CITATION: Robson v. Federal Express Canada Corp., 2024 ONSC 5002
COURT FILE NO.: CV-19-00616354-00CP
DATE: 20241008

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KAREN ROBSON, Plaintiff

– and –

FEDERAL EXPRESS CANADA CORPORATION, FEDEX GROUND PACKAGE SYSTEM, INC. AND FEDEX GROUND PACKAGE SYSTEM, LTD.**,** Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *James Bunting, Sean Campbell, and Anna White*, for the Plaintiff

Eliot Kolers, Samaneh Hosseini, and Hesam Wafaei, for the Defendants

HEARD: September 11-12, 2024

CERTIFICATION MOTION

I. Overview

[1] The Plaintiff moves for certification of this action under section 5(1) of the *Class Proceedings Act*, SO 1992, c. 6.

[2] The action raises a consumer protection claim alleging undisclosed and unsolicited fees charged by the Defendants (collectively "FedEx"). The putative class are non-commercial purchasers of goods from sellers outside of Canada which are shipped to Canadian customers via FedEx.

[3] The focus of the claim is on the invoices provided by FedEx, specifically by Federal Express Canada Corporation ("FedEx Canada"), a company located in Mississauga, Ontario, to the Plaintiff and other class members. Plaintiff's counsel contend that these invoices embody a contract with the consumers/purchasers of the goods shipped by FedEx. The Plaintiff claims that the invoices charge for fees never disclosed or agreed to by her, and that they are misleading in that they disguise FedEx's customs clearance fees for government levies.

[4] The Plaintiff bought knitting materials online from a seller in the United States that cost USD $174.80. The seller specified that this purchase included "free shipping", and arranged for the goods to be shipped by FedEx. After taking delivery of the product, the Plaintiff received an invoice from FedEx charging her for certain fees labelled "Advancement Fee" and "Clearance Entry Fee" and collectively titled "FedEx Ground Services", as follows:

FedEx Ground Services

Advancement Fee	10.00
HST on ADV/Ancillary Service Fees	5.07
Clearance Entry Fee	29.00
Canada HST	20.16
TOTAL	**CAD $64.23**

FedEx Express has arranged clearance and submitted payment to the customs agency the destination country on your behalf. For information about importing fees by country, please visit fedex.ca/ancillary.

[5] The invoice instructed the Plaintiff to remit payment for these fees either online to fedex.ca/pay or to FedEx Canada in Mississauga. The Plaintiff has deposed that she paid the amount shown on the invoice believing that the fees described therein related to government-levied customs charges, including duties and taxes. In believing that, however, she was mistaken.

[6] The Advancement Fee and Clearance Entry Fee went to FedEx for arranging for Canada Customs clearance and for advancing the customs duties on the Plaintiff's behalf. These were services which she had not requested and was unaware she would need or receive, having thought she contracted for "free delivery" of her purchased goods.

[7] The central question is whether the Plaintiff and putative class members are entitled to the benefit and protections of the *Consumer Protection Act*, SO 2022, c. 30 ("*CPA*") and its equivalents in other provinces. Plaintiff's counsel submit that in purchasing goods shipped by FedEx, and in being invoiced by the FedEx entity in Ontario, the *CPA* applies to their transactions. They invoke the provisions of the *CPA* prohibiting undisclosed fees by service providers.

[8] FedEx's counsel submit that in purchasing goods shipped by FedEx, customers in the Plaintiff's position are, under the law of agency in contracts of carriage, bound with the imputed knowledge of the consignor of the goods – i.e. the sellers who contracted with FedEx on their behalf. FedEx's position is that since the consignors/sellers knew of FedEx's Ground Service fees, the putative class members cannot avail themselves of any protection against these fees under the *CPA*. They also submit that the relevant transactions for the cross-border shipments occurred outside of Ontario and Canada, such that the *CPA* does not apply.

II. The *Class Proceedings Act* certification criteria

a) Section 5(1)(a) – cause of action

[9] The first criterion for certification is that the claim must disclose a cause of action. As with a motion under Rule 21, "a pleading should not be struck" – nor certification denied – "for failure to disclose a cause of action unless it is 'plain and obvious' that no claim exists": *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, at para. 25. The merits of the claim are not in issue at the certification stage: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 SCR 477, at para. 99. Moreover, in analyzing a cause of action under section 5(1)(a) of the *Class Proceedings*

Act, no evidence is admissible and the facts as set out in the Statement of Claim must be taken as established: *Ford v. F. Hoffman - La Roche Ltd*. (2005), 74 OR (3d) 758, at para. 17 (SCJ).

[10] Before examining the specific causes of action pleaded, I will observe that this claim is not the first of its kind. In *Wright v. United Parcel Service Canada Ltd*., 2011 ONSC 5044, this Court certified a claim alleging similar unsolicited customs clearing service fees against another parcel delivery service. Although the facts of each case differ – the *Wright* claim alleged coercive conduct by the defendant that is not alleged against FedEx in the case at bar – the consumer protection claims in the two cases for the most part parallel each other. The consumer's claims of unfair practices, unjust enrichment, and unconscionable representation were all found to pass the section 5(1)(a) hurdle for certification purposes: *Ibid*., at paras. 549, 617, 634.

[11] Fedex's counsel also point out that *Wright* was a case of 'casual' consigners who used FedEx as a consignee on a one-off basis and who had non-negotiable contracts. The evidence here is that the consignor of the Plaintiff's package had an ongoing contract with FedEx. In addition, the customer invoice at issue in *Wright* contained no reference to the consignee's website, whereas the Plaintiff's customer invoice containing the impugned fees directed a consumer to the FedEx website for any questions or inquiries.

[12] With respect, those nuances of the *Wright* case amount to distinctions without a relevant difference. Needless to say, the specific contract in issue in a given case that must be analyzed whenever a contract is relevant to the cause of action pleaded. The FedEx contract underlying the consignment of the Plaintiff's goods is problematic in ways that are discussed below and under the circumstances does not get FedEx very far. Furthermore, a fine print advisory referring a customer to FedEx's website – a large and complex internet site which is difficult to navigate and not designed for consumer ease-of-access – is of little assistance to FedEx in the consumer transactional context at issue.

[13] FedEx seeks to rely on *Vallance v. DHL Express (Canada) Ltd*., 2024 BCSC 140, at para. 214, where the B.C. court found that the courier company had provided multiple notifications of similar fees, and that this was sufficient to impute the consumer's consent to the fees. In my view, however, the *Vallance* reasoning does not apply here. FedEx's reference to its website on the customer invoice does not suffice to overcome the consumer's surprise at being charged any fees at all. After all, in pleading the *CPA*, the Plaintiff invokes the standard not of the well informed customer, but of the "credulous and inexperienced consumer": *Richard v. Time Inc*., [2012] 1 SCR 265, at paras. 70-72.

[14] FedEx also contends that the Plaintiff could have contacted FedEx to complain about the fees in question and to request a "re-bill" eliminating the unwanted Ground Service fees. To that end, there is affidavit evidence from FedEx explaining that such complaints do get properly dealt with, and that a one-time waiver of the fees is available to those who inquire. Counsel for FedEx also points out that the Plaintiff has conceded that she saw the reference to the FedEx website on her invoice, but did not bother to contact FedEx about the fees.

[15] Again, I find that to be of little assistance to FedEx here. A customer in the Plaintiff's position might well conclude that contacting a global corporation like FedEx about some relatively small but unexpected service fees might be like the proverbial 'fight with city hall' – i.e. an

exercise in frustration. More to the point, the FedEx Ground Services Fees, charged in the face of the "free shipping" advisory that accompanied the purchase of the goods being shipped, are from the Plaintiff's perspective like a restaurant unexpectedly charging more for a meal than indicated on the menu. If the FedEx fees are shown to be wrongfully charged in the first place, the potential for having them reversed if the customer catches it does not address the problem or undermine the claim.

[16] In section 1 of the *CPA*, a "supplier" is defined as a person in the business of selling or supplying goods or services. This includes "an agent of the supplier and a person who holds themself out to be a supplier or an agent of the supplier." It takes no stretch of interpretation to conclude that the Plaintiff and the putative class members are consumers under the *CPA* and that FedEx are collectively suppliers engaged in the business of supplying services to those customers.

[17] The Plaintiff pleads a number of different breaches of the *CPA*. These include: a) charging unsolicited service fees (section 13), b) engaging in the unfair practices of false, misleading, and/or unconscionable representations (sections 14, 15, 17), c) breach of a future performance agreement by non-disclosure of the fees and other details in respect of the future performance (section 22), and d) breach of a remote agreement by failing to disclose the specific services and their value to the consumer (sections 45-46). In assessing these causes of action, it is important to keep in mind that the pleading alleges a severe asymmetry of information between the consumer and FedEx, and that this imbalance leads to the false impression that the fees in question are government-mandated and that the consumer has no choice but to agree to them.

[18] The Plaintiff also pleads that these various unfair practices and breaches of the *CPA* entitle her and the proposed class members to rescission of their agreements and damages against FedEx. These remedies are sought under section 18 of the *CPA*, which provides consumers with a right to seek a remedy against a supplier of services who has committed an unfair practice, including instances in which the consumer was unaware of the practice impugned in the claim. The *CPA* provides courts with a wide latitude in fashioning a remedy to such claims: see *Drynan v. Bausch Health Companies Inc.*, 2021 ONSC 7423, at para. 94, leave to appeal ref'd 2022 ONSC 1586 (Div Ct).

[19] Finally, the Plaintiff has pleaded all of the ingredients of an unjust enrichment claim. These include: "(a) that the defendant was enriched; (b) that the plaintiff suffered a corresponding deprivation; and (c) that the defendant's enrichment and the plaintiff's corresponding deprivation occurred in the absence of a juristic reason": *Moore v. Sweet*, [2018] 3 SCR 303, at para. 37.

[20] In the class action context, courts have previously held that the relationship between the supplier and the consumer need not necessarily be a direct one, and that the consumer may have only dealt with intermediaries rather than the impugned supplier: *Kalra v. Mercedes Benz*, 2017 ONSC 3795, at para. 22. In any case, whether each ingredient of the unjust enrichment claim is made out under the circumstances is not a matter to be determined at the certification stage: *Pro-Sys*, at para. 88. It is sufficient that the elements of unjust enrichment, with sufficient material facts to support that claim, is pleaded on behalf of the Plaintiff and proposed consumer class: *Microcell Communications Inc v. Frey*, 2011 SKCA 136, at paras. 22-25.

[21] Counsel for FedEx place some reliance on a similar claim against FedEx which was dismissed by the Superior Court of Quebec. The cause of action pleaded in that case was false or misleading misrepresentations contrary to Quebec's *Consumer Protection Act*, CQLR, chapter P-40.1. In the Quebec court's view, "the legal relationship [between the consumer and FedEx] is problematic. The only legal link between [Plaintiff] and FedEx does not give rise to the action being brought": *Perry-Fagant v. Federal Express Canada Corporation*, 2024 QCCS 2927, at para. 38. The court found that since the consumer's contact was with the seller/consignor, and there was no direct contact between the consumer and FedEx, there was no recognized cause of action.

[22] The same logic does not apply under the Ontario *CPA*. Sections 1 and 2 of the *CPA* create a legal relationship between the consumer and a supplier of goods or services, and that relationship is deemed to be a "consumer transaction". FedEx's delivery services, as invoiced, constitute such a consumer transaction and thereby fall within the *CPA*'s ambit.

[23] The Quebec court also stressed that the consumer knew or could have known by inquiring about the fees, but had failed to initiate any contact with FedEx: *Perry-Fagant*, at para. 82. This is not a relevant inquiry in Ontario. The Court of Appeal has held that a consumer's "reliance or even knowledge of the unfair practice" plays no part in the analysis of liability under the *CPA*: *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921 at paras. 39. The causal link between the provider of the service or goods and the consumer is established as long as the consumer ordered the goods or service while the impugned practice was ongoing: *Ibid*., at para. 90.

[24] Finally, the Quebec court reasoned that any ambiguity there may have been in FedEx's communication with the customer was minor and was a result of the customer's own misunderstanding: *Perry-Fagant*, at para. 107. In contrast, section 11 of Ontario's *CPA* provides that any ambiguity should be resolved in favour of the consumer. Moreover, section 5 of *CPA* requires disclosure by the supplier of goods or services to be clear, prominent, and comprehensible.

[25] The explanation for the FedEx Ground Services Charges on the invoice received by the Plaintiff does not fit that description. It is unclear on the face of the invoice what, exactly, the charges are for; indeed, even the direction to the FedEx website for further explanation of what should be a simple, straightforward explanation signals a lack of clarity. There are sufficient material facts pleaded to support the Plaintiff's claim that she misunderstood the fees as shown on the invoice not because she is an atypical consumer, but because she is a typical one.

[26] Counsel for FedEx submits that there is no possible claim under the *CPA*, since any cause of action would ultimately be based on the underlying contract. That contract is identified by FedEx's counsel as a master service agreement, or a Transportation Service Agreement, between consignor/seller and consignee/FedEx and a transportation invoice billed by FedEx to the consignor/seller. The Plaintiff, for example, purchased knitting materials in the United States, and the underlying shipping contract between the consignor/seller and FedEx would likely have been formed in the United States. Counsel for FedEx submits that "there is nothing in the FedEx docs modifies the common law principle that the consignor contracts with the shipper on behalf of the consignee": *Blackman v FedEx*, 2009 BCSC 201, at para. 41.

[27] Counsel for the Plaintiff has a two-part answer to FedEx's point about the territorial reach of the *CPA*. In the first place, they argue that a party cannot rely on a contract that the other party has never seen and that they have not produced. This very point was made in *Wright*, at para. 220, where it was stated that the *situs* of the contract "is a fact that would be within [the defendant's] knowledge and they should have presented evidence to support this assertion."

[28] In reply to this argument, counsel for FedEx has explained that while the actual agreement between the consignor and FedEx is not in the record, one of the deponents, Catherine Ventura, FedEx's Manager for Trade and Supply Chain Compliance, has described its terms in a general way and has indicated that the agreement contains FedEx's standard terms found online. In her affidavit, Ms. Ventura provides a URL address which links to FedEx's Service Guide. This Guide contains information about calculating shipping rates per weight of the package, with a breakdown to many U.S. and international destinations – Montreal, Toronto, and Vancouver among them.

[29] The FedEx Service Guide does not, however, say anything about the place of contracting with the Plaintiff's seller as consignor. That agreement is not in the record; as FedEx's counsel has explained, it was not included as an exhibit by Ms. Ventura and was not specifically requested by Plaintiff's counsel. If one searches the FedEx website for Transportation Service Agreements, it becomes apparent that the agreements are done on a country-by-country basis. The one applicable to Canada is denominated in Canadian dollars and gives FedEx's Toronto office as FedEx's address for all communications.

[30] The standard FedEx Pricing Agreement for consignors is also posted online. This is denominated in U.S. dollars and presumably applies to the consignor of the Plaintiff's goods, although I do not know that for a fact. I note that it mentions that FedEx supplies Ground Services, but I can find nothing in any of these documents that speaks to the cost of those services or to FedEx's practice of passing on the Ground Service Fees to end-use consumers.

[31] I do not say this in order to give evidence; it may well be that such a term does exist but that I did not find it. Rather, the point is that the crucial contractual matter on which FedEx relies has been referenced in such an obscure way that it is, effectively, not in the record. Accordingly, I can only repeat what Justice Horkins said in *Wright*, at para. 434: "If UPS [or FedEx] uses other forms of contract documents to contract with standard service customers, they ought to have produced them." There is a certain irony in FedEx relying on an obscure and, for all intents and purposes, invisible contract term, all in an effort to explain the force of an obscure and, for all intents and purposes, invisible contract term.

[32] In any case, Plaintiff's counsel emphasize that the invoice sent from FedEx to the Plaintiff billing the Plaintiff for the unsolicited fees came from FedEx Canada, whose billing office is located in Mississauga, Ontario. We do not know how or where the consignor contracted with FedEx, but we do know from the evidence in the record that the Plaintiff was directed to make payment to the "fedex.ca" address denoting the Canadian location of its office.

[33] It is apparent on the face of the documentation that, whatever situation might obtain between the consignor and FedEx, the relationship between FedEx and the Plaintiff is an Ontario legal relationship. Both are located in the province. There is nothing anyone can point to in the record that rebuts that obvious geographic fact.

[34] Section 5(1)(a) of the *Class Proceedings Act* is not the place to take a deep dive into obscure contractual terms that may or may not be obliquely referenced in the evidence, or to engage in a careful weighing of that as against evidence apparent on the surface of the documents in the record: *Lambert v. Guidant Corp*. [2009] OJ No. 1910, para 68. The contract is pleaded as an Ontario consumer contract, and there are material facts pleaded to support that characterization.

[35] Section 2(1) of the *CPA* provides that the consumer protection terms of that statute apply to consumers in other provinces of Canada if the person engaging in the transaction with the consumer is located in Ontario. Furthermore, a misleading or unconscionable representation is defined in section 15(1) of the *CPA* as including an invoice or statement made for the purpose of receiving payment for goods or services.

[36] Given that FedEx carries on business in Ontario, and its impugned statements are issued by and delivered to consumers on an invoice from FedEx Canada located in Ontario, the connection to Ontario is sufficiently established: see *College of Optometrists v. Essilor*, 2019 ONCA 265, at para. 92 *et seq.* The *CPA* provides a cause of action to consumers such as the Plaintiff in Ontario and across the country.

[37] In short, there is no basis for FedEx's contention that the Plaintiff has not pleaded viable causes of action. The section 5(1)(a) threshold of the *Class Proceedings Act* has been crossed by the claim.

b) Section 5(1)(b) – identifiable class

[38] Section 5(1)(b) of the *Class Proceedings Act* requires the class to be defined by reference to objective criteria, and for membership to be bounded and capable of being determined without reference to the merits of the action: *Hollick, supra*, at para. 17. Plaintiff's proposed class definition meets these basic requirements.

[39] The proposed class encompasses:

> All individuals in Canada who between February 2016 and the date that notice of certification is issued paid Service Fees [to FedEx] when acting for personal, family, or household purposes.

[40] FedEx's counsel points out that the class definition is premised on determining whether any proposed member is a personal or a commercial user of FedEx's services. Plaintiff's counsel concedes that is correct, but submits that the distinction presents no obstacle to certification of the class.

[41] It does not appear to present a great challenge to determine whether a given customer is in the class because they used FedEx to ship goods for personal purposes, or out of the class because they used FedEx to ship goods for commercial purposes. As explained by FedEx's own deponent, Kyriakos Fabios, the Director of FedEx Trade Networks Transport and Brokerage (Canada) Inc., the *Customs Act* requires the consignor of any cross-border parcel to identify whether the goods are being shipped for "casual" – i.e. personal – or commercial usage. That information will be available in FedEx's records for any potential class member.

[42] As Plaintiff's counsel state, it will be readily apparent whether the *CPA* applies to a given parcel based on this distinction. In any case, courts have previously determined that individuals can self-identify as non-commercial users for consumer protection purposes: *Jiang v. Peoples Trust*, 2017 BCCA 119, paras 73-79.

[43] The proposed class definition fits all of the criteria set out in the *Hollick* case. The class is not overly broad, nor is it vaguely or subjectively defined.

[44] The Advancement Fee and Clearance Entry Fee charged to the Plaintiff and other potential class members was implemented by FedEx in February 2016. Identifying that date as the starting date of the class period is therefore rationally connected to the proposed common issues.

[45] FedEx responds to this by indicating that a start date of more than two years ago raises a limitation issue. Plaintiff's counsel, on the other hand, is of the view that any limitation questions can and should be addressed at a future time.

[46] There is ample authority for the proposition put forth by Plaintiff's counsel that certification is not the time to consider a limitation defence: *Stenzler v TD Asset Management*, 2020 ONSC 111, para 31. There may well be individual discoverability issues with respect to the running of the limitation period, which are to be addressed at a later stage "after the common issues are determined": *Smith v. Inco Limited* (2011), 107 OR (3d) 321, at para. 165 (CA).

[47] The proposed class definition meets the requirement of an identifiable class in section 5(1)(b) of the *Class Proceedings Act*.

c) Section 5(1)(c) – common issues

[48] It is by now well established that that section 5(1)(c) of the *Class Proceedings Act* requires that there be "some basis in fact" that the proposed common issues are real issues in the case and that they can be answered in common across the class members: *Kuiper v. Cook (Canada) Inc.* (2020), 149 O.R. (3d) 521, at para. 27 (Div Ct). That said, the Supreme Court of Canada indicated in *Hollick*, at para. 16, that this does not entail an examination of the merits of the claim. The Court in this respect serves a gatekeeping function, ensuring that the common issues are realistic in light of the record but not necessarily provable at this stage*: Crosslink v. BASF Canada*, 2014 ONSC 4529, at para. 35.

[49] Moreover, the common issues need not resolve the entire claim; in fact, it is recognized that a common issue is acceptable as such even if it "makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution": *Cloud v. Attorney General of Canada* (2004), 73 O.R. (3d) 401, at para. 53 (CA). Not all class members need to have suffered the identical harm, or harm at all, so long as there is a rational connection between the definition of the class and the common issues: *Tiboni v. Merck Frosst Canada Ltd*., 2008 CanLII 37911, at para. 58 (SCJ).

[50] As Plaintiff's counsel describe them, the proposed common issues are centred around the question of whether the way in which the Ground Service Fees, denoted on the customer invoice as the FedEx Advancement Fee and Clearance Entrance Fee, are charged, violates the *CPA*. This

is foundational to the claim and, Plaintiff's counsel submit, can be determined on an objective basis focused on FedEx's own conduct.

[51] There is commonality in that the Plaintiff and all class members discovered the unsolicited fees on their invoice and, presumably, paid them. The evidentiary foundation for the claims of unfair practices, misrepresentation, and unjust enrichment under the *CPA* are the same for all proposed class members. FedEx's evidence demonstrates that there is a uniform procedure when performing cross border services and that there is a standard-form FedEx invoice.

[52] Moreover, under the *CPA*, claims of misrepresentation do not turn on consumer knowledge or reliance, and do not require individualized evidence from the claimant: *Ramdath v. George Brown College*, 2015 ONCA 921, at para. 39. Likewise, differences in knowledge level among class members, with some potentially being aware of the impugned fees and others being misled, does not undermine the commonality of the issue: *Wright v. UPS*, 2015 ONSC 2220, at para. 37 (Div Ct).

[53] In all, the analysis of misrepresentation and unfairness as defined in the *CPA* are matters that can be analyzed for the entire class in common. Similar deceptive practices have previously been certified as common issues by this court: see *Rebuck v. Ford Motor Company*, 2018 ONSC 7405.

[54] The proposed common issues also include questions on aggregate and punitive damages. Aggregate damages are authorized under s. 24(1) of the *Class Proceedings Act*, provided that: a) the claim is for money damages, b) the entitlement can be established as a matter of fact and law, and c) the *quantum* can be reasonably established.

[55] The Court of Appeal indicated in *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, that aggregate damages may be a proper subject for the common issues if the evidentiary and legal basis for the claim is supported by the record. As Chief Justice Winkler put it, at para. 125, "the elements of the cause of action must be proven to establish the defendant's monetary liability to some or all members of the class. If it is possible for these elements to be established through the resolution of the common issues, then the requirements of s. 24(1)(b) are capable of being met."

[56] These requirements have been satisfied in the record before me. Monetary relief is a central part of the Plaintiff's claim, and there is some basis in fact for the prospect of establishing liability by resolving the common issues. The Statement of Claim seeks remedies under the *CPA* as well as restitution/disgorgement of fees charged by FedEx. The Plaintiff has produced expert evidence by Peter Steger, an experienced accountant who has been qualified as an expert in damages quantification, that demonstrates that any information required to calculate aggregate damages is within FedEx's knowledge.

[57] The Plaintiff's record thereby establishes that once FedEx produces its sales records and related financial data, damages will be calculable on a common basis without individual class members having to provide elements of that proof. Aggregate damages questions flowing from disgorgement claims of this nature have previously been certified by this court: see *Drynan v. Bausch Health Companies Inc*., 2021 ONSC 7423, leave to appeal ref'd 2022 ONSC 1586 (Div Ct). FedEx has not produced an expert to counter the Plaintiff's position on this point.

[58] As for punitive damages, the test for those under the *CPA* does not require a claimant to establish malice or bad faith. Rather, negligence or inattention to the consumer's rights by the service provider can suffice: *Bernstein v. Peoples Trust Co.*, 2019 ONSC 2867, at paras. 315-317.

[59] There is at least some basis in fact to support the Plaintiff's claim that FedEx's Advancement Fee and Clearance Entry Fee were designed to mislead consumers by obscuring or their true nature. The Plaintiff submits that those fees have been used by FedEx to artificially lower the cost it charges consignors for its delivery service by offloading part of the charge to the ultimate consumer. It is alleged in the Claim that this conduct has led to FedEx's competitive advantage at the expense of consumers.

[60] The Plaintiff need not prove this allegation at the certification stage. It is sufficient that there is some basis in fact for her position that there was intentional design behind the allegedly misleading billing practices. Plaintiff's counsel submit that the discernable economic result of FedEx's Ground Service fee billing policy provide that basis in fact. They also point out that punitive damages in such circumstances have previously been made the subject of common issues by this court: see *Agnew-Americano v. Equifax Canada Co*., 2019 ONSC 7110.

[61] The proposed common issues are set out by Plaintiff's counsel as follows:

> Consumer Protection
>
> 1. Did the Defendant breach section 13(2) of the Consumer Protection Act, 2002, S.O. 2002, c. 30 (the "CPA") and similar provisions in the Equivalent Consumer Protection Legislation by demanding payment from consumers for unsolicited services?
>
> 2. Did the Defendant engage in any Unfair Practices within the meaning of the CPA and the Equivalent Consumer Protection Legislation?
>
> 3. Are the agreements between the Defendant and Class members future performance agreements, and, if so, did they comply with the requirements for such agreements?
>
> 4. Are the agreements between the Defendant and Class members remote agreements, and, if so, did they comply with the requirements for such agreements?
>
> 5. If common issues 1, 2, 3, and/or 4 are answered in the affirmative, are Class members' consumer agreements with the Defendant binding?
>
> 6. If common issues 1, 2, 3, and/or 4 are answered in the affirmative, are Class members, or any of them, entitled to restitution or damages under the CPA and the Equivalent Consumer Protection Legislation?
>
> 7. Should the Defendant be permanently enjoined from engaging in the unfair practices, including charging and collecting the Unsolicited Service Fees (as defined in the Statement of Claim)?

8. Is it in the interests of justice to waive any requirements to demand or give notice that a consumer seeks to recover restitution or damages under the CPA and the Equivalent Consumer Protection Legislation?

Unjust Enrichment

9. Was the Defendant unjustly enriched at the expense of the Class from charging and collecting the Unsolicited Service Fees?

10. If so, are Class members entitled to restitution or disgorgement of the Unsolicited Service Fees?

Aggregate Monetary Relief

11. If common issues 1, 2, 3, 4, and/or 9 are answered in the affirmative, can the quantum of the relief sought by Class members be determined on an aggregate basis, and, if so, in what amount?

12. Is the Defendant liable to pay exemplary or punitive damages to Class members, and, if so, in what amount(s)?

[62] On the basis of the principle discussed above, I see no reason why all of these issues should not be certified. Under the circumstances, they are rationally related to the Plaintiff's claim, are all capable of being addressed in common, and there is some basis in fact to support each of them.

d) Section 5(1)(d) – preferable procedure

[63] The Supreme Court of Canada has provided the instruction that "the preferability inquiry should be conducted through the lens of the three principal advantages of class actions – judicial economy, access to justice, and behaviour modification": *Hollick*, at para. 27.

[64] As Plaintiff's counsel submit in their factum, consumer claims are generally well suited to class actions since under the *CPA* the consumer's reliance, or even knowledge of the unfair practice, is not necessary for the claim. As previously stated in these reasons for decision, as long as the consumer entered into an agreement with the service provider while the unfair practice was going on, the causal link is deemed to exist: *Ramdath*, *supra*, at paras. 39, 88, 90, 93.

[65] It is also obvious in the present case that the small size of each claim, but the large quantity of claims overall, point to a class action as the way to accomplish all three of the overarching goals identified by the Supreme Court. As indicated at the outset of these reasons, the Plaintiff's total expenditure on the impugned fees was $64.23 – a figure in a range that is unlikely to prompt litigation by any individual FedEx user, and that cannot be efficiently pursued by an aggrieved customer.

[66] In my view, there is no realistic avenue for legal redress for the Plaintiff's claim other than a class action. The preferable procedure requirement for certification under section 5(1)(d) of the *Class Proceedings Act* is satisfied.

e) Section 5(1)(e) – Plaintiff and litigation plan

[67] The Plaintiff has no apparent conflict with the proposed class members and the evidence demonstrates that she is capable of instructing counsel and playing a constructive role as representative Plaintiff.

[68] Plaintiff's counsel have produced a litigation plan that is satisfactory. Such plans are in any case flexible instruments and are always a work in progress: *Pearson v. Inco Inc*. (2005), 78 O.R. (3d) 641, at para. 97 (CA).

[69] The requirements with respect to the representative Plaintiff and the litigation plan contained in section 5(1)(e) of the *Class Proceeding Act* are satisfied.

III. Disposition

[70] This action is certified as a class action under section 5(1) of the *Class Proceedings Act*.

[71] The class is defined as in paragraph 39 above. The Plaintiff is the representative Plaintiff and her counsel is class counsel.

[72] The common issues are as set out in paragraph 61 above.

[73] The parties may make written submissions on costs. I would ask Plaintiff's counsel to send brief submissions to my assistant by email within two weeks of today and for FedEx's counsel to send equally brief submissions by email to my assistant within two weeks thereafter.

Date: October 8, 2024 **Morgan J.**