

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Vallance v. DHL Express (Canada), Ltd.*,
2024 BCSC 140

Date: 20240130
Docket: S213608
Registry: Vancouver

Between:

Gayle Vallance

Plaintiff

And

DHL Express (Canada), Ltd. (dba DHL Canada) and DHL Express (USA), Inc.
Defendants

Before: The Honourable Justice Matthews

Reasons for Judgment

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Overview

[1] Gayle Vallance and the proposed class members in this proposed national class action purchased goods online that were shipped to Canada by the defendant DHL Express (Canada), Ltd., doing business as DHL Canada, and its international affiliates. Ms. Vallance alleges that DHL Canada charged undisclosed fees for customs clearance imbedded in what were described as import duties and taxes charged by the Canadian Border Services Agency. She seeks to certify this class action to claim damages for the fees or restoration of the fees pursuant to the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*], similar provincial consumer protection legislation of other provinces, and the *Competition Act*, R.S.C. 1985, c. C-34. Ms. Vallance also seeks damages for unjust enrichment and the tort of deceit.

[2] DHL Canada does not dispute that it charged what it calls a processing fee for taking packages through the customs clearance process but it asserts that the processing fee was disclosed. It submits that decisions of this court and the Court of Appeal for British Columbia preclude this claim and that Ms. Vallance has not met her burden regarding any of the certification elements set out in s. 4 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

[3] A court hearing a certification application must make a certification order if the pleadings disclose a cause of action, there is an identifiable class of two or more persons, there are common issues of fact or law, a class proceeding is the preferable procedure to resolve the common issues, and there is a representative plaintiff who will fairly represent the interests of the class, who has proposed a workable plan of advancing the proceeding and notifying the class members, and who does not have an interest in conflict with the class.

[4] A significant argument advanced by DHL Canada is that previous cases about customs processing fees stand for the proposition that such claims are doomed to fail and not certifiable. Ms. Vallance argues that these cases do not stand for those propositions and are distinguishable. Because of the prevalence of the

arguments about those cases on certification, I will review them and determine their applicability as a preliminary issue.

- [5] All of the certification elements are in dispute. The core issues are:
- a) Whether Ms. Vallance has adequately pleaded detrimental reliance or an alternate theory of causation in order to disclose causes of action for breaches of the BPCPA and other provincial consumer protection legislation;
 - b) whether the evidence provides some basis in fact for the common issues in circumstances where Ms. Vallance did not disclose an individual communication she had with DHL Canada about the processing fee and other class members, who swore affidavits, did not state that they had deposed to all facts relevant to certification; and
 - c) whether the evidence of the varying communications that the class members had with DHL Canada preclude a common inquiry into whether DHL Canada's representations were false or misleading.

Preliminary Issue – Applicability and Effect of *Blackman* and *Macfarlane*

[6] DHL Canada submits that this case is the latest in a series of custom brokerage fee cases sought to be brought as class actions, all of which have failed, including *Blackman v. Fedex Trade Networks Transport & Brokerage (Canada), Inc.*, 2009 BCSC 201; and *MacFarlane v. United Parcel Service Canada Ltd.*, 2009 BCSC 740 [*MacFarlane*], aff'd 2010 BCCA 171 [*MacFarlane BCCA*]. DHL Canada submits that just as *Blackman* and *MacFarlane* failed, so too should this case.

[7] Before reviewing those cases, I will review the evidence about importation of goods bought from places outside Canada and Ms. Vallance's claims to provide context for the analysis of *Blackman* and *MacFarlane*.

[8] In these reasons, where the evidence is simply background or is non-controversial, I will state it as fact. Where evidence is contested or is not conceded

and it is on a point other than non-controversial background information, I will identify the debate. To the extent that I state or find facts, I only do so for the limited purpose of determining whether the certification evidentiary standard, “some basis in fact” for the section 4 elements except s. 4(1)(a), has been met.

[9] DHL Canada provides package delivery and express courier services in every province and territory in Canada. When it is involved in delivering packages that have been sent from locations outside of Canada, it works with foreign affiliated companies in countries outside of Canada.

[10] Ms. Vallance’s claim on behalf of the proposed national class is that DHL Canada charges a fee for bringing packages that it has agreed to deliver through the border that it does not disclose but falsely represents as part of import tax and/or duty charges to be paid to the Canadian Border Services Agency. She alleges that while there are often import and duty taxes owing, the amount charged by DHL Canada is not purely import tax and duty remitted to the Canadian Border Services Agency, but includes a customs clearance fee that DHL Canada charges to take the package through the importation process and to remit the import taxes and duties to the Canadian Border Services Agency.

[11] Ms. Vallance alleges that when the package comes into the country, DHL Canada notifies the receiver that there are “import duty/tax” or “import duty/tax and clearance fees” owing. She alleges that the communications do not include that this amount includes a processing fee charged by and retained by DHL Canada.

[12] DHL Canada’s affiant, Asteway Desta, deposed how a purchase made by a person in Canada, using DHL Canada as the domestic shipper, makes its way from the foreign place of purchase to the Canadian receiver. Ms. Desta deposed that a foreign vendor will typically contract with an affiliate of DHL Canada in that country. Ms. Desta deposed that the vendor contracts with the foreign DHL affiliate to ship the package to Canada, at which point it engages DHL Canada to clear the shipment through customs and deliver it to the purchaser.

[13] Ms. Desta deposed that the relationship between DHL Canada and persons such as the proposed class members is governed by the DHL Express Terms and Conditions of Carriage which are posted on DHL Canada's website. They stated that DHL Canada may perform customs clearance services. Ms. Desta deposed that DHL Canada has a Service & Rate Guide which is also published on its website and which states that a processing fee will be applied to all non-document shipments.

[14] Ms. Desta deposed that Canada Border Services Agency collects the duties and taxes payable on imported goods in Canada. It is a requirement of law to report goods imported into Canada to Canada Border Services Agency without delay: *Reporting of Imported Goods Regulation*, SOR 86-873, s.12. If goods are imported by an authorized courier such as DHL Canada, the courier must report them before entry. Canada Border Services Agency requires documentation of the contents of the shipment, the declared value and the country of manufacture to determine the tariff classification and the value of the goods.

[15] Ms. Desta deposed that some shipments may be exempt from duties or taxes but still must clear customs.

[16] Ms. Desta deposed that DHL Canada provides custom clearance services by which it acts as the purchaser's agent and reviews the shipping documentation, completes the Canada Border Services Agency required declarations and forms, categorizes the goods based on value, manages queries from Canada Border Services Agency, pays the applicable duties and taxes to Canada Border Services Agency to secure the release of the shipment, requests corrections or refunds relating to Canada Border Services Agency accounting for goods, and maintains the records that are required to be maintained by law.

[17] DHL Canada charges a fee for clearing customs which it calls a processing fee. In 2021, its base processing fee was \$17.00. If 2.5% of the shipment value is higher than the base rate, then the processing fee will be 2.5% of that amount.

[18] DHL Canada does not charge a processing fee on shipments that do not require customs clearance, such as documents or *de minimis* shipments where the value is below a certain threshold.

[19] Ms. Desta deposed that purchasers are not required to use DHL Canada's custom clearance services and pay the processing fee. They can self-clear a shipment or hire an independent broker. If the receiver chooses to do so, DHL Canada will hold the shipment until it has been notified that the applicable duties and/or taxes have been paid to Canada Border Services Agency.

[20] Ms. Desta deposed that DHL Canada communicates with the receiver about amounts owing through different means, depending on the contact information that the receiver provided to the shipper and that the shipper provided to the DHL affiliate. Those means include by email, SMS and/or telephone calls. If the communication is by email, a link is provided to an online portal where the receiver can view the calculation of the amounts, download relevant documents, and pay the amounts owing. If the communication is by SMS, the online portal is hyperlinked to the SMS message. Ms. Desta deposed that DHL Canada used standard wording for email communications and SMS communications. The standard wording changed during the class period and differed depending on whether the communication was by SMS or text. If the communication was by telephone, it was not standard.

[21] Ms. Vallance deposed to her experience with this process. She deposed that she had used DHL Canada often. She deposed that in February 2021, she purchased books from a seller in the United Kingdom. She deposed the books were purchased for her personal use.

[22] Ms. Vallance deposed that before delivery of the books, she received an email from DHL Canada which stated that there was "Canada Customs duties & taxes (Import charges) and you must pay it online before release of the shipment" and set out an amount owing of \$33.16. Ms. Vallance deposed that she paid the \$33.16 on the understanding that the money she paid to DHL Canada was owed to the government for duties and taxes. She deposed that DHL Canada did not tell her

that the \$33.16 included an additional fee charged by and retained by DHL Canada. After Ms. Vallance requested a receipt and received one from DHL Canada, she learned that \$17.85 of the \$33.16 was a DHL Canada processing fee (\$17.00) and GST on the processing fee (\$0.85). Based on the receipt, Ms. Vallance believes there were no duties owing on her shipment.

[23] Ms. Vallance alleges that DHL Canada's practice is to imbed its processing fee in a charge that it describes to the receiver as import duties and/or taxes. She deposed that DHL Canada did not disclose to her that it charged a fee for the customs clearance service until after she paid it. She alleges that DHL Canada's communications contain false and misleading representations and its practice is a deceptive practice that prevents the receivers from exploring the avenues for clearing customs including self-clearing or hiring a different broker and not paying DHL Canada's processing fee.

[24] DHL Canada asserts that it is common knowledge that packages must clear customs, and that it has a contractual relationship with every receiver that provides for that.

[25] As I will discuss below, other purported class members have made affidavits about their experiences but Ms. Vallance's description of her experience suffices to provide the context for the claim.

Horizontal *Stare Decisis*

[26] In *R. v. Sullivan*, 2022 SCC 19 at paras. 61–63, 73, the Supreme Court of Canada clarified the application of horizontal *stare decisis*, the doctrine which determines whether a superior court may decline to follow the principles of law set by a court of the same level of court within the province.

[27] Horizontal *stare decisis* requires a judge to examine prior judicial decisions by courts of coordinate jurisdiction and first determine whether the ratio is binding or distinguishable: *Sullivan* at para. 64. If binding, the judge must then determine whether the precedent must be followed or departed from. The court may only

depart from a binding case if one or more of the exceptions described in *Re Hansard Spruce Mills*, [1954] 4 D.L.R. 590, 1954 CanLII 253 (B.C.S.C.) apply:

1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;
2. The earlier decision was reached per incuriam ("through carelessness" or "by inadvertence"); or
3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.

Sullivan at para. 75.

[28] Aspects of *Blackman* and of *Macfarlane* are distinguishable, at least on the issue of whether or not a cause of action exists. In addition, the first *Re Hansard Spruce Mills* exception applies, as aspects of those decisions have been undermined by subsequent appellate decisions.

Blackman

[29] In *Blackman*, the plaintiff in a proposed class action claimed that customs brokerage fees were a breach of the *BPCPA*. The *Blackman* decision was made on the defendants' summary trial application. The parties agreed the matter was appropriate for summary trial disposition.

[30] The plaintiff in *Blackman* alleged that the conduct of the defendant customs brokerage and defendant carrier constituted deceptive acts or practices within the meaning of s. 4 of the *BPCPA*. Ms. Vallance also claims that DHL Canada's conduct pertaining to processing fees is a deceptive act or practice within the meaning of s.4 of the *BPCPA*.

[31] The s. 4 claims of a deceptive act or practice in *Blackman* are the claims most applicable to this case. The s. 4 claims in *Blackman* were, with one exception, framed as failures to disclose. The plaintiff alleged, for example, failure to disclose a fee and failure to provide customers with an opportunity to arrange customs clearance by themselves: at paras. 58–59. The exception is an allegation of a misleading description of interest charges on funds. The judge found that the fee

was not interest, and that the consumer could not have been led to an error in judgment by the information: at para. 79.

[32] Justice Garson, then on this court, was the chambers judge in *Blackman*. Justice Garson held that a failure to disclose could not qualify as a deceptive act under the *BPCPA* definition, which was sufficient to dispose of the s. 4 claims: at paras. 67, 70.

[33] Ms. Vallance alleges express misrepresentations, e.g. the text message describing the processing fee as a tax/duty (import charge). Accordingly, the reason for the dismissal in *Blackman* does not apply in this case where positive misrepresentations are alleged. In addition, in cases decided after *Blackman*, the law on whether a failure to disclose may qualify as a deceptive act under the *BPCPA* has evolved. I will address this below.

[34] However, in *Blackman*, Garson J. went further and stated that regardless of whether failure to disclose could constitute a deceptive practice, the court would not find the alleged lack of disclosure to constitute deceptive conduct. Justice Garson's reasons for this conclusion were based on the facts in that case. For example, Garson J. concluded that Fedex provided accurate information to consumers at paras. 71–73.

[35] Whether the facts of this case will preclude finding of a deceptive act or practice is a matter which requires a merits-based analysis on evidence. While DHL Canada asserts that a certification application is not devoid of a merits analysis, it is certainly not a robust, or merits-focussed, analysis: *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338, leave to appeal to SCC ref'd, No. 40479 (4 May 2023) [*Nissan Canada*] at paras. 134, 138.

[36] The type of analysis that led to Garson J.'s findings in *Blackman* was factually intensive and merits-focussed and therefore does not assist with whether the s. 4 claims in this action disclose a cause of action pursuant to s. 4(1)(a) of the *Class Proceedings Act*. The applicability of *Blackman* on whether there is evidence to

support a *BPCPS* s.4 common issue is also very limited given the factual merits analysis at the *Blackman* summary trial.

[37] Justice Garson also dismissed the unjust enrichment claim in *Blackman*. Justice Garson concluded there was no merit to this claim because there was a contract between the plaintiff and the defendants that served as a juristic reason. DHL Canada relies on Garson J.'s analysis of the contract as arising from legislation relating to bills of lading. Justice Garson's reasoning was referred to with approval by the Court of Appeal in *MacFarlane*. I will apply this reasoning when I address the unjust enrichment cause of action.

[38] Justice Garson dismissed the claim for illegal interest charged on disbursement fees, the claim that services were unsolicited within the meaning of s. 11 of the *BPCPA*, and the claims that the fees were unconscionable within the meaning of s. 8 of the *BPCPA*. None of those claims are equivalent to claims made in this case so the analysis on those claims is not relevant.

MacFarlane

[39] *Blackman* was applied by Justice Goepel, then of this court, in *MacFarlane* to preclude certification of claim pertaining to custom brokerage fees.

[40] In *MacFarlane*, the plaintiff abandoned his s. 4 *BPCPA* claim due to Garson J.'s decision in *Blackman*.

[41] In *MacFarlane* at para. 28, Goepel J. recited certification legal principles, including that the case must be subjected to the "air of reality test" described in *Samos Investments Inc. v. Pattison*, 2001 BCSC 1790, aff'd 2003 BCCA 87, at paras. 155–157. Justice Goepel explained that even if the case passed the threshold for the pleadings disclosing a cause of action, if the claims did not have an air of reality, certifying the claim would not further the goals of efficiency or fairness.

[42] In *MacFarlane*, Goepel J. held that because of Garson J.'s decision in *Blackman* there was no air of reality to the *MacFarlane* claim and it could not be

certified: at paras. 43–44. The Court of Appeal held that the only question in that case was whether the transaction was an unsolicited transaction under s. 11 of the *BPCPA*, and Goepel J. did not err in determining, based on *Blackman*, that there could not be no cause of action for a s. 11 claim. That claim is not made in this case, and therefore *MacFarlane* cannot be dispositive of whether this claim discloses a cause of action

[43] The Court of Appeal did not address how to square Goepel J.’s determination that the claim lacked an air of reality with the Court of Appeal’s determination that Goepel J. had determined that the claim failed under s. 4(1)(a). The air of reality test was a merits-based inquiry into the viability of a claim sought to be certified which had its origins in *Samos*. It has never been applicable at the s. 4(1)(a) stage. Although I am not aware of a case expressly articulating that this test is no longer applicable to the s. 4(1)(b)-(e) certification considerations, review of the jurisprudence demonstrates that the air of reality test has been supplanted by an approach by which the certification judge avoids a merits-focused approach, while still giving the claim more than symbolic scrutiny: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 103 [*Pro-Sys*]; *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 51; and *Nissan Canada* at paras. 134, 138.

Subsequent Appellate Cases

[44] In *Blackman*, Garson J. concluded that a failure to disclose could not qualify as a deceptive act under the *BPCPA*: at paras. 67, 70.

[45] In *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 [*Seidel SCC*] the Supreme Court of Canada considered whether to lift a stay on proceedings in a consumer protection class action pertaining to a contract of adhesion. The Supreme Court of Canada stated, at para. 37, that it was important to interpret consumer protection legislation generously in favour of consumers. In *Wright v. United Parcel Service Canada Ltd.*, 2015 ONSC 2220, Justice Horkins of the Ontario Superior Court of Justice questioned the correctness of *Blackman* because Garson J. had not

considered or undertaken a generous, consumer-protection oriented interpretation of the *BPCPA*: at para. 39.

[46] In *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260 at para. 80, the Court of Appeal for British Columbia explained that in s. 4(3)(b)(vi) of the *BPCPA* the words “representation by a supplier ... that fails to state a material fact” are such that an omission can constitute a deceptive practice and ground a cause of action. This clearly indicates that a failure to disclose has the potential to qualify as a deceptive act under the *BPCPA*. I followed this in a recent certification decision, *Bowman v. Kimberly Clark Corporation*, 2023 BCSC 1495 at para. 158.

[47] Accordingly, the law has evolved since *Blackman* in a way that eliminates the precedential value of the conclusions reached by Garson J. at paras. 67 and 70.

Section 4(1)(a) – Cause of Action

[48] Ms. Vallance discontinued her claims against DHL Express (USA), Inc. Her claim continues against DHL Canada only.

Legal Principles

[49] Section 4(1)(a) of the *Class Proceedings Act* requires that the pleadings disclose a cause of action. Assuming all facts pleaded to be true, the pleadings disclose a cause of action unless it is plain and obvious that the claim cannot succeed: *Pro-Sys* at para. 63; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 20; and *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25.

[50] In undertaking the s. 4(1)(a) inquiry, the court must read the pleadings generously, permitting novel but arguable claims and accommodating inadequacies in form to the extent reasonable by allowing for amendments: *Finkel* at para. 17; and *Sherry v. CIBC Mortgage Inc.*, 2020 BCCA 139 at para. 53. Novel claims should be allowed to proceed to trial where they will permit an incremental development in the law: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 19, citing *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 21 [*Imperial Tobacco*].

[51] Nevertheless, the court must address issues that call into question whether the case has a legal foundation. If the case is bound to fail, or if it is clear that if the facts alleged are taken to be true a court would not recognize the claim, the claim should not be permitted to proceed: *Atlantic Lottery* at paras. 18–19; and *Finkel* at para. 18, citing *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 at para. 64.

[52] A claim will be bound to fail if the pleading does not set out the elements of the cause of action and the material facts in support of them: *Imperial Tobacco* at para. 22; *Sekhon v. Canada (AG)*, 2019 BCSC 1164 at para. 30; and *Kindylides v. Does*, 2020 BCCA 330 at paras. 29, 31, leave to appeal to SCC ref'd, 39728 (October 14, 2021).

Competition Act

[53] Pursuant to s. 36 of the *Competition Act*, a person who has suffered loss or damage as a result of conduct which is contrary to a Part IV provision, including false or misleading representations made contrary to s. 52 or s. 52.01, may sue for an amount equal to the loss or damaged proved.

[54] DHL Canada argues that Ms. Vallance's claim does not disclose a cause of action under the *Competition Act* because she has not pleaded an actionable misrepresentation and because she has failed to plead material facts in support of her claim that the processing fee is not accurately described by DHL Canada.

Misrepresentation

[55] Sections 52 and 52.01 of the *Competition Act* prohibit false or misleading representations. DHL Canada characterizes Ms. Vallance's claim as pleading omissions. It is correct that Ms. Vallance has pleaded that DHL Canada did not disclose, and did not advise, that the fees charged to class members included a processing or brokerage fee (at paras. 5, 24, 41 and 45 of the further amended notice of civil claim). However, these paragraphs must be considered in the context of the pleading as a whole, where Ms. Vallance pleads false representations and

misleading representations pertaining to communications about duties and taxes owing because they did not include the information that the amounts said to be owing to DHL Canada included processing fees charged by DHL Canada. See paras. 1-6, 17-21, 24-27 of the further amended notice of civil claim.

[56] For example, Ms. Vallance pleads that DHL Canada:

- a) made “misleading representations” about the nature of the processing fee at para. 20 of the further amended notice of civil claim;
- b) “knowingly and recklessly made representations to the Plaintiff and other Class Members that were false or misleading” at para. 25 of the further amended notice of civil claim;
- c) sent electronic messages to the class members that were “false or misleading in a material respect” at para. 26 of the further amended notice of civil claim; and
- d) made “representations” that “were false, misleading and deceptive” at para. 27 of the further amended notice of civil claim.

[57] DHL Canada’s characterization of Ms. Vallance’s further amended notice of civil claim, in a manner that is different from the pleading read as a whole, is not a basis on which to find it is bound to fail. It is inconsistent with the guiding principle of reading pleadings generously. It is inconsistent with the authorities that require that consumer protection legislation be interpreted generously in favour of consumers: *Seidel* SCC at para. 37.

[58] DHL Canada submits that a misrepresentation by omission is not an offence under the *Competition Act*, citing *Hoy v. Expedia Group*, 2022 ONSC 6650 at para. 117; and *Palmer v. Teva Canada Ltd.*, 2022 ONSC 4690 at para. 253.

[59] In *Hoy*, the focus of Perell J.’s reasoning that the claims were bound to fail was that despite that the pleading used the words misrepresentation, the gravamen of the complaint was a failure to disclose (at para. 117). The plaintiff did not plead

that the defendant's representations were false or inaccurate. That is manifestly different than Ms. Vallance's pleading.

[60] Similarly, in *Palmer*, Perell J. considered a failure to warn pleading to be a failure to disclose claim.

[61] Moreover, I do not accept that DHL Canada's re-characterization of the amended notice of civil claim, if accurate, would render it bound to fail. If the facts alleged are true, then DHL Canada communicated to the class members that they owed money to DHL Canada for duties and taxes, and did not communicate that the sum owed to DHL Canada was not all duties in taxes but included a processing fee charged by DHL Canada. Such representations could fairly be characterized as a false, misleading, and misrepresentation by omission. The jurisprudence that the *Competition Act* does not impose a duty of disclosure does not stand for the proposition that a failure to disclose is not actionable if the circumstances around the lack of disclosure include a representation that is false or misleading.

Material Facts

[62] Rule 3-1(2)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, provides that a notice of civil claim must set out the material facts in support of a claim. Rule R. 3-7(1) prohibits pleading evidence. Material facts are facts that prove the elements of a cause of action: *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 at paras. 45–48; *Kindylides v. Does*, 2020 BCCA 330 at para. 34, leave to appeal to SCC ref'd, 39728 (October 14, 2021). Evidence is the means by which material facts are proved.

[63] In *Imperial Tobacco* at para. 22, the Supreme Court of Canada stressed the importance of pleading material facts, explaining that while a claimant may not be able to prove the material facts at the time they are pleaded, the claimant must plead them nonetheless. It is not open to the claimant to wait and see how the evidence develops before pleading material facts.

[64] Nevertheless, sometimes the pleading of the elements of the cause of action will also amount to pleading material facts, and sometimes is not even necessary to plead the elements if they can be inferred from the other matters pleaded: *Watson v. Bank of America Corporation*, 2015 BCCA 362 at para. 101. Whether a pleading is adequate must be assessed keeping in mind the purpose of pleadings which is to give the other party notice of the case it will have to meet.

[65] The review of pleadings to determine if they are bound to fail must take into account other principles of pleadings including the prohibition against prolix, redundant, lengthy pleadings and pleading evidence. Common sense governs and so a pleading will not be struck if what is alleged to be missing does not preclude the defendant from knowing the case to be met: *Watson* at paras. 99–102.

[66] Ms. Vallance claims damages pursuant to s. 36 of the *Competition Act*. The elements of a s. 36 claim are:

- a) the person suffered loss or damage,
- b) as a result of conduct that is contrary to any provision in Part VI of the *Competition Act* or an order under the *Competition Act* made by the Competition Tribunal or another court.

[67] Ms. Vallance pleads conduct that is contrary to ss. 52 and 52.01, which are *Competition Act* Part VI provisions. The elements of conduct that is contrary to s. 52 of the *Competition Act* are:

- a) the defendant made representation to the public that is false or misleading;
- b) the defendant made false or misleading representation knowingly or recklessly; and
- c) did so for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest.

[68] The elements of conduct that is contrary to s. 52.01 of the *Competition Act* are:

- a) the defendant caused or sent a false or misleading representation in an electronic message;
- b) the defendant sent the electronic message containing the false or misleading representation knowingly or recklessly; and
- c) did so for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest.

Criminal Intent

[69] The intent elements of ss. 52 and 52.01. require pleas that the defendant acted “knowingly or recklessly” when making the false or misleading representations (s. 52) and sending electronic communications containing false or misleading representations (s. 52.01).

[70] DHL Canada asserts that Ms. Vallance has pleaded facts about the impact of the alleged misrepresentations, but no material facts about DHL Canada’s knowledge or intent other than bare conclusory facts.

[71] I do not agree. In addition to several places where Ms. Vallance pleads that DHL Canada’s conduct was undertaken knowingly or recklessly, she also pleads, at para. 28 of the further amended notice of civil claim, that DHL Canada’s conduct was planned and deliberate.

[72] It is correct that Ms. Vallance does not plead extensive material facts about knowledge and intention. In *Watson*, the Court of Appeal for British Columbia upheld the certification judge’s rejection of the submission that where the plaintiff failed to plead the mental element of conduct contrary to s. 45 of the *Competition Act*, the claim was bound to fail. The Court of Appeal, at paras. 101–102, upheld the chambers judge’s reasoning and held that common sense and the pleading as a

whole were such that an express pleading of the mental element would be redundant and therefore not necessary.

[73] In the circumstances of this case, the only material facts that could be pleaded would be synonyms for knowingly or recklessly. Requiring more, runs the risk of requiring pleading evidence of intention. Common sense and the rules against prolix and redundant pleadings govern.

[74] The claim is not bound to fail due to the pleading of the intention element of the *Competition Act* claims.

Causation and Loss

[75] DHL Canada submits that Ms. Vallance has not pleaded material facts to support that reliance on DHL Canada's representations caused her a loss.

[76] Section 36 of the *Competition Act* requires causation between the false or misleading representations and the alleged loss. The jurisprudence has contained a debate as to whether causation must be advanced through a pleading of detrimental reliance or whether it can be proven through other theories of causation. See: *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366 at paras. 233–235; *Krishnan v. Jamieson Laboratories Inc.*, 2021 BCSC 1396 at paras. 67–71 and 181–189, aff'd *WN Pharmaceuticals Ltd. v. Krishnan*, 2023 BCCA 72; *British Columbia v. Apotex*, 2022 BCSC 1 at paras. 150–153; and *Bowman* at paras. 54–58.

[77] I will not review the debate in these reasons because I consider it to be settled that the causation element of s. 36 of the *Competition Act* can be advanced through a pleading of detrimental reliance or through a pleading that the defendant's misleading representations caused the plaintiff to spend more than he or she would have had the representation not been made: at paras. 233–235.

[78] In this case, Ms. Vallance pleads detrimental reliance, and she pleads that had DHL Canada not falsely represented that the sums were owing for duty and taxes without disclosing that they included a fee to be paid to DHL Canada, the

proposed class members would have been able to avoid that fee by clearing customs themselves or hiring another customs broker to do it. I consider both pleas to be supported by material facts, consistent with legal principles I have set out, at paras. 5, 19, 20, 35, 40 and 48 of the further amended notice of civil claim.

[79] For example, at para. 20 of the further amended notice of civil claim, Ms. Vallance pleads that the class members had no legal obligation to pay the customs clearance fee that DHL Canada charged and would not have paid fees that they were not legally obliged to pay. She pleads that had DHL Canada not made misleading representations about the nature of the fees, the class members would not have paid them.

[80] DHL Canada argues that Ms. Vallance must plead, for example, that she would have avoided the processing fee by self-clearing her books or hiring an independent broker and that that these options would be less expensive. I do not agree. This would be pleading evidence, not material facts.

[81] DHL Canada's submission in this regard overlaps with its submission that Ms. Vallance has not pleaded loss or material facts to support a loss. DHL Canada submits that no loss can be claimed if there was no alternative means for Ms. Vallance and the class members to receive their packages in a timely way, more conveniently, and/or pay less fees.

[82] This submission does not assist with determining whether the pleading discloses a cause of action. Ms. Vallance has pleaded loss due to paying DHL Canada a fee that she had no legal obligation to pay and would not have paid if she knew she had no legal obligation to pay it. Whether, at the end of the day, there will be facts found that support this claim is not a matter that is considered at this stage.

[83] DHL Canada also submits that the law does not support Ms. Vallance's claim as a loss, i.e. if she proves what she has alleged, there is no loss at law because she received the customs clearance services for which she paid the processing fee. This is an argument relevant to whether the claim discloses a cause of action.

[84] I do not accept it. *Valeant* stands for the proposition that a claim is not bound to fail if the loss claimed is that the plaintiff paid more for something or paid for something that the plaintiff would not have paid for had the representation not been made. The question of loss is not whether the plaintiff got something for what he or she paid, it is whether the representation caused the plaintiff to pay when he otherwise would not, or to pay more.

British Columbia *Business Practices And Consumer Protection Act* and Other Provincial Consumer Protection Legislation

[85] Ms. Vallance pleads that within the meanings set out in the *BPCPA*: the proposed class members are consumers; DHL Canada's delivery services are services; DHL Canada is a supplier; and the supply of delivery services by DHL Canada are consumer transactions. She alleges that Ms. Vallance and the class members relied on DHL Canada's representations that the fees that DHL Canada charged to them were for import duties or taxes charged by Canada Customs for goods being shipped to Canada. She alleges that DHL Canada's representations were false, misleading and untrue and were deceptive acts and practices as described in s. 4 and contrary to s. 5 of the *BPCPA*.

[86] Ms. Vallance seeks damages pursuant to s. 171 of the *BPCPA* or relief in the form of a declaration and restoration order under s. 172 of the *BPCPA*.

[87] Ms. Vallance also makes similar claims under consumer protection legislation of other provinces on behalf of proposed class members whose claims are covered by consumer legislation in other provinces as follows:

- a) Alberta: *Consumer Protection Act*, R.S.A. 2000, c. C-26.3;
- b) Saskatchewan: *The Consumer Protection and Business Practices Act*, S.S. 2013, c. C-30.2;
- c) Manitoba: *Consumer Protection Act*, C.C.S.M. c. B120;
- d) Ontario: *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A.;

- e) Quebec: *Consumer Protection Act*, C.Q.L.R. c. P-40.1;
- f) Prince Edward Island: *Business Practices Act*, S.P.E.I. c. B-7;
- g) Newfoundland & Labrador: *Consumer Protection and Business Practices Act*, S.N.L. 2009, c. C-31.1.

[88] DHL Canada argues that Ms. Vallance has not pleaded loss, damage or a viable theory of compensable harm and has ignored crucial differences in the various provincial statutes.

Damage or Loss and Compensable Harm

[89] Section 171 of the *BPCPA* permits a person to bring an action for damages against a supplier where that person has suffered damage or loss due to a contravention of the act or its regulations.

[90] DHL Canada submits that Ms. Vallance’s pleading of loss is insufficient for the same reasons discussed above in relation to the *Competition Act* claim. I do not accept the submission for the same reason.

[91] DHL Canada also submits that Ms. Vallance has failed to plead material facts to support compensable harm, citing *Palmer* at paras. 231–235; and *Hoy* at paras. 212–224.

[92] In *Palmer*, the plaintiffs ingested a drug that was contaminated. They did not suffer any adverse medical consequences. They sued for their medical bills in investigating potential adverse consequences as well as the cost of the drug on the basis that it was valueless but they paid for it. As discussed above, in *Hoy*, Perell J. held that there was no cause of action under the *Competition Act* for failing to disclose the contamination. In *Palmer*, Perell J. did not answer the question of whether the same was true under provincial consumer protection legislation. Justice Perell held that the constituent element of loss could not be established in that case because:

[231] For the reasons described above, the law, as it exists in Canada, does not provide compensation for an increase of risk of harm as such. As noted above, compensation is for actualities not an increase in potentiality. Further, in the immediate case there is no basis in fact for claiming compensation for refunds and for wasted pills and there is no social utility in advancing these *de minimis* claims.

[232] To the extent that any of the consumer protection statutes require damages as a constituent element for liability, there is no basis in fact that any Class Members have suffered any compensable harm. The heads of damages for medical bills and for medical monitoring arising from an increased risk of experiencing cancer are not recoverable. As for refunds and wasted pills, the advice from Health Canada was to continue taking the valsartan medication unless advised to stop by a health care provider and so there may not have been many returned or wasted drugs. The voluntary recall was directed at retailers, and some of the consumers who were personally out-of-pocket might as a matter of common sense return their valsartan for a refund when they got a replacement for their prescription. The heads of damages for refunds and the expense of bills thrown away are *de minimis* and do not satisfy the preferable procedure criterion.

[Emphasis Added].

[93] Prior to this passage, Perell J. stated that he was addressing the certification elements of cause of action, common issues and preferability together, in an amalgamated way. Justice Perell did not always express whether particular aspects of his reasons pertained to particular certification elements. Justice Perell's comments about compensable harm in the underlined portions of this passage turn on the lack of the required evidentiary substratum for common issues and preferability, i.e. some basis in fact. That is expressly not a requirement for determining whether a cause of action exists; the court may not consider evidence on that certification element.

[94] Similarly, in *Hoy*, Perell J.'s discussion on compensable harm is based on lack of evidence to satisfy the some basis in fact requirement for the certification elements: *Hoy* at para. 97.

[95] DHL Canada's misplacement of this argument as a cause of action issue is apparent when considering DHL Canada's submissions applying the compensable harm point to this case. DHL Canada submits that there is no suggestion that the plaintiffs did not receive what they paid for when they paid for customs clearance

services. I understand that DHL Canada's position in the litigation generally is that the class members had ample notice that they were paying for customs clearance services and received adequate services for the fee they paid. However, those are evidentiary matters that are merits-focussed.

[96] In addition, these positions are not entirely responsive to Ms. Vallance's claim, which is that the class members did not have notice that they were paying for custom clearance services because DHL Canada's representations about that were misleading. They have pleaded that they had other choices to clear their packages through customs. The fact that DHL might have done so adequately is, from the proposed class members' perspective, beside the point.

[97] I am of the view that there is no plain and obvious flaw in this claim.

Causation - Detrimental Reliance

[98] An element under s. 171 of the *BPCPA* is that the damage or loss was suffered due to a contravention of the *BPCPA* or its regulations. That element is referred to as the causation element. The wording of s. 172 of the *BPCPA* is slightly different, but also incorporates a causation element.

[99] DHL Canada submits that Ms. Vallance must plead detrimental reliance and she has not done so adequately because she has not pleaded material facts on detrimental reliance.

[100] Like under the *Competition Act*, there has been a debate in the jurisprudence as to whether the only means of satisfying the causation element of these provisions is detrimental reliance. In *Bowman*, I concluded that the weight of the jurisprudence is that detrimental reliance is not always required for the causation element of s. 171 based on a breach of ss. 4, 5, or 8 of the *BPCPA*, or to seek declaratory and restorative remedies under s. 172, as long as the plaintiff has pleaded an alternative theory of causation.

[101] DHL Canada acknowledges that detrimental reliance is not always required, but asserts that in this case, individual reliance is required as it is the only path to establish causation. DHL Canada did not articulate whether what it refers to as individual reliance is different from detrimental reliance.

[102] I do not understand DHL Canada to be asserting a new kind of reliance when it refers to individual reliance. I understand its submissions to be that reliance cannot be based on an allegation of a common representation because it is inherently individual, citing *Ileman v. Rogers Communication Inc.*, 2014 BCSC 1002 at para. 67, aff'd 2015 BCCA 260.

[103] In *Ileman*, Justice Weatherill was considering the debate about detrimental reliance in the context of a s. 4(1)(a) analysis. However, his proposed reconciliation of the divergent authorities based on the category of representation has not been picked up in the more recent caselaw. In *Seidel v. Telus Communications Inc.*, 2016 BCSC 114 at paras. 88–104, Justice Masuhara undertook a thorough review of the law. At para. 89 he stated that under ss. 4 and 5 of the *BPCPA*, a deceptive act or practice includes conduct that is “capable of deceiving or misleading; actual deception is not required”: (emphasis by Masuhara J.), citing *Knight v. Imperial Tobacco Canada Limited*, 2005 BCSC 172 at para. 29, rev'd in part, 2006 BCCA 235. Accordingly, Masuhara J. concluded that the question of deception can be litigated without reference to the circumstances of the class members because the focus is on what the defendant did and the effect it was capable of having, not what effect it actually had, a proposition that was stated in *Knight* and repeated in *Stanway* at para. 77.

[104] In any event, in this case, Ms. Vallance has pleaded detrimental reliance in relation to her *BPCPA* claim at para. 62 of the further amended notice of civil claim. I consider the pleas to be adequate and to be supported by material facts, consistent with legal principles I have set out, at paras. 5, 19, 35, 60, 62, 68, 69, 74, 75, 80, 81, 85, 86, 92, 93, 98, 99, 105, and 106 of the further amended notice of civil claim.

[105] In addition, at paras. 64, 70, 76, 82, 87, 94, 100, 107 and 109 of the amended notice of civil claim, Ms. Vallance has pleaded an alternate causation theory, that as a result of DHL Canada’s false, misleading and untrue representations, the class members suffered loss and damages in the amount they unknowingly paid to DHL Canada for DHL Canada’s processing or brokerage fees.

[106] In my view, this alternate theory, that DHL Canada’s representations caused the class members to pay fees not knowing what they were paying for, and believing them to be paid for government duties and/or taxes, is analogous to causation theories that have been allowed to ground a claims as not bound to fail in recent cases such as *Krishnan; Bowman; and MacKinnon v. Pfizer Canada Inc.*, 2021 BCSC 1093, aff’d 2022 BCCA 151 (except on punitive damages).

[107] As I have set out above, the novelty of a pleading is not usually a ground to preclude the plaintiff from pursuing the claim. In *Finkel*, the Court of Appeal for British Columbia considered the alternate causation theory involving breach of contract or a failure to disclose that was alleged to be a deceptive act or practice, to be novel, but held that s. 171 is capable of the broad interpretation necessary for such a claim to be available at law: *Finkel* at paras. 78–79, 83, 87.

[108] Applying that reasoning here, I am satisfied that Ms. Vallance’s plea of detrimental reliance and her alternate plea of causation are such that the claim is not bound to fail for lack of a pleading of causation.

Disgorgement

[109] In paras. 66, 78, and 102 of the further amended notice of civil claim, Ms. Vallance pleads for relief under certain provisions of the *BPCPA*, the Saskatchewan and the Newfoundland and Labrador consumer protection legislation. She seeks declaratory relief and seeks to have monies paid by class members to DHL Canada restored to them including “the disgorgement of profits or revenues”.

[110] In *Atlantic Lottery*, the Court set out to clarify the legal terminology pertaining to restitution and disgorgement, including the historical usage of those terms

interchangeably. Justice Brown, for the Court, explained that restitution returns a wrongful benefit, the defendant received from the plaintiff, to the plaintiff where the defendant's gain corresponds to the plaintiff's loss. Disgorgement is a type of remedy calculated exclusively by reference to the defendant's wrongful gain, irrespective of whether it corresponds to damage suffered by the plaintiff and, indeed, irrespective of whether the plaintiff suffered damage at all: *Atlantic Lottery* at para. 23.

[111] In *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310, the plaintiffs alleged in a putative class action that Mazda Canada's representations as to the quality of its components, including door locks, were deceptive acts by a supplier contrary to ss. 4 and 5 of the *BPCPA*. The Court of Appeal for British Columbia determined that a breach of the *BPCPA* cannot constitute the "wrong" for purposes of a claim in unjust enrichment, or other relief not contemplated by the statute (including disgorgement). The Court held that the *BPCPA* is an exhaustive code for the regulation of consumer transactions and that so called "anti-enrichment" claims premised on breach of the *BPCPA* are not available in law: *Koubi* at paras. 63–65. The Court of Appeal in *Wakelam* cited this analysis with approval (see paras. 55–66). See also *Hoy* at paras. 145–161, which reviews and summarizes this case law with a focus on disgorgement.

[112] I agree that the jurisprudence is settled on this point; a claim for disgorgement under provincial consumer legislation is bound to fail.

[113] Accordingly, the last sentence of para. 66 of the further amended notice of civil claim is bound to fail. It shall be struck. However, striking it does not affect the viability of the balance of the claims under provincial consumer protection statutes.

Differences Between Provincial Consumer Protection Legislation

[114] DHL Canada asserts that Ms. Vallance has ignored crucial differences between the provincial consumer protection legislation such that the claims ought not be allowed to proceed. However, DHL Canada has not, in its written submissions, said what those are.

[115] In *Palmer* at para. 229, Perell J. described the provincial consumer protection statutes as similar with significant differences. One of the significant differences he described was that under the Ontario legislation, privity of contract between the supplier and the consumer is required. Ms. Vallance has pleaded privity of contract in her claims under the Ontario legislation, the Quebec legislation, the Prince Edward Island legislation, and the Newfoundland and Labrador legislation.

[116] In addition, Ms. Vallance's claims for relief are not the same under all of the provincial consumer protection statutes because not all provide for restorative relief. Her pleadings reflect those significant differences between the statutes. Similarly, the Alberta and Ontario consumer protection legislation require notice be given within a year of the alleged unfair practice. Section 7.2(3) and s. 101 of those respective provincial statutes permit the court to allow the claim despite the notice having not been given if the interests of justice warrant it. Ms. Vallance has pleaded waiver of the notice requirements pursuant to those sections of those statutes.

[117] Despite the lack of specifics as to why DHL Canada submits that these pleadings fall short, it is the plaintiff's burden to persuade me that they disclose a cause of action. Based on the plaintiff's submissions and my review, I am persuaded.

Unjust Enrichment

[118] An action in unjust enrichment restores money or property to a plaintiff who can establish: (1) the defendant was enriched; (2) the plaintiff suffered a corresponding detriment; and (3) the absence of a juristic reason for the enrichment: *Pro-Sys* at para. 85.

[119] DHL Canada submits that Ms. Vallance's pleading does not include any material facts pertaining to deprivation and lack of juristic reason. DHL Canada submits that Ms. Vallance's pleading goes through rituals of pleading unjust enrichment but is bereft of substance because it does not account for the fact that the class members received the customs clearance services and so there can be no deprivation.

[120] For the reasons given above, I am not persuaded that DHL Canada's position that the class members received valuable services for the processing fees they paid is an answer to the claims. In any event, the evidence going to those alleged facts cannot be considered at this stage.

[121] Ms. Vallance has pleaded that the class members suffered a deprivation that corresponded to DHL Canada's gain. Ms. Vallance pleads that the deprivation is the funds that class members paid to DHL Canada for DHL Canada's hidden processing fees. This is a valid pleading, including material facts, on corresponding deprivation.

[122] DHL Canada also submits that the plaintiff has not pleaded material facts in support of the no juristic reason element of this claim. DHL Canada submits that because the arrangement between the class members and DHL Canada was governed by a contract through the common law of bills of lading and statutory law of bills of lading there could be no plea of lack of juristic reason.

[123] In *Atlantic Lottery* at para. 71, Brown J. held that where the claim pleaded a contract that included the transaction that the plaintiff claimed was unlawful, and the claim contained no pleading nor material facts to support vitiating that contract, the claim was bound to fail because a contract is in the established category of juristic reasons. I accept that as a matter of law, there is a contract as DHL Canada asserts: *Blackman* at paras. 34–41, 114, see also *MacFarlane BCCA* at para. 10.

[124] In this case, Ms. Vallance has pleaded that any contracts that existed did not provide a juristic reason because a hidden processing or brokerage fee was outside the scope of the contract, there was no consideration for such a term that flowed to the class members, and any such contracts should be treated as repudiated or rescinded.

[125] DHL Canada asserts that without pleading the contents of the contracts between the receivers, foreign shippers, and foreign DHL affiliate, the claim lacks material facts. I do not agree. DHL Canada took me through the contracts at the certification hearing. Setting their contents out in the notice of civil claim would not

be pleading material facts because many aspects of those contracts are not material. Doing so would also likely offend the rules on prolix and lengthy pleadings.

[126] Ms. Vallance has pleaded that the contracts do not pertain to the dispute or there was no consideration of a term pertaining to a processing fee. This plea is valid and contains material facts. It distinguishes the decision in *Blackman* regarding unjust enrichment.

[127] At para. 57 of the further amended notice of civil claim, which appears under the “unjust enrichment” heading, Ms. Vallance pleads that the proposed class members are “entitled to restitution of DHL Canada’s financial gain”. Though the word “disgorge” does not appear here, the emphasis on the remedy, being the amount of DHL Canada’s financial gain, supports an interpretation of the pleadings to seek disgorgement as a remedy for unjust enrichment. As discussed above, in *Atlantic Lottery*, the Supreme Court of Canada made it clear that the word restitution should not be used to mean disgorgement. Accordingly, para. 57 of the further amended notice of civil claim is struck.

[128] In the relief sought section, para. 37 (m) seeks “restitution”. It does not suffer from the same problem as para. 57 because it does not seek restitution of DHL Canada’s financial gain. Accordingly, striking para. 57 does not undermine the relief sought for unjust enrichment.

Tort of Deceit

[129] The tort of deceit has the following elements:

- a) a false representation made by the defendant;
- b) that the defendant knew or was reckless to, the falsehood of the representation;
- c) that the false representation caused the plaintiff to act;
- d) and that, as a result, the plaintiff suffered a loss.

See: *Bruno Appliance and Furniture, Inc. v. Hyrniak*, 2014 SCC 8 at para. 21

[130] DHL Canada asserts that Ms. Vallance's pleadings set out the elements in a bare and conclusory manner, without any material facts.

[131] With regard to the first, third and fourth elements, when the further amended notice of civil claim is read as a whole, sufficient material facts are in the pleading. I have referred to those above in relation to the other causes of action.

[132] In addition, I accept that with regard to the first element of the tort of deceit, a false representation, also called a fraudulent misrepresentation, need not be a positive statement, and/or can be a partially true statement from which a party can draw a reasonable but incorrect conclusion: *Kuhnke v. Karner*, 2022 BCCA 399 at para. 45. In relation to this tort, Ms. Vallance's pleadings that DHL Canada made false and misleading representations, and failed to disclose the fee it was charging by hiding it in the representation about duty and taxes, meet those requirements.

[133] With respect to the second element, intention, I refer to my analysis of the intention element of the *Competition Act* and reach the same conclusion. In the context of this claim, nothing will be added by pleadings synonyms for Ms. Vallance's pleadings that DHL Canada made the false and misleading representations knowingly and intentionally.

Punitive Damages

[134] DHL Canada submits that Mr. Vallance has not pleaded material facts to support the claim for punitive damages.

[135] Ms. Vallance's pleadings pertaining to punitive damages include that DHL Canada's conduct was high-handed, showed a marked departure from the ordinary standards of decent behaviour, was planned and deliberate and merits punishment. This portion of the further amended notice of civil claim also refers to the facts set out in further amended notice of civil claim.

[136] In *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111 at para. 140, Garson J. concluded that the facts pleaded and the evidence in support of the facts pleaded did not describe conduct that could be characterized with the punitive damages descriptors. Instead, the pleadings and the evidence described a mistake the defendant made that had disastrous consequences.

[137] DHL Canada relies on *Hoy* at paras. 171–177, where Perell J. struck a claim for punitive damages because the pleading went no further than “a mere breach of consumer protection legislation”. DHL Canada submits that Ms. Vallance’s pleadings regarding punitive damages are bald assertions unsupported by material facts and so the court should follow *Hoy*.

[138] *Kirk* stands for the proposition that pleading a mere mistake cannot support a plea for punitive damages. Similarly, *Hoy* stands for the proposition that pleading a mere breach of consumer protection legislation cannot support a plea for punitive damages.

[139] It is not accurate to characterize Ms. Vallance’s pleading as seeking punitive damages based on a mere breach of consumer protection law. The conduct pleaded is very different from a mere mistake. The pleading is that DHL Canada engaged in high-handed, planned, and deliberate conduct to hide the customs clearance fee by falsely representing it was taxes and duties owing to the government.

[140] I conclude that material facts are pleaded in relation to the pleading for punitive damages.

[141] The claim for punitive damages is not bound to fail.

Wilful Concealment

[142] Ms. Vallance pleads that DHL Canada wilfully concealed the existence of the processing fee.

[143] Ms. Vallance does not plead this as a cause of action or seek a common issue based on wilful concealment. It may be, as DHL Canada surmises, relevant to any limitation defence that DHL Canada will rely on.

[144] Since the limitation issues are not raised at this certification hearing and no common issue is raised based on this pleading, I decline to consider it further.

Sections 4(1)(b)-(e) – Evidence and Evidentiary Threshold for Certification

Legal Principles

[145] The proposed representative plaintiff must show some basis in fact to support the certification elements in s. 4(1)(b), (c), (d) and (e) of the *Class Proceedings Act*. *Hollick* at paras. 24–26; *Finkel* at para. 19.

[146] The “some basis in fact” threshold is low. It is not a burden to prove anything on the balance of probabilities: *Nissan Canada* at paras. 134–136. The threshold is deliberately low because there has been no discovery and the evidence has not been through the trial laboratory. The low threshold anticipates that the evidence will be more developed at trial and the findings of fact may well be different. In *Finkel* at paras. 19–20, the Court of Appeal explained that the “some basis in fact” standard does not require the court to weigh and resolve conflicting facts and evidence” and that the court is ill-equipped to resolve conflicting evidence at the certification stage.

[147] While the certification hearing should not be merits-focussed, there is to be more than symbolic scrutiny of the evidence: *Pro-Sys* at para. 103. Still, this scrutiny is about the evidence going to the certification requirements, not the merits. At para. 104, the Supreme Court of Canada in *Pro-Sys* went on to explain that the purpose of a more than symbolic scrutiny of the evidence is to ensure that if the matter proceeds on a class basis, it will not founder “at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met”.

[148] Section 5(5) of the *Class Proceedings Act* requires each person bringing an application for certification, and each person swearing an affidavit in response to an application for certification, to depose that there are no material facts pertaining to

certification that have not been disclosed. To be understood, that provision must be read in the context of the preceding subsections of s. 5:

- 5** (1) An application for a certification order under section 2 (2) or 3 must be supported by an affidavit of the applicant.
- (2) A copy of the notice of application and supporting affidavit must be filed and
- (a) served by ordinary service on all persons by whom or on whose behalf a pleading has been filed in the proceeding, and
 - (b) served by personal service on any other persons named in the style of proceedings.
- (3) Unless otherwise ordered, there must be at least 14 days between
- (a) the service of a notice of application and supporting affidavit, and
 - (b) the day named in the notice of application for the hearing.
- (4) Unless otherwise ordered, a person to whom a notice of application and affidavit is served under this section must, not less than 5 days or such other period as the court may order before the date of the hearing of the application, file an affidavit and serve a copy of the filed affidavit by ordinary service on all persons by whom or on whose behalf a pleading has been filed in the proceeding.
- (5) A person filing an affidavit under subsection (2) or (4) must
- (a) set out in the affidavit the material facts on which the person intends to rely at the hearing of the application,
 - (b) swear that the person knows of no fact material to the application that has not been disclosed in the person's affidavit or in any affidavits previously filed in the proceeding, and
 - (c) provide the person's best information on the number of members in the proposed class.

Evidence Led by Ms. Vallance

[149] DHL Canada submits that the evidence tendered by Ms. Vallance suffers from several problems, which when considered cumulatively, render the evidence inappropriate and insufficient to serve as some basis in fact for the s. 4(1)(b)-(e) certification requirements. The problems that DHL Canada asserts are: the evidence has internal conflicts, not all of those who made affidavits made the attestation

required by s. 5(5)(b) of the *Class Proceedings Act*; the contents of the affidavits, in particular Ms. Vallance's, are not substantively in accordance with the s. 5(5)(b) attestation; and the affidavits made by the proposed class members are almost identical calling into question whether they reflect the various affiants' own evidence.

[150] Section 5(1) of the *Class Proceedings Act* requires a certification application to be supported by an affidavit of the applicant and s. 5(4) requires a person on whom a certification application is served to provide an affidavit. Taking into account those provisions, on a plain reading, the s. 5(5)(b) attestation requirement applies to the parties, i.e. the proposed representative plaintiff(s) and the defendant(s), but does not apply to non-party affiants. Proposed class members who are not the representative plaintiff are not parties.

[151] DHL Canada submits that the attestation requirement applies to all affiants on a certification application, relying on *N&C Transportation v. Navistar International Cantlie v. Canadian Heating Products Inc.*, 2016 BCSC 2129 at para. 31, rev'd in part on other grounds, 2018 BCCA 312; *British Columbia v. Apotex Inc.*, 2022 BCSC 1383 at para. 49 [*Apotex*]; and *Fleming v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2023 BCSC 296 at para. 82.

[152] I do not agree that *N & C Transportation* or *Apotex* stand for that proposition.

[153] The issue in *N & C Transportation* was whether the defendant was required to file an affidavit and if it did so, whether that affiant was required to make the s. 5(5)(b) attestation. DHL Canada refers to para. 31, where Justice Skolrood quoted *Class Actions in Canada*, loose-leaf ed. (Toronto: Canada Law Book, 2014) and in that quote, the words "each affiant" are used in reference to the s. 5(5)(b) attestation. Justice Skolrood quoted the passage on the point of whether the defendant was required to have a representative make an affidavit, not whether non-party affiants have a s. 5(5)(b) obligation,

[154] In *Apotex*, at para. 46, Justice Fitzpatrick explained that "the requirement in s. 5(5)(b) applies to a plaintiff, as above, and also a responding defendant(s) in a

class proceeding”. Justice Fitzpatrick was considering whether a person, employed and specifically authorized by the plaintiff to make its affidavit on certification, had a s. 5(5)(b) obligation when making an affidavit on behalf of the government plaintiff. *Apotex* is not authority for the proposition that s. 5(5)(b) has application beyond the affidavits of parties.

[155] In *Fleming* at para. 82, Justice E. MacDonald determined she should give less weight to an affidavit made by a non-party who had not made the “attestation that is required by s.5(5)(b)”. There is no consideration, beyond that statement, of the issue of whether a non-party is required to make a s. 5(5)(b) attestation. I do not consider *Fleming* authority for that proposition.

[156] Accordingly, I conclude that Ms. Vallance has a s. 5(5)(b) obligation but the other purported class members do not.

[157] DHL Canada asserts that the affidavits are not just deficient for failure to make the attestation (except for Ms. Vallance) but also for failure to make the affidavit in accordance with a general duty to disclose all material facts pertaining to the subject matter of their evidence, regardless of whether there is an attestation requirement. DHL Canada submits that Ms. Vallance and the proposed class member affiants have omitted material facts pertaining to the communications they had with DHL Canada over their packages. I will review that allegation below. I agree that such omissions would diminish the use to which the affidavits can be put, especially on the issue of whether there is some evidence to support a common issue of false or misleading representation. If there is a missing evidence on what representations were made by DHL Canada, then the Court may not be able to conclude that the proposed common issues that pertain to the alleged false or misleading representations can be decided commonly.

[158] It is also clear that the failure to comply with the attestation is relevant to what weight a court gives evidence: *Cantlie v. Canadian Heating Products Inc.*, 2017 BCSC 286 at para. 171. DHL Canada asserts that Ms. Vallance made the

attestation, but did not include all material evidence in her affidavit. I will address this below.

[159] DHL Canada also relies on *Larsen v. ZF TRW Automotive Holdings Corp.*, 2023 BCSC 1471, at para. 33, where Justice Majawa observed that the court must consider the evidence put forth by the plaintiff on certification as a whole and where that body of evidence conflicts, it will not pass the evidentiary threshold of some basis in fact. I agree that conflicts in evidence could have that outcome where the conflicts are on evidence, for example, of whether a common issue is common; or for another example, if aggregate damages are sought, whether they can be determined on a class wide basis.

[160] Finally, DHL Canada asserts that the affidavits of Ms. Vallance and the other purported class members are “boilerplate” or “cookie cutter” affidavits, and that undermines the credibility of the affiants and affects what weight ought to be given to their affidavits: *Wood-Tod v. The Superintendent of Motor Vehicles*, 2020 BCSC 155 at para. 94. I agree with this statement of how evidence should be assessed.

Ms. Vallance’s Evidence

[161] Ms. Vallance’s affidavit evidence about the processing fee is as follows:

7. At 11:19 am on February 26, 2021, I received an email from DHL advising that my shipment was in Richmond, British Columbia, but that I needed to pay \$33.16 (CDN) in "duties and taxes" before DHL would release the shipment to me and that if it was not paid in 5 days, my package would be returned. Attached as **Exhibit A** is a true copy of this email.

8. After receiving the aforementioned email, I paid DHL the sum of \$33.16 (CDN). I did so on the understanding that all of this money was required to be paid to the government as "duties and taxes" for lawfully allowing me to receive my package. I believed this to be the case because the email made reference to "duties and taxes" and at no time prior to paying this sum did DHL advise me that it would also include an additional fee for their services.

9. When I paid the sum of \$33.16 I did not receive a receipt for this payment and none was provided to me in advance before I paid it. I sent DHL an email at 12:33 pm on February 26, 2021 asking for a receipt as none was provided. This is set in the aforementioned email.

10. DHL eventually provided me with a receipt for the \$33.16 (CDN) for the sum that I previously paid. Attached as **Exhibit B** is a true copy of this receipt. Upon review of this receipt, I learned for the first time that DHL

charged a "processing fee" of \$17.00 (CDN) plus \$0.85 (CDN) for GST for a total of \$17.85 (CDN). DHL never advised me, prior to payment, that the sum of \$33.16 (CDN) included an additional fee for its services. Had I known of this, I would have refused to pay it as I had already paid an additional £57.00 for shipping.

11. While the email I received from DHL indicated that "duties and taxes" were to be charged, the invoice shows that there were no charges for "duties" at all.

[162] The other evidence, including Ms. Vallance's evidence on cross examination, demonstrates that Ms. Vallance's affidavit does not include all of her interactions with DHL Canada. In addition, it is not possible, based on Ms. Vallance's evidence on cross examination, to understand exactly how many communications she had in what order, including on the crucial issue of whether she knew about the processing fee before she paid it.

[163] Ms. Desta deposed that DHL Canada sent Ms. Vallance a text message about her shipment from DHL Canada on February 23 and 24, 2021. Ms. Vallance was asked about this on cross examination and testified that she did not recall that. On re-examination on her cross examination, Ms. Vallance testified that the number to which DHL Canada sent the text messages was a landline.

[164] As set out above, in para. 7 of her affidavit, Ms. Vallance deposed that she received the communication that she alleges contained the false and misleading representation, by email on February 26, 2021. She appended the email as Exhibit A to her affidavit. She deposed that it described "duties and taxes" owing. In fact, it describes "duties and taxes (import fees)" owing. She deposed that the first time she became aware that she had paid \$17.00 as a customs processing fee as part of what was described in Exhibit A to her affidavit, was when she requested and was sent a receipt for the payment, which she appended as Exhibit B to her affidavit.

[165] Ms. Desta deposed that Ms. Vallance's Exhibit A was sent to her as a result of a phone call that Ms. Vallance made to DHL Canada. Ms. Desta deposed that DHL Canada called Ms. Vallance on February 26, 2021 because she had not paid the amounts owing for her delivery, and spoke to her father, although at her cross examination it was stipulated by Ms. Vallance's counsel that DHL Canada spoke to

Ms. Vallance's husband. Ms. Desta deposed that the same day, Ms. Vallance requested and received a code to access the DHL Canada's online portal. Ms. Desta deposed that through the online portal, there was information describing the customs processing fee. Ms. Desta also deposed that on January 26, 2021, Ms. Vallance telephoned DHL Canada, and after that call, DHL Canada sent Exhibit A to Ms. Vallance.

[166] At her cross examination, Ms. Vallance agreed that she called DHL Canada. She testified that she did so because she had received an invoice and was surprised by the processing fee. She also testified that she called DHL Canada to make the payment. She also testified that she called DHL Canada to get a receipt. It is not clear whether these references are to the same phone call or more than one phone call.

[167] If Ms. Vallance did make the payment by telephone, or made a call at which she was given a code to access the online portal to make a payment, there were opportunities for communications about what she was paying for, through the telephone call or through the online line portal (which had material describing the processing fee as a processing fee).

[168] Although the evidence about what happened in what order is not at all clear, it appears that Ms. Vallance spoke to DHL Canada by phone at least once before she paid and before she received Exhibit B. If that is correct, then her evidence that she called DHL Canada because she was surprised by the processing fee might mean she learned of the processing fee and called DHL Canada before she paid it. This calls into question whether the false and misleading representations, that she alleged that DHL Canada made to her and to the proposed class members were common, because an aspect of what she asserts was commonly false and misleading was the hidden fee. If Ms. Vallance was already aware of the processing fee before she paid DHL Canada \$33.16 then the processing fee was not hidden when she paid it.

[169] What Ms. Vallance refers to as a receipt and appends as Exhibit B to her affidavit, is described as an invoice on its face and it is dated February 23, 2021.

Ms. Vallance did not depose as to when she received Exhibit B, nor did she append the email by which the receipt was sent, so it can be determined when, in relation to Exhibit A, it was sent.

[170] Overall, Ms. Vallance's affidavit about the communications she had with DHL Canada pertaining to the delivery of her books, and the amounts she paid to DHL Canada, is problematic as a foundation of common issues on the core allegation in this case because her affidavit is incomplete and therefore unreliable. In addition, the evidence discloses more than one opportunity for her to learn about the customs processing fees through communications that she did not describe in her affidavit and for which the content of the communications is unknown.

[171] In her affidavit, Ms. Vallance described two communications with DHL Canada about the fees – Exhibit A, which she asserts is the false and misleading communication, and Exhibit B, which she described as the first information she had that the money she paid included a customs processing fee. Leaving aside the text messages, which she asserts she did not receive, Ms. Desta's evidence and Ms. Vallance's cross examination revealed that DHL Canada communicated with her through the telephone call with her husband; through providing her with an access code as a result of a request she made, probably by telephone, for access to the online portal; and through that telephone call or possibly another telephone call with her personally, all on February 26, 2021. Ms. Vallance does not describe any of this in her affidavit. On her cross examination, she repeated that the first communication she had with DHL Canada about this was Exhibit A.

[172] Nor can Ms. Vallance's chronology of what she was told and when she was told it be reconciled with Exhibit B, which on its face predates the January 26, 2021 communications and which describes the customs processing fee.

[173] Because Ms. Vallance did not include the evidence about the communications other than Exhibit A and Exhibit B in her affidavit, her affidavit evidence is incomplete in a material way. Specifically, she did not disclose the other opportunities for her to receive information about what the \$33.16 charge was for before she paid it. The evidence she left out is material, and therefore a failure to

comply with her s. 5(5)(b) attestation despite making the attestation. The gaps in her evidence are material because the missing evidence calls into question whether the proposed class members received uniform communications from DHL Canada and whether DHL Canada's communications about its processing fee were commonly false and misleading.

The Evidence of Other Proposed Class Members

[174] Several proposed class members swore affidavits. I have reviewed this evidence in detail. I will not recite it all here. Below I identify the communications that they had with DHL Canada about various shipments and amounts that DHL Canada told them were owing on their shipments.

[175] The affidavits and the cross examination evidence reveal that the evidence is incomplete so far as disclosing all of the communications that these proposed class members had with DHL Canada over the subject matter of this litigation.

[176] For example, Brandon Evers deposed in his affidavit that:

8. On or about March 8, 2021, I received an email from DHL advising that I needed to pay \$24.96 (CDN) in import duties and taxes before DHL would release the shipment to me. The email included a link to make this payment online.

9. After receiving the aforementioned email, I paid DHL the sum of \$24.96 (CDN), using the link provided in the email from DHL. I did so on the understanding that all of this money was required to be paid to the government as duties and taxes for lawfully allowing me to receive my package. I believed this to be the case because the email made reference to import duties and taxes and at no time prior to paying this sum did DHL advise me that it also included an additional fee for its services.

[177] Mr. Evers did not produce the email he received that he referred to in his affidavit, so it cannot be determined whether his summary of its contents is accurate.

[178] On cross examination, Mr. Evers testified that he received text messages from DHL Canada about his shipments. He testified that he had access to those text messages when he prepared his affidavit. When cross examining counsel asked why he did not include the content of the messages in his affidavit, his counsel

objected to the question. When cross examining, counsel asked that question a second time, Mr. Evers testified that he provided the text messages to his counsel and the fact that he did not append them to his affidavit was “not up to” him. He also disclosed during cross examination that during a phone call with DHL Canada, the person with whom he spoke told him about the processing fee and that he could self-clear his package. He did not disclose this evidence in his affidavit.

[179] The jurisprudence that considers whether an advertisement is false and misleading under consumer protection law including the precursor legislation to the *Competition Act* holds that a court should consider the general impression made by the entirety of the advertisement: *Richard v. Time Inc.*, 2012 SCC 8 at para. 55; *R. v. International Vacations Ltd.* (1980), 33 O.R. (2d) 327, 1980 CanLII 1828 (C.A.); *R. v. Imperial Tobacco Products Ltd.*, 22 D.L.R. (3d) 51, [1971] 5 W.W.R. 409 (Alta. C.A.) [*Imperial Tobacco Products*] at para. 53.

[180] I agree with DHL Canada that in a case such as this involving representations about a transaction, where a plaintiff alleges that the defendant made false and misleading representations, all of the communications in that transaction must be considered in order to determine whether the impression created by the representations was false and misleading.

[181] Accordingly, the failure of Ms. Vallance and some of the other putative class members to disclose all communications they had with DHL Canada renders their affidavits incomplete in material aspects. Regardless of whether putative class members, other than Ms. Vallance, were required to disclose all material facts pursuant to s. 5(5)(b) of the *Class Proceedings Act*, their failure to do so calls into question the reliability of their evidence on the critical issue of whether the allegations of false and misleading representations give rise to a common issue that can be resolved on a class wide basis.

[182] DHL Canada points out that every class member who swore an affidavit on this application and who was cross examined, including Ms. Vallance, deposed that

they knew that international shipments must clear customs and may be subject to duties and taxes.

Section 4(1)(b) – Identifiable Class

[183] Section 4(1)(b) of the *Class Proceedings Act* requires the plaintiff to establish that there is an identifiable class of two or more persons. The purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38 [*Dutton*].

[184] A class must be defined with reference to objective criteria that do not depend on the merits of the claim. The class definition must bear a rational relationship to the common issues and should neither be unnecessarily broad nor should it arbitrarily exclude potential class members: *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 82.

[185] The evidence adduced by the plaintiff must include some basis in fact that at least two persons could self-identify as class members and could later prove they are members of the class: *Sun-Rype Products v. Archer Daniels Midland Co.*, 2013 SCC 58 at para. 67.

[186] The class definition proposed by Ms. Vallance is:

All persons in Canada who paid a processing or brokerage fee to DHL for good shipped to them by DHL from a destination outside of Canada (the “Class” or “Class Members”).

[187] DHL Canada asserts that this class definition is overbroad because it is not time limited and so includes anyone who ever paid a processing or brokerage fees and some such claims would be precluded by limitation periods. Ms. Vallance submits that limitation issues are individual issues that will only arise if DHL Canada pleads a limitation defence. If that occurs, limitation periods will be subject to the discoverability provision of the *Limitation Act*, S.B.C. 2012 c.13 and can and should be dealt with as individual issues.

[188] I agree with Ms. Vallance’s submission. Since DHL Canada has not filed a response to the civil claim, there is no limitation defence raised that can be considered on this certification application.

[189] However, as discussed below, the evidence shows that this class contains persons who may have been unaware of the DHL Canada’s processing fee the first time they paid it, but were made aware of the processing fee before a subsequent shipping transaction with DHL Canada and paid the fee again. That makes the proposed common issues on reliance and causation problematic because they would be assessed for some class members who assert that they paid the fee not knowing it included a processing fee for a service provided by DHL Canada, and others who paid it knowing it was a processing fee paid to DHL Canada.

[190] While that is primarily a problem with whether reliance or causation can be certified as common issues, it might also require a different class definition or subclassing. I conclude that the proposed class definition is problematic. Given the views I hold pertaining to s. 4(1)(c), there is no utility in attempting to solve the problem with the class definition.

Section 4(1)(c) – Common Issues

Proposed Common Issues

[191] Ms. Vallance’s proposed common issues are set out in Appendix A.

[192] All of the common issues proposed are related to or based on a finding that DHL Canada made a false and misleading representation pertaining to its processing fee by imbedding it in what it described as duties and taxes owing to the government. That allegation underlies the *Competition Act* and provincial consumer legislation claims. If that allegation cannot be determined on a class-wide basis, then the ancillary questions of detrimental reliance and causation cannot be decided on a class-wide basis because they will be without a class-wide factual substratum. Similarly, the unjust enrichment claim elements of deprivation and lack of juristic

reason, as discussed above, depend on proof of the hidden processing fee, as does the tort of deceit and the claim for punitive damages.

[193] Putting aside the substance of the proposed common questions, some of them have what I will describe as structural problems. Some of them contain more than one issue. Some recall antecedent answers on other issues, but the statement of the issues does not make that clear. For example, 1.a. requires determinations of whether the representations were false or misleading, if they were made recklessly and knowingly, and if they give rise to s. 36 damages. Common issue 1.b. is whether detrimental reliance is required or whether a “causal connection” is enough which is an issue that must be determined to answer the s. 36 part of 1.a. Issue 1.c. is whether the payment of the processing fee can amount to proof of the detrimental reliance. As I will relate below, the 1.b. and 1.c. issues are not supported by some evidence that they can be resolved on a class wide basis and the s. 36 portion of s.1.a. cannot be answered until sections 1.b and 1.c. are answered.

[194] The issues proposed for the tort of deceit and unjust enrichment are very broad and would need to be broken down in accordance with the discussion above about the elements of those causes of action.

[195] I do not have the same concerns about the issues proposed under the provincial consumer legislation.

[196] Accordingly, before determining whether the proposed common issues could be redrafted, it is necessary to determine whether that core allegation of wrongful conduct can be determined on a class wide basis.

Legal Principles

[197] Section 4(1)(c) of the *Class Proceedings Act* requires the plaintiff to establish that the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members. Section 1 of the *Class Proceedings Act* defines common issues as “(a) common but not

necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts”.

[198] In *Dutton* at para. 39, the Court held that the underlying question when analyzing commonality is “whether allowing the suit to proceed as a [class proceeding] will avoid duplication of fact-finding or legal analysis”. In *Service v. University of Victoria*, 2019 BCCA 474 at para. 59, the Court of Appeal held that this a low threshold i.e. that the “plaintiff need only show that there is a triable factual or legal issue that, once determined, will advance the litigation”.

[199] In *Pro-Sys* at para. 108, the Court explained that an issue will be common only where its resolution is necessary to each class member's claim, but it is not essential that the class members be identically situated *vis-à-vis* the opposing party.

[200] In *Vivendi Canada Inc. v. Dell’Aniello*, 2014 SCC 1 at paras. 45–46, the Court further clarified that questions can be considered common even if the answers to those questions vary between class members. Even a significant difference among class members does not necessarily defeat a finding of commonality so long as success for one class members does not mean failure for another.

[201] As discussed above, to satisfy s. 4(1)(c) of the *Class Proceedings Act*, the proposed representative plaintiff must show “some basis in fact” that the claims raise common issues. The evidentiary burden on commonality is low. It is understood by recognizing that some basis in fact can be contrasted to no basis in fact: *Nissan Canada* at paras. 134–136, citing *Hollick* at paras. 24–25, and *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 leave to appeal to SCC ref’d, 38784 (19 December 2019) at paras. 100–104.

[202] In *Bowman*, I reviewed the law on the evidentiary burden pertaining to the common issues element and concluded that there must be common issues to certify a class proceeding, but evidence going to their existence is not always necessary: at para. 139. Common issues exist when they are live issues of fact or law. Evidence going to the commonality of a proposed common issue, which is always required,

may often also go to the existence of that proposed common issue. If it does not, existence can be supported by the pleadings or the law.

False and Misleading Representations

[203] The core of this claim is that DHL Canada misrepresented the processing fee it charged for its custom clearance services by describing it as a duty or tax to be remitted to the government and imbedding the fee in a charge for duties, and/or taxes.

[204] Ms. Vallance alleges that the communications to class members in this regard give rise to a common issue.

[205] The evidence of the written communications is as follows:

- a) DHL Canada communicated to Ms. Vallance what she owed for “duties & taxes (Import charges)”.
- b) DHL Canada communicated to Tomasz Nackiewicz that he owed “import duty/tax and clearance fees” for his shipment.
- c) DHL Canada communicated to Brandon Evers by email that there were import duties and taxes owing. The exact wording cannot be confirmed because Mr. Evers did not produce the email. The contents of the texts are not known because Mr. Evers did not produce them despite having them.
- d) DHL Canada communicated with Monica Klaudt by text message but the content of those text messages is not known. DHL Canada sent her confirmation emails of payment which referred to “import duty/tax and clearance fees”;
- e) DHL Canada communicated to David Brown that he had outstanding “import duty/tax and clearance fees” for his shipment;

- f) DHL Canada communicated to Alexandre Kiss by text message that “payment of duty/tax” was required on his shipment;
- g) DHL Canada communicated to Maxime Levesque that he owed “import duty/tax and clearance fees” for his shipment;
- h) DHL Canada communicated to Lee Martin that he owed “import duty/tax and clearance fees” for one shipment and there were “Import Duty and/or Tax and Customs Clearance Service Charges” due on another shipment;
- i) DHL Canada communicated to Yinfei Yang about three different shipments. On the first, it communicated that she owed “import duty/tax and clearance fees”, and on the second and third that she owed “Import Duty and/or Tax and Customs Clearance Service Charges”.

[206] Ms. Vallance argues that because none of the communications used the words “processing” or “brokerage” in relation to the fees being charged and the amounts owing, the communications were commonly devoid of the words that would have made them not false and misleading and therefore those communications were commonly false and misleading. She also argues that because the email subject lines read “IMPORT DUTY/TAX PAYMENT”, the communication should be read as pertaining to import duties and taxes, and if other information was communicated in the body of the message, it does not change that the communication was limited to what was stated in the subject line.

[207] Despite that submission, the common question that Ms. Vallance proposes, in relation to the provincial consumer protection legislation, is as follows:

Did DHL create ambiguity about a material fact in a consumer transaction by imbedding the Processing Fee in the “import duty/tax and clearance fees” it charged Class Members in British Columbia and retained for its own benefit, contrary to s. 4(3)(b)(vi)?

[208] Ms. Vallance puts the same words in quotes above in her common question pertaining to false and misleading representations contrary to the *Competition Act*.

[209] I do not accept Ms. Vallance’s position that the subject line or the lack of disclosure of the processing fee being paid to DHL Canada and not to the government, create commonality that supersedes the differences in communications made to putative class members about the processing fee. As addressed above, when considering whether a representation is false or misleading, the entire body of communications between a defendant and a plaintiff, on the subject matter of the alleged false or misleading representation, must be considered.

[210] The small sample of messages in the evidence of the proposed class members demonstrates a surprising level of variation given DHL Canada’s evidence that it had standard language that changed over the class period but was not tailored to individual receivers. Eight of the nine putative class members who provided evidence disclosed the wording of the written representations. There were four differently worded representations. It is clear that some class members received more than one materially different written communication.

[211] The evidence as a whole is that the lack of individual tailoring does not equate with class-wide uniform messages. While a common issue arises from “common but not necessarily identical” facts or principles of law and therefore some level of variation can be present and an issue will still be common, this level of variation interferes with commonality. Some of the messages contained similar wording but some used wording that is materially different when considering whether the communication had the capability to mislead. For example, when the allegation is hidden fee for the service of clearing the package through customs, a representation that “payment of duty/tax” is owing is materially different than a representation that payment is owing for “Import Duty and/or Tax and Customs Clearance Service Charges”.

[212] There is a real concern that at a common issue trial, when considering what wording is false or misleading, there would be a natural tendency to compare and

contrast various forms of wording against others, such that success for one class member might mean failure for another.

[213] The evidence discloses there are at least four variations but there is no means to determine how many there may be, since the evidence also discloses that some of the communications were oral. Ms. Vallance has not proposed sub-classing to deal with the variations.

[214] This lack of commonality is exacerbated by the fact that DHL Canada told at least one putative class member (Mr. Evers) about the processing fee and the option to self-clear before he paid it. This evidence that DHL Canada is consistent with DHL Canada's evidence that it discloses the processing fee several times throughout the delivery process, including in the terms and conditions of carriage that it asserts are part of its contracts with the putative class members and which are on its website, its service and rate guide which is on its website, on its FAQ portion of its website and on the online portal. DHL Canada's FAQ section also informs that a person can choose to self-clear a package or appoint an independent broker.

[215] The evidence is that Ms. Vallance and some of these proposed class members used the online payment portal. The online payment portal contained information that broke down the amount owing by category, including the processing fee. Ms. Vallance asserts that the processing fee was listed under the heading "Other Levy Charges", so DHL Canada was still disguising it as a government tax.

[216] Some putative class members received a second or third representation after having already paid the customs clearance processing fee on a previous shipment and after having been advised that they had paid it. This level of knowledge takes some putative class members beyond the "credulous" consumer described by the Alberta Court of Appeal in *Imperial Tobacco Products* at para. 53.

[217] Ms. Vallance points out that the communications need only be "capable" of being misleading to be false and misleading, i.e. it is an objective assessment. That does not address the variability of the communications that the evidence

demonstrates in this case. The question of whether the various forms of communications are capable of misleading will have to be asked for each different form of communication.

[218] I am of the view that there are no common issues that can be certified pertaining to the allegations that representations were false and misleading in relation to the *Competition Act*, provincial consumer legislation claims, tort of deceit, or claim for punitive damages.

Detrimental Reliance or Causation

[219] As discussed above, detrimental reliance or an alternative theory of causation are material elements of the causes of action pursuant to s. 36 of the *Competition Act* and the provincial consumer protection legislation.

[220] Having decided that no common issues can be determined on a class-wide basis regarding false or misleading representations, the issue of detrimental reliance or alternative theories of causation do not have a class-wide substratum to be decided class-wide.

[221] In case I am wrong on that, I observe that these issues, in this case, are not supported by evidence reaching the threshold of some basis in fact that they could be decided commonly if the underlying false or misleading representations are proved on a class wide basis.

[222] With regard to the *Competition Act* claims, Ms. Vallance proposes common issues as to whether detrimental reliance is required or whether evidence of payment of the processing fee can provide proof of causation.

[223] DHL Canada argues that if detrimental reliance is the plaintiff's causation theory, then it is inherently individual inquiry and cannot support a common issue: *0116064 B.C. Ltd. v Alio Gold Inc.*, 2022 BCCA 85. The Court of Appeal reviewed many decisions that stand for the proposition that detrimental reliance, or an alternate theory of causation, in the many causes of action that call for reliance or

another theory of causation, are unsuitable for certification. At paras. 44-46 the Court of Appeal confirmed that principle to not be absolute and held that it did not apply in that case, because the case was about a single transaction and a limited number of identified and known representations.

[224] This case is not the type of case described by the Court of Appeal in *Alio Gold*. This is not a case where the proposed class member and the defendants were involved in a single transaction. Nor were there only a few representations that were made to the public as a whole. In this case, there were individual transactions and individual communications to each class member. The evidence is incomplete as to what the communications were. As discussed above, despite the incomplete evidence, the evidence discloses considerable variability.

[225] Ms. Vallance has pleaded detrimental reliance and an alternative causation theory and therefore her pleading survived the s. 4(1)(a) analysis. At this stage, her claims must be analyzed as to whether detrimental reliance or causation can be determined on a class wide basis.

[226] The variability in the evidence precludes a determination that there can be class-wide assessment of what was communicated to the class members as the foundation for detrimental reliance or causation for the *Competition Act* claim.

[227] Ms. Vallance does not propose any separate common issues to address detrimental reliance or causation expressly for the provincial consumer protection legislation claims. That is not fatal, as the common issues do not need to complete the cause of action: *Kirk* at para. 65, citing *Cloud v. Canada (Attorney General)*, 247 D.L.R. (4th) 667, 2004 CanLII 45444 (Ont. C.A.) at para. 53.

[228] However, Ms. Vallance has proposed common issues pertaining to damages under the provincial consumer legislation. For example, she proposes a common issue pertaining to s. 171 of the *BPCPA*. That provision requires proof of causation or detrimental reliance. As I have concluded that no common issue can be stated for causation or detrimental reliance, no s.171 common issue can be stated.

[229] The same problems therefore arise for the provincial consumer protection claims as for the *Competition Act* claims *vis-à-vis* detrimental reliance and causation.

Conclusion on Common Issues

[230] The core of the claim is false and misleading representations. The evidence as to what representations DHL Canada made to the putative class members who swore affidavits is incomplete. It cannot be said there is some basis in fact that the core claim gives rise to common issues because the evidence is incomplete and the evidence that has been proffered demonstrates variability that precludes common issues on false and misleading representations.

[231] The inability to state a common issue on that core allegation undermines the necessary factual and/or legal substrata for any other common issues.

Section 4(1)(d) – Preferable Procedure

[232] The preferability element is found in s. 4(1)(d) of the *Class Proceedings Act* which requires the court to consider whether a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. Section 4(2) of the *Class Proceedings Act* sets out non-exhaustive criteria pertinent to determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues.

[233] Both s. 4(1)(d) and s. 4(2) make it clear that the preferability analysis is in reference to common issues. If there are no common issues, there is nothing to compare with respect to preferability.

[234] As I have concluded that there are no common issues, the preferability analysis cannot be undertaken.

Section 4(1)(e) – Representative Plaintiff

[235] Section 4(1)(e) of the *Class Proceedings Act* requires the court to consider whether there is a representative plaintiff who:

- (i) would fairly and adequately represent the interests of the class,

- (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
- (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[236] I conclude that the lack of common issues precludes analysis of a plan for advancing the proceeding as a class proceeding and the third consideration. The lack of common issues is such that Ms. Vallance cannot be determined to be an appropriate representative plaintiff.

Disposition

[237] Ms. Vallance’s application for certification is dismissed.

[238] Paragraph 57 and the last sentence of paragraph 66 of the further amended notice of civil claim are struck.

“Matthews J.”

APPENDIX A

PLAINTIFF'S PROPOSED COMMON ISSUES

1. With respect to the *Competition Act*, RSC 1985, c. C-34:
 - a. Did DHL offend s. 52(1) of the *Competition Act*, RSC 1985, c. C-34 by imbedding the Processing Fee in the “import duty/tax and clearance fees” it charged the Class Members which it retained for its own benefit, and by knowingly or recklessly making representations to the Class Members which were false or misleading in a material respect and if so, are damages payable to the Class Members pursuant to s. 36(1)(a) of the *Competition Act*, RSC 1985, c. C-34?
 - b. Did DHL offend s. 52.01(1) and (2) of the *Competition Act*, RSC 1985, c. C-34 by including a false or misleading representation in the subject matter information of electronic messages sent to the Class Members or by sending electronic messages to the Class Members that contained a representation that was false or misleading in a material respect and, if so, are damages payable to the Class Members pursuant to s. 36(1)(a) of the *Competition Act*, RSC 1985, c. C-34?
 - c. In the circumstances of this case, is it necessary for the Class Members to prove detrimental reliance in order for them to maintain a claim for damages under s. 36(1)(a) of the *Competition Act*, RSC 1985, c. C-34 or is a causal connection between DHL’s conduct and the Class Members’ loss sufficient to ground their s. 36(1)(a) claims?
 - d. If it is necessary for the Class Members to prove detrimental reliance in order for them to maintain a claim for damages under s. 36(1)(a) of the *Competition Act*, RSC 1985, c. C-34, did the payment of the Processing Fee by the Class Members to DHL constitute such reliance?

2. Pursuant to the British Columbia *Business Practices and Consumer Protection Act*, SBC 2004, c. 2, with respect to Class Members resident in British Columbia at the time of paying the Processing Fee to DHL:

- a. Did DHL create ambiguity about a material fact in a consumer transaction by imbedding the Processing Fee in the “import duty/tax and clearance fees” it charged Class Members in British Columbia and retained for its own benefit, contrary to s. 4(3)(b)(vi)?
- b. Did DHL discharge the burden of proof that it did not engage in a deceptive act or practice in respect of a consumer transaction as required by s. 5?
- c. Are damages payable to Class Members in British Columbia pursuant to s. 171?
- d. Should the Court grant a declaration pursuant to s. 172 of the *Business Practices and Consumer Protection Act*, SBC 2004, c. 2 that the practices engaged in by DHL contravened the said act, and if so, should DHL be required to restore to Class Members any money that DHL acquired as a result of the said contraventions?

3. Pursuant to the Alberta *Consumer Protection Act*, RSA 2000, c. C-26.3, with respect to Class Members resident in Alberta at the time of paying the Processing Fee to DHL:

- a. Did DHL create ambiguity about a material fact in a consumer transaction by imbedding the Processing Fee in the “import duty/tax and clearance fees” it charged Class Members in Alberta and retained for its own benefit, contrary to s. 6(2)(c)?
- b. Did DHL engage in an unfair practice in a consumer transaction by imbedding the Processing Fee in the “import duty/tax and clearance

fees” it charged Class Members in Alberta, contrary to and retained for its own benefit, contrary to s. 6?

- c. Is it in the interests of justice to waive any requirement for notice, pursuant to s. 7.2(3) of the *Consumer Protection Act*?
- d. Are damages payable to Class Members in Alberta pursuant to s. 13(2)(b)?
- e. Should punitive and/or exemplary damages be awarded to Class Members in Alberta pursuant to s. 13(2)(c)?

4. Pursuant to the Saskatchewan *The Consumer Protection and Business Practices Act*, SS 2013, c. C-30.2, with respect to Class Members resident in Saskatchewan at the time of paying the Processing Fee to DHL:

- a. Did DHL create ambiguity about a material fact in a transaction involving goods or services with consumers by imbedding the Processing Fee in the “import duty/tax and clearance fees” it charged Class Members in Saskatchewan and retained for its own benefit, contrary to s. 7(o)?
- b. Did DHL engage in an unfair practice in a transaction involving goods or services with consumers by imbedding the Processing Fee in the “import duty/tax and clearance fees” it charged Class Members in Saskatchewan and retained for its own benefit, contrary to ss. 6 and 8(1)?
- c. Are damages payable to Class Members in Saskatchewan pursuant to s. 93(1)(a)?
- d. Should punitive and/or exemplary damages be awarded to Class Members in Saskatchewan pursuant to s. 93(1)(b)?

- e. Should the Court grant a declaration pursuant to s. 93(1)(f) of *The Consumer Protection and Business Practices Act*, SS 2013. c. C- 30.2 that the practices engaged in by DHL contravened the said act, and if so, should DHL be required to restore to Class Members any money that DHL acquired as a result of the said contraventions?
5. Pursuant to the Manitoba *The Business Practices Act*, CCSM c. B120, with respect to Class Members resident in Manitoba at the time of paying the Processing Fee to DHL:
 - a. Did DHL create ambiguity about a material fact in a consumer transaction by imbedding the Processing Fee in the “import duty/tax and clearance fees” it charged Class Members in Manitoba and retained for its own benefit, contrary to s. 2(3)(p)?
 - b. Did DHL engage in an unfair practice in a consumer transaction by imbedding the Processing Fee in the “import duty/tax and clearance fees” it charged Class Members in Manitoba and retained for its own benefit, contrary to ss. 2 and 5?
 - c. Are damages payable to Class Members in Manitoba pursuant to s. 23(2)(a)?
 - d. Should punitive and/or exemplary damages be awarded to Class Members in Manitoba pursuant to s. 23(4)?
 6. Pursuant to the Ontario *Consumer Protection Act, 2002*, SO 2002, c 30, Schedule A, with respect to Class Members resident in Ontario at the time of paying the Processing Fee to DHL:
 - a. Did DHL create ambiguity about a material fact in a consumer transaction by imbedding the Processing Fee in the “import duty/tax and clearance fees” it charged Class Members in Ontario and retained for its own benefit, contrary to s. 14(2)(14)?

- b. Did DHL engage in an unfair practice in a consumer transaction by imbedding the Processing Fee in the “import duty/tax and clearance fees” it charged Class Members in Ontario and retained for its own benefit, contrary to ss. 14 and 16?
 - c. Is it in the interests of justice to waive any requirement for notice, pursuant to s. 101 of the *Consumer Protection Act, 2002*?
 - d. Are damages payable to Class Members in Ontario pursuant to s. 18(1)?
 - e. Should punitive and/or exemplary damages be awarded to Class Members in Ontario pursuant to s. 18(11)?
7. Pursuant to the Newfoundland and Labrador *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, with respect to Class Members resident in Newfoundland and Labrador at the time of paying the Processing Fee to DHL:
- a. Did DHL create ambiguity about a material fact in a consumer transaction by imbedding the Processing Fee in the “import duty/tax and clearance fees” it charged Class Members in Newfoundland and Labrador and retained for its own benefit, contrary to s. 7(w)?
 - b. Did DHL discharge the burden of proof that it did not engage in an unfair practice in respect of a consumer transaction as required by s. 9?
 - c. Are damages payable to Class Members in Newfoundland and Labrador pursuant to s. 10(2)(b)?
 - d. Should punitive and/or exemplary damages be awarded to Class Members in Newfoundland and Labrador pursuant to s. 10(2)(b)?

8. Pursuant to the Prince Edward Island *Business Practices Act*, SPEI c. B-7, with respect to Class Members resident in Prince Edward Island at the time of paying the Processing Fee to DHL:
 - a. Did DHL create ambiguity about a material fact in a consumer transaction by imbedding the Processing Fee in the “import duty/tax and clearance fees” it charged Class Members in Prince Edward Island and retained for its own benefit, contrary to s. 2(a)(xiii)?
 - b. Did DHL engage in an unfair practice in a consumer transaction by imbedding the Processing Fee in the “import duty/tax and clearance fees” it charged Class Members in Prince Edward Island and retained for its own benefit, contrary to ss. 2 and 3?
 - c. Are damages payable to Class Members in Prince Edward Island pursuant to s. 4(1)?
 - d. Should punitive and/or exemplary damages be awarded to Class Members in Prince Edward Island pursuant to s. 4(2)?

9. Pursuant to the Quebec *Consumer Protection Act*, CQLR c P-40.1, with respect to Class Members resident in Quebec at the time of paying the Processing Fee to DHL:
 - a. Did DHL engage in a prohibited practice by imbedding the Processing Fee in the “import duty/tax and clearance fees” it charged Class Members in Quebec and retained for its own benefit, contrary to s. 215?
 - b. Are damages payable to Class Members in Quebec pursuant to s. 272 and, if not, should the contracts between DHL and Class Members in Quebec be rescinded?
 - c. Should punitive and/or exemplary damages be awarded to Class Members in Quebec pursuant to s. 272?

10. Is DHL liable to the Class Members pursuant to the tort of deceit?
11. Is DHL liable to the Class Members pursuant to unjust enrichment?
12. Should the Court make an aggregate damages award in favour of Class Members and, if so, in what amount?
13. Should the Court award punitive and exemplary damages against DHL at common law and if so, in what amounts?