that the customer did not pay for.
 7. Travel services that the customer did not pay for with cash or by a cheque, credit card or other similar payment method.
 8. Insurance premiums.
 9. A claim that is based on the cost, value or quality of the travel services or alternate travel services.
 10. A claim in connection with which travel services were provided under section 68 or 69.
 11. Consequential or indirect damages incurred as a result of the failure to provide the travel services.
- (4) If the travel services were not provided because an end supplier who is an airline or a cruise line became bankrupt or insolvent or ceased to carry on business, subclauses (1) (b) (i) and (1) (c) (i) do not apply.

A travel agent may claim on the Fund in certain circumstances where the agent reimburses a customer or pays money to provide alternate travel service under section 58. As well, a travel wholesaler is entitled to a claim on the Fund for reimbursement of money paid to a customer in certain circumstances as set out in section 59 of the Regulation.

The Tribunal also considered the following statutory provisions:

Real Estate and Business Brokers Act, 2002 – O. Reg. 567/05, section 1(1)(a):

“customer” means,

- (a) with respect to a brokerage and a trade in real estate, a person who, in the trade,
 - (i) has an agreement with the brokerage under which the brokerage provides services to the person, and
 - (ii) is not represented under a representation agreement by the brokerage or any other brokerage,

Travel Agents Act, Regulation respecting travel agents, R.R.Q. 1981, c. A-10:

- (d) “customer”: every person benefiting from the tourist services provided by a travel agent, excluding any direct or indirect supplier of a travel agent.

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A:

Interpretation

- 1. In this Act,

“consumer” means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes; (“consommateur”)

The *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F, provides:

Rule of liberal interpretation

- 64. (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

Same

- (2) Subsection (1) also applies to a regulation, in the context of the Act under which it is made and to the extent that the regulation is consistent with that Act.

The “modern principle” of statutory interpretation preferred by the courts⁵ is this:

⁵ *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] S.C.J. No. 2; [1998] 1 S.C.R. 27 (S.C.C.)

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974), at p. 74]

Cases considered:

Ontario (Travel Industry Council) v. Gray (c.o.b. All Sport Accommodations), 2010 ONCA 518

Sunquest Vacations Ltd. (Re) [1998] O.C.R.A.T.D. No. 136

ANALYSIS

O. Reg. 26/05 provides that a customer is entitled to be reimbursed for travel services paid for but not provided, if the customer paid for the travel services and the payment or any part of it was made to or through a registered travel agent.

Customer is not defined in the Act or the Regulation. The Respondent has provided two definitions for “customer” found in other legislation. Specifically, under the *Real Estate and Business Brokers Act, 2002* – O. Reg. 567/05, a customer is defined, with respect to a brokerage and a trade in real estate, as “a person who has an agreement with the brokerage under which the brokerage provides services to the person”. The Tribunal notes that a “trade” in real estate encompasses a whole range of transactions.

The other definition of customer put forth is found in the *Travel Agents Act*, Regulation respecting travel agents, R.R.Q. 1981, c. A-10. This definition appears to be even broader as it includes “every person benefiting from the tourist services provided by a travel agent, excluding any direct or indirect supplier of a travel agent”.

“Customer” is defined in the Shorter Oxford English Dictionary as “a person who makes a purchase or gives business, especially habitually to any particular seller or establishment”.⁶

CIBC has an agreement with Merit, a registrant under the Act, under which Merit provides services to CIBC: specifically Merit makes travel arrangements for CIBC clients and orchestrates the payment by CIBC for all or a portion of those travel services. Based on any of the three definitions set out above, CIBC would be a “customer” given these facts.

⁶ Shorter Oxford English Dictionary, On Historical Principles, 5th ed., Volume 1, Oxford University Press

In coming to its decision however, the Board has chosen to add criteria to the definition of “customer” in its interpretation of s. 57(1)(a). It has included the criteria that the customer is the person who has made the bookings and received an invoice with the travel details. Based on these additional criteria, the Board concluded that since the consumer has satisfied the criteria of having made the booking, and had been given an invoice with the travel details, they are therefore the “customer”. This conclusion apparently then precludes CIBC from being considered “the customer”.

The wording of the Regulation is simply that a customer may be entitled to reimbursement if the customer paid for the travel services and the payment or any part of it was made to or through a registered travel agent. In this particular situation, there are two parties acting, the consumer making the travel arrangements (and in some instances potentially making some payment) and CIBC paying for the services selected (partially or entirely). The fact that the consumer may qualify as a customer, does not in the Tribunal’s opinion, disqualify CIBC from being considered a customer for the purposes of section 57(1)(a); nor does the fact that in some instances a consumer may have paid something towards the travel services obtained.

It has been suggested that the purpose of the Act and Regulation is to protect the “travelling public”. Clearly this is one purpose. The Fund, however, responds to claims by customers, travel agents and travel wholesalers. This suggests that the intent and object of the Act is to offer protection to a broader group of persons who are affected by the failure of a travel registrant. It is not simply protecting the travelling consumer. Travel agents and travel wholesalers are business entities and the Act offers them protection when they suffer a loss as a result of a registrant’s failure, provided they have followed the rules and acted prudently. It does not seem reasonable to conclude that a business such as CIBC, which has an agreement with a travel registrant, to pay for travel services through it, albeit for the benefit of another party, should be barred from compensation when a registrant fails because it did not select the specific travel services and was not provided with the details of those services. CIBC paid for travel services, selected by its clients, through a registered travel agent, Merit, and it has provided documentation to prove this.

Mr. Pepper testified he did not appreciate that CIBC would not be making the travel service arrangements for its clients directly with Merit, when he provided his opinion that CIBC would be able to access the Fund. The Tribunal finds it surprising that this would have been his assumption given that the Act would appear to prohibit a non-registrant from playing such a role.

It is very clear from the Act and Regulation that the purpose of the Fund is to reimburse for actual losses. Section 57(3) 6. explicitly excludes claims for travel services obtained with a voucher, certificate, coupon or similar document that the customer did not pay for. Clearly, this would be a basis to deny a claim by CIBC’s clients for reimbursement for the travel services they anticipated receiving through their rewards program but did not actually pay for. The travel services being claimed for by CIBC, however, were paid for by CIBC with a wire transfer of money to Merit. This fact is not in dispute.

Why CIBC was paying, and how much it was paying, was determined by an agreement with its client and involved the redemption of points. This does not change the fact that CIBC was a customer of a registered travel agent, which paid for the travel services through that agent, and the travel services they paid for were not provided. These are the requirements for reimbursement under the Act and the Tribunal finds that CIBC has satisfied those requirements.

The total amount being claimed by CIBC is \$15,117.85. The evidence before the Tribunal indicates that \$2,164.35 of this was retained by Merit as commission, pursuant to their agreement with the defunct Conquest. Had Merit reimbursed CIBC and made a claim for compensation pursuant to section 58, this fact would have reduced the eligible claim amount. However, that is not the claim before the Tribunal.

ORDER

On the basis of the evidence, the Tribunal orders that the Fund should pay to the Applicant its claim of \$15,117.85.

LICENCE APPEAL TRIBUNAL

Elizabeth Sproule, Vice-Chair

RELEASED: March 31, 2011

This decision may also be available on Quicklaw.