

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KAREN ROBSON, Plaintiff

– and –

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

BEFORE: Justice E.M. Morgan

COUNSEL: *Sean Campbell, Anna White, and Martina Bellisario*, for the Plaintiff

Eliot Kolers, Samaneh Hosseini, and Amy Yun, for the Defendants

HEARD: September 25, 2026

MOTION TO BIFURCATE TRIAL and AMEND COMMON ISSUES

[1] The Defendants move to bifurcate the anticipated trial (along with documentary production and pre-trial discoveries) of this certified class action. They propose that the first stage address liability and the second stage, if reached, address damages. They also move to add one new question to the certified common issues.

I. Bifurcating the action

[2] Defendants’ counsel are of the view that bifurcation is a logical way to approach the action since the evidence relating to damages is severable from, and greatly outweighs, the evidence relating to liability. They submit that there is no reason to delay the liability portion of the case waiting for productions and expert evidence relevant to damages only. They further submit that bifurcation in these circumstances falls within the case management judge’s mandate under section 12 of the *Class Proceedings Act*, SO 1992, c. 6 (“CPA”) to engage in “active and strategic case management, and...to focus on the fair and efficient resolution of the issues”: *Amyotrophic Lateral Sclerosis Society of Essex v. Windsor (City)*, 2015 ONCA 572, at para. 67.

[3] Plaintiff’s counsel express the contrary view. They submit that, in the first place, the evidence going to liability and damages is not as easily severable as the Defendants portray it. They pose the issue of punitive damages as one in which the nature of the liability and the quantum of damages are closely connected to each other and in which the same body of evidence will be

relevant to both stages of the action. They further submit that bifurcation will not create efficiency, but rather is a formula that could potentially create significant delay in trying the case.

a) The certification decision

[4] The Plaintiff claims that the Defendants charge hidden or confusing fees on their shipments which then class members – i.e. the Defendants’ retail customers – have neither understood nor agreed to pay. The Amended Statement of Claim alleges breaches of section 13 (unsolicited services) and sections 14 and 15 (unfair practices) of the *Consumer Protection Act, 2002*, S.O. 2002, c.30.

[5] The certified class is defined as follows:

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

Robson v. Federal Express Canada Corp., 2024 ONSC 5002, at para. 39 (“*Certification Motion*”).

[6] The claim seeks compensatory, restitutionary and/or disgorgement damages of \$500 million, along with \$50 million in exemplary or punitive damages. The common issues set out in the Certification Order are:

Unsolicited Services Claim

(1) Did the Defendants breach section 13 of the CPA by providing customs clearance services (the “Services”) for which a clearance entry fee and/or disbursement/advancement fee (the “Service Fees”) were charged? Specifically:

(a) Under section 13 of the CPA, is a service unsolicited when the supplier fails to disclose to the consumer, in advance of providing a service, that the service will be provided and its associated cost?

(b) If yes, did the Defendants fail to disclose to the Class, in advance of providing the Services, that the Services would be provided and the associated costs of those Services?

(c) If yes, and the Services were unsolicited within the meaning of section 13 of the CPA, is a refund under section 13(6) of the CPA the appropriate relief?

(d) If yes, can the unsolicited services relief owed to Class members be calculated in the aggregate and, if so, what amount of aggregate damages should be awarded?

Unfair Practices Claim

(2) In the alternative if the Defendants did not breach section 13 of the CPA, did the Defendants engage in unfair practices under sections 14 and 15 of the CPA, including by describing on the FedEx Invoice (as defined in the Statement of Claim) the Service Fees using ambiguity as to a material fact or failing to state a material fact; misrepresenting the purpose of a charge; making a representation while knowing that the consumer is not reasonably able to protect his or her interests; or on any other grounds?

(a) If yes, what is the appropriate remedy or remedies under section 18 of the CPA?

(b) Can the appropriate remedy or remedies under section 18 of the CPA be calculated in aggregate and, if so, what amount of aggregate damages should be awarded?

Unjust Enrichment

(3) Was the Defendant unjustly enriched at the expense of the Class from charging and collecting the Service Fees?

(a) If yes, what is the appropriate relief?

(b) Can the unjust enrichment relief owed to Class members be calculated in aggregate and, if so, what amount of aggregate damages should be awarded?

Additional Remedies/Issues

(4) If the answer to common issues 1, 2, or 3 is yes, should the Defendants be permanently enjoined from charging and collecting the Service Fees?

(5) Are the Defendants liable to pay exemplary or punitive damages to Class members, and, if so, in what amount(s)?

(6) Is it in the interests of justice to waive any requirements to demand or give notice that a consumer seeks to recover a refund or other remedy under the CPA?

[7] Certification of the action has been affirmed by the Court of Appeal: *Robson v. Federal Express Canada Corporation*, 2025 ONCA 831 (“*Certification Appeal*”). The focus of the certification motion was on the invoices provided by the Defendants to the Plaintiff and class members. Class counsel submitted that the invoices represent a contract with the consumers as purchasers of the goods shipped by the Defendants. The certification decision identified the central liability issues as being that the Defendants’ invoices charge for fees never disclosed or agreed to by customers, that are misleading in that they disguise the Defendants’ customs clearance fees for government levies: *Certification Motion*, at para. 3.

[8] The majority of the common issues focus on those liability issues. Four of the common issues – numbers 1(d), 2(b), 3(b), and 5 – deal with quantification of damages and entitlement to and quantification of punitive damages.

[9] On January 6, 2026, class counsel provided a proposed Discovery Plan to Defendants' counsel. In the Discovery Plan, the Plaintiff seeks wide-ranging and extensive documentary disclosure from the Defendants covering roughly the past decade.

[10] The vast majority of the categories of documents listed by class counsel are only potentially relevant to the quantification of damages or whether exemplary or punitive damages should be awarded. The financial information requested by the Plaintiff is not relevant to the determination of any of the common issues on liability, which focus on whether the certain services provided by the Defendants were unsolicited within the meaning of section 13 of the *Consumer Protection Act*, or in the alternative, whether the Defendants made misleading disclosure about the service fees within the meaning of sections 14 and 15 of that Act.

[11] Defendants' counsel submit that the production requests are not only broad and onerous, but that they require the disclosure of highly confidential financial information that is not necessary at this stage of the proceeding, and that will only be necessary to produce if liability is found at the first stage of the trial.

[12] The operable portion of the Discovery Plan setting out the documentation sought to be produced provides:

1. FedEx Corporation organizational chart, and organizational charts of all relevant subsidiaries
2. Intercompany agreements (Transportation Service Agreements) between consignor/seller and consignee/FedEx, as well as the transportation invoice billed by FedEx to the consignor/seller
3. Intercompany agreements, invoices, and transfer pricing documentation relating to systems, management services, or operational support used in delivering the Unsolicited Services in Canada
4. All documents, policies, meeting minutes, presentations, memoranda, guides, guidelines, correspondence, internal communications related to FedEx's implementation of the Advancement Fee (ADV), Disbursement Fee (DF), and/or Clearance Entry Fee (CEF) (the 'Unsolicited Fees')
5. All documents, policies, meeting minutes, presentations, memoranda, guides, guidelines, correspondence, internal communications related in any way to moving the clearance entry fee from the 'Transportation Invoice' to the 'Duties and Taxes Invoice'
6. All documents, policies, meeting minutes, presentations, memoranda, guides, guidelines, correspondence, internal communications related to FedEx Canada's

customer service training practices in respect of the Unsolicited Fees during the Period

7. All documents, policies, meeting minutes, presentations, memoranda, guides, guidelines, correspondence, internal communications related to one-time credits for Unsolicited Fees during the period

8. Number of customers that have contracted with FedEx to change to or use the Broker Select Service Option (rather than the Broker-Inclusive Service Option)

9. All documents, policies, records, transcripts, recordings, meeting minutes, presentations memoranda, guides, guidelines, correspondence, internal communications related to the Duties and Taxes Invoice, including the number of Duties and Taxes Invoices that were sent/issued to customers during the class period, and the contact information for any customer who received one

10. All documents, policies, records, transcripts, recordings, meeting minutes, presentations memoranda, guides, guidelines, correspondence, internal communications of FedEx Canada's Revenue and Operations Team related to the Unsolicited Fees

11. All documents, policies, records, transcripts, recordings, meeting minutes, presentations memoranda, guides, guidelines, correspondence, scripts, internal communications related to Automated CEF Proactive Notification Calls/Precall Program Precalls

12. Any documents, records, transcripts, recordings, or internal communications related to telephone calls with FedEx customers, including the number of customers who opt in to live Customer Service Calls regarding the Unsolicited Fees

13. All documents, policies, records, transcripts, recordings, meeting minutes, presentations memoranda, guides, guidelines, correspondence, scripts, internal communications related to FedEx's current practice of not disclosing the amount of ground duties/taxes and CEF in the call as the recipient will receive an invoice after delivery, and/or any prior process(es)

14. All documents, policies, records, transcripts, recordings, meeting minutes, presentations memoranda, guides, guidelines, correspondence, internal communications related to the information in the FedEx Service Guide regarding the Unsolicited Fees

15. All documents, policies, records, transcripts, recordings, meeting minutes, presentations memoranda, guides, guidelines, correspondence, internal communications related to the FedEx Pricing Agreement for consignors

16. More particularly, any documents that speak to the cost of those services and/or FedEx's practice of passing on the Ground Service Fees to end-use consumers

17. All documents, policies, records, transcripts, recordings, meeting minutes, presentations memoranda, guides, guidelines, correspondence, internal communications related to FedEx Canada Training Guide

a. More particularly:

i. Decision not to include scenarios in Training Guide for customers asking whether the CEF is a duty or tax

ii. Decision not to include scenarios in Training Guide for customers who want to accept package but do not want to be billed for any or all of the CEF

iii. Decision not to refer to disbursement fee in training guide

iv. Decision not to refer to advancement fee in training guide

18. Records available to the Defendants of all contact information of Canadian individuals who paid any of the Impugned Fees, including name, phone number, email address and mailing address, during the class period

19. Contact information for any person who paid any of the Impugned Fees during the class period

20. Records of any consumer complaint regarding the Unsolicited Fees and/or the Duties and Taxes Invoice to a regulator, and contact information for any such consumer

21. Master records and segmentation fields identifying individuals acting for personal, family or household purposes; residential/B2C indicators; any internal or third-party research used to classify transactions

22. Records of any consumer complaint regarding the Unsolicited Fees and/or the Duties and Taxes Invoice to FedEx Canada, and contact information for any such consumer

a. Records of any consumer inquiries regarding the Duties and Taxes Invoice and/or the Unsolicited Fees

23. Records of the amount of Unsolicited Fees paid by consumers FedEx Canada during the class period

24. Electronic exports for all Class Period transactions with Unsolicited Service Fees, including invoice and waybill identifiers, consignee details, customer type flags, itemised charges (Advancement/Disbursement Fee, Clearance Entry Fee, tax on those fees), duties/taxes on goods, payments received, and all refunds/credits/chargebacks with reasons

25. CBSA and other remittance statements, batch-level remittance files, reconciliations between levies paid and amounts billed to consignees, and related treasury records
26. Records of all profits earned by FedEx related to the Unsolicited Fees during the class period
27. Credit facility agreements, interest rates and calculations, working capital policies, bank statements evidencing advances of duties/taxes and timing of recoveries
28. Contracts, statements of work and invoices for any outsourced brokerage or clearance tasks; volumes and rates
29. GL account lists; period trial balances for relevant fee revenue and cost accounts; bridges from billing subledgers to GL; month-end close checklists and adjustment logs
30. The Defendants' financial statements/accounting records related to the Unsolicited Fees and/or any related practices for the Period.

[13] Defendants' counsel point out that there are some 4.8 million discreet transactions during the class period that need to be analyzed and their documentation vetted. Collecting the accounts, invoices, remittance statements, bank statements, etc. will be a monumental task, to say nothing of the accounting information, cost and profit statements, financing details, and interest calculations contained in this list. They further observe that none of those books, records, and other financial information pertain to the liability issues, all of which centre on the invoice issued to the customer and whether the services described therein were contracted for and comprehensible. The enormity of the production requests, even for a large multinational corporation like the Defendants, is disproportionate to any need to be completed before the liability claim can be pursued.

[14] Defendants' counsel state that in addition to the sheer quantity of documentation entailed in the damages part of the action, the financial data demanded of the Defendants is extremely sensitive in a competitive industry. The Defendants understand that commercial concerns alone do not generally suffice to keep relevant information confidential in litigation; however, their point is that the highly sensitive financial information far outweighs the liability documentation in sheer quantity, and may not have to ever be produced if the Plaintiff is unsuccessful in establishing liability. They contend, with understandable concern, that the quantity-to-value ratio of the damages documentation being sought vs. the liability issues at hand amounts to a substantial tail wagging a slender dog.

[15] Rule 6.1.01(2) of the *Rules of Civil Procedure* provides:

- (2) In determining whether to order a separate hearing, the court shall consider,
 - (a) whether ordering a separate hearing will dispose of some or all of the issues, shorten or simplify the rest of the proceeding or result in a substantial saving of costs;

- (b) whether the issues are clearly severable and can be heard separately without unduly repeating evidence or risking inconsistent findings of fact;
- (c) whether ordering a separate hearing would unduly prejudice or advantage a party, including the impact on any counterclaim, crossclaim or third or subsequent party claim or, in cases where a jury notice has been delivered, on a party's election to have the action heard by a jury;
- (d) the impact of ordering a separate hearing at the applicable stage in the proceeding; and
- (e) any other relevant matter.

[16] Historically, the tendency has been to avoid bifurcating a trial: *Kovach v. Linn*, 2010 ONCA 126, at para 38. Justice Perell accurately stated in *Peter v. Medtronic Inc.*, 2009 CanLII 56744, at para. 15, aff'd 2010 ONSC 3777 (Div. Ct.), that, "The general principle has been that the court's jurisdiction to separate issues should be exercised only in the rarest of cases where this approach is clearly advantageous and fair to both parties." [citations omitted]

[17] That said, it is apparent to me that most, if not all of the factors listed in Rule 6.1.01(2) support bifurcating the present case. As between liability and damages, the evidence is for the most part easily differentiated. The liability part of the trial will, one way or another, dispose of some of the issues; moreover, there is no danger of inconsistent findings, it is not a jury trial, and there are no counterclaims, crossclaims, third party claims, etc. As Justice Perell further pointed out in *Peter v. Medtronic*, at para. 27, there are other considerations to factor into a bifurcation decision as it applies to a class action:

In my opinion, it [bifurcation] is in the best interests of the Class Members and the Defendants to focus their attention and use their resources first to adjudicate the other issues that were certified for a common issues trial. These issues may be determined without precisely quantifying the amount of any disgorgement. Discovery and adjudication of the quantification of Medtronic's revenues and profits will delay the commencement of the trial and prolong what will undoubtedly be a long trial in any event. The postponement of the quantification of the disgorgement should accelerate the timetable for the proceedings. Further, the bifurcation of the issues avoids Medtronic being prejudiced should it turn out that its conduct does not merit any disgorgement of its gains.

[18] Justice Lax reached a similar conclusion in *Yvonne Andersen et al. v. St. Jude Medical, Inc.*, 2010 ONSC 77. In fact, she went a step further by expounding on the place of punitive damages in a bifurcated trial, at para. 35: "...punitive damages inquiry could be bifurcated between a preliminary consideration of the defendants' conduct and entitlement, and a subsequent and final determination of liability for, and quantum of, punitive damages after an assessment of the compensatory damages." To the extent that punitive damages require a conclusion about Defendants' conduct, some liability issues may be relevant to both stages of the action. But since the damages issue comes second the evidence required to make that determination will already be

in the record. There is nothing about punitive damages that stands as a bar to bifurcating the action into liability and damages stages.

[19] In the case at bar, the Plaintiff's opposition to bifurcation is essentially based on the prospect of delay. That, of course, is a legitimate concern. But in the circumstances here, it is not clear that the delay will be any greater with a single discovery process and trial than with a bifurcated one. Documentary production for the liability issues is now complete, and the parties are ready to schedule oral examinations for discovery. Once those are complete, the Plaintiff would be in a position to serve a trial record for the first stage of a bifurcated trial and then proceed to trial.

[20] In the meantime, the Defendants can, and should, be working on collecting the evidence producible for discoveries in the second stage. That may take considerably more time if the Discovery Plan is taken to reflect the Defendants' production obligations, but that lengthy process will have to take place regardless of whether the action is bifurcated. Barring any appeals from the stage 1 trial (which is at the present time unknowable), it may make little difference whether the damages materials are collected sequentially with an earlier liability process or if no oral discoveries and trial on any issues can begin until full documentary production of the damages issues is complete.

[21] In the balance, any prejudice to the Plaintiff resulting from bifurcation is speculative and far smaller than the burden on and prejudice to the Defendants resulting from having to complete full documentary production of the vast quantity of material relevant to the damages issues before having the liability issues at least underway. Bifurcation is the most efficient way to proceed with fairness to both sides in this action.

II. Amending the common issues

[22] In addition to the bifurcation motion, the Defendants have moved to add one additional question to the existing list of common issues:

Does the Ontario *Consumer Protection Act* apply to any matter raised in the statement of claim?

[23] Defendant's counsel state that the reason for the motion is that new information has been brought to light by the Court of Appeal's ruling on certification of this matter. In the course of upholding the certification decision, the Court indicated that my reasons for decision went too far in opining that the relationship between the Defendants and the Plaintiff was an "Ontario legal relationship." The Court stated that it was not necessary to reach a conclusion "on the merits or to assess the record at this step. It was necessary only for him to find that, given the wording of ss. 1 and 2(1) of the *Consumer Protection Act*, the claim as pleaded discloses a reasonable cause of action": *Certification Appeal*, at para. 62.

[24] This, of course, is a valuable lesson. But it is not new information being announced by the Court of Appeal. It is a restatement of what may have been a modern innovation when stated by Lord Abinger two centuries ago in *Becham v. Drake* (1841), 9 M. & W. 79 (Exch.), at 91: "[I]n modern times, it has been the usage of judges, not to go out of their way to decide every point that

arises, but to adjudicate only upon the point necessary to the disposal of the cause.” This is by now a classic notion that motion judges, including me, should continue to heed.

[25] The Court of Appeal’s comment amounts to a statement that what the Defendants seek is a repetition of what already exists: the Plaintiff’s claim on its merits, and the common issues as they stand, raise the very issue that the Defendants now want to redundantly add. Indeed, the first of the certified common issues asks:

Did the Defendants breach section 13 of the CPA by providing customs clearance services (the “Services”) for which a clearance entry fee and/or disbursement/advancement fee (the “Service Fees”) were charged?

[26] The answer to the Defendants’ new question is embedded in the existing question. If the Defendants are found to have breached section 13 of the *Consumer Protection Act*, then there will have been a finding that the Act applies to the situation at hand. And if the Defendants are found not to have breached section 13, then there will have been a finding either that the Act does not apply to the situation at hand or that section 13 was not breached for other reasons that are not relevant to the applicability of the entire Act. In the former case the new common issue is answered without being specifically asked, and in the latter case the new common issue need not be specifically answered and so need not be asked.

[27] The Defendants’ proposed question, in other words, does one of two things: it either adds nothing to the analysis, or it compels the very type of overreaching analysis that the Court of Appeal says is unnecessary. There is therefore no reason to add this proposed new question.

III. Disposition

[28] The Defendants’ bifurcation motion is granted. Common issues 1(d), 2(b), 3(b), and 5 are hereby bifurcated from the remainder of the common issues for the purposes of documentary production, discovery, and the common issues trial.

[29] The Defendants’ motion to amend the common issues by adding a new common issue is dismissed.

[30] The results are mixed. There will be no costs in respect of these motions for or against any party.

Date: October 1, 2026

Morgan J.