

NO.  
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**ROBERT MACFARLANE**

PLAINTIFF

AND:

**UNITED PARCEL SERVICE CANADA LTD.**

DEFENDANT

Brought Under the *Class Proceedings Act*

**STATEMENT OF CLAIM**

1. The Plaintiff, Robert Macfarlane, retired, is a resident of British Columbia.
2. The Defendant, United Parcel Service Canada Ltd., an Ontario corporation with its registered head office at #400 – 6285 Northam Drive, Mississauga, Ontario, is registered extraprovincially pursuant to the *Business Corporations Act* in British Columbia under number A0024212 and has its mailing and delivery address in this province at 2900 – 595 Burrard Street, Vancouver, British Columbia.
3. In bringing this action pursuant to the provisions of the *Class Proceedings Act* on behalf the Plaintiff and a putative class of people in British Columbia who were improperly charged a “brokerage fee” by the Defendant, the Plaintiff pleads and relies upon the provisions of the *Class Proceedings Act*, RSBC 1996, c. 50 and the *Business Practices and Consumer Protection Act*, SBC 2004, c.2 (“BPCPA”).

## THE DEFENDANT'S SERVICE

4. The Defendant is in the business of package delivery and supply chain services, and operates in over 200 countries and territories.
5. The range of services offered by the Defendant to British Columbian consumers 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 the United States of America (the "United States") through Canadian customs.
6. 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*.

## ONLINE SHOPPING

7. British Columbians increasingly order goods from websites in the United States whereby an order is placed over the Internet, and the goods are shipped to consumers in British Columbia from the United States (hereinafter "Online Orders").
8. In a large percentage of Online Orders, the Defendant delivers the shipment to the consumer.
9. The cost of an Online Order typically includes:
  - (a) the value of the goods;
  - (b) a shipping and handling fee; and

- (c) charges levied by Canada and British Columbia, including the Social Service Tax, the Goods and Services Tax, excise, and customs duty (collectively hereinafter "Government Levies").

## **BROKERAGE FEE**

- 10. On or about July 25, 2005, the Plaintiff placed an Internet order with Arizona Hearing Online for an amplified telephone device (the "Device"), at a total disclosed cost of \$119.00 USD.
- 11. On July 29, 2005, the Defendant's employee attended the Plaintiff's home to deliver the Device and, as a condition of handing the Device over to him, required that he pay the Defendant's employee Government Levies of \$20.30 that had been paid on his behalf as well as a Brokerage Fee in the amount of \$38.40.
- 12. The said 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 Plaintiff's customs broker agent at the Canadian border, and cleared the shipment through Canadian customs.
- 13. At no time prior to delivery of the Device did the Defendant:
  - (a) contact the Plaintiff by any means;
  - (b) establish any form of contract with the Plaintiff;
  - (c) obtain the Plaintiff's consent to act as his customs broker;
  - (d) disclose to the Plaintiff the existence of the Brokerage Fee;
  - (e) disclose to the Plaintiff the actual or anticipated amount of the Brokerage Fee; or
  - (f) provide the Plaintiff with the opportunity to arrange for customs clearance on his own, whether to be performed by himself, by a licensed customs broker, or by a duly authorized agent.

**BUSINESS PRACTICES AND CONSUMER PROTECTION ACT**

14. The Plaintiff and all putative class members are “consumers” within the meaning of s. 1 of the BPCPA.
15. The Defendant is a “supplier” within the meaning of s. 1 of the BPCPA.

**Unsolicited Service**

16. The Plaintiff and all putative class members at no time requested that the Defendant act as a customs broker on their behalf, nor did they expressly acknowledge in writing or otherwise to the Defendant any intention to accept such service.
17. The Defendant’s customs broker service constitutes an unsolicited service within the meaning of s. 11 of the BPCPA.

**Deceptive Practices**

18. The conduct of the Defendant constitutes a deceptive practice within the meaning of s. 4(1)(b) of the BPCPA.
19. Such conduct includes, but is not limited to the following acts or omissions by the Defendant, either individually or in any combination thereof, which have the capability, tendency or effect of deceiving or misleading consumers by creating the false impression that no charges will be levied by the Defendant for the benefit of the Defendant:
  - (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; and
  - (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.
20. By failing to disclose the material fact that the Defendant intended to charge the Plaintiff and putative class members a Brokerage Fee, the conduct of the Defendant has the effect of misleading them by creating the false impression that no such charges will be levied by the Defendant for the benefit of the Defendant, and the conduct of the Defendant, therefore, constitutes a deceptive act or practice within the meaning of s. 4(3)(b)(vi) of the BPCPA.

### **Unconscionable Practices**

21. Goods may be shipped from the United States to Canada and in each case Canada Post will clear the shipment through Canadian customs for a flat fee of \$5.00
22. The amount of the Defendant's Brokerage Fee charged to the Plaintiff and putative class members grossly exceeds the amount of the fee for which similar subjects of similar consumer transactions are readily obtainable by similar consumers, and therefore constitutes an unconscionable practice within the meaning of s. 8(3)(c) of the BPCPA.
23. The circumstances of the payment of the Brokerage Fee, including, but not limited to, the absence of a contractual agreement, the absence of disclosure of the existence or amount of the Brokerage Fee, the absence of consent for the Defendant to act as a customs broker, and the grossly excessive amount of the Brokerage Fee, results in a transaction so harsh and adverse as to constitute an unconscionable practice within the meaning of s. 8 of the BPCPA.

**Demand for Refund**

24. The Defendant has received and continues to receive payment of Brokerage Fees from the Plaintiff and other putative class members which the Defendant is not entitled to receive and the Plaintiff on his own behalf and on behalf of all other putative class members hereby demands, pursuant to s. 14 of the BPCPA, a refund of all payments made for such unsolicited services.

**Damages Claimed**

25. The Plaintiff, on his own behalf and on behalf of all putative class members, seeks restitution pursuant to s. 171 of the BPCPA of all funds received from them by the Defendant by virtue of its acts, omissions and other practices as described herein.

**Declaration**

26. The Plaintiff and other putative class members, because of the unauthorized acts of the Defendant as aforesaid, have been affected by the requirement to pay unauthorized charges to the Defendant and the Plaintiff, therefore, on his own behalf and on behalf of all other putative class members, seeks a declaration pursuant to s. 172 (1) of the BPCPA that:
- (a) the said conduct of the Defendant is conduct in respect of a consumer transaction which is in contravention of the provisions of the BPCPA; and
  - (b) a permanent injunction restraining the Defendant from contravening the provisions of the BPCPA by continuing the unauthorized actions as aforesaid.
27. The Plaintiff seeks an order pursuant to s. 172 (3) of the BPCPA that the Defendant restore to him and all other putative class members any and all monies which the Defendant has acquired in contravention of the BPCPA.

**UNJUST ENRICHMENT**

28. The Defendant, by its actions as aforesaid, has been and continues to be unjustly enriched at the expense and to the detriment of the Plaintiff and putative class members.
29. The Defendant in these circumstances is a constructive trustee of all amounts accruing to it as a result of the collection and retention of improperly collected Brokerage Fees, all profits accruing to it through and as a result of the Brokerage Fees, and all such amounts must be returned to the Plaintiff and putative class members.

**PUNITIVE, AGGRAVATED AND EXEMPLARY DAMAGES**

30. The acts, omissions and other practices of the Defendant as hereinbefore set out, are variously described as harsh, vindictive, reprehensible, malicious, high-handed, arbitrary, or deserving of condemnation and punishment. The Plaintiff, therefore, seeks, on behalf of himself and putative class members, punitive, aggravated and exemplary damages against the Defendant.

**PRAYER FOR RELIEF**

**WHEREFORE**, the Plaintiff claims on his own behalf and on behalf of members of the putative class as follows:

- (a) a refund pursuant to s. 14 of the BPCPA of all monies paid to and received by the Defendant for unsolicited services aforesaid;
- (b) damages suffered or losses incurred due to a contravention of the provisions of the BPCPA pursuant to the provisions of s. 171 of the BPCPA;

- (c) a declaration that the actions of the Defendant as aforesaid are actions by a supplier in respect of a consumer transaction in contravention of the provisions of s. 172 (1) (a) of the BPCPA;
- (d) a permanent injunction restraining the Defendant from continuing the actions taken by them as aforesaid in contravention of the BPCPA, pursuant to s. 172 (1) (b) of the BPCPA;
- (e) an order that the Defendant restore to the Plaintiff and other putative class members all monies acquired by it as a result of its actions as aforesaid in contravention of the provisions of the BPCPA, pursuant to s. 172 (3) (a) of the BPCPA;
- (f) a declaration that the Defendant is a trustee of all monies received as aforesaid from the Plaintiff and putative class members and an order directing the return of those funds;
- (g) punitive, aggravated and exemplary damages;
- (h) costs pursuant to s.37(2) of the *Class Proceedings Act*;
- (i) interest pursuant to the *Court Order Interest Act*, and
- (j) such further and other relief as to this Honourable Court may seem just.

**PLACE OF TRIAL: VANCOUVER, BRITISH COLUMBIA.**

**DATED** at the City of North Vancouver, in the Province of British Columbia, this \_\_\_ day of October, 2006.

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James M. Poyner  
Solicitor for the Plaintiff

**THIS STATEMENT OF CLAIM** is filed by **JAMES M. POYNER**, of the law firm of **POYNER BAXTER LLP**, Barristers & Solicitors, whose place of business and address for delivery is: Lonsdale Quay Plaza, #408 – 145 Chadwick Court, North Vancouver, B.C. V7M 3K1 – Telephone: 604-988-6321 – Fax: 604-988-3632.