

**CITATION:** Pabla v. Caterpillar of Canada Corporation et. al. 2022 ONSC 732  
**COURT FILE NO.:** CV-14-60168CP  
**DATE:** 2022/02/01

**COURT OF ONTARIO,  
SUPERIOR COURT OF JUSTICE**  
**Proceeding under the Class Proceedings Act, 1992 as amended**

**RE:** Sukhvir Pabla, Plaintiff

**AND:**

Caterpillar of Canada Corporation and Caterpillar Inc., Defendants

**BEFORE:** Regional Senior Justice Calum MacLeod

**COUNSEL:** Jeff Orenstein & Andrea Grass, for the Plaintiff

Gordon McKee & Rebecca Torrance, for the Defendants

**HEARD:** January 31, 2022

**DECISION AND REASONS**

[1] This was a hearing to approve the settlement of this class action and to consider the compensation sought by class counsel. The action was certified as a class proceeding on September 22, 2021. There is a parallel class proceeding in Quebec and the settlement is contingent on approval in both provinces. The settlement was approved in Quebec by the Honourable Mr. Justice Lukasz Granosik on January 27, 2022.

[2] I have approved the settlement and the proposed counsel fee. I have also approved the “Representative Plaintiff’s Service Award” or honorarium. Although this is a settlement and it is unopposed by any class member, it is still necessary for the court to scrutinize the settlement and the proposed fees with some care.

The following are brief reasons and observations.

**Background**

[3] The action involves certain alleged deficiencies in Caterpillar engines utilizing an Advanced Combustion Emission Reduction Technology manufactured between 2005 and 2009. There had been a similar lengthy class proceeding in the United States. On February 21, 2014, a class proceeding was launched in the Superior Court of Quebec (*9157-4863 Quebec Inc. v. Caterpillar of Canada et al.*, Court File No. S.C.M. 500-06-000681-144 (Montreal)). This Ontario proceeding was commenced by class counsel on February 14, 2014. I am advised by counsel for the defendants that they are not aware of any other class proceedings commenced in Canada.

[4] The Ontario proceeding was intended to be a national class proceeding for members of the class located in any province other than Quebec, while the Quebec proceeding was intended to cover class members residing in Quebec. As I understand it, this use of parallel proceedings is common because the Quebec court will not certify a national class unless the defendant is resident in Quebec. The head office of Caterpillar of Canada Corporation is located in Ontario. The head office of Caterpillar Inc. is located in Peoria, Illinois.

[5] A global national settlement was apparently reached after extensive mediation before a retired Ontario judge, the Honourable Douglas Cunningham. This resulted in a consent to certification in both jurisdictions, approval of a litigation plan, notice provisions and dates for opting out of the classes. The settlement was and is contingent on gaining approval from both the Quebec court and the Ontario court.

[6] The Ontario action was certified as a class action by order of the Honourable Mr. Justice Michel Charbonneau. The class definition for the “national class” is as follows:

**All Persons in Canada, excluding members of the Quebec Class, who are original purchasers or original lessees, subsequent purchasers or subsequent lessees, including but not limited to those having some rights to residual purchase of vehicles at lease end, of a vehicle (including trucks, buses and other heavy duty vehicles) powered by a Subject Engine. Excluded from the Class are Defendants, all present or former affiliates and/or directors of Defendants, all Persons who have already released claims against Defendants for the relief provided herein, and all persons who will make a timely and valid election to opt-out of the Class in accordance with the provisions of the notice of class certification and opt-out rights. National Class does not include Persons that have previously executed settlement releases concerning the Subject Engines. Such persons that have previously executed settlement releases are specifically excluded from the Class.**

[7] The Quebec proceeding was also certified with an identical class definition for the Quebec class. The plan for notification of class members, opting out and obtaining court approval was essentially identical in both jurisdictions. The entire settlement is contingent on approval by both courts.

[8] As noted above, the settlement was approved in Quebec on January 27, 2022. It remains for this court to independently review the matter in accordance with the Ontario class action legislation and applicable jurisprudence.

[9] To approve a settlement, the court must be satisfied that the settlement is fair, reasonable and in the best interests of all class members. The fees of class counsel must also be approved

whether they propose to calculate those fees pursuant to a contingency fee agreement or by some other means. The fees must be fair and reasonable under all of the circumstances.<sup>1</sup>

[10] The factors to be considered in assessing the fairness of a settlement are now set out in s. 27.1 (5) of the Act and although that section does not technically apply to this action (pursuant to the transition provisions in s. 39) the section encapsulates much of the pre-existing jurisprudence under the former s. 29 (2) and is a useful guide.<sup>2</sup> The approval of counsel fees is governed by s. 32 of the Act.

### **Analysis and Approval of the Settlement**

[11] The settlement proposes to establish an escrow fund of \$8,000,000 to satisfy claims by owners or lessors of the approximately 7,491 affected engines that were sold in Canada. It is proposed to provide a simplified claims process whereby three categories of claimants will receive between \$500 and \$30,000 each depending upon the number of qualified repairs each member of the class experienced and the number of claims. If there is a surplus in the escrow fund after all claims have been addressed, the surplus will be divided between the *Fonds d'aide aux actions collectives* in respect of a statutory share of the Quebec portion of the funds and a charity chosen by Class Counsel and approved by the court.

[12] To qualify for compensation, class members will have 180 days to submit a claim form to the claims administrator. There is a simplified process for submitting such a claim through the settlement website and I am advised that 110 claimants representing 252 engines have already pre-registered in response to the settlement notification process.

[13] Only two opt outs were received. One of those was by a class member who no longer owned the equipment in question and was fully satisfied with service he had received from the defendants. Not a single class member filed a notice of objection to the settlement. The clear support for the settlement amongst members of the class is a factor for the court to consider in approving the settlement.

[14] The outcome of the class proceeding in the United States and the similarities and differences with that settlement as well as the claims history under the United States settlement agreement are also matters to be considered. Finally, this court has examined the approval of the settlement by the Superior Court of Quebec.

[15] I am satisfied that the settlement is fair and reasonable under the circumstances and is in the best interests of the class members. The process envisioned by the settlement documents appears to provide sufficient funds to provide reasonable compensation to members of the class in a reasonable time frame with a minimum of individual expense or complication. Despite the age of these engines at this point in time, there have been few individual actions and as noted above, there have been almost no members of the class who have opted out. It appears that the mechanism

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<sup>1</sup> See for example *Marchand v. Ford Motor Company*, 2018 ONSC 685 and *Silver v. Imax Corp.*, 2016 ONSC 403

<sup>2</sup> See *Bancroft-Snell v. Visa Canada Corporation*, 2018 ONSC 5166 @ paras. 118 – 120

of a class proceeding has produced compensation for class members who might otherwise have had no effective recourse.

[16] There is no evidence of collusion or any reason to think that this settlement is a settlement designed to undermine legitimate claims. To the contrary, it was negotiated at arms length over a number of years following extensive disclosure and discovery and following lengthy negotiations with both sides represented by experienced counsel.

### **Counsel Compensation**

[17] There is a contingency fee agreement in this case. Under that agreement, counsel is entitled to a fee equivalent to 30 percent of the Settlement Fund or a multiplier of 3.5 times the fee generated by an hourly rate. Both contingency fee agreements and class counsel compensation in class proceedings require approval. That approval is not automatic. The Act contemplates reasonable compensation to counsel including a premium for taking on the risk and investing the time and capital required to pursue these matters. This however is not the objective of the legislation. It is critically important that class proceedings fulfill the objective of delivering collective justice in situations where individual pursuit of claims would be impractical. The court must be satisfied that the compensation sought by class counsel is fair and reasonable and is not predatory in any way.

[18] I am advised that the actual amount of docketed time by members of class counsel's law firm is \$979,556.00. There is also a deferred disbursement of \$480,000 to U.S. counsel. This is because most of the disclosure and discovery in connection with this action was obtained or conducted in the United States by U.S. class counsel as a matter of efficiency. Class counsel also estimates a further amount of legal work with an approximate value of \$30,000 will be required to complete the settlement process after court approval. That amount will also be covered by the counsel compensation award.

[19] In this case, counsel seeks approval of the contingency fee and compensation based on 30 percent of the settlement or \$2.4 million plus tax to cover all services past and future as well as all disbursements. This is less than would be generated by a 3.5 multiplier and, in fact, it is closer to a multiplier of 1.5 if the time of U.S. counsel is included.

[20] Having regard to the time spent, risk undertaken, expertise brought to bear and the result obtained, I consider the proposed amount to be reasonable. I note that while formal approval of the counsel fee was not sought in Quebec, Justice Granosik did have this amount before him and indicated his belief that it was reasonable. In addition, the fee request was part of the settlement and was included in the terms of proposed settlement circulated to members of the class prior to this hearing. As noted, no objections or adverse comments were received from any class member.

### **“Service Award”**

[21] Counsel seeks approval of a “Class Representative Service Award” or what is usually referred to as an honorarium for the class representative in this proceeding but also for the class

representative in the Quebec proceeding. That is a fee of \$20,000 divided between the two class representatives.

[22] The reason for seeking approval of payment to the Quebec class representative in this proceeding is that the entire approval of the counsel compensation and compensation to the class representatives was put before this court and not before the Superior Court in Quebec. I am advised that the reason for this is that although there is a Quebec class and a national class, the \$8,000,000 is a global settlement for claimants throughout Canada and the settlement encompasses amounts to be paid to members of both the Quebec class and the national class. The work done by counsel and by the representative plaintiffs cannot be logically segregated between the two actions and it would be artificial to do so. There is no separate claim of compensation sought for pursuing the Quebec class proceeding.

[23] I had two concerns. The first of these was whether an honorarium to the representative plaintiffs was appropriate. The second was whether it was appropriate for this court to approve a payment to the representative plaintiff in the Quebec class proceeding or whether that was an attempt to avoid the scrutiny of the court in Quebec. This question arose in *Forbes v. Toyota Canada Inc.*<sup>3</sup> and in *Muraton c. Toyota Canada Inc.*<sup>4</sup>. As I observed in *Forbes* and as Justice Gagnon observed in *Muraton*, the *Code of Civil Procedure* of Quebec contains different statutory language than the Ontario Act.<sup>5</sup> In *Forbes/Muraton* Justice Gagnon approved a different amount for the Quebec representative plaintiff than I approved in Ontario.

[24] I am aware that in approving this settlement in Quebec, Justice Granosik was told that the fees were to be dealt with globally in the Ontario proceeding. However the Quebec court did express a view on the matter. In the “motifs de jugement”, Justice Granosik states « ... CONSIDERANT que les frais et les dépenses des avocats en Demande sont justifiés et raisonnables en regard de la preuve présentée ... LE TRIBUNAL ACCEUILLE la Demande selon le jugement signé ce jour. » The Quebec judgment therefore passes comment on the fees and expenses of counsel but is silent about the “Service Award”.

[25] I was referred to *Vitoratos c. Takata Corporation* where the fees of counsel and indemnity to the representative plaintiffs had been approved in Ontario and the Quebec court was not asked to do so.<sup>6</sup> I am not sure that this case can be taken as suggesting that this is the best procedure. In that case, the evidence was that most of the work had been done in Ontario and on an earlier date the Quebec court had stayed the certification of the Quebec action pending resolution of parallel proceedings in Ontario.<sup>7</sup> Moreover, on a later occasion, the court stated that even if a

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<sup>3</sup> 2018 ONSC 5369

<sup>4</sup> 2018 QCCS 4235

<sup>5</sup> Article 593, *Code of Civil Procedure*, CQLR c. C-25.01

<sup>6</sup> 2020 QCCS 853 – see paras. 25 & 26

<sup>7</sup> 2016 CarswellQue 9605 (e-Carswell) (CSQ)

request to approve the accounts was not before the court, the court still had a duty to ensure that the fees were reasonable and in the interests of the Quebec class.<sup>8</sup>

[26] I am satisfied that asking for a single approval of the counsel fees and the Service Award was not a deliberate attempt to forum shop, but was a matter of expediency and convenience. I think it would have been preferable either to allocate the fees for approval as was done in *Forbes* and *Muraton* or to ask both courts to grant separate and parallel approvals. The entire settlement is contingent on both sets of approvals so there is no path to payment if only one court approves the settlement.

[27] I recognize that the request for an honorarium for the representative plaintiffs in both Ontario and Quebec is disclosed in the settlement and the settlement documents are appended to and form part of the Quebec judgment. In addition, the Quebec court retains jurisdiction over the Quebec class action and will be provided with a copy of these reasons. If there is any cause for concern in this regard, it may be addressed by Justice Granosik.

[28] Having satisfied myself that there was no intention to avoid disclosure to the Superior Court of Quebec, I will proceed to deal with the question of a fee to each of the representative plaintiffs on its merits.

[29] The evidence before the court satisfies me that the representative plaintiffs are both businesspersons who were pursuing the litigation for the benefit of the class members across the country and in Quebec. A certain amount of time and effort was required from each of the representative plaintiffs and there is no useful way to segregate work done for the benefit of the national class from work done for the benefit of the Quebec class. Both Mr. Pabla and the principal of the Quebec numbered company had to be actively involved over a number of years. The role of the representative plaintiff is important and is not just nominal.<sup>9</sup>

[30] Under the circumstances, the proposed honorarium or service fee of \$10,000 each is reasonable. I accept the submission of counsel that such fees have become more common than they once were and that there is utility in encouraging the active involvement of representative plaintiffs in litigation of this type.<sup>10</sup>

[31] While the courts will remain vigilant not to create a class of mercenary plaintiffs for hire, there is no evidence that is the case here.<sup>11</sup> The proposed honoraria, may be viewed as substantial when measured against the compensation otherwise available to each class member but they are nominal when measured against the time and sustained involvement required to bring this matter to a successful conclusion. They are unlikely to be viewed as enriching the representative plaintiffs to the detriment of the class.

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<sup>8</sup> 2021 QCCS 231 @ para 54

<sup>9</sup> See *Azar v. Strada Crush Limited*, 2020 ONSC 549 @ paras 22 & 23

<sup>10</sup> See for example, *McSherry v. Zimmer*, 2016 ONSC 4606.

<sup>11</sup> See para 31, *Forbes v. Toyota*, supra & para. 51 of *Marchand v. Ford*, supra

### **Summary and Conclusion**

[32] In conclusion, I am approving the settlement along with the fees proposed by counsel and the “service fee” or honorarium for each of the representative plaintiffs. A copy of these reasons and the judgment are to be provided by class counsel to Justice Granosik.

[33] I will add that if Justice Granosik should for any reason determine that a payment should not be made to the representative plaintiff in the Quebec class action, that will not affect my approval of the settlement.

[34] The releases contained in the judgment are intended to deal with any outstanding individual proceedings in other provinces brought by plaintiffs who were class members and did not opt out. I am advised by counsel for the defendants that there is one Ontario proceeding which appears to be dormant. That is an action that was struck from the trial list in Toronto many years ago and it should have been dismissed by the Registrar. That action will be permanently stayed.

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Regional Senior Justice C. MacLeod

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**DECISION AND REASONS**

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Regional Senior Justice C. MacLeod

**Released:** February 1, 2022