

CITATION: Dow v. 407 ETR Concession Company Limited, 2016 ONSC 7086
COURT FILE NO.: CV-12-452351-00CP
DATE: 20161115

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)
)
MICHAEL DOW, GWENDOLYN MIRON) *David Thompson and Matthew G. Moloci for*
and PETER TEOLIS) *the Plaintiffs*
)
Plaintiffs)
)
- and -)
)
407 ETR CONCESSION COMPANY) *J. Thomas Curry, Rebecca Jones and Kelly*
LIMITED and 407 INTERNATIONAL INC.) *Hayden for the Defendants*
)
Defendants)
)
)
Proceeding under the *Class Proceedings Act, 1992*) **HEARD:** November 15, 2016
)

PERELL, J.

REASONS FOR DECISION

1. Introduction

[1] In this action under the *Class Proceedings Act, 1992*, S.O. 1992, this is an omnibus motion for: (a) certification; (b) approval of a settlement; (c) approval of Class Counsel fees; (d) approval of an honorarium; and (e) incidental relief.

2. The Class Action

[2] The *Highway 407 Act, 1998*, S.O. 1998, c. 28 (“*407 Act*”) authorizes the Defendants, 407 ETR Concession Company Limited and 407 International Inc. (“407 ETR”), to charge tolls for the use of Highway 407. The tolls are invoiced on a monthly basis to vehicle permit holders.

[3] When tolls are not paid, under the *Act*, 407 ETR may inform the Registrar of Motor Vehicles about the non-payment, and the Registrar was obliged to designate the vehicle in “Plate Denial.” Beginning around May 2008, 407 ETR effected Plate Denial against insolvent vehicle permit owners.

[4] On April 27, 2012, the Plaintiffs, Michael Dow, Gwendolyn Miron, and Peter Teolis, commenced a proposed class action.

[5] Before commencing the action, on October 7, 2011, Mr. Dow, Ms. Miron, and Mr. Teolis, entered into a contingency fee retainer agreement with Scarfone Hawkins LLP, a law firm with considerable experience in class action litigation. The contingency agreement provides for a 30% contingency fee of the total value of the settlement, calculated after all expenses, including disbursements, have been deducted. Scarfone Hawkins agreed to indemnify their clients if there were adverse costs consequences.

[6] In their proposed class action, Mr. Dow, Ms. Miron, and Mr. Teolis, alleged that the use of Plate Denial in circumstances of insolvency is contrary to the stay of proceedings under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") and ignored the compromise and release of debts effected by a bankruptcy proceeding. They asserted that 407 ETR's interpretation of the *407 Act*, and its conduct was unlawful.

[7] The proposed Class is:

All Persons who, prior to the Court Approval Date, incurred tolls and/or additional charges to 407 ETR, who subsequently became Insolvent, and who were subject to exercise of the Plate Denial remedy by 407 ETR for those tolls and/or additional charges through the delivery of notices pursuant to section 22(4) of the *407 Act*;

[8] The proposed common issues for certification and settlement approval purposes are as follows:

(a) is the Plate Denial remedy a proceeding for the recovery of a claim provable in bankruptcy?

(b) are tolls and additional charges claimed by 407 ETR against Class Members claims provable in bankruptcy pursuant to section 121 of the *BIA*?

(c) are tolls and additional charges claimed by 407 ETR against Class Members released by operation of the *BIA* upon discharge and/or completion of a proposal or consumer proposal?

(d) does interest on tolls and additional charges accrue only to the commencement of an insolvency proceeding?

(e) has 407 ETR acted unlawfully in failing to comply with the *BIA* mandated stay of proceedings and release of Class Members' tolls and additional charges by its use of the Plate Denial remedy?

(f) are sections 14(1), 14(3), 14(6), 15(2), 15(3), 16, 21 and 22 of the *407 Act* constitutionally inoperative to the extent that those provisions authorize or permit the use of the Plate Denial remedy to enforce payment of tolls and additional charges stayed, compromised and/or released by operation of the *BIA*?

(g) has 407 ETR breached proposal contracts with Class Members who have filed an approved proposal or approved consumer proposal under the *BIA*?

(h) should 407 ETR be required to withdraw Notices of Failure to Pay filed with the Registrar in respect of Class Members for whom 407 ETR has been provided with a notice of stay of proceedings either under a bankruptcy or under a proposal and/or a certificate of discharge?

(i) should 407 ETR be restrained from using its Plate Denial remedy against any person in contravention of the stay of proceedings?

(j) should 407 ETR be restrained from using its Plate Denial remedy against any person for the purpose of collecting debts compromised and/or released by operation of the *BIA*?

(k) do Class Members have a cause of action in relation to 407 ETR's use of the Plate Denial remedy in relation to debts that were or become subject to a stay of proceedings or discharge under the *BIA*? If so, are they entitled to damages in relation to that cause of action(s)?

[9] In a separate Superior Court action, the issue of the interpretation of the *Highway 407 Act, 1998* was litigated. Ultimately, 407 ETR was unsuccessful, and on November 15, 2015, the Supreme Court of Canada ruled that the purpose and effect of s. 22(4) of the *Act* is to allow 407 ETR to enforce the collection of toll debts which constitute claims provable in bankruptcy. The Court ruled, however, that the *Act* cannot be used to enforce an otherwise discharged provable claim. Further, the Court ruled that the operation of s. 22(4) of the *Act* frustrates the financial rehabilitation purpose of the *Bankruptcy and Insolvency Act*. See *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)*, 2015 SCC 52.

3. The Settlement

[10] After arm's-length negotiations, the proposed class action has now been settled subject to court approval. Under the Settlement Agreement, the Defendants have agreed to make changes to their business practices, and establish a Settlement Fund of \$7,965,800.00, to be distributed to Eligible Class Members, after deduction of costs. There is a detailed distribution scheme.

[11] It is the opinion of Class Counsel that in the circumstances, the Settlement Agreement is fair, reasonable and in the best interests of Class Members.

[12] Mr. Dow, Ms. Miron, and Mr. Teolis support the Settlement.

4. Certification for Settlement Purposes

[13] The court is required to certify the action as a class proceeding where the following five-part test in s. 5 of the *Class Proceedings Act, 1992* is met: (1) the pleadings disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (3) the claims of the class members raise common issues; (4) a class proceeding would be the preferable procedure for the resolution of the common issues; and (5) there is a representative plaintiff who: (a) would fairly and adequately represent the interests of the class; (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying

class members of the proceeding, and (c) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[14] The fact that an action is certified on consent for settlement purposes does not dispense with the need to meet the certification criteria but they may be less rigorously applied in a settlement context: *Osmun v. Cadbury Adams Canada Inc.*, [2009] O.J. No. 5566 (S.C.J.) at para. 21.

[15] Pursuant to s. 5 (1) of the *Class Proceedings Act, 1992*, I am satisfied that all of the criteria for certification have been satisfied.

5. Settlement Approval

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

[17] 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. See: *Fantl v. Transamerica Life Canada*, *supra*, at para. 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.) at para. 38; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, *supra*, at para. 45; *Kidd v. Canada Life Assurance Company*, *supra*.

[18] 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: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10. An objective and rational assessment of the pros and cons of the settlement is required: *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 (Ont. S.C.J.) at para. 23.

[19] 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: *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 70; *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.). A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally: *Fraser v. Falconbridge Ltd.* (2002), 24

CPC (5th) 396 at para. 13; *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 (Ont. S.C.J.) at para. 17.

[20] The design of the approval process requires the court to carefully scrutinize any proposed settlement. The design of the approval process: (a) requires the proponents of the settlement to justify it; (b) provides an opportunity for those affected by the settlement to be heard; and (c) requires the court to evaluate the settlement and make a formal order. This design is meant both to deter bad settlements and also to ensure good ones that achieve the goals of the class action regime; namely: access to justice, behaviour modification, and judicial economy.

[21] In the immediate case, having regard to the various factors that the court must consider in approving or rejecting a settlement, I conclude that the settlement is fair, reasonable, and the best interests of the Class Members. I approve the settlement.

6. Class Counsel Fee

[22] 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: *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.) at para. 13; *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 (S.C.J.) at para. 25.

[23] 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: *Smith v. National Money Mart*, *supra*; *Fischer v. I.G. Investment Management Ltd.*, *supra*, at para. 28.

[24] In my opinion, having regard to the various factors used to determine whether to approve the fees of class counsel, the fee request in the immediate case should be approved.

7. Honorarium

[25] Mr. Dow, Ms. Miron, and Mr. Teolis request “Representative Plaintiff Compensation.” They request \$10,000.00 each payable out of the Settlement Fund. The compensation includes reimbursement of any out-of-pocket costs incurred.


[26] Mr. Dow, Ms. Miron, and Mr. Teolis were actively involved in the litigation and in giving instructions to Class Counsel. They were willing to expose their personal financial circumstances to public scrutiny in order for the litigation to advance. It is unlikely that the issues in the action would have ever been litigated on an individual basis given the relatively small amounts in issue, the nature of the constitutional question and necessary declaratory relief, the legal complexities and the unique vulnerability of the Class Members as insolvent persons.

Were it not for their efforts, no litigation would likely have been commenced and there would have been no recovery in favour of the Class.

[27] This is an appropriate case for an honorarium.

8. Conclusion

[28] Orders accordingly.



Perell, J.

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