

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

LEE VALLEY TOOLS LTD.

Plaintiff

- and -

CANADA POST CORPORATION

Defendant

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT*, 1992

STATEMENT OF DEFENCE

1. The defendant ("Canada Post") admits the allegations contained in paragraphs 2 and 3, the first sentence of paragraph 5 and paragraphs 7 (except the last sentence), 8 (insofar as the information that it sets out is paraphrased from Canada Post's 1998 Distribution Services Customer Guide), 11 (except the second sentence), 12, 14 (only with respect to the date of the cited letter), 15 (except the first sentence), 18 and 27 of the statement of claim.

2. Canada Post denies the allegations contained in paragraphs 1 and 4, the second sentence of paragraph 5, paragraph 6, the last sentence of paragraph 7, paragraph 9, the last sentence of paragraph 10, the second sentence of paragraph 11, paragraph 13, paragraph 14 (with respect to the described content of the cited letter), the first sentence of paragraph 15 and paragraphs 16, 17, 19, 20, 21, 22, 23, 24 and 26 of the statement of claim. Canada Post also denies that the plaintiff is entitled to any of the relief claimed in paragraph 1 of the statement of claim.

3. Canada Post has no knowledge in respect of the allegations contained in the first sentence of paragraph 10 and paragraph 25 of the statement of claim.

4. Contrary to Lee Valley's allegations, Canada Post's methods for determining shipping charges are entirely consistent both with the *Weights and Measures Act*, and with the terms of

Canada Post's agreements with its customers, including its agreement with Lee Valley.

The parties and their relationship

5. Canada Post is a Crown corporation incorporated under the *Canada Post Corporation Act*, R.S.C. 1985, c. C-10, and is an agent of Her Majesty the Queen in right of Canada. It has the capacity, rights, powers and privileges of a natural person.

6. While Canada Post has by statute the exclusive privilege of collecting, transmitting and delivering letters, it has no exclusive privilege with respect to parcels. No one is required to transmit goods by post, and Canada Post competes with many other parcel shipping services. Similarly, while Canada Post has entered into contractual relationships with customers for parcel shipping services, no one is required to enter into contracts with Canada Post. These contractual relationships are entirely voluntary.

7. Lee Valley is an Ontario corporation, carrying on business as what it describes as a designer, manufacturer and seller of wood working and gardening tools, hardware and accessories. Lee Valley sells its merchandise through a mail order catalogue, as well as through stores located across Canada.

8. Since approximately June 1990, Lee Valley has used the services of Canada Post to ship parcels containing its merchandise to Lee Valley's customers across the country. At various times during this period, the parties have entered into agreements for terms of at least one year governing Canada Post's parcel shipping services to Lee Valley. The relationship between the parties is currently governed by an agreement of this kind.

9. As do all of Canada Post's agreements with its customers, Canada Post's agreement with Lee Valley incorporates the terms of Canada Post's Customer Guide. The most recent edition of the Customer Guide is the January 15, 2007 edition, as modified by amendments posted from time to time on Canada Post's website. Section 1.1 of the current Customer Guide provides:

This Customer Guide forms part of the Agreement between the Customer and Canada Post for such [parcel] services. It explains the qualifications and other Terms and Conditions under which these [parcel] services are provided.

Previous versions of Canada Post's Customer Guide, including the January 17, 2005 edition referred to at paragraph 18 of Lee Valley's statement of claim, included a comparable provision.

10. Lee Valley's claim relates to the terms and conditions in the Customer Guide that permit Canada Post to set shipping charges on the basis of the greater of the actual weight and the volumetric weight of a parcel, and that set out the method by which the volumetric weight of a parcel is determined. These provisions are referred to in this statement of defence as the "cubing provisions," and the process by which the volumetric weight of a parcel is determined is referred to as "cubing."

The Weights and Measures Act

11. Section 3 of the Act provides for the Minister of Industry to approve, in accordance with the regulations, devices or classes, types or designs of devices for use in trade. "Device" is defined to mean:

any weight, weighing machine, static measure or measuring machine and includes any equipment and accessories attached to or used in conjunction with the device that have or can have an effect on the accuracy of the device.

Section 8 of the Act prohibits the use in trade of any device unless it has been approved for use in trade pursuant to section 3 of the Act, and has been inspected by an inspector who has certified that the device meets the requirement of the Act and its regulations.

12. Section 4(1) of the Act provides that all units of measurement used in Canada shall be determined on the basis of the International System of Units established by the General Conference of Weights and Measures. Section 4(2) states that the basic units of measurement for use in Canada are as set out and defined in Part I of Schedule I of the Act. The basic units include the kilogram and the metre.

13. Section 4(4) of the Act provides that the prefixes for multiples and submultiples of the units of measurement referred to in section 4(2) are as set out and defined in Part V of Schedule I. The prefixes set out and defined in Part V of Schedule I include "centi," defined as 10^{-2} .

14. Section 7 of the Act prohibits the use in trade of a unit of measurement unless that unit is set out and defined in Schedule I (which sets out units based on the International System of Units) or Schedule II (which sets out certain Canadian units of measurement), or the use of that unit is authorized in the regulations.

15. Section 34 of the Act deals with "short service" and applies to a "person who provides a service on the basis of any unit of measurement or the use of a facility on the basis of a unit of measurement of time." The section is engaged only if there is a deficiency in "the amount of service that that person provides or the time for which that person provides the use of the facility."

16. While the current version of the Act creates certain offences, it does not grant civil remedies.

Canada Post's shipping charges

17. The method by which Canada Post weighs and measures parcels for the purpose of determining shipping charges is set out both in the statement of claim and in Canada Post's Customer Guide, on which Lee Valley relies in the statement of claim. As described above at paragraph 9, the Customer Guide forms part of the terms and conditions of Canada Post's agreements with its customers, including its current agreement with Lee Valley.

18. In accordance with the terms of the Customer Guide, Canada Post sets the charges for parcel shipping services on the basis of the actual weight of a parcel and the volumetric weight of a parcel. Both volumetric weight and actual weight are expressed in kilograms.

19. Consistent with the cubing provisions of the Customer Guide, the volumetric weight of a parcel is derived by multiplying the length of a parcel by its width and height to obtain its volume, expressed in cubic centimetres. That figure is then divided by a standard "cubing factor" (formerly referred to as the "constant minimum density factor") of 4,000 for Purolator International shipments and 6,000 for all other services. The cubing factor of 6,000 reflects the expectation that a package weighing one kilogram will ordinarily occupy a space of 6,000 cubic centimetres, and adjusts for situations in which the density of the package is greater than this norm. This calculation yields the volumetric weight of the parcel, expressed in

kilograms. Shipping charges for the parcel are then based on the greater of the parcel's actual weight and its volumetric weight.

20. Determining shipping charges on the basis of the greater of actual and volumetric weight is intended to ensure that the shipping charge for a lightweight, bulky item adequately covers the cost of transportation, taking into account the space it occupies. For heavier, denser items, weight is the primary concern for the shipping company, but for lighter, less dense items, volume is the primary concern. For example, when the parcel is a box of feather pillows, the weight of the parcel is almost inconsequential, but the volume or space that it takes up in the vehicle in which it is transported is not. In contrast, when the parcel is a carton of books, the weight of the parcel is the primary cost consideration.

21. In February 2003, Canada Post installed new equipment at many of its main processing plants that automated the cubing process described above, without changing the underlying nature of that process. This parcel processing equipment is used to determine the volumetric weight of some parcels submitted to Canada Post for shipping. However, this occurs only at the plants where the equipment has been placed, and even there, only on an audit basis.

22. The cubing process described in the Customer Guide – basing charges for shipping services on a unit of weight (the kilogram), and then adding what is in essence a density surcharge – is a common practice in the transportation industry.

Shipping charges to Lee Valley

23. Since January 1, 2000, there have been several different parcel shipping agreements between Canada Post and Lee Valley, with varying provisions for charges for bulky but lightweight items:

- an agreement applicable from November 1999 to November 2000, under which cubing charges were waived;
- an agreement applicable from November 2000 to January 2001, under which cubing charges were waived;

- an agreement applicable from February 2001 to January 2004 (and ultimately extended to June 2004), under which cubing charges were phased in over a three year period, and became fully payable only in February 2003; and
- an agreement applicable from June 2004 to the present, under which cubing charges are fully payable.

24. All of Canada Post's agreements with Lee Valley, including the current agreement, have afforded Lee Valley more favourable shipping rates than would apply if Lee Valley paid ordinary retail rates.

Customer error practices and standard sized boxes

25. The Customer Guide requires that, when submitting a parcel to Canada Post for shipping and for the purpose of determining the shipping charge that will be imposed, customers must indicate the actual weight of the parcel or the volumetric weight of the parcel, whichever the customer determines to be greater. Since 2002, the Customer Guide has also made clear that Canada Post reserves the right to reweigh or cube any item it receives for shipping and to adjust customers' invoices as applicable where Canada Post detects that an item's declared weight is different from the actual weight or volumetric weight. Canada Post does not reweigh or cube all items submitted to it for shipping. It reweighs or cubes on an audit basis only.

26. The Customer Guides after 2005 stated that Canada Post would not correct dimensions or weight that customers had overstated. However, Canada Post changed this practice effective January 15, 2007. Credit adjustments are now applied when parcels that have been scanned by Canada Post's parcel processing equipment are found to weigh less than the weight declared on the customer order documentation. Since Canada Post only uses its parcel processing equipment in some plants and on an audit basis, as described above, adjustments in either direction are only made when the equipment is used and customer errors are detected.

Cubing does not contravene the Act

27. Contrary to Lee Valley's allegations, the cubing process as applied by Canada Post does not violate sections 4 or 7 of the Act; nor does it violate any other part of the Act or the

regulations. The Act specifically allows for use in trade of kilograms and centimetres as units of measurement. Canada Post measures parcels using these units and expresses the weight of parcels in kilograms.

28. Nothing in the Act prohibits Canada Post's use of the cubing formula as a basis for determining volumetric weight, or its expression of that value in kilograms. Canada Post's use of "volumetric weight" as a basis for determining shipping charges, as described by Lee Valley in its statement of claim, is merely a method for taking both weight and dimension of parcels into account when setting these charges.

29. While the Act sets out the required units of weight and measure for use in trade, it does not specify how companies must use these units of weight and measure in setting fees for services. Nor does it dictate what unit of measurement a shipper must use as the basis for invoicing its customers.

Customer error practices and standard sized boxes do not contravene the Act

30. Contrary to the allegations in paragraphs 9 and 10 of the statement of claim, Canada Post does not require its customers to use standard size boxes. There is therefore no practice of this kind that could contravene the Act.

31. Contrary to the allegations in paragraphs 13, 23 and 24(iv) of the statement of claim, Canada Post's practices in respect of customer error do not contravene the Act. Nothing in the Act prohibits Canada Post's practices in respect of customer error.

Canada Post's equipment is approved in accordance with the Act

32. Contrary to the allegation in paragraph 19 of the statement of claim, the equipment that Canada Post uses to weigh and measure parcels for the purpose of determining shipping charges has been certified by Measurement Canada, the branch of the Department of Industry Canada charged with administering the Act. Where Canada Post opts to reweigh or cube items submitted to it for shipping as set out in its Customer Guide, it does so using government-approved equipment. The approval process in respect of Canada Post's equipment included the inspections required by section 8 of the Act.

Canada Post is not "short servicing" Lee Valley

33. Though the statement of claim does not specifically refer to section 34 of the Act, it appears that Lee Valley is alleging that Canada Post is contravening section 34 in providing services to Lee Valley. As described above, section 34, which deals with "short service," applies only to a "person who provides a service on the basis of any unit of measurement or the use of a facility on the basis of a unit of measurement of time," and is engaged only if there is a deficiency in "the amount of service that that person provides or the time for which that person provides the use of the facility."

34. Canada Post does not "[provide] ... the use of a facility on the basis of a unit of measurement of time." It also does not "[provide] a service on the basis of a unit of measurement." Even if Canada Post were providing a "service" of the type contemplated by section 34, the "amount" of service is in no way deficient. The service that Canada Post provides is to ship goods from point A to point B. The "amount" of that service is the same whatever the sum charged for it.

No entitlement to restitution

35. Even if Canada Post's methods for calculating shipping charges under its agreements with Lee Valley contravene the Act, which Canada Post denies, Lee Valley is not entitled to restitution.

36. These agreements have conferred on Lee Valley the benefit of substantially lower rates than it would otherwise have paid. If these agreements are found to be unenforceable, Lee Valley should be obliged to pay Canada Post for the value of the shipping services that it has received, based on ordinarily applicable rates.

No entitlement to aggravated or punitive damages

37. Canada Post expressly denies Lee Valley's allegations in paragraph 26 of the statement of claim that Canada Post has been reckless in knowingly engaging in shipping practices that contravene the Act. As set out above, Canada Post's shipping practices are consistent with industry practice.

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38. Aggravated damages are awarded for harm caused to a plaintiff's feelings. As a corporation, Lee Valley is not entitled to aggravated damages even if they might otherwise be payable.

39. There is also no basis in fact or in law for Lee Valley's claim of exemplary and punitive damages.

Dismissal with costs

40. Canada Post therefore requests that this action be dismissed against it with costs. Because Lee Valley has made unsubstantiated allegations of recklessness against Canada Post, Lee Valley should be required to pay costs on a substantial indemnity basis.

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LEE VALLEY TOOLS LTD. Plaintiff and Defendant
CANADA POST CORPORATION

Court File No: 06-CV-320840 CP

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Proceeding commenced at Toronto

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STATEMENT OF DEFENCE

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