

SMALL CLAIMS COURT OF NOVA SCOTIA
Cite: McKendrick v. FedEx, 2017 NSSM 46

SCCH No.465804

BETWEEN:

Chelsea McKendrick

Claimant

– and –

FedEx

Defendant

Adjudicator: Augustus Richardson, QC

Heard: September 5, 2017

Decision: September 14, 2017

Appearances: Michael Rhodes, operations manager, for the defendant

DECISION

[1] Can a national courier company advertise, name and charge for a delivery service called “Priority Overnight,” and then bury in small print somewhere on its web site the advice that delivery will actually take two days rather than one? And can it limit its liability to a shipper and a receiver who have relied on the company’s representation that the delivery service is “overnight” to only \$100.00? On the facts before me the answer must be ‘no.’

[2] I heard the testimony and submissions of the claimant on her own behalf. I heard the testimony and submissions of Mr Michael Rhodes, an operations manager for FedEx, on its behalf.

[3] The claimant Chelsea McKendrick (nee Smith) operates Owls Ridge Farm at 47 Conrod Road in Seaforth, Nova Scotia. In the spring of 2016 she had a mare that she wished to breed. She ordered horse sperm from a stallion owned by Dreamscape Farm (“Dreamscape”) in Langley, British Columbia. Dreamscape is one of the leading suppliers in Canada of horse semen, drawn from its stable of stallions.

[4] Horse sperm is motile for only a very short time. It must be kept cold and used within roughly 24 hours of production. Timing is further complicated by the fact that mares, once they have ovulated, have a similarly short window of fertility. Matching the two takes careful and precise timing.

[5] The claimant placed an order with Dreamscape. Ms Jennifer Arnoldt, a principal with Dreamscape, delivered the product on ice to FedEx in Langley, B.C. on May 2nd, 2016. She chose and paid for FedEx's "Priority Overnight" delivery service. Her expectation—and that of the claimant—was that the product would be delivered the next day, May 3rd. The claimant believed this to be the case because Ms Arnoldt called her on May 2nd to tell her that she had entrusted the product to FedEx's "Priority Overnight" service and that she should expect delivery to Dartmouth, Nova Scotia the next day.

[6] In reliance upon this advice the claimant had her mare injected with hormones to trigger ovulation. She incurred the cost of a veterinarian as well as for the hormone injections. She also began to call FedEx's delivery tracking service so as to be ready to pick up the package as soon as it was delivered to the Dartmouth facility on May 3rd. But delivery on May 3rd did not happen. The claimant made a number of increasingly desperate calls to FedEx's customer service line, only to be advised eventually that the package was in Mississauga, Ontario on May 3rd, and that it would not arrive in Dartmouth until May 4th. It was delivered on that date. It was used, but failed to impregnate the mare. The claimant's testimony was that the mare, having ovulated, would almost certainly have become pregnant had it been inseminated on May 3rd. But by May 4th the sperm had lost its potency, and the mare's fertility had also decreased.

[7] The package of horse sperm destined for the claimant was not the only one sent out by Dreamscape to the Maritimes on May 2nd. The claimant testified that she had been told by Ms Arnoldt that two others had been sent on the same day, to Moncton. Neither arrived on May 3rd. The claimant further testified that she was advised that Dreamscape no longer uses FedEx, and instead uses regular airline flights so as to ensure overnight delivery of its product. The claimant offered this testimony to support her argument that FedEx had misrepresented its service. Dreamscape was a well-respected supplier of quality stallion sperm, and it would not have knowingly shipped its product by a service it knew would not be 'overnight.'

[8] Mr Rhodes testified that at some point in the past FedEx's "Overnight Priority" service might in fact have been overnight, at least when its service area was smaller. However, since November 2015 FedEx's west to east coast overnight service had changed to two days, rather than one day overnight. He testified that FedEx's web site had a page called "Get Rates &

Transit Times” where a shipper (like Ms Arnoldt) could input the respective postal codes for the shipping and receiving sites. Had she done so she would have seen that a package delivered to FedEx’s Langley site on May 2nd would not arrive in Dartmouth until May 4th.

[9] Mr Rhodes argued that FedEx’s contract (and liability, if any) was with Dreamscape (or Ms Arnoldt) and not Ms McKendrick. She was not a party to the contract and so could not complain. Even if she could, Mr Rhodes argued that she should be bound by the limitation of liability clause printed on the shipping waybill. The wording of the limitation, which is buried in a very large block of terms and conditions printed in a very tiny font, is as follows: “LIMITATION OF LIABILITY: If not governed by Federal or Provincial laws, regulations, orders, or requirements as described above, FedEx’s maximum liability for damage, loss, delay, shortage, mis-delivery, nondelivery, misinformation or failure to provide information in connection with your shipment, even if caused by our negligence or gross negligence, is limited by this Agreement to the amount of actual damage or CDN \$100 per shipment, whichever is less, unless you declare in advance a higher value for carriage as described below, and pay any applicable supplementary charge.” The clause goes on at greater length to the apparent effect that even when a higher value is declared FedEx’s liability will not exceed CDN \$500.00.

[10] I was not persuaded by the evidence or submissions of FedEx for a number of reasons.

[11] First, Ms McKendrick’s claim sounds in both contract and negligence. She was not a contracting party with FedEx. She was, however, the receiver. As such she was someone within the scope of FedEx’s duty of care. FedEx can be expected to have known that the receiver of a “Priority Overnight” package was relying on the package arriving the day after it was shipped.

[12] Second, Ms McKendrick as receiver, and Ms Arnoldt as shipper, relied upon FedEx’s representation. It was a representation made express in the very name of its service. Delivery would be “Priority Overnight.” Ms McKendrick’s reliance was reasonable given the name and nature of the service being provided. It was a reliance that FedEx obviously knew would exist—otherwise why offer such a service using such a name?

[13] I note too that the FedEx web site page dealing with the Priority Overnight service contains the following representations: “We’ve got you covered with overnight delivery in Canada” and “Delivery times: Door-to-door, next-business-day, morning delivery to most metropolitan areas.” There is a footnote to that second statement: “Some restrictions apply. See the Terms and Conditions for more information.” Clicking on “Terms and Conditions” takes one

to a page called “Service Guides.” There is nothing on that page that references two- rather than one-day service.

[14] Similarly, there is a page called “Canada Covered.” It lists intra-Canada shipping services “at a glance.” The page contains the following: “Your Shipping Need (Delivery by)” and then says this: “Morning, next business day to most metropolitan areas - 2 to 3 business days to other areas” and the response: “Our Solution – FedEx Priority Overnight.” There is a similar footnote, clicking on which takes one to “Service Guides” page which, as already noted, says nothing about two rather than one day service. (I attach copies of these pages to these reasons.)

[15] It strikes me then as unlikely that Ms Arnoldt would or indeed could have known that the “Priority Overnight” service she was purchasing—and that Ms McKendrick as receiver was relying upon—was in fact a two day service. She was shipping from and to a metropolitan area, not some “other area.” I accept Ms McKendrick’s argument that the nature of Dreamscape’s business and reputation was such that it would not have knowingly used a service that took two days rather than one. I note too that three of the FedEx web pages dealing with Priority Overnight service (as discussed already) say nothing about the service actually being two days under circumstances. The fact that there is another page on the FedEx web site that might alert a shipper (if he or she input various data) to the fact that delivery from the west to the east coast would take more than a day was not in my view effective to negate such reliance. I do not think that the supplier of a service can negate an express representation contained in the very name of the service it offers by burying a caveat to that representation somewhere on its web site.

[16] On these facts I was satisfied that FedEx had misrepresented the nature of the service it was offering, and that it was liable to Ms McKendrick for that misrepresentation.

[17] But should Ms McKendrick be bound by the limitation of liability contained in FedEx’s way bill? I was not persuaded that it should be.

[18] First, it is not clear to me that the contracting party—Ms Arnoldt—could herself have been bound by the limitation. There was no evidence that it was brought to her attention. It is effectively hidden in a large block of very small type. And FedEx’s fault was not so much one of “loss, delay, shortage, misdelivery, nondelivery, misinformation or failure to provide information” as it was one of misrepresentation. Its position would have been much stronger had it simply called its service “Priority” and then advised the shipper to ask how long it would take to deliver the package. But if Ms Arnoldt could not be bound by that contractual limitation, then

neither could Ms McKendrick. Second, and in any event, Ms McKendrick was not a party to the contract. She cannot thus be bound by its terms.

[19] For these reasons and on these facts I have concluded that FedEx is liable to Ms McKendrick in damages. Those damages include the costs thrown away because the sperm did not arrive in time. They do not include the cost of the attempt to impregnate the mare a second time. The cost of impregnating the mare would have been the normal and natural outcome of the sperm arriving on time. What can be claimed are the costs thrown away. These are the following:

a	Vet charges to ready the mare	\$297.84
b	Vet charges re first impregnation.	\$342.52.
c	Costs.	\$100.00
d	Total.	\$740.36

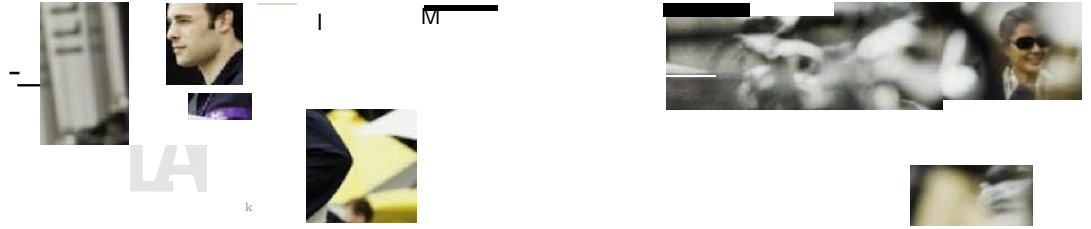
[20] I will make an order to that effect.

DATED at Halifax, Nova Scotia
this 14th day of September, 2017

Augustus Richardson, QC
Adjudicator

Intra-Canada Shipping Services

FedEx Priority Overnight®



Intra-Canada Shipping Services

Shipping Services at a Glance

- FedEx Next Flight
- FedEx First Overnight
- FedEx Priority Overnight
- FedEx Standard Overnight
- FedEx 2Day
- FedEx Economy
- FedEx Ground

Additional Service Options

Rates and Transit Times

Packaging Basics

Returns Solutions

FedEx Services Tools & Home

Shipping and Delivery Services FedEx Priority Overnight®

We've got you covered with overnight delivery in Canada.

Service Details

Delivery Times	Door-to-door, next-business-day, morning delivery to most metropolitan areas.*
Service Days	Monday to Friday. Saturday Service is also available.
Delivery Area	Available to all provinces and territories across Canada.*
Package Size and Weight	<ul style="list-style-type: none"> Up to 150 lbs. (68 kg) each (unlimited total shipment weight). Up to 108" (274 cm) in length, or 130" (330 cm) in length and girth combined (L+2W+2H).

Additional Information

- Supported by the FedEx Money-Back Guarantee.*
- View Terms and Conditions.
- Learn how to ship online using FedEx Ship Manager MT at fedex.ca.
- Use the 'Get Rates and Transit Times' tool to obtain a rate quote and determine the expected delivery date and time for your shipment.*

Value-Added Service Options

- FedEx® Delivery Signature Options
- Saturday Service
- FedEx Global Returns
- Dangerous Goods
- Hold at FedEx Location

FedEx Network

FedEx Express

* Some restrictions apply. See the Terms and Conditions for more information.



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Service Guides



Service Guides

- [FedEx Express Rate Guide 2017](#)
- [FedEx Ground Rate Guide 2017](#)
- [2016 FedEx Express and FedEx Ground Service Guide \(PDF\)](#)
- [FedEx International Premium and FedEx International Express Freight Terms & Conditions](#)
- [FedEx Freight 100 Rules Tariff \(PDF\)](#)
- [Service Guide Amendments](#)
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Service Guides

Our Service Guides provide you with detailed information about FedEx® shipping services, including Terms and Conditions and FedEx Express® and FedEx Ground® rates.

Standard List Rate Guides

- [FedEx Express Rates 2017 \(PDF\) – Effective January 2, 2017](#)
- [FedEx Ground Rates 2017 \(PDF\) – Effective January 2, 2017](#)

Remote Surcharge Information

- [FedEx Express Extended Service Area Surcharges \(PDF\)](#)
FedEx Express intra-Canada and international shipments delivered to or picked up from remote and less-accessible locations are assessed an out-of-delivery or out-of-pickup-area surcharge. A list of postal codes where this surcharge applies is available [here](#).
- [FedEx Ground Remote Rural Surcharges \(PDF\)](#)
FedEx Ground packages delivered to rural locations are assessed a remote rural surcharge. A list of postal codes where this surcharge applies is available [here](#).

Service Guides

- [2016 FedEx Express & FedEx Ground Service Guide \(PDF\)](#)
- [FedEx International Premium MT and FedEx® International Express Freight Terms & Conditions](#)
- [FedEx Freight 100 Rules Tariff \(PDF\)](#)

Rate Guide Amendments

- [FedEx Express Rate Guide](#)
- [FedEx Ground Rate Guide](#)

Service Guide Amendments

- [FedEx International Premium MT and FedEx® International Express Freight Terms and Conditions](#)
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Shipping Services at a Glance



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- FedEx Priority Overnight
- FedEx Standard Overnight
- FedEx 2Day
- FedEx Economy
- FedEx Ground

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Rates and Transit Times

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Returns Solutions

FedEx Services Tools & Home

Intra-Canada Shipping Services at a Glance

If you're shipping within Canada, FedEx® has you covered. **Time sensitive?** We can do that. **Budget conscious?** We can help.

Intra-Canada Services*

Your Shipping Need (Delivery by)	Our Solution
<ul style="list-style-type: none"> • Within hours (depending on availability) 	FedEx Next Flight ® **
<ul style="list-style-type: none"> • 10 a.m. next business day to most metropolitan areas 	FedEx First Overnight®
<ul style="list-style-type: none"> • Morning, next business day to most metropolitan areas - 2 to 3 business days to other areas 	FedEx Priority Overnight®
<ul style="list-style-type: none"> • 5 p.m. next business day to businesses and by 8 p.m. to residences in most metropolitan areas 	FedEx Standard Overnight™
<ul style="list-style-type: none"> • 5 p.m. in 1 to 2 business days to businesses and by 8 p.m. to residences in most metropolitan areas 	FedEx 2Day®
<ul style="list-style-type: none"> • 5 p.m. in 1 to 3 business days to businesses and by 8 p.m. to residences in most metropolitan areas 	FedEx Economy®
<ul style="list-style-type: none"> • 1 to 7 business days 	FedEx Ground®

FedEx Express® Freight Services*

Your Shipping Need (Delivery by)	Our Solution
<ul style="list-style-type: none"> • 5 p.m. next business day to most locations 	FedEx 1Day® Freight

FedEx Freight® (LTL) Services †

Your Shipping Need	Our Solution
<ul style="list-style-type: none"> • Time-sensitive delivery 	FedEx Freight Priority‡

* Some restrictions apply. See the Terms and Conditions in the FedEx Service Guide at fedex.ca for details.

** FedEx Next Flight packages can weigh up to a 2,200 lbs. (997 kg).

† Transit times vary based on both the origin and destination.

‡ Subject to the terms and conditions of the FXP (100) Series Tariff.

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