COURT OF APPEAL FOR ONTARIO

CITATION: Rebuck v. Ford Motor Company, 2023 ONCA 121
DATE: 20230224
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MacPherson, Hoy and Coroza JJ.A.

BETWEEN

Barry Rebuck

Plaintiff (Appellant)

and

Ford Motor Company and Ford Motor Company of Canada, Limited
and Yonge-Steeles Ford Lincoln Sales Limited

Defendants (Respondents)

Proceeding under the *Class Proceedings Act, 1992*

Irving Marks, David Taub, Joey Jamil, Michael Peerless, and Emily Assini, for the appellant

Hugh M. DesBrisay, Jill Lawrie, Catherine Beagan-Flood, and Laura Dougan, for the respondents

Heard: January 25, 2023

On appeal from the order of Justice Edward P. Belobaba of the Superior Court of Justice, dated June 15, 2022, with reasons reported at 2022 ONSC 2396.

REASONS FOR DECISION

[1] This appeal concerns a certified class action relating to the fuel consumption estimates affixed to vehicles manufactured by the respondents (collectively “Ford”)

and repeated in their marketing materials. The class claim is that the EnerGuide labels affixed to Ford's 2013 and 2014 new vehicles and Ford's marketing materials were false or misleading under two statutory regimes – the federal *Competition Act*, R.S.C. 1985, c. C-34, and the consumer protection statutes of seven provinces, including Ontario's *Consumer Protection Act*, *2002,* S.O. 2002, c. 30, Sch. A.

[2] The federal government's EnerGuide label program helps consumers compare energy efficiencies when purchasing high-energy-use products. For most products, EnerGuide labelling is required by federal regulation. In the case of new vehicles, EnerGuide labels were affixed pursuant to a Memorandum of Understanding ("MOU") which, based on Ministerial powers provided under federal legislation, the Department of Natural Resources ("NRCan") entered into with the Motor Vehicle Manufacturers' Association, which included Ford Canada, and the Association of International Automobile Manufacturers.

[3] In extending the use of EnerGuide labels to the sale or lease of new vehicles, the federal government had two objectives: to help consumers compare the fuel consumption of different vehicles and models before making a purchase or lease decision and to encourage fuel-efficient driving.

[4] In its 2012 *Guidelines for Determination and Submission of Fuel Consumption Data for Fuel Consumption Labelling* (the "Guidelines"), the federal

government prescribed the design and content of the EnerGuide labels that had to be affixed by vehicle manufacturers to new vehicles in the 2013 and 2014 model years. Ford's EnerGuide label for 2014 set out three core pieces of information: (1) the estimated fuel consumption for city driving was 24 miles per gallon ("mpg"); (2) the estimated fuel consumption for highway driving was 36 mpg; and (3) the estimated annual fuel cost was $2,600. In compliance with the Guidelines, the label also states that, "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". Across its top, the label advises, "Ask your dealer for the FUEL CONSUMPTION GUIDE or call 1-800-387-2000".

[5] The Fuel Consumption Guide ("FCG") explained that, "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."

[6] In their marketing materials, Ford repeated the estimated fuel consumption for city and highway driving set out in the EnerGuide label. The estimates were accompanied by the statement: "Fuel consumption ratings based on Transport Canada approved test methods. Actual fuel consumption will vary".

[7] When the appellant, the representative plaintiff Barry Rebuck, leased a 2014 Ford Edge SUV, he reviewed the information on the EnerGuide label that had been

affixed by Ford Canada to the vehicle's window. On a trip to Florida in December 2014, the appellant noticed that the on-board fuel consumption display was showing only 23 mpg while highway driving. He understood that fuel consumption would vary widely from individual to individual based on a range of factors and he did not expect to achieve the 36 mpg while highway driving estimate set out on the EnerGuide label. In fact, he expected the fuel consumption understatement for highway driving to be as much as 25%.

[8] Class counsel discovered that Ford used a 2-Cycle Test (laboratory-controlled city and highway tests) prescribed by NRCan for its 2013 and 2014 Canadian vehicles, while using the 5-Cycle Test adopted by the United States Environmental Protection Agency for its American vehicles. The 5-Cycle Test added three new test cycles in addition to the city and highway tests: the cold temperature operation test, the hi-speed/quick-acceleration test, and the air conditioning test. NRCan later adopted the 5-Cycle Test and concluded that it better approximated real-world driving conditions and behaviours. At the time the appellant leased his vehicle, the Guidelines required the use of the data from the 2-Cycle Test.[1] U.S. data based on the 5-Cycle Test could not be used, even in marketing material.

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[1] NRCan adopted the 5-Cycle Test in 2015, a year after the appellant leased his vehicle.

[9] In early 2016, the appellant filed a class action alleging breaches of the misleading advertising provisions in the federal *Competition Act* and provincial consumer protection legislation. He sought $1.5 billion as compensation for a proposed class of about 600,000 persons in Canada who purchased or leased a new 2013 or 2014 Ford vehicle. This action was ultimately certified as a class proceeding in 2018.

[10] After certification, both the appellant and Ford brought competing motions for summary judgment to resolve the matter.

[11] On June 15, 2022, Belobaba J. dismissed the appellant's motion for summary judgment and granted Ford's cross-motion for summary judgment. The result was the dismissal of the class action in its entirety.

[12] In his judgment, the motion judge identified three common issues:

> Common Issue No. 1: Did Ford contravene s. 52 of the *Competition Act*?
>
> Common Issue No. 2: Did Ford contravene ss. 14 and 17 of Ontario's *Consumer Protection Act* and parallel provisions of provincial consumer protection legislation by making false, misleading, or deceptive representations?
>
> Common Issue No. 3: Are the class members entitled to damages under s. 36(1) of the *Competition Act*, s. 18(2) of Ontario's *Consumer Protection Act*, and the parallel provisions of the consumer protection legislation in other

provinces and, if so, can the damages payable by Ford be determined on an aggregate basis and in what amount?

[13] The motion judge decided these issues in favour of Ford. He concluded:

> Common Issues Nos. 1 and 2, and the first part of No. 3, are answered in favour of the Defendants.
>
> The plaintiff's motion for summary judgment is dismissed.
>
> The defendants' cross-motion for summary judgment (dismissing the class action in its entirety) is granted.

[14] The appellant contends that the motion judge erred in reaching all three of these conclusions.

[15] On the first common issue, the appellant submits that the motion judge erred in his interpretation and application of s. 52 of the *Competition Act* by failing to hold that the representations made to the public by Ford on the EnerGuide label and in its marketing materials were knowingly false or misleading by understating the vehicles' actual fuel consumption by an average of 15%.

[16] We do not accept this submission.

[17] Sections 52(1), 52(1.1)(a) and 52(4) of the *Competition Act* provide as follows:

> (1) 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 pubic that is false or misleading in a material respect.

> (1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that
>
> (a) any person was deceived or misled;
>
> …
>
> (4) In a prosecution for a contravention of this section, the 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.

[18] It must be remembered that a person who contravenes s. 52(1) of the *Competition Act* is guilty of an offence. The information Ford provided on its EnerGuide labels and in its marketing materials complied with NRCan's mandatory directions and guidelines. The motion judge found that the signatories to the MOU, including Ford Canada, reasonably believed that NRCan's directives and guidelines were mandatory. By affixing its EnerGuide labels containing the information set out above and repeating that information in its marketing materials, Ford was carefully complying with the MOU and the Guidelines, not, as the appellant asserts, "knowingly or recklessly" making a representation to the public that is false or misleading in a material respect. As the motion judge recognized, it is hard to believe that the federal government intended to criminalize or otherwise impugn its own EnerGuide labels.

[19] It is true that by 2014 the picture was changing. The United States had adopted the 5-Cycle Test and it was widely acknowledged to better approximate real- world driving conditions than the 2-Cycle Test.

[20] However, that does not mean that Ford was obliged to shift to the 5-Cycle Test in Canada. As we have stated, the Guidelines required the use of the 2-Cycle Test, and did not permit the use of U.S. data based on the 5-Cycle Test. Ford complied with the MOU and the Guidelines. The fact that the United States – or Brazil, Luxembourg or any other country – might have had different, even better, guidelines is irrelevant.

[21] As to whether the representations were false or misleading, the appellant does not assert that, literally, the statements and representations set out on the EnerGuide label or the marketing materials were false or misleading in any respect. Moreover, before the motion judge, the appellant retracted 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. Rather, class counsel argued that the label conveyed the general impression 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 fuel consumption that was above or below these medians. The motion judge rejected this argument. Contrary to the appellant's submission on appeal, the motion judge applied an objective test, considering "the general impression conveyed by the EnerGuide Label to the average car-buyer". He did not impermissibly stray into a subjective analysis or require proof, contrary to

s. 52(1.1), that anyone was deceived or misled simply by noting that the appellant's evidence undermined the general impression argued by his counsel.

[22] The appellant reframes his argument on appeal, submitting that the general impression conveyed is that the estimates predicted the vehicles' actual fuel consumption, subject to reasonable variance, and, as a result, Ford understated the vehicles' actual fuel consumption by an average of 15%. This is merely a version of the alleged "actual mileage" general impression abandoned at the hearing before the motion judge. We are not persuaded that the EnerGuide label and the marketing materials convey this general impression to the average car-buyer.

[23] As noted above, the motion judge referred to the average car-buyer. The appellant argues that the correct test required the motion judge, and requires this court, to consider the general impression that the representation is likely to convey to a credulous and inexperienced consumer: *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265, at para. 78.

[24] The Supreme Court of Canada in *Richard* considered Quebec's *Consumer Protection Act*, C.Q.L.R. c. P-40.1. The Court held that the words "credulous and inexperienced" described the average consumer for the purposes of that Act. However, the Court acknowledged that "the adjectives used to describe the average consumer may vary from one statute to another" to reflect the "diversity

of economic realities to which different statutes apply and of their objectives": *Richard*, at para. 68. The intention of Quebec's *Consumer Protection Act* is "to protect vulnerable persons from the dangers of certain advertising techniques": *Richard*, at para. 72.

[25] Section 1.1 of the *Competition Act* describes its purpose, in relation to consumers, as "to maintain and encourage competition in Canada…in order to provide consumers with competitive prices and product choices." Further, as noted above, a person who contravenes s. 52(1) of the *Competition Act* is guilty of an offence.

[26] This court has not previously considered whether the "credulous and inexperienced" consumer standard articulated in *Richard* applies to the *Competition Act*. Even if it did (and we do not determine that issue[2]), we are not persuaded that the general impression that the EnerGuide label was likely to convey to a credulous and inexperienced consumer purchasing or leasing a Ford vehicle is what the appellant alleged below or on appeal. The word "credulous" does "not suggest that the average consumer is incapable of understanding the literal meaning of the words used in an advertisement if the general layout of the advertisement does not render those words unintelligible": *Richard*, at para. 72.

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[2] See Anita Banicevic, "Assessing General Impression Under the *Competition Act*: The Credulous Man Who Was Never There", (2016) 29:2 Can Competition L Rev 57 for an analysis of this issue.

[27] On the second common issue, the appellant states in its factum that it "repeats and relies on the arguments made in respect of the errors set out in Common Issue 1 in support for its position that [Ford's] Representations were false, misleading and deceptive in breach of sections 14 and 17 of [Ontario's] *Consumer Protection Act*" and the parallel provisions of the consumer protection legislation in six other provinces.

[28] Sections 14 and 17 of Ontario's *Consumer Protection Act* provide:

> 14 (1) It is an unfair practice for a person to make a false, misleading or deceptive representation.
>
> (2) Without limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representations:
>
> …
>
> 14. A representation…failing to state a material fact if such…failure deceives or tends to deceive.
>
> …
>
> 17(1) No person shall engage in an unfair practice.

[29] The motion judge found that the appellant "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." He rejected the appellant's argument that, while Ford could not change the content of the EnerGuide label or use ratings other than those that it did, Ford

failed to state material facts, and their failure to do so deceived or tended to deceive, by not providing supplemental disclosure to customers to the effect that: (1) the ratings on the label were provided for comparison purposes and not to predict actual fuel consumption; (2) the ratings, based on the 2-Cycle Test, and not the 5-Cycle Test, understated fuel consumption under real-world driving conditions by some 15%; and (3) the ratings on the label could only be achieved with fuel-efficient driving and not normal "real world" driving. The motion judge noted that the additional facts that the appellant argued should have been disclosed "simply restated what was already made clear in the FCG".

[30] The appellant contends that the reference to the FCG on the EnerGuide label was not a disclaimer and served as a mere advisement to look elsewhere. The appellant argues that the court should not assume that consumers will follow this advice. Further, the onus ought to have been on Ford to demonstrate that the FCG was provided to all consumers. Even if the FCG fulfilled its disclosure obligations, Ford's marketing materials were in breach of its duty to disclose because they did not refer to the FCG.

[31] We are not persuaded by this submission. In our view, there was no deceptive non-disclosure in breach of s. 14 of Ontario's *Consumer Protection Act* or the parallel provisions of the consumer protection legislation in six other provinces. All of the appellant's three "omissions" are variations on statements indicating that the ratings on the EnerGuide label do not represent the "actual" fuel

consumption that will be achieved under “real-world driving conditions”. Given that the appellant failed to establish (or even advance the submission) that the overall impression conveyed by the label was that the represented mileage would be achieved by all drivers, the motion judge did not err in finding that the absence of additional disclosure would not deceive or tend to deceive the average car-buying consumer.

[32] As to the appellant’s assertion that the motion judge failed to address the marketing materials, which did not refer to the FCG, the motion judge characterized the appellant as focusing on the EnerGuide label and including little to no discussion of his allegation that Ford repeated the label’s fuel consumption data in their sales brochures and marketing materials. The motion judge noted that extending the focus to include the marketing materials “would have been problematic.” Such materials would appear to raise significant individual issues.

[33] In any event, while the marketing materials did not refer to the FCG, every consumer received the EnerGuide label, which did. There is no basis to interfere with the motion judge’s finding that car-buyers for whom fuel consumption was important would “likely” have consulted the FCG. The appellant’s argument that the references to the FCG on the EnerGuide label are not “disclaimers” is irrelevant. What is relevant is that the EnerGuide label prominently directed the customer to the FCG. The prospective customer was provided with accurate and

valuable information about fuel consumption and told where they could look for additional information.

[34] In light of our resolution of the first two issues, the third common issue relating to the calculation of damages does not arise.

[35] The appeal is dismissed. The respondent is entitled to its costs of the appeal fixed at $60,000, inclusive of disbursements, plus HST.

J.C. MacPherson J.A.

Alexander M. J.A.

S. Coroza J.A.