CITATION: Forbes v. Toyota Canada Inc., 2018 ONSC 5369
COURT FILE NO.: 16-70667-CP
DATE: 2018/09/14

COURT OF ONTARIO
SUPERIOR COURT OF JUSTICE
In the matter of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6

RE: DEVIN FORBES, STEVEN LAGACÉ, MICHAEL EVELAND and JOSEPH EDWARD PAUL RATZ, Plaintiffs

AND:

TOYOTA CANADA INC., Defendants

BEFORE: Mr. Justice Calum MacLeod

COUNSEL: Jeff Orenstein, for the Plaintiffs

Sylvie Rodrigue, for the Defendant

HEARD: September 7, 2018

ENDORSEMENT

[1] This is a class proceeding relating to alleged defects in certain motor vehicles sold by the defendant in Canada. I have been managing the action in collaboration with Mr. Justice Gagnon of the Quebec Superior Court in Montreal who is responsible for a parallel class proceeding in that jurisdiction. [1]

[2] In June of this year, following negotiation of a settlement between the defendant and a consortium of counsel representing all of the representative plaintiffs, each court issued judgments granting voluntary certification (for settlement purposes) and approving the manner of notice to members of the class.

[3] The defendant has its head office in Ontario. The Quebec court was asked to certify the proceeding in relation to members of the class of affected vehicle owners living in Quebec. This court was asked to certify the proceeding in relation to a national class of members resident in Ontario and elsewhere in Canada other than Quebec. There were no other class proceedings in any of the other provinces or territories.

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[1] See 2017 ONSC 2743, May 2nd, 2017 and 2018 ONSC 3613, June 8, 2018 for further details. See also 2017 QCCS 1858

[4] The June orders contemplated what would in effect be simultaneous hearings for approval of the settlement in Quebec and in Ontario. The motion to approve the settlement was heard in Montreal on September 5th, 2018 and in Ottawa on September 7th, 2018. It had been agreed between the courts that judgment would be released simultaneously if possible.

[5] I have now completed my review of the settlement documents, the results of the notice campaign and the other materials put before the court. As counsel are aware, I have conferred with my colleague in Montreal and we have each had the benefit of comparing draft judgments. In addition, there has been regular communication between all counsel and both courts by way of e-mail.[2]

[6] I am cognizant that class proceedings in the United States dealing with almost identical issues were resolved in a similar manner to what is proposed in Canada under the settlement agreement.[3] I am satisfied that the settlement should be approved pursuant to s. 29 of the *Class Proceedings Act*. I am also approving the counsel fees and a modest honorarium for the representative plaintiffs.

[7] I will briefly address each of these components of the settlement.

Background

[8] The litigation relates to complaints by owners of certain model years of Toyota Tundra, Tacoma and Sequoia vehicles. It is alleged that the frames of those vehicles are subject to premature rusting and that the owners of those vehicles are exposed to excessive repair, replacement or safety issues.

[9] As stated above, there had been litigation in the United States in relation to this issue ultimately leading to certification and settlement of class proceedings in that country. In Canada, various class proceedings were started in Quebec and Ontario seeking similar relief against Toyota Canada Inc. Those proceedings have been reduced to the two that are now under consideration.

[10] In June of this year the plaintiffs and the defendant reached a comprehensive agreement dealing with the rights of the class members. To summarize, without admission of liability, Toyota agreed to what amounts to a voluntary notice, recall, inspection, repair and replacement program. As part of the agreement, the parties agreed to certification of the class proceedings (for settlement purposes) and to immediately begin a notice program.[4] The courts in Ontario and Quebec were requested to act in concert to grant the certification and approve the plan for notifying members of the class and then to hold simultaneous hearings to consider approval of the final settlement.

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[2] Due to the matter proceeding on consent, the detailed terms of settlement forming part of the certification order, the availability of the settlement on the internet and the fact that only two courts were involved, it was not felt necessary to formally invoke the *Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions*.

[3] United States District Court for the Central District of California, Case No. 2:15-cv-02171-FMO-FFM

[4] The full text of the settlement will be annexed to the formal judgment and is described in greater detail in the judgment of the Quebec Superior Court **[Quebec Neutral Citation to be inserted before publication]**

[11] The order I granted on June 8th, 2018 certified the following class for settlement purposes:

> "All persons, entities, or organizations resident in Canada (including the Territories), excluding the members of the Quebec Class, who, at any time as of the entry of the Pre-Approval Order, own or owned, purchase(d), or lease(d) any of the Subject Vehicles distributed for sale or lease in Canada. Excluded from the Class are: (a) Toyota, its officers, directors, and employees; its affiliates and affiliates' officers, directors, and employees; its distributors and distributors' officers, directors and employees; and Toyota Dealers and Toyota Dealers' officers and directors; (b) Class Counsel; (c) judicial officers and their immediate family members and associated court staff assigned to this case; and (d) persons or entities who or which timely and properly exclude themselves from the Class as provided in this Settlement Agreement."

[12] The common issue that was certified was "**Are the Subject Vehicles subject to excessive, premature rust corrosion in the course of their normal use?**" As set out in the order, the Subject Vehicles were defined as Toyota Tacoma vehicles for the model years 2005 – 2010, Toyota Tundra vehicles for the model years 2007 – 2008 and Toyota Sequoia vehicles for the model years 2005 – 2008. These are the same model years identified in the statement of claim and involved in the other class proceedings.

[13] Pursuant to the June order the parties immediately engaged in the notice program. As I will mention momentarily the notice program was subsequently modified but it is fair to describe it as extensive. The court is now called upon to approve the settlement on behalf of all parties to the class proceedings and also approve the fees and disbursements of counsel. There is also a request for a modest honorarium for the representative plaintiffs. Each of these categories require different analysis.

The Settlement

[14] While each court must make its own determination, it is of course desirable that there be as much uniformity as possible when dealing with parallel class proceedings. The settlements propose that similar rights and remedies be accessible to all affected owners regardless of where they reside. The Canadian settlement is conditional upon approval in Ontario and Quebec.

[15] The settlement itself appears to provide a net benefit to all class members at significant expense to Toyota. There is no reason for the court to reject the settlement. It provides a significant program for inspection, repair, treatment and replacement of frames that are found to be defective. All subject vehicles are eligible for inspection and frames will be replaced if significant corrosion is detected. These are benefits that are in addition to ordinary warranty protection or regulatory requirements and would not be available to the class members without the class proceeding and subsequent settlement.

[16] When considering a settlement in which the defendant has consented to certification and then entered into an agreement with the representative plaintiffs, one concern a court might have is to be alert to any sign of collusion. In theory a defendant might recruit a friendly plaintiff and then seek to bind the class of potential plaintiffs to an improvident settlement. That is not the case

here. The settlement was negotiated at arm's length and appears to provide substantial benefits to the class.

[17] Safeguards exist to guard against inappropriate settlements. These include the requirement for notice, the provisions for opting out and the right of class members to object to the settlement.

[18] The proposed manner of giving notice was approved by the court in June of this year and amended on two occasions. The latter was necessary because counsel had erroneously assumed that there would be full co-operation from motor vehicle registrars in each province without the necessity of obtaining orders from that province's courts.

[19] Despite this hiccup, the notice program was extensive. Firstly there was direct mailing using Toyota's own data base of vehicle owners and information obtained from motor vehicle registrars in many of the provinces. Almost 100,000 notices were mailed directly. Secondly, there was widespread advertising on social media. Finally there were advertisements run in major newspapers. Mr. Orenstein describes this as an aggressive notice plan and I agree.

[20] Statistics show that many thousands of individuals consulted the web site maintained by class counsel. As of the date of the motion only 22 class members had opted out. Only three notices of objection were filed and no one appeared to oppose the settlement.

[21] Of the objections that were received, none were objections to the settlement as such. One of the objectors had started his own litigation and subsequently chose to opt out. The other objectors were not class members. They were owners of vehicles not covered by this proceeding who felt that the benefit of the settlement should be extended to them.

[22] I have no hesitation in approving the settlement. It readily meets the criteria considered by other judges of this court.[5] I concur with the conclusion of the United States District Court that the settlement "confers an excellent recovery for plaintiffs and the class members."[6]

Counsel Fees

[23] The issue of costs and counsel fees must be considered separately. In this case, Toyota's contribution to costs was negotiated separately from the settlement itself. There was hard bargaining.

[24] Toyota has agreed to payment of $775,000.00 inclusive of fees, disbursements and taxes. Plaintiffs counsel have incurred combined disbursements of $33,106.60 inclusive of taxes and have combined docket entries of $909,707.44. Given the time expended, the significance of the issues, the results achieved and the factual and legal complexity of the issues amongst other factors, the fees claimed (which amount to a negative multiplier) do not appear unreasonable.

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[5] See for example, *Nunes v. Air Transat A.T. Inc. et. al.*, (2005) 20 CPC (6th) 93; 2005 CanLii 21681 (SCJ)
[6] P. 362 of the motion record

[25] The consortium of plaintiffs' counsel have agreed to a payment that is less than what they advise the court is the sum of their docketed time or the percentage they would have charged based on a contingency fee

[26] I have not felt it necessary to scrutinize these costs in detail because Toyota has agreed to pay them and they are not coming out of the funds available to the class members. These costs are being paid in addition to the settlement benefits available to the class.

[27] I have been provided with a breakdown of the fees and disbursements owing to each of the counsel involved in the consortium. I am asked to approve the global amount less the allocation to Mr. Assor who is counsel in the Quebec action. His portion of the fees and disbursements will be scrutinized by the Quebec court.

[28] Though I have not engaged in a detailed examination of docket entries, I am satisfied on the evidence that the fee allocation agreed amongst counsel is a reasonable representation of work actually done by each law firm and is not merely a fee splitting arrangement.

[29] I have approved the proposed payments.

Honoraria

[30] In addition to payment of costs in the form of legal fees and disbursements, I am also asked to approve a modest honorarium amounting to roughly $3,000 for each representative plaintiff. Toyota has agreed to pay $15,000.00 in addition to the settlement and in addition to the costs.

[31] There are different schools of thought on payment of honoraria to the representative plaintiffs and there are good policy reasons not to treat such payments as routine.[7] It is not the purpose of the *Class Proceedings Act* to encourage a category of plaintiffs for hire. On the other hand, payment of a modest honorarium encourages plaintiffs to be involved in the litigation in a meaningful way. [8]

[32] In this case, the payment is a modest one and Toyota has agreed to pay it in addition to the other components of the settlement. There appears to be no conflict of interest between the representative plaintiffs and the class members because this aspect of the settlement was negotiated separately from the main settlement.

[33] The representative plaintiffs have expended time and effort to instruct counsel, to meet with counsel, to provide information and they were exposed to litigation risk[9]. While I have not

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[7] See *Currie v. McDonald's Restaurants of Canada Ltd.*, (2007) 51 CPC (6th) 99 (SCJ). Mr. Orenstein argues that in fact there has been a trend towards awarding at least modest honoraria. There is a useful article, at (2014) 40:1 Queen's LJ 341, Morabito, V, *Additional Compensation to Representative Plaintffs in Ontario: Conceptual, Empirical and Comparative Perspectives.*

[8] *Snelgrove v. Cathay Forest Products Corp.*, 2013 ONSC 7282 (SCJ)

[9] Although not the risk of costs because they were at all times to be indemnified by class counsel

been provided with evidence that they incurred extraordinary costs, or effort or risk, as the amounts are modest and as the parties have agreed to the payment, I am not inclined to withhold approval.

[34] Accordingly I have also approved the honoraria in the amount of $12,000.00 which is net of the amount allocated to the Quebec plaintiff. The latter will be a question for the Quebec court which may operate under different constraints.[10]

Court Supervision

[35] There is a provision in the draft judgment that any of the parties may bring a motion to the case management judge for directions with respect to the implementation or interpretation of the Settlement Agreement. This reflects the fact that the court will remain seized of the matter until the settlement is fully implemented.

[36] Related to this is the question of how long the claims administrator must operate the web site and the compensation program and whether further reports to the court are required. There are various deadlines for submitting claims. The earliest of these is November 19th, 2018 which is the date for requesting reimbursement for out of pocket costs incurred in respect of frames replaced before the date of the certification order. It is not apparent how long it may take to dispose of all timely claims, and whether the court might be called upon to resolve disputes that might arise in the implementation of the agreement.

[37] In the United States judgment there is a provision that "without affecting the finality of this Order in any way, the court hereby retains jurisdiction over the parties, including class members, for the purpose of construing, enforcing and administering the Order and Judgment as well as the Settlement Agreement itself". I am told that in Quebec, the practice has developed that the court remains seized of the matter until it issues a "jugement de clôture" or closing judgment. In any event, the Superior Court of Quebec has a regulation requiring the designated administrator to file a detailed report with the court after the time limit for members to file their claims has expired.[11]

[38] It would be appropriate for this court to also receive a final report from the claims administrator when the last claim has been completed and the settlement program is to be wound up. This will permit the court to be satisfied that the administrator can be discharged and to give direction as to how long the web site should remain accessible to the public. It will also provide useful information to satisfy the court that the program established by the settlement has operated as planned. It is important for the credibility of the class action regime that there is transparency concerning the benefits actually achieved. Finally, this provision will ensure that the provisions for the class in Quebec and in the national class continue to operate in tandem.

[39] In his judgment, Justice Gagnon has specified the content of the report the Quebec court expects to receive. I would expect the same level of detail. In the absence of a statutory requirement in Ontario, I have added this provision to the judgment.

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[10] In particular Art. 593, *Code of Civil Procedure*, (CQLR chapter C-25.01)

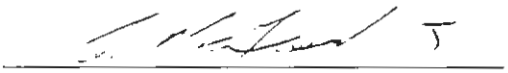
[11] Article 59, *Regulation of the Superior Court of Quebec in Civil Matters* (CQLR chapter C-25.01, r. 0.2.1)

Conclusion

[40] In conclusion, I am approving the settlement including the fees, disbursements and honoraria. A copy of the draft judgment is attached without the Appendix but the settlement agreement will be attached to the formal order.

[41] I have co-ordinated the release of this judgment with my colleague in Montreal so that our judgments will be released at noon today with immediate effect.

[42] Once again I commend counsel for the level of professionalism and organization they brought to bear on this matter. I thank Mr. Justice Gagnon and the Quebec Superior Court with whom it has been a pleasure to collaborate.



Mr. Justice Calum MacLeod

Date: Released, September 14, 2018