

**CITATION:** Romeo v. Ford Motor Co., 2018 ONSC 6772  
**COURT FILE NO.:** CV-15-539855-00-CP  
**DATE:** 20181115

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Rebecca Romeo, Joe Romeo, Diane Beland, Elyse Choiniere, Linda Goodman, and Tracy Corst., Plaintiffs

– AND –

Ford Motor Company and Ford Motor Company of Canada, Limited, Defendants

**BEFORE:** E.M. Morgan J.

**COUNSEL:** *Theodore Charney, Tina Yang, Remissa Hirji*, for the Plaintiffs

*Hugh DesBrisay*, for the Defendants

**HEARD:** November 13, 2018

**CERTIFICATION OF CLASS ACTION**

[1] The Plaintiffs move for certification under the *Class Proceedings Act, 1992*, SO 1992, c. 6 (“CPA”) of a national class action. They have reached a tentative settlement with the Defendants, which is reflected in a Term Sheet dated November 5, 2018. The present motion is not for approval of the settlement itself – that will come at a later date discussed below. Rather, this motion is for a consent Order certifying the action, setting out the common issues therein, and setting the steps to be taken in giving notice to the class.

[2] The claim arises out of allegedly non-repairable defects in the transmissions of Ford Focus and Ford Fiesta automobiles containing a Powershift Dual-Clutch Transmission (“Class Vehicles”). Plaintiffs contend in the Statement of Claim that the defects in the transmissions can cause serious vehicle performance issues and represent a safety hazard. They allege that the current and former owners of the Class Vehicles have suffered significant repair costs and other damages. They have brought the action on behalf of all persons in Canada who purchased or leased one of these types of vehicles.

[3] The Class Vehicles were sold to the Plaintiffs and other potential class members with a Ford Canada Limited New Vehicle Warranty (the “Warranty”). The Warranty guaranteed that the Defendants would “repair, replace or adjust those parts on Ford cars and light trucks that are found to be defective in materials or workmanship made or supplied by Ford for the coverage periods”. The Warranty contains a section entitled “Powertrain Coverage” in which the transmission is

specifically covered for five years or 100,000 kilometres. Furthermore, the Warranty is transferrable with the ownership of the vehicle if the vehicle is sold prior to the Warranty's expiry, thereby expanding the class to all first and subsequent owners.

[4] In the Fresh as Amended Statement of Claim, the Plaintiffs claim damages under a number of different causes of action: breach of contract/warranty, negligence, breach of consumer protection legislation, unjust enrichment and/or waiver of tort. For the purposes of this consent certification, the Plaintiffs only advance claims in breach of contract/warranty at common law, and, for Quebec residents, breach of articles 1726 and 1730 of the *Civil Code of Quebec*, CQLR c. C-1991 ("*CCQ*"). The Term Sheet reflects proposed compensation to the class members for these breaches by the Defendants.

[5] A motion for certification is a procedural motion only. The test for certification is set out in section 5(1) of the *CPA*, as follows:

- 5(1) The Court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
- (a) the pleadings or the notice of motion discloses a cause of action;
  - (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
  - (c) the claims or defences of the class members raise common issues;
  - (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
  - (e) there is a representative plaintiff or defendant who,
    - (i) would fairly and adequately represent the interests of the class,
    - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
    - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[6] I am satisfied that all of the criteria for certification under this section have been met.

[7] Breach of contract and/or warranty is certainly a known cause of action. The threshold for the test under s. 5(1)(a) is quite low, and in order to refuse certification on this ground I would have to be convinced that the action "cannot possibly succeed at trial": *Hollick v Toronto*, [2001] 3 SCR 158, at para. 25. Since the class is composed of purchasers of a product with a written Warranty, it is clear that they can at the very least claim for breach of the purchase contract and the Warranty that went with it.

[8] Likewise, for class members who purchased the Class Vehicles in Quebec, the facts as pleaded support a claim for breach of article 1726 of the *CCQ*. That article binds a

seller/manufacture to a warranty that the product is free of latent defects such that the buyer would not have bought it at the given sale price if they had known of the defects. The Plaintiffs' pleading sets out that the Defendants were bound to the *CCQ* warranty and that the Quebec class members would not have bought the Class Vehicles, or paid so high a price for them, had they been aware of the defective transmissions. The Plaintiffs have also pleaded that the class members suffered damages as a consequence of the breach of art. 1726.

[9] The proposed class contains more than two appropriate members who are aware of their obligations to the class and appear to be appropriate representative Plaintiffs. The proposed class is defined as all persons in Canada who purchased or leased from the Defendants a Ford Fiesta or Ford Focus vehicle with a Dual Clutch Transmission, for the model years 2011 and forward. Similar definitions have been approved in other class actions against automobile manufacturers: see, e.g., *Quenneville v. Volkswagen Group Canada Inc.*, 2016 ONSC 7959, at para. 13. The proposed class is readily discernable by reviewing the purchase or lease agreements and Warranty documentation, and there is an evident and rational connection between the class and the proposed common issues: *Western Canadian Shopping Centres Inc. v Dutton*, [2001] 2 SCR 534, at para 38.

[10] The parties are in agreement on the common issues to be addressed at trial. These include the question of whether there was a warranty agreement between the class members and the Defendants, the terms of that agreement, and whether there was a breach of that agreement. Breach of warranty-based common issues have been certified in other class actions, including those claiming defects in the manufacture of motor vehicles: see, e.g., *Bondy v Toshiba of Canada Ltd.* (2007), 39 CPC (6th) 339, at paras. 48-53 (SCJ), and *N&C Transportation Ltd. v Navistar International Corp.*, 2016 BCSC 2129, at paras. 156-61.

[11] More specifically, the common issues are:

1. Did Ford Motor Company of Canada, Limited ("Ford Canada") enter into a New Vehicle Limited Warranty agreement with the class members who purchased and/or leased Class Vehicles within the warranty period?
2. Did the warranty contain any express or implied warranty or condition as to the merchantability or fitness of the Class Vehicles?
3. Did the warranty include an express warranty whereby Ford Canada warranted that its dealers would repair, replace, or adjust those parts on the Class Vehicles found to be defective due to manufacturer design, or defects in materials or workmanship?
4. If the answer to common issue 3 is Yes, is the Dual Clutch Transmission defective? If so, how?
5. If the answer to common issues 3 and 4 is Yes, has Ford Canada breached the terms of the warranty requiring Ford Canada to warrant that its dealers will repair, replace, or adjust defects in the Dual Clutch Transmission?
6. Are the defects in the Dual Clutch Transmission capable of being repaired within the meaning of the warranty?

7. For the Quebec class members, did the Defendants warrant pursuant to Article 1726, and as applicable to manufacturers pursuant to Article 1730 of the *CCQ*, either impliedly or expressly, that the Class Vehicles were free of latent Defects which render them unfit for the use for which they were intended or which diminished their usefulness at the time of sale?
8. If so, did the Defendants' sale or lease of the Class Vehicles breach this implied or express warranty?

[12] There is "some basis in fact" for each of these common issues: *Hollick*, at para 25. As the Supreme Court of Canada has observed, "The 'some basis in fact' standard does not require the court to resolve conflicting facts and evidence at the certification stage... The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; 'rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding'": *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 SCR 477, at para 102, quoting *Infineon Technologies AG v Option consommateurs*, [2013] 3 SCR 600, at para 65.

[13] In the circumstances, I am of the view that a class proceeding is the preferable procedure for this action. It is fair, efficient, and manageable, and generally preferable to individual trials and other procedures: see *Rumley v British Columbia*, [2001] 3 SCR 184, at para 35; *Hollick*, at para 28. The policy objectives of access to justice, behavior modification, and judicial economy are fostered by trying the common issues together rather than requiring individual trials of each of those questions for each class member (or of questions 1-6 for class members in common law provinces and questions 7-8 for class members in Quebec).

[14] More specifically, where certification is sought for the purposes of a proposed settlement, and there is a cause of action, an identifiable class, and common issues, there is a "strong basis" for concluding that a class proceeding is the preferable procedure: *Krajewski v TNow Entertainment Group, Inc.*, 2012 ONSC 3908, at para 32. Indeed, the very existence of a proposed settlement at the certification stage represents a strong argument that the preferable procedure criterion for certification has been satisfied: *Coleman v Bayer Inc.*, [2004] OJ No 1974, at para 80 (SCJ); *Paramount Pictures (Canada) Inc. v Dillon*, [2006] OJ No 2368, at para 36 (SCJ).

[15] Under section 17 of the *CPA*, notice of certification of a class proceeding must be given to class members. In terms of the form of that notice, section 19(1) of the *CPA* gives the court latitude to order notice as it considers necessary to protect the interests of any class member or to ensure the fair conduct of the proceeding.

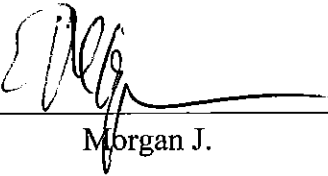
[16] Accordingly, counsel for the Plaintiffs have provided a proposed Notice of Class Action and Proposed Settlement (the "Notice") to the class which incorporates the required contents from s. 17(6) of the *CPA*. These include a description of the proceeding, a statement of the manner and time for class members to opt out of the proceeding, a summary of the agreement between the representative plaintiffs and class counsel regarding the payment of fees and disbursements, and providing an address to which class members are to direct any inquiries. The Notice also describes the key terms of the tentative settlement and directs class members to view the Term Sheet online.

[17] In my view, the contents of the long and short form Notices submitted by Plaintiffs' counsel are sufficient to alert class members of their legal rights at stake, to inform them about certification and the proposed settlement, to allow them to seek out additional information from class counsel if desired, and to advise them of their right to opt out if they do not wish to be bound by the certification or the proposed settlement. In addition, the proposal that the Notice be distributed by a court-appointed claims administrator who will mail a copy of it to each class member, and the further publication of the Notice in English and French newspapers across Canada, all appear to adequately ensure that the class members are properly advised of the certification and proposed settlement.

[18] In the result, the motion for certification for settlement purposes is hereby granted. Likewise, the form and plan for distribution of the Notice to the class is hereby approved. There shall be an Order to go in the form submitted to me by counsel, which includes as schedules the short and long form Notices as well as the settlement Term Sheet.

[19] The settlement approval hearing is scheduled for March 18, 2019. That should give ample time for all notice and other requirements leading up to the settlement to be fulfilled, as set out in the Order submitted by counsel and approved with this endorsement.

[20] There shall be no costs of this motion for or against any party.



Morgan J.

**Date:** November 15, 2018