

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

RYAN WRIGHT AND JULIA ZISLIN

Plaintiffs

- and -

UNITED PARCEL SERVICE CANADA LTD.

Defendant



Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANT

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

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

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

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

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

Date February 19, 2007

Issued by

A handwritten signature in black ink, appearing to read "M. Bennett", written over a horizontal line.

Local registrar

Address of court office London Court House
Registrar
80 Dundas Street
London, ON N6A 6A3

TO: United Parcel Service Canada Ltd.
6285 Northam Drive, Suite 400
Mississauga, ON L4V 1X5
Canada

DEFINED TERMS

1. In this Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

- (a) "Brokerage Fee" means a fee related to the customs broker service, often, but not always, referred to as a brokerage fee;
- (b) "CJA" means the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended;
- (c) "Class Members" means all people in Canada (excluding British Columbia) who were charged a Brokerage Fee by the Defendant;
- (d) "*Class Proceedings Act*" means the Ontario Class Proceedings Act, 1992, S.O. 1992, c. 6, as amended;
- (e) "*Code*" means the *Criminal Code of Canada*, R.S., 1985, c. C-46 as amended;
- (f) "*Consumer Protection Act*" means the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A, as amended;
- (g) "Defendant" means the defendant, UPS;
- (h) "Disbursement Fee" means that portion of the Brokerage Fee which compensates UPS for advancing credit, referred to as a "bond fee" or "disbursement fee";
- (i) "Government Levies" means charges levied by the Federal and Provincial governments of Canada, excluding British Columbia, including, but not limited to, provincial sales taxes (if applicable), the Goods and Services Tax, Harmonized Sales Tax (if applicable), excise, and customs duty;
- (j) "Plaintiffs" means Wright and Zislin, collectively;
- (k) "United States" means the United States of America;

- (l) "UPS" means the defendant, United Parcel Service Canada Ltd;
- (m) "Wright" means the plaintiff, Ryan James Wright; and
- (n) "Zislin" means the plaintiff, Julia Zislin.

CLAIM

2. The Plaintiffs, Ryan James Wright and Julia Zislin, claim on their behalf and on behalf of all Class Members:

- (a) an Order pursuant to the *Class Proceedings Act* certifying this action as a class proceeding and appointing the Plaintiffs as representative plaintiffs of the Class Members;
- (b) a declaration that the notice given by Wright on November 7, 2006 on his own behalf and on behalf of "all similarly situated persons" is sufficient to give notice to the Defendant on behalf of all Class Members;
- (c) in the alternative, a declaration that it is not in the interests of justice to require notice be given pursuant to s. 101 of the *Consumer Protection Act*;
- (d) a declaration that the Brokerage Fees levied constitute unsolicited services as per s. 13 of the *Consumer Protection Act*;
- (e) in the alternative:
 - (i) a declaration that the Defendant engaged in "false, misleading or deceptive representation[s]" as per s. 14 of the *Consumer Protection Act* in charging the Brokerage Fees;
 - (ii) a declaration that the Defendant engaged in "unconscionable representation[s]" as per s. 15 of the *Consumer Protection Act* in charging the Brokerage Fees;
 - (iii) a declaration that the Defendant used its custody or control of the Class Member's goods to pressure the consumer into renegotiating the terms

of a consumer transaction contrary to s. 16 of the *Consumer Protection Act*;

- (iv) a declaration that any agreement found to exist between either Plaintiff and the Defendant constitutes a future performance, internet or remote agreement pursuant to Part IV of the *Consumer Protection Act*;
- (v) a declaration that any such agreement did not meet the prescribed requirements pursuant to Part IV of the *Consumer Protection Act*;
- (f) a declaration that the Disbursement Fee constitutes criminal interest contrary to s. 347 of the *Code*;
- (g) a declaration that any funds received by the Defendant through the charging of the Brokerage Fees are held in trust for the benefit of the Plaintiffs and persons similarly situated;
- (h) damages in the amount of \$50,000,000.00;
- (i) punitive damages in the amount of \$10,000,000.00;
- (j) a permanent injunction restraining UPS from continuing any actions taken by them in contravention of the *Consumer Protection Act*;
- (k) pre-judgment interest pursuant to the *CJA*;
- (l) costs of this action on a substantial indemnity basis; and
- (m) such further and other relief as to this Honourable Court may seem just.

THE PLAINTIFF

3. The plaintiff, Wright, is a resident of Ottawa, Ontario. As described below, on or about October 5, 2006, he purchased a pair of shoes over the internet, from a website operated from the United States. Upon delivery, UPS levied approximately \$9.24 in Government Levies and approximately \$31.00 as a Brokerage Fee.

4. The plaintiff, Zislin, is a resident of Toronto, Ontario. On or about November 21, 2006, Zislin's mother shipped a pair of ski boots to Zislin. The boots were Zislin's property which had been left in her mother's care in the United States. Upon delivery, UPS levied \$7.65 in Government Levies and \$39.10 (plus taxes of \$2.35) as a Brokerage Fee.

UPS'S BUSINESS

5. The Defendant is in the business of package delivery and supply chain services, and operates in over 200 countries and territories.

6. The range of services provided by the Defendant includes a *courier service*, whereby the Defendant physically transports shipments from one point to another, and a *customs broker service*, whereby the Defendant acts as a customs broker agent and clears Canadian-bound shipments from outside of Canada through Canadian customs.

7. The Defendant is authorized to provide customs broker services in Canada, having been approved as a customs broker licensee pursuant to s. 9 of the *Customs Act*, R.S., 1985, c.1 (2nd Supp.), and the *Customs Broker Licensing Regulations*.

REMOTE SHOPPING

8. Canadians, including the Plaintiffs and those similarly situated, increasingly purchase goods remotely, over the Internet, via telephone or through the mail. In many of these transactions, the goods are purchased from foreign merchants, and the goods are shipped to consumers in Canada from the foreign country.

9. In many such transactions, the Defendant delivers the shipment to the consumer.

INTERNATIONAL SHIPPING

10. Canadians often ship goods, for a variety of reasons. Many such shipments are handled by the Defendant.

THE BROKERAGE FEE

Wright

11. On or about October 5, 2006, Wright placed an order over the Internet with a vendor found using the eBay website. Wright ordered a pair of women's shoes for a total cost of USD\$60.00. The vendor, not Wright, arranged for shipping and handling via UPS at a cost of USD\$22.00.

12. On October 16, 2006, the Defendant's employee attended Wright's home to deliver the shoes. In addition to the shipping and handling fees Wright paid at the point of purchase,, Wright was informed by the Defendant's employee that he had been assessed an additional \$40.29. UPS required that these fees be paid prior to delivery. As no one was present at the Wright's residence to pay them, the delivery was aborted. When Wright discovered that UPS had aborted the delivery, he called the Defendant, and requested that the package be held for pickup at a UPS depot, as the delivery was time-sensitive.

13. Upon questioning, the Defendant's employee stated that the additional fees consisted of the Brokerage Fees (and applicable taxes) and were the costs incurred by UPS in shepherding the package through customs.

14. Wright inquired as to why UPS had not contacted him for approval of the Brokerage Fees. An employee of the Defendant stated that it was assumed that he had agreed to pay additional fees when UPS was selected as a courier, and that it was UPS policy not to contact either the sender or recipient of a package to obtain approval. UPS was in possession of the phone number and other contact information of the Plaintiff at all material times.

15. Wright attended the UPS depot on October 18th and was informed that the package was not available for pickup. Wright drove to meet a UPS employee to pickup the package. Despite the fact that Wright had fully paid for the goods and shipping, as a condition of handing the goods over to Wright the UPS employee required that he pay the Government Levies of approximately \$9.24 that had been paid by UPS on his behalf as well as a Brokerage Fee in the amount of approximately \$31.00.

Zislin

16. On or about November 21, 2006, Zislin received a pair of ski boots that had been shipped to her by her mother. When the Defendant's employee attended Zislin's home to

deliver the boots, the employee requested that Zislin pay \$49.10 to cover certain fees that the employee identified as a customs charge, and that any questions should be directed to Canada Customs.

17. Zislin was told by the Defendant's employee that if she did not pay the additional fees the package would not be delivered. Accordingly, Zislin paid the fees.

18. The Brokerage Fee is a non-governmental charge levied by the Defendant, and purports to be justified by the fact that the Defendant acted as the Plaintiffs' customs broker agent at the Canadian border, and cleared the shipment through Canadian customs.

19. At no time prior to delivery of either package did the Defendant:

- (a) contact either Plaintiff by any means notwithstanding that the Defendant, at all material times, had in its possession the Plaintiffs' contact information;
- (b) establish any form of contract with either Plaintiff;
- (c) obtain either Plaintiffs' consent to act as customs broker;
- (d) disclose to either Plaintiff the existence of the Brokerage Fee;
- (e) enter into a contract with either Plaintiff;
- (f) disclose to either Plaintiff the actual or anticipated amount of the Brokerage Fee; or
- (g) provide either Plaintiff with the opportunity to arrange for customs clearance on his or her own, whether to be performed by themselves, by a licensed customs broker, or by a duly authorized agent.

THE CONSUMER PROTECTION ACT

20. The Defendant is resident in Ontario for the purpose of s. 2 of the *Consumer Protection Act*.

THE DEFENDANT'S SERVICE WAS UNSOLICITED

21. The Plaintiffs at no time requested that UPS act as a customs broker on either of their behalf, nor did they expressly acknowledge in writing or otherwise to UPS any intention to accept such service.

22. The UPS customs broker service constitutes an unsolicited service within the meaning of s. 13 of the *Consumer Protection Act*.

23. The Plaintiffs plead that at no time did they enter into any agreement whatsoever with UPS.

THE DEFENDANT ENGAGES IN UNFAIR PRACTICES

24. In the alternative, and only to the extent that an agreement did exist between either Plaintiff and the Defendant, that agreement was made due to the deceptive conduct of the Defendant, in violation of ss. 14 - 18 of the *Consumer Protection Act*.

25. Such conduct includes, but is not limited to, the following acts or omissions by UPS, either individually or in any combination thereof, which were false, misleading or deceptive representations:

- (a) failing to establish a contractual agreement with consumers;
- (b) failing to secure consumers' consent to act as his or her agent in the role of customs broker;
- (c) failing to disclose the existence of the Brokerage Fee;
- (d) failing to disclose the actual or anticipated amount of the Brokerage Fee;
- (e) failing to provide consumers with the opportunity, or to disclose to them how, to arrange for customs clearance by themselves, by a licensed customs broker, or by a duly authorized agent;
- (f) representing that the Brokerage Fee had previously been agreed to, when it had not;

- (g) representing that the customs clearance service provided by UPS was needed or advisable, when it was not;
- (h) using ambiguity or innuendo to represent that the Brokerage Fee was an fee levied by a governmental authority, when it was not;
- (i) misrepresenting the nature of the Brokerage Fee; and
- (j) representing that the Plaintiffs were obligated to pay the Brokerage Fee when they were not.

26. In addition, UPS's representations were unconscionable as UPS was aware that:

- (a) the Plaintiffs were unable to protect their interests because of ignorance;
- (b) the Brokerage Fee grossly exceeds the price at which similar goods or services are readily available to like consumers;
- (c) the consumer transaction is excessively one-sided in favour of UPS;
- (d) the terms of the consumer transaction are so adverse to the Plaintiffs as to be inequitable; and
- (e) the Plaintiffs were subject to undue pressure to enter the transaction.

27. Each of these representations were made deliberately and it is the policy of UPS to make such representations.

28. Additionally, it is UPS's practice to use its custody and control of the Plaintiffs' goods to ensure that the Plaintiffs would pay the Brokerage Fee.

29. By failing to disclose the material fact that UPS intended to charge the Plaintiffs and the Class Members a Brokerage Fee, the conduct of UPS has had the effect of misleading them by creating the false impression that no such charges will be levied by UPS. The conduct of UPS, therefore, constitutes a deceptive act or practice.

UPS IGNORES THE STATUTORY REQUIREMENTS

30. Again in the alternative, and only to the extent that agreements did exist between each of the Plaintiffs and the Defendant, said agreements did not meet the requirements imposed by the *Consumer Protection Act* and its associated regulations.

31. Each of the agreements between the Plaintiffs and the Defendant:

- (a) were made for the future performance of a service;
- (b) were formed through the use of text-based internet communications; and/or
- (c) were made while the Plaintiffs and the Defendant were not present together.

32. Neither of these agreements were ever delivered in writing to the Plaintiffs. As such, none of the requirements of the *Consumer Protection Act* and its associated regulations were met. In particular, but without limiting the generality of the foregoing, the Plaintiffs plead that they were never provided with, *inter alia*:

- (a) a fair and accurate description of the services to be supplied;
- (b) an itemized list of the prices at which the services are to be supplied to the consumer, including taxes and shipping charges;
- (c) a description of each additional charge that applies or may apply, such as customs duties or brokerage fees, and the amount of the charge; or
- (d) the total amount that the supplier knows is payable by the consumer under the agreement.

33. The Plaintiff states that it is UPS's practice to not provide documentation in the form required by the *Consumer Protection Act*.

UPS CHARGES CRIMINAL INTEREST

34. Part of the Brokerage Fee is the Disbursement Fee. This fee is 2.7% of the monies advanced by UPS to the Plaintiff to cover certain government fees. There is a minimum charge of \$5.85.

35. UPS advanced credit to each of the Plaintiffs for less than one week. The annualized interest charged by UPS far exceeds 60%. It is UPS's practice to charge interest at such a rate.

UPS'S MOTIVES

36. Contrary to representations made by UPS and its employees, the Brokerage Fee was not simply to cover UPS's costs in clearing the Plaintiffs' goods through customs. UPS utilizes the Brokerage Fee, including the interest charged and the Disbursement Fee, in order to artificially lower the apparent costs of its services by hiding profit. The Defendant's predominant purposes were:

- (a) to procure a competitive advantage;
- (b) to enrich itself; and/or
- (c) to penalize consumers who used UPS's less lucrative services and to make up lost profit.

NOTICE

37. Wright gave notice to the Defendant on November 7, 2006.

38. Notice was given on his own behalf and on behalf of all those similarly situated (defined in the notice as "all persons in Canada (save British Columbia) who were charged a Brokerage Fee by UPS").

39. The Plaintiffs plead and rely on s. 101 of the *Consumer Protection Act*.

40. On November 15, 2006 the Defendant acknowledged receipt of the notice letter, and refused to make payment as demanded.

DAMAGES SUFFERED

41. The Defendant has failed to refund the cost of the unsolicited service, as required by s. 13 the *Consumer Protection Act* to Zislin. Zislin was charged approximately \$39.10, plus taxes, as a Brokerage Fee.

42. The Defendant has failed to refund the amount Zislin overpaid due to UPS's false, misleading, deceptive and unconscionable representations, as required by s. 18 of the *Consumer Protection Act*. This amount is equal to the Brokerage Fee.

43. In the alternative, and only to the extent that an agreement is found to exist between either Plaintiff and the Defendant, the Defendant has failed to refund the full cost of the cancelled agreement as required by s. 96 of the *Consumer Protection Act*. The full cost of the agreement includes the Governmental Levies, the shipping charge and the Brokerage Fee. Wright, for example, paid approximately \$65.00 in total.

44. The Plaintiffs plead that, due to the egregious nature of the Defendant's conduct, including, without limiting the generality of the foregoing, misrepresenting a charge as a government levied and official tax charge, using control of Plaintiffs goods to force payment, charging criminal interest and the other unconscionable conduct enumerated above the Class Members are entitled to recover aggravated, punitive and exemplary damages.

45. The Defendant, was, at all material times, aware of the relevant provisions of the *Consumer Protection Act* and the *Code*. Nonetheless, the Defendant engaged in a protracted and extensive course of conduct in intentional disregard of the law. This course of action continued even after the Defendant was on notice of the commencement of this and other actions. UPS's conduct thus offends the moral standards of the community, warrants the condemnation of this Court and renders them liable to pay aggravated, punitive and exemplary damages.

RESTITUTIONARY REMEDIES

46. The Defendant has been unjustly enriched.

47. The Defendant has been enriched via the funds received through, *inter alia*:

- (a) charging interest at exorbitant rates in violation of the *Criminal Code*;
- (b) demanding funds in return for an unsolicited service;
- (c) representing that payment was required, when it was not;

- (d) misrepresenting the purpose of the Brokerage Fee;
- (e) taking advantage of the Plaintiffs' ignorance of the law and the nature of the Brokerage Fee;
- (f) failing to provide the Plaintiffs with written contracts which list, *inter alia*, the cost of brokerage; and
- (g) demanding payment in order to release the Plaintiffs' property

each of which is a violation of the *Consumer Protection Act*.

48. The Plaintiffs and the Class Members are the source of these funds.

49. The Plaintiffs plead that there is no juristic reason for the payments made to the Defendant.

50. The Plaintiffs plead that all such funds are subject to a constructive trust and that the Plaintiff, and persons similarly situated, are entitled to an accounting and disgorgement of such funds.

STATUTES, PLACE OF TRIAL AND JURISDICTION

51. The Plaintiffs pleads and relies upon the *Consumer Protection Act*, the *Code* and the *Class Proceedings Act*.

52. The Plaintiffs proposes that this action be tried at the City of London, Ontario, as a proceeding under the *Class Proceedings Act*.

February 19, 2007

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Court File No:

53299 CP

Plaintiff Defendant

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at London

STATEMENT OF CLAIM

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