KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 144**

Date: **2024 08 12**
File No.: QBG-RG-01230-2012
Judicial Centre: Regina

BETWEEN:

KEVIN WITTAL

PLAINTIFF

- and -

FORD MOTOR COMPANY OF CANADA LTD. and FORD MOTOR COMPANY

DEFENDANTS

Counsel:

E.F. Anthony Merchant, K.C., Iqbal S. Brar, Anthony Tibbs, and Jaclin Watters (student-at-law)	for the plaintiff
John Mather, Kenneth A. Ready, K.C., Hugh DesBrisbay, Graham Caithness, Jade Wong, and Michael Robson (student-at-law)	for the defendants

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FIAT — MITCHELL J.
August 12, 2024

I. OVERVIEW

[1] Mr. Kevin Wittal, the proposed representative plaintiff, purchased a 2007 Ford Explorer vehicle in 2011. He drove it for a few years before having the engine replaced in 2014 due to extensive damage resulting from allegedly defective spark plugs.

[2] Mr. Wittal now brings this proposed class action asserting that because of an inherent design defect, the spark plugs in certain vehicles built by the proposed

defendant, Ford Motor Company, between 2004 and 2008, are difficult to remove and to repair, resulting in increased maintenance and replacement costs to owners of those vehicles. He seeks an order certifying it pursuant to *The Class Actions Act*, SS 2001, c C-12.01 [*CAA*].

[3] Mr. Wittal's Amended Statement of Claim [ASC] pleads alleged breaches of the *Competition Act*, RSC 1985, c C-34; various provincial consumer protection statutes, most notably *The Consumer Protection and Business Practices Act*, SS 2013, c C-30.2 [*CPBPA*]; and certain express and implied warranties. It also pleads the tort of negligence and a claim of unjust enrichment. Finally, it seeks various relief including: (1) general and special damages; (2) exemplary and punitive damages; (3) costs for repairing or replacing all improperly designed spark plugs in relevant vehicles; and (4) an accounting and disgorgement of revenues or profits obtained by the defendants, Ford Motor Company and Ford Motor Company of Canada Ltd., obtained from these alleged breaches.

[4] The proposed defendants, Ford Motor Company and Ford Motor Company of Canada Ltd., maintain that Mr. Wittal has not established any of the certification requirements set out in s. 6 of the *CAA*. They assert that he has not pled or established some basis for any viable cause of action. Alternatively, should I conclude a viable cause of action exists, the defendants say this claim is not amenable to certification. Particularly, they contend that there is no commonality of issues or an identifiable class.

[5] Ultimately, the proposed defendants claim that were this proposed class action be certified, it would constitute a seismic shift in products liability litigation.

[6] These reasons explain why I conclude that Mr. Wittal's proposed action fails to satisfy all element for certification required by the *CAA*. His complaints are more amenable to resolution by way of an individual action. Consequently, his

application for certification must be dismissed.

II. THE PROPOSED PARTIES AND PROPOSED CLASS

A. The Proposed Plaintiff

[7] Mr. Wittal currently resides in Regina, Saskatchewan. On or about December 16, 2011, he purchased a used 2007 Ford Explorer vehicle from Titan Automotive Group Limited, a used car dealership in the City of Regina.

B. The Proposed Defendants

[8] The Proposed Defendant, Ford Motor Company of Canada Ltd. [Ford of Canada], is a corporation located in Oakville, Ontario.

[9] The Proposed Defendant, Ford Motor Company [FMC], is headquartered in Dearborn, Michigan. It manufactures and distributes automobiles on six continents.

[10] FMC manufactured the vehicles identified in the proposed class vehicles. Ford of Canada provided a Limited Warranty to purchasers and leasees of the proposed class vehicles.

C. The Proposed Class and Proposed Class Vehicles

[11] The proposed class is defined at para. 5(a) of the ASC as follows:

> **"CLASS"** means entities and all persons who purchased or leased vehicles listed in FORD's TSB 08-7-6, in Canada.
>
> [Emphasis in original]

[12] The proposed Class Vehicles is defined at para. 5(b) of the ASC to mean:

> **"CLASS Vehicle"** means vehicles listed in FORD's TSB 08-7-6.
>
> [Emphasis in original]

[13] TSB is the acronym for "Technical Service Bulletin". FMC issued four

such bulletins relating to the procedure for removing spark plugs and extracting broken spark plugs from Class Vehicles.

[14] Particularly relevant to this application is TSB 08-7-6 issued on April 1, 2008. Entitled "Ignition System, Spark Plug Removal Instructions", TSB 08-7-6 identifies the following vehicles as possessing improperly designed spark plugs resulting in engine defects:

a) 2005-2008 Mustang

b) 2004-2008 F-150

c) 2005-2008 Expedition, F-Super Duty

d) 2006-2008 Explorer

e) F-53 Motorhome Chassis

f) 2007-2008 Explorer Sport Trac

g) 2005-2008 (Lincoln) Navigator

h) 2006-2008 (Lincoln) Mark LT

i) 2006-2008 (Mercury) Mountaineer

[15] TSB 08-7-6 further states that each of these vehicles listed possesses one of the following engines:

a) 5.4 Litre 3-Valve built before October 9, 2007

b) 6.8 Litre 3-Valve built before October 9, 2007

c) 4.6 Litre 3-Valve built before November 30, 2007

[16] TSB 08-7-6 offers guidance to independent car dealers about spark plug removal in Class Vehicles. It sets out a detailed procedure for removing the spark plugs, including the use of tools specifically designed to assist in such removal. It further details the procedure for extracting broken spark plugs.

III. BACKGROUND AND PROPOSED COMMON QUESTIONS

A. Evidence of the Proposed Plaintiff

[17] As noted, Mr. Wittal purchased a 2007 Ford Explorer from a used car dealership in December 2011. At that time, the odometer of the vehicle indicated it already had 92,450 kilometers, and at his cross-examination, Mr. Wittal admitted he knew that the Limited Warranty on the vehicle had long expired.

[18] On or about June 14, 2013, the "check engine light" of Mr. Wittal's vehicle displayed. Consulting a diagnostic code reader, he determined the vehicle's engine was misfiring. By now, the vehicle had accumulated approximately 147,000 kilometers.

[19] Mr. Wittal took his vehicle to an independent Ford dealership and instructed the technician to remove and replace the spark plugs. During the process, one of those spark plugs broke, requiring the removal of the vehicle's cylinder head to extract the broken pieces. This procedure cost Mr. Wittal $4,904.20.

[20] Sixteen months and approximately 50,000 kilometers later, Mr. Wittal again detected an abnormal noise in the vehicle's engine, as well as an exhaust leak.

[21] On or about October 17, 2014, Mr. Wittal took his vehicle to Don's Auto Repair in Regina, which is not a Ford dealership. At that time, the technician removed three studs from the vehicle's cylinder head. The total cost for this repair was $954.49.

[22] This repair did not fix the problem. Mr. Wittal returned to an independent

Ford dealer where a technician diagnosed the problem and advised it required a new engine. The replacement of the vehicle's engine cost Mr. Wittal approximately $11,800.

[23] Despite these setbacks, Mr. Wittal continued to drive his vehicle for 10 years after he had purchased it, and 14 years after its manufacture. He estimated that his vehicle had clocked between 216,000 and 230,000 kilometers in October 2021.

[24] Mr. Robert Briton, another putative class member resident in the Province of Alberta filed an affidavit on this application. He averred that he leased a 2006 Ford F150 vehicle in May 2006. Some six-and-a-half years later, Mr. Briton took his vehicle to a mechanic for a routine maintenance.

[25] During that procedure, the technician replaced the vehicle's spark plugs. In that process, eight were broken and some were pushed into the engine's cylinder head. The engine had to be removed and dismantled to repair this damage. Consequently, Mr. Briton had to pay approximately $7,738.42 for this replacement and subsequent repairs.

[26] At the time Mr. Briton was cross-examined on his affidavit, he allowed that he continued to drive the vehicle which by then had accumulated 242,000 kilometers.

[27] The final putative class member to file an affidavit was Ms. Denise Garvin, a resident of the Province of Ontario. In September 2011, she purchased a 2008 Ford Explorer from an independent Ford dealership located in Windsor, Ontario.

[28] Approximately four years later, Ms. Garvin took her vehicle to an independent dealership to have its spark plugs replaced. At that time, the vehicle had approximately 124,000 kilometers. During that process, three spark plugs stuck to the engine and one of them broke. Ms. Garvin paid $1,100 to have it removed.

[29] As well, Mr. Wittal submitted one report prepared by a purported expert, Mr. Mark Allen, dated October 28, 2019 [Allen Report]. Mr. Allen is an automotive service technician who operates a used car inspection service called "Auto Detectives". He is neither an accredited engineer nor experienced in vehicle or engine design. Despite his lack of professional credentials, Mr. Allen stated that he has inspected automobiles and testified in court for more than 20 years.

[30] The Allen Report is principally a collection of unattributed articles found on-line by Mr. Allen. These articles are interspersed with his commentary related to the perils of removing spark plugs from various Class Vehicles. He opines at page 20 of the Allen Report that the "amount of complaints associated with this Ford product design defect far exceeds the descriptive term 'excessive'".

B. Evidence of the Proposed Defendants

[31] The Proposed Defendants, FMC and Ford of Canada, filed two affidavits sworn by Mr. Nicolas Lacasse. Mr. Lacasse is the National Service Operations Manager at Ford of Canada.

[32] Mr. Lacasse explained that neither FMC nor Ford of Canada sell or lease vehicles directly to Canadian consumers. All new vehicles are sold or leased by independent franchised dealers. These dealers independently sell or lease vehicles to customers.

[33] As well, dealers do not enter into sale or lease agreements on behalf of FMC or Ford of Canada. Contracts for the sale or lease of Ford vehicles are between the independent dealership and the individual customer. Neither FMC nor Ford of Canada is a party to those contracts.

[34] Mr. Lacasse also gave evidence respecting the Limited Warranty, the Scheduled Maintenance Guide, TSBs, and FMC's and Ford of Canada's relationship

with independent dealerships and customers.

1. The Limited Warranty

[35] Ford of Canada provides a Limited Warranty with each new vehicle sold or leased in Canada. It warrants that independent dealers will repair, replace, or adjust parts found to be defective for coverage periods set out in it.

[36] Different parts have different coverages under the Limited Warranty. Spark plugs in Class Vehicles are covered by the Emissions Defect Warranty. For Ford branded vehicles, this warranty is for 36 months or 60,000 kilometers – whichever occurs first. For Lincoln branded vehicles this warranty is for 48 months or 80,000 kilometers – whichever occurs first.

[37] The Limited Warranty does not warrant all vehicles will be free from defect. No vehicle is designed to operate problem free indefinitely. Nor does it warrant that maintenance work will be completed easily on Ford vehicles or the costs associated with maintenance or repair work outside the scope of the Limited Warranty.

[38] In portions salient to this certification application, the Limited Warranty further stipulates:

> The foregoing coverage described in the New Vehicle Limited Warranty are the only express warranties on the part of Ford of Canada and the selling dealer. You may have other rights which may vary by province.
>
> ...
>
> Any implied warranty or condition as to merchantability or fitness is limited to the applicable warranty duration period as specified herein.
>
> ...
>
> The above provisions do not preclude the operation of any applicable provincial statute which in certain circumstances may not allow some of the limitations and exclusions described in these warranty coverages.

2. The Scheduled Maintenance Guide

[39] All Ford vehicles come with a Scheduled Maintenance Guide which sets out recommended maintenance schedules for a vehicle's various components. These schedules vary depending upon a vehicle's individual and specific operating conditions.

[40] For the Class Vehicles, the recommended maintenance schedule for replacing spark plugs under normal operating conditions is 90 months or 150,000 kilometers – whichever occurs first. However, for 2008 MY Ford Cars and light duty trucks, and 2008 MY Lincoln vehicles, the recommended maintenance schedule is 144,000 kilometers.

3. TSBs

[41] TSB 08-7-6 figures prominently in this certification application. FMC and Ford of Canada regularly issue TSBs to independent dealers offering guidance and instructions respecting warranty and non-warranty repairs to a vehicle or its component parts. According to Mr. Lacasse, TSBs are ubiquitous and not unique to FMC. Indeed, Mr. Allen, the proposed plaintiff's expert, testified that vehicle manufacturers have issued thousands of TSBs.

[42] As noted, TSB 08-7-6 details the process for the removal of spark plugs, including the tools specifically designed for this purpose. It states that some Class Vehicles "may experience difficulty with spark plug removal [which] may cause damage to the spark plug and leave part of the spark plug in the cylinder head".

[43] Aside from TSB 08-7-6, Ford of Canada has not issued any safety recalls or other field service actions relating to spark plugs in Class Vehicles. Nor has Transport Canada or the National Highway Traffic Safety Administration – the agency of the United States Government tasked with over-seeing transportation safety – initiated any safety investigations.

C. Proposed Common Issues

[44] In his Notice of Application for Certification at para. (e), Mr. Wittal proposes 16 common issues for certification. The complete text of these issues is reproduced at Appendix "A" below.

IV. LAW

[45] To be certified, a proposed class action must satisfy the requirements identified in ss. 6(1) of the *CAA*. These legislated requirements are similar, if not identical, to those found in class action statutes in other provinces, as well as Rule 334.16 of the *Federal Court Rules*, SOR/98-106. Consequently, judicial interpretations of those various statutes, while not binding in Saskatchewan, are instructive.

[46] Section 6(1) of the *CAA* reads as follows:

> **Class certification**
>
> **6**(1) Subject to subsections (2) and (3), the court shall certify an action as a class action on an application pursuant to section 4 or 5 if the court is satisfied that:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class;
>
> (c) the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members;
>
> (d) a class action would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a person willing to be appointed as a representative plaintiff who:
>
> (i) would fairly and adequately represent the interests of the class;
>
> (ii) has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action; and

> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[47] In *Hollick v Toronto (City)*, 2001 SCC 68 at para 16, [2001] 3 SCR 158 [*Hollick*], McLachlin C.J. stated that the purpose of a certification hearing is "… decidedly not meant to be a test of the merits of the action". Rather, the "… question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action".

[48] As the Court of Appeal in *Pederson v Saskatchewan (Minister of Social Services)*, 2016 SKCA 142, [2017] 5 WWR 669 [*Pederson*], admonished at para. 29:

> [29] ... Judges hearing certification applications must be mindful that the hearing operates as a meaningful screening device and there should be more than symbolic scrutiny of the evidence. Despite this, the issues are essentially procedural. A consideration of the merits of the claim is neither necessary nor warranted. The process does not allow for an extensive assessment of the complexities and challenges a plaintiff may face in establishing its case. It is within these broad boundaries that the task of the hearing judge must be accomplished.

See also: *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 at paras 100-105, [2013] 3 SCR 477 [*Pro-Sys*].

[49] When exercising this "meaningful scrutiny", a court must be mindful of the overarching purposes of a class action. Initially identified in *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46 at paras 27-29, [2001] 2 SCR 534 [*Dutton*], and reiterated in *Hollick* at para 15, and *Vivendi Canada Inc. v Dell'Aniello*, 2014 SCC 1 at para 1, [2014] 1 SCR 3, these overarching purposes are threefold, namely:

a) First, and foremost, "… class actions serve judicial economy by avoiding unnecessary duplication of fact-finding and legal analysis …" (*Dutton* at para 27);

b) Second, class actions enhance "… access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually" (*Dutton* at para 28); and

c) Third, "… class actions serve efficiency and justice by ensuring that … wrongdoers modify their behaviour to take full account of the harm …" (*Hollick* at para 15) they have caused or might cause.

[50] Accordingly, it is imperative that courts not take "… an overly restrictive approach …" to a class action statute; rather, they should "… interpret the Act in a way that gives full effect to the benefits foreseen by the drafters": *Hollick* at para 15.

[51] While the objective of certification is to determine if, from a procedural perspective, the proposed action is best prosecuted as a class action; conversely, "… certification seeks to filter out manifestly unfounded and frivolous claims": *Lin v Airbnb Inc.*, 2019 FC 1563 at para 25 [*Lin*].

[52] In *Pro-Sys* at paras 63, and 99-104, the court set out the requisite legal standards applicable on an application to certify an action. Simply put, two separate standards apply to the five certification criteria set out in ss. 6(1): one for the "cause of action" criterion (clause 6(1)(a)), and one for the four other criteria (clauses 6(1)(b) to (e)).

[53] A plaintiff seeking certification bears the burden of demonstrating that each criterion has been met. See: *Hoffman v Monsanto Canada Inc.*, 2007 SKCA 47 at paras 23 and 25, 293 Sask R 89; and *G.C. v Merck Canada Inc.*, 2019 SKQB 42 at para 32. This list is conjunctive, and all five requirements must be satisfied before a proceeding can be certified as a class action. See, for example: *Brink v Canada*, 2024 FCA 43 at para 138, 490 DLR (4th) 552; and *Samson Cree Nation v Samson Cree Nation (Chief and Council)*, 2008 FC 1308 at para 35, [2009] 4 FCR 3, aff'd *Buffalo v Samson Cree Nation*, 2010 FCA 165 at para 3, 320 DLR (4th) 629.

[54] That said, this burden is not onerous. The test to be applied to the first criterion for certification – the pleadings must disclose a cause of action – is similar, if

not the same, as when assessing whether to strike or dismiss a pleading. See, especially: *Pro-Sys* at para 63; *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 20, [2011] 2 SCR 261 [*Elder Advocates*]; and *Pederson* at para 65. This means each cause of action pleaded must be assessed to see if it is plain and obvious that it discloses no reasonable cause of action and cannot succeed. See, for example: *Hollick* at para 25; *Elder Advocates* at para 20; *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 at 980; and *Pederson* at para 65.

[55] For purposes of this inquiry, material facts must be taken to be true. Yet, this presumption is displaced if the facts pled are "… manifestly incapable of being proven". See: *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19 at para 87, [2020] 2 SCR 420 [*Babstock*], quoting *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para 22, [2011] 3 SCR 45.

[56] Furthermore, although facts are presumed to be true, they must be pled in support of each cause of action. Bald conclusory assertions are not allegations of material fact and cannot support a cause of action. See: *Lin* at para 29; and *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at para 31, 321 DLR (4th) 301.

[57] For the four other certification criteria (ss. 6(1)(b) to (e)), a plaintiff has the burden of adducing evidence to show "some basis in fact" that they have been demonstrated. See particularly: *Hollick* at para 25; and *Pro-Sys* at para 99. See also: *Pederson* at paras 28-29, and *Kane v FCA US LLC*, 2022 SKQB 69 at paras 92-93, [2022] 9 WWR 680 [*Kane*].

[58] This threshold is also low given a court's inability to "engage in the finely calibrated assessments of evidentiary weight" at the certification stage: *AIC Limited v Fischer*, 2013 SCC 69 at para 40, [2013] 3 SCR 949 [*Fischer*]. The "some basis in fact" standard means that for the last four certification criteria, an evidentiary foundation is needed to support certification. The use of the word "some" implies that the evidentiary record need not be exhaustive, and a court must refrain from assessing the sufficiency of evidence or resolving conflicts in the evidence. See: *Fischer* at para 41, citing

McCracken v Canadian National Railway Company, 2012 ONCA 445 at paras 75-76, 111 OR (3d) 745; and *Lin* at para 30.

[59] Finally, it is settled that the "some basis in fact" standard falls below the civil standard of proof, *i.e.* on a balance of probabilities. See: *Pro-Sys* at para 105. Since at the certification stage a court does not engage in a robust analysis of the merits of the claims advanced on the application, a successful certification order does not presage the result of a subsequent common issues trial. See: *Pro-Sys* at para 105, and *Lin* at para 31.

V. ANALYSIS OF CERTIFICATION CRITERIA

A. Subsection 6(1)(a) – Cause of Action

1. Law

[60] The first criterion asks whether the pleadings disclose a cause of action. This assessment is made on the standard applicable on a motion to strike pleadings under Rule 7-9(2)(a) of *The King's Bench Rules*, namely assuming all facts pled are true, it is plain and obvious the claim has no reasonable prospect of success. See: *Pro-Sys* at para 63; and *Babstock* at para 14.

[61] Material facts are accepted as true unless they are patently ridiculous or incapable of proof. Pleadings are to be interpreted generously when determining if a cause of action is disclosed. See: *Babstock* at para 88. However, bare allegations or conclusory legal statements based on assumptions or speculation are not material facts and are not assumed to be true when determining if a viable cause of action has been pled. See for example: *Das v George Weston Limited*, 2018 ONCA 1053 at para 74, 43 ETR (4th) 173 [*Das*].

2. Identifying the Causes of Action Pled

[62] The plaintiff's ASC advances five potential causes of action:

a) Breach of the *CPBPA*, and consumer protection legislation in other provinces (paras. 57-65);

b) Breach of ss. 36 and 52 of the *Competition Act* (paras. 65-68);

c) Breach of Express and Implied Warranty (paras. 69-78);

d) Negligence (paras. 79-89); and

e) Unjust Enrichment (paras. 90-92).

3. Analysis of Proposed Causes of Action

3.1 Breach of the *Competition Act*

3.1.1 Pleading

[63] Breaches of s. 52 of the *Competition Act* are pled particularly at paras. 65 to 68 of the ASC. Section 36 of the *Competition Act* is invoked in aid of this claim.

[64] In the ASC, Mr. Wittal pleads at paras. 65 -67 as follows:

> 65. Section 36 of the *Competition Act* … entitles the Plaintiffs and CLASS members to recovery of losses and damages incurred as a result of conduct that is contrary to Part VI.
>
> 66. At all materials, FORD violated section 52 of the *Competition Act* … by knowingly making false and materially misleading representations, including omissions of information, to the Plaintiffs and CLASS regarding improperly designed spark plugs and related engine defects within vehicles listed in TSB 08-7-6 for the purpose of promoting the use, supply, and sale of FORD vehicles and to promote FORD's business interests.
>
> 67. As a result of violating the *Competition Act*, FORD caused the Plaintiff to purchase the VEHICLE.

[65] Respecting the allegation of "false and materially misleading representations", the ASC at para. 57 pleads that FMC and Ford of Canada in

"standardized brochures" and "warranties" made statements that (i) the Class Vehicles "were constructed of parts that were carefully scrutinized and that worked together seamlessly"; (ii) the Class Vehicles "required spark plug replacement at 100,000 miles", and (iii) the Class Vehicles had "the best performing engines, were the most reliable, were the least expensive to own and maintain, and had the best resale value".

3.1.2 Law

[66] Section 52(1) of the *Competition Act* is drafted as a criminal provision and only applies where a person knowingly or recklessly makes a false or misleading representation. As noted, there is no general duty to disclose. See, for example: *Arora v Whirlpool Canada LP*, 2013 ONCA 657 at para 50, 370 DLR (4th) 59 [*Arora*]. While the failure to disclose a material fact can amount to a false or misleading representation under provincial consumer protection such as the *CPBPA*, it does not amount to a breach of ss. 52(1). See: *Rebuck v Ford Motor Company*, 2022 ONSC 2396 at para 43, 161 OR (3d) 758 [*Rebuck*].

[67] Subsection 36(1) allows any person who has suffered loss or damage "as a result" of a breach of ss. 52(1) to sue for, and recover, damages flowing from such a breach. It is s. 36, and not s. 52, that creates a cause of action. See: *Singer v Schering-Plough Canada Inc.*, 2010 ONSC 42 at para 107, 87 CPC (6th) 276 [*Singer*].

[68] Even though ss. 52(1) is a criminal provision, if damages are being sought in a civil proceeding under ss. 36(1), a plaintiff must only establish a breach of ss. 52(1) on a balance of probabilities. See: *Rebuck* at para 44.

[69] In *Singer* for example, Strathy J. (as he then was) held that to succeed in a ss. 52(1) claim, a plaintiff must show "… a causal connection between the breach (the materially false or misleading representation to the public) and the damages suffered by the plaintiff": (para 107).

[70] Recently however, in *Live Nation Entertainment, Inc. v Gomel*, 2023 BCCA 274 at para 124, 484 DLR (4th) 379, the British Columbia Court of Appeal

determined that a proposed plaintiff was not required to plead detrimental reliance in order to ground an independent claim under the *Competition Act*. See also: *Valeant Canada LP/Valeant Canada S.E.C. v British Columbia*, 2022 BCCA 366 at paras 232 and 236.

3.1.3 Analysis

[71] Mr. Wittal alleges that the proposed defendants falsely misrepresented the class vehicles as reliable, safe, and free from defects. He maintains that the class vehicles, and his vehicle particularly, suffered from the alleged vehicle defect, namely faulty spark plugs, and the proposed defendants have been unable to fix these issues.

[72] As noted, at para. 57 of the ASC, Mr. Wittal pleads that the proposed defendants in "standardized brochures" and warranty documents represented that the class vehicles: (i) "were constructed of parts that were carefully scrutinized and that worked together seamlessly"; (ii) "required spark plug replacements at 100,000 miles"; and (iii) "had the best performing engines, were the most reliable, were the least expensive to own and maintain, and had the best resale value".

[73] The proposed defendants assert that in the ASC, Mr. Wittal has failed to plead any material facts respecting the form of these representations, let alone the words utilized, how they were communicated, by whom, and to whom. Moreover, the proposed defendants, relying upon *Arora* at paras 50-51, submit that failing to disclose that removing and replacing certain spark plugs may be difficult, cannot constitute a misrepresentation for purposes of s. 52 of the *Competition Act*. See, also: *Williams v Canon Canada Inc.*, 2011 ONSC 6571 at para 227. Simply put, the pleading is bald and fails to identify any common express misrepresentation.

[74] Reading the ASC as a whole, I am not persuaded that Mr. Wittal has pled a clear misrepresentation. Like *Kane*, it is apparent that the alleged misrepresentation complained of relates to the proposed defendants' failure to disclose the difficulties

experienced by some consumers with the allegedly defective spark plugs. This is not sufficient to ground a reasonable cause of action for purposes of ss. 6(1)(a) of the *CAA*. See: *Kane* at para 125.

[75] Accordingly, I conclude it is plain and obvious that Mr. Wittal's claim based on alleged breaches of the *Competition Act* cannot succeed and must be struck.

3.2 Breach of Provincial Consumer Protection Statutes

3.2.1 Pleading

[76] Breaches of various provincial consumer protection statutes are pled in the ASC. At para. 58, for example, Mr. Wittal lists the existing consumer protection legislation in all ten provinces and alleges the unfair trade practices he identified in the pleading amount to breaches of these provincial statutes.

[77] Mr. Wittal attempts to particularize these unfair trade practices at para. 62 as follows:

> a) representing that goods or services have sponsorship, approval, performance characteristics, accessories, ingredients, components, qualities, uses or benefits that they do not have;
>
> b) representing that goods or services are of a particular standard, quality, grade, style, model, origin, or method of manufacture when they are not;
>
> c) representing that a transaction involving goods and services involves or does not involve rights, remedies, or obligations where that representation is deceptive or misleading; and

d) using exaggeration, innuendo, or ambiguity in representing a material fact, or failing to disclose a material fact, if the representation is deceptive or misleading.

[78] Specifically, at para. 63, he alleges:

> 63. FORD's marketing of vehicles listed in TSB 08-7-6 with improperly designed spark plugs and related engine defects, without revealing material facts to the Plaintiffs and CLASS members with the intent that the Plaintiff and CLASS members be unaware of the unrevealed material facts rely upon the omission constitutes unlawful, unfair, and deceptive business acts or practices within the meaning of *The Consumer Protection Act*, S.S. 1996, c. C-30.1, *The* [*CPBPA*], and other similar legislation throughout Canada.

[79] Of relevance here are ss. 6-8 of the *CPBPA*, the pertinent Saskatchewan statute.

3.2.2 Law

[80] The *CPBPA*'s antecedent was first enacted in 1977 as *The Consumer Products Warranties Act, 1977*, SS 1976-77, c 15. It is remedial legislation which Abella J. described in *Prebushewski v Dodge City Auto (1984) Ltd.*, 2005 SCC 28 at para 33, [2005] 1 SCR 649, as "part of an emerging legislative pattern in North America designed to equitably reconfigure the imbalance in bargaining power between consumers and those who manufacture and sell products"**.**

[81] To fulfil this objective, the protections to consumers afforded by legislation like the *CPBPA* must be given a generous and liberal interpretation. See, for example: *Seidel v TELUS Communications Inc.*, 2011 SCC 15 at para 37, [2011] 1 SCR 531; *Schroeder v DJO Canada Inc.*, 2010 SKQB 125 at para 41, 356 Sask R 162; and *Tchozewski v Lamontagne*, 2014 SKQB 71 at para 47, 440 Sask R 34.

3.2.3 Analysis

[82] Section 6 of the *CPBPA*, the central provision, reads as follows:

> **Unfair practices**
>
> **6** It is an unfair practice for a supplier, in a transaction or proposed transaction involving goods or services, to:
>
> (a) do or say anything, or fail to do or say anything, if as a result a consumer might reasonably be deceived or misled;
>
> (b) make a false claim;
>
> (c) take advantage of a consumer if the person knows or should reasonably be expected to know that the consumer:
>
> (i) is not in a position to protect his or her own interests; or
>
> (ii) is not reasonably able to understand the nature of the transaction or proposed transaction; or
>
> (d) without limiting the generality of clauses (a) to (c), do anything mentioned in section 7.

[83] Section 2(i) of the *CPBPA* defines "supplier" to include manufacturers of goods and services, either as a principal or agent, as well as distributors of those goods and services.

[84] For purposes of this putative class action, the defendant, FMC, would appear to qualify as a manufacturer of the vehicles, and Ford of Canada as a distributor of those vehicles, if not a manufacturer. Consequently, it is not plain and obvious Mr. Wittal would fail in demonstrating that these defendants fit the statutory definition of "supplier" for the purposes of the *CPBPA*. See also: *Kane* at para 127.

[85] That said, a survey of consumer protection legislation from other provinces reveals that not all those statutes authorize claims of unfair trade practices against a manufacturer or distributor. In addition to the *CPBPA*, only the following provincial statutes recognize such claims:

a) Alberta: *Consumer Protection Act*, RSA 2000, c C-26.3, ss 6, and 7.3

b) British Columbia: *Business Practices and Consumer Protection Act*, SBC 2004, c 2, ss1(1), 4-8

c) Manitoba: *The Business Practices Act*, CCSM, c B120, ss 2-4

d) Québec: *Consumer Protection Act*, CQLR, c P-40.1, ss 1, 219-222.

[86] However, there is authority in this province which holds that the sections of the *CPBPA* relating to unfair trade practices do not create a cognizable cause of action. See: *Evans v General Motors of Canada Company*, 2019 SKQB 98 at para 44, [2019] 10 WWR 725 [*Evans*]. Barrington-Foote J.A. went on to explain in that paragraph that the proposed plaintiffs had failed to "seek any relief based directly or indirectly" on the alleged breaches of those sections.

[87] Yet, it appears that the ASC in this case is distinguishable from the pleading scrutinized in *Evans*. At para. 64 of the ASC, Mr. Wittal claims that because of the alleged violations of ss. 6-8 of the *CPBPA* by the proposed defendants, he "and CLASS members have suffered economic damages in an amount to be proven at a common issues trial on an aggregated basis". Unlike *Evans*, the ASC seeks monetary damages for those alleged violations.

3.2.4 Conclusion on Unfair Trade Practices Claim

[88] At the certification stage, all Mr. Wittal must do is show that it is not plain and obvious his claim about alleged unfair trade practices is doomed to fail. It is a low threshold. I am not persuaded by the proposed defendants' arguments that this claim is without merit and should be rejected at this stage.

[89] That said, I will consider whether this claim should be certified as a common issue later in these reasons.

3.3 Breach of Express and Implied Warranties

3.3.1 Pleading

[90] Mr. Wittal alleges that the proposed defendants breached express warranties made to him and other putative class members. Particularly, he alleges at paras. 70-73 of the ASC as follows:

> 70. When the Plaintiffs and CLASS members purchased and leased the vehicles listed in TSB 08-7-6, either as a new vehicle or as a pre-owned vehicle with remaining warranty coverage, FORD expressly warranted under its "Bumper to Bumper" warranty that it "will repair, replace, or adjust all parts on your vehicle that are defective in factory-supplied materials or workmanship." FORD went on to promise that it would pay for all repairs and parts to replace defective parts, including the improperly designed spark plugs. FORD also expressly warranted that these spark plugs need not be replaced until 100,000 miles or 160,000 kilometres.
>
> 71. The defects at issue in this claim were present at the time of sale and lease of the vehicles listed in TSB 08-7-6 to the Plaintiffs and CLASS members.
>
> 72. FORD breached its express warranties, and continues to breach these express warranties, because it did not, and does not, cover the expenses associated with replacing the improperly designed plug in Plaintiff's and CLASS members' vehicles listed in TSB 08-7-6, and because these spark plugs need to be replaced well before 100,000 miles. FORD further breached these express warranties because the same improperly designed spark plugs were placed in vehicles listed in TSB 08-7-6 once the factory-supplied plugs were removed.
>
> 73. Pursuant to the express warranties and other legal obligations, FORD was obligated to pay for or reimburse the Plaintiffs and CLASS members for costs incurred in replacing the improperly designed spark plugs and for Spark Plugs Defects.

[91] Mr. Wittal further pleads at para. 69 of the ASC that the proposed defendants also breached the statutory warranty contained in the *CPBPA*. This paragraph reads as follows:

> 69. FORD is a manufacturer pursuant to *The Consumer Protection Act*, SS 1996, c C-30.1, *The* [*CPBPA*], and similar legislation elsewhere in Canada, and is subject to the deemed statutory

> warranties that the product supplied is of acceptable quality and is fit for the particular purpose for which the product is intended and being bought.

3.3.2 Analysis

3.3.2.1 Breach of Express Warranties

[92] Respecting the allegation that the proposed defendants breached express warranties made to him, Mr. Wittal acknowledges that he and other members of the proposed class did not contract with them. However, he asserts that the proposed defendants were contractually obliged to back the applicable warranty service.

[93] The proposed defendants demur. They assert there is no basis for Mr. Wittal's claim against them, as he purchased his vehicle after the Limited Warranty had expired. They maintain that Mr. Wittal's complaint is with the used car retailer from whom he purchased the vehicle, and not with them.

[94] The proposed defendants submit that the Limited Warranty is incorporated by reference into the ASC, and forms part of the pleadings. See for example: *Das* at para 74, and *Kalra v Mercedes Benz*, 2017 ONSC 3795 at para 24, 15 CELR (4th) 145 [*Kalra*].

[95] Essentially, Mr. Wittal seeks damages arising from an alleged design defect. However, in *Carter v Ford Motor Company of Canada*, 2021 ONSC 4138, 76 CCLT (4th) 206 [*Carter*], a case similar to this one, the court determined at para. 125 that the Limited Warranty did not guarantee vehicles would be "free of design defects". Rather, it warrants that the Ford Motor Company of Canada would be "liable to pay for parts and to correct for defects in materials or workmanship and it disclaims consequential damages": *Carter* at para 125.

[96] Nor did the proposed defendants guarantee that the spark plugs: (1) would be easy to remove; (2) would not break during removal; (3) would not require

replacement before a certain point in time; or (4) need replacing until 100,000 miles or 160,000 kilometers.

[97] Here, the Limited Warranty explicitly limits an owner's remedies to repairment or replacement of the damaged part while all other claims are foreclosed. Furthermore, Mr. Wittal has failed to plead that he or any other owner of a class vehicle has requested that a damaged spark plug be repaired or replaced under the terms of the Limited Warranty and was refused. See further: *Kalra* at paras 25-26.

[98] Accordingly, I conclude Mr. Wittal's claim that the proposed defendants breached express warranties and the Limited Warranty is doomed to fail and must be struck.

3.3.2.2 Breaches of Implied Warranties

[99] Mr. Wittal alleges further that the proposed defendants breached implied warranties made to him and other putative class members.

[100] The proposed defendants submit that this claim has no merit. They assert that the case law is clear that a term will not be implied if it is inconsistent or otherwise conflicts with an express provision in the agreement. See: *Arora* at paras 177-183; *Carter* at para 133; and *Kalra* at para 26.

[101] Consequently, the proposed defendants assert first that for those putative class members who purchased a class vehicle with Limited Warranty coverage, the only warranties available are expressly provided for in the Limited Warranty coverage. The Limited Warranty prohibits all other forms of liability and disclaims all other warranties except statutorily imposed warranties.

[102] Second, the proposed defendants assert that for those putative class members who purchased a class vehicle after the Limited Warranty had expired – a

group which includes Mr. Wittal – they have no contractual relationship with the proposed defendants. As a result, there can be no implied warranties. See, for example: *Carter* at paras 131-133.

[103] Finally, and in any event, the proposed defendants assert that Mr. Wittal has failed to plead material facts establishing a breach of implied warranty claim. See, for example: *Kalra* at para 27.

[104] Having reviewed Mr. Wittal's arguments, as well as the ASC, I agree with the proposed defendants that his claim for breaches of implied warranties is doomed to fail, and, accordingly, must be struck.

3.3.2.3 Breaches of Statutory Warranties

[105] As referenced earlier, Mr. Wittal pleads at para. 69 of the ASC alleged breaches by the proposed defendants of the statutory warranty provisions found in ss. 19 and 21 of the *CPBPA*. He asserts that the proposed defendants warranted that the class vehicles are "of acceptable quality" and "fit for the particular purpose for which the product is intended and being bought". He alleges further at para. 70 that the proposed defendants breached the statutory warranties because they did not "cover expenses associated with replacing the improperly designed plugs" and because "the spark plugs need to be replaced well before 100,000 miles".

[106] Section 19 of the *CPBPA* sets out in subparagraphs (a) to (h), a litany of statutory warranties which a "retail seller" is deemed to have given to a consumer. Section 21 plainly asserts that a manufacturer is deemed to have extended these statutory warranties to a consumer.

[107] The specific warranties identified in s. 19 include warranties that: (1) the consumer product is of acceptable quality (ss. 19(d)); (2) if the consumer makes known the purpose for which the consumer product is being purchased that it is fit for that

purpose (ss. 19(e)); and (3) “the consumer product and all its components are to be durable for a reasonable period” (ss. 19(g)).

[108] The proposed defendants emphasize that in the ASC, Mr. Wittal did not assert that the class vehicles are unusable or fall below the reasonable expectation of a purchaser of such a product. Instead, Mr. Wittal acknowledged he only began experiencing difficulties with the class vehicle’s spark plugs seven years after the vehicle in question had been manufactured.

[109] As Perell J. recognized in *Carter* at para 147, merchantability and fitness for purpose are “highly contentious individual issues”. He then asked rhetorically: “How can a vehicle be proven to be unmerchantable or unfit for its purpose when the alleged defence comes after the vehicle has been used for moderate to lengthy periods of time without a problem?”. This inquiry, I believe, is especially apt in the circumstances of Mr. Wittal’s claim.

[110] In both *Evans* and *Kane*, Barrington-Foote J.A., and Elson J., respectively, found that the claim for a breach of the statutory warranties in those cases disclosed a reasonable cause of action. See: *Evans* at para 47; and *Kane* at para 129. It should be noted that in *Kane*, Elson J. expressly held: “As cumbersome as it may be to conduct a common issues trial based on this cause of action, I am satisfied that the cause of action is, at the very least, disclosed in the pleading, but only for claims in Saskatchewan”.

[111] That said, the proposed defendants seek to distinguish *Evans* on the basis that there, the alleged defects in the vehicles in question – coolant leaks causing engine over-heating – came to light within one to two years after manufacture. See: *Evans* at para 9.

[112] Mr. Wittal has plead only a breach of the statutory warranties found in

the *CPBPA*. A review of consumer protection statutes from other provinces reveals that only two are broad enough to cover the situation of Mr. Wittal and other putative class members. Those two statutes and their relevant sections are as follows:

a) New Brunswick: *Consumer Product Warranty and Liability Act*, SNB 1978, c C-18.1, ss 8-12, 23; and

b) Québec: *Consumer Protection Act*, ss 1, 37-41.

[113] I accept the proposed defendants' arguments that any claim by Mr. Wittal involving an alleged breach of statutory warranties will be exceedingly difficult to prove. However, at this stage I cannot say with assurance this claim does not present a reasonable cause of action.

[114] That said, I will consider whether it is appropriate to certify this as a common issue suitable for a common issues trial later in this fiat.

3.4 Negligence

3.4.1 Pleading

[115] Mr. Wittal pleads negligence in paras. 79-89 of the ASC. The essence of this claim is found in paras. 82, 83, 88, and 89 as follows:

> 82. FORD was negligent in failing to exercise due care in manufacturing, designing, distributing, testing, constructing, fabricating, analysing, recommending, merchandising, advertising, promoting and selling the vehicles listed in TSB 08-7-6 for the reasons outlined in this Claim and in the following manner:
>
> a. By failing to properly test and inspect CLASS Vehicles so as to prevent the defect and the danger and economic damages it caused persons such as the Plaintiff;
>
> b. By failing to properly design CLASS Vehicles so as to prevent the defect and the danger and economic damages it caused persons such as the Plaintiff; and

> c. By failing to warn the Plaintiff and CLASS members of the defects in the CLASS Vehicles, including the Spark Plug Defects so as to prevent the danger and economic damages it caused persons such as the Plaintiff, when FORD knew, or should have known that the defects were latent and not apparent.
>
> 83. As a result of the Spark Plug Defects, CLASS Vehicles require unreasonable maintenance and repair and CLASS members incur unreasonable costs.
>
> …
>
> 88. In selling and continuing to sell CLASS Vehicles in Canada that contain a dangerous defect that FORD knew of, FORD breached the standard of care expected of it.
>
> 89. As a direct, proximate, and foreseeable result of the negligent acts and omissions of FORD, the Plaintiff and CLASS members have suffered economic damages in an amount to be proven at a common issues trial on an aggregated basis or on an individualistic basis through one of the methods permitted in *The Class Actions Act*.

[116] Earlier in the ASC, Mr. Wittal explains what the alleged design defect in the spark plugs has cost him and other putative class members. At paras. 53-55, he pleads:

> 53. Each CLASS member has been damaged by FORD's conduct, as they have been forced to pay, or will pay, hundreds or thousands of additional dollars to remove the improperly designed spark plugs from vehicles listed in TSB 08-7-6 and the value of their vehicles has been diminished because of these defects.
>
> 54. The process and efforts to remove spark plugs from CLASS Vehicles and the damages caused by FORD's ineffective spark plug removel process and defective design of its spark plugs and CLASS Vehicle engines as described in the aforementioned paragraphs and below is collectively referred to as the "**Spark Plug Defects**".
>
> 55. The costs incurred by the Plaintiff, including but not limited to the replacement of his VEHICLE's engine was due to Spark Plug Defects.
>
> [Emphasis in original]

3.4.2 Law

[117] To sustain a claim for negligence, a plaintiff must prove all the elements of the tort of negligence; there are five. They are: (1) a duty of care owed by the defendant to the plaintiff; (2) the defendant's failure to meet this duty of care; (3) compensable damages sustained by the plaintiff; (4) the compensable damages were caused in fact by the defendant's breach of the duty of care; and (5) the compensable damages are not too remote in law. See: *1688782 Ontario Inc. v Maple Leaf Foods Inc.*, 2020 SCC 35 at para 17, [2020] 3 SCR 504 [*Maple Leaf*]; *Carter* at para 85; and *Kane* at para 101.

[118] In *Maple Leaf*, the court clarified that claims in negligence for pure economic loss cannot succeed unless the alleged defect presents an imminent threat of real and substantial danger to health and safety. Further, the court elaborated that "there is no right to be free from the prospect of damage … only a right not to suffer damage that results from exposure to unreasonable risk": *Maple Leaf* at para 44, citing *Babstock* at para 33.

[119] Thus, the basis for any duty owed by a manufacturer of goods to a purchaser "vanishes where the defect presents no imminent threat": *Maple Leaf* at para 46. The "mere creation of risk…is not wrongful conduct": *Babstock* at para 33.

3.4.3 Analysis

[120] *Carter* highlights that the effect of *Maple Leaf* on product liability claims such as this, is that unless the pleading asserts an "imminent threat of real and substantial danger", a claim for pure economic loss cannot be sustained and must be struck. See: *Carter* at paras 103-104; and *Kane* at paras 110-113.

[121] Here, Mr. Wittal repeatedly pleads that the defective spark plugs create a "danger", however, no material facts are pled to support a claim that any such event

results in an imminent threat of real and substantial danger. The only material facts relate to Mr. Wittal's personal experience. He had to replace the spark plugs in his class vehicle at approximately the 147,000 kilometers mark. After an intervening repair some 16 months later, his vehicle experienced sputtering and a lack of acceleration, but otherwise operated without incident. See: ASC at paras. 10-23. These allegations do not reveal any imminent threat of danger.

[122] Allegations of non-imminent danger in a pleading cannot sustain a claim in negligence for pure economic loss. See: *Carter* at para 111; and *Kane* at para 113.

[123] Operational issues are inherent in vehicles and do not constitute an imminent risk or real and substantial danger. Consequently, Mr. Wittal cannot assert the spark plugs that broke during the initial repair of his vehicle "would unquestionably have caused serious injury or damage". See: *Maple Leaf* at para 43, citing *Winnipeg Condominium Corporation No. 36 v Bird Construction Co.*, [1995] 1 SCR 85 at para 38.

[124] Finally, Mr. Wittal fails to plead a tenable claim respecting the duty to warn. To be sure, manufacturers have a duty of care to warn consumers of dangers inherent in the use of the product, dangers of which the manufacturer knows or ought to know. Here, the ASC does not plead that the alleged design defect in the spark plugs presents an inherent danger. Consequently, there can be no duty of care to warn a purchaser that a manufacturer's goods may be shoddy. See: *Carter* at para 106.

3.4.4 Conclusion

[125] Accordingly, I conclude Mr. Wittal's claim against the proposed defendants for negligence is doomed to fail and must be struck.

3.5 Unjust Enrichment

3.5.1 Pleading

[126] Mr. Wittal pleads a claim for unjust enrichment in paras. 90-92 of the ASC. He alleges at para. 90 that he "and CLASS members unknowingly conferred a benefit upon FORD by paying for vehicles listed in TSB 08-7-6 which contained defective parts and components for use in a vehicle, paying for FORD replacement parts, and paying for repairs related to improperly designed spark plugs, and related engine defects". He asserts further at para. 91 that allowing the proposed defendants "to retain the money paid by the Plaintiff and CLASS members … to FORD and its dealers for which FORD is responsible, would be inequitable".

3.5.2 Law

[127] The requisite elements of a claim of unjust enrichment were summarized in *Garland v Consumers' Gas Co.*, 2004 SCC 25 at para 30, [2004] 1 SCR 629, and clarified in *Kerr v Baranow*, 2011 SCC 10, [2011] 1 SCR 269 [*Kerr*]. See also: *Moore v Sweet*, 2018 SCC 52 at para 37, [2018] 3 SCR 303 [*Moore*].

[128] In *Kerr*, Cromwell J. explained that the unjust enrichment analysis is comprised of three elements: (1) enrichment, *i.e.* has the defendant been enriched by the plaintiff?; (2) corresponding deprivation, *i.e.* has the plaintiff suffered a corresponding deprivation?; and (3) no juristic reason, *i.e.* the enrichment and corresponding deprivation occurred without a juristic reason. Respecting the third element, Cromwell J. stated that no juristic reason for the enrichment and corresponding deprivation means "… that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case …". See: *Kerr* at paras 36 and 40.

[129] At para. 37 of *Kerr*, he elaborated that courts have "… taken a straightforward economic approach to the first two elements – enrichment and corresponding deprivation …". However, the third element of the unjust enrichment

analysis "… provides for due consideration of the autonomy of the parties, including factors such as 'the legitimate expectation of the parties, [and] the right of the parties to order their affairs by contract'…" See: *Kerr* at para 41, quoting *Peel (Regional Municipality) v Canada; Peel (Regional Municipality) v Ontario* [1992] 3 SCR 762 at 803.

[130] More recently, in *Babstock* at paras 23-25, a majority of the Supreme Court announced that disgorgement is not a remedy for unjust enrichment.

3.5.3 Analysis

[131] In *Carter*, Perell J. held that a defendant manufacturer cannot be enriched when putative class members purchase vehicles from an independent dealer. It is the dealer that is enriched, not the manufacturer. See: *Carter* at paras 159-162. I agree with the proposed defendants that the same reasoning applies to Mr. Wittal's claim because he purchased his vehicle from a used car retailer. In his circumstances, it is the used car retailer who is enriched, not the proposed defendants.

[132] In *Kane*, Elson J. concluded at para. 134 that *Babstock* had also fundamentally altered the remedy for unjust enrichment in class actions for product liability cases. He explained further at paras. 137-141, and in some detail, that the decision of Alberta Court of Appeal in *Spring v Goodyear Canada Inc.*, 2021 ABCA 182, 459 DLR (4th) 315, underscored this fundamental alteration. I agree with Elson J.'s analysis and conclusions.

[133] Here, even if it could be said that the proposed defendants had in some way received an enrichment from Mr. Wittal, the relevant sale or lease agreement is a juristic reason for the enrichment, the third consideration under the unjust enrichment analysis. See: *Moore* at para 37. Consequently, no viable claim of unjust enrichment can be demonstrated.

[134] Finally, and in any event, an unjust enrichment claim would unnecessarily complicate the class proceeding, and make it unmanageable, with only minimal contribution to access to justice, behaviour modification and judicial economy

– the avowed goals for class actions. See especially: *Shah v LG Chem, Ltd.*, 2015 ONSC 6148 at para 234, 390 DLR (4th) 87.

3.5.4 Conclusion

[135] Accordingly, I conclude Mr. Wittal's claim against the proposed defendants for unjust enrichment is doomed to fail and must be struck.

4. Conclusions Respecting ss. 6(1)(a) of the *CAA*

[136] I conclude that of all the causes of action advanced under ss. 6(1)(a) of the *CAA*, only two qualify as reasonable causes of action, namely the alleged breaches of the *CPBPA*. I address whether these causes of action can be certified as common issues later in these reasons.

B. Subsection 6(1)(b) – Identifiable Class

[137] The second criterion, ss. 6(1)(b) of the *CAA*, requires an identifiable class of two or more persons.

1. Law

[138] In *Pederson* at para 69, Ottenbreit J.A. for the court stated that a prospective plaintiff has to establish the following under the second criterion, namely:

> [69] … (1) satisfy the court that the proposed class definition permits an objective determination of whether an individual is a member; (2) provide evidence to establish that the class exists; and (3) establish a rational connection between the proposed class definition, the proposed cause of action, and the proposed common issues ...

See also: *Dutton* at para 38; *Hollick* at paras 20-21; and *Alves v First Choice Canada Inc.*, 2011 SKCA 118 at paras 58-59, 342 DLR (4th) 427.

[139] Earlier, in *Toms Grain & Cattle Co. Ltd. v Arcola Livestock Sales Ltd.*, 2006 SKCA 20 at para 28, 279 Sask R 281 [*Toms Grain & Cattle Co.*], Smith J.A. elaborated on this criterion as follows:

> [28] **However, the mere fact that a group of people is identifiable is not sufficient to render them a class for the purpose of a class action. In addition, there must be a rational connection between the proposed class definition, the proposed causes of action and the proposed common issues. In effect, the class description must describe persons who in fact have a claim asserted in the statement of claim.** This has often been interpreted to mean that all members of the proposed class must have at least a colourable claim and that the class definition should not be over-inclusive or under-inclusive, sweeping in those who do not have a claim against the proposed defendants or arbitrarily excluding others who share the same cause of action. See, for example, *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.), *Lau et al v. Bayview Landmark Inc. et al* (1999), 40 C.P.C. (4th) 301 (Ont. Sup. Ct.). In addition, the application for certification must provide a minimum evidentiary basis for the court to be satisfied that there is a class of more than one person who share the common claim. Both requirements, that the class definition must bear a rational relationship to the causes of action certified and the proposed common issues (and therefore must not be unreasonably over-inclusive or under-inclusive), and that there be an evidentiary basis supporting the factual conclusion that such a class exists (i.e., that all the members of the class have suffered the loss claimed), were upheld by the Supreme Court of Canada in *Hollick, supra.*
>
> [Emphasis added]

2. Analysis

[140] Mr. Wittal proposes that an appropriate class definition in this case is: "All persons in Canada, including their estates, who at any time before the date of the certification order, purchased or leased vehicles listed in Ford's TSB 08-7-6 in Canada" (Notice of Application for Certification at para. (b)) .

[141] The proposed defendants submit that this class definition is not only overbroad and unmanageable, it lacks commonality. It ought not to be certified.

[142] It is well-settled that the fact the class can be defined by objective criteria does not fully determine the identifiable class issue. An applicant must also show a rational relationship between the class and the common issues. See, especially: *Pederson* at para 69; and *Toms Grain & Cattle Co.* at para 28. As McLachlin C.J.C.

noted in *Hollick* at para 21, all that is required is "some showing" that the class is not "unnecessarily broad". See also: *Pearson v Inco Ltd.* (2006), 78 OR (3d) 641 (Ont CA) at para 57; and *Mancinelli v Royal Bank of Canada*, 2020 ONSC 1646 at para 190.

[143] I am persuaded that here, the proposed class definition is unnecessarily broad and lacks a rational relationship between the class and the common issues.

[144] First, it purports to embrace all persons or their estates from across Canada who at some point purchased a class vehicle prior to certification. This is hardly a class which is “capable of clear definition identified by objective criteria”. See: *Mueller v Nissan Canada Inc.*, 2021 BCSC 338 at para 117, rev’d in part, *Nissan Canada Inc. v Mueller*, 2022 BCCA 338.

[145] Second, this class definition fails to satisfy the requirement that a rational relationship exists between it and the common issues. I have determined that only the alleged breaches of certain provisions of the *CPBPA* may be characterized as reasonable causes of action. Mr. Wittal did not plead with any specificity complementary provisions from other provinces. Indeed, as noted earlier, it appears that very few provincial statutes are as broad as Saskatchewan’s.

[146] Consequently, I cannot accept, let alone certify, Mr. Wittal’s proposed class definition. It fails to satisfy the second criterion found in ss. 6(1)(b) of the *CAA*. This holding alone is enough to dismiss Mr. Wittal’s certification application. See, for example: *Hoy v Expedia Group Inc.*, 2022 ONSC 6650 at paras 226-227.

[147] However, this is not the only reason why I decline to certify Mr. Wittal’s proposed class action. I am further persuaded that the relevant common issues he proposes fail to satisfy the minimum requirements of ss. 6(1)(c) of the *CAA*.

C. Subsection 6(1)(c) – Common Issues

[148] For purposes of the analysis that follows, it is important to note that the only proposed common issues relevant are those which pertain to sections of the *CPBPA* relating to unfair trade practices and statutory warranties.

1. Law

[149] Subsection 6(1)(c) requires that claims of class members raise common issues of fact or law that will move the litigation forward. Section 2 of the *CAA* defines common issues as either: (a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical facts.

[150] In *Lin* at para 117, for example, Gascon J. explained that a court should decide whether a common issue exists by applying the following principles:

> [117] … (i) the commonality question should be approached purposively; (ii) an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim; (iii) it is not essential that the class members be identically situated *vis-à-vis* the opposing party; (iv) it is not necessary that common questions predominate over non-common issues, though the class members' claims must share a substantial common ingredient to justify a class action, as the Court will examine the significance of the common issues in relation to individual issues; and (v) success for one class member must mean success for all, since all class members must benefit from the successful prosecution of the action, albeit not necessarily to the same extent …

See also: *Pro-Sys* at para 108; and *Pederson* at para 80.

2. Analysis

[151] The causes of action which I found to be as reasonable are restricted only to certain sections of the *CPBPA*. Indeed, Mr. Wittal did not cite in the ASC any sections found in complementary consumer protection statutes from other provinces.

[152] The proposed common issues [PCI] which relate to this statute are PCIs Nos. 4, 6, 7, and 8. They are very loosely worded as evidenced by PCI No. 6 for example: "Whether the Defendants violated competition legislation or consumer protection legislation by selling the Class Vehicles with the Defect?"

[153] PCI No. 6, as well as the other relevant PCIs, ignores different statutory language in other provincial consumer protection statutes, as well as the differences in the causes of action created by those enactment pursuant to which putative class members may make their claims.

[154] The potential for differing answers to issues posed by different provincial consumer protection statutes defeats commonality. There can be no single answer applicable to the claims of all members of the proposed class. See: *Merck Frosst Canada Ltd. v Wuttunee*, 2009 SKCA 43 at para 145, 324 Sask R 210 [*Merck-Frosst*].

[155] Additionally, Mr. Wittal made no attempt to identify subclasses which might render these questions less complicated and less complex. See: *Merck-Frosst* at para 146.

[156] Finally, I note that in *Kane* at para 161, Elson J. also found that the PCIs in that case relating to the application of the *CPBPA* did not qualify as common issues for purposes of ss. 6(1)(c) of the *CAA*.

[157] Accordingly, I find that the third criterion under ss. 6(1) – common issues – also is not satisfied in this application. This holding, too, defeats Mr. Wittal's application to have his proposed class action certified.

D. Subsections 6(1)(d) and (e) – Remaining Certification Criteria

[158] There are two further certification criteria which, for purposes of this application, do not need to be addressed. However, for completeness, I will set out my

conclusions respecting them.

1. Subsection 6(1)(d) – Preferable Procedure

[159] This section requires a proposed plaintiff to demonstrate that a class action "…would be the preferable procedure for the resolution of the common issues…". This criterion involves a consideration of whether a class proceeding is preferable to a series of individual actions to ensure the fair and efficient resolution to the common issues which have been certified.

[160] In *Ross v Canada (Attorney General)*, 2018 SKCA 12 at para 75, [2018] 5 WWR 669, Richards C.J.S. summarized the analytical approach to this inquiry as follows:

> [75] … This framework [of analysis applicable to ss. 6(1)(d) of the *Act*] was explained in *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 SCR 158 [*Hollick*], where the Supreme Court clarified that preferability is rooted in two central concepts. The first is whether the class action will be a fair, efficient and manageable method of advancing the claim. The second is whether the class action will be preferable to other reasonably available means of resolving the claims of the class members. See: *Hollick* at para 28. This analysis must be conducted through the lens of the three goals of class proceedings, i.e., access to justice, judicial economy and behaviour modification. See: *Hollick* at para 27; *AIC Limited v Fischer*, 2013 SCC 69 at paras 16 and 22, [2013] 3 SCR 949 [*Fischer*]. Further, in conducting this assessment, the common issues must be considered in the context of the action as a whole. See: *Hollick* at para 30.

[161] Utilizing this approach, I would have concluded that a class proceeding is not the preferable procedure for this matter. As the only reasonable causes of action relate to the operation of certain sections of the *CPBPA*, and possibly complementary consumer protection legislation in other provinces, individual actions are more appropriate.

[162] Individual actions would better accommodate the textual idiosyncrasies of the different statutes, while at the same time enabling a plaintiff or plaintiffs who are

similarly situated to seek redress for alleged harms.

2. Subsection 6(1)(e) – Suitable Representative Plaintiff

[163] Subsection 6(1)(e) of the *CAA* stipulates that for purposes of certification, the applicant must present a representative plaintiff who: (1) can prosecute the action fairly and adequately represent the interests of the class; (2) has produced a workable litigation plan; and (3) does not have a conflict of interest with respect to the common issues. See further: *Pederson* at paras 98-102.

[164] Had it been necessary for me to decide, I would have concluded that Mr. Wittal was a plaintiff who would prosecute a class action fairly; represent the interests of other class members adequately; and would not be in a conflict of interest. However, I am not persuaded that the litigation plan he presented was one that "sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action": ss. 6(1)(e)(ii).

[165] Accordingly, I would have concluded that Mr. Wittal also failed to satisfy the suitable representative plaintiff criterion.

VI. CONCLUSION

[166] As I have explained, I conclude that Mr. Wittal has failed to satisfy all the criteria necessary for certification as set out in ss. 6(1) of the *CAA*. Consequently, his certification application must be dismissed.

[167] The proposed defendants have not asked for costs. No costs order is made.

J.

G.G. MITCHELL

APPENDIX A

Proposed Common Issues, Notice of Application for Certification

…

(e) certifying the following issues as common issues:

(1) Whether the Class Vehicles contain a design, development, or manufacturing defect affecting its spark plugs (the "*Defect*"), that can cause or contribute to unreasonable repair costs or engine damage when driven as intended;

(2) If the answer to No. 1 is "yes", when did or should the Defendants have known of the Defect?;

(3) Whether the Defect in the Class Vehicles can cause, contribute, or increase the risk of engine damage, personal injury, or death?;

(4) Whether the Defendants on a class wide basis misrepresented the Class Vehicles as being of good merchantable quality, or being fit and safe for their ordinary intended use, when in fact they were equipped with the Defect?;

(5) Whether the Defendants breached express, implied warranties, or statutory warranties by selling the Class Vehicles, with the Defect?;

(6) Whether the Defendants violated competition legislation or consumer protection legislation by selling the Class Vehicles, with the Defect?;

(7) Whether it was unreasonable or unlawful for the Defendants to introduce the Class Vehicles with the Defect into the Canadian streams of commerce?;

(8) Whether the Defendants provided adequate warnings as to the fitness of the Class Vehicles' transmission system or misrepresented on a class wide basis the fitness of Class Vehicles containing the Defect?;

(9) Whether the Defendants knowingly, recklessly, or negligently breached a duty to warn the Plaintiff and the Class of the risks associated with purchasing, owning, or operating a Class Vehicle with the Defect?;

(10) Whether the Defendants breached a duty of care owed to Class Members, and, if so, when and how?;

(11) Whether the Defendants have been unjustly enriched by the receipt of revenues from the lease and sale of the Class Vehicles?;

(12) Whether the Plaintiff and Class suffered a corresponding deprivation by paying for the Class Vehicles?;

(13) Is there any juristic reason justifying retention by the Defendants, of the revenues from the sale of the Class Vehicles?;

(14) Should the Defendants be required to disgorge the revenues they received from the sale of the Class Vehicles to the Plaintiff and the Class and if so, how much and should his disgorgement be made in the aggregate and how should this disgorgement be distributed among the Class?;

(15) Whether the Defendants should pay exemplary or punitive damages, and, if so, how much, to whom, and how is it to be distributed?; and

(16) Whether the Plaintiff and Class suffered damages and, if so, what the appropriate measure of damages should be?.