



Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Electronically issued : 07-Jan-2022
Délivré par voie électronique : 07-Jan-2022
Toronto

KAREN ROBSON

Plaintiff

– and –

FEDERAL EXPRESS CANADA CORPORATION

Defendant

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6

STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date _____ Issued by _____
Local Registrar

Address of 330 University Ave
court office: Toronto, ON M5G 1R7

TO: **Federal Express Canada Corporation**
5985 Explorer Drive
Mississauga, ON L4W 5K6
Canada

CLAIM

1. The Plaintiff, Karen Robson, on her own behalf and on behalf of the proposed

Class (as defined below) claims:

- a) A declaration that the Defendant engaged in unfair practices under Part III of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30 (the “CPA”) and similar provisions in Equivalent Consumer Protection Legislation (as defined below) in other provinces;
- b) A declaration that the Defendant has contravened section 13(2) of the CPA and similar provisions in Equivalent Consumer Protection Legislation by demanding payment from consumers for unsolicited services;
- c) A declaration that the Defendant has contravened section 22 of the CPA and similar provisions in Equivalent Consumer Protection Legislation by failing to adhere to the prescribed requirements for future performance agreements;
- d) A declaration that the Defendant has contravened sections 45 and 46 of the CPA and similar provisions in Equivalent Consumer Protection Legislation by failing to adhere to the prescribed requirements for remote agreements;
- e) A declaration under section 93(1) of the CPA that any consumer agreement between the Defendant and Class Members is not binding;

- f) A declaration that Class Members are entitled to a return of any payments made under any agreement with the Defendant;
- g) An order permanently enjoining the Defendant from demanding or suggesting that a consumer is required to make a payment in respect of Unsolicited Service Fees (as defined below);
- h) An order permanently enjoining the Defendant from engaging in unfair practices in respect of the Unsolicited Service Fees it charges consumers;
- i) Statutory relief and/or compensatory, restitutionary and/or disgorgement damages in the amount of \$500 million (or some other amount to be determined by the Court) pursuant to sections 13, 18 and 100 of the CPA and similar provisions in Equivalent Consumer Protection Legislation, including a refund of all amounts paid in respect of the Unsolicited Service Fees;
- j) Restitution and/or disgorgement damages on the grounds of unjust enrichment;
- k) Exemplary or punitive damages in the amount of \$50 million or some other amount to be determined by the Court;
- l) An order, pursuant to section 24 of the *Class Proceedings Act, 1992*, S.O. 1992, c.6 (the "**Class Proceedings Act**"), of aggregate damages,

and/ or an order under section 25 of the *Class Proceedings Act* directing individual hearings in respect of damages;

- m) To the extent necessary, an order under section 18(15) and/or section 101 of the CPA and similar provisions in Equivalent Consumer Protection Legislation waiving any demand or notice provisions, and any requirements relating to any required demand or notice;
- n) A reference to decide any issues not decided at the trial of the common issues;
- o) Pre-judgment and post-judgment interest pursuant to ss. 128 and 129 of the *Courts of Justice Act*, R.S.O. 1980, c. 43;
- p) The costs of this proceeding plus applicable goods and services and harmonized sales taxes;
- q) The costs of notice and of administering the plan of distribution of the recovery in this proceeding, plus applicable taxes; and
- r) Such further and other relief as counsel may request and this Honourable Court deems just.

A. NATURE OF THE CLAIM

2. This action concerns Federal Express Canada Corporation's ("**FedEx**"), use of unfair practices in its cross-border delivery service, including making misleading and deceptive representations regarding the fees it charges consumers who import goods into Canada. Among other things, FedEx fails to disclose to consumers in advance


who ship goods into Canada that it will charge consumers for customs-related services, or the quantum of those fees, misrepresents the nature of the fees it charges, and demands payment for unsolicited customs-related services.

3. FedEx ships goods around the world, including within Canada, and ships goods from other countries into Canada. This claim concerns the fees FedEx charges to ship goods into Canada when goods are shipped via FedEx Ground Services.

4. Most goods that FedEx ships into Canada are subject to the Goods and Services Tax and/or provincial sales tax or the Harmonized Sales Tax (depending on the province or territory into which the package is being shipped). In some instances, goods are also subject to duties. If goods are subject to a duty and/or tax, in most instances, FedEx arranges to pay any duties and applicable provincial and federal sales tax ("**Duties & Taxes**") on behalf of the Canadian consumer to whom the good is destined. FedEx then delivers the good to the consumer and subsequently sends the consumer an invoice for reimbursement of the applicable taxes (the "**FedEx Invoice**").

5. However, in addition to invoicing the consumer for government levied Duties & Taxes, the FedEx Invoice also includes several fees or surcharges: (i) that are misrepresented by FedEx to appear to be government levied fees, taxes or duties when in fact these fees are collected and retained by FedEx for its own benefit; and (ii) for customs-related services that consumers have not asked FedEx to provide (together, "**Unsolicited Service Fees**"). These Unsolicited Service Fees often exceed the government levied duties and taxes.

6. The image below is from a FedEx Invoice received by the Plaintiff for a \$113 (USD) purchase of yarn (discussed further below). The Unsolicited Service Fees listed are illustrative of the Fees included in a typical FedEx Invoice.



Invoice Summary		
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 in the destination country on your behalf. For information about importing fees by country, please visit fedex.ca/ancillary.

7. Each of these four fees are discussed below:
- “Canada HST”**. Nowhere does the FedEx Invoice disclose or explain that “Canada HST” is the *only* true government-imposed Tax and that no Duty applies to the good in question. FedEx’s failure to disclose that HST (or other provincial taxes and duties that may apply) is the only government imposed fee, creates in the mind of the consumer the general impression that all the fees included on the FedEx Invoice are government related Duties & Taxes.
 - “Advancement Fee”** sometimes described by FedEx as a **“Disbursement Fee”** or a **“FedEx Reimbursement on Delivery Fee”**

(together the “**Disbursement Fee**”). The general impression created in the mind of a consumer by the term “disbursement fee” or “advancement fee” or “FedEx reimbursement on delivery fee” is a fee paid by FedEx on the consumer’s behalf for which FedEx is entitled to be reimbursed. Nowhere does the FedEx Invoice disclose or explain the nature of the Disbursement Fee. Specifically, the FedEx Invoice does not disclose that the Disbursement Fee is not a Duty or Tax and is in fact an administrative fee set by FedEx that FedEx charges a consumer ostensibly for paying Duties & Taxes on the consumer’s behalf, but which is not itself a duty or tax.

- c) “**Clearance Entry Fee**”. The general impression created in the mind of a consumer by the term “clearance entry fee” is of a charge imposed by a government agency as part of the Canadian customs regime. Nowhere does the FedEx Invoice disclose or explain the nature of this fee or that this fee is *not* a government levied “clearance fee” or a Duty or Tax but is instead a fee collected by FedEx, ostensibly for “arranging clearance” of the good in question. The clearance entry fee charged by FedEx often exceeds the amount of Duty & Tax levied on the good. Moreover, “arranging clearance” is a largely automated process which involves no more than a FedEx employee entering a few keystrokes.
- d) “**HST on Disb/Ancillary Service Fees**”. Nowhere does the FedEx Invoice disclose or explain the nature of the “Ancillary Service Fee” but the backlash between “Disb” and “Ancillary Service Fee” creates in the

mind of the consumer the impression that “Ancillary Service Fee” is the same as, or similar in nature to, the “Disbursement Fee” described above. Nowhere does the FedEx Invoice make it clear that the “HST on Disb/Ancillary Service Fees” is the HST payable on the Disbursement Fee and the Clearance Entry Fee.

8. Immediately following the itemization of the above fees, the FedEx Invoice includes the following statement which is designed to reinforce in the mind of the consumer the general impression that all of the fees listed are fees imposed by the government and that have been or will be paid by FedEx on the consumer’s behalf:

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

9. Nowhere does the FedEx Invoice disclose or explain that the consumer can arrange to pay any applicable Duties & Taxes themselves which would make all of the Unsolicited Service Fees entirely avoidable.

10. Together the **Disbursement Fee, Clearance Entry Fee and HST on Disb/Ancillary Service Fees** are referred to collectively as the “**Unsolicited Service Fees**”.

11. The Unsolicited Service Fees:

- a) Are described by FedEx, including on FedEx Invoices, in a manner and context that constitutes an unfair practice. Among other things, the

representations are false and misleading, misrepresent the nature and purpose of the Fees and fail to state material facts.

- b) Constitute an unfair practice because they are unconscionable. FedEx's conduct amounts to billing consumers exorbitant amounts for unauthorized and unsolicited services. At no time does a consumer who has received a good shipped by FedEx Ground Services request or agree to FedEx providing customs-related services, including arranging customs clearance for the goods they have ordered or making Duty & Tax payments on their behalf. Nor does a consumer agree to the amount charged by FedEx for any such services. The Unsolicited Service Fees are excessively one-sided in favour of FedEx and so adverse to the consumer as to be inequitable and/or unconscionable.
- c) Are unsolicited services pursuant to section 13(2) of the CPA. All the customs-related services provided by FedEx can be performed by a consumer at little or no cost and FedEx's practices contravene consumer protection laws prohibiting companies from demanding payment for unsolicited goods and services, regardless of whether the consumer has received some benefit from that service.
- d) Contravene the requirements for remote and future performance agreements in consumer protection laws which require, among other things, that suppliers provide consumers in advance of supplying a service with fair and accurate descriptions of the services provided, or

proposed to be provided, including the total amount that the supplier knows would be payable by the consumer, and provide the consumer the opportunity to accept or decline the services in question;

- e) Are not authorized by consumers and FedEx has been unjustly enriched from the receipt of the Unsolicited Service Fees without legal justification.

12. FedEx has made, and continuous to make, representations regarding the Unsolicited Service Fees knowing that these representations are false, misleading, deceptive, unconscionable and unlawful (or with reckless disregard for the truth or accuracy of the representations) with the intention of earning a profit.

B. THE PARTIES

The Plaintiff

13. The Plaintiff, Karen Robson, is a resident of Southampton, Ontario.

The Class

14. This Action is commenced by the Plaintiff pursuant to the *Class Proceedings Act* on her own behalf and on behalf of the class of individuals acting for personal, family or household purposes in Canada who have paid Unsolicited Service Fees (collectively, the “**Class**”).

The Defendant

15. The Defendant, FedEx, is a corporation incorporated under the laws of Nova Scotia. FedEx began operations in 1987 as Federal Express Canada Ltd. FedEx is an international package delivery and express courier service. It is headquartered in Mississauga, Ontario.

16. FedEx is part of the FedEx group of companies which have annual revenue in excess of \$80 billion (USD).

17. FedEx delivers packages around the world including within Canada, and into Canada from outside the country. Broadly speaking, FedEx offers two options to consumers shipping goods into Canada: FedEx Express and FedEx Ground Services. If a consumer or vendor ships using FedEx Express, the consumer or vendor pays a higher price for expedited delivery but is not charged separately for the Unsolicited Service Fees described above which are described by FedEx as included in the price. FedEx Ground Services offer longer delivery times but the delivery charge (excluding the Unsolicited Service Fees) is less expensive than the fees charged for using FedEx Express services.

18. FedEx relies on the Unsolicited Service Fees to artificially lower the apparent cost of its Ground Service in order to procure a competitive advantage, enrich itself and penalize consumers who use the ostensibly less expensive (before the addition of the Unsolicited Service Fees) Ground Service shipping method and thereby make up lost profit.

C. IMPORTING GOODS FOR PERSONAL USE AND THE SHIPPING DOCUMENTS

19. Goods imported from outside Canada that are not intended for sale or for a commercial use are considered to be for personal use. These goods are usually subject to Taxes and sometimes to Duties.

20. With a few exceptions, goods imported into Canada for personal use are subject to provincial and federal sales tax which, in some provinces, are combined into a harmonized sales tax or HST. Most goods made in Canada, the United States or Mexico can be brought or shipped into Canada subject only to provincial and federal sales tax.

21. Some goods made outside of Canada, such as dairy products, are subject to duty (in addition to sales tax) regardless of their origin and many goods made outside of Canada, Mexico and the United States are subject to duty *and* sales tax.

22. The “Rates of Duty” are set by the Department of Finance Canada and are calculated as a percentage of the good’s value based on the type of good in question. Usually, in circumstances where a Canadian consumer orders a good from a vendor outside Canada, the vendor will retain FedEx, or another international shipping company, to deliver the good to the consumer. At the time of purchase, the consumer has no contractual relationship with FedEx and in many instances will not be aware of the identity of the shipping company retained by the vendor to deliver the imported good.

23. Unless collected by the vendor, the consumer will be responsible for paying any Duties & Taxes on goods imported into Canada. In most instances, where FedEx has been retained by a vendor to ship a good into Canada using FedEx Ground Services, FedEx arranges payment of the Taxes and/or Duties on behalf of the Canadian consumer. In these circumstances, FedEx delivers the good to the

consumer and subsequently sends the consumer an invoice, ostensibly for the Duties & Taxes FedEx has paid on the consumer's behalf.

24. As noted above, this Claim concerns Unsolicited Service Fees associated with goods delivered into Canada using FedEx Ground Services. In these circumstances, a consumer wishing to bring a good into Canada, or the vendor of the good on the consumer's behalf, (the "**consignor**") consigns the good to FedEx for delivery to a consumer located in Canada. Typically, a number of documents are associated with the consignment: a Canada Customs Coding Form (which is a Canada Border Services Agency form that identifies the party importing the good, describes the good and identifies the Duties and/or Taxes that apply); a Commercial Invoice (that describes the good and its value, identifies the exporter, the importer, the consignee of the good, and the party responsible for paying Duties and Taxes and identifies FedEx as the broker); and a Certificate of Origin (which is a declaration by the consignor attesting to the description of the good being imported and the identity of the consumer to whom the good is being shipped). Collectively, the Canada Customs Coding Form, the Commercial Invoice, and Certificate of Origin are together the "**Shipping Documents**". Nothing in the Shipping Documents discloses or refers to FedEx charging the Unsolicited Service Fees.

25. Typically, the consumer to whom the good is being shipped does not receive the Shipping Documents until the good is delivered, and/or until sometime after FedEx has delivered the good when FedEx sends the Shipping Documents to the consumer together with the FedEx Invoice.

26. From the moment a good is consigned to FedEx for shipment, FedEx knows that a Ground Services customer will be charged the Unsolicited Service Fees and it has all the information that it needs to calculate or estimate the amount of these Fees and to disclose these fees to the consumer. FedEx knows: the name of the consumer importing the goods; the declared value of the goods; which party is responsible for Duties & Taxes and the amount of applicable Duties & Taxes; the amount of the brokerage or clearance fee it intends to charge; and the amount of the Disbursement Fee that it intends to charge. Despite this knowledge, none of the Shipping Documents refer to, identify or explain the nature of the Unsolicited Service Fees, which only appear on the FedEx Invoice provided to the consumer after the good has been delivered and the unsolicited services have been provided.

D. THE UNFAIR PRACTICES

27. The Defendant has made and continues to make false, misleading and deceptive representations (examples of which are detailed above) to consumers, regarding the Unsolicited Service Fees (the “**Representations**”).

28. On June 29, 2020, the Plaintiff ordered on-line weaving supplies (specifically six types of weaving fibre) from Ganxxet, a company based in the United States that sells cords, yarns and rope to consumers. The Ganxxet invoice provided to the Plaintiff at the time of purchase stated that there would be no charge for shipping. At the time of the on-line purchase, the Plaintiff was unaware that FedEx would be the shipping company retained to deliver her purchase and reasonably believed that any shipping cost paid by the vendor would cover all the services that a courier provides, including customs-related services.

29. The Ganxxet website contained the following disclosure regarding duties and taxes:

Be aware that all shipments that are imported into any country outside the US may be subject to taxes, custom duties and fees **by the destination country**. [Emphasis Added].

30. The Commercial Invoice FedEx provided to Ms Robson identified Ganxxet as the exporter of the goods and Ms Robson as the importer and the consignee. The Commercial Invoice provided to Ms Robson lists the total price of the six spools of yarn as \$113 (USD) and lists a charge of \$0.00 for each of the following: (i) insurance; (ii) freight; (iii) packaging; (iv) handling; and (v) other. The Canada Customs Coding Form valued the goods at \$155.08 (CAD) for the purposes of calculating Duties & Taxes and assessed GST of \$20.16 and stated that “customs duties” and “excise tax” were nil. FedEx also provided Ms Robson with a copy of the Certificate of Origin. Collectively, the Commercial Invoice, Canada Customs Coding Form and Certificate of Origin relating to Ms Robson’s Ganxxet order are together, the “**Ganxxet Shipping Documents**”.

31. None of the Ganxxet Shipping Documents provided to Ms Robson refer to, identify or imply that Ms Robson would be charged by FedEx for the Unsolicited Service Fees. Ms Robson first became aware that FedEx intended to charge her Unsolicited Service Fees upon receipt of a FedEx Invoice dated August 6, 2020, almost 6 weeks after she placed her order and approximately 5 weeks after she received the goods on July 2, 2020.

32. Attached to the FedEx Invoice were copies of the Ganxxet Shipping Documents. The FedEx Invoice demanded a payment of \$64.23 from Ms Robson. As set-out above, the various fees comprising the total of \$64.23 are identified on the FedEx Invoice under the heading "Invoice Summary" as follows:

- a) Advancement Fee: \$10
- b) HST on Disb/Ancillary Service Fee: \$5.07
- c) Clearance Entry Fee: \$29.00
- d) Canada HST: \$20.16

33. For the reasons described above, the way in which these Unsolicited Service Fees are described, and manner in which these Fees are presented, on the August 6, 2020 FedEx Invoice convey the general impression that all these fees are customs and tax related fees imposed by the government that had been paid by FedEx on the Plaintiff's behalf.

34. Contrary to the general impression conveyed by the itemization of the fees on the FedEx Invoice, the only fee collected by Canada customs is the "Canada HST" in the amount of \$20.16. All the other fees, totalling \$39 (almost 70% of the total invoiced amount) are fees collected and retained by FedEx on its own behalf and the \$5.07 HST in tax that FedEx collects on these service fees.

35. The misleading impression that all the fees on the FedEx Invoice are duty and tax related is reinforced by other representations made on the FedEx Invoice provided

to Ms Robson. Immediately below the Invoice Summary, the FedEx Invoice contains the following representation:

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

36. Describing the itemized fees as amounts in respect of which FedEx has “submitted payment to the customs agency in the destination country on your behalf” and as “importing fees by country” reinforces in the mind of the consumer the misleading impression that the Unsolicited Service Fees are fees mandated by government customs agencies, and collected by FedEx on behalf of those agencies, and not fees charged by FedEx for services provided.

37. One of the “Payment Methods” identified on the August 6, 2020, FedEx Invoice is to pay on-line at fedex.ca/pay. The Plaintiff paid the August 6, 2020, FedEx Invoice using PayPal through the FedEx website on August 15, 2020. The on-line payment process does not provide a consumer with any information to clarify the nature of the fees contained on the FedEx Invoice.

38. The FedEx Invoice also includes the following statement: “For information about importing fees by country, please visit fedex.ca/ancillary”. The general impression of these words is to reinforce the impression that the fees on the FedEx Invoice relate to country-specific government “import fees”. Moreover, for any consumer who visits “fedex.ca/ancillary” that webpage does not explain the charges that appear on the FedEx Invoice. Instead, it includes general statements about how

FedEx may charge service fees in some countries and then refers to a further drop down link that a consumer must select by country. Even if reviewed by a consumer, the information buried in FedEx's website does not alter the general impression that the fees on the FedEx Invoice are customs related fees or taxes imposed by the government. FedEx has intentionally buried this information on its website and it is not "clear, comprehensible and prominent" disclosure as required under section 5 of the CPA (and similar provisions in Equivalent Consumer Protection Legislation).

39. In addition, the landing page for FedEx's Canadian website (<https://www.fedex.com/en-ca/home.html>) contains a link described as follows: "Get help with **duties & taxes**, tracking, payments and more" (emphasis added). The link makes no reference to fees collected by FedEx on its own behalf. Clicking the link "Get help with duties & taxes, tracking, payments and more" takes a consumer to a page described as "Additional Information and Resources". Among the additional information and resources listed below this heading is a section titled "**Pay Duties and Taxes**" (emphasis added). This section repeatedly references "duties and taxes" but makes no reference to the fact that various fees included on the FedEx Invoice are collected by FedEx on its own behalf as described above. These representations reinforce, and are intended to reinforce, in the consumer's mind the impression that all the fees itemized on the FedEx Invoice are government mandated fees that have been paid by FedEx on the consumer's behalf.

40. At no time did the Plaintiff request or agree to FedEx providing her with services related to the Unsolicited Service Fees, including arranging customs

clearance for the goods she had ordered or making Duty & Tax payments on her behalf.

41. At no time prior to delivering the goods and issuing the FedEx Invoice did FedEx advise the Plaintiff that it would charge the Unsolicited Service Fees (or any of them) for customs related services nor advise Ms Robson that she could have arranged customs clearance for her order on her own behalf.

42. Notably, FedEx could have disclosed to Ms Robson, and to other consumers importing goods into Canada, the fees it charges for customs-related services, including the Disbursement Fee and the Clearance Entry Fee, at the time the good is consigned to FedEx for delivery. Each of: the Advancement/Disbursement Fee; the HST on Disb/Ancillary Fees; the Clearance Entry Fee; and the Canada HST are known or knowable to FedEx at the time the good in question is consigned to it for shipment, and in advance of FedEx providing consumers with the Unsolicited Services. For example, the Disbursement Fee is a fee (the greater of 2.5% of the Duty and Tax amount or \$10) charged in circumstances where FedEx arranges payment of Duties & Taxes on behalf of the consumer importing the good in question. FedEx knows at the time of consignment that, or could easily ascertain whether, a good imported into Canada is subject to provincial and/or federal sales tax, a fact that triggers the Disbursement Fee. Similarly, the Clearance Entry Fee varies in amounts set by FedEx according to the declared value for duty, a value that the exporter provides to FedEx at the time the good is consigned to FedEx for delivery.

43. FedEx's failure to disclose to consumers the fees it intends to charge for customs-related services deprives consumers of the opportunity to accept those services at the price proposed by FedEx or to make other arrangements for having their package clear customs.

E. BREACH OF THE *CONSUMER PROTECTION ACT*

44. The Plaintiff and Class members plead and rely upon the CPA and equivalent consumer protection legislation of other provinces and territories, including the *Consumer Protection Act*, R.S.A. 2000, c. C-26.3 (formerly the *Fair Trading Act*, R.S.A. 2000, c. F-2), sections 1, 2, 5, 6, 7, 7.2, 13, 20, 21, 22, 23, 24, 28, 30, 31, 35, 142.1; the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, sections 1, 2, 4, 5, 7, 8, 9, 10, 12, 14, 17, 19, 21, 23, 27, 28, 46, 47, 48, 49, 50, 51, 171, 172; *The Business Practices Act*, C.C.S.M. c. B120, sections 1, 2, 3.1, 4, 5, 6, 8, 23; *The Consumer Protection Act*, C.C.S.M. c. C200, sections 59, 61, 62, 64, 174, 175, 177; the *Consumer Product Warranty and Liability Act*, S.N.B. 1978, c. C-18.1, sections 1, 2, 4, 15, 23; the *Consumer Protection and Business Practices Act*, S.N.L. 2009, c. C-31.1, sections 2, 7, 8, 9, 10, 24, 28, 29, 31, 35.1, 35.2, 35.3; the *Consumer Protection Act*, R.S.N.W.T. 1988, c. C-17, section 70; the *Consumer Protection Act*, R.S.N.S. 1989, c. 92, sections 26, 28(A); the *Consumer Protection Act*, R.S.N.W.T. (Nu) 1988, c. C-17, section 70; the *Business Practices Act*, R.S.P.E.I. 1988, c. B-7, sections 1, 2, 3, 4; the *Consumer Protection Act*, CQLR c. P-40.1, sections 1, 2, 11.1, 54.1, 54.4, 54.6, 54.7, 55, 214.1, 215, 216, 217, 218, 219, 220, 221, 228, 239, 252, 253, 262, 263, 271, 272, 276; *The Consumer Protection and Business Practices Act*, S.S. 2013, c. C-30.2, sections 2, 4, 6, 7, 8, 9, 44, 93; and the *Consumers Protection Act*, R.S.Y. 2002,

c.40, sections 58, 64 (collectively, the “**Equivalent Consumer Protection Legislation**”).

45. The Defendant has breached section 13(2) of the CPA and similar provisions of Equivalent Consumer Protection Legislation by demanding payment and making representations that suggest that a consumer is required to make a payment in respect of the Unsolicited Service Fees described above.

46. Class members are entitled under section 13(6) of the CPA and similar provisions of Equivalent Consumer Protection Legislation to a refund of payments made to the Defendant for the Unsolicited Service Fees.

47. If required, it is in the interests of justice for the court to waive any requirement that a consumer demand a refund within the prescribed time, or any requirements related to such a demand, under section 101 of the CPA and similar provisions in Equivalent Consumer Protection Legislation. Section 8 of the CPA expressly authorises class proceedings arising out of consumer agreements. It is not in the interests of justice to impose notice and demand requirements on every putative class member, particularly in circumstances such as the instant case, where a defendant has misrepresented the nature of the fees at issue in a way that obscures the fact that the impugned fees are in respect of unsolicited services.

48. In addition, the Defendant has engaged in an unfair practice by making false, misleading, deceptive and/or unconscionable representations with respect to the Unsolicited Service Fees contrary to sections 14, 15 and 17 of the CPA and similar provisions of Equivalent Consumer Protection Legislation. In this respect:

- a) The Plaintiff and the Class members are “consumers” pursuant to the CPA and Equivalent Consumer Protection Legislation. The Defendant is a “supplier” engaged in the business of supplying services pursuant to the CPA and Equivalent Consumer Protection Legislation.
- b) The Defendant has engaged in “consumer transactions” pursuant to the CPA and Equivalent Consumer Protection Legislation by providing customs-related services to consumers, including arranging for imported goods to clear customs and paying Duties & Taxes on behalf of consumers.
- c) The Defendant entered into “consumer agreements” with the Plaintiff and Class members by supplying services and demanding payment for customs-related services, including arranging for goods imported into Canada by Class members to clear customs and making Duty & Tax payments on their behalf.
- d) Under section 11 of the CPA and similar provisions in Equivalent Consumer Protection Legislation, any ambiguity regarding more than one reasonable interpretation of any consumer agreement entered into between Class members and the Defendant, or ambiguity regarding any information that must be disclosed under the CPA or Equivalent Consumer Protection Legislation, must be interpreted to the benefit of the proposed Class.

- e) Under section 5 of the CPA and similar provisions in Equivalent Consumer Protection Legislation, if a supplier is obligated to disclose information under the Act, that disclosure must be clear, comprehensible and prominent.

49. The Unsolicited Service Fees are represented to consumers in a manner that is false, misleading or deceptive. Among other things, the Defendant:

- a) Represents that the transaction involves rights or obligations when such representation is false, misleading or deceptive contrary to subsection 14(2)13 of the CPA;
- b) Uses ambiguity as to a material fact and fails to state a material fact when such use or failure deceives or tends to deceive consumers contrary to subsection 14(2)14 of the CPA, including by failing to describe the Unsolicited Service Fees in a manner that is not misleading and/or failing to do so in advance of providing unsolicited customs-related services thereby depriving consumers of the opportunity to arrange for customs clearance by themselves; and
- c) Misrepresents the purpose of the Unsolicited Service Fees contrary to subsection 14(2)16 of the CPA, including by representing that these Fees are levied by a governmental authority when they are not and representing that the Plaintiff was obligated to pay the Unsolicited Service Fees when she was not.

50. The Defendant has also made unconscionable representations contrary to section 15(2) of the CPA and similar provisions in Equivalent Consumer Protection Legislation. Among other things, the Defendant knew or ought to have known that:

- a) Consumers are unable to protect their interests because of an inability to understand the language of the FedEx Invoice, and, more generally, the Canadian customs regime, contrary to subsection 15(2)(a) of the CPA. Given the lack of information on the Shipping Documents, FedEx knew or ought to have known consumers would be ignorant of the existence and nature of the Unsolicited Service Fees;
- b) Consumers are unable to receive a substantial benefit from the subject matter of the Representations contrary to subsection 15(2)(c) of the CPA;
- c) The transactions described above are excessively one-sided in favour of the Defendant contrary to subsection 15(2)(e) of the CPA;
- d) The terms of the transactions described above are so adverse to the consumer as to be inequitable contrary to subsection 15(2)(f) of the CPA; and
- e) Consumers are being subjected to undue pressure to agree to the terms of the FedEx Invoice and to accept the unsolicited services provided by FedEx.

51. FedEx has engaged in an unfair practice for at least the following reasons:

- a) FedEx failed to establish a contractual agreement with consumers for the Unsolicited Service Fees;
- b) FedEx failed to secure the consumer's consent to act as his or her agent in the role of customs broker;
- c) FedEx failed to disclose the existence of the Unsolicited Service Fees;
- d) FedEx failed to disclose the actual or anticipated amount of the Unsolicited Service Fees;
- e) FedEx failed to provide consumers with the opportunity, or to disclose to them how, to arrange for customs clearance by themselves, by a licensed customs broker, or by a duly authorized agent;
- f) FedEx represented that the Unsolicited Service Fees had previously been agreed to, when they had not;
- g) FedEx used ambiguity or innuendo to represent that the Unsolicited Service Fees were levied by a government authority, when they were not;
- h) FedEx misrepresented the nature of the Unsolicited Service Fees; and
- i) FedEx represented that the Plaintiff was obligated to pay the Unsolicited Service Fees, when she was not.

52. Class members are entitled to damages including but not limited to, the right to recover any amounts paid to FedEx under sections 18(2) and 96(6) of the CPA and

similar provisions of Equivalent Consumer Protection Legislation because the return or restitution of the unsolicited services provided by the Defendant is no longer possible.

53. It is in the interests of justice that the Class members obtain, to the extent necessary, a waiver under sections 18(15) and/or section 101 of the CPA or any notice or demand requirements for the reasons set out above at paragraph 47.

54. In addition, the Defendant's agreements with the Plaintiff and putative Class members are future performance agreements because the performance of the services and payment for such services is not made at the time that the goods to be imported are consigned to FedEx for shipment into Canada. Although the shipping process begins at the time a good is consigned to FedEx, the brokerage related services are not performed until after the Shipping Documents are prepared.

55. The Defendant has breached section 22 of the CPA and similar provisions in Equivalent Consumer Protection Legislation which requires that future performance agreements must be in writing, delivered to a consumer and made in accordance with the prescribed requirements. FedEx has failed to meet the requirements of a future performance agreement by, among other things, failing to provide to consumers in writing a fair and accurate description of the services to be supplied, including an itemized description of any additional charges that apply or may apply such as customs duties or brokerage fees and the amount of such charges.

56. In the alternative, the Defendant's agreements with the plaintiff and putative Class members are remote agreements because FedEx and the plaintiff and Class

members are not present at the time goods are consigned to FedEx for delivery to Canada. FedEx has breached sections 45 and 46 of the CPA and similar provisions in Equivalent Consumer Protection Legislation by, among other things, failing to provide to consumers in writing a fair and accurate description of the services to be supplied to the consumer, including a description of any additional charges that apply or may apply such as customs duties or brokerage fees and the amount of such charges.

57. As a result, under sections 23, 47 and 93 of the CPA and similar provisions in Equivalent Consumer Protection Legislation any agreements between the Defendant and the Plaintiff and putative Class members are cancellable, and neither binding nor enforceable.

58. If required, it is in the interests of justice for the court to waive under section 101 of the CPA and similar provisions of Equivalent Consumer Protection Legislation any notice or demand requirements associated with the remedies for breach of the requirements of future performance and remote agreements for the reasons set out above at paragraph 47.

F. UNJUST ENRICHMENT

59. The Defendant was unjustly enriched by the receipt of the Unsolicited Service Fees, the Class suffered a corresponding deprivation (including being deprived of the opportunity to consider a less expensive alternative shipping method or to not ship at all) and there is no juristic reason for the enrichment because of the breaches of the CPA and Equivalent Consumer Protection Legislation set out above.

60. Moreover, under the CPA and Equivalent Consumer Protection Legislation any agreements between FedEx and the Plaintiff and putative Class members are cancellable, and neither binding nor enforceable as set out above. Under section 95 of the CPA and Equivalent Consumer Protection Legislation, the effect of cancelling a consumer agreement is to treat it as if it never existed, nullifying any juristic reason that may have otherwise existed for FedEx's enrichment.

61. Class members are entitled to a remedy in the form of restitution of any amounts paid to FedEx or disgorgement (and to the extent necessary an accounting) of the revenue earned by the Defendant as a result of its misconduct.

G. PUNITIVE DAMAGES

62. This Court should order the Defendant to pay substantial exemplary and punitive damages. The Defendant's conduct was calculated and designed to mislead consumers, including by obscuring or concealing the true nature of the Unsolicited Service Fees it charged and collected from consumers. The Unsolicited Service Fees are used to artificially lower the apparent cost of FedEx's Ground Service, obtain a competitive advantage, enrich itself and penalize consumers who used FedEx's less lucrative Ground Service and make up lost profit. The Defendant's conduct was, and continues to be, high-handed, malicious and reprehensible and it departs to a marked degree from the standards expected of an international shipping company.

H. PLACE OF TRIAL

63. The Plaintiff proposes that this Action be tried in Toronto.

January 7, 2022

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KAREN ROBSON and FEDERAL EXPRESS CANADA CORPORATION

Plaintiff Defendant

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

STATEMENT OF CLAIM

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