



Civil Resolution Tribunal

Date Issued: May 31, 2024

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Nikaeen v. Wal-Mart Canada Corp.*, 2024 BCCRT 501

BETWEEN:

ROSS NIKAEEN

APPLICANT

AND:

WAL-MART CANADA CORP./LA COMPAGNIE WAL-MART DU
CANADA and BUYATAB ONLINE INC.

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Kristin Gardner

INTRODUCTION

1. This is a final decision dismissing this claim as out of time under the *Limitation Act*. This is not a decision on the merits of the dispute.
2. The applicant, Ross Nikaeen, says he bought electronic gift cards online for the respondent retailer, Wal-Mart Canada Corp./La Compagnie Wal-Mart du Canada,

totalling \$600. Mr. Nikaeen says his attempts to redeem the gift cards from Wal-Mart were unsuccessful, both online and in-store. He claims \$1,100 for a full refund of the gift cards' purchase price and damages for inconvenience.

3. Mr. Nikaeen did not make any allegations in the Dispute Notice against the other respondent, Buyatab Online Inc. However, Wal-Mart's Dispute Response says that Mr. Nikaeen bought the gift cards from Buyatab, and so it is Buyatab that Mr. Nikaeen has a contract with, not Wal-Mart. Buyatab did not file a Dispute Response, and so it is in default, as discussed further below.
4. Wal-Mart also says that Mr. Nikaeen's claim is out of time under the *Limitation Act*.
5. Mr. Nikaeen is self-represented. Wal-Mart is represented by an in-house lawyer, Brendan Clancy.

JURISDICTION AND PROCEDURE

6. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness.
7. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate to provide proportional and speedy dispute resolution, I find that an oral hearing is not necessary in the interests of justice.
8. Section 42 of the CRTA says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court.

9. Mr. Nikaeen submitted a February 13, 2024 email as part of his evidence. Wal-Mart objects to it being considered because it is marked “without prejudice”. Generally, this means that the communication is protected from being disclosed as evidence in a dispute or court action under what is called settlement privilege. Settlement privilege exists to encourage settlement by allowing parties to make admissions without fear that those admissions will end up as evidence in a later hearing. See *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37. I find that the February 13, 2024 email is protected by settlement privilege. So, I have not considered it in making my decision.

ISSUE

10. The issue is whether the CRT should dismiss Mr. Nikaeen’s claim as out of time under the *Limitation Act*.

EVIDENCE AND ANALYSIS

11. In making this decision, I have reviewed the Dispute Notice, the Dispute Response, and the parties’ submissions and evidence on the limitation issue.
12. Section 13 of the CRTA says that the *Limitation Act* applies to CRT claims. Section 6 of the *Limitation Act* says that the basic limitation period to file a claim is 2 years after the claim is “discovered”. At the end of the 2-year limitation period, the right to bring a claim ends, even if the claim otherwise would have been successful.
13. Section 8 of the *Limitation Act* says a claim is “discovered” on the first day the person knew, or reasonably ought to have known, that the loss or damage occurred, that it was caused or contributed to by an act or omission of the person against whom the claim may be made, and that a court or tribunal proceeding would be an appropriate way to remedy the damage.

14. Mr. Nikaeen filed his application for CRT dispute resolution on December 10, 2023. So, in order to have filed his claim within the 2-year limitation period, he must have discovered his claim no earlier than December 10, 2021.
15. In his application for dispute resolution, Mr. Nikaeen said he became aware of his claim in November 2021. He said he purchased two gift cards for \$300 each on December 31, 2020, and that after several unsuccessful attempts to use them, he filed a complaint with Consumer Protection BC in November 2021. Mr. Nikaeen also says he made a subsequent complaint to the Better Business Bureau (BBB) in December 2021. He says Wal-Mart never responded to those complaints.
16. Wal-Mart argues that Mr. Nikaeen's claim is out of time based on the above chronology of events and Mr. Nikaeen's admission that he discovered his claim in November 2021. Wal-Mart also provided email evidence showing Mr. Nikaeen contacted Buyatab on July 20, 2021, to report he had been unable to use the gift cards. Buyatab responded the same day that it was a third-party gift card company, and that Mr. Nikaeen should contact Wal-Mart directly.
17. Mr. Nikaeen admits that he tried unsuccessfully to use the gift cards in July 2021. He says he made several calls to Wal-Mart's customer service line in 2021 without receiving any clear answers, but says he still trusted Wal-Mart would resolve the issue.
18. Wal-Mart provided phone logs suggesting Mr. Nikaeen first contacted Wal-Mart by phone on November 11, 2021, about the gift cards. They also show that Wal-Mart's customer service agent attempted to phone Mr. Nikaeen back the next day but had to leave a voicemail message. Wal-Mart says this is the only record it has of any contact with Mr. Nikaeen before he started this CRT dispute.
19. Overall, I do not accept Mr. Nikaeen's submission that he contacted Wal-Mart several times in 2021. He provided no supporting evidence of the alleged attempts. If Mr. Nikaeen had repeatedly contacted Wal-Mart as he alleges, I would have expected he would have some record of it such as his own phone log or emails. On balance, I find

Wal-Mart's evidence is more persuasive, and find it likely Mr. Nikaeen only called Wal-Mart customer service one time, on November 11, 2021.

20. In *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, the Supreme Court of Canada confirmed that a claim is discovered when a plaintiff has "actual or constructive knowledge of the material facts on which a plausible inference of liability" can be drawn. A claim's discoverability does not require knowledge of the exact extent of the loss. Rather, it is sufficient to know that some loss has occurred. See *Peixeiro v. Haberman*, 1997 CanLII 325 (SCC).
21. I find Mr. Nikaeen discovered his claim in November 2021, consistent with what he stated in the Dispute Notice. While it appears he first had trouble using the gift cards in July 2021, I accept that he initially thought the respondents might resolve the issue. However, by November 2021, I find neither respondent had provided Mr. Nikaeen with any resolution. I note that Mr. Nikaeen provided no supporting evidence of his submission that he contacted Wal-Mart throughout 2022 and 2023, or that Wal-Mart ever assured him that it would resolve the issue. As noted above, I find that Mr. Nikaeen likely did not contact Wal-Mart customer service again after November 2021.
22. Further, as noted, Mr. Nikaeen undisputedly complained to Consumer Protection BC in November 2021 about his inability to use the gift cards. Mr. Nikaeen did not provide a copy of his complaint or the exact date. Nevertheless, I find that by November 30, 2021, at the latest, Mr. Nikaeen knew a loss had occurred and he knew or should have known that a court or tribunal proceeding against the respondents was an appropriate way to remedy the loss. Therefore, I find Mr. Nikaeen's claim was out of time when he filed it on December 10, 2023.
23. As noted above, Buyatab is in default because it did not file a Dispute Response. Generally, liability is assumed when a party is in default. However, given my finding that Mr. Nikaeen was out of time to bring his claim against both respondents, I dismiss his claim against both Wal-Mart and Buyatab.

24. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. As Mr. Nikaeen was unsuccessful, I find he is not entitled to reimbursement of his paid CRT fees. Wal-Mart did not pay any fees or claim dispute-related expenses.

ORDER

25. I dismiss Mr. Nikaeen's claims and this dispute.

Kristin Gardner, Vice Chair