CITATION: Rebuck v. Ford Motor Company, 2022 ONSC 2396
COURT FILE: CV-16-544545-CP
DATE: 20220615

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

BARRY REBUCK

Plaintiff

- and -

FORD MOTOR COMPANY and FORD MOTOR COMPANY OF CANADA, LIMITED and YONGE-STEELES FORD LINCOLN SALES LIMITED

Defendants

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward Belobaba

COUNSEL: *Irving Marks, David Taub, Michael J. Peerless, Matthew Baer, Joey Jamil* and *Emily Assini* for the Plaintiff

Hugh M. DesBrisay, Jill M. Lawrie, Catherine Beagan Flood and *Jadeney Wong* for the Ford Defendants

HEARD: April 12, 13 and 14 by Zoom video with follow-up written submissions.

Cross-motions for Summary Judgment

[1] This certified class action[1] alleging misleading advertising by the Ford defendants[2] ("Defendants") is before the court for an adjudication on the merits.

[2] The case involves the federal government's EnerGuide program. The court must decide whether Ford Canada's fuel consumption estimates as set out on the EnerGuide labels affixed to their new vehicles, model years 2013 and 2014, and repeated in their marketing material, were

[1] The action was certified as a class proceeding by Justice Morgan: see [2018] O.J. No. 6709.

[2] The claim against the dealership defendant, Yonge-Steeles Ford, has been discontinued.

false or misleading under the federal *Competition Act*[3] and certain provincial consumer protection statutes.[4]

[3] Six common issues were certified initially. Class counsel, however, have narrowed their focus to three, renumbered as follows:

(i) Did the Defendants contravene section 52 of the *Competition Act* (which prohibits false or misleading advertising)?

(ii) Did the Defendants contravene sections 14 and 17 of the *Consumer Protection Act*,[5] and parallel provisions of provincial consumer protection legislation, by making false, misleading or deceptive representations?

(iii) Are the class members entitled to damages under section 36(1) of the *Competition Act*, section 18(2) of the *Consumer Protection Act* and the parallel provisions of the consumer protection legislation in other provinces and, if so, can the damages payable by the defendants be determined on an aggregate basis and in what amount?

[4] Both sides bring motions for summary judgment — the plaintiff urging that the common issues be decided in his favour and the Defendants that the class action be dismissed in its entirety. Both sides agree, as do I, that summary judgment is a fair and appropriate method of adjudication because the issues in dispute can be resolved on the filed documentation and affidavit and transcript evidence. I am satisfied that the merits can be decided summarily. There are no issues requiring a trial.[6]

Background

[5] When Barry Rebuck leased his new 2014 Ford Edge SUV, he reviewed the information on the EnerGuide Label that had been affixed by Ford Canada to the vehicle's window. He noted that the vehicle's fuel consumption was estimated to be 24 miles per gallon in city driving and 36 miles per gallon in highway driving. The estimated annual fuel cost was $2600.

[6] Set out below is a duplicate of the EnerGuide Label used in 2014. The copy below is more legible than the plaintiff's actual EnerGuide Label, portions of which over the years have become

---

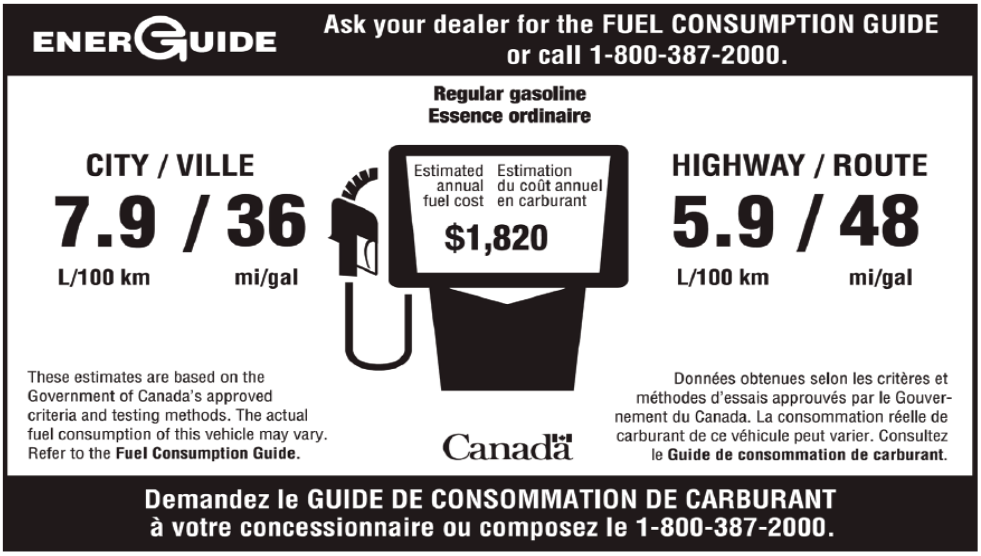
[3] *Competition Act*, R.S.C. 1985, c. C-34, as am.

[4] Because of privity of contract issues (here only the manufacturer is being sued, not the dealer/retailer) class counsel have limited their statutory consumer protection claims to seven provinces — Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, P.E.I. and Quebec — where privity of contract is arguably not required.

[5] *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sch. A.

[6] The parties initially intended to proceed by way of cross-motions for summary judgment. The certification judge, however, concluded that the matter should be decided by way of a "hybrid trial" and made the required direction, leaving the final decision to the trial judge. I was appointed to hear the hybrid trial. After discussions with counsel, it was agreed that the matter would proceed primarily as a motion for summary judgment, leaving open the possibility for *viva voce* evidence if such was needed. As it turned out, no *viva voce* evidence was needed. The matter therefore proceeded by way of cross-motions for summary judgment just as counsel initially intended.

blurred and difficult to read. The only difference in the Label below is in the fuel consumption numbers and the "estimated annual fuel cost." Recall that the estimates printed on the EnerGuide Label for the plaintiff's 2014 Ford Edge were 24 mpg/city and 36 mpg/highway. The estimated annual fuel cost was $2600. Otherwise, this was what the plaintiff read when he leased his 2014 Ford Edge:



[7] In addition to the city and highway mpg estimates, the EnerGuide Label also displayed the federal government's "EnerGuide" and "Canada" marks and advised in both English and French that:

- The estimates are based on the Government of Canada's approved criteria and testing methods;
- The actual fuel consumption of this vehicle may vary;
- One should "Refer to the Fuel Consumption Guide";
- One can obtain a copy of the FUEL CONSUMPTION GUIDE from the dealer or by calling 1-800-387-2000.

[8] Fuel efficiency was important to the plaintiff because he and his wife drove to Florida every December for their winter vacation. It was on the first drive south with the new vehicle, in December 2014, that the plaintiff noticed that the on-board fuel consumption display was showing only 23 mpg while highway driving "which was far worse than the 36 miles per gallon as set out on the EnerGuide Label."

[9] The plaintiff understood that fuel consumption would vary widely from individual to individual depending on a range of factors, including one's driving behaviour. The plaintiff agreed that "how you drive a car and what's inside the car and what the road conditions are and what the weather is like, all impacts on fuel efficiency that you are going to get." He also understood that

that “no fuel consumption rating is ever going to be able to tell you what the actual fuel consumption is going to be for all vehicles and all conditions.” It depends completely on “how I drive my car.”

[10] The plaintiff’s evidence is that he did not expect to achieve the 36 mpg/highway driving estimate as set out on the EnerGuide Label but he did expect “maybe … 30, maybe 27”.

[11] In any event, he was not pleased with a fuel consumption of 23 mpg in highway driving. He arranged to have the vehicle inspected by Ford dealerships, first in Florida, then in Ontario. In each case, he was told there was “nothing wrong with the vehicle.”

[12] The plaintiff retained legal counsel who reviewed the test methods used by the Defendants to generate the fuel consumption data printed on the EnerGuide Labels. Class counsel discovered that Ford continued to use a 2-Cycle Test (a laboratory-controlled city test and a laboratory-controlled highway test) for its 2013 and 2014 Canadian vehicles while using a more accurate 5-Cycle Test for its American vehicles.

[13] The 5-Cycle Test, adopted by the American EPA in 2008, had added three new test cycles in addition to the city and highway test: the cold temperature operation test, the hi-speed/quick-acceleration test, and the air conditioning test. The federal Department of Natural Resources (“NRCan”) took several more years to adopt the 5-Cycle Test and finally did so, effective 2015, concluding that it was “more representative of typical driving conditions and styles" and would "better approximate real-world driving conditions and behaviours".

[14] In a notice-letter dated September 1, 2015, class counsel advised Ford Canada that unless the plaintiff’s concern about fuel consumption was satisfactorily resolved within 30 days, a class action would be filed alleging unfair practices under provincial consumer protection legislation. The primary complaint was that Ford knew that the 5-Cycle Test was a more accurate representation of real-world driving behaviour but continued to use the 2-Cycle Test that understated actual fuel consumption by some 15 per cent.

[15] Ford Canada responded on October 11, 2015 making three points: one, the data in the EnerGuide Label was generated using Government of Canada approved and required test methods; two, the overall purpose was to provide a fair and reliable method to compare the relative fuel consumption of different vehicles and not to predict actual fuel consumption; and three, that “no test” could simulate “all possible combinations of conditions that may be experienced by your client.” More specifically, as Ford Canada explained:

> The following are a few of the factors that can affect the fuel consumption of your client's vehicle: driving style and behaviour, acceleration, braking, speed, temperature, weather, tire pressure, type of drive system, and powered accessories installed on the vehicle.

[16] Ford Canada concluded its letter by noting that “tips on driving and maintenance that will help your client achieve optimal fuel consumption” were set out in the 2014 Fuel Consumption Guide, that the 5-Cycle Test would take effect with the 2015 model year, and that “your client's vehicle is operating within normal parameters and fuel consumption will vary for the reasons described above.” The plaintiff’s complaint was obviously not resolved to his satisfaction.

[17] In early 2016, the plaintiff filed this class action on behalf of the 600,000 persons in Canada who had purchased or leased a new 2013 and 2014 Ford vehicle. The class action alleges breaches of the misleading advertising provisions in the federal *Competition Act* and provincial consumer protection laws. The class seeks damages of $1.5 billion as compensation for the alleged 15 per cent overpayment in fuel charges incurred over the course of the ownership or lease of their vehicles.

[18] The Ford defendants responded with a long list of detailed submissions in a 340-page factum whose record-setting length apparently escaped judicial attention. The Defendants made two basic points: first, the design and content of the EnerGuide Label, including the use of the 2-Cycle Test method in 2013 and 2014, were explicitly required by the federal government; secondly, and in any event, there was nothing false or misleading in the EnerGuide Label's representations, whether under the *Competition Act* or provincial consumer protection law.

[19] Before turning to the three common issues that are before me for decision, I set out a more detailed understanding of the federal government's EnerGuide Label and the switch from 2-Cycle to 5-Cycle testing.

The EnerGuide Label

[20] Most Canadians are familiar with the federal government's EnerGuide Label program. The energy consumption information helps consumers compare energy efficiencies when purchasing large household appliances and many other high-energy-use products. The EnerGuide Label program is primarily the responsibility of NRCan and its Office of Energy Efficiency and is based on the broad powers provided under the *Department of Natural Resources Act*[7] and the *Energy Efficiency Act.*[8] For most products, EnerGuide labelling is required by federal regulation. Not so for the automobile industry. The attachment of the EnerGuide Label to new vehicles was achieved via voluntary agreements based on Ministerial powers provided under the legislation just noted.[9]

[21] ***The MOUs.*** In 1995 and 1996 respectively, NRCan entered into a Memoranda of Understanding ("MOU") with the Motor Vehicle Manufacturers' Association ("MVMA"),[10] which included Ford Canada, and the Association of International Automobile Manufacturers of Canada. In each case, the Memorandum of Understanding ("MOU") extended the use of EnerGuide Labels and fuel consumption reporting requirements to the sale or lease of new vehicles.[11] In doing so, the federal government had two objectives: to help consumers compare the fuel consumption of different vehicle brands and models before making a purchase or lease

[7] S.C. 1994, c. 41.

[8] S.C. 1992, c 36.

[9] *Ibid*., s. 21(c) provides that "The Minister may, for the purpose of promoting the efficient use of energy … (c) enter into agreements with any person…".

[10] Now known as the Canadian Vehicle Manufacturers' Association

[11] More precisely, to all new "light duty vehicles" which would include all automobiles and some smaller trucks. However, it is sufficient for my purposes here to simply say "new vehicles".

decision and to encourage fuel-efficient driving. As a result of the two MOUs, all vehicle manufacturers in Canada, through their respective associations, agreed to work closely with NRCan to help reduce greenhouse gas emissions.

[22] The MOU entered into by the MVMA contained an explicit commitment to encourage its members, including Ford Canada, to:

- submit data to NRCan on the fuel consumption ratings of new vehicles on a consistent and complete basis;
- work with NRCan on the development of effective consumer information programs;
- provide information on vehicle fuel consumption to dealers for prospective new vehicle purchasers; and
- work with their dealer networks to improve retention of NRCan's fuel consumption labels attached to new vehicles while on their lots and in their showrooms.

[23] Ford Canada understood and accepted that the MOU imposed binding obligations and that compliance with NRCan's directives and guidelines was mandatory. A retired senior Ford Canada manager, who had been directly involved in the negotiation and implementation of the MVMA MOU, provided this uncontroverted evidence:

> Given that Ford of Canada had made commitments under the MVMA MOU and given that the government was adamant that all industry participants comply with the requirements of the NRCan Program, … our approach to compliance with the requirements of the NRCan Program was the same as our approach to compliance with federal regulations, such as the 2010 Passenger Regulations. … we were scrupulous in ensuring that we followed NRCan's directives and Guidelines.

[24] Even though the automobile manufacturer's initial decision to enter into an MOU was voluntary, I am satisfied on the evidence that the signatories, including individual members such as Ford Canada, reasonably believed that NRCan's directives and guidelines were mandatory.

[25] ***The 2012 Guidelines***,[12] which also applied to the 2013 and 2014 model years herein, prescribed the design and content of the EnerGuide Labels that had to be affixed by the automobile manufacturer to its new vehicles — such as shape, colour and dimensions; the specific placement of the EnerGuide and Government of Canada marks and logos; and the display of the fuel consumption ratings as determined by the 2-Cycle Test.

[26] The Guidelines complemented the regulated testing and reporting requirements imposed on motor vehicle manufacturers under the *Passenger Automobile and Light Truck Greenhouse*

[12] Government of Canada, *Guidelines for Determination and Submission of Fuel Consumption Data for Fuel Consumption Labelling* (2012).

Gas Emission Regulations[13] and the *On-Road Vehicle and Engine Emission Regulations*[14] that had been promulgated under the *Canadian Environmental Protection Act, 1999*.[15]

[27] The Guidelines required that the following statements appear on the EnerGuide Labels:

- The city and highway fuel consumption estimates using the 2-Cycle Test;
- The phrase "Estimated annual fuel cost" and the estimated dollar amount using a prescribed formula;
- The statement "These estimates are based on the Government of Canada's approved criteria and testing methods. The actual fuel consumption of this vehicle may vary. Refer to the Fuel Consumption Guide;" and
- The statement "Ask your dealer for the FUEL CONSUMPTION GUIDE or call 1-800-387-2000".

[28] The Guidelines made clear that there was little room for deviation from the prescribed requirements. For example, the vehicle manufacturer could not refer to any other fuel consumption information on the face of the EnerGuide Label. Only the 2-Cycle Test data could be used in Canada. U.S. data (based on the 5-Cycle Test) could not be used, even in marketing material.

[29] ***The Fuel Consumption Guides.*** NRCan published annual Fuel Consumption Guides ("FCGs") that were available without charge at the dealership, via a 1-800 call or on-line. The FCGs provided about 15 pages of explanatory information and another 25 pages of tables listing individual vehicle attributes and test results. The FCGs also provided detailed information about the testing methods, how the ratings should be used, the factors that affect fuel consumption and NRCan's plans to change the test method and adopt the 5-Cycle Test beginning in 2015.

[30] The FCGs explained that "no test can simulate all possible combinations of conditions that may be experienced by drivers" and that the ratings only provided a reliable basis for comparison:

> It would be difficult to drive every model of new vehicle on the road to measure fuel consumption, and almost impossible to consistently duplicate on-road testing results because many variables can affect a vehicle's performance. Instead, a controlled laboratory testing method is followed to ensure that all vehicles are tested under identical conditions and that the results are consistent and repeatable.
>
> …

[13] SOR/2010-201.

[14] SOR/2003-2.

[15] S.C. 1999, c. 33.

> The ratings provide a reliable comparison of the fuel consumption of different vehicles. However, your vehicle's fuel consumption will vary from the published ratings, depending on how, where and when you drive.

[31] The repeated message in the FCGs (for anyone who took the time to review their contents) was that the fuel-efficiency ratings on the EnerGuide Label were provided for comparison purposes/vehicle rankings and to encourage fuel-efficient driving behaviour — not to predict actual fuel consumption.

The switch from 2-Cycle to 5-Cycle testing

[32] As already noted, the EPA adopted the 5-Cycle Test in 2008. NRCan did not do so until 2015. The possible adoption of the 5-Cycle Test method was first discussed with the Canadian vehicle manufacturers in 2011 but was not formally announced by the federal government until the end of 2013, to take effect with the 2015 model year.

[33] The time lag in the adoption of the 5-Cycle Test in Canada can be attributed to an important policy difference that separated NRCan and its American counterpart. Both NRCan and the EPA agreed that fuel consumption ratings based on a 2-Cycle Test provided a reliable comparison tool and also that the comparative fuel-efficiency rankings would remain the same whether one used the 2-Cycle or 5-Cycle Test. The important policy difference (made clear in the inter-governmental documentation that is before the court) was this — NRCan wanted to use the fuel-consumption information set out on its EnerGuide Label to encourage fuel-efficient driving (smooth acceleration and braking, compliance with speed limits etc). The EPA, on the other hand, was more willing to provide fuel-consumption data that reflected "real world" driving behaviour which often included rapid acceleration and braking, speeding, etc.

[34] In any event, NRCan concluded in due course that it was time to align its test methods with those in the U.S. The 2013 and 2014 FCGs recognized that the 5-Cycle Test was "more representative of typical driving conditions and styles" and would "better approximate real world driving conditions and behaviours". The 2013 and 2014 FCGs also noted that the change-over to the 5-Cycle Test would increase the fuel consumption data — by "about 15 per cent" (2013 FCG) or "10 to 20 per cent" (2014 FCG).

Analysis

[35] I begin with this observation. The focus of attention of counsel and the court throughout the course of the hearing was the EnerGuide Label and included little to no discussion of the allegation that the Defendants repeated the Label's fuel-consumption data in their sales brochures and marketing material. This made sense. Extending the focus to include what was said in the marketing material would have been problematic. The plaintiff says nothing in his evidence about sales brochures or marketing material or about the fuel consumption representations that were set out therein.

[36] There is no suggestion from the plaintiff or any other class member that they considered or even noticed any such marketing material when they purchased or leased their new vehicle, let alone that they suffered any loss or damage "as a result" of anything that was said therein. Without

such supporting evidence, any allegation or claim about the Defendants' representations in its marketing material would have gone nowhere. Hence, the focus on the EnerGuide Label.

[37] The plaintiff makes two arguments in this regard that can be summarized as follows.

[38] The first is that the fuel ratings on the EnerGuide Label were false and misleading. And worse, stating that they were using "government-approved test methods", the Defendants conveyed the impression that the fuel consumption ratings were certified by the Government of Canada and that their accuracy could be trusted because the government stood behind them.

[39] The second argument goes beyond the face of the Label and alleges deceptive non-disclosure. The plaintiff submits that the Defendants failed to disclose (i) that the ratings were provided for comparison purposes and not to predict actual fuel consumption; (ii) that the fuel consumption ratings, based on a 2-Cycle Test and not the more representative 5-Cycle Test used in the U.S., understated fuel consumption under real-world driving conditions by at least 15 percent; and (iii) that the ratings printed on the EnerGuide Label could only be achieved with fuel-efficient driving and not normal "real world" driving.

[40] The plaintiff goes on to argue that if the Defendants were indeed precluded from unilaterally making any changes to the EnerGuide Label itself, they should at least have attached a second sheet of paper or Second Label (my words) to the vehicle's window that disclosed these three important omissions. By failing to attach this Second Label containing these disclosures, the Defendants misled and deceived class members.

[41] I note that class counsel in their submissions did not always differentiate between the two lines of argument, facial impression and non-disclosure. This was a distinction that developed over the course of the hearing. Also, class counsel did not always differentiate between the evidence that supported the two lines of argument, noting correctly that "there is significant overlap in the factual issues regarding the representations." It was generally understood that the same evidence would be used to support the allegations under s. 52(1) of the *Competition Act* and those under provincial consumer protection law.

[42] I now turn to the certified common issues.

- **<u>Common Issue No. 1</u>: Did the Ford defendants contravene section 52 of the *Competition Act*?**

[43] Section 52(1) provides as follows:

> No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

[44] Section 36(1) allows any person who has suffered loss or damage "as a result" of a breach of s. 52(1) to sue for and recover damages for such breach. Even though s. 52(1) is a criminal

provision, if damages are being sought in a civil proceeding under s. 36(1), the plaintiff only has to establish the s. 52(1) breach on a balance of probabilities.[16]

[45] Note that s. 52(1), drafted as a criminal provision, only applies where a person knowingly or recklessly *makes* a false or misleading representation. There is no general duty to disclose.[17] That is, the failure to disclose a material fact which can amount to a false or misleading representation under provincial consumer protection law (discussed below) is not a breach of s. 52(1) of the *Competition Act.*

[46] The s. 52(1) issue is thus limited to whether the plaintiff can establish on a balance of probabilities that the Defendants knowingly or recklessly made false or misleading representations by affixing the NRCan-required EnerGuide Label to the windows of its new 2013 and 2014 vehicles.

[47] In my view, the plaintiff has not established a breach of s. 52(1). I say this for two reasons.

[48] First, the Defendants' compliance with federal government guidelines (that prescribed the design and content of the EnerGuide Label and the required fuel-consumption test method) cannot fairly or reasonably amount to a breach of federal competition law. Not only would this be contrary to fair play and common sense, it would also contravene a long-standing principle of statutory interpretation — namely, that there is a particularly strong presumption of consistency within the federal government[18] and, where federal statutes can be interpreted so as not to interfere with each other, that interpretation is to be preferred.[19]

[49] As the Supreme Court noted in *Oldman River*,[20] even as between a federal statute (here, s. 52(1) of the *Competition Act*) and a federal subordinate measure (here, NRCan's 2012 Guidelines) "there is a presumption that the legislature did not intend to make or empower the making of contradictory enactments."[21] In other words, there is a presumption that the federal government did not intend to criminalize or otherwise impugn its own EnerGuide Labels.

[50] The application of this principle of statutory interpretation (the presumption of consistency) is, in my view, sufficient to dispose of Common Issue No. 1. Counsel for the Defendants also

---

[16] See *Janelle Pharmacy Ltd. et al v. Blue Cross of Canada,* 2003 NSSC 179 at paras. 95-97, and *Maritime Travel Inc. v. Go Travel Direct.Com Inc.,* 2008 NSSC 163 at para. 16. Because the allegation relates to a criminal provision, some judges have suggested that the plaintiff must establish "a degree of probability that is commensurate with the occasion" (that is, something more than just 51 per cent): see, for example, *Bater v. Bater* [1950] 2 ALL E.R. 458 at 459, per Lord Denning. For reasons that will become evident, I am content to use the conventional probability standard without any further gloss.

[17] *Arora v. Whirlpool Canada LP*, 2013 ONCA 657, at para. 50.

[18] *Thibodeau v. Air Canada*, 2014 SCC 67, at paras 93-97.

[19] *Garland v. Consumers' Gas Co.*, 2004 SCC 25, at para. 76.

[20] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3.

[21] *Ibid.,* at 38.

advanced a compelling submission based on a related principle of statutory interpretation known as the "regulated conduct doctrine" or RCD.[22] Given the "presumption of consistency," there is no need, in my view, to consider the application of RCD.

[51] I agree, however, with counsel for the Defendants that whether the courts are applying the presumption of consistency or RCD, the "through-line", as counsel put it, is that the courts are loathe to impose civil liability, much less criminality, when a defendant has fully complied with a statutorily-authorized regulatory regime.[23]

[52] If I am wrong on the statutory interpretation point, I set out a second reason.

[53] The second reason why, in my view, a breach of s. 52(1) has not been established on a balance of probabilities is the lack of evidentiary basis for the "general impression" analysis that is advanced by class counsel.

[54] S. 52(4) of the *Competition Act* provides that:

> [T]he general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

[55] There is no dispute that the fuel-efficiency data that was generated by the Defendants, submitted to NRCan and recorded by the Defendants on the EnerGuide Label were calculated in accordance with the 2-Cycle Test method as approved and required by the federal government. There can be no dispute that each of the statements and representations set out on said Label was literally true.

[56] What about the "general impression" that was conveyed by the EnerGuide Label? In many misleading advertising cases, evidence of "general impression", although primarily provided by the plaintiff, is often augmented with consumer focus group or survey evidence or by appropriate experts. In this way, in cases such as here where the alleged facial misrepresentation is not inherently obvious, the court can consider and possibly benefit from these additional consumer survey or expert perspectives.

[57] Unfortunately, for reasons unknown, class counsel filed just one affidavit on point, that of the plaintiff. Recall that the plaintiff's sole complaint was that the fuel consumption of the 2014 Ford Edge in highway driving was only 23 miles per gallon "which was far worse than the 36 miles per gallon as set out on the EnerGuide Label."

---

[22] The regulated conduct defence insulates a defendant from liability (typically for breach of the *Competition Act*) for conduct that is directed or authorized by a federal or provincial regulatory scheme. See *Hughes v. Liquor Control Board of Ontario,* 2019 ONCA 305 for a recent discussion of this interpretive principle and the leading caselaw.

[23] Also see this court's use of a broad "public interest" analysis in *Kopyto v. The Law Society of Upper Canada*, 2012 ONSC 4050, aff'd 2012 ONCA 833.

[58] Both sides agree that the plaintiff has the onus of establishing a false or misleading general impression. What general impression was advanced by class counsel?

[59] One possible "general impression" that could have been advanced, if supported with evidence, is that the EnerGuide Label created the expectation that every driver would actually achieve the estimated 24 mpg/city and 36 mpg/highway. Class counsel could also have noted that by referring to "government-approved test methods", the Defendants were conveying the impression that the fuel consumption ratings were certified by the Government of Canada and their accuracy could be trusted because the federal government stood behind them.

[60] But this particular impression (that the ratings on the EnerGuide Label showed the actual mileage that would be achieved by all drivers) was retracted by the plaintiff. In his answers to undertakings and written interrogatories, the plaintiff conceded that class members would *not* have had an expectation based on the Label ratings that they would experience fuel consumption equal to these ratings. Indeed, as already noted, the plaintiff understood that fuel consumption varies widely and depends on a range of factors, including one's driving behaviour:

> I understand, you know, how you drive a car and what's inside the car and what the road conditions are and what the weather is like, all impacts on the fuel efficiency that you are going to get … no fuel consumption rating is ever going to be able to tell you what the actual fuel consumption is going to be for all vehicles and all conditions …[It depends completely on] how I drive my car.

[61] It is interesting to note that some drivers were able to achieve the EnerGuide Label ratings with fuel-efficient driving. NRCan's representation in its 2013 and 2014 FCG that the fuel consumption ratings "may be achieved with a properly maintained vehicle driven with fuel efficiency in mind" is in fact supported by numerous independent studies that were summarized in an expert report filed by the Defendants and, as well, by a number of individual-driver affidavits, also filed by the Defendants.

[62] In any event, the suggestion that the general impression conveyed by the EnerGuide Label to the average car-buyer was that they would achieve a level of fuel consumption equal to the ratings set out on the Label was retracted by the plaintiff. The plaintiff himself did not expect this, noting that fuel consumption varies widely and depends almost completely on driving behaviour. Nor did most drivers. This point was made by one of plaintiff's experts, Mr. Duleep, who agreed that the fact that actual fuel consumption will vary depending on how, where and when a vehicle is driven is "well known … to *most* vehicle owners." (Emphasis added).

[63] The only "general impression" submission that was advanced by class counsel was set out by the plaintiff in an answer to a written interrogatory — that although fuel consumption would vary, it would vary "with an equal probability of coming in a range equal as to above or below depending on driving conditions" and that the "fuel consumption estimate [sic] should represent the median experience."

[64] In other words, the general impression conveyed by the EnerGuide Label ratings, argued class counsel, was that the city and highway mpg ratings were intended and understood as *median* ratings and that every driver would have an equal chance of achieving a fuel consumption that was above or below these medians. But here again, there is no basis for this suggested general

impression. I agree with counsel for the Defendants that there is nothing on the face of the EnerGuide Label or in any evidence in the record from the plaintiff or any other class member that supports this "median" interpretation.

[65] Indeed, the plaintiff's evidence undermines this suggested class-wide expectation. Recall that the plaintiff admitted that he expected some variance from the EnerGuide Label ratings and fuel cost estimates based on his individual driving style. But the variance he expected was not that he would achieve or exceed the Label value *50 per cent of the time*. The plaintiff's evidence — that he expected to achieve "maybe 27 mpg" in highway driving — indicates that as far as he was concerned, he would have been content with a fuel consumption number *all the time* that was as much as 25 per cent higher than the 36 mpg estimate on the EnerGuide Label. That is, the plaintiff himself would have accepted a fuel consumption number that was actually higher than the 15 per cent/ 10 to 20 per cent increase associated with the "undisclosed" 5-Cycle Test.

[66] To repeat, the only general impression argument advanced by class counsel is the "median" submission as just described. But there is nothing on the face of the Label and no evidence from any class member, including the plaintiff himself, that supports this "median" submission.

[67] I am therefore obliged to conclude that class counsel have not established *any* general impression conveyed by the EnerGuide Label that was false or misleading. Nor have they established that by complying with NRCan's mandatory directions and guidelines, the Defendants were "knowingly or recklessly" disseminating false or misleading information.

[68] In my view, class counsel's only plausible submission is limited to non-disclosure — that the Defendants knew and failed to disclose that the fuel consumption data on the EnerGuide Label was based on a 2-Cycle test method that did not reflect real-world driving and understated fuel consumption by some 15 per cent. And, therefore, the Defendants should have attached a Second Label correcting this non-disclosure. However, as already noted, civil liability for non-disclosure, imposed routinely in common law breach of contract cases[24] and explicitly available under provincial consumer protection statutes,[25] does not fall within the reach of s. 52(1) of the *Competition Act.*[26]

[69] I therefore conclude that the Defendants have not contravened s. 52(1) of the *Competition Act*. This conclusion is based on the statutory presumption of consistency and on a finding that the "median" general impression submission advanced by class counsel is not supported with any evidence.

[70] My answer to Common Issue No. 1 is "no".

---

[24] *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, at paras. 89 and 91.

[25] Discussed in detail below.

[26] If I am wrong on this point, then my analysis of the non-disclosure submission under the provincial consumer protection law that follows below under Common Issue No. 2 would also apply to s. 52(1) and Common Issue No. 1.

- **<u>Common Issue No. 2</u>: Did the Ford defendants contravene sections 14 and 17 of the *Consumer Protection Act* and parallel provisions of provincial consumer protection legislation by making false, misleading or deceptive representations?**

[71] As I have already noted, the plaintiff has confined his provincial consumer protection claim to seven jurisdictions: Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, P.E.I. and Quebec.[27] The consumer protection legislation in each of these provinces, particularly in relation to the misleading advertising issue, is broadly the same and generally reflects the language in the Ontario statute.

[72] Sections 14(1) of the Ontario *Consumer Protection Act*[28] provides that "It is an unfair practice for a person to make a false, misleading or deceptive representation." Various examples are then listed including "A representation that the goods or services have … performance characteristics … benefits or qualities that they do not have." Section 17(1) and (2) reaffirm the "unfair practice" point and s. 18(2) provides for remedies, including damages.

[73] Here again, the plaintiff advances two lines of argument, one with respect to the impression conveyed by the EnerGuide Label (the submissions advanced above under Common Issue No. 1 are generally repeated) and the second with respect to non-disclosure.

[74] The "impression" submissions failed under the federal competition law claim above and they fail as well under the provincial consumer protection claims — and for the same reasons. The plaintiff has not established on a balance of probabilities that any of the representations on the face of the EnerGuide Label or that the overall impression conveyed by the Label was false, misleading or deceptive, even under the most generous reading of the provincial "unfair practice" provisions.

[75] The only plausible argument, as already noted, is misrepresentation by non-disclosure. The provincial consumer protection legislation explicitly extends "false, misleading or deceptive" to include non-disclosure. For example, s. 14(2)14 of the Ontario statute says this:

> Without limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representations:
>
> (14) … failing to state a material fact if such … failure deceives or tends to deceive.

[76] This is where the non-disclosure (and Second Label) submission comes in. As class counsel put it in a post-hearing written submission:

> Once Ford made the Representations [in the EnerGuide Label] it ought to have disclosed additional information to make its Representations not misleading nor false (e.g., a one-page informational sheet regarding the differences between 2-

[27] *Supra*, note 4.

[28] *Supra*, note 5.

> Cycle and 5-Cycle testing, the transition to 5 Cycle testing and the expected 15% average increase in the ratings).

[77] Counsel for the Defendants tried to neutralize the non-disclosure submissions by referring to several well-known presumptions in the interpretation of intersecting federal and provincial laws: (i) it is presumed that Parliament intends its laws to co-exist with provincial laws;[29] (ii) it is presumed that provinces intend their laws to co-exist with federal law;[30] and (iii) courts must make every effort to interpret valid federal and provincial laws in a manner that does not conflict.[31]

[78] Counsel for the Defendants also advanced, in the alternative, an argument based on the federal paramountcy doctrine — that a judicial finding that the federally-required EnerGuide Label was false or misleading under provincial consumer protection law because it failed to disclose certain material facts would result in an "operational conflict" and the frustration of a federal purpose such that the offending provisions of the provincial consumer protection laws would have to be rendered inoperative.

[79] In my view, the statutory presumption and federal paramountcy submissions do not apply in the non-disclosure context on the facts herein. I say this for the following reason.

[80] Even though it is true that the 2012 Guidelines precluded the Defendants from unilaterally making any changes or alterations to the federally-prescribed EnerGuide Label, there was nothing in the Guidelines that prevented the Defendants from affixing a Second Label that simply disclosed the three omissions alleged by class counsel:

> (i) that the ratings on the EnerGuide Label were provided for comparison purposes and not to predict actual fuel consumption;
>
> (ii) that the fuel consumption ratings, based on a 2-Cycle Test and not the more representative 5-Cycle Test used in the U.S., understated fuel consumption under real-world driving conditions by some 15 percent; and
>
> (iii) that the ratings on the EnerGuide Label could only be achieved with fuel-efficient driving and not normal "real world" driving.

[81] I agree with class counsel that affixing this Second Label, which simply restated what was already made clear in the FCG, would not have contravened any presumptions of federal-provincial statutory interpretation; nor would it have raised any concerns about operational conflict or any issues relating to federal paramountcy.

[82] The only question, as I see it, is whether in all the circumstances and on the evidence before the court, the Defendants, and in particular Ford Canada, were legally obliged to attach a Second Label disclosing the three alleged omissions. That is, whether the Defendants knew or ought to

---

[29] *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, at para 27.

[30] *Fawcett v Fawcett*, 2018 ONCA 150, at para 34.

[31] *Canadian Western Bank v. Alberta*, 2007 SCC 22, at paras 37.

have known that the EnerGuide Label was deficient because it failed to disclose certain material facts (the three above-listed "omissions"), that such failure "deceived or tended to deceive" the car-buying customer and thus further disclosure was required.

[83] This is a determination that must be based on what was said on the Label itself, and if other documents such as the FCG were referred to and actually consulted, what was said in the FCG.

[84] Consider the three alleged omissions and my initial rebuttals:

(i) *That the ratings on the EnerGuide Label were provided for comparison purposes and not to predict actual fuel consumption;*

The EnerGuide Label referred the car-buyer to the FCG not once but twice, and the second time in block letters. The 2013 and 2014 FCG made clear that the ratings were being provided for comparison purposes only and not to predict actual fuel consumption.

I also note that the Label described the fuel consumption ratings as "estimates" and noted that "the actual fuel consumption of this vehicle may vary". Most drivers, including the plaintiff and certainly the automobile manufacturer, understood that fuel consumption varied widely and depended largely on one's driving style.

The plaintiff also agreed that what was important was that the ratings be based on the same testing methods and conditions for all vehicles — because that way, consumers could compare the fuel efficiency rating of one vehicle against another.

(ii) *That the fuel consumption ratings, based on a 2-Cycle Test, and not the more representative 5-Cycle Test used in the U.S., understated fuel consumption under real-world driving conditions by at least 15 percent;*

This information was also provided in the FCG. And, as already noted, the EnerGuide Label referred the reader to the FCG not once but twice, and the second time in block letters.

I also note that whether one used the 2-Cycle or 5-Cycle Test, the vehicle rankings remained the same. As for the "15 per cent" understatement, recall again that the plaintiff expected the fuel consumption understatement for highway driving to be as much as 25 per cent.

(iii) *That the ratings on the EnerGuide Label could only be achieved with fuel-efficient driving and not normal "real world" driving.*

Here again, this point was made clear in the FCG.

I also note the evidence filed by the Defendants that most drivers understood that fuel consumption varied widely and depended largely on one's driving style and that many drivers were actually able to achieve the actual EnerGuide Label ratings with fuel-efficient driving.

[85] These rebuttals, however, are not determinative. The Defendant's obligation to affix the suggested Second Label is an inquiry that requires a deeper analysis. The primary focus of this inquiry is the sufficiency of the recommendation on the EnerGuide Label that the car-buyer refer to the FCG. Did car-buyers actually do so?

[86] In my view, the most persuasive evidence impacting the Defendants in the context of the non-disclosure analysis would be evidence about the average car buyer's actual utilization of the FCG and what Ford knew or should have known about such use or non-use. For example, if class counsel had presented credible evidence that despite the Label's references to the FCG, the vast majority of reasonable car buyers simply relied on the EnerGuide Label and never or very rarely consulted the FCG *and* that Ford knew that this was the case, then this evidence would have been highly relevant in the determination of Ford's disclosure obligations.

[87] Of course, had there been such evidence (that few if any car buyers bothered to refer to the FCG *and* this was known at Ford) it probably would have been known at NRCan as well. If so, it would mean that a federal government department for some reason was directing vehicle manufacturers to mislead Canadian car buyers. Not a credible proposition — at least not in the context of fuel consumption ratings and EnerGuide Labels.

[88] In any event, *no such evidence was presented by class counsel* — probably because none could be found. The reality is that the purchase or lease of a new car, for almost every consumer, is a significant financial decision that typically involves careful thought and often, considerable research. The uncontroverted evidence filed by the Defendants' experts shows that the Google search ranking for the FCG on-line was "high" and that car buyers for whom fuel consumption was important would "likely" have consulted the FCG, just as NRCan would have expected. And, again, there is no evidence that Ford had any reason to believe otherwise.

[89] I am therefore not persuaded on the evidence before me that Ford should have concluded that the references to the FCG on a federally-prescribed EnerGuide Label were deceptively deficient and required the additional disclosures suggested by class counsel. There is simply no supporting evidence for this Second Label submission.

[90] My answer to Common Issue No. 2 is "no".

- **<u>Common Issue No. 3:</u> Are the class members entitled to damages under section 36(1) of the *Competition Act*, section 18(2) of the *Consumer Protection Act*, and the parallel provisions of the consumer protection legislation in other provinces and, if so, can the amount of damages payable by the Defendants be determined on an aggregate basis and in what amount?**

[91] Given my answers above to Common Issues Nos. 1 and 2, it follows that class members are *not* entitled to damages under section 36(1) of the *Competition Act*, section 18(2) of the *Consumer Protection Act* or the parallel provisions in the other named provinces. The answer to the first part of Common Issue No. 3 is "no".

[92] There is, therefore, no need to consider the second part of the question about aggregate damages.

[93] I will, however, offer this additional comment because of the obvious time and effort that counsel on both sides expended on the damages question. In my view, even if the plaintiff had prevailed on liability (the first two issues), he probably would not have prevailed on the damages issue. The hurdles awaiting the plaintiff in the second part of Common Issue No. 3 were formidable — privity of contract problems, detrimental reliance issues, limitation periods, mitigation obligations and the obvious need for individualized assessments. These damages issues, however, were not reached in this decision.

[94] In sum, this is a class action that was burdened with both legal and evidentiary challenges but failed primarily because of the latter — a complete absence of evidence for any of the plaintiff's key allegations.

Disposition

[95] Common Issues Nos. 1 and 2, and the first part of No. 3, are answered in favour of the Defendants.

[96] The plaintiff's motion for summary judgment is dismissed.

[97] The defendants' cross-motion for summary judgment (dismissing the class action in its entirety) is granted.

[98] If the parties are unable to agree on a fair and reasonable costs award, I will be pleased to receive brief written submissions — from the defendants within 21 days and from the plaintiff within 21 days thereafter. If counsel require more time to come to an agreement about the appropriate costs award, they should advise accordingly.

[99] I am grateful to counsel on both sides for their assistance.

Signed: *Justice Edward Belobaba*

Date: June 15, 2022