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## ARTICLE

# Ontario and Québec Set to Update Legal Requirements on Loyalty Programs

Recent legislative changes regarding loyalty programs enacted in Ontario and confirmed in Québec provide more insight into how loyalty programs will be regulated moving forward.

There has been uncertainty in Canada with regards to whether consumer-incentive programs involving loyalty or rewards points fall under the scope of provincial consumer protection laws, given their free nature. Loyalty programs encourage consumers to be loyal to a specific merchant in exchange for the opportunity to obtain goods and services either at a discounted price or for free or for other exclusive offers. In return, merchants that offer these loyalty programs often gain repeat customers and valuable information from consumers' purchasing habits. In many cases, loyalty programs are linked to consumer accounts or contracts which themselves are covered by consumer protection laws. In recent years, Aeroplan and Air Miles announced miles and points older than a certain number of years would expire, but both ultimately opted to abandon their plans in the face of consumer backlash.<sup>1</sup> Recently, growing consumer concerns have prompted provinces to enact legislation prohibiting expiry dates on gift cards (prepaid purchase cards). Regulators have now become more interested in consumer rewards programs and have pushed to amend consumer protection laws to cover them.

The recent legislative changes regarding loyalty programs that have been enacted in Ontario and confirmed in Québec provide more insight into how loyalty programs will be regulated moving forward.

## Ontario

On December 8, 2016, Ontario's Consumer Protection Act<sup>2</sup> (the "Ontario CPA") was amended to include in the definition of a "consumer agreement", contracts under which a supplier agrees to provide rewards points to a consumer. In addition, the new amendments prohibit suppliers from entering into or amending a consumer agreement to provide for the expiry of rewards points due to the passage of time alone. As a result, organizations offering rewards or loyalty points to its consumers may no longer require that its customers use their earned rewards points by a specific time.

The amendments are not yet in force and on October 20, 2017, the Ontario government introduced regulations (the "Regulations") supporting the implementation of this new rule prohibiting the expiration of rewards points. When they enter into force, the new amendments to the Ontario CPA will have a retroactive effect to October 1, 2016.

The Regulations specifically exclude stamp or punch card incentives offered by retailers, therefore permitting the expiry of these types of offers. Moreover, the Regulations also provide that the general rules for specific types of consumer contracts such as future performance contracts, internet agreements or remote agreements (distance contracts) will not apply to the portion of a consumer agreement that relates to the provision of rewards points. The Regulations also impose a prescribed value for application of the ban on expiry points — the value of any one of the goods or services, or single set of goods or services that the consumer may receive in exchange for points redeemed must be more than \$50. The prohibition on expiry points still applies where the good or service that the consumer receives in exchange for points is a gift card or voucher which can be combined with other gift cards or vouchers to purchase any good or service with a value of more than \$50. Practically speaking, this would mean that rewards points would be permitted to expire when the value of any one of the goods or services that the consumer may receive in exchange for these points is not more than \$50.

Ontario's new rule against the expiration of rewards points still provides for certain other exceptions. Most notably, upon the termination of the consumer contract (either by the consumer or the supplier) under which rewards points are provided, the consumer's accumulated rewards points may expire if this was provided for in the consumer agreement. Moreover, the Ontario CPA does not prevent rewards points from expiring if there is another reason for expiry in addition to the passage of time. The additional reason must be a substantive factor and not simply a disguised means of expiry on the basis of time alone. As an example, the Regulations permit the expiry of rewards points due to account inactivity or if a consumer does not engage in transactions for a certain period of time.

## Québec

Québec is set to follow in Ontario's footsteps regarding imposing a ban on the expiry of loyalty points. On February 22, 2017, Bill 791: An Act to Amend the Consumer Protection Act was introduced as a Private Member's bill by a member of Québec's second opposition party. This Bill proposed a prohibition on the expiration of consumer's rewards points. On May 2, 2017, the Québec government itself introduced Bill 134: An Act mainly to modernize rules relating to consumer credit and to regulate debt settlement service contracts, high-cost credit contracts and loyalty programs ("Bill 134"), which included substantially similar wording regarding the prohibition against expiry of rewards points in addition to amendments to other parts of the Québec Consumer Protection Act<sup>3</sup> (the "Québec CPA").

Of note is that unlike the Private Member's bill, Bill 134 does not specifically prohibit the change of the value of rewards points. In effect, the new proposed amendments would permit merchants to amend essential elements of a non-fixed-term contract provided that it previously specified, in the contract, the elements that may be amended unilaterally. This provision would give Québec merchants the ability to modify terms of their loyalty program contract with consumers on the condition that they provide the consumers with specific details of the amendment. This rule is aligned with the current general rule in the Québec CPA regarding modifications to consumer contracts.

As in Ontario, the Québec CPA would now explicitly cover contracts involving a loyalty program, which is defined as a program under which consumers may receive goods or services at a reduced price or free of charge through the use of exchange units. As such, a consumer loyalty contract would be subject to the various rules and requirements found in the Québec CPA.

Bill 134 was adopted unanimously by the Québec National Assembly on November 15, 2017. There is currently no indication as to when Bill 134 may enter into force, however, its sponsor has indicated that draft regulations may be ready by February 2018.

## Takeaways for Businesses

The soon-to-be harmonization across Ontario and Québec of a prohibition against the expiry of loyalty and rewards points will provide consistency across Canada's two most populous provinces and may inspire other provinces to follow suit.

Merchants in Ontario that offer rewards points programs currently in place or which existed as of October 1, 2016, may not provide for the expiry of their loyalty points. In Québec, Bill 134 has become law, but is not yet in force. Bill 134, as adopted, does not include a retroactive effect for its proposed amendments, but merchants should be reviewing their practices to take into account the new changes, which will likely come into effect in early 2018.

Moreover, it is important to keep in mind that in Québec, loyalty programs are also considered contracts of adhesion and therefore subject to the same stringent rules (e.g. prohibition against abusive clauses).

With the legislative changes in Ontario and in Québec, it is clear that consumer laws will now apply to loyalty programs in these two provinces.

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1 See [Air Miles backs off from plan to let points expire](#) and [Good news: 7-year points expiration scuttled for Aeroplan](#).

2 2002, S.O. 2002, c. 30.

3 c. P-40.1

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