COURT OF APPEAL FOR ONTARIO

CITATION: Robson v. Federal Express Canada Corporation, 2025 ONCA 831
DATE: 20251203
DOCKET: COA-24-CV-1256

Huscroft, George and Favreau JJ.A.

BETWEEN

Karen Robson

Plaintiff (Respondent)

and

Federal Express Canada Corporation, FedEx Ground Package System, Inc. and FedEx Ground Package System, Ltd.

Defendants (Appellants)

Eliot N. Kolers, Samaneh Hosseini and Hesam Wafaei, for the appellants

James Bunting, Sean Campbell and Anna White, for the respondent

Heard: April 30, 2025

On appeal from the order of Justice Edward M. Morgan of the Superior Court of Justice, dated October 8, 2024, with reasons reported at 2024 ONSC 5002.

Favreau J.A.:

A. OVERVIEW

[1] The appellants, Federal Express Canada Corporation, FedEx Ground Package System, Inc. and FedEx Ground Package System, Ltd. (collectively "FedEx"),[1] appeal an order certifying this action as a class proceeding.

[2] The respondent, Karen Robson, bought knitting supplies online from a company based in the United States. FedEx was responsible for shipping the supplies from the United States to Ms. Robson in Ontario. When Ms. Robson purchased the supplies, the seller advised her that shipping was free. She subsequently received an invoice from Federal Express Canada Corporation ("FedEx Canada") seeking payment for various fees. Ms. Robson paid the invoice, on the understanding that the fees were government taxes and duties. It turns out that a significant portion of these charges were amounts FedEx kept for itself as fees for its brokerage services.

[3] Ms. Robson seeks to bring a class action on behalf of non-commercial purchasers who paid similar fees to FedEx. The claim alleges that FedEx breached the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A, and equivalent

[1] All three companies are ultimately subsidiaries of FedEx Corporation. The appellants provide services relating to the shipment of goods from the United States to Canada. Federal Express Canada Corporation provides customer service and other services. FedEx Ground Package System, Inc. and FedEx Ground Package System, Ltd. jointly provide carrier services.

consumer protection legislation in other jurisdictions in Canada. The claim also alleges that FedEx was unjustly enriched.

[4] The motion judge certified the action as a class proceeding.

[5] FedEx submits that the motion judge erred in finding that: (1) the claim discloses a cause of action, (2) there are common issues and (3) the class definition is not overly broad.

[6] I would dismiss the appeal. In my view, the issues raised by FedEx may constitute valid defences to the claim, but I see no error in the motion judge's determination that the claim discloses a cause of action. I also see no error in the motion judge's conclusion regarding common issues and the class definition.

B. BACKGROUND

(1) Ms. Robson's order and the delivery by FedEx

[7] On June 29, 2020, Ms. Robson ordered knitting supplies from Ganxxet, a company based in the United States that sells yarn. The price for the materials was US$174.80. Ganxxet's website advertised that there would be free delivery but that any shipments to countries outside of the United States "may be subject to taxes, custom duties and fees by the destination country."

[8] A few days later, on July 2, 2020, Ms. Robson received an email from Ganxxet advising that her package was shipped by FedEx. The same day, she

received a telephone message from FedEx advising that her shipment "may require the payment of clearance entry fees, duties and taxes."

[9] Ms. Robson received the package on July 7, 2020. The package included an invoice, prepared by Ganxxet, on a standard FedEx form. The invoice described the contents and value of the package, identified Ms. Robson as the "consignee", and stated that the consignee was responsible for paying "duties and taxes".

[10] Approximately one month later, on August 6, 2020, Ms. Robson received an invoice from FedEx Canada. The first page of the invoice contained an "Invoice Summary" that set out the following charges:

> **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.

[11] The FedEx invoice stated that the amount of $64.23 was "due upon receipt" and provided payment options for making this payment.

[12] Ms. Robson paid the FedEx invoice online on August 15, 2020.

[13] Ms. Robson's position is that, at the time she made the payment, she believed that all the amounts were for government-levied customs charges; she did not believe that any of these amounts went to FedEx for any services it provided.

[14] As it turns out, the "Advancement Fee" and "Clearance Entry Fee" are not amounts for government duties and taxes, but rather amounts that went to FedEx. The charge for "HST and ADV/Ancillary Services Fees" is a tax on the Advancement Fee and Clearance Entry Fee. The charge for "Canada HST" is a tax on the goods Ms. Robson bought.

(2) Ms. Robson's proposed class action against FedEx

[15] Ms. Robson commenced a class proceeding against FedEx on January 7, 2022.

[16] The claim pleads that most goods that FedEx ships into Canada are subject to government sales taxes, such as the Harmonized Sales Tax ("HST"). In some cases, the goods are also subject to duties. When goods are subject to sales taxes and/or duties, FedEx generally pays those amounts and sends consumers an invoice.

[17] The claim alleges that FedEx uses unfair practices in its cross-border delivery services, including by making misleading and deceptive representations about the fees it charges consumers who import goods into Canada through FedEx.

[18] The claim alleges that the invoices FedEx sends to consumers include misleading fees and surcharges, such as the Advancement Fee and Clearance Entry Fee on Ms. Robson's invoice. The claim alleges that FedEx misrepresents these fees and surcharges to appear as though they are government-levied taxes and duties. The claim further alleges that FedEx imposes these fees and surcharges for customs related services that consumers did not ask FedEx to provide. The claim describes these fees and surcharges as "Unsolicited Service Fees".

[19] The claim alleges that these practices contravene ss. 13, 14 and 15 of the *Consumer Protection Act*, amongst other provisions, and that they give rise to a claim for unjust enrichment.

[20] The claim seeks various declarations, including declarations that FedEx has engaged in unfair practices under Part III of the *Consumer Protection Act*. The claim also seeks disgorgement of "unsolicited service fees" paid by the class members, and exemplary or punitive damages of $50 million.

(3) The motion judge's decision

[21] The motion judge found that the claim meets all the criteria for certification under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[22] The motion judge found that the claim discloses a cause of action for breach of the *Consumer Protection Act*. He rejected FedEx's suggestion that there was no misrepresentation in this case because Ms. Robson and other potential class members could find out about the nature of the fees through FedEx's website. He also rejected FedEx's argument that the *Consumer Protection Act* did not apply because the claim arises from a contract made in the United States between FedEx and Ganxxet. In rejecting this argument, the motion judge observed that the contract between FedEx and Ganxxet was not in the record before him. Therefore, FedEx could not rely on that contract to establish that its relationship with Ms. Robson was not subject to Ontario law.

[23] The motion judge also found that the claim discloses a cause of action for unjust enrichment because the claim pleads all the necessary ingredients: "(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."

[24] In finding that the claim discloses a cause of action, the motion judge rejected FedEx's reliance on Quebec case law, including a decision of the Superior

Court of Quebec which refused to certify a similar claim against FedEx as a class proceeding: *Perry-Fagant c. Federal Express Canada Corporation*, 2024 QCCS 2927, aff'd 2025 QCCA 1098.[2] The motion judge distinguished *Perry-Fagant* on the basis of differences between Quebec's consumer protection legislation and Ontario's *Consumer Protection Act*.

[25] The motion judge accepted the class definition proposed by Ms. Robson. That definition goes back to 2016 and includes class members from across Canada, including Quebec. The motion judge rejected as premature FedEx's argument that the class definition was overinclusive because it included class members whose claims would be statute barred by the two-year limitation period in s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.

[26] The motion judge was satisfied with the common issues proposed by Ms. Robson. He certified common issues related to ss. 13 (unsolicited services), and 14 and 15 (unfair practices) of the *Consumer Protection Act*. He also certified the claim for unjust enrichment. He further certified the questions of whether FedEx should be permanently enjoined from charging the impugned fees and whether exemplary or punitive damages should be awarded.

[2] The Court of Appeal of Quebec's decision, which upheld the Superior Court's judgment, was not available to the motion judge nor was it available when the appeal was argued before this court. The parties sent a copy of the Court of Appeal of Quebec's decision after the appeal was heard by this court.

[27] Finally, the motion judge found that a class proceeding was the preferable procedure to resolve the common issues and that the litigation plan put forward by Ms. Robson was appropriate.

C. ISSUES RAISED ON APPEAL

[28] The appellants raise three issues on appeal:

1. Did the motion judge err in finding that the claim discloses a cause of action?
2. Did the motion judge err in finding that there are common issues?
3. Did the motion judge err in defining the class too broadly?

[29] I am satisfied that the claim discloses a cause of action and that the motion judge did not err in finding that there are common issues and in defining the class. I address each of the issues raised by FedEx in turn.

D. ISSUE 1: THE MOTION JUDGE DID NOT ERR IN FINDING THAT THE CLAIM DISCLOSES A CAUSE OF ACTION

[30] FedEx submits that the motion judge erred in finding that the claim discloses a cause of action under the *Consumer Protection Act*.[3] Specifically, FedEx argues that the motion judge erred in finding that the *Consumer Protection Act* applies to the contract of carriage in this case because it was made in the United States between FedEx and Ganxxet, and because the Act has no extraterritorial application. FedEx further argues that Ms. Robson and the class members, as

[3] FedEx does not appeal the motion judge's finding that the claim discloses a cause of action for unjust enrichment.

consignees, were bound by any agreement between Ganxxet or other vendors, as consignors, and FedEx.

[31] In my view, this argument misconceives the proper focus of the analysis under s. 5(1)(a) of the *Class Proceedings Act*. At this stage, the question is whether the claim discloses a reasonable cause of action based on the allegations in the statement of claim. The issue of where the contract was made and whether the *Consumer Protection Act* applies should be decided on a proper evidentiary record and not as part of the determination of whether the claim discloses a reasonable cause of action. Based on the facts pleaded and having regard to the provisions in the *Consumer Protection Act*, I am satisfied that the claim discloses a cause of action for breach of ss. 13, 14 and 15 of the *Consumer Protection Act*.

(1) Test under s. 5(1)(a) of the *Class Proceedings Act* and standard of review

[32] The first requirement for certifying an action as a class proceeding, under s. 5(1)(a) of the *Class Proceedings Act*, is that the claim discloses a cause of action.

[33] The test under s. 5(1)(a) is the same as under r. 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194: *Bowman v. Ontario*, 2022 ONCA 477, 162 O.R. (3d) 561, at para. 25. A claim will be found not to disclose a cause of action only if, assuming the facts pleaded are true, it is plain and obvious that the claim

discloses no reasonable cause of action: *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 17; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 14. The claim must be read generously, making allowances for drafting deficiencies: *Catalyst Capital Group Inc. v. Veritas Investment Research Corp*., 2017 ONCA 85, 136 O.R. (3d) 23, at para. 21. The court must assume that all facts pleaded in the statement of claim are true, unless they are merely bald conclusions, pure legal assertions or claims that are patently ridiculous or incapable of proof: *Carcillo v. Ontario Major Junior Hockey League*, 2025 ONCA 652, at para. 19.

[34] A court should not find that there is no reasonable cause of action simply because a claim has not yet been recognized, or because the underlying law is unsettled, or because the plaintiff's odds of success seem slim. Rather, the court "must be generous and err on the side of permitting a novel but arguable claim to proceed to trial": *Imperial*, at para. 21.

[35] No evidence is admissible at this stage of the test for certifying an action as a class proceeding: *Davis v. Amazon Canada Fulfillment Services*, 2025 ONCA 421, at para. 63; *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.), at para. 52, leave to appeal refused, [2006] S.C.C.A. No. 1; *Condon v. Canada*, 2015 FCA 159, at para. 13; and *Dewey v. Corner Brook Pulp and Paper Limited*, 2025 NLCA 8, 507 D.L.R. (4th) 193, at para. 88.

[36] The correctness standard of review applies to the issue of whether the claim discloses a cause of action under s. 5(1)(a) of the *Class Proceedings Act*: *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295, at para. 57. As this court recently stated in *Carcillo*, at para. 20, the Supreme Court's guidance in *Pioneer* regarding the standard of review that applies to this branch of the certification test is "conclusive".

(2) The facts pleaded support a claim under the *Consumer Protection Act*

[37] The motion judge did not err in concluding that the claim discloses a cause of action under the *Consumer Protection Act*.

[38] The claim is based on allegations that FedEx breached ss. 13, 14 and 15 of the *Consumer Protection Act*.

[39] It is helpful to start with a review of the relevant provisions of the Act. The full relevant provisions are reproduced in Appendix A.

[40] Section 1 of the *Consumer Protection Act* defines a "supplier" as, amongst other things, a person who is in the "business of supplying goods or services." That definition "includes an agent of the supplier and a person who holds themself out to be a supplier or an agent of the supplier". Section 2(1) of the *Consumer Protection Act* provides that the Act "applies in respect of all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place". A "consumer transaction" is

broadly defined in s. 1 as “any act or instance of conducting business or other dealings with a consumer, including a consumer agreement”.

[41] Section 13(1) of the *Consumer Protection Act* provides that a consumer has no legal obligations in relation to the use or disposal of unsolicited goods or services. Section 13(2) states that a supplier is prohibited from demanding a payment for unsolicited goods or services. In addition, pursuant to ss. 13(7) and (8), a consumer who demands a refund for an unsolicited good or service is entitled to a refund from the supplier and can commence an action to recover the payment.

[42] Sections 14 and 15 are in Part III of the *Consumer Protection Act*, which deals with “unfair practices”. Section 14(1) provides that it is an unfair practice to make a false, misleading or deceptive representation. Section 14(2) sets out a non-exhaustive list of representations that constitute false, misleading or deceptive representations, including, at s. 14(2)(16), a “representation that misrepresents the purpose of any charge or proposed charge.” Section 15(1) provides that it is an unfair practice to make an unconscionable representation. Section 15(2) sets out a non-exhaustive list of circumstances in which representations may be unconscionable, including, at s. 15(2)(b), where “the price grossly exceeds the price at which similar goods or services are readily available to like consumers”. Section 17 prohibits anyone from engaging in an unfair practice. Section 18 sets out the remedies available for an unfair practice, which include the right to bring

an action in the Superior Court for rescission and damages, including exemplary damages.

[43] I agree with the motion judge that the claim pleads facts in support of causes of action arising from ss. 13, 14 and 15 of the *Consumer Protection Act.*

[44] With respect to s. 13, the claim pleads, amongst other allegations, that Ms. Robson and the class members did not request or solicit the services FedEx provided in relation to the Advancement and Clearance Entry fees. The claim further alleges that "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."

[45] With respect to ss. 14 and 15, the claim pleads that FedEx misrepresented the nature of the fees it charged Ms. Robson and the class members such that they amount to an unfair practice. The claim alleges that the fees are described in a manner that "convey[s] the general impression that all these fees are customs and tax related fees imposed by the government that had been paid by FedEx" on Ms. Robson's behalf. The claim provides a detailed description of FedEx's invoice and how it conveys the false impression that the fees charged are all duties and

taxes. For example, the claim describes the text on the invoice immediately following the list of fees as follows:

> 36. 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.
>
> 37. 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.
>
> …
>
> 39. 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 [*Consumer Protection Act*] (and similar provisions in Equivalent Consumer Protection Legislation).

[46] On the face of the statement of claim, having regard to the relevant provisions of the *Consumer Protection Act,* I am satisfied that the claim discloses a reasonable cause of action for breach of ss. 13, 14 and 15 of the Act.

(3) Similar claim already certified in Ontario

[47] Ms. Robson's claim is similar to another claim that was previously certified as a class proceeding in Ontario: *Wright v. United Parcel Service Canada Ltd.*, 2011 ONSC 5044, aff'd 2015 ONSC 2220 (Div. Ct.), 336 O.A.C. 21, leave to appeal to Ont. C.A. refused, M45175 (September 18, 2015), leave to appeal refused, [2015] S.C.C.A. No. 466. In *Wright*, the plaintiffs brought a class action against United Parcel Service Canada Ltd. and other related companies (collectively "UPS") for undisclosed brokerage fees. As part of the claim, the plaintiffs alleged that UPS breached ss. 13, 14 and 15 of the *Consumer Protection Act.* The motion judge, Horkins J., certified the action as a class proceeding. Although there was an appeal to the Divisional Court from the certification order, the appeal dealt only with the issue of whether the claim under s. 13 of the *Consumer Protection*

Act raised common issues, and not with whether the claim disclosed causes of action.[4] Therefore, in this section of my reasons, I refer to the Superior Court's decision and not the Divisional Court's decision.

[48] The claims made in *Wright* against UPS under ss. 13, 14 and 15 of the *Consumer Protection Act* are similar to those made against FedEx in this case. While Horkins J.'s reasoning in finding that those claims disclose a cause of action is not binding on this court, it is persuasive.

[49] Horkins J. held that the claim disclosed a reasonable cause of action pursuant to s. 13 of the *Consumer Protection Act* because the plaintiffs alleged that they did not request the brokerage service and UPS demanded payment before delivery: *Wright*, at para. 138. Horkins J. recognized that there was limited judicial guidance regarding the scope of s. 13 and that the claim was therefore novel, but she concluded that it was nevertheless not plain and obvious that the claim would fail. I note that, to date, there remains little guidance on the scope of s. 13.

[4] Wilton-Siegel J. granted leave to appeal to the Divisional Court from the order certifying the unsolicited services claim, finding that s. 13 of the *Consumer Protection Act* "appears to contemplate a case-specific inquiry" into consumer knowledge: *Wright v. United Parcel Service Canada Ltd.*, 2012 ONSC 3287, 295 O.A.C. 385, at para. 29. In a second leave decision, Wilton-Siegel J. refused leave to appeal from the order certifying the common issue under ss. 14 and 15. Under those sections, "[c]onsumer knowledge would not exclude a finding of a breach … although it may be relevant for the issue of damages or other appropriate remedy": *Wright v. United Parcel Service Canada Ltd.*, 2014 ONSC 1008, at para. 26.

[50] Similarly, Horkins J. was satisfied that the claim pleaded misrepresentations in support of the claims made pursuant to ss. 14 and 15 of the *Consumer Protection Act*. Many of the misrepresentations alleged in *Wright* in support of the claim under s. 14 are similar to those alleged in Ms. Robson's claim, including "failing to disclose the existence of the additional fee", "using ambiguity or innuendo to represent that the additional fee was levied by a governmental authority, when it was not", and "misrepresenting the nature of the additional fee". The misrepresentations alleged in support of the claim under s. 15 are also similar to those alleged in this case, namely "the additional fee grossly exceeded the price at which similar goods or services are readily available to like consumers" and "the consumer transaction is excessively one-sided in favour of UPS". As with the claim under s. 13, Horkins J. noted that there was little judicial authority regarding ss. 14 and 15, and that, given the facts pleaded appeared to be consistent with those legislative provisions, it was not plain and obvious that the claims would fail. I note that there is still little guidance on ss. 14 and 15.

[51] FedEx seeks to distinguish *Wright* from the circumstances of this case on the basis that in *Wright*, unlike in this case, UPS refused to deliver the plaintiffs' packages until they paid the fees at issue. I do not see this as a significant difference for the purpose of determining whether the claim discloses a cause of action under ss. 13, 14 and 15 of the *Consumer Protection Act.* In both cases, the

claims allege that the services were unsolicited and that the purpose of the fees was misrepresented. If UPS refused to deliver the packages until the fees were paid, its alleged conduct may be more egregious than FedEx's alleged conduct, but this distinction does not mean the claim against FedEx does not disclose a cause of action. The *Consumer Protection Act* explicitly applies to circumstances where a consumer has already paid for the service: ss. 13(3), 13(8) and 18(2). At the pleadings stage of the proceeding, the fact that FedEx billed Ms. Robson and the class members after it delivered the goods is not a basis for finding that the claim does not disclose a cause of action.

(4) Quebec decisions not binding or determinative

[52] FedEx also argues that the claim does not disclose a cause of action because the *Consumer Protection Act* does not apply to the relationship between Ms. Robson and FedEx. FedEx submits that the contract for the carriage of goods was formed in Florida between FedEx and Ganxxet. According to FedEx, Ganxxet was the consignor and entered the contract on behalf of Ms. Robson, the consignee. As such, Ganxxet acted as Ms. Robson's agent and she is therefore bound by the terms of the agreement between FedEx and Ganxxet. Given that the agreement between FedEx and Ganxxet was made outside of Ontario, the *Consumer Protection Act* does not apply because it has no extra-territorial

application. FedEx argues that the motion judge erred in finding that the *Consumer Protection Act* applies to the transactions in this case.

[53] FedEx relies on two decisions from Quebec where the courts have refused to certify similar actions on the basis that Quebec law, including that province's consumer protection legislation, does not apply to the transactions at issue: *Leblanc c. United Parcel Service du Canada ltée*, 2012 QCCS 4619, and *Perry-Fagant*.[5]

[54] In *Leblanc*, the plaintiffs had purchased articles for personal use from vendors in the United States that were carried by UPS and FedEx. The plaintiffs sought to bring a class action to recover brokerage fees they paid to UPS and FedEx. They claimed that the fees were for unsolicited services and that the fees were undisclosed, disproportionate and abusive. The Quebec court refused to certify the claim for several reasons. Notably, the court found that the plaintiffs had no recourse against UPS or FedEx under Quebec's consumer protection legislation. The contracts of carriage between the vendors and the carriers, which

[5] There are two additional class action decisions from Quebec involving courier companies charging custom fees: *Gauthier c. United Parcel Service of Canada Ltd*. 2013 QCCS 1212, and *Farias c. Federal Express Canada Corporation*, 2018 QCCS 5634, aff'd 2019 QCCA 1954. *Gauthier* involved a similar claim to the one in *Leblanc* and was decided around the same time. The Superior Court dismissed the application for authorization to institute a class action, following the reasoning in *Leblanc*. The court certified the class proceeding in *Farias*, but there were significant differences in the facts in that case. Most notably, the contractual documents between the parties designated the plaintiff who ordered and received the goods in Quebec as the client. *Farias* is therefore not relevant to the arguments advanced by FedEx in this case.

were the relevant contracts, were made in the United States and therefore governed by foreign law.

[55] Most recently, in *Perry-Fagant*, the plaintiff brought a claim against FedEx Canada based on allegations that are very similar to the ones in this case. The claim alleged that FedEx Canada's undisclosed customs and brokerage fees breached the *Civil Code of Québec*, S.Q. 1991, c. 64, the *Consumer Protection Act*, C.Q.L.R., c. P-40.1 and the *Charter of Human Rights and Freedoms*, C.Q.L.R., c. C-12, and that FedEx Canada was unjustly enriched. The Superior Court of Quebec dismissed the application for authorization to institute a class action. The Court of Appeal of Quebec upheld that ruling in brief reasons in which it essentially endorsed the Superior Court's decision. As part of the Superior Court's ruling in *Perry-Fagant*, the court determined that the plaintiff had not established an arguable case because there was no legal relationship between the plaintiff and FedEx Canada, and that Quebec law would not apply to the contract of carriage. Relying on the analysis in *Leblanc*, the court held that the contract was between the carrier and the seller of goods in the United States, and not with the plaintiff. Given that the contract was made in the United States, American law, rather than Canadian law, applied to the transaction.

[56] FedEx urged the motion judge to follow the same reasoning as in *Leblanc* and *Perry-Fagant* to conclude that Ms. Robson's proposed class proceeding does

not disclose a cause of action. The motion judge considered the Quebec cases but found that they did not apply to Ms. Robson's claim because of distinctions between the law in Quebec and Ontario. Specifically, he concluded that Ontario's *Consumer Protection Act* applies to Ms. Robson's claim, contrary to the finding in the Quebec cases about the application of that province's consumer protection legislation. Referring to *Perry-Fagant*, the motion judge stated:

> 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.
>
> The same logic does not apply under the Ontario [*Consumer Protection Act*]. Sections 1 and 2 of the [*Consumer Protection Act*] 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 [*Consumer Protection Act's*] ambit. [Emphasis added.]

[57] The motion judge further rejected FedEx's argument that Ontario law does not apply to the transaction because the contract of carriage was made in the United States between FedEx and Ganxxet. In making this finding, the motion judge relied on s. 2(1) of the *Consumer Protection Act*, the facts pleaded in the claim and the documents produced by the parties:

> 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.
>
> … The contract is pleaded as an Ontario consumer contract, and there are material facts pleaded to support that characterization.
>
> Section 2(1) of the [*Consumer Protection Act*] 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 [*Consumer Protection Act*] as including an invoice or statement made for the purpose of receiving payment for goods or services.
>
> 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. The [*Consumer Protection Act*] provides a cause of action to consumers such as the Plaintiff in Ontario and across the country. [Citations omitted. Emphasis added.]

[58] The motion judge also rejected FedEx's reliance on the terms of the contract between FedEx and Ganxxet as a basis for finding the claim relates to a contract made outside of Ontario. The motion judge observed that FedEx had not produced a copy of the contract as part of its evidence on the motion and, therefore, its reliance on the contract was misplaced.

[59] FedEx submits that the motion judge erred in distinguishing the Quebec cases, and specifically in finding that the *Consumer Protection Act* applies to the

transactions in this case. FedEx renews its argument that the claim relates to a carriage contract made outside of Ontario, and, as such, the *Consumer Protection Act* does not apply. In making this argument, FedEx submits that the motion judge misapplied s. 2(1) of the *Consumer Protection Act*.

[60] I agree with the motion judge that the Quebec cases are not determinative or even persuasive on the issue of whether Ms. Robson's claim against FedEx discloses a reasonable cause of action. However, I do not entirely agree with the motion judge's approach to this issue. In some instances, he went beyond the necessary inquiry for determining whether the claim discloses a reasonable cause of action and offered what appear to be definitive conclusions on the nature of the transactions between the parties and on the applicability of the *Consumer Protection Act* to those transactions.

[61] As the motion judge observed, there are notable differences between the law in Quebec and the law in Ontario. For example, s. 2(1) of the *Consumer Protection Act* provides that the Act "applies in respect of all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place". Section 1 of the Act broadly defines a "consumer transaction" as meaning "any act or instance of conducting business or other dealings with a consumer, including a consumer agreement". There are no similar provisions in Quebec's consumer protection legislation.

Therefore, even if a court were to find that the contract was entered into outside of Ontario, the court could still find that FedEx "conduct[ed] business or other dealings" with Ms. Robson while FedEx or Ms. Robson was located in Ontario. Based on the pleaded facts, it is not plain and obvious that the *Consumer Protection Act* would not apply to such a transaction.

[62] However, it was not necessary for the motion judge to go any further than that. The legislative differences between the consumer protection statutes in Ontario and Quebec led the motion judge to conclude that "FedEx's delivery services, as invoiced, constitute such a consumer transaction and thereby fall within the [*Consumer Protection Act's*] ambit" (emphasis added). The motion judge also stated that the relationship between FedEx and Ms. Robson was an "Ontario legal relationship" and that there was "nothing anyone can point to in the record that rebuts that obvious geographic fact" (emphasis added). It was not necessary or appropriate for the motion judge to reach conclusions on the merits or to assess the record at this step. It was necessary only for him to find that, given the wording of ss. 1 and 2(1) of the *Consumer Protection Act*, the claim as pleaded discloses a reasonable cause of action.

[63] Section 5(1)(a) of the *Class Proceedings Act* requires the court to focus on the statement of claim to determine whether a reasonable cause of action is disclosed. This is to be done without regard to the evidence and without the need

to reach definitive factual or legal conclusions on the merits of the claim. Such conclusions are better addressed on a motion for summary judgment or at trial.

[64] Here, the pleading refers to the invoice FedEx provided to Ms. Robson, and alleges that the terms of the invoice contravene ss. 13, 14 and 15 of the *Consumer Protection Act*. As reviewed above, on their face, the allegations in the statement of claim support these claims. FedEx may have good defences to these claims, including on the basis of its contractual relationship with Ganxxet and other vendors, but these defences do not arise on the face of Ms. Robson's statement of claim. The issue of whether Ganxxet acted as Ms. Robson's agent, and whether Ms. Robson was bound by the terms of the agreement between FedEx and Ganxxet in so far as the brokerage fees are concerned should be decided on a proper evidentiary record. Accordingly, FedEx's approach to this issue is misguided in the context of the test in Ontario under s. 5(1)(a) of the *Class Proceedings Act*.

(5) Conclusion on cause of action

[65] I see no error in the motion judge's conclusion that the pleadings disclose a cause of action under ss. 13, 14 and 15 of the *Consumer Protection Act*. The issues raised by FedEx may provide valid defences, but these are issues better decided on a full evidentiary record on a motion for summary judgment or at trial.

E. ISSUE 2: THE MOTION JUDGE DID NOT ERR IN FINDING THAT THE CLAIMS RAISE COMMON ISSUES

[66] The appellants submit that the motion judge erred in finding that Ms. Robson's claims raise common issues in relation to s. 13 of the *Consumer Protection Act* and in relation to ss. 14 and 15 of the Act. I disagree.

(1) Test under s. 5(1)(c) of the *Class Proceedings Act* and standard of review

[67] Other than the issue of whether the claim discloses a cause of action, this court owes deference to the motion judge's decision on whether the action should be certified as a class proceeding, including on the question of common issues. Absent an error on an extricable question of law, the court should interfere only if the motion judge committed a palpable and overriding error: *Carcillo*, at para. 43; *Pioneer*, at para. 94; and *Pearson*, at para. 43.

[68] The threshold to determine commonality is low: *Carcillo*, at para. 40. An issue is common if "its resolution is necessary to the resolution of each class member's claim": *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 39.

[69] However, it is not necessary that the class members be identically situated in relation to the opposing party: *Western*, at para. 39. In addition, common issues do not have to resolve the entire claim. An issue can be common even if it makes up a limited aspect of the liability inquiry: *Carcillo*, at para. 40; *Cloud v. Canada*

(Attorney General) (2004), 73 O.R. (3d) 401 (C.A.), at paras. 52-53, leave to appeal refused, [2005] S.C.C.A. No. 50.

[70] It is not the role of the motion judge to decide the merits of a particular issue or to resolve conflicts in the evidence. Rather, the motion judge must be satisfied that there is "some basis in fact" to support the conclusion that an issue is common to the class members and that it can be decided on a class basis: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 102; *Cloud*, at para. 50; and *Carcillo*, at para. 41.

(2) Common issues pursuant to s. 13 of the *Consumer Protection Act*

[71] The motion judge certified the following common issues arising from s. 13 of the *Consumer Protection Act*:

> Unsolicited Services Claim
>
> 1. Did the Defendants breach section 13 of the [*Consumer Protection Act*] … by providing customs clearance services (the 'Services') for which a clearance entry fee and/or disbursement/advancement fee (the 'Service Fees') were charged? Specifically:
>
> a. Under section 13 of the [*Consumer Protection Act*], is a service unsolicited when the supplier fails to disclose to the consumer, in advance of providing a service, that the service will be provided and its associated cost?
>
> b. If yes, did the Defendants fail to disclose to the Class, in advance of providing the Services, that the Services would be provided and the associated costs of those Services?

> c. If yes, and the Services were unsolicited within the meaning of section 13 of the [*Consumer Protection Act*], is a refund under section 13(6) of the [*Consumer Protection Act*] the appropriate relief?

[72] The motion judge considered whether the claims of unsolicited services under s. 13 of the *Consumer Protection Act* and the misrepresentation claims under ss. 14 and 15 raise common issues together. He first explained that these claims focus on FedEx's invoice, and that they 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 [Entry] Fee, are charged, violates the [*Consumer Protection Act*]." He then concluded that the claims raise common issues as follows:

> 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 [*Consumer Protection Act*] 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.

[73] FedEx submits that the motion judge gave short shrift to its argument on the issue of whether the claim for unsolicited services raises common issues, and that he improperly lumped this analysis in with his analysis on the issue of misrepresentations. Specifically, FedEx submits that the issue of unsolicited services cannot be decided on a common basis because each class member

received different information from their vendor or consignor regarding what shipping charges it would be required to pay, and because each class member had different communications with FedEx in advance of the delivery.

[74] The motion judge's analysis of this issue was brief, but I am not convinced that he committed any errors in concluding that the s. 13 claim raises common issues.

[75] In *Wright*, the Divisional Court dealt with the issue of whether the motion judge in that case erred in certifying a similar claim made under s. 13 of the *Consumer Protection Act*. Swinton J., writing for the court, rejected UPS's arguments that the unsolicited service claim could not be decided on a common basis. In doing so, she described the claim as "systemic" in nature, because it focused on UPS's conduct and its compliance with the *Consumer Protection Act*. She noted that the class members in that case took the position that UPS had an obligation to disclose the brokerage fees and to obtain consent to their payment, and stated that whether this position was correct was an issue for trial that could be decided on a class basis.

[76] FedEx seeks to distinguish *Wright* on the basis that, in that case, the court found that UPS used a standard form contract with all vendors that did not disclose the brokerage fees. Therefore, in *Wright* the focus on UPS's standard form communications and practices in dealing with class members made sense.

However, in this case there is no evidence of standard form contracts. I am not persuaded by this distinction. This difference may ultimately be relevant at trial, but, as the trial judge noted, FedEx did not disclose its contract with Ganxxet.

[77] In addition, Ms. Robson relies on the standard form invoice in support of her position that the brokerage fees were undisclosed. As Ms. Robson points out, s. 13(9) of the *Consumer Protection Act* provides that "unsolicited goods and services" include services "supplied to a consumer who did not request them" (emphasis added). In the absence of FedEx's contract with Ganxxet and with the benefit of the standard form invoice, I agree with the motion judge that Ms. Robson has demonstrated some basis in fact for deciding the s. 13 issue as a common issue.

[78] In arguing that the claim does not raise common issues arising from unsolicited services, FedEx renews its argument that Ms. Robson and other class members, as consignees, were bound by the agreements between the vendor or consignor and FedEx. As I addressed in the section dealing with whether the claim discloses a reasonable cause of action, this position may be a valid defence to the claim, but FedEx's arguments on the merits of the claim do not affect the commonality of the issues raised by Ms. Robson. As in *Wright*, whether the parties "are correct in their interpretation of the obligations under the [*Consumer Protection Act*] … is an issue that can be determined in common". At the

certification stage, it would not be appropriate to resolve the conflicts between FedEx's evidence about its practices and Ms. Robson's evidence that she could not have requested services that FedEx did not disclose.

(3) Common issues pursuant to ss. 14 and 15 of the *Consumer Protection Act*

[79] The motion judge certified the following common issues arising from ss. 14 and 15 of the *Consumer Protection Act*:

> Unfair Practices Claim
>
> 2. In the alternative if the Defendants did not breach s. 13 of the [*Consumer Protection Act*], did the Defendants engage in unfair practices under sections 14 and 15 of the [*Consumer Protection Act*], including by describing on the FedEx Invoice (as defined in the Statement of Claim) the Service Fees using ambiguity as to a material fact or failing to state a material fact; misrepresenting the purpose of a charge; making a representation while knowing that the consumer is not reasonably able to protect his or her interests; or on any other grounds?
>
> a. If yes, what is the appropriate remedy or remedies under section 18 of the [*Consumer Protection Act*]?
>
> b. Can the appropriate remedy or remedies under section 18 of the [*Consumer Protection Act*] be calculated in aggregate and, if so, what amount of aggregate damages should be awarded?

[80] As I discussed above, the motion judge's analysis of whether the claim raises common issues focused on FedEx's invoice that lists the fees at issue and FedEx's uniform practices. In addition, the motion judge emphasized that

consumer knowledge and reliance are not relevant to the claims of misrepresentation under ss. 14 and 15 of the *Consumer Protection Act*, and can therefore be decided on a class-wide basis:

> [U]nder the [*Class Proceedings Act*], claims of misrepresentation do not turn on consumer knowledge or reliance, and do not require individualized evidence from the claimant. 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. [Citations omitted.]

[81] FedEx submits that the motion judge erred in finding that the issue of misrepresentations could be decided on a class-wide basis because the class members each had different communications about the fees with FedEx and with their respective vendors. I see no error.

[82] FedEx accepts that a claim under ss. 14 and 15 of the *Consumer Protection Act* does not require reliance on or knowledge of the unfair practice: *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921, 392 D.L.R. (4th) 490, at para. 39, leave to appeal requested but application for leave discontinued, [2016] S.C.C.A. No. 79. FedEx also does not challenge the motion judge's findings "that there is a uniform procedure when performing cross border services and that there is a standard-form FedEx invoice."

[83] Rather, FedEx argues that the merits of an unfair practice claim depend on "the totality of the transaction" with each class member. Even if FedEx made the

same representation to all class members in the invoice, there could be no common issue because other communications varied. On this point, FedEx relies on two decisions of the Supreme Court of British Columbia: *Vallance v. DHL Express (Canada), Ltd.*, 2024 BCSC 140, and *Webster v. Robbins Parking Service Ltd.*, 2016 BCSC 1863.

[84] *Vallance* and *Webster* do not assist FedEx. These decisions apply British Columbia's consumer protection legislation, which requires plaintiffs to establish a causal link between the impugned practice and a pecuniary loss they suffered: *Live Nation Entertainment, Inc. v. Gomel*, 2023 BCCA 274, 484 D.L.R. (4th) 379, at para. 81.[6]

[85] There is no such provision in Part III of the *Consumer Protection Act*. Section 18(1) entitles consumers to a remedy if they entered an agreement "after or while a person has engaged in an unfair practice". Liability does not depend on the consumer having entered the agreement due to or in reliance on the unfair practice. As a result, the standard invoice could objectively misrepresent the impugned fees even if it did not subjectively mislead some class members who had separate individual communications with FedEx.

[6] While I would not rely on *Vallance* in the context of Ontario law, I note that *Vallance* addresses two older British Columbia cases which FedEx cites in its factum: *Blackman v. Fedex Trade Networks Transport & Brokerage (Canada), Inc.*, 2009 BCSC 201, 57 B.L.R. (4th) 270; *MacFarlane v. United Parcel Service Canada Ltd.*, 2009 BCSC 740, 57 B.L.R. (4th) 47, aff'd 2010 BCCA 171. Matthews J. declined to follow both decisions given their outdated "merits-focussed" analysis at the certification stage: *Vallance*, at paras. 28, 35-36 and 43.

[86] Again, this is an issue best decided at trial rather than at this stage of the proceedings. At the certification stage, the existence of other communications does not undermine the commonality of the issues in the unfair practices claim.

F. ISSUE 3: THE MOTION JUDGE DID NOT ERR IN DEFINING THE CLASS

[87] FedEx submits that the motion judge erred in allowing the following class definition:

> All individuals in Canada who, after placing an order for a shipment while acting for personal, family or household purposes (i.e. not for a business purpose), paid an invoice from Federal Express Canada Corporation for at least one of a "Clearance Entry Fee", "Disbursement Fee", or "Advancement Fee" from 2016 to present.

[88] FedEx argues that the class definition is overly broad because it includes people whose claims are barred by the limitation period and residents of Quebec. I see no reversible error in the class definition approved by the motion judge.

(1) Test under s. 5(1)(b) of the *Class Proceedings Act* and standard of review

[89] As on the question of common issues, this court owes deference to the motion judge's determination of the class definition. Again, absent an error on an extricable question of law, the court should only interfere if the motion judge committed a palpable and overriding error: *Carcillo*, at para. 43; *Pioneer*, at para. 94; and *Pearson*, at para. 43.

[90] The purpose of the class definition is "to: (i) identify those persons who have a potential claim for relief against the defendants; (ii) define the parameters of the lawsuit so as to identify those persons who are bound by its result; (iii) describe who is entitled to notice of the action": *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 S.C.R. 545, at para. 57. The class definition should bear a rational relationship to the common issues asserted by all class members: *Western*, at para. 38. Class definitions must be defined with precision, and in a way that is not over-inclusive or under-inclusive: *Amyotrophic Lateral Sclerosis Society of Essex v. Windsor (City)*, 2015 ONCA 572, 387 D.L.R. (4th) 603, at para. 33; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 21. In addition, the class must be defined in objective terms, without any reference to the merits of the claim or subjective characteristics: *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), at paras. 69-70.

[91] The definition approved by the motion judge meets these criteria. The issues of the limitation period and Quebec residents may ultimately provide good defences to some of the claims, but I am not persuaded that they should have an impact on the class definition.

[92] I start with a discussion of the limitation period issue and then address the issue of whether the class definition should include residents of Quebec.

(2) Timeframe of class definition

[93] The action was commenced on January 7, 2022. The class definition certified by the motion judge goes back to 2016, which is six years prior to the commencement of the action. The class definition therefore includes people over a four-year period whose claims are presumptively statute barred, namely people who paid the fees at issue between 2016 and January 6, 2020. Ms. Robson's rationale for starting the class period in 2016 is that this is when FedEx allegedly started the billing practices at issue in this case.

[94] The motion judge refused to narrow the class definition based on the limitation period, reasoning that there is "ample authority for the proposition … that certification is not the time to consider a limitation defence". Both decisions the motion judge relied on held that the "discoverability issues" arising from the claims in those cases should be addressed after certification: *Stenzler v. TD Asset Management Inc*., 2020 ONSC 111, at para. 31, leave to appeal refused, 2020 ONSC 5987 (Div. Ct.); *Smith v. Inco Ltd*., 2011 ONCA 628, 107 O.R. (3d) 321, at para. 165, leave to appeal refused, [2011] S.C.C.A. No. 539. To these authorities, I would add this court's decision in *Amyotrophic*, where the court held, at para. 41, "the case law is clear: where the resolution of the limitation issue depends on a factual inquiry, such as when the plaintiff discovered or ought to have discovered the claim, the issue should not be decided on the motion for certification".

[95] As reviewed above, Ms. Robson's claim is based on allegations of undisclosed fees and misrepresentations. Claims of this nature may well raise legitimate discoverability issues. The certification stage is not the time to close off the possibility that some people who paid these fees prior to January 7, 2020, may nevertheless have valid claims. FedEx may have a valid limitation defence to their claims as a whole or there may be a need for individual assessments of the discoverability of these claims. However, the class definition should not be used to foreclose these claims at this stage of the proceedings.

[96] FedEx argues that, while there are cases where the class definition extends beyond a two-year period, class definitions in consumer protection class actions typically mirror the basic limitation period. FedEx relies on the following decisions: *Bernstein v. Peoples Trust Company*, 2017 ONSC 752, 97 C.P.C. (7th) 286, at paras. 100-101; *Hoy v. Expedia Group Inc*., 2022 ONSC 6650, at para. 247, aff'd 2024 ONSC 1462 (Div. Ct.), 494 D.L.R. (4th) 673; *Sankar v. Bell Mobility*, 2013 ONSC 5916, 52 C.P.C. (7th) 75, at para. 17, leave to appeal refused, 2013 ONSC 7529 (Div. Ct.); *Graham v. Imperial Parking Canada Corporation*, 2010 ONSC 4982, 74 B.L.R. (4th) 172, at paras. 165-167, leave to appeal refused, 2011 ONSC 991 (Div. Ct.), 279 O.A.C. 342; and *Magill v. Expedia, Inc*., 2013 ONSC 683, 36 C.P.C. (7th) 74, at para. 118.

[97] I am not persuaded by this argument. In assessing whether the class definition is appropriate, the issue is not what type of claim is asserted, but, rather, whether the class definition meets the legal requirements for certification. I note that, in *Bernstein*, at para. 100, Perell J. held that the class definition should be limited to people whose claims presumptively fall within the basic limitation period. He adopted this approach out of a concern over a potential conflict for the purpose of settlement between the interests of class members whose claims presumptively fall within the limitation period and class members whose claims presumptively fall outside the limitation period. This court implicitly rejected this as a basis for limiting the class period in *Amyotrophic*, at paras. 46-47, and, instead, held that subclasses may be appropriate in cases where some parties have claims that are presumptively time barred.

[98] Indeed, in this case, FedEx's billing practices raise common issues for all class members, but the issue of the applicability of the limitation period will be different for class members who paid the impugned fees before and after January 7, 2020. This is an issue that can be managed by the creation of a subclass if the court below determines that the limitation period issue can be determined on a subclass basis. Otherwise, for those whose claims presumptively fall outside the basic limitation period, discoverability will have to be decided on an individual basis once the common issues have been decided: *Smith*, at para. 165.

But this does not detract from the finding that the class definition meets the criteria for certification.

(3) Quebec residents should not be excluded from the class definition

[99] FedEx submits that residents of Quebec should be excluded from the class definition. They rely on the decision in *Perry-Fagant* to argue that they should not be subjected to a "revolving door" of claims from residents of Quebec.

[100] In making the argument that the class definition should exclude Quebec residents, FedEx relies on *Bear v. Merck Frosst Canada & Co.*, 2011 SKCA 152, 345 D.L.R. (4th) 152, at para. 74. In that decision, the Court of Appeal for Saskatchewan found that two proposed class actions were properly struck as abuses of process because they amounted to relitigation or litigation by instalment. FedEx does not claim abuse of process and, therefore, *Bear* is not relevant to this issue.

[101] The motion judge did not address the inclusion of Quebec residents in his reasons.

[102] FedEx may ultimately have good arguments to avoid claims from residents of Quebec based on the decision in *Perry-Fagant* or the consumer protection legislation in Quebec or the doctrine of abuse of process. As set out in the cause of action analysis above, there are notable differences between the *Consumer*

Protection Act in Ontario and the legislation in Quebec.[7] However, determining whether the class definition is appropriate is not the proper context in which to evaluate the merits of the class members' claims. This is an issue best decided on a motion for summary judgment or on a common issues trial. Moreover, based on the record before the court, it is not possible to determine whether Quebec residents may have a viable claim based on the manner in which Ms. Robson's claim is pleaded, as compared to the claim that was advanced in *Perry-Fagant*. Accordingly, it would not be appropriate to exclude these claims from the class definition at this stage.

G. DISPOSITION

[103] I would dismiss the appeal. I would award costs in the agreed amount of $40,000 all inclusive to Ms. Robson.

Released: December 3, 2025 "L.F."

"L. Favreau J.A."
"I agree. Grant Huscroft J.A."
"I agree. J. George J.A."

[7] Similarly, there are differences between Ontario's consumer protection legislation and the legislation in British Columbia that may ultimately affect the viability of claims from residents of British Columbia. But differences between the legislation in different provinces can and should be addressed at a different stage of the proceedings.

APPENDIX A

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A

Interpretation

1 In this Act,

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

"consumer agreement" means an agreement between a supplier and a consumer in which,

(a) the supplier agrees to supply goods or services for payment, or

(b) the supplier agrees to provide rewards points to the consumer, on the supplier's own behalf or on behalf of another supplier, when the consumer purchases goods or services or otherwise acts in a manner specified in the agreement; ("convention de consommation")

"consumer transaction" means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement; ("opération de consommation")

…

"supplier" means a person who is in the business of selling, leasing or trading in goods or services or is otherwise in the business of supplying goods or services, including the supply of rewards points, and includes an agent of the supplier and a person who holds themself out to be a supplier or an agent of the supplier; ("fournisseur")

…

Application

2 (1) Subject to this section, this Act applies in respect of all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place.

…

Unsolicited goods or services: relief from legal obligations

13 (1) Except as provided in this section, a recipient of unsolicited goods or services has no legal obligation in respect of their use or disposal.

No payment for unsolicited goods or services

(2) No supplier shall demand payment or make any representation that suggests that a consumer is required to make payment in respect of any unsolicited goods or services despite their use, receipt, misuse, loss, damage or theft.

Request not inferred

(3) A request for goods or services shall not be inferred solely on the basis of payment, inaction or the passing of time.

Material change deemed unsolicited

(4) If a consumer is receiving goods or services on an ongoing or periodic basis and there is a material change in such goods or services, the goods or services shall be deemed to be unsolicited from the time of the material change forward unless the supplier is able to establish that the consumer consented to the material change.

Form of consent

(5) A supplier may rely on a consumer's consent to a material change that is made orally, in writing or by other affirmative action but the supplier shall bear the onus of proving the consumer's consent.

Demand

(6) If a supplier has received a payment in respect of unsolicited goods or services, the consumer who made the payment may demand a refund of the payment in accordance with section 92 within one year after having made the payment.

Refund

(7) A supplier who receives a demand for a refund under subsection (6) shall refund the payment within the prescribed period of time.

Consumer may commence action

(8) The consumer who made the payment may commence an action to recover the payment in accordance with section 100.

Definition

(9) In this section,

"unsolicited goods or services" means,

(a) goods that are supplied to a consumer who did not request them but does not include,

(i) goods that the recipient knows or ought to know are intended for another person,

(ii) a change to periodically supplied goods, if the change in goods is not a material change, or

(iii) goods supplied under a written future performance agreement that provides for the periodic supply of goods to the recipient without further solicitation, or

(b) services that are supplied to a consumer who did not request them but does not include,

(i) services that were intended for another person from the time the recipient knew or ought to have known that they were so intended,

(ii) a change to ongoing or periodic services that are being supplied, if the change in the services is not a material change,

(iii) services supplied under a written future performance agreement that provides for the ongoing or periodic supply of services to the recipient without further solicitation, or

(iv) any prescribed towing services or vehicle storage services regulated under the *Towing and Storage Safety and Enforcement Act, 2021*, including services provided under prescribed circumstances.

…

False, misleading or deceptive representation

14 (1) It is an unfair practice for a person to make a false, misleading or deceptive representation.

Examples of false, misleading or deceptive representations

(2) Without limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representations:

1. A representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or qualities they do not have.
2. A representation that the person who is to supply the goods or services has sponsorship, approval, status, affiliation or connection the person does not have.

3. A representation that the goods or services are of a particular standard, quality, grade, style or model, if they are not.
4. A representation that the goods are new, or unused, if they are not or are reconditioned or reclaimed, but the reasonable use of goods to enable the person to service, prepare, test and deliver the goods does not result in the goods being deemed to be used for the purposes of this paragraph.
5. A representation that the goods have been used to an extent that is materially different from the fact.
6. A representation that the goods or services are available for a reason that does not exist.
7. A representation that the goods or services have been supplied in accordance with a previous representation, if they have not.
8. A representation that the goods or services or any part of them are available or can be delivered or performed when the person making the representation knows or ought to know they are not available or cannot be delivered or performed.
9. A representation that the goods or services or any part of them will be available or can be delivered or performed by a specified time when the person making the representation knows or ought to know they will not be available or cannot be delivered or performed by the specified time.
10. A representation that a service, part, replacement or repair is needed or advisable, if it is not.
11. A representation that a specific price advantage exists, if it does not.
12. A representation that misrepresents the authority of a salesperson, representative, employee or agent to negotiate the final terms of the agreement.
13. A representation that the transaction involves or does not involve rights, remedies or obligations if the representation is false, misleading or deceptive.
14. A representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.
15. A representation that misrepresents the purpose or intent of any solicitation of or any communication with a consumer.

16. A representation that misrepresents the purpose of any charge or proposed charge.

17. A representation that misrepresents or exaggerates the benefits that are likely to flow to a consumer if the consumer helps a person obtain new or potential customers.

Unconscionable representation

15 (1) It is an unfair practice to make an unconscionable representation.

Same

(2) Without limiting the generality of what may be taken into account in determining whether a representation is unconscionable, there may be taken into account that the person making the representation or the person's employer or principal knows or ought to know,

(a) that the consumer is not reasonably able to protect his or her interests because of disability, ignorance, illiteracy, inability to understand the language of an agreement or similar factors;

(b) that the price grossly exceeds the price at which similar goods or services are readily available to like consumers;

(c) that the consumer is unable to receive a substantial benefit from the subject-matter of the representation;

(d) that there is no reasonable probability of payment of the obligation in full by the consumer;

(e) that the consumer transaction is excessively one-sided in favour of someone other than the consumer;

(f) that the terms of the consumer transaction are so adverse to the consumer as to be inequitable;

(g) that a statement of opinion is misleading and the consumer is likely to rely on it to his or her detriment; or

(h) that the consumer is being subjected to undue pressure to enter into a consumer transaction.

…

Unfair practices prohibited

17 (1) No person shall engage in an unfair practice.

One act deemed practice

(2) A person who performs one act referred to in section 14, 15 or 16 shall be deemed to be engaging in an unfair practice.

Advertising excepted

(3) It is not an unfair practice for a person, on behalf of another person, to print, publish, distribute, broadcast or telecast a representation that the person accepted in good faith for printing, publishing, distributing, broadcasting or telecasting in the ordinary course of business.

Rescinding agreement

18 (1) Any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages.

Remedy if rescission not possible

(2) A consumer is entitled to recover the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer or to recover damages, or both, if rescission of the agreement under subsection (1) is not possible,

(a) because the return or restitution of the goods or services is no longer possible; or

(b) because rescission would deprive a third party of a right in the subject-matter of the agreement that the third party has acquired in good faith and for value.

Notice

(3) A consumer must give notice within one year after entering into the agreement if,

(a) the consumer seeks to rescind an agreement under subsection (1); or

(b) the consumer seeks recovery under subsection (2), if rescission is not possible.

Form of notice

(4) The consumer may express notice in any way as long as it indicates the intention of the consumer to rescind the agreement or to seek recovery where rescission is not possible and the reasons for so doing and the notice meets any requirements that may be prescribed.

Delivery of notice

(5) Notice may be delivered by any means.

When notice given

(6) If notice is delivered other than by personal service, the notice shall be deemed to have been given when sent.

Address

(7) The consumer may send or deliver the notice to the person with whom the consumer contracted at the address set out in the agreement or, if the consumer did not receive a written copy of the agreement or the address of the person was not set out in the agreement, the consumer may send or deliver the notice,

(a) to any address of the person on record with the Government of Ontario or the Government of Canada; or

(b) to an address of the person known by the consumer.

Commencement of an action

(8) If a consumer has delivered notice and has not received a satisfactory response within the prescribed period, the consumer may commence an action.

Same

(9) If a consumer has a right to commence an action under this section, the consumer may commence the action in the Superior Court of Justice.

Evidence

(10) In the trial of an issue under this section, oral evidence respecting an unfair practice is admissible despite the existence of a written agreement and despite the fact that the evidence pertains to a representation in respect of a term, condition or undertaking that is or is not provided for in the agreement.

Exemplary damages

(11) A court may award exemplary or punitive damages in addition to any other remedy in an action commenced under this section.

Liability

(12) Each person who engaged in an unfair practice is liable jointly and severally with the person who entered into the agreement with the consumer for any amount to which the consumer is entitled under this section.

Limited liability of assignee

(13) If an agreement to which subsection (1) or (2) applies has been assigned or if any right to payment under such an agreement has been assigned, the liability of the person to whom it has been assigned is limited to the amount paid to that person by the consumer.

Effect of rescission

(14) When a consumer rescinds an agreement under subsection (1), such rescission operates to cancel, as if they never existed,

(a) the agreement;

(b) all related agreements;

(c) all guarantees given in respect of money payable under the agreement;

(d) all security given by the consumer or a guarantor in respect of money payable under the agreement; and

(e) all credit agreements, as defined in Part VII, and other payment instruments, including promissory notes,

(i) extended, arranged or facilitated by the person with whom the consumer reached the agreement, or

(ii) otherwise related to the agreement.

Waiver of notice

(15) If a consumer is required to give notice under this Part in order to obtain a remedy, a court may disregard the requirement to give the notice or any requirement relating to the notice if it is in the interest of justice to do so.