CITATION: Romeo v. Ford Motor Co., 2019 ONSC 1831
COURT FILE NO.: CV-15-539855-00-CP
DATE: 20190321

2019 ONSC 1831 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Rebecca Romeo, Joe Romeo, Diane Béland, Elyse Choiniere, Linda Goodman, and Tracy Corsi, Plaintiffs

– AND –

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

BEFORE: E.M. Morgan J.

COUNSEL: *Theodore Charney and Remissa Hirji*, for the Plaintiffs

Hugh DesBrisay, for the Defendants

HEARD: March 18, 2019

SETTLEMENT APPROVAL

I. The Settlement Agreement

[1] This motion is brought by the Plaintiffs under s. 29(2) of the *Class Proceedings Act, 1992*, SO 1992, c. 6 ("CPA") for approval of the Settlement Agreement they have entered into with the Defendants effective November 5, 2018. The Settlement Agreement has come about as a result of two days of mediation with Professor Eric Green in Boston on April 9 and 20, 2018, as well as settlement discussions both preceding and subsequent to the mediation. Class counsel also move for approval of their fees and for approval of honoraria for the representative Plaintiffs.

[2] In my certification judgment of November 15, 2018, I summarized the basics of the Plaintiffs' claims as follows:

> [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.
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> [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.
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> *Romeo v Ford Motor Co*., 2018 ONSC 6772, at paras 2-3.

2019 ONSC 1831 (CanLII)

[3] The class is defined in the certification judgment 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 2011-2016 (the "Class Vehicles"). The settlement adopts this definition, with the exception of the following persons excluded from the class for settlement purposes: (1) Ford's employees, officers, directors, agents, and representatives, and their family members; (2) presiding judges and Class Counsel; (3) persons who have sued Ford Motor Company or Ford of Canada in a court or who commenced a proceeding under CAMVAP in relation to the Powershift Transmission or the DPS6 Transmission in a Class Vehicle and (4) all those otherwise in the class that properly opt out of the settlement class.

[4] The Settlement Agreement provides compensation to the class members for breaches 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"). It has been entered into on a national basis; the representative Plaintiffs in the actions in other provinces have not opted out of the settlement, and so the release that accompanies the Settlement Agreement will ultimately dispose of those actions as well as the Ontario action.

[5] In considering settlement approval under s. 29(2) of the CPA, the court must examine the fairness and reasonableness of the Settlement Agreement. This is done with a view to ascertaining whether it is in the best interests of the class having regard to the claims and defences and any objections raised to the settlement: *Baxter v Canada (Attorney General)* (2006), 83 OR (3d) 481, at para 10 (SCJ).

[6] In evaluating the Settlement Agreement, the court may take into account, among other things: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) settlement terms and conditions; (d) recommendation and experience of counsel; (e) future expenses and likely duration of litigation and risk; (f) recommendation of neutral parties; (g) if any, the number of objectors and nature of objections;

(h) the presence of good faith, arms-length bargaining and the absence of collusion; (i) the degree and nature of communications by counsel and the representative parties with class members during the litigation; and (i) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Lavier v MyTravel Canada Holidays Inc*., 2011 ONSC 1222, at para 21 [citations omitted].

2019 ONSC 1831 (CanLII)

[7] The Certification Order granted approval of a short-form and a long-form Notice of Class Action and Settlement Proposal (the "Notice") addressed to the class. Both forms of Notice were disseminated by the claims administrator, RicePoint Administration Inc., in accordance with the terms of the Certification Oder – i.e. by email to known email addresses of persons under warranty and publication in newspapers across the country. In addition, the short-form Notice was sent in English and French by the Claims Administrator to some 164,543 mailing addresses from the list of potential class members provided by the Defendants. This number reflects the number of persons who purchased or leased new Class Vehicles directly from a Ford dealership, or who purchased or leased used Class Vehicles and who registered as owners or lessees with Ford of Canada.

[8] Counsel for both sides attended at a two-day mediation with Professor Eric Green of Boston on April 9 and 20, 2018. They thereafter engaged in protracted settlement discussions, finally reaching a proposed settlement on November 5, 2018. Of the 164,543 class members who were mailed the Notice, there were 414 op-outs (0.25% of the Class) and 5 objections. While I have looked at each of the objections and taken them seriously, none of them raised a cogent point with respect to the settlement at large.

[9] One objector misconstrued the settlement and thought that the warranties on the Class Vehicles would be cancelled, another sought a lifetime warranty on his vehicle, another did not seem to realize that even vehicles older than those automatically covered by the settlement may submit a claim if they do so within 6 months of the claims commencement date, while another complained that certain alternative benefits are only open to vehicle owners with 3 or more repairs when in fact many such benefits are open to owners with only 2 repairs. One or two of the objectors had understandable complaints from their subjective point of view but raised no issue with respect to the class overall – e.g. one said compensation should be specifically tailored to the distance the owner lives from a dealer rather than number of times the vehicle had to be brought in for service, and another wanted compensation for software flashes to commence with just 1 software flash whereas the case law and the parallel U.S. settlement calls for compensation after 2 flashes.

[10] The terms of settlement are, of course, laid out in detail in the Settlement Agreement. The settlement is structured on a claims-made basis, so that there is no finite global amount that can be identified as the settlement amount. Different categories of vehicle owners with different types of experiences with transmission repairs will receive specifically defined benefits under the agreement, which the Defendants will fund as the claims come in.

[11] The benefits to class members are therefore varied in accordance with their history with their vehicle. These benefits range from partial refunds if the class member's vehicle's

transmission continues to malfunction after multiple repairs attempts, to reimbursement of the costs of out-of-warranty replacements, to compensation for the inconvenience of having their vehicle serviced. The particulars of the payments are provided in sections H.B. and H.C of the Settlement Agreement and some examples of cash payment calculations are set out in sections H.F. thereof.

2019 ONSC 1831 (CanLII)

[12] The Plaintiffs have described these benefits in affidavits supporting this motion, which in turn provide an explanatory background to the specific provisions of the Settlement Agreement. All of this is summarized at paragraphs 35-55 of the Plaintiffs' factum, as follows [references omitted]:

> **Terms of the settlement – cash payments**
>
> [35] … In brief, a Class Member who has made service visits to an authorized Ford dealership for three or more THRs, or for three or more Software Flashes (as defined in the Settlement Agreement), within the first seven years or 160,000 kilometres from the Class Vehicle's delivery to its first retail owner, may recover cash payments.
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> [36] For three or more THRs, a qualifying Class Member is entitled to cash payments in the amount of $252 (for the third visit) up to $725 (for the eighth visit), for a total of $2,932. Alternatively, a Class Member can elect to receive an Owner Appreciation Certificate for twice the value of the cash payment ($504 up to $1,450, for a total of $5,864). Owner Appreciation Certificates are discount coupons that may be applied toward the purchase of a new Ford vehicle from an authorized Ford Dealer. The amount stated on the Certificate will be deducted from the vehicle's purchase price. An Owner Appreciation Certificate expires within twelve (12) months of issuance.
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> [37] For three or more qualifying Software Flashes, a Class Member is entitled to cash payments of $65 for each service visit, for a total of $780. Class Members cannot receive these Software Flash cash payments if they receive THR cash or certificate payments or Alternative Benefits.
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> [38] For Class Vehicles manufactured after June 5, 2013, if: a Class Member had two or more clutch replacements performed by a Ford dealership while they owned or leased the Class Vehicle and within five years or 100,000 kilometers; a Ford Dealership performs appropriate diagnostic procedures and determines an additional clutch replacement is needed; and the Class Member pays for the additional clutch replacement, then the Class Member is entitled to reimbursement for out-of-pocket costs for the additional clutch replacement if it is performed by a Ford dealership while they owned or leased the Class Vehicle, and within seven years or 160,000 kilometers of the Warranty Start Date (as defined in the Settlement Agreement). The new clutch will also be subject to a two-year warranty.
>
> [39] Claims for cash payments must be submitted within 180 days of the commencement of the claims period for service visits which have already occurred. For future qualifying

service visits, the claims for those cash payments must be submitted within 180 days of the service visit.

Terms of the settlement – Alternative Benefits

[40] Alternative Benefits provide eligible current owners with a partial refund of the purchase price and provide eligible current lessees with a partial refund of lease payments. An owner can recover the purchase price, less a reduction for usage and a reduction for its residual value. Owners will continue to own their vehicle, hence the reduction for residual value. A lessee can recover all lease payments, less a reduction for usage, with the vehicle being returned to Ford.

[41] Particulars of the Alternative Benefits program can be found in sections II.H to II.I of the Settlement Agreement. In brief, a Class Member who is a current owner or lessee of a Class Vehicle which has undergone at least two THRs (for newer models) or three THRs (for older models), but is continuing to experience performance issues with the Dual Clutch Transmission, can submit a claim for Alternative Benefits.

[42] Class Members must fall into one of five categories in order to be eligible for Alternative Benefits. These categories, which are defined at section II.H.1 of the Settlement Agreement, are designed to address the varying circumstances amongst the Class Members, due to the expiry of the Ford New Vehicle Warranty for some model years, the advanced age of some of the vehicles, and the number of THR repairs.

[43] Categories 1 and 2 cover the more recent 2013-2016 Fiesta and Focus model years. For the most part, these model years remain under the original five-year warranty or the extended seven-year warranty. A Class Member who falls under category 1 or 2 is eligible for Alternative Benefits if their Class Vehicle has undergone at least two THRs with that owner/lessee within the first five years or 100,000 kilometres (the warranty period). For the 2013 model year Class Vehicles, the five years have likely elapsed, but owners/lessees of 2014-2016 model year Class Vehicles likely have anywhere from a few months up to calendar year 2021 before the eligibility period for two or more THRs expires. The claim must be submitted within seven years or 160,000 kilometres (potentially up to calendar year 2023 for 2016 model year Class Vehicles); or, for those outside those parameters, within 180 days of the claims administration commencement date.

[44] Categories 3 and 4 cover the older 2011-2012 Fiesta and 2012 Focus model years. These Class Vehicles have been on the road as far back as 2010; therefore, they must have undergone at least three THRs in order for their owners/lessees to be eligible for Alternative Benefits. These THRs must have taken place within seven years or 100,000 kilometres (versus five years or 100,000 kilometres for categories 1 and 2). The claim must be submitted within seven years or 160,000 kilometres; or, for those outside those parameters, within 180 days of the claims administration commencement date.

2019 ONSC 1831 (CanLII)

[45] Category 5 covers all model years of the Class Vehicles where the current owner or lessee has undergone four or more THRs within the first five years or 100,000 kilometres. The claim must be filed within the first six years; or, for those outside the deadline, within 180 days of the claims administration commencement date.

[46] For all claimants, their Class Vehicle must first undergo a three-part Transmission Diagnostic Test to confirm that it is actually experiencing transmission performance issues. The Transmission Diagnostic Test is routinely administered at Ford dealerships before a THR under warranty is authorized by Ford, and it is intended to diagnose: (i) fluid leaks contaminating the clutches, (ii) excessive r.p.m. fluctuations on either clutch, and (iii) Transmission Control Module error codes. If the Transmission Diagnostic Test identifies: (i) fluid contamination of a clutch, (ii) r.p.m. fluctuations on either clutch in excess of 250 r.p.m., or (iii) any Transmission Control Module error codes, then the Class Vehicle shall be considered to have 'failed' the Transmission Diagnostic Test.

[47] If the Class Vehicle 'passes' the Transmission Diagnostic Test at the initial claims stage, the Class Member may elect to have a second Ford dealership perform the Transmission Diagnostic Test again on the Class Vehicle (the 'Second Opinion Test'). The Class Member has 30 days from the date of the first passed Transmission Diagnostic Test to conduct a Second Opinion Test.

[48] A Class Member can apply for Alternative Benefits anytime during the time limits set out in the Settlement Agreement for filing a claim. There is also the ability to re-apply once for Alternative Benefits during the claim period. Therefore, if the Class Vehicle passes the Transmission Diagnostic Test at the initial stage but the performance issues subsequently become worse within the claim period for that Class Vehicle, the Class Member can re-apply for Alternative Benefits and re-start the testing process.

[49] For claimants under Categories 1-4, whose vehicles fail the initial Transmission Diagnostic Test, Ford will have one more chance to repair the Dual Clutch Transmission in their Class Vehicle (the 'Subsequent Repair', as defined in the Settlement Agreement). Following the Subsequent Repair, Ford must pay Alternative Benefits if the Class Vehicle experiences a recurrence of transmission performance issues within one year, as demonstrated by a Subsequent Failed Transmission Diagnostic Test. For claimants who submit under Category 5, Alternative Benefits are available without any opportunity for a Subsequent Repair.

[50] The Transmission Diagnostic Tests must be performed by a Ford dealership, but a Class Member has the option of choosing which Ford dealership will perform the Transmission Diagnostic Test. Ford will pay for the Transmission Diagnostic Test(s) if the Class Vehicle is within seven (7) years or 160,000 kilometres of the Warranty Start Date (whichever occurs first).

2019 ONSC 1831 (CanLII)

[51] If a Class Member qualifies for an Alternative Benefits payment, then Ford will, subject to its right to make an offer to repurchase the Class Vehicle, make a payment based on the following formula:

a) For Original Owners: Alternative Cash Payment (Original Owner) = Purchase Price – ((mileage (in km) on the vehicle's odometer at the time of the Subsequent Repair Failed Transmission Diagnostic Test /193,000) x Purchase Price) – Residual Value of Vehicle.
a) *[sic]* For Subsequent Owners: Alternative Cash Payment (Subsequent Owner) = Purchase Price – ((mileage (in km) on the vehicle's odometer from the date of the Subsequent Owner's Purchase of the Class Vehicle to the time of the Subsequent Repair Failed Transmission Diagnostic Test /193,000) x Purchase Price) – Residual Value of Vehicle.
b) For Lessees: Ford will repurchase the Class Vehicle from the lessor, pay off the amount currently owing to the lessor in accordance with the lease agreement and make an Alternative Cash Payment (Lessee) based on the following formula: Alternative Cash Payment (Lessee) = Lease Payments – ((mileage (in km) on the vehicle's odometer at the time of the Subsequent Repair Failed Transmission Diagnostic Test /193,000) x Lease Payments).

[52] For those who qualify in Category 5, the mileage calculation will be completed using the mileage (in km) on the vehicle's odometer at the time of the initial failed Transmission Diagnostic Test.

[53] For Class Vehicle owners, the Residual Value of the Class Vehicle will be determined as follows:
c) for vehicles with current odometer readings placing them in the Extra Clean, Clean, Average or Rough Canadian Black Book ("CBB") value categories, the Residual Value will be equivalent to the CBB trade-in Rough value at the time the Alternative Benefits award becomes owing; or
d) for vehicles with current odometer readings placing them in the Beyond Rough or 'equivalent rough with mileage adjustment' CBB value categories, the Residual Value will be equivalent to the CBB trade-in Beyond Rough or 'equivalent rough with mileage adjustment' values at the time the Alternative Benefits award becomes owing.

[54] Ford may elect to make an offer to repurchase the Class Vehicle from an eligible claimant on terms set by Ford. The Class Member may then elect to either accept such offer or demand the Alternative Cash Payment pursuant to the formula set out above.

[55] A Class Member can apply for cash payments and Alternative Benefits at the same time. The Class Member would (if eligible) receive cash payments while the Alternative Benefits claim is ongoing. If the Class Member recovers Alternative Benefits, any cash payments received are credited against the Alternative Benefits claim. The denial of an Alternative Benefits claim has no impact on eligibility for cash payments.

2019 ONSC 1831 (CanLII)

[13] The settlement was negotiated by the parties with the help of an experienced mediator. Class counsel are very experienced class action lawyers. The Defendants undertook a broad disclosure process, including their entire database, current to May 2016, of warranty repair data.

[14] Plaintiffs' economist, Edward M. Stockton, an expert well recognized in the courts, filed an affidavit in support of this approval motion in which he expressed the view that the settlement is a fair and reasonable one. Counsel for the Plaintiffs have summarized his expert evidence at para 60 of their factum, as follows [references omitted]:

> [60] In his affidavit sworn in support of this motion for settlement approval, Mr. Stockton opined as follows:
>
> > a) the cash payments benefit schedule in the Settlement 'reasonably reflects the concepts that a vehicle that has a higher repair incidence likely exhibited more periods of diminished performance, and that owners and lessees of these vehicles experienced higher consequential costs in order to address maintenance and performance issues with their [Class Vehicles]';
> >
> > b) the graduated benefit schedule for THR repairs in the Settlement 'offers expanded benefits for consumers with both a more severe past vehicle performance and reliability experiences and poorer future ownership prospects', which is consistent with the AWS warranty repair data, which shows that certain of the Class Vehicles exhibit tendencies to require multiple repairs or to be unable to accommodate a successful repair;
> >
> > c) with regard to the Alternative Benefits awards calculation, the calculation of Residual Value is conservative and offers many Class Members a larger benefit than if the residual value was based on the actual value category for each Class Vehicle;
> >
> > d) that, based on his educated sample calculations, the Alternative Benefits payments for persistently troubled Class Vehicles that are not repairable will foreseeably exceed $5,000 in most cases and potentially even $10,000; and
> >
> > e) in conclusion, '…the proposed settlement agreement provides substantial compensation in connection with the nature of the alleged defect, overpayment effects experienced, and the quality of consumers' ownership experiences. Overall the settlement benefits are reasonable, substantial and correlated with individual experiences.'

[15] The test for approval of a settlement under s. 29 of the CPA is whether, in all of the circumstances, the proposed settlement is fair, reasonable, and in the best interests of the class: *Parsons v Canadian Red Cross Society* (2000), 49 OR (3d) 281, at para 69. In making this assessment, I am to take into account the claims and defences raised by the parties as well as any

2019 ONSC 1831 (CanLII)

objections expressed to the proposed settlement: *Baxter v Canada (Attorney General)* (2006), 83 OR (3d) 481, at para 10. Since a settlement is by its very nature a compromise, it does not have to be perfect, but it must be within a range of reasonableness given these factors: *Eklund v Goodlife Fitness Centres Inc*., 2018 ONSC 4146, at para 29.

[16] As my colleague Horkins J. pointed out in *Wein v Rogers Cable Communications Inc*., 2011 ONSC 7290, it is not the court's responsibility to independently concoct an optimal settlement or to send the parties back to the drawing table for an improved settlement. "Where the parties are represented, as they are in this case by reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation": *Ibid*., at para 20.

[17] In the present case, the terms set out in the Settlement Agreement are in many respects more advantageous to the class cembers than the individual remedies available to them at common law or under the CCQ for breach of warranty. The fact that this is a claims-made compensation program eliminates any concern that a ceiling will be reached with respect to class members' claims. In general, the settlement will alleviate class members of the burden of proving all of the elements of a contested breach of warranty claim, with its inevitable expense, uncertainty, risk of an adverse costs ruling, and delay. The compensation payments are relatively generous, and the claimants are allowed to keep their own vehicles if they wish to do so and thereby retain their residual resale value. Moreover, like all settlements, the present arrangement spares the class the costs and inherent delays of future litigation, which can, of course, be substantial.

[18] Taking all of these factors into account, I am of the view that the proposed settlement is in the best interests of the class. It should be approved and the claims administrator be appointed.

II. Late opt-outs

[19] I will add a note about the opt-out requests that arrived after the March 5, 2019 deadline for opting out. Class counsel advise that there were 5 individuals making such requests, at least one of which was through independent counsel. They have indicated in various ways that the Notice of the settlement did not come to their attention in time for them to exercise their opt-out right in a timely way.

[20] I sympathize with these individuals and acknowledge that, taking each one on its own, there would be little cost to waiving the deadline and allowing the opt-out. As counsel point out, however, there are precedential ramifications of making such an allowance. If one can permit a flexible deadline for a week or two then why not for a month or two or even for a year or two, provided that the person making the request is *bona fide* in his or her claim not to have known about the settlement earlier? This would be unduly cumbersome for the administration of the claims, but at the same time there is no principled reason why such late claims should be distinguished from the 5 that I have before me.

2019 ONSC 1831 (CanLII)

[21] This is a case where all of the potential class members were known to the Defendants, and they opened their data banks to the claims administrator to ensure that everyone received notice of the settlement. The only truly principled way to address class members' opt-out is to enforce the deadline for all claimants. If the cut-off date cannot be overlooked for all, it cannot be overlooked for any one.

[22] I will not allow any opting out of the settlement after the deadline set out in the Notice.

III. Class counsel fees

[23] The fact that the settlement is being made on a claims-made basis rather than as a single, global settlement, puts a slightly different gloss on Plaintiffs' counsel's fees than is usually the case. Here, the fees are being paid in part by the Defendants and in part by the class.

[24] This type of arrangement, while not typical, is not, however, entirely unique. Courts have on previous occasions approved such fee arrangements where the fees paid were determined to be reasonable: see *Glover v Toronto (City)*, 2014 OSC 305. It has for at least a decade been the case that the court must, in exercise of its settlement approval jurisdiction under s. 29 of the CPA, approve every aspect of a settlement including class counsel fees even where those fees are paid by the Defendant and do not come out of the funds set aside for the class: *Killough v The Canadian Red Cross*, 2007 BCSC 941.

[25] As class counsel explain it, the Defendants will contribute $2,000,000 plus HST, and, in addition, will make a $1,000,000 advance (inclusive of HST) on the fees that class counsel will recover out of the claims program. In all, this amounts to a 1.85 multiplier on class counsel's billable time, which sits at $1,555,496.

[26] In addition, class counsel will collect an additional fee of 10% of the paid claims (inclusive of HST, reducing this to 8.85% going to class counsel). This additional fee will be deducted from the compensation payment made to each Class Member who submits a valid claim within the terms of the Settlement Agreement. Likewise, another 10% of the paid claims will go to the Law Foundation in return for the funding of disbursements that was provided to class counsel.

[27] In analyzing whether a fee arrangement is reasonable, I must keep in mind that class counsel undertakes risk in taking on a class action on a contingency basis. While there was some financial support in this case from the Class Action Fund, that pool of funds covers disbursements, not class counsel fees. Here, there was, as in all contingency fee cases, "the risk of receiving no compensation for the time…invested in the case": *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829, at para 14.

[28] In addition, I must keep in mind the results that class counsel have achieved for the class in concluding a settlement with the Defendants. Here, the Settlement Agreement represents compensation and justice for many thousands of consumers in a situation where the size of each claim would doubtless have discouraged or impeded litigation for most of those individuals. That is the type of access to justice that the CPA was designed to foster.

2019 ONSC 1831 (CanLII)

[29] A settlement of this nature, in which the Defendants have committed many millions of dollars to compensatory payments, will also reflect the goal of behavior modification. Given these accomplishments, and the fact that the settlement itself reflects a commitment to judicial efficiency in resolving cases, class counsel has set the groundwork for having its fees approved: *Bancroft-Snell v Visa Canada Corp*, 2015 ONSC 7275, at para 49.

[30] Neither the multiplier-based fee being paid by the Defendants nor the 10% fee being paid by the Class Members is out of line with the reasonable expectations of the Class Members or the existing case law. The 1.85 multiplier over the base fee is well below the maximum suggested by the Court of Appeal in *Gagne v. Silcorp* (1998), 41 OR (3d) 417, 425, where the Court indicated that "the range of the appropriate multiplier is "slightly greater than one to three or four in the most deserving case." I see no reason to disturb this figure.

[31] The class members are paying 10%, all inclusive, of the benefits payable to them by the Defendants. This is not a particularly high figure compared with other percentages that the courts have approved. In fact, contingency fee rates of up to 33.3% have been held to be presumptively valid: *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686, at paras 7-9. This "provide[s] a real economic incentive to lawyers to take on a class proceeding and do it well": *Sayers v Shaw Cablesystems Ltd*., 2011 ONSC 962, at para 37. That kind of analysis is certainly applicable in the present case. I likewise see no reason to disturb the percentage that class counsel proposes recovering in fees from Class Members.

[32] The one issue that gives me pause in respect of legal fees is that in a claims-made settlement one cannot know in advance what the ultimate settlement amount will be. That means that one equally cannot know in advance what the ultimate amount of fees will be. While counsel do not expect the settlement to go beyond $50,000,000, they cannot be certain that it will not escalate beyond their present expectations.

[33] At the $50,000,000 settlement point, the fees calculated as a percentage of the award may become so large as to require revisiting. As Belobaba J. stated in *Brown v Canada (Attorney General)*, 2014 ONSC 3429, at para 61, citing *Richardson v Low* (1996), 23 BCLR (3d) 268, at para 35, "the question 'What is the reasonable fee?' at least in mega-fund cases must be answered 'not as a percentage but in dollars.'" Counsel must make an appointment to come back and speak to the matter if the overall settlement amount reaches that point.

IV. Honoraria for representative Plaintiffs

[34] Class counsel request a $7,500 honorarium for lead Plaintiff Rebecca Romeo and $5,000 honoraria for each of the other five representative Plaintiffs. These payments are proposed as "a recognition that the representative plaintiffs meaningfully contributed to the Class Members' pursuit of access to justice": *Johnston v The Sheila Morrison Schools*, 2013 ONSC 1528, at para 43.

[35] The representative Plaintiffs were active participants in this litigation and in the mediation that culminated in the Settlement Agreement. They were not promised any payment in taking on the task. This Court has previously awarded similar honoraria to representative

2019 ONSC 1831 (CanLII)

plaintiffs in recognition of their efforts: see *Hislop v Canada (Attorney General)* [2004] OJ No 1867, at para 22; *Elkund v Goodlife*, *supra*, at para 53. I see no reason not to grant class counsel's request.

V. Notice of settlement

[36] The settlement calls for notice to be provided to class members. There will be publication in newspapers across Canada and with updates on class counsel's website devoted to this class proceeding. However, there will not be a further mass mailing of notices to class members. They have recently received a mailing of the Notices of certification, which in turn alerted them to the settlement and to class counsel's website for updates on the settlement. There is no reason to repeat that exercise at this point.

[37] The notice of settlement approval should allow a sufficient waiting period to allow the appeal period for this motion to run its course.

VI. Disposition

[38] The Settlement Agreement is hereby approved.

[39] The deadline for opting out of the settlement is not waived.

[40] Class counsel's fees payable partly by the Defendants and partly by the class, as described in paras 23-24 above, are hereby approved.

[41] The honoraria for the representative Plaintiffs, as described in para 31 above, are hereby approved.

[42] The Notice of settlement approval is approved, with a change in its terms to allow a 45-day waiting period rather than a 30-day period as originally proposed.

Morgan J.

Date: March 21, 2019

2019 ONSC 1831 (CanLII)