

CANADA

(Class Action)
SUPERIOR COURT

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

R. SCHACHTER

NO: 500-06-000490-090

Petitioner

-vs.-

TOYOTA CANADA INC.

and

TOYOTA MOTOR CORPORATION

Respondents

**AMENDED MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION
&
TO ASCRIBE THE STATUS OF REPRESENTATIVE
(Art. 1002 C.C.P. and following)**

TO ONE OF THE HONOURABLE JUSTICES OF THE SUPERIOR COURT,
SITTING IN AND FOR THE DISTRICT OF MONTREAL, YOUR PETITIONER
STATES AS FOLLOWS:

I. GENERAL PRESENTATION

A) The Action

1. Petitioner wishes to institute a class action on behalf of the following group, of which he is a member, namely:
 - all residents in Canada who own, lease, or otherwise possess Toyota and/or Lexus vehicles equipped with Electronic Throttle Control System with Intelligence (“ETCS-i”), or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who own, lease, or otherwise possess Toyota and/or Lexus vehicles equipped with Electronic Throttle Control

System with Intelligence (“ETCS-i”), or any other group to be determined by the Court;

2. Petitioner contends that the Respondents designed, manufactured, distributed, and sold certain automobiles with the Electronic Throttle Control System with Intelligence (“ETCS-i”) that are dangerous and/or defective in that it will allow sudden unintended acceleration of the vehicles’ engine;
3. Further, Petitioner alleges that the Respondents failed to incorporate important failsafe measures critical to assisting a driver in maintaining control of the vehicle during a sudden unintended acceleration event;
4. By reason of these actions and omissions, the Petitioner and the members of the class have suffered damages which they wish to claim;

B) The Respondents

5. Respondent Toyota Motor Corporation is a Japanese automotive company;
6. Respondent Toyota Canada Inc. is involved in the “commerce de gros d’automobiles” (wholesale trade of automobiles), the whole as appears more fully from a copy of the Quebec Inspector General of Financial Institutions Report, produced herein as **Exhibit R-1**;
7. Respondent Toyota Canada Inc. is an affiliate of the Respondent Toyota Motor Corporation, and carries on business on it’s behalf throughout Canada, including the Province of Quebec;
8. Respondents Toyota Canada Inc. and Toyota Motor Corporation have either directly or indirectly designed, manufactured, marketed, and distributed Toyota and Lexus vehicles throughout Canada, including the Province of Quebec;
9. Given the close ties between the Respondents and considering the preceding, both Respondents are solidarily liable for the acts and omissions of the other. Unless the context indicates otherwise, both Respondents will be referred to as “Toyota” for the purposes hereof;

C) The Situation

10. On or about 1998, Respondents began designing, manufacturing, distributing, and selling certain automobiles equipped with the Electronic Throttle Control System with Intelligence (“ETCS-i”);



11. ETCS-i is described as a system whereby the engine's throttle is controlled by electronic signals that are sent from a sensor that detects the position of the gas pedal to an electronic module that determines how much throttle opening is being requested and in turn send the electronic signals to a throttle control motor that opens the throttle plate;
12. Initially, the Respondents designed their vehicle with both an electronic throttle control and a redundant mechanical linkage between the gas pedal and the engine throttle control as a failsafe in the event of a sudden unintended acceleration. This failsafe system would disconnect the ETCS-i and automatically allow the throttle to be controlled by the mechanical linkage;
13. Beginning on or about 2001, the Respondents eliminated this redundant mechanical linkage between the gas pedal and the engine throttle control on their Toyota and Lexus automobiles equipped with ETCS-i;
14. Since that time, over 1,000 Lexus and Toyota owners have reported sudden, spontaneous acceleration of their vehicles, including crashes blamed for 19 deaths and a number of fatalities;
15. Most notably, and which was the source of much press as of recent, was the case of a family of four whose fatalities were caused by the sudden and uncontrollable acceleration of their Lexus ES 350 up to 100 miles per hour (mph) before crashing near San Diego, California on August 28th 2009;
16. Despite this knowledge over the years, the Respondents continued to design, manufacture, advertise, and distribute Toyota and Lexus vehicles equipped with ETCS-i that are susceptible to incidents of sudden unintended acceleration and fail to incorporate critical failsafe measures to assist the driver in such an event;
17. One such failsafe measure is a computer algorithm that will direct the ETCS-i to automatically reduce the engine to idle when the brakes are being applied while the throttle is in the open position. This failsafe measure has been incorporated by other automobile manufacturers in vehicles designed with electronic throttle control for years;
18. On or about November 5th 2009, a similar class action was filed in the United States District Court for the Central District of California in file number 2:09-cv-08143, the whole as appears more fully from a copy of the Class Action Complaint, produced herein as **Exhibit R-2**;
19. Toyota has decided to recall certain affected vehicles in the United States and Canada;



19.1 On or about November 26th 2009, Respondents issued a recall of various Toyota and Lexus models, due to what it represented was a design flaw that could cause the gas pedal to get caught on the edge of the removable floor mat and cause uncontrollable acceleration. The following models were involved in this first recall:

- 2007 – 2010 Toyota Camry
- 2005 – 2010 Toyota Avalon
- 2004 – 2009 Toyota Prius
- 2005 – 2010 Toyota Tacoma
- 2007 – 2010 Toyota Tundra
- 2009 – 2010 Toyota Venza
- 2008 – 2010 Toyota Highlander
- 2009 – 2010 Toyota Corolla
- 2009 – 2010 Toyota Matrix
- 2009 – 2010 Pontiac vibe
- 2007 – 2010 Lexus ES 350
- 2006 – 2010 Lexus IS 250 and IS 350

19.2 On or about January 21st 2010, Respondents issued a recall of various Toyota and Lexus models, due to what it now represented was due to a problem with the accelerator pedal becoming stuck in a partially depressed position or returning to the idle position slowly, thereby causing uncontrollable acceleration. The following models were involved in this second recall:

- 2009 – 2010 Toyota RAV4
- 2009 – 2010 Toyota Corolla
- 2009 – 2010 Toyota Matrix
- 2005 – 2010 Toyota Avalon
- 2007 – 2010 Toyota Camry
- 2010 Toyota Highlander
- 2007 – 2010 Toyota Tundra
- 2008 – 2010 Toyota Sequoia

19.3 A copy of Toyota Canada Inc.'s recall notices as appears on their website are attached hereto and produced herein as **Exhibit R-3** en liasse;

19.4 It is becoming quite clear that the Respondents either knew or should have known about the extent of the sudden acceleration problem by at the very least September 2009, but decided to downplay the issue and blame it on the floor mats, which was a quick and easy fix, rather than to proceed to a much wider recall. Even now, after the Respondents' newest recall, they have still not addressed all of the vehicles that are equipped with ETCS-i;



19.5 In addition, numerous class actions have been filed in the United States following the news of the most recent January 2010 recall, the whole as more fully appears from a copy of these Class Action Complaints, produced herein as **Exhibit R-4 en liasse**;

II. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER

20. On or about April 2006, Petitioner purchased a 2007 Toyota Camry Sports Edition (SE) for approximately \$35,000 at the Toyota dealership "Toyota Président" located at 1920, Sainte-Catherine Street West, in downtown Montreal, Quebec, H3H 1M4;
21. Recently, Petitioner became aware of the sudden acceleration crash in San Diego, California and the recall that has taken place in the United States;
22. Concerned about his safety, Petitioner then contacted the dealership where he purchased his Toyota Camry to inquire if his vehicle was equipped with ETCS-i;
23. Petitioner was told that his vehicle was equipped with ETCS-i, that he should remove his drivers' side floor mat, and that there would likely be a recall in Canada of some sort (specific makes and years were not mentioned) to change the gas pedal some time in April 2010;
24. Petitioner has removed his drivers' side floor mat but is not satisfied with this as a solution, as it does not alleviate his safety concerns. Had Petitioner known about this serious danger and/or defect, he would not have purchased his vehicle. Further, Petitioner is disappointed to know that, assuming a recall takes place in Canada, repairs will only take place in April 2010, that he must drive all winter without a floor mat (which will damage his car), and that he must be inconvenienced with bringing his car in for a repair which will cause him to forfeit the use of his car for a certain period and cause him much aggravation and inconvenience;
25. Petitioner's damages are a direct and proximate result of the Respondents' conduct;
26. In consequence of the foregoing, Petitioner is justified in claiming damages;

III. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP

28. Every member of the class owns, leases, or otherwise possesses a Toyota and/or Lexus vehicles equipped with ETCS-i;

29. Each member of the class is justified in claiming at least one or more of the following as damages:
- a. Costs of repairs of their vehicles;
 - b. Cleaning costs due to the removal of the drivers' side floor mat throughout the winter;
 - c. Loss of use and enjoyment of their vehicles;
 - d. Trouble, inconvenience, and loss of time having to deal with the problem;
 - e. Anxiety and fear until such time as their vehicles are repaired;
 - f. Punitive and/or exemplary damages;
 - g. Reduced resale value of their vehicles;
30. All of these damages to the class members are a direct and proximate result of the Respondents' conduct;

IV. CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION

- A) The composition of the class renders the application of articles 59 or 67 C.C.P. difficult or impractical
31. Toyota and/or Lexus vehicles equipped with ETCS-i have been sold in Quebec and Canada since approximately the year 2001. Petitioner is unaware of the specific number of persons who have purchased, leased, or otherwise possess these vehicles, however, it is safe to estimate that it is in the tens of thousands (if not hundreds of thousands);
32. It is possible, and even likely, that class members may be identified through business records maintained or accessible by the Respondents;
33. Class members are numerous and are scattered across the entire province and country;
34. In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Respondents. Even if the class members themselves could afford such individual litigation, the court system could not as it would be overloaded. Further, individual litigation of the factual and legal issues raised by the

conduct of Respondents would increase delay and expense to all parties and to the court system;

35. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory judgements on questions of fact and law that are similar or related to all members of the class;
 36. These facts demonstrate that it would be impractical, if not impossible, to contact each and every member of the class to obtain mandates and to join them in one action;
 37. In these circumstances, a class action is the only appropriate procedure for all of the members of the class to effectively pursue their respective rights and have access to justice;
- B) The questions of fact and law which are identical, similar, or related with respect to each of the class members with regard to the Respondents and that which the Petitioners wish to have adjudicated upon by this class action
38. Individual questions, if any, pale by comparison to the numerous common questions that predominate;
 39. The damages sustained by the class members flow, in each instance, from a common nucleus of operative facts, namely, Respondents' misconduct;
 40. The recourses of the members raise identical, similar or related questions of fact or law, namely:
 - a. Are the Toyota and Lexus vehicles equipped with ETCS-i dangerous and/or defective because the ETCS-i may cause sudden unintended acceleration?
 - b. Are the Toyota and Lexus vehicles equipped with ETCS-i dangerous and/or defective because the ETCS-i fails to incorporate critical failsafe measures designed to assist the driver in maintaining control of the vehicle in the event of a sudden unintended acceleration?
 - c. Are the Toyota and Lexus vehicles equipped with ETCS-i fit to be used as intended?
 - d. Did the Respondents fail to perform adequate testing on the Toyota and Lexus vehicles equipped with ETCS-i prior to releasing them?



- e. Did the Respondents know or should they have known that the Toyota and Lexus vehicles equipped with ETCS-i are dangerous and/or defective?
 - f. Did the Respondents fail to adequately disclose to consumers that the Toyota and Lexus vehicles equipped with ETCS-i were dangerous and/or defective or did the Respondents do so in a timely manner?
 - g. Are the Respondents responsible for all related costs (including, but not limited to, repair costs, cleaning costs, lost time, trouble and inconvenience, loss of use and enjoyment, anxiety and fear, reduced resale value) to class members as a result of the problems associated with the Toyota and Lexus vehicles equipped with ETCS-i?
 - h. Should an injunctive remedy be ordered to force the Respondents to recall and repair class members' Toyota and Lexus vehicles equipped with ETCS-i free of charge?
 - i. Are the Respondents responsible to pay compensatory, moral, punitive and/or exemplary damages to class members and in what amount?
41. The interests of justice favour that this motion be granted in accordance with its conclusions;

V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

42. The action that the Petitioner wishes to institute on behalf of the members of the class is an action in damages;
43. The conclusions that the Petitioner wishes to introduce by way of a motion to institute proceedings are:

GRANT the class action of the Petitioner and each of the members of the class;

ORDER the Defendants to recall all Toyota and Lexus vehicles equipped with ETCS-i and repair said vehicles free of charge;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioner and each of the members of the class;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

A) The Petitioner requests that he be attributed the status of representative of the Class

44. Petitioner is a member of the class;

45. Petitioner is ready and available to manage and direct the present action in the interest of the members of the class that they wish to represent and is determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the class, as well as, to dedicate the time necessary for the present action before the Courts of Quebec and the *Fonds d'aide aux recours collectifs*, as the case may be, and to collaborate with his attorneys;

46. Petitioner has the capacity and interest to fairly and adequately protect and represent the interest of the members of the class;

47. Petitioner has given the mandate to his attorneys to obtain all relevant information with respect to the present action and intends to keep informed of all developments;

48. Petitioner, with the assistance of his attorneys, are ready and available to dedicate the time necessary for this action and to collaborate with other members of the class and to keep them informed;

49. Petitioner is in good faith and has instituted this action for the sole goal

of having his rights, as well as the rights of other class members, recognized and protecting so that they may be compensated for the damages that they have suffered as a consequence of the Respondents' conduct;

50. Petitioner understands the nature of the action;

51. Petitioner's interests are not antagonistic to those of other members of the class;

B) The Petitioner suggests that this class action be exercised before the Superior Court of justice in the district of Montreal

52. A great number of the members of the class reside in the judicial district of Montreal and in the appeal district of Montreal;

53. Respondent Toyota Canada Inc. has its principal place of business in the judicial district of Montreal;

54. The Petitioner's attorneys practice their profession in the judicial district of Montreal;

55. The present motion is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present motion;

AUTHORIZE the bringing of a class action in the form of a motion to institute proceedings in damages;

ASCRIBE the Petitioner the status of representative of the persons included in the class herein described as:

- all residents in Canada who own, lease, or otherwise possess Toyota and/or Lexus vehicles equipped with Electronic Throttle Control System with Intelligence ("ETCS-i"), or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who own, lease, or otherwise possess Toyota and/or Lexus vehicles equipped with Electronic Throttle Control System with Intelligence ("ETCS-i"), or any other group to be determined by the Court;

IDENTIFY the principle questions of fact and law to be treated collectively as the following:

- a. Are the Toyota and Lexus vehicles equipped with ETCS-i dangerous and/or defective because the ETCS-i may cause sudden unintended acceleration?
- b. Are the Toyota and Lexus vehicles equipped with ETCS-i dangerous and/or defective because the ETCS-i fails to incorporate critical failsafe measures designed to assist the driver in maintaining control of the vehicle in the event of a sudden unintended acceleration?
- c. Are the Toyota and Lexus vehicles equipped with ETCS-i fit to be used as intended?
- d. Did the Respondents fail to perform adequate testing on the Toyota and Lexus vehicles equipped with ETCS-i prior to releasing them?
- e. Did the Respondents know or should they have known that the Toyota and Lexus vehicles equipped with ETCS-i are dangerous and/or defective?
- f. Did the Respondents fail to adequately disclose to consumers that the Toyota and Lexus vehicles equipped with ETCS-i were dangerous and/or defective or did the Respondents do so in a timely manner?
- g. Are the Respondents responsible for all related costs (including, but not limited to, repair costs, cleaning costs, lost time, trouble and inconvenience, loss of use and enjoyment, anxiety and fear, reduced resale value) to class members as a result of the problems associated with the Toyota and Lexus vehicles equipped with ETCS-i?
- h. Should an injunctive remedy be ordered to force the Respondents to recall and repair class members' Toyota and Lexus vehicles equipped with ETCS-i free of charge?
- i. Are the Respondents responsible to pay compensatory, moral, punitive and/or exemplary damages to class members and in what amount?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Petitioner and each of the members of the class;

ORDER the Defendants to recall all Toyota and Lexus vehicles equipped with ETCS-i and repair said vehicles free of charge;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioner and each of the members of the class;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

DECLARE that all members of the class that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;

FIX the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the class that have not exercised their means of exclusion will be bound by any judgement to be rendered herein;

ORDER the publication of a notice to the members of the group in accordance with article 1006 C.C.P. within sixty (60) days from the judgement to be rendered herein in LA PRESSE and the NATIONAL POST;

ORDER that said notice be available on the Respondent Toyota's website with a link stating "Notice to Toyota and Lexus owners";

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

THE WHOLE with costs including publications fees.

Montreal, February 1, 2010

Jeff Orenstein
CONSUMER LAW GROUP INC.
Attorney for the Petitioner