

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Aimee Skye, Plaintiff

**AND:**

Honda North America, Inc., American Honda Motor Co., Inc. Honda Motor Company Ltd., and Honda Canada Inc., Defendants

**BEFORE:** Tranquilli J.

**COUNSEL:** Assini E., Baer, M. for the Plaintiff

Adamson C. for the Defendants

**HEARD:** March 8, 2021 via Zoom

**ENDORSEMENT – SETTLEMENT & CLASS COUNSEL FEE APPROVAL**

- [1] The plaintiff brings this motion on consent for an order approving the Settlement Agreement pursuant to s. 29 of the *Class Proceedings Act, 1992*.
- [2] The proposed settlement arises from the Honda Canadian Oil Dilution Class Action. If approved, it will resolve the claims of all persons who purchased or leased a Class Vehicle in Canada and approve the class counsel fee, fixed in the total amount of \$226,282.50.
- [3] For oral reasons given, I granted the order sought, as being fair, reasonable and in the best interests of the class, subject to these further written reasons.
- [4] The plaintiff filed extensive materials, comprised of a motion record, factum, brief of authorities and draft order. The motion record included the affidavit of Chelsea Smith, a lawyer with Class Counsel, the affidavit of Victoria Fellner, project manager with the Settlement Administrator RicePoint, and the affidavit of the representative plaintiff, Aimee Skye.

**Background**

- [5] The action concerns a defect known as an “Oil Dilution Condition” (ODC) in two types of Honda vehicles produced between 2016 and 2018. The plaintiff alleges that the 1.5 turbocharged engine in the Class Vehicles is predisposed to an ODC which results in oil and gas fumes, decreased oil viscosity, premature wear and possible failure of the engine.

- [6] On September 25, 2020 I granted the certification order, which among other terms identified the Settlement Class, the common issue, appointed Class Counsel and the Settlement Administrator and approved the Notice and Notice Plan.
- [7] In general, the proposed settlement provides the following benefits to Class Members: a warranty extension to a date that ends six years after the vehicles original sale or lease date, with no mileage limitation; a product update which includes a software update on the Class Vehicles and reimbursement to eligible Class Members for expenses incurred before November 16, 2020 as a direct result of the ODC , such as towing, oil change or diagnostic costs. This is a claims-made settlement with no risk of prorating. The administration of the settlement will continue to be overseen by this court to ensure compliance and fair distribution.
- [8] The costs of settlement administration and Class Counsel fees are to be borne by the defendants over and above these settlement benefits for the Class Members.
- [9] The settlement agreement does not extinguish or release claims for personal injury, damage to property other than to a settlement Class Vehicle or claims that relate to something other than the settlement Class Vehicle and the alleged engine defect.
- [10] There are 163,056 Class Vehicles, readily identified by the defendants. The parties note that this was a very successful Notice program, which included 80,902 mailed notices and 192,000 notices delivered by email.
- [11] The deadline for opting out was December 31, 2020. The Settlement Administrator received 453 valid opt-out elections. Of those, 337 opt-outs were from Quebec residents. Further inquiries by the parties revealed that a Quebec consumer advocacy organization, the Automotive Protective Agency (APA), had actively encouraged Class Members to opt-out. The number of opt-outs exceeds the threshold which would permit the defendants to terminate the Settlement Agreement; however, Honda still supports the settlement. Honda remains of the view that the settlement is fair and reasonable, and that the product update has been highly effective in mitigating the ODC issue. As of the hearing of this motion, the defendants are not aware of any other ODC claims being commenced against it in any of superior courts in Canada.
- [12] One objection was filed. The objector complained that the ODC issues with his vehicle persist after having received the product update, that the settlement does not provide a meaningful benefit and is concerned about the terms of the warranty extension.

### **Analysis**

- [13] To approve a class proceeding settlement, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class: *Mancinelli v. Royal Bank of Canada*, 2019 ONSC 25 at para 188. In considering whether the proposed settlement meets these requirements, I am guided by and have considered the principles set out in *Nunes v. Air Transat Inc.*, [2005] O.J. No 2527 (S.C.J.) at para 7.

- [14] I accept the parties' submissions that the evidence demonstrates there is no reason to deviate from the strong initial presumption of fairness in respect of the proposed settlement. The parties are represented by counsel with an established history and experience in class action litigation. The terms of settlement were vigorously negotiated, with multiple exchanges and amendments to the Settlement Agreement. They only recently agreed on the proposed Counsel Fee.
- [15] The terms of settlement fall within the required "zone of reasonableness" for approval. Although the matter would resolve before completion of the discovery phase, the parties had the investigation and settlement information from the USA litigation available to them. The Settlement Agreement largely follows the terms of the US settlement. However, it was not merely a "cut and paste" exercise. It is also marginally more favourable than the US settlement: the US agreement confined the product update to certain States, whereas in Canada there is no such geographic limitation.
- [16] I have considered the concerns raised by the one objector; however, I am satisfied that his objection does not provide a basis for the court to conclude that the settlement is contrary to the interests of the class as a whole. The uncontradicted evidence is that the product update has been successful in the overwhelming majority of Class Vehicles (91.4 – 96.2% to date). The objector's reports of ongoing issues, such as poor engine/cabin heating and gas fumes are vehicle specific for which causes other than ODC may be responsible. The settlement provides for Honda to continue goodwill consideration to individual Class Members on a case-by-case basis, which may be available to the objector based on the particular issues encountered in that vehicle. It was open to him to opt-out of the settlement to pursue relief in respect of his issues with his vehicle.
- [17] Notwithstanding the objector's opinion, the court is satisfied that the settlement provides material benefits to the Class Members, with the extensive notice program, the continuation of the product update, warranty extension and compensation for eligible Class Members who incurred out-of-pocket expenses related to the ODC. To dismiss this motion on the basis of the one objector's concerns would materially prejudice the Class as a whole: *Hunt v. Mezentco Solutions Inc.*, 2017 ONSC 2140 at paras. 162-164. It would force the litigation to continue for questionable benefit where the terms of the settlement mirror the results of the US litigation and are marginally better. The Class would be deprived of immediate and certain settlement benefits while this matter continued through the delay and expense of discovery and further negotiation: *Voutour v. Pfizer Canada Inc.*, 2011 ONSC 7118 at paras 63, 64, 68.
- [18] The court is also satisfied that the recommended counsel fee is fair and reasonable. The retainer agreement contemplates a contingency fee of 30% as per s. 33 of the *Class Proceedings Act, 1992*. As noted by the parties, the terms of the settlement agreement do not accommodate testing of the proposed fee as a percentage against recovery in order to consider whether the fee is fair and reasonable: *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 at para. 26. Counsel therefore approached the analysis of the reasonableness of the fee based on a multiplier of time rather than as a contingent fee. The multiplier used is approximately 1.3 times the value of work to date to the estimated value of work by the completion of the matter. The parties negotiated fees outside of the settlement benefits to

Class Members. The parties advised the court that the recommended counsel fee is the recent result of hard-fought negotiations, where Class Counsel sought a higher multiplier and the defendants a lower multiplier. The counsel fee is the result of a base fee of \$152,000, which less than counsel's time docketed on the file, and disbursements of about \$2,000 with a multiplier of 1.3 based on the risks undertaken by counsel and the future work reasonably anticipated on the matter. In my view, this is a reasonable approach, recognizing that counsel had the benefit of the US litigation and yet has still needed to use a significant degree of skill and time in managing what remains a complex action. The fees are also negotiated as an additional payment by the defendants and does not compromise the benefits to the Class Members. The result achieved favours approval of the requested fee for Class Counsel.

- [19] In summary, the proposed settlement and counsel fee reflect arms-length negotiations and confer valuable benefits on the Class Members. It is a fair result and promotes efficient use of the court process. An order will go in accordance with the Notice of Motion dated March 4, 2021 and the draft order is signed.
- [20] The parties may contact the trial coordinator for the purpose of scheduling any further appointments that may be necessary in the administration and supervision of the settlement of the claims and conclusion of the matter.



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Tranquilli J.

**Date:** March 8, 2021