

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

Cite as: Wilmot v. Toyota Canada Inc., 2011 NSSM 48

Claim No: SCCH 345283

**BETWEEN:**

Name Janet Latter Wilmot **Claimant**

Name Toyota Canada Inc. **Defendants**

Name O'Regan's Toyota Dartmouth

**DECISION**

Date of Hearing: June 28, 2011.

Date of Last Correspondence: September 11, 2011

Date of Decision: September 13, 2011.

Editorial Notice

Addresses have been removed from this electronic version of the judgment.

Janet Latter Wilmot appeared on her own behalf.

Ryan Conrod and Larissa Law (Law student) appeared on behalf of the Defendant, Toyota Canada Inc.

Kate Marshall and Toayo Simmonds (Law student) appeared for the Defendant, O'Regan's Toyota Dartmouth.

- (1) This matter concerns damage caused to the Claimant's vehicle resulting from a failed fitting to a cooling line. Certain facts are not in dispute.
- (2) The vehicle, a 2006 Toyota Sienna van was purchased by the Claimant from the Defendant, O'Regan's Toyota Dartmouth ("O'Regan's). It was manufactured by the Defendant, Toyota Canada Inc. ("Toyota Canada"). The Claimant took delivery of the vehicle on March 23, 2006. At the time of the purchase, the Claimant's vehicle was covered by a manufacturer's warranty issued by Toyota Canada. On January 20, 2011, the vehicle stalled as the result of the failure of a corroded fitting. The failure resulted in a significant leakage of transmission fluid thereby ruining the radiator and transmission. Mrs. Latter Wilmot seeks from the Defendants the cost of repairing the transmission and radiator, charges incurred for a rental car while the vehicle was being repaired and her costs of this matter. One item on the original claim, the repair of the lock sensor was withdrawn at the hearing as it became apparent in evidence that the work had been successfully completed.

### **The Issues**

- (3) This two issues in this claim are as follows:
  - Is the deficiency experienced by the Claimant covered by the manufacturer's warranty?
  - In performing work on the vehicle, was the Defendant, O'Regan's, liable in negligence, breach of contract or other obligation imposed by law?

### **The Evidence**

- (4) Janet Latter Wilmot testified that she and her husband, Ronald, attended to O'Regans on March 23, 2006 and purchased their vehicle, a red 2006 Toyota Sienna van. At the time, she ordered the vehicle to be undercoated and protected. The van has been used since the purchase as a personal vehicle.
- (5) On September 28, 2006, they attended to O'Regans for the vehicle's first oil and filter change. They experienced problems afterwards as a result and concluded that the mechanics on duty overfilled the oil. From that point forward, Mr. Wilmot personally undertook the oil and filter changes. The Wilmots tendered into evidence a log of all service performed by themselves personally, and at the dealership. They provided receipts for the repairs at O'Regan's along with the receipts for the oil and tires. A review of their records reveals that the simpler tasks, oil changes, tire changes and the like were performed by Mr. Wilmot. The more complex tasks and repairs including repairs to the body work, a wheel well flap and replacing the transmission were performed at

O'Regan's. (The receipts pertaining to the Wilmot's summary were not all tendered into evidence. Receipts for any expenses incurred prior to August 2007 for their own work are missing. Reference is made in the table to C-3, page 1. However, no such page actually exists.).

- (6) On January 12, 2010, O'Regan's performed a transmission replacement which was covered by the Power train warranty. The mileage on the vehicle was 75,033. According to the invoices tendered by the Claimants, the cost of the repair was \$1322.44.
- (7) The transmission worked without incident until around January 20, 2011 when it started slipping as the Claimants were driving the van to fill up at a gas station. They took it home and observed green fluid on the ground. They called O'Regans and took the vehicle there for servicing. The van stalled while pulling into O'Regan's driveway. O'Regan's towed the van to their service area where their service team assessed the issue as a failed fitting from the cooling line running between the radiator and the transmission. Ms. Latter Wilmot was advised that it was a part of the radiator and as a result, it was not covered by Toyota Canada's Power train warranty. At the time of the service, the odometer reading was 89,447 km. The Claimant tendered into evidence pictures of the fitting at the transmission and the corrosion on the joints. Despite the apparent lack of warranty coverage, the Wilmots agreed to have the transmission replaced by O'Regan's. Two invoices and receipts for \$103.44 (diagnostics) and \$3611.33 (repairs) were entered into evidence. She further submits that any rust would have been noticed the first time rather than the second.
- (8) On cross-examination, Ms. Wilmot confirmed she is not a mechanic. She has taken the vehicle in for servicing as required. She acknowledged having an accident with the vehicle in the summer of 2010. She described that incident where a car pulled out and struck the side of the van. In re-direct evidence, she indicated that the impact from the collision was at a different area than the radiator or transmission.
- (9) Ronald Edward Wilmot, the Claimant's husband, testified that he is not a mechanic but has experience in working on vehicles and a member of the Shearwater Auto Club, a club designed for auto repair hobbyists. He acknowledged that he is aware that the radiator fluid was designed to cool the engine. He checked the vehicle's fluids regularly after every fill up and the transmission fluid levels were always correct. He also testified to observing the undercoating of the vehicle when it was being serviced. He believes that work was completed. The undercoating also came with a service warranty which they tendered into evidence as part of their book of exhibits. He provided photographs of the fitting which attaches to the cooling line running between the transmission and the radiator, He testified that the transmission and radiator are approximately one foot apart from each other.

- (10) Daniel Paul Fournier gave evidence for the Claimants. He is a self-employed mechanic working out of Coast Gas in Dartmouth, Nova Scotia. He tendered into evidence a statement which indicates that he has been a transmission specialist since 1977 along with a copy of his apprenticeship certificate. He testified that he did not inspect the Wilmots' vehicle and does not know them personally beyond inspecting this car and attending to court. In his experience, he has not seen or heard of a fitting of this type failing. If this type of fitting failed, transmission fluid would leak out. On cross-examination, he acknowledged that the radiator and transmission were two separate parts approximately one foot apart from each other in a Toyota Sienna. These parts could be replaced separately.
- (11) Kevin Rudolph testified for the Defendants. He is a Service Advisor at O'Regan's Toyota. He describes himself as the "middle man" between the service technicians and the customers. In short, he takes the orders from the customers and explains to them the issues related to the vehicles once service has been recommended or performed.
- (12) He testified to having met Ms. Wilmot several times in this capacity. He met her on January 20, 2011 when the vehicle was delivered to O'Regan's and called her to advise that it required a transmission and radiator. He testified to telling her that the matter was referred for "Goodwill Assistance", a discretionary program offered by Toyota Canada for vehicles which are past warranty. In that instance, the costs in certain instances may be borne by Toyota Canada and O'Regans. Toyota was provided with the photographs and Mr. Rudolph indicated that the coverage was declined.
- (13) He testified to reviewing the knock sensor issues as well but it is clear that this issue has been resolved. The issue was found to be a pinched wire which was rectified.
- (14) In cross-examination, he acknowledged that he has no particular expertise respecting transmission or cooling lines. His role is merely to relay information, not diagnostics. He was advised that the escape of the fluids caused the transmission problems. In giving re-direct evidence, Mr. Rudolph testified that he was advised the vehicle was leaking fluids before the vehicle stalled. He recommended the Wilmots to stop driving and have the vehicle towed if there is a problem.
- (15) Doug Hamilton is the Warranty Administrator at O'Regan's. He testified that it is his job to review the individual warranty claims and process them. He reviewed the warranty claim by the Wilmots respecting the January 20, 2011 incident. He testified that the van was covered by a 3 year or 60,000 km "bumper to bumper" warranty, meaning most parts are eligible to be repaired or replaced in that time period, subject to certain exceptions. Toyota Canada will replace or repair the transmission if defective. In his view, the transmission was not defective at the time of the incident because "something else took it out". He reviewed the ledgers related to service by the Wilmots and noted the "Customer does not service here". In reviewing the "Consolidated Vehicle Service

History – O'Regan's Toyota Dartmouth" (tab 2 in the Defendants' Book of Exhibits), all items indicated in red were not performed at the dealer. In relation to undercoating for the transmission, typically, undercoating is not applied to transmission parts and hoses. He indicated that undercoating is dark in colour. He believes the pink spray in the picture was the paint on the body of the van.

- (16) He tendered into evidence several e-mails between O'Regan's and Toyota Canada respecting TCI service requests. Throughout the e-mails (and other O'Regan's documents), they reiterate the fact the Wilmots serviced the vehicle elsewhere, using statements such as "they are not a regular service customer, and therefore we will offer no other assistance other than providing the transmission only at warranty pricing as the warranty is well over the 3/60 warranty", or simply, "Customer does not service here". This was a factor in several decisions when dealing with the Wilmots.
- (17) In response to questions from Mr. Conrod, he testified that some warranty assistance beyond the "bumper to bumper" may be provided up to 80,000 km or 4 years of ownership. He described the problem as a radiator problem rather than a transmission issue and therefore, it is not covered by the Powertrain Warranty at 100,000 km or 5 years. Cooling lines are not covered by the warranty. He has not seen this type of fitting rust and is not sure why it would happen. He testified that the technicians would not put the part on the vehicle if they believed it would fail.
- (18) Justin Oickle is an automotive technician with O'Regan's Toyota and has been employed there for seven years. He performed the diagnostics and repaired the Wilmot's van in 2011 and completed the work order. He observed transmission fluid on the ground and observed a "visible transmission leak". He checked the transmission and it would not move. When he replaced the transmission fluid, he found it still did not move. He recommended a new transmission and radiator.
- (19) He indicated that he had no dealings with the Wilmots besides the repair and replacement of the transmission.
- (20) On cross-examination, he testified that he observed there was quite a bit of fluid on the ground when the vehicle stalled. When a transmission is removed, it is not always necessary to remove the lines. On re-direct by Ms. Marshall, he testified that the threads were corroded behind the flange and inside the radiator.
- (21) Todd Robinson testified for the Defendant, Toyota Canada Inc. He is the Manager of Parts and Services Operations for all of Canada. He has worked for 26 years in the automotive business dealing with Toyotas, including several years with O'Regans in their Dartmouth and Halifax locations.

- (22) He testified that the Owners' Supplement, which includes the new car warranty is received with the purchase of each new vehicle. The primary warranty is the "bumper to bumper", 36 month or 60,000 km warranty which replaces any defect in material or workmanship, other than accidental damage. In addition, there are certain parts covered by the Powertrain Warranty. These items are listed on page 7 of the booklet. He indicated that the radiator is not part of the Powertrain, neither are the transmission cooling lines. He testified that the "Seals and Gaskets" referenced in the warranty relate to the assembly for the internal workings of the transmission or transaxle. He is of the view that the fitting would be covered by the "bumper to bumper" warranty had it not been expired. Further, the warranty does not cover any incidentals such as car rentals. It does not cover new replacement parts beyond the greater of the end of the warranty period or 90 days after installation. He described the Goodwill Assistance program as applying when a vehicle is within one year or 20,000 km from expiration. The costs of this program are funded by the dealer and manufacturer. The decision to act under this program is the result of correspondence with the dealer. He did not view the vehicle personally.
- (23) On examination by Ms. Marshall, Mr. Robinson acknowledged that the warranty with Toyota is received when the vehicle is purchased. If the warranty applies, Toyota Canada will pay for the work.

### **Summary of Findings of Fact**

- (24) In reviewing the evidence of the various witnesses for O'Regan's Toyota, they have been consistent in their conclusions. Specifically, the failure of the fitting was caused due to significant corrosion. Once it failed, a large leakage of transmission fluid resulted. Justin Oickle testified to observing transmission fluid near the vehicle when in the driveway as it was red in colour and the leak was near the transmission. I accept his evidence in this respect. By contrast, I do not accept Doug Hamilton's statements that the Wilmots ran the vehicle dry. I find the failed fitting caused the transmission to leak fluid until it was dry. Furthermore, I do not find it was caused by a motor vehicle accident. That collision occurred with another part of the vehicle. While it would have been prudent for the Wilmots to have had their car inspected after the accident, I do not find this in anyway contributed to the failure of the fitting.
- (25) I find the Wilmots performed all of the more routine repairs themselves, such as oil and tire changes. I have some difficulty with their evidence in this respect, particularly where certain maintenance work was not performed precisely according to the warranty. Further, receipts for earlier service and oil filters are missing. However, the records are otherwise complete and corroborated by the receipts. I accept that the oil and filter changes were completed around the time the oil was purchased.

### **The Issues**

- (26) As noted above there are two issues:  
 - Alleged breach of warranty.  
 - Liability in consumer protection law or negligence.
- (27) The first issue I shall address is the application of the manufacturer's warranty.

### **Manufacturer's Warranty**

- (28) The manufacturer's warranty is found at Tab 1 in Toyota Canada Inc.'s Book of Exhibits, entitled *Owner's Manual Supplement – Warranty Maintenance and Roadside Assistance Information for 2006 Models*. It is clear and not disputed that the terms of the warranty apply to the Wilmot's vehicle and form part of the sales contract. The following sections are relevant to this claim:

**“REPAIRS AT NO CHARGE**

Repairs and adjustment covered by these warranties are made at no charge for parts and labour. Components will be repaired or replaced with new or remanufactured parts at the option of Toyota. Replaced components are warranted for the balance of the applicable New Vehicle Warranty.

**YOUR TOYOTA VEHICLES CARRIES AN EXTENSIVE 36 MONTH/60,000 KILOMETRE WARRANTY:**

The basic complete vehicle warranty covers repairs on any part of the vehicle supplied by Toyota that is defective in material or workmanship, subject to the exceptions indicated under “What is Not Covered” on pages 12 & 13.

Coverage is for a period of 36 months or 60,000 km, whichever comes first...” (page 6)

- (29) This latter portion is the “bumper to bumper” warranty referred to by the witnesses. The omitted section describes an exception which does not apply.
- (30) The warranty provides longer coverage for the power train:

**”YOUR TOYOTA IS BACKED BY THESE ADDITIONAL NEW VEHICLE WARRANTIES**

The powertrain components listed on page 7 are covered under the Toyota New Vehicle Warranty for a period of 60 months or 100,000 km, whichever comes first, subject to the exceptions under “What is Not Covered” on pages 12 & 13.”

- (31) On page 7, it lists several components making up the Power train with a list of related parts, under the heading, *Transmission and Transaxle*. This list include:  
 “Transmission/Transaxle case and all Internal Parts” and “Seals and Gaskets”.
- (32) On Page 12:

**”WHAT IS NOT COVERED**

## FACTORS BEYOND THE MANUFACTURER'S CONTROL

This warranty does not cover damage or failures resulting directly or indirectly from any of the following:

- Abuse or negligence.
- Modification, alteration or tampering, disconnection, including installation of non-Toyota accessories.
- Repairs and adjustments caused by improper maintenance, lack of required maintenance and/or the use of fluids, fuel, oil or lubricants, other than those recommended in your Owners Manual."

- (33) Other exceptions are listed on pages 12 and 13, which do not have any relevance to this matter.
- (34) At page 14 and 15, the warranty addresses maintenance and replacement parts:

### WHERE TO GO FOR MAINTENANCE

Toyota recommends having maintenance performed by an authorized Toyota dealership....

### REPLACEMENT PARTS

Toyota recommends using only Toyota Genuine Parts when you need to replace a part on your vehicle. Like all Toyota products, Toyota Genuine Parts are built to the highest standards of quality, durability and performance. They are also designed to fit your vehicle's exact specifications....

...Toyota Genuine Parts are covered by their own warranty (see your dealer for details) or the remainder of any New Vehicle warranty, whichever is longer. **Non-Toyota Parts, or any damage or failures resulting from their use are not covered by any Toyota warranty."**

- (35) Finally at page 23:

### RECOMMENDED MAINTENANCE

#### REGULAR MAINTENANCE SERVICE

Your Toyota requires the following regularly scheduled maintenance at the time and distance indicated on the interval chart.

#### EVERY 6 MONTHS/8000 KM LUBRICATION

Replace engine oil & filter...  
 ...Inspect coolant, brake & washer fluid levels.

#### EVERY 12 MONTHS/16,000 KM SERVICE

Replace engine oil & filter....  
 ...Inspect coolant, brake, washer fluid, automatic transmission & hybrid transaxle fluid levels....  
 ...Inspect steering gear box, linkage and suspension parts for looseness, damage or leakage.  
 Inspect ball joints & dust covers, drive shaft and steering rack boots, chassis nuts & bolts for looseness or damage.

- (36) The questions concerning the application of the warranty relate to whether the fitting is a gasket or seal which is part of the transmission. If so, it is covered by the 60 month, 100,000 km warranty. Secondly, if it is covered by this warranty, then I must determine if the Wilmots have done anything to void that coverage.

### The Law

- (37) The governing legal principle in the interpretation of contracts is summarized by Fridman, *The Law of Contract, 5<sup>th</sup> ed* at p. 454:

“Where there is no ambiguity in a written contract it must be given its literal meaning. (p.454)”

“Words must be given their plain, ordinary meaning, at least unless to do so would result in an absurdity.”

- (38) Finally, where there is ambiguity, the *contra proferentum* rule applies:

“In cases of doubt, as a last resort, language should always be construed against the grantor or promissory under the contract. (p. 458)”.

- (39) These statements have been adopted with approval by all levels of Court in Nova Scotia, as well as the rest of Canada.

- (40) The issue to be determined is which warranty covers this fitting, the 3 year, 60,000 kilometre basic complete warranty or the 60 month or 100,000 kilometre power train warranty. As noted above, I find it is a seal which is part of the transmission.

- (41) In determining the ordinary meaning of the term, “seal”, it is common practice for Courts in Canada to adopt a dictionary definition. Unfortunately, conventional dictionaries are general in application. The Concise Oxford Dictionary defines a seal as:

“...a substance or device used to close an aperture or act as a fastening.”

- (42) Meanwhile, the Merriam-Webster Dictionary defines seal as:

“(1) a tight and perfect closure (as against the passage of gas or water) (2) a device to prevent the passage or return of gas or air into a pipe or container.”

- (43) There are many examples of seals in a mechanical setting, not simply in an automotive context. Using the above definitions, one or more of the following characteristics apply to a seal:

- It closes an aperture or gap on any surface.
- It can act as a fastening to any opening.
- Seals are designed to (1) prevent the passage of liquids or gases usually as leakage; (2) containment of liquids or gases. They may be separate parts or as part of a piece joining

two systems.

- (44) A fitting which joins a cooling hose to a transmission case meets this definition, particularly where the joint is designed to contain the transmission fluid in the transmission itself. According to the warranty, the transmission includes the transmission/transaxle case. In this instance, the fitting helped to contain the fluid in the transmission at the aperture or hole, where the hose joins the transmission. It serves a very important role in the operation of the transmission. Counsel for both Defendants submitted that this is part of the radiator and engine cooling system. While this may be correct, many parts in a vehicle, including this one have multiple purposes. There is nothing contained in the warranty which precludes its application to such parts. If the fitting were not designed in this way, the engine would be damaged. I find it is a seal, part of the transmission and, thus covered by the 60 month, 100,000 km. warranty
- (45) If I am wrong in finding that the language of the warranty is sufficient to allow coverage, I would have no difficulty and finding the wording of the warranty to be sufficiently ambiguous such that it is appropriate to resort to the *contra proferentum* rule and favour an interpretation against the drafter, Toyota Canada.
- (46) As a result, I find the fitting was covered by the 100,000 km/60 month Power train warranty. Toyota Canada shall be liable for all repairs to the transmission and radiator which resulted from the failure of the fitting.
- (47) The timing of the oil changes Wilmots' was not raised at the hearing. In any event, I do not find that any of that work caused the fitting to corrode or the transmission and radiator to seize or burn out. Further, the language of the warranty is clear. Toyota Canada merely *recommends* any maintenance be performed at a dealership; it does not *require* it. If Toyota Canada required work performed only at Toyota dealerships, the warranty should be specific in that respect. The language of the warranty suggests Toyota must expect that some of their customers may perform certain maintenance themselves or at garages outside of their dealership network. The Wilmots were aware of the potential risks to the warranty coverage of performing their own work as they chose to have transmission work and other more complex tasks performed by O'Regans.
- (48) The evidence which I accept has not shown any improper maintenance, abuse, negligence or other causes listed in the warranty. Their servicing was reasonable. The warranty is not voided as a result of this maintenance.
- (49) Section 28A(1)(a) of the *Consumer Protection Act*, R.S.N.S. 1989, c.92, as amended, provides:

28A (1) For the purpose of this Section, a manufacturer, seller or lessor makes an express warranty respecting an automobile where the manufacturer, seller or lessor makes a statement respecting the automobile either:

(a) as part of a written contract for the sale or lease of the automobile by the seller or lessor to a purchaser or lessee; ....1994, c. 16, s. 3.

- (50) As a result of this subsection, I find the warranty was part of the contract of sale. Thus, O'Regan's is also liable for the breach of the express provisions of the warranty.

**Additional Liability of the Defendant, O'Regan's Toyota Dartmouth**

- (51) In Nova Scotia, the purchaser of a vehicle has recourse not only in the express terms of a contract but also in implied warranties and negligence.

- (52) The liability of a seller to a buyer, such as an automotive dealership to its customer, is defined in Section 26(3) of the *Consumer Protection Act*:

Notwithstanding any agreement to the contrary, the following conditions or warranties on the part of the seller are implied in every consumer sale:

...(h) a condition that the goods are of merchantable quality, except for such defects as are described;

...(j) a condition that the goods shall be durable for a reasonable period of time having regard to the use to which they would normally be put and to all the surrounding circumstances of the sale.

- (53) Further, section 26(5) states:

(5) There shall be implied in every consumer sale of services a condition, on the part of the seller, that the services sold shall be performed in a skilful and workmanlike manner.

- (54) Before commenting on the application of these warranties, I note that the application of the *Consumer Protection Act* was not pleaded at the hearing nor in any of the submissions. This issue was addressed by Justice Davison in *Conrad v. Cole Ford Sales Limited* (1991), 102 N.S.R. (2d) 193, when dealing with a motion to amend pleadings, his Lordship stated the following at p. 201:

"The ultimate test of any deficiency in pleading and whether it could be cured by an amendment is whether prejudice has been suffered by the other party which cannot be compensated in costs. In the present case, the fact that the plaintiff was going to rely on the **Sale of Goods Act** [and **Consumer Protection Act**] became apparent a week before trial when the pre-trial briefs were exchanged. Furthermore, I cannot accept the submission that a defendant, against whom action has been taken for breach of contract in the sale of a consumer item would be surprised if reliance was placed on those two well-known statutes. (emphasis mine)"

- (55) In the present case, the Notice of Claim makes it clear that the issue respects the warranty coverage for the transmission and the worthiness of the fitting. The pleadings suggest it was caused by a failure of the rustproofing, a submission which I reject. Furthermore, both Defendants were represented by very able counsel. The companies have been in business for many years and should be well acquainted with these statutes. They apply to

every consumer transaction. I adopt the reasoning of Justice Davison to facts of this case.

- (56) The application of the sections of the *Consumer Protection Act* have been applied by the Courts in Nova Scotia. There are several key principles arising from the case law. These principles were summarized very well by my colleague, Adjudicator Patrick L. Casey, QC, in *Boudreau v. Dooley*, 2009 NSSM 64, where he stated the following at p. 5:

*MacIsaac v. Chebucto Ford Sales Ltd.*, 1989 CarswellNS 406, a decision of the Nova Scotia County Court, makes the following findings which apply to the case at hand:

- (a) The Consumer Protection Act applies to transactions of sale between persons engaged in the ordinary course of business in the sale of new and used motor vehicles.
- (b) The issue of whether the goods are of merchantable quality is to be decided on a case by case basis.
- (c) The definition of merchantable quality is found in the case of Hardwick Game Farm v. Suffolk Agricultural and Poultry Producers Association (1969) 2 A.C. 31, (1968) 2 All E.R. 444 (H.L.) as follows:
 

*“... the goods should be in such a state that a buyer, fully acquainted with the facts, and therefore knowing what hidden defects exist and not being limited to their apparent condition would buy them obtainable for such goods if in reasonable sound order and condition and without special terms.”*
- (d) The definition of “reasonably durable for the purpose” is also applied on a case to case basis.
- (e) The warranties under the Consumer Protection Act apply regardless of the existence or nonexistence of dealers warranties.

In *Penney v. Brett Pontiac Buick GMC Ltd.*, 1990 CarswellNS 531, Justice Boudreau of the Nova Scotia Supreme Court (Trial Division) also held that a finding that the vehicle is not durable for a reasonable period of time is a question of fact in each case. In that case, the Small Claims Court Adjudicator had found that the vehicle was not reasonably durable under Section 20C(3)(j) of the Consumer Protection Act even though the vehicle had been sold on an as is basis, and this finding was upheld on appeal.

In *McAsphalt Industries Ltd. v. Chapman Bros. Ltd.*, 2008 CarswellNS 754, Justice LeBlanc of the Nova Scotia Supreme Court, when dealing with the issue of merchantable quality pursuant to the Sale of Goods Act, referred to the definition of merchantability in the case of *Murray v. Sperry Rand Corp.* (1979) 96 D.L.R. (3d) 113 (Ont. H.C.) wherein the term was defined as meaning that the goods were “reasonably fit for general purposes such goods serve”.

- (57) The transmission was repaired on January 12, 2010. I accept the evidence of Mr. Oickle that the rusting of such a fitting was uncommon and not experienced by anyone at O'Regan's up to the time of this incident. They did not check it when the transmission was replaced in 2010. A little over one year later, after less than 5 years of ownership and 89,447 km driven, the fitting failed. This occurred despite that the vehicle has been used for their personal use only and has been maintained. The failure of the fitting resulted in considerable damage and significant repair costs. To apply the tests espoused by the case law, I find that a fitting such as this must be able to withstand ordinary conditions as long as the other parts of the transmission would continue to perform. Where it did not, it cannot be said to be in a reasonable sound order. In my opinion, a reasonable purchaser would not have accepted the vehicle with such a fitting. It is also reasonable to expect

that the fitting would have been checked and replaced at the time the transmission was repaired in 2010. If the part was off warranty beyond 3 years or 60,000 kilometres, which I do not find, the Claimant should have been given an opportunity to have the fitting replaced at her expense so that this could have possibly been avoided.

- (58) In the circumstances, I find the fitting was not durable for a reasonable period of time and not of merchantable quality. As a result, I find the Defendant, O'Regan's Toyota Dartmouth liable under s. 26(3)(h) and (j) of the *Consumer Protection Act*. Further, I find their service level breached the implied warranty of the services being performed in a skillful and workmanlike manner. A breach of any of these implied warranties is sufficient to render O'Regan's liable under the *Consumer Protection Act*.
- (59) Ms. Marshall submitted a helpful brief on behalf of O'Regan's addressing the application of the law of negligence in the performance of the repair work. While it is not necessary for me to consider the issue at this juncture, I accept her submissions that the evidence is not sufficient to establish negligence on the part of the Defendants.

### **Remedies Available**

- (60) In reviewing the remedies available in the breach of a contract for the sale of goods, a court may either order rescission of the contract or damages equal to the cost of repair for those items which were caused by the breach. In these circumstances, it would be unjust to order the contract rescinded. Instead, I order the Claimant is entitled to the cost of repairs and any additional expenses.
- (61) The Claimant seeks reimbursement for car rentals of \$320.29. I find this expense to be reasonable and arising directly from the breach of contract. I find the Defendant, O'Regan's liable for this item.

### **The Actions of the Claimant**

- (62) I turn to the actions of Mr. Wilmot at the time when he first noticed a leak on January 20, 2011. He called O'Regan's and was advised by Mr. Rudolph to have the vehicle towed rather than risking potential damage from driving it. Nevertheless, he decided to drive the vehicle to their shop. The vehicle stalled and the transmission parts would not move after the fact. It is logical to me that decision exacerbated any problems already created by the failure of the seal. However, I am unable to find that it was the sole or principal cause of the damage to the transmission and radiator. The evidence is not sufficient to prove that. I find some damage was caused by his actions. I reduce the amount awarded by 10% of the cost of diagnostics and repairs or \$361.48.

### **Summary**

(63) In summary, I find the Defendants jointly and severally liable to the Claimant for the repair of the transmission together with their costs in the amount of:

Amount of Diagnostics/Repairs:	\$3614.77
Less 10%	(\$361.48)
Costs	<u>\$ 89.68</u>
Total	<b>\$3342.97</b>

(64) The finding of joint and several liability is appropriate given that both Defendants were found liable to the Claimant arising from the same incident. If the Defendants so desire, I will be pleased to hear them as to the apportionment of liability.

(65) In addition, the Defendant O'Reagans Toyota Dartmouth are liable for the cost of the rental car at \$320.29.

Order accordingly.

Dated at Halifax, NS,  
on September 13, 2011;

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**Gregg W. Knudsen, Adjudicator**

Original: Court File  
Copy: Claimant(s)  
Copy: Defendant(s)