

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)	
)	
RICK A. DES-ROSIERS and STEPHEN KOMINAR)	<i>Sabrina Lombardi</i> for the Plaintiffs
Plaintiffs)	
- and -)	
)	
TAKATA CORPORATION, TK HOLDINGS INC., HONDA MOTOR CO., LTD., HONDA OF AMERICA MANUFACTURING, INC. and HONDA CANADA)	<i>David Kent, and Calie Adamson</i> for the Defendants Honda Motor Co., Ltd., Honda of America Manufacturing, Inc., and Honda Canada
Defendants)	<i>Emma Arenson, objector</i>
)	
Proceeding under the <i>Class Proceedings Act,</i> 1992)	HEARD: December 22, 2020

PERELL, J.

REASONS FOR DECISION

A. Introduction

- [1] In this action under the *Class Proceedings Act, 1992*¹:
- a. the Plaintiffs Rick A. Des-Rosiers and Stephen Kominar move for approval of a Settlement Agreement; and
 - b. Class Counsel, a National Consortium of: (a) McKenzie Lake Lawyers LLP; (b) Strosberg Sasso Sutts LLP; (c) Rochon Genova LLP; (d) Kim Spencer McPhee PC; (e) Merchant Law Group LLP; (f) Consumer Law Group PC; and (g) Garcha & Company move for approval of their fees.
- [2] If approved by the Court, the Settlement Agreement will resolve one of several products

¹ S.O. 1992, c. 6.

liability class actions brought against Takata Corporation and TK Holdings Inc., who manufactured dangerously defective air bags (Takata PSAN Inflators) and against car manufacturers who installed the air bags.

[3] In the immediate case, the action concerns airbags that were installed in approximately 1.5 million Honda and Acura vehicles manufactured by the Defendants Honda Motor Co. Ltd., Honda of America Manufacturing Inc., and Honda Canada. There were several separate Transport Canada Recalls between April 2013 and May 24, 2016 involving these vehicles and their airbags.

B. Settlement Approval

[4] On November 7, 2014, this Action was commenced by way of Notice of Action. Subsequently, a Statement of Claim was filed and then amended, with the most recent iteration being the Second Amended Fresh as Amended Statement of Claim, filed July 6, 2016.

[5] There are related actions in British Columbia, Saskatchewan, and Québec. There was an action in the United States.

[6] The Plaintiffs signed contingency fee retainer agreements with Class Counsel. The Retainers provided that Class Counsel would only be paid in the event of success. Specifically, the Retainers set a fee of 33.33% of the total recovery to the Class, plus disbursements and applicable taxes. At the time of signing the Retainers, the Plaintiffs understood that in the event of success, either by way of judgment or settlement, counsel could be paid as a percentage of the recovery.

[7] On April 8, 2019, the action was dismissed as against Takata Corporation and TK Holdings Inc., on account of their filing Chapter 11 bankruptcy protection proceedings in the United States Bankruptcy Court and initiating civil rehabilitation proceedings in Japan, as well as seeking recognition orders under Part IV the Canadian *Companies' Creditors Arrangement Act*.²

[8] After extensive investigations and intensive negotiations that began in mid-2017, the parties reached a settlement. The proposed Settlement resolves all past, present, and future alleged economic loss claims in any way arising out of or relating to the ownership, resale, purchase, acquisition, finance and/or lease of the Subject Vehicles relating to the faulty Takata PSAN Inflators.

[9] The parties intend that the Settlement Agreement will achieve the primary objective of the litigation in that it targets the significant safety risk that Takata's defective airbags pose to the Class Members, using a robust Outreach Program designed to ensure that the maximum number of Subject Vehicles obtain the Recall Remedy, together with other benefits.

[10] The Settlement Agreement provides: (1) a Recall Remedy; (2) reimbursement of Out-of-Pocket expenses associated with the Recall Remedy; (3) an Outreach Program; (4) a Customer Support Program; and (5) an Automotive Recycler Program for the recovery of scrap inflators.

[11] Pursuant to section 9 of the Settlement Agreement, the Defendants will also pay Class Counsel fees and expenses, subject to this Court's approval.

[12] Under the Settlement Agreement, Honda Canada is continuing its traditional and non-traditional outreach to Class Members (other than Automotive Recyclers), beyond what is required

² R.S.C. 1985, c. C-36.

by the *Motor Vehicle Safety Act*, until Substantial Completion of the Recall Remedy is achieved.

[13] The Settlement Agreement does not, in any way, extinguish or release claims for or relating to bodily injury and its sequelae arising from the deployment of an inflator in a Subject Vehicle that is subject to a Recall.

[14] The Settlement Agreement resolves the claims included in this Action, as well as the Québec, Saskatchewan and British Columbia actions. A separate settlement approval will be sought in Québec (though fee approval is only being sought in Ontario) and recognition and enforcement of the Ontario approval, along with necessary dismissals, will be sought in Saskatchewan and British Columbia.

[15] On May 14, 2019, certification for settlement purposes and notice approval was sought and obtained in this action.

[16] On May 7, 2020, Orders from this Court and various other provinces were granted respecting the use of vehicle owner information for the purposes of giving notice of the proposed Settlement.

[17] The Certification Notice was disseminated by Epiq Class Action Services Canada Inc. (“EPIQ”), by press release, website posting, 1,758,454 direct mailings, and 416,527 notices sent by email to Class Members.

[18] 18,060 Class Members contacted EPIQ requesting further information about the Settlement Agreement by a toll-free phone number. There were 311,898 English webpage hits and 68,179 French webpage hits. EPIQ received 83 letters and 4,159 emails.

[19] Class Counsel also received and responded to hundreds of inquiries since the Settlement Agreement became public.

[20] The deadline to opt-out of the settlements was November 20, 2020, and the deadline to submit objections was October 21, 2020. As of December 10, 2020, EPIQ received 368 opt-out forms including 110 from persons residing within the province of Québec and 258 from persons residing outside of Québec: The total opt-outs represent 0.00024% of all Class Members. The opt-out threshold triggering termination under the Settlement Agreement was not reached.

[21] As of December 10, 2020, two objections had been filed. The objectors found the overall value of the benefits conferred by the Settlement to Class Members inadequate. One of the objectors, Emma Arenson spoke at the hearing and raised a number of concerns about the value of the benefits to the Class Members and about possible difficulties associated with a Class Member being required to provide proof of having incurred reimbursable expenses.

[22] Given the current status of the case law, the voluntary steps taken by the Defendants to remedy the defect, the benefits provided by the Settlement, (and a similar settlement reached in the U.S. litigation, which has already been approved), Class Counsel views the Settlement Agreement as fair and reasonable and in the best interests of the Class.

[23] The Representative Plaintiffs recommend approval of the settlement.

[24] Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, or settlement of a class action. Section 29 states:

Discontinuance, abandonment and settlement

29.(1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court.

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members.

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds.

[25] Section 29(2) of the *Class Proceedings Act, 1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.³

[26] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with Class Members during the litigation.⁴

[27] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement.⁵ An objective and rational

³ *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 43 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 57 (S.C.J.).

⁴ *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.); *Jeffery v. Nortel Networks Corp.*, 2007 BCSC 69; *Fakhri v. Alfalfa's Canada, Inc.*, 2005 BCSC 1123.

⁵ *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 10 (S.C.J.).

assessment of the pros and cons of the settlement is required.⁶

[28] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation.⁷ A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.⁸

[29] Generally speaking, the exercise of determining the fairness and reasonableness of a proposed settlement involves two analytical exercises. The first exercise is to use the factors and compare and contrast the settlement with what would likely be achieved at trial. The court obviously cannot make findings about the actual merits of the Class Members' claims. Rather, the court makes an analysis of the desirability of the certainty and immediate availability of a settlement over the probabilities of failure or of a whole or partial success later at a trial. The court undertakes a risk analysis of the advantages and disadvantages of the settlement over a determination of the merits. The second exercise, which depends on the structure of the settlement, is to use the various factors to examine the fairness and reasonableness of the terms and the scheme of distribution under the proposed settlement.⁹

[30] In my opinion, the settlement in the immediate case is good, fair, reasonable, and in the best interests of the Class Members as a whole. Ms. Arenson's well-researched and reasoned concerns about proof of expense claims did not make the settlement unreasonable or unfair to the class as a whole. A Class Member would have had similar and perhaps greater difficulties had he or she opted out of the class action to sue Honda or had the class action proceeded to individual issues trials. It was reasonable for Honda to require proof particularly because under the Settlement Agreement it accepted an uncapped liability for reimbursable expenses. Ms. Arenson also seemed to somewhat underappreciate the value of some of the other benefits to Class Members although she forthrightly acknowledged that she viewed the Outreach Program as a meaningful contribution to the value of the settlement.

[31] I approve the Settlement Agreement.

C. Fee Approval

[32] The negotiations with respect to the fee followed the resolution of the terms of the Settlement Agreement. A separate Fee Agreement was executed by the parties on January 14, 2019. The parties negotiated a fee of \$5,750,000, plus \$119,800 towards disbursements, plus applicable taxes. The fee portion was calculated based on a maximum of \$3.78 per vehicle value.

[33] The Fee Agreement stipulates that should a more favourable fee (i.e. less than \$3.78/vehicle) be reached in Other Proceedings involving defective Takata PSAN Inflators in other manufacturer's vehicles, Class Counsel must reimburse the Honda Defendants the difference in per-vehicle value.

⁶ *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 at para. 23 (Ont. S.C.J.).

⁷ *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.); *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.).

⁸ *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.); *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 at para. 13 (S.C.J.).

⁹ *Welsh v. Ontario*, 2018 ONSC 3217.

[34] The fees, disbursements and tax amounts will be paid by the Defendants in addition to the benefits available to Class Members, not deducted from the benefits available to Settlement Class Members and be in addition to the costs paid by the Defendants for notice and claims administration.

[35] The requested legal fees, using a multiplier for comparison purposes, represents approximately 3.2 times the total fees expended by Class Counsel in pursuing this litigation to date, and 2.5 times the total fees expected to be incurred to the end of the settlement period.

[36] Up to December 1, 2020, Class Counsel has incurred work-in-progress of \$1,762,190.99, disbursements, and taxes, as set out in the chart below.

FIRM	HOURS	FEES
Strosberg Sasso Sutts LLP	1,065.36	\$488,328.19
Consumer Law Group	1057.50	\$592,437.50
McKenzie Lake Lawyers LLP	965.70	\$483,983.05
Merchant Law Group LLP	137.11	\$61,185.59
Garcha & Company	106.23	\$63,096.25
Rochon Genova LLP	105.79	\$60,260.29
Kim Spencer McPhee	19.25	\$12,900.13
TOTAL		\$1,762,190.99
Taxes on Fees		\$239,307.27
Disbursements		\$188,136.18
Taxes on Disbursements		\$23,786.08
TOTAL		\$2,213,420.52

[37] Class Counsel's time in preparation for the approval motion is not included in the above sums. In addition to preparing and attaining ancillary approval orders in other provinces, Class Counsel anticipates that further work will continue with respect to the administration of the Settlement Agreement.

[38] In light of the nature of the benefits available to Class Members under this Settlement, the total value of this Settlement is not readily calculable. For example, the costs of Honda's efforts under the Outreach Program total approximately \$16.0 million to date. With respect to the Recall Remedy as of December 14, 2020, 1,009,206 vehicles have received the Recall Remedy, and

1,907,240 Takata PSAN Inflators have been repaired in Subject Vehicles. To date, Honda has also incurred administration costs of \$2.7 million for this Settlement, including almost \$2.0 million respecting the costs of implementing the Notice Plan.

[39] Since the total value of the Settlement includes benefits that are not readily calculable, as well as highly individualized cash payments (the quantum of which will be highly individualized depending on future claims that have neither been filed nor paid yet), there is not a dollar-figure Settlement value against which to apply the 33.33% contingency fee percentage. Given the difficulty in monetizing the total value of the Settlement, however, Class Counsel's requested fees may be considered in terms of a multiplier. In this case, the Class Counsel Fee sought is 3.2 times Class Counsel's total time and expenses to date, and 2.5 times if future time is taken into consideration (and lesser still, if any disbursements are incurred in future).

[40] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved.¹⁰ Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.¹¹

[41] These risks of a class proceeding include all of liability risk, recovery risk, and the risk that the action will not be certified as a class proceeding.¹²

[42] Fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well.¹³

[43] Accepting that Class Counsel should be rewarded for taking on the risk of achieving access to justice for the Class Members, they are not to be rewarded simply for taking on risk divorced of what they actually achieved.¹⁴ Placing importance on providing fair and reasonable compensation to Class Counsel and providing incentives to lawyers to undertake class actions does not mean that the court should ignore the other factors that are relevant to the determination of a reasonable fee.¹⁵ The court must consider all the factors and then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.¹⁶

¹⁰ *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.); *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 25 (S.C.J.).

¹¹ *Smith v. National Money Mart*, 2010 ONSC 1334, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.).

¹² *Gagne v. Silcorp Ltd.*, [1998] O.J. No. 4182 t para. 17 (C.A.); *Endean v. Canadian Red Cross Society*, 2000 BCSC 971 at paras. 28 and 35.

¹³ *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (C.A.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 at paras. 59-61 (S.C.J.); *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 at para. 37.

¹⁴ *Welsh v. Ontario*, 2018 ONSC 3217 at para. 103.

¹⁵ *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233 at para. 92.

¹⁶ *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 at para. 47 (B.C.C.A.).

[44] In my opinion, having regard to the various factors used to determine whether to approve Class Counsel's fee request, Class Counsel's fee request in the immediate case should be approved.

D. Conclusion

[45] Orders to go as asked.

A handwritten signature in black ink that reads "Perell, J." with a stylized flourish at the end.

Perell, J.

Released: December 22, 2020

CITATION: Des-Rosiers v. Takata Corporation, 2020 ONSC 8043
COURT FILE NO.: CV-16-543767-00CP
DATE: 2020/12/22

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SUPERIOR COURT OF JUSTICE**

BETWEEN:

**RICK A. DES-ROSIERS AND STEPHEN
KOMINAR**

Plaintiffs

- and -

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Defendants

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