

June 29, 2009

## Your New Vehicle is a “Lemon Car”. Do you Arbitrate or Sue in a Lawsuit?

Our thanks to Mr. Eric Lai and the Toronto Star Wheels section for allowing us to provide a response to one of their reader's questions last Saturday, June 27, 2009. You can find that article within our June 29, 2009 blog entry - [www.bcbarristers.com/en-US/blog.aspx](http://www.bcbarristers.com/en-US/blog.aspx)

The term “lemon car” refers to legislation in various US states that specifically deal with when a new car is deficient and needs to be replaced/refunded by the manufacturer. The legislation differs from US state to state, but in essence their laws try to set up objective standards (i.e. a certain number of breakdowns in a certain timeframe) and also set out the remedies available to the car buyer.

Ontario does not have a “lemon car” law. So if you purchase a new car and it has problems and requires service and repair and still doesn't work well, what do you do?

As indicated in the Toronto Star Wheels article, your choices come down to either proceeding to arbitration with CAMVAP or starting a lawsuit against the manufacturer.

Comparing these two options: a lawsuit is expensive (a lawyer will have to be retained) and presenting the case at Trial will take effort. The time to Trial may be 12-24 months. The Court may order the contract set aside and lawsuit can award more in damages than the arbitration process. CAMVAP cannot refund the purchase price of your car; they can only order the manufacturer to “buy back” your car, less the depreciation.

**Can This Contract Be Set Aside (i.e give back the car and get his money back)?** If this option is chosen, your lawyer will start a lawsuit in Ontario's Superior Court of Justice (and not Small Claims Court which has a \$10,000 jurisdictional limit).

The Court will decide whether the vehicle was so deficient as to constitute a fundamental breach of the contract, by the manufacturer. How “deficient” does the car have to be to constitute a fundamental breach? Given the lack of ‘lemon car’ legislation in Ontario, there is no precise answer. Though the case appears strong, this reader will have to introduce evidence to prove the deficiencies and show how seriously they impaired his ability to use the car. S/he can refer to the U.S. lemon car legislation (different states have different variations of this law) and their various standards – i.e. having to service the same problem 4 or more times during the first 18,000 miles on the car qualifies in some States as a “lemon car” – but an Ontario Court is not bound by those U.S. laws.

Of course, the manufacturer's response in Court might be that a car starting “smoothly” is a subjective interpretation; that any car (new or old) stalling occasionally during the winter might be expected; and the warranty appears to have been honoured promptly regarding the issue of the engine light.

**What Might a Court Award?** In a lawsuit, other damages can also be claimed. For example, the reader might claim expenses incurred, such as some loss of earnings (related to time wasted servicing the car). S/he may seek an amount for the loss of value of the car upon sale (due to the persistent problems). There is no guarantee that these heads of damages will be awarded; they must be proven in Court.

For example, for loss of earnings to date, with 5 service visits in 8 months, the Court might find that a “normal” car would only be expected to have 1 service visit under warranty – i.e. the reader had 4 visits too many. The Court may find s/he wasted 3 hours on each service visit. Therefore s/he might be awarded 12 hours of lost time (4 visits x 3 hrs each) to date, with an hourly rate (i.e. \$30/hr) to be decided upon by the Court. A provision for future lost time due to future visits may be claimed, but to limit his loss, it may be reasonably anticipated that s/he would sell his car sometime in the future.

It is best to realistically estimate a “high” and “low” scenario for potential damages under a lawsuit, in order to compare this option with arbitration.

**Another Option – Proceed with CAMVAP.** As indicated in the article, CAMVAP is a dispute resolution program in which most car manufacturers agree to participate in and be bound by the decision of the Arbitrator.

The system is fast and the awards are lower than what may be awarded in a Court. In addition, the expectation is the tribunal develops an better ability to evaluate these issues, as it is their specialty.

Our thanks again to Mr. Eric Lai and the Toronto Star Wheels section for allowing us to participate.

Gregory Chang  
Toronto Insurance Litigation Lawyer  
Bougadis, Chang LLP  
[www.bcbarristers.com](http://www.bcbarristers.com)