

CANADA
PROVINCE OF QUÉBEC
District of Montréal

SUPERIOR COURT

Class Action

No.: 500-06-000895-173

EMANUEL FARIAS,

Plaintiff

vs.

**FEDERAL EXPRESS CANADA
CORPORATION, dba FEDEX EXPRESS**

Defendant

DEFENCE
(Art. 170 C.C.P.)

IN DEFENCE TO PLAINTIFF'S ORIGINATING APPLICATION OF A CLASS ACTION LAWSUIT, THE DEFENDANT FEDERAL EXPRESS CANADA CORPORATION dba FED EX EXPRESS ("FedEx") SUBMITS THE FOLLOWING:

1. The Defendant FedEx denies as drafted the allegations contained in paragraph 1 of the Originating Application of a Class Action Lawsuit (the "**Originating Application**").
2. With respect to the allegations contained in paragraphs 2 and 3 of the Originating Application, the Defendant FedEx refers to the judgement rendered by the Court, denying anything that is not in conformity therewith.
3. With respect to the allegations contained in paragraph 4 of the Originating Application, the Defendant FedEx refers to exhibit P-1, denying anything that is not in conformity therewith.
4. With respect to the allegations contained in paragraph 5 of the Originating Application, the Defendant FedEx refers to exhibit P-2, denying anything that is not in conformity therewith.
5. With respect to the allegations contained in paragraph 6 of the Originating Application, the Defendant FedEx refers to exhibit P-3, denying anything that is not in conformity therewith.

6. With respect to the allegations contained in paragraphs 7 and 8 of the Originating Application, the Defendant FedEx refers to provisions of the *Consumer Protection Act*, denying anything that is not in conformity therewith.
7. With respect to the allegations contained in paragraphs 9 to 11 of the Originating Application, the Defendant FedEx refers to the *Canada-European Union Comprehensive Economic and Trade Agreement*, denying anything that is not in conformity therewith.
8. With respect to the allegations contained in paragraph 12 of the Originating Application, the Defendant FedEx refers to exhibit P-4, denying anything that is not in conformity therewith.
9. The Defendant FedEx denies the allegations contained in paragraph 13 of the Originating Application.
10. With respect to the allegations contained in paragraph 14 a) and 14 b) of the Originating Application, the Defendant FedEx refers to exhibits P-5 and P-6, denying anything that is not in conformity therewith.
11. With respect to the allegations contained in paragraphs 14 c) to 14 f) of the Originating Application, the Defendant FedEx refers to exhibit P-7, denying anything that is not in conformity therewith.
12. The Defendant FedEx denies as drafted the allegations contained in paragraph 15 of the Originating Application.
13. The Defendant FedEx denies the allegations contained in paragraphs 16 to 21 21 of the Originating Application.
14. With respect to the allegations contained in paragraphs 22 to 27 of the Originating Application, the Defendant FedEx refers to provisions of the *Consumer Protection Act*, denying anything that is not in conformity therewith.
15. The Defendant FedEx denies the allegations contained in paragraphs 28 to 40 of the Originating Application.

AND FOR FURTHER PLEA, THE DEFENDANT ADDS:

I. General Information on FedEx

16. FedEx is a corporation duly incorporated pursuant to the laws of Canada, which has operated in Canada since 1987, providing time-guaranteed express package shipping services to businesses and individuals.
17. FedEx has been a licensed customs brokerage in Canada since 1987. This function is performed by the FedEx Global Trade Services (“**GTS**”) group that consists of about 400 employees across Canada. GTS has two primary functions:

(1) acting as a licensed customs brokerage in Canada; and (2) assessing duties and taxes for shipments coming into Canada.

18. The GTS group is closely supported by the FedEx Regulatory group, which monitors regulatory changes, develops quality and compliance processes, and lends customs technical guidance and support to the GTS team and customers.
19. FedEx handles customs clearance for about 20,000 inbound shipments per day.

II. The role of the Canada Border Services Agency and duty charges

20. FedEx acts as the customer's agent, or in lieu of the importer, for performance of customs clearance and all custom duties collected by FedEx are remitted to the Canada Border Services Agency ("**CBSA**").
21. Any errors in the collection of duties are not to the benefit of FedEx as they are remitted to the CBSA.
22. The CBSA administers legislation governing the admissibility of goods into Canada, including the *Customs Act*, R.S.C., 1985, c.1, which ensures the collection of duties, controls the movement of goods into (and out of) Canada, and protects Canadian industry.
23. The CBSA has broad powers, including the following:
 - (a) The right to audit;
 - (b) The right to suspend or cancel a customs broker's licence;
 - (c) The right for compliance verification, as namely appears from the CBSA Memorandum D17-4-0, dated September 23, 2016, communicated herewith as **Exhibit D-1**;
 - (d) The right to administer penalties for non-compliance, as namely appears from an extract of the CBSA website entitled "Administrative Monetary Penalty System", communicated herewith as **Exhibit D-2**.
24. The CBSA dictates the rates and FedEx will assess duties and taxes based on information provided on a shipment air waybill, the commercial invoice and other relevant documents.
25. In the normal course of business, adjustments to duties are routinely required and errors can be caused by a myriad of factors. The Office of the Auditor General of Canada highlighted in its Spring 2017 report that the imported goods were misclassified more than 20% of the time, as appears from the report, attached as **Exhibit D-3**.

26. Adjustments to duties will be rectified by FedEx and the CBSA through established processes, as appears from:
 - (a) an extract of the CBSA website entitled "Disputing duty and taxes", communicated herewith as **Exhibit D-4**;
 - (b) the CBSA memorandum D6-2-6 entitled "Refund of Duties and Taxes on Non-commercial Importations", communicated herewith as **Exhibit D-5**; and
 - (c) the CBSA memorandum D6-2-3 entitled "Refund of duties", communicated herewith as **Exhibit D-6**.
27. The customer has the option to dispute duties or taxes directly with the CBSA, as appears from Exhibits D-4 and D-6 or by contacting FedEx to dispute such fees.
28. When customer disputes are received by FedEx, the FedEx Brokerage Administration Services (BAS) group, will provide service to customers to address their duty and tax disputes and CBSA audits on Canadian imports. The BAS team will assist in determining the reason for the dispute and assist with the CBSA refund procedure.
29. Customers are advised that they can contact FedEx in the event of a dispute, as appears from the invoice issued by FedEx to Mr. Farias, communicated herewith as **Exhibit D-7**.
30. This invoice specifically indicates that "Federal Express has paid duties/taxes and GST to Canada Customs and Revenue Agency on your behalf, Errors and Omissions must be reported in writing immediately upon receipt (...)"
31. It is noteworthy that Mr. Farias was aware of this process, because at least on one occasion in the past, he had contacted FedEx to dispute fees that were invoiced to him related to a shipment. The invoice dated November 3, 2016 for that particular shipment is communicated herewith as **Exhibit D-8**.
32. FedEx's records show that Mr. Farias disputed the duties and taxes charged claiming the shipment qualified as a gift and was therefore exempted from duty fees.
33. While Mr. Farias' dispute was declined on the basis that the shipment did not qualify as a gift, he was nevertheless credited, as a customer satisfaction effort, a \$10 advancement fee, which is a service fee charged by FedEx when it is required to pay certain duties and taxes in advance on the customer's behalf.
34. FedEx's records indicate that the remaining balance of \$61.20 owed by Mr. Farias was never paid to FedEx and remains outstanding.

35. With respect to the shipment which is the object of his personal claim in support of this class action, Mr. Farias opted to file on December 8, 2017 the present class action proceedings against FedEx, only two (2) days following delivery of his shipment on December 6, 2017, instead of initiating a process with FedEx or with the CBSA to dispute the duty fees, as described above.

III. **CETA and applicable Tariff Treatment**

36. The *Customs Act* provides legislative authority to the CBSA to administer and enforce collection of duties and taxes that are imposed under separate taxing legislation including the Customs Tariff, S.C. 1997, c. 36, which includes the preferential tariff treatment under the *Canada-European Union Comprehensive Economic and Trade Agreement* ("**CETA**"), which came into effect on September 21, 2017.
37. A tariff treatment code is assigned to every preferential tariff treatment and the CBSA assigned *CETA* preferential tariff treatment code "31".
38. Generally, the Canada-European Tariff ("**CEUT**") or Tariff Treatment 31 ("**TT31**") will apply to any imported goods where the following conditions are met: (1) the country of manufacture of the goods is one of the *CETA* beneficiary countries; and (2) the country of export (direct to Canada) is one of the *CETA* beneficiary countries.
39. TT31 applies to both commercial goods importation and casual goods importation as distinguished by the *Customs Act*. Commercial goods are any goods imported into Canada for sale or for any commercial, industrial, occupational, institutional or other like use.
40. In addition to the qualifying factors set out above, the importation of commercial goods requires a proof of origin statement that is to be provided in shipment documentation to ensure the shipped goods are entitled to TT31.
41. Casual goods are any goods imported into Canada that are not intended for sale or for any industrial, occupational, commercial, institutional or other like use and do not require a certificate of origin to claim TT31.

IV. **Preparation for CETA at FedEx**

42. Bill C-30 (*An Act to implement the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States and to provide for certain other measures*) received Royal Assent on May 16, 2017.
43. The effective date of the *CETA* legislation was not known until on or around July 8, 2017 when Canada and the EU jointly announced the provisional launch date of September 21, 2017.

44. In May 2017, FedEx assigned a cross-functional team to review available information on *CETA* to identify procedural and system changes that would be required to accommodate the new free trade agreement.
45. Updates were made to the FedEx internal Free Trade Agreement Manual ("**FTAM**"), an internal resource document used by all FedEx Brokers with respect to various preferential tariff treatments such as *CETA*, as appears from the updates communicated herewith as **Exhibit D-9**.
46. Where required, *CETA*-specific customs requirements were clarified by FedEx through the Canadian Society of Customers Brokers, with the CBSA and/or Global Affairs Canada.
47. Internal talking points were distributed to all GTS and Regulatory customer facing FedEx employees, as appears from the document communicated herewith as **Exhibit D-10**.
48. Internal training was provided to the Regulatory Solutions help desk and all GTS Brokers across Canada.
49. *CETA* Information was published publically on the FedEx Canada website to assist FedEx customers, as appears from the website extract, communicated herewith as **Exhibit D-11**.
50. FedEx Brokers use a software application to log shipment and goods information.
51. Auto-rating logic was loaded into this FedEx Broker software application in order to automatically seek out TT31 qualifying criteria in the relevant fields (i.e. the country of manufacture and country of origin) and apply TT31 to a shipment of goods where those qualifying criteria are satisfied.
52. Where auto-rating is not done, then a valid tariff treatment code must be manually inputted by a broker.

V. Internal Reviewing of *CETA* Clearance Processing

53. From September 21, 2017 through to January 31, 2018, just over 100,000 shipments qualifying for TT31 moved through the FedEx system with 92% of those shipments receiving the correct tariff treatment.
54. The FedEx Regulatory team performs regular audits (usually 5 to 8 per year) and in addition, FedEx Brokers are required to audit a certain number of shipments every month.
55. FedEx has a dispute resolution process for customers whereby any billing inquiries or concerns including those related to import duty and/or taxes can be filed for review and corrected where warranted.

56. FedEx invoices (for FedEx account holders) and FedEx receipts (for non-account holders) instruct customers to contact FedEx customer service for this purpose, as appears from the sample FedEx invoice and the sample FedEx receipt communicated herewith as **Exhibit D-12**.
57. Corrections to duties and taxes collected are made in cooperation with CBSA processes and filing requirements, as appears from the CBSA memorandum D6-2-3 entitled "Refund of duties", Exhibit D-6.
58. As a licensed customs brokerage, FedEx routinely works with the CBSA in this manner and is actively involved in a number of trade and compliance programs.
59. In October 2017, FedEx internal audits targeting shipments originating out of the EU and into Canada were completed for the purpose of monitoring the quality of *CETA* clearances since September 21, 2017 and these internal reviews identified the following custom clearance entry issues which impacted about 8% of all *CETA* shipments:
 - (a) entries that were completed prior to Sept 21, 2017 and had TT31 applied in error. The cause was manual error by FedEx brokers;
 - (b) entries where TT31 was applied in error. The cause was an issue with the auto-rating logic used;
 - (c) entries where TT31 was not applied in error. The cause was manual error by FedEx brokers;
60. By the end of November 2017, there were already at least 70 *CETA* related disputes filed by customers under review by FedEx.
61. All customs processing errors are identified and corrected on an ongoing basis in accordance with usual FedEx processes, quality control, and CBSA requirements.

VI. Corrective actions to Overcharging Resulting From *CETA* Processing Errors

62. Upon noticing the above-mentioned issues, which impacted about 8% of all *CETA* shipments, FedEx investigated to make sure all potential impacted shipments could be identified and also identified the corrective actions to be taken.
63. A summary of all shipments where overcharges occurred as a result of TT31 not being applied to qualifying shipments of goods is communicated herewith as **Exhibit D-13**.
64. In total, \$504,197 in duties were collected in error by FedEx for *CETA* qualifying shipments. Of this amount, 60% (\$301,269) were collected on commercial goods shipments and 40% (\$202,928) were collected on casual goods shipments.

65. For all shipments identified in Exhibit D-13, FedEx has either directly refunded eligible customers itself or completed all steps necessary as broker to allow for CBSA to refund all eligible customers based on its own rules and policies.
66. The corrective steps taken by FedEx differed depending on whether the duties FedEx had collected in error had been remitted to the CBSA or not.
67. All of the class members that were impacted by the errors described above have been reimbursed by FedEx or by the CBSA.
68. For those shipments where FedEx had already remitted collected duties to the CBSA, an *Adjustment Request* form or “B2 form” was required to be filed with the CBSA to retrieve the collected and remitted duties from the CBSA as appears from the CBSA memorandum D6-2-3 entitled “Refund of duties”, Exhibit D-6, and from the Canada Customs Adjustment Request (referred to as the “B2 form”), communicated herewith as **Exhibit D-14**.
69. Categorized by the corrective steps taken, the shipments identified in Exhibit D-13 where TT31 was not applied in error, fall into three (3) categories, as appears from the table attached as Exhibit D-13.
70. **Category 1** - casual or commercial goods shipments where duties were collected in error by FedEx but had not yet been remitted to the CBSA. This category of corrections included the shipment of the Plaintiff, Mr. Farias.
71. The following corrective steps were taken by FedEx:
 - (a) Customers were notified of the correction to be made via letter;
 - (b) Credits were issued to FedEx account holders or refunds by cheque were issued to non-account holders, which process was completed by June 29, 2018.
72. **Category 2** - casual goods shipments where duties were collected and remitted to the CBSA.
73. The following corrective steps were taken by FedEx and/or the CBSA:
 - (a) Customers were notified of the correction to be made via letter;
 - (b) As per an agreement made between FedEx and the CBSA, FedEx directly advanced refund amounts where owing to expedite the process;
 - (c) FedEx filed the required B2 forms with the CBSA to retrieve the collected and remitted duties from the CBSA;
 - (d) With customers already refunded, the CBSA agreed to refund the actual remitted duties to FedEx directly;

- (e) The CBSA had advised it would take at least six (6) months before FedEx is reimbursed, these reimbursements however being completed today. In instances where the CBSA decided not to issue a refund to a customer, FedEx suffered a loss as a result of the advanced refund.
- 74. **Category 3** – Commercial goods shipments where duties were collected and remitted to the CBSA.
- 75. The following corrective steps were taken by FedEx and/or the CBSA:
 - (a) Customers were notified of the correction to be made via letter;
 - (b) FedEx filed the required B2 forms with the CBSA;
 - (c) CBSA has issued any refunds directly to the customer in keeping with the usual CBSA process of adjusting and refunding duties.
- 76. As a result of the above-mentioned actions, all eligible class members have already been reimbursed by FedEx directly, or by the CBSA, with the result that none of them sustained a loss.
- 77. The custom clearance entry issues identified by FedEx resulting in the *CETA* processing errors have been rectified preventing any further overcharging. This is confirmed by regular routine quality control audits.

VII. The situation of the Plaintiff, Mr. Farias

- 78. The overcharge of the Plaintiff, Mr. Farias, was corrected with the shipments in Category 1.
- 79. As all other eligible customers in Category 1, Mr. Farias received the letter Exhibit D-7.
- 80. As noted in this letter, Mr. Farias received a full refund amount of \$76.71, via a cheque dated May 11, 2018, which was not yet cashed by Mr. Farias. This amount can be broken-down as follows:
 - (a) An amount of \$66.72 representing the value of the duties incorrectly collected as per *CETA*;
 - (b) An amount of \$9.99 representing the sum of the taxes incorrectly collected as sales tax is calculated on the total amount (duties + value of goods).

VIII. FedEx Charging Of Ancillary Fees

- 81. FedEx may charge ancillary fees, where applicable, relating to customs clearance services provided for international shipments, including shipments imported into Canada. Those fees are not related to the application of the *CETA*.

82. One such ancillary fee is a Reimbursement on Delivery fee ("ROD") which is charged to customers, where duties and taxes are owing, who do not have a FedEx account. If the item is duty-free and tax-exempt, then this fee will not be charged. Again, this fee is unrelated to *CETA*.
83. The Plaintiff, Mr. Farias, did not have a FedEx account and therefore was charged a \$10.00 ROD fee, plus applicable taxes, as an amount of \$61.46 representing the sales tax correctly assessed on the value of goods, was owing.
84. The ROD fee applies to shipments with duties and/or taxes owing where the customer has no FedEx account or has poor payment history.
85. This ROD fee is what is considered to be a processing fee at FedEx.
86. The customers part of the class sought by the Plaintiff are subject to the "2016 FedEx Service guide", which includes the "FedEx Express Terms and conditions", communicated herewith as **Exhibit D-15** or to the "2018 FedEx Service guide", which includes the "FedEx Express Terms and conditions", communicated herewith as **Exhibit D-16**.
87. The fact that FedEx may provide customs clearance services for international shipments and charge related ancillary fees is disclosed in the terms and conditions which govern FedEx shipments.
88. Additional details on ancillary fees are available to customers on the FedEx.ca website, as appears from an extract, communicated herewith as **Exhibit D-17**.
89. All fees invoiced to the customers by FedEx are clearly detailed on the customers' receipts, including any ancillary fees, which (if invoiced) are broken down and listed accordingly.

IX. Arbitration provision

90. Page 36 of the "2016 FedEx Service guide", which includes the "FedEx Express Terms and conditions" and page 40 of the 2018 FedEx Service guide", which includes the "FedEx Express Terms and conditions" in section entitled "Claims, Legal Action and Arbitration" provide for an arbitration provision as follows:

(m) Any claim for damages or other relief arising out of or relating in any way to this FedEx Service Guide, or the services we provided to you, or offered to provide, or the consideration that you paid or agreed to pay to us for such services, or the interpretation or application of these Terms and Conditions, containing a request for monetary or injunctive relief that, if allowed or granted, would have a reasonable value in excess of \$1,000,000 inclusive of all claims asserted by you in conjunction with others or on behalf of others, shall be resolved by arbitration pursuant to the Ontario Arbitration Act, 1991. The arbitrator shall be responsible for determining whether a claim meets the requirements for resolution by arbitration under this provision. We agree to pay all filing and other administrative fees necessary to initiate any such arbitration, subject to the right of the arbitrator to reallocate and

assess such fees against other parties to the arbitration in accordance with the arbitration rules applicable to the proceedings.

91. At this point in time, FedEx has no indication that the value of the claim which could be subject to this arbitration provision, with regards to the non-consumers, may meet the required threshold to be referred to arbitration.
92. Should the value of the claim on behalf of the non-consumers be amended to exceed the required threshold, FedEx reserves all of its rights to refer this claim to arbitration.

X. Conclusion

93. FedEx acted diligently to correct all *CETA* processing errors, which were identified and corrected in accordance with usual FedEx processes, quality control and CBSA requirements and in conformity with the Customs Act and its regulations.
94. The custom clearance entry issues identified by FedEx resulting in the *CETA* processing errors were rectified preventing any further overcharging. This is confirmed by regular routine quality control audits.
95. FedEx took all corrective actions to overcharging resulting from *CETA* processing errors and all qualifying customers have been reimbursed either directly by FedEx or by the CBSA, with the result that the class members have sustained no damages they can validly claim.
96. The actions taken by FedEx were in conformity with the CBSA's policies and with FedEx general business practices.
97. Consequently, and in view of the foregoing, there is absolutely no basis for a claim in punitive damages on a class wide basis against FedEx.
98. The Originating Application is ill-founded in fact and in law.
99. The present Defence is well founded in fact and in law.

FOR THESE REASONS, DEFENDANT PRAYS THIS HONOURABLE COURT TO:

- A. GRANT** the present Defence;
- B. DISMISS** Plaintiff's Originating Application;

C. THE WHOLE with legal costs.

Montréal, May 14, 2021

Borden Ladner Gervais S.E.N.C.R.L., S.R.L.

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CANADA
PROVINCE OF QUÉBEC
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No.: 500-06-000895-173

EMANUEL FARIAS,

Plaintiff

vs.

**FEDERAL EXPRESS CANADA
CORPORATION, dba FEDEX EXPRESS**

Defendant

LIST OF EXHIBITS OF DEFENDANT

- EXHIBIT D-1 :** CBSA Memorandum;
- EXHIBIT D-2 :** extract of the CBSA website entitled “Administrative Monetary Penalty System”;
- EXHIBIT D-3 :** Copy of a report;
- EXHIBIT D-4 :** CBSA website entitled “Disputing duty and taxes”;
- EXHIBIT D-5 :** CBSA memorandum D6-2-6 entitled “Refund of Duties and Taxes on Non-commercial Importations”;
- EXHIBIT D-6 :** CBSA memorandum D6-2-3 entitled “Refund of duties”;
- EXHIBIT D-7 :** Copy of invoice issued by FedEx to Mr. Farias;
- EXHIBIT D-8 :** Copy of invoice dated November 3, 2016;
- EXHIBIT D-9 :** Copy of the updates to the FedEx internal Free Trade Agreement Manual;
- EXHIBIT D-10 :** Email sent on September 20, 2017, entitled « New Free Trade Agreement effective September 21, 2017 »;
- EXHIBIT D-11 :** FedEx Canada website extract;

- EXHIBIT D-12 :** Copy of sample FedEx invoice and the sample FedEx receipt;
- EXHIBIT D-13 :** Summary of shipments;
- EXHIBIT D-14 :** Copy of the Canada Customs Adjustment Request (referred to as the “B2 form”);
- EXHIBIT D-15 :** Copy of the “2016 FedEx Service guide”, which includes the “FedEx Express Terms and conditions”;
- EXHIBIT D-16 :** Copy of the “2018 FedEx Service guide”, which includes the “FedEx Express Terms and condition”;
- EXHIBIT D-17 :** Extract of the FedEx.ca website.

Montréal, May 14, 2021

Borden Ladner Gervais S.E.N.C.R.L., S.R.L.

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Objet: NOTIFICATION/ Emanuel Farias c. Federal Express Canada Corporation / 500-06-000895-173 / Defence and Exhibits D-1 to D-17
Pièces jointes: Exhibits Defence (D-1 to D-17).zip; Defence VF(71862408.3).pdf

**BORDEREAU DE NOTIFICATION
PAR COURRIER ÉLECTRONIQUE
(ARTICLE 134 C.P.C.)**

DATE :

Montréal, le 14 mai 2021

EXPÉDITEUR :

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DISTRICT OF MONTRÉAL
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EMANUEL FARIAS,

Plaintiff

C.

**FEDERAL EXPRESS CANADA
CORPORATION dba FEDEX EXPRESS**

Defendant

DEFENCE
(art. 170 C.C.P.)

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